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## Ninth Circuit Court of Appeals Revives Two 401(k) Fee Cases, Potentially Making It More Difficult for Plan Fiduciaries to Obtain Early Dismissal

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In a rather surprising move, the Ninth Circuit Court of Appeals issued two short decisions within the span of a week, which reversed lower court dismissals in 401(k) fee cases brought against Salesforce.com, Inc. and Trader Joe's Company. A motion to dismiss challenges the quality of a plaintiff's allegations at the beginning of a case before any discovery is taken and seeks to have the plaintiff's claims dismissed on grounds that they are legally insufficient. If the plaintiff defeats that motion, it does not mean their case will be successful, but only that they are permitted to proceed to discovery to try to obtain evidence that supports their claims. While both of these Ninth Circuit decisions will be unpublished, meaning lower courts are not required to follow them, they may still be cited as persuasive authority and could impact fee litigation in the Ninth Circuit by potentially making it more difficult for plan fiduciaries to obtain dismissals early in litigation.

Plaintiffs in "excessive fee" lawsuits commonly allege that plan fiduciaries selected and retained investment options that were overly priced and underperformed against their benchmarks, and that plan recordkeeping fees were unreasonably high. While fiduciary defendants have obtained recent early

wins in this litigation by challenging the plausibility of the plaintiffs' allegations, these Ninth Circuit decisions bucked those trends and gave significant deference to the plaintiffs' claims. Both opinions took a strict approach in accepting *all* of the plaintiffs' allegations as true for purposes of ruling on the defendants' motions to dismiss; and, if they stand, they could make it easier for plaintiffs to proceed past the early pleading stage and attempt to develop their cases through discovery.

### Lower Court Dismissals

The plaintiffs in *Davis v. Salesforce.com, Inc.*<sup>1</sup> alleged that the plan's investment options were overpriced given that, among other reasons, there were purportedly lower-cost share class and collective investment trust versions of the challenged funds available in the market. In the district court, the Salesforce defendants aptly pointed out, and the court agreed, that the basis for the difference in price between the share classes was based on the fact that the plan's funds offered revenue sharing, which is acceptable, and the plaintiffs' proposed alternatives did not.

The Salesforce fiduciaries further argued that they were under no obligation to select any particular type of investment, like a collective investment trust (CIT), over a mutual fund alternative because those investment vehicles are fundamentally different. The district court agreed with the defendants and dismissed with prejudice the plaintiffs' claims for fiduciary breach and their derivative claim on the duty to monitor, finding that the plaintiffs' claims were insufficient to create an inference that the committee acted imprudently.

Likewise, in *Kong v. Trader Joe's, Co.*,<sup>2</sup> the plaintiffs alleged that the plan fiduciaries did not offer the lowest-cost share class of the challenged funds and that the plan's recordkeeper charged unreasonably high service fees. The defendants in this case also argued that the difference in price between the share classes was based on the fact that the plan's funds included a revenue sharing component. The defendants further argued that the plaintiffs had failed to allege a basis for their claim that the plan's recordkeeping fees were too high, when taking into account the services that the recordkeeper performed in exchange for its fee and the lack of a viable

benchmark against which those fees could be measured. The district court held that the plaintiffs' allegations failed to create an inference of imprudence and dismissed their claims with prejudice.

### Ninth Circuit Reverses the Lower Court Dismissals

On April 8, 2022 and April 15, 2022, two different Ninth Circuit panels reversed the lower court decisions in *Salesforce* and *Trader Joe's*, respectively, based on findings that the plaintiffs had met their burden in alleging a basis for their fiduciary breach claims such that the plaintiffs may now continue to litigate those cases. Both orders stressed the court's responsibility, at the initial pleading stage of the litigation, to accept the plaintiffs' allegations as true, and to allow their claims to proceed where both the plaintiffs and defendants presented plausible, yet alternative explanations for the claims at issue.

After little analysis, the panels in both cases held that the plaintiffs adequately pleaded fiduciary breach claims based on allegations that plan fiduciaries should have offered lower-cost share classes of certain challenged funds. In *Salesforce*, the court concluded that the revenue sharing component that accounted for the difference in share price was merely an "alternative explanation" offered by defendants, and that the plaintiffs' claims should be allowed to proceed where the plaintiffs and defendants presented alternative, yet plausible explanations. Similarly, in *Trader Joe's* the court held that the defendants' revenue sharing explanation was "unavailing at the pleading stage" and that the factual record needed to be further developed before the court would consider this defense.

The court in *Salesforce* further held that it needed a more developed factual record before it could determine whether it was prudent for the plan's fiduciaries to retain the challenged funds in the plan instead of the plaintiffs' proposed CIT alternatives. Citing the motion to dismiss standard, the court accepted as true the plaintiffs' allegations that the alternative CIT versions had the same underlying investments and asset allocations, but the CIT versions performed better and had a lower investment management fee. The appellate court held that this, too, was sufficient to survive the defendants' attempt at an early dismissal.

Finally, the *Trader Joe's* decision held that fiduciaries must defray reasonable expenses of administering the plan and, accepting the plaintiffs' allegations as true as the court must do when deciding a motion to dismiss, the defendants did not act with the purpose of defraying reasonable expenses. The court did not provide any analysis regarding how it reached that conclusion.<sup>3</sup> This was enough for the case to survive the defendants' motion to dismiss.

## Looking Forward

Defendants in both cases have the right to petition for a rehearing of their cases, either to the panels that issued the orders or to the entire Ninth Circuit Court of Appeals, and/or to petition for Supreme Court review. We think such challenges are likely. Notably, both decisions appear to contradict a prior Ninth Circuit decision in *White v. Chevron, Corp.*,<sup>4</sup> where the Ninth Circuit affirmed a lower court's dismissal of strikingly similar claims. That

inconsistency may make it likely that the broader Ninth Circuit agrees to review these decisions *en banc*. Neither *Salesforce* nor *Trader Joe's* cited or addressed *White*.

Should these decisions stand, they will be unpublished and therefore not binding authority outside the particular cases themselves. That status will allow the decisions to be disregarded by other district courts in ruling on motions to dismiss, as *Salesforce* and *Trader Joe's* would only be persuasive authority. Notably, these decisions do not impact each of the arguments that defendants have used to gain early victories in this litigation, and they do not impact the strength of defenses at later stages of cases — either at summary judgment or trial. It will take time to measure the broader impact of these decisions on fee litigation in the Ninth Circuit, as we observe the way district courts interpret these decisions and the extent to which they rely on these holdings when ruling on future motions.

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<sup>1</sup> No. 21-15867, 2022 WL 1055557 (9th Cir. 2022).

<sup>2</sup> No. 20-56415, slip op. (9th Cir. Apr. 15, 2022).

<sup>3</sup> Having revived the plaintiffs' fiduciary breach claims, both courts also revived the plaintiffs' derivative duty to monitor claims which were based on the underlying fiduciary breach claims.

<sup>4</sup> 752 Fed. Appx. 453 (9th Cir. 2018).

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