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Employee Retirement Plans and Alleged Breaches of Fiduciary Obligations (CLE)

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Schulte Roth & Zabel

Employee Retirement Plans and Alleged Breaches of Fiduciary Obligations

NCSCBHEP 45th Annual National Conference

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Defendants

EMORY UNIVERSITY

PRINCETON UNIVERSITY

CORNELL UNIVERSITY FOUNDED A.D. 1865

Duke UNIVERSITY

GEORGETOWN UNIVERSITY

Massachusetts Institute of Technology

NYU

JOHNS HOPKINS UNIVERSITY

VANDERBILT

Penn UNIVERSITY of PENNSYLVANIA

BROWN

NORTHWESTERN UNIVERSITY

COLUMBIA UNIVERSITY

Washington University in St. Louis

UNIVERSITY OF SOUTHERN CALIFORNIA

LUX ET VERITAS

DOI: 10.58188/1941-8043.1762

Common Allegations

- Failure to leverage bargaining power
- Expensive and underperforming investment options
- Recordkeeping fees
- Inclusion of proprietary investments
- Too many investment options

Failure to Leverage Bargaining Power

- Basis of the claim: The plans failed to use their bargaining power to reduce costs to participants by including retail class shares as opposed to institutional class shares

- Claim rejected: Penn, NYU, Columbia, Duke, Princeton, Vanderbilt, Johns Hopkins, Chicago

- Claim proceeding: Emory, MIT, Princeton, Cornell

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Expensive and Underperforming Investment Options

- Basis of the claim: The plans selected and retained expensive and underperforming investment options

- Claim rejected: Penn

- Claim proceeding: NYU, Columbia, Cornell, MIT, Emory, Chicago, Johns Hopkins, Princeton, Duke

Recordkeeping Fees

- Basis of the claim: The plans incurred duplicative fees from using more than one record-keeper

- Claim rejected: Penn

- Claim proceeding: Emory, NYU, Columbia, Johns Hopkins, Princeton

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Inclusion of Proprietary Investments

- Basis of the claim: The plans breached their fiduciary duties by agreeing to contracts with service providers that required the inclusion of proprietary investment options
- Claim rejected: Penn, NYU, Columbia, MIT, Vanderbilt, Cornell
- Claim proceeding: Emory, Duke

Too Many Investment Options

- Having hundreds of investment options causes participant confusion and inaction
- Claim rejected: Penn, Johns Hopkins, Cornell, NYU, Columbia, MIT, Emory, Vanderbilt
- Claim proceeding: Duke

DOI: 10.58188/1941-8043.1762

Sweda v. The University of Pennsylvania

- First of these cases to be dismissed in full
- Participants asserted breach of fiduciary duties arising out of plan fiduciaries' decisions to:
  - Lock the plan into certain TIAA-CREF accounts
  - Allow TIAA-CREF and Vanguard to serve as their own recordkeepers and use asset-based recordkeeping instead of flat, per person fees
  - Offering some retail class shares
  - Permitting some underperforming funds to remain in the plan
- E.D. Pa. dismissed all claims, citing *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011), which holds that courts should consider the composition of the plan's offerings as a whole, rather than singling out individual underperforming funds

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<u>Timed Agenda: Mark Brossman, Partner, Schulte Roth and Zabel LLP</u>

Introduction and Background (5 min total)

- Quick overview of 403(b)
- Development of regulatory scheme
- Same plaintiff's law firm
- Same type of defendants

Common Allegations (10 min total)

- Failure to Leverage Bargaining Power (2 min)
- Expensive and Underperforming Investment Options (2 min)
- Record Keeping Fees (2 min)
- Inclusion of Proprietary Investments (2 min)
- Too Many Investment Options (2 min)

Sweda v. University of Pennsylvania (5 min)

<u>Outline of Proposed Class Actions Against University Retirement Plans</u>

Mark Brossman, Partner, Schulte Roth and Zabel LLP

- Proposed class actions filed against the following universities: Emory University, Duke University, University of Pennsylvania, Columbia University, Cornell University, Johns Hopkins University, Massachusetts Institute of Technology, New York University, Northwestern University, Vanderbilt University, Princeton University, University of Southern California, Yale University, Georgetown University, Washington University in Saint Louis, Brown University, and the University of Chicago.
    - Plaintiffs filed a second complaint against the retirement plans maintained by NYU Langone Hospitals and NYU Langone Health Systems
- Common Allegations: (i) the plans failed to use their bargaining power to reduce costs to participants by including retail class shares as opposed to institutional class shares ("<u>Failure to Leverage Bargaining Power</u>"); (ii) the plans selected and retained expensive and underperforming investment options ("<u>Underperforming Investment Options</u>"); (iii) the plans incurred duplicative fees from using more than one record-keeper ("<u>Recordkeeping Fees</u>"); (iv) the plans breached their fiduciary duties by agreeing to

DOC ID - 27745004.2

contracts with service providers that required the inclusion of proprietary investment options ("Inclusion of Proprietary Investments"); (v) the plans offered participants *too many* investment options.

- Failure to Leverage Bargaining Power (claim rejected): Penn, NYU, Columbia, Duke, Princeton, Vanderbilt, Johns Hopkins, Chicago

    - Institutional class shares (which are generally only available to larger institutions with more bargaining power) were included as plan options (37 out of 78 in *Penn* case). Further, institutional class shares are only available if significantly more money was funneled into each them. "Switching from retail to institutional shares is not a matter of checking a different box. It requires fiduciaries to balance the menu of options given to plan beneficiaries against the fees." *Sweda v. Univ. of Pa.*, 2017 BL 334297, at *11 (E.D. Pa. Sept. 21, 2017). Case law in the Third, Seventh and Ninth circuit holds that including higher cost-share classes instead of identified available low-cost share classes does not constitute imprudence. "[P]rudent fiduciaries may very well choose to offer retail class shares over institutional class shares (presumably even where, as here, both versions have identical portfolio managers, underlying investments, and asset allocation, because retail class shares necessarily offer higher liquidity than institutional investment vehicles." *Sacerdote v. N.Y. Univ.*, 2017 BL 29949, at *14 (Aug. 25, 2017).

- Failure to Leverage Bargaining Power (claim proceeding): Emory, MIT, Princeton, Cornell

    - Plaintiffs state a plausible claim for breach of the duty of prudence where allegations state that the plan did not use its bargaining power to obtain lower cost fees and that the lower cost shares are the exact same as the higher cost shares except for the actual fees charged plausibly states a claim for breach of the duty of prudence. In the *Cornell* case, the court will allow this allegation to proceed to the extent that plaintiffs can allege that the plan sponsor selected specific retail funds over lower-cost, but otherwise identical institutional.

- Underperforming Investment Options (claim rejected): Penn

    - There is no cause of action in ERISA for "underperforming funds." The fact that only 7 more funds underperformed than would be expected may be consistent with a breach of fiduciary duty, but it does not show that the plaintiffs "nudged their claims across the line from conceivable to plausible." *See Twombly*, 550 U.S. at 570.

- Underperforming Investment Options (claim proceeding): NYU, Columbia, Cornell, MIT, Emory, Chicago, Johns Hopkins, Princeton, Duke

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    - Plaintiffs alleged that particular funds underperformed relative to comparable lower-cost alternatives over the preceding one-, five-, and ten-year periods. Had the plans' fiduciaries prudently monitored and evaluated such investment options, they would have removed them.

- Recordkeeping Fees (claim rejected): Penn

    - In *Penn*, the plan includes two recordkeepers; Vanguard and TIAA-CREF each serve as the recordkeeper for their respective offerings. The plaintiffs alleged that the plan allowed Vanguard and TIAA-CREF to charge unreasonable fees by allowing them to operate as their own recordkeepers (rather than consolidating all funds with a single third-party recordkeeper). The court dismissed this allegation because the "bundling of services is not inconsistent with lawful, free market behavior in the best interests…of [the] beneficiaries." *Sweda v. Univ. of Pa.*, 2017 BL 334297, at *8 (E.D. Pa. Sept. 21, 2017). The court found "rational bundling reasons" to allow separate recordkeepers (i.e., Vanguard's requirement that they serve as recordkeeper to gain access to the desired Vanguard portfolio). *Id.*

- Recordkeeping Fees (claim proceeding): Emory, NYU, Columbia, Johns Hopkins, Princeton

    - Plaintiffs' allegation that a prudent fiduciary would have chosen one recordkeeper instead of multiple recordkeepers was sufficient to state a claim for relief because this "inefficient and costly structure caused Plan participants to pay excessive and unreasonable fees…[and] similarly-sized plans have a single recordkeeper instead of multiple recordkeepers, which helps keep costs lower." *Henderson v. Emory Univ.*, 2017 BL 158874, at *6 (N.D. Ga. May 10, 2017). The court in the *NYU* case noted that while having a single recordkeeper is not required as a matter of law, the plaintiffs alleged facts (i.e., NYU consolidated recordkeeping for one retirement plan, but not its other retirement plan) supporting the proposition that a prudent fiduciary would have chosen fewer recordkeepers and thus reduced costs to plan participants.

- Inclusion of Proprietary Investments (claim rejected): Penn, NYU, Columbia, MIT, Vanderbilt, Cornell

    - The plan's contractual agreement with a service provider requiring it to place certain investment options in the plan did not, on its own, demonstrate imprudence because the plaintiffs made no allegations that the plan sponsor was unable to terminate such agreement if they believed that to be a prudent action.

- Inclusion of Proprietary Investments (claim proceeding): Emory, Duke

        - Plaintiffs alleged that the plans' fiduciaries commited the plans to an imprudent arrangement in which certain investments had to be included and could not be removed from the plan even when they were no longer prudent investments and prevented the plans from using alternatives recordkeepers who could provide services at a lower costs. The courts agreed that these allegations sufficiently stated a claim for relief because the plans' fiduciaries had no process to remove these accounts and failed to monitor and remove these imprudent investments.

    - Too Many Investment Options (claim rejected): Penn, Johns Hopkins, Cornell, NYU, Columbia, MIT, Emory, Vanderbilt

        - Having too many investment options does not hurt the plans' participants, but instead provides them opportunities to choose the investments they prefer.

    - Too Many Investment Options (claim proceeding): Duke

        - No reason provided. In the plaintiffs' amended complaint, plaintiffs alleged that the plan's over 400 investment options caused participant confusion and inaction.

- Only the suit against the University of Pennsylvania was dismissed in full (currently on appeal in the Third Circuit).

- Most courts found that these common allegations violate ERISA's duty of prudence and not ERISA's duty of loyalty. In each lawsuit, plaintiffs also brought a claim under Section 406 of ERISA. Only the court in the *Duke* case allowed such a claim to proceed. In *Duke*, plaintiffs alleged that the defendants, by using the plan's four recordkeepers, caused the plan to engage in transactions that the defendants knew or should have known constituted an exchange of property between the plan and the four recordkeepers. These transactions occurred each time the plan paid fees to TIAA-CREF, Fidelity, VALIC, and Vanguard and in connection with the plan's investments in funds that paid revenue sharing to TIAA-CREF, Fidelity, VALIC, and Vanguard.

- In the suits against Yale and Northwestern, the courts have not yet ruled on each university's motion to dismiss.

- In the USC case, in lieu of a motion to dismiss, USC moved to compel arbitration and the court denied USC's motion to compel arbitration. The university appealed the issue of whether arbitration clauses in employment agreements extend to ERISA claims — an issue of first impression in the Ninth Circuit. The case has not been stayed pending appeal.

- Motions to certify class have been filed in the MIT, Duke cases

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- The NYU case is set to proceed to trial in April. The Vanderbilt case is set to proceed to trial in November 2019.
- The UPenn case was dismissed in its entirety by the district court. It has been appealed to the Third Circuit. The Princeton case has been stayed pending the outcome of the UPenn case.
- The Columbia case has settled.
- The Chicago case is currently in mediation.
- Motions to dismiss have been filed in the Brown and Washington University cases.

Pagination
* BL

Majority Opinion >

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DAVID CLARK, et al., Plaintiffs, v. DUKE UNIVERSITY, et al., Defendants.

1:16-CV-1044

May 11, 2017, Filed May 11, 2017, Decided

For DAVID CLARK, INDIVIDUALLY AND AS A REPRESENTATIVE OF A CLASS OF PARTICIPANTS AND BENEFICIARIES ON BEHALF OF THE DUKE FACULTY AND STAFF RETIREMENT PLAN, KEITH A FEATHER, INDIVIDUALLY AND AS A REPRESENTATIVE OF A CLASS OF PARTICIPANTS AND BENEFICIARIES ON BEHALF OF THE DUKE FACULTY AND STAFF RETIREMENT PLAN, JORGE LOPEZ, INDIVIDUALLY AND AS A REPRESENTATIVE OF A CLASS OF PARTICIPANTS AND BENEFICIARIES ON BEHALF OF THE DUKE FACULTY AND STAFF RETIREMENT PLAN, THOMAS C MEHEN, INDIVIDUALLY AND AS A REPRESENTATIVE OF A CLASS OF PARTICIPANTS AND BENEFICIARIES ON BEHALF OF THE DUKE FACULTY AND STAFF RETIREMENT PLAN, SUSIE PETTUS, INDIVIDUALLY AND AS A REPRESENTATIVE OF A CLASS OF PARTICIPANTS AND BENEFICIARIES ON BEHALF OF THE DUKE FACULTY AND STAFF RETIREMENT PLAN, ROBERT HEALY, INDIVIDUALLY AND AS A REPRESENTATIVE OF A CLASS OF PARTICIPANTS AND BENEFICIARIES ON BEHALF OF THE DUKE FACULTY AND STAFF RETIREMENT PLAN, Plaintiffs: JEROME J. SCHLICHTER, LEAD ATTORNEY, SCHLICHTER BOGARD & DENTON, ST. LOUIS, MO; ETHAN D. HATCH, SCHLICHTER BOGARD & DENTON, LLP, ST. LOUIS, MO; HEATHER LEA, SCHLICHTER BOGARD & DENTON, ST. LOUIS, MO; KURT C. STRUCKHOFF, SCHLICHTER BOGARD & DENTON, ST. LOUIS, MO; MICHAEL A. WOLFF, SCHLICHTER BOGARD & DENTON, ST. LOUIS, MO; SEAN E. SOYARS, SCHLICHTER BOGARD & DENTON, ST. LOUIS, MO; TROY A. DOLES, SCHLICHTER BOGARD & DENTON, ST. LOUIS, MO; DAVID B. PURYEAR, JR., PURYEAR AND LINGLE, P.L.L.C., GREENSBORO, NC.

For KATHI LUCAS, Plaintiff: HEATHER LEA, SCHLICHTER BOGARD & DENTON, LLP, ST. LOUIS, MO; TROY A. DOLES, SCHLICHTER BOGARD & DENTON, ST. LOUIS, MO; JEROME J. SCHLICHTER, SCHLICHTER BOGARD & DENTON, ST. LOUIS, MO.

For DUKE UNIVERSITY, DUKE INVESTMENT ADVISORY COMMITTEE, KYLE CAVANAUGH, TIM WALSH, JAMES S. ROBERTS, KENNETH C. MORRIS, RHONDA BRANDON, NEAL TRIPLETT, Steve Smith, Defendants: JEREMY P. BLUMENFELD, LEAD ATTORNEY, MORGAN, LEWIS & BOCKIUS, LLP, PHILADELPHIA, PA; STACY K. WOOD, LEAD ATTORNEY, PARKER POE ADAMS & BERNSTEIN, CHARLOTTE, NC; ABBEY M. GLENN, MORGAN LEWIS & BOCKIUS, LLP, WASHINGTON, DC; CHRISTOPHER A. WEALS, MORGAN LEWIS & BOCKIUS, LLP, WASHINGTON, DC; DONALD L. HAVERMANN, MORGAN LEWIS & BOCKIUS, LLP, WASHINGTON, DC.

Catherine C. Eagles, UNITED STATES DISTRICT JUDGE.

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Catherine C. Eagles

ORDER

The defendants move to dismiss the plaintiffs' amended complaint. As pled, the first and second causes of action are barred by the statute of limitations and the sixth and eighth causes of action have insufficient facts alleged to make them plausible. The third, fourth, and fifth causes of action state a claim. The defendant has insufficiently explained why the seventh cause of action should be dismissed.

The plaintiffs assert in their first cause of action that "[d]efendants were required to independently assess 'the prudence of *each* investment option' for the Plan on an ongoing basis, and to act prudently and solely in the interest of the Plan's participants in deciding whether to maintain a recordkeeping arrangement. **[*2]** Defendants were also required to remove investments that were no longer prudent for the Plan." Doc. 24 at ¶ 226 (citations omitted) (emphasis in original). They then allege that defendants breached these fiduciary duties as follows:

> By allowing TIAA-CREF to mandate the inclusion of the CREF Stock Account and Money Market Account in the Plan, as well as the TIAA Traditional Annuity, and to require that it provide recordkeeping for its proprietary options, Defendants committed the Plan to an imprudent arrangement in which certain investments had to be included and could not be removed from the plan *even if they were no longer prudent investments*, and prevented the Plan from using alternative recordkeepers who could provide superior services at a lower cost. In so doing, Defendants abdicated their duty to independently assess the prudence of each option in the Plan on an ongoing basis, and to act prudently and solely in the interest of participants in selecting the Plan's recordkeeper. By allowing TIAA-CREF to dictate these terms, Defendants favored the financial interests of TIAA-CREF in receiving a steady stream of revenues from TIAA-CREF's proprietary funds over the interest of participants.

Id. at ¶ 227. (emphasis in original). In their second cause of action, they assert that "[b]y allowing the Plan to be locked into an unreasonable arrangement . . . Defendants caused the Plan to engage in transactions that it knew or should have known constituted" a prohibited transaction "each time the Plan paid fees to TIAA-CREF." *Id.* at ¶ 233.

These claims are subject to a six-year limitations period, which is shortened to three years if the plaintiff had actual knowledge of the breach. 29 U.S.C. § 1113 . The plaintiffs do not allege a specific date as to when Duke entered into the agreement with TIAA-CREF which "locked" Duke in to both offering the specified TIAA-CREF products and to using TIAA-CREF's recordkeeping services, *see* Doc 24 at ¶ 81, though they do allege facts indicating that Duke had entered into the arrangement with TIAA-CREF by 2010. Doc. 24 at ¶¶ 169, 181. The defendants proffer the 2009 Form 5500 it filed, showing that TIAA-CREF was an "investment" carrier" in that year. *See, e.g.*, Doc. 35-10 at 85. The plaintiffs do not dispute that date, *see* Doc. 38 at 10,1 and instead contend that their claim is timely because it is based on the fact that the defendants maintained the arrangement with TIAA-CREF and, as to the first cause of action, failed to monitor and remove CREF stock from the plan because of the "locked-in" agreement, Doc. 38 at 10-11, and, as to the second cause of action, engaged in prohibited transactions within the limitations period. Doc. 38 at 25.

The plaintiffs' contentions are inconsistent with their allegations, which clearly state that the violations are based on the "inclusion" of the locking-in provision and Duke's decision to "commit[] the Plan to an imprudent arrangement," to "allow[] the Plan to be locked into an unreasonable arrangement," and to "shackle[]the Plan." This act occurred no later than 2009, or, considering only the allegations in the complaint, no later **[*3]** than 2010. This lawsuit was filed in January 2017, more than six years after 2010. Thus these claims, as pled, are barred by the statute of limitations, and will be dismissed.

The eighth cause of action fails to state a claim. While a plaintiff need not prove a claim in the complaint, some specific facts must be alleged to make the claim plausible. That is not the case as to this cause of action, which is hypothetical and conclusory.

The third, fourth, and fifth causes of action plausibly allege claims on which relief may be granted. The defendants failed to establish a basis for dismissing the seventh cause of action in their initial brief in support. The Court declines to consider a new argument first raised in the reply brief as to this cause of action.

In the sixth cause of action, the plaintiffs allege that TIAA-CREF, VALIC, Fidelity, and Vanguard are parties-in-interest "as the plan's providers of investment services." Doc. 24 at ¶ 265. They further allege that the defendants engaged in prohibited transactions "[b]y placing investment options in the Plan in investment options managed by TIAA-CREF, VALIC, Fidelity, and Vanguard." Doc. 24 at ¶ 266. To the extent the plaintiffs are alleging that it was a prohibited transaction to invest in mutual funds because the entities providing the mutual funds are parties-in-interest by virtue of making mutual funds available for investment, the statute precludes that argument. *See* 29 U.S.C. § 1002(21)(B) .2 If the plaintiffs meant to allege a claim based on some other theory or facts, that is not clear from the amended complaint.3 *See Erickson v. Pardus*, 551 U.S. 89 , 93 , 127 S. Ct. 2197 , 167 L. Ed. 2d 1081 (2007) (holding that the complaint should give the defendant fair notice of what the claim is and the grounds upon which it rests). The sixth claim for relief will be dismissed.

It is **ORDERED** that the defendants' motion to dismiss the amended complaint, Doc. 34, is:

1. **GRANTED** as to the plaintiffs' First, Second, Sixth, and Eighth Causes of Action; and

2. **DENIED** as to the Third, Fourth, Fifth, and Seventh Causes of Action.

It is further **ORDERED** that the plaintiffs' first motion to exclude outside materials reference in defendant's reply brief, Doc. 41, is **GRANTED**.

This the 11th day of May, 2017.

/s/ Catherine C. Eagles

UNITED STATES DISTRICT JUDGE

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fn 1

Courts generally do not consider matters outside the pleadings when ruling on a motion to dismiss. *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212 , 234 (4th Cir. 2004). A court may, however, consider documents that are integral to and relied upon in the complaint and whose authenticity is not in dispute. *Blankenship v. Manchin*, 471 F.3d 523 , 526 n.1 (4th Cir. 2006); *accord, Tellabs, Inc. v. Makor Issues & Rights, Ltd.* , 551 U.S. 308 , 322 , 127 S. Ct. 2499 , 168 L. Ed. 2d 179 (2007).

fn 2

The same is true to the extent the plaintiffs base their claim on the plan's purchase of annuity contracts. *See* Prohibited Transaction Exemption 84-24. *See* 49 Fed. Reg. 13208 -03, 13211 (Apr. 3, 1984)

fn 3

In the briefing on this issue, the plaintiffs say these four entities are parties-in-interest because they are record-keepers who furnished services to the plan. That is not, however, what they said in Count VI of the amended complaint. Doc. 24 at ¶ 265. One cannot amend a complaint in a brief. *See S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175 , 184-185 (4th Cir. 2013). Even if it were appropriately alleged that it was the record-keeper role which gave rise to the party-in-interest status asserted in the sixth cause of action, it is still not clear which of the preceding two hundred and sixty-four paragraphs are relevant and what

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exactly gives rise to the prohibited transaction claim the sixth cause of action purports to set forth. *See Stanard v. Nygren*, 658 F.3d 792 , 797 (7th Cir. 2011) (noting that defendants are entitled to "fair notice of the claims against them and the grounds supporting the claims" and that the complaint should be sufficient to "frame the issue and provide the basis for informed pretrial proceedings").

General Information

Judge(s)	CATHERINE CALDWELL EAGLES
Related Docket(s)	1:16-cv-01044 (M.D.N.C.);
Topic(s)	Civil Procedure
Court	United States District Court for the Middle District of North Carolina
Parties	DAVID CLARK, et al., Plaintiffs, v. DUKE UNIVERSITY, et al., Defendants.

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Clark v. Duke Univ., No. 1:16-CV-1044, 2017 BL 355977 (M.D.N.C. May 11, 2017), Court Opinion

Direct History

1 **Clark v. Duke Univ., No. 1:16-CV-1044, 2017 BL 160715 (M.D.N.C. May 11, 2017)**
motion granted, motion to dismiss granted (in part), motion to dismiss denied (in part), case dismissed (in part)

2 **Clark v. Duke Univ., No. 1:16-CV-1044, 2017 BL 355977 (M.D.N.C. May 11, 2017)**
motion to dismiss granted (in part), motion to dismiss denied (in part), case dismissed (in part)

Direct History Summary	
Caution	0
Negative	0
Total	0

Case Analysis

No Treatments Found

Case Analysis Summary	
Positive	0
Distinguished	0
Caution	0
Superseded	0
Negative	0
Total	0

Table Of Authorities (6 cases)

Authorities Summary	
Positive	6
Distinguished	0
Caution	0
Superseded	0
Negative	0
Total	6

1 Cited , (See) S. Walk at Broadlands Homeowners Ass'n v. OpenBand at Broadlands, LLC, 713 F.3d 175, 58 CR 22 (4th Cir. 2013)

In the sixth cause of action, the plaintiffs allege that TIAA-CREF, VALIC, Fidelity, and Vanguard are parties-in-interest "as the plan's providers of investment services." Doc. 24 at ¶ 265 . They further allege that the defendants engaged in prohibited transactions "[b]y placing investment options in the Plan in investment options managed by TIAA-CREF, VALIC, Fidelity, and Vanguard." Doc. 24 at ¶ 266 . To the extent the plaintiffs are alleging that it was a prohibited transaction to invest in mutual funds because the entities providing the mutual funds are parties-in-interest by virtue of making mutual funds available for investment, the statute precludes that argument. *See* 29 U.S.C. § 1002(21)(B) . 2 If the plaintiffs meant to allege a claim based on some other theory or facts, that is not clear from the amended complaint. 3 *See* *Erickson v. Pardus* , 551 U.S. 89 , 93 , 127 S. Ct. 2197 , 167 L. Ed. 2d 1081 (2007) (holding that the complaint should give the defendant fair notice of what the claim is and the grounds upon which it rests). The sixth claim for relief will be dismissed.
...

2 Discussed , (See) , Quoted Stanard v. Nygren, 658 F.3d 792 (7th Cir. 2011)

In the sixth cause of action, the plaintiffs allege that TIAA-CREF, VALIC, Fidelity, and Vanguard are parties-in-interest "as the plan's providers

Table Of Authorities (6 cases)

of investment services." Doc. 24 at ¶ 265 . They further allege that the defendants engaged in prohibited transactions "[b]y placing investment options in the Plan in investment options managed by TIAA-CREF, VALIC, Fidelity, and Vanguard." Doc. 24 at ¶ 266 . To the extent the plaintiffs are alleging that it was a prohibited transaction to invest in mutual funds because the entities providing the mutual funds are parties-in-interest by virtue of making mutual funds available for investment, the statute precludes that argument. *See* 29 U.S.C. § 1002(21)(B) . 2 If the plaintiffs meant to allege a claim based on some other theory or facts, that is not clear from the amended complaint. 3 *See* *Erickson v. Pardus* , 551 U.S. 89 , 93 , 127 S. Ct. 2197 , 167 L. Ed. 2d 1081 (2007) (holding that the complaint should give the defendant fair notice of what the claim is and the grounds upon which it rests). The sixth claim for relief will be dismissed.

...

3 Cited , (Accord) Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 127 S. Ct. 2499, 168 L. Ed. 2d 179, 75 U.S.L.W. 4462 (2007)

These claims are subject to a six-year limitations period, which is shortened to three years if the plaintiff had actual knowledge of the breach. 29 U.S.C. § 1113 . The plaintiffs do not allege a specific date as to when Duke entered into the agreement with TIAA-CREF which "locked" Duke in to both offering the specified TIAA-CREF products and to using TIAA-CREF's recordkeeping services, *see* Doc 24 at ¶ 81 , though they do allege facts indicating that Duke had entered into the arrangement with TIAA-CREF by 2010. Doc. 24 at ¶¶ 169 , 181. The defendants proffer the 2009 Form 5500 it filed, showing that TIAA-CREF was an "investment" carrier" in that year. *See, e.g.* , Doc. 35-10 at 85. The plaintiffs do not dispute that date, *see* Doc. 38 at 10, 1 and instead contend that their claim is timely because it is based on the fact that the defendants maintained the arrangement with TIAA-CREF and, as to the first cause of action, failed to monitor and remove CREF stock from the plan because of the "locked-in" agreement, Doc. 38 at 10-11, and, as to the second cause of action, engaged in prohibited transactions within the limitations period. Doc. 38 at 25.

...

4 Discussed , (See) Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)

In the sixth cause of action, the plaintiffs allege that TIAA-CREF, VALIC, Fidelity, and Vanguard are parties-in-interest "as the plan's providers of investment services." Doc. 24 at ¶ 265 . They further allege that the defendants engaged in prohibited transactions "[b]y placing investment

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Table Of Authorities (6 cases)

options in the Plan in investment options managed by TIAA-CREF, VALIC, Fidelity, and Vanguard." Doc. 24 at ¶ 266 . To the extent the plaintiffs are alleging that it was a prohibited transaction to invest in mutual funds because the entities providing the mutual funds are parties-in-interest by virtue of making mutual funds available for investment, the statute precludes that argument. *See* 29 U.S.C. § 1002(21)(B) . 2 If the plaintiffs meant to allege a claim based on some other theory or facts, that is not clear from the amended complaint. 3 *See* *Erickson v. Pardus* , 551 U.S. 89 , 93 , 127 S. Ct. 2197 , 167 L. Ed. 2d 1081 (2007) (holding that the complaint should give the defendant fair notice of what the claim is and the grounds upon which it rests). The sixth claim for relief will be dismissed.

...

5 Cited Blankenship v. Manchin, 471 F.3d 523 (4th Cir. 2006)

These claims are subject to a six-year limitations period, which is shortened to three years if the plaintiff had actual knowledge of the breach. 29 U.S.C. § 1113 . The plaintiffs do not allege a specific date as to when Duke entered into the agreement with TIAA-CREF which "locked" Duke in to both offering the specified TIAA-CREF products and to using TIAA-CREF's recordkeeping services, *see* Doc 24 at ¶ 81 , though they do allege facts indicating that Duke had entered into the arrangement with TIAA-CREF by 2010. Doc. 24 at ¶¶ 169 , 181. The defendants proffer the 2009 Form 5500 it filed, showing that TIAA-CREF was an "investment" carrier" in that year. *See, e.g.* , Doc. 35-10 at 85. The plaintiffs do not dispute that date, *see* Doc. 38 at 10, 1 and instead contend that their claim is timely because it is based on the fact that the defendants maintained the arrangement with TIAA-CREF and, as to the first cause of action, failed to monitor and remove CREF stock from the plan because of the "locked-in" agreement, Doc. 38 at 10-11, and, as to the second cause of action, engaged in prohibited transactions within the limitations period. Doc. 38 at 25.

...

6 Cited Am. Chiropractic Ass'n v. Trigon Healthcare, Inc., 367 F.3d 212 (4th Cir. 2004)

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Table Of Authorities (6 cases)

that TIAA-CREF was an "investment" carrier" in that year. *See, e.g.* , Doc. 35-10 at 85. The plaintiffs do not dispute that date, *see* Doc. 38 at 10, 1 and instead contend that their claim is timely because it is based on the fact that the defendants maintained the arrangement with TIAA-CREF and, as to the first cause of action, failed to monitor and remove CREF stock from the plan because of the "locked-in" agreement, Doc. 38 at 10-11, and, as to the second cause of action, engaged in prohibited transactions within the limitations period. Doc. 38 at 25.

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252 F.Supp.3d 1344
United States District Court,
N.D. Georgia, Atlanta Division.

Geneva HENDERSON, et al, Plaintiffs,
v.
EMORY UNIVERSITY, et al, Defendants.

CIVIL ACTION NO. 1:16–CV–2920–CAP
|
Signed 05/10/2017

Synopsis
Background: Participants and beneficiaries brought putative class action against retirement plans' fiduciaries and others under Employee Retirement Income Security Act (ERISA), alleging that fiduciaries did not use their bargaining power to negotiate for lower expenses, did not exercise proper judgment in deciding what investment options to include in plans, and allowed recordkeepers to tie plans to certain investment options and collect unlimited asset-based compensation from their own proprietary products. Defendants moved to dismiss for failure to state a claim.

Holdings: The District Court, Charles A. Pannell, Jr., J., held that:

[1] participants and beneficiaries stated claim for breach of ERISA's duty of prudence, based on fiduciaries allegedly choosing retail-class shares with higher fees over institutional-class shares with lower fees;

[2] fiduciaries did not breach ERISA's duty of prudence by allegedly offering too many investment options for participants;

[3] participants and beneficiaries stated claim for breach of ERISA's duty of prudence, based on fiduciaries' use of three separate recordkeepers for the plans;

[4] participants and beneficiaries stated prohibited transaction claim, based on fiduciaries agreeing to lock in certain types of investments;

[5] fiduciaries did not engage in prohibited transactions under ERISA by including mutual funds offered by recordkeepers as investment options; and

[6] participants and beneficiaries stated claim for breach of ERISA's duty of loyalty.

Motion granted in part and denied in part.

West Headnotes (17)

[1] **Labor and Employment**
Prudence

Participants and beneficiaries of retirement plans stated claim against plan fiduciaries for breach of ERISA's duty of prudence, based on choosing retail-class shares with higher fees over institutional-class shares with lower fees, by alleging that fiduciaries did not use their bargaining power to obtain the lower cost fees, that lower cost options were the exact same as the higher cost shares except for the actual fees charged to participants, and that no reasonable fiduciary would choose or be complacent with being provided retail-class shares over institutional-class shares. Employee Retirement Income Security Act of 1974 § 404, 29 U.S.C.A. § 1104(a)(1)(B).

Cases that cite this headnote

[2] **Labor and Employment**
Prudence

Retirement plan fiduciaries did not breach ERISA's duty of prudence by allegedly offering too many investment options for participants; having too many options did not hurt participants, but instead provided them opportunities to choose the investments that they preferred. Employee Retirement Income Security Act of 1974 § 404, 29 U.S.C.A. § 1104(a)(1)(B).

2 Cases that cite this headnote

[3] **Labor and Employment**

Prudence

Participants and beneficiaries of retirement plans stated claim against plan fiduciaries for breach of ERISA's duty of prudence, based on fiduciaries' use of actively managed funds instead of passively managed funds, by alleging that fiduciaries did not properly analyze funds used in the plans, were forced to use certain funds provided by recordkeepers, were persuaded by certain recordkeepers to use their funds without researching other funds, and that had they analyzed the funds, they would have learned that actively managed funds, including funds recordkeepers required the plans to use, would not outperform similar passively managed funds. Employee Retirement Income Security Act of 1974 § 404, 29 U.S.C.A. § 1104(a)(1)(B).

Cases that cite this headnote

[4] **Labor and Employment**
Prudence

Participants and beneficiaries of retirement plans stated claim against plan fiduciaries for breach of ERISA's duty of prudence, based on fees assessed for annuities offered by plans, by alleging that distribution expenses were charged for marketing and advertising fund to potential investors, but participants had no choice as the funds were selected by plans' sponsor, mortality and expense risk charges assessed were not relevant to all participants, but benefited only participants who elected to annuitize their holdings upon retirement, and that expenses aided the fund companies but not the participants. Employee Retirement Income Security Act of 1974 § 404, 29 U.S.C.A. § 1104(a)(1)(B).

Cases that cite this headnote

[5] **Labor and Employment**
Prudence

Participants and beneficiaries of retirement plans stated claim against plan fiduciaries for breach of ERISA's duty of prudence, where they alleged that fiduciaries continued to retain particular accounts as investment options despite their histories of substantial underperformance and excessive and unnecessary fees compared to available alternatives. Employee Retirement Income Security Act of 1974 § 404, 29 U.S.C.A. § 1104(a)(1)(B).

2 Cases that cite this headnote

[6] **Labor and Employment**
Prudence

A plaintiff may allege that a fiduciary breached the duty of prudence under ERISA by failing to properly monitor investments and remove imprudent ones. Employee Retirement Income Security Act of 1974 § 404, 29 U.S.C.A. § 1104(a)(1)(B).

1 Cases that cite this headnote

[7] **Labor and Employment**
Prudence

Allegations by participants and beneficiaries of retirement plans that plan fiduciaries should have used a stable value fund instead of a traditional annuity were sufficient to state claim against fiduciaries for breach of ERISA's duty of prudence. Employee Retirement Income Security Act of 1974 § 404, 29 U.S.C.A. § 1104(a)(1)(B).

Cases that cite this headnote

[8] **Labor and Employment**
Prudence

Allegations by participants and beneficiaries of retirement plans that plan fiduciaries' revenue sharing was improper and overcompensated the recordkeepers were sufficient to state claim for breach of ERISA's duty of prudence. Employee Retirement Income Security Act of 1974 § 404, 29 U.S.C.A. § 1104(a)(1)(B).

2 Cases that cite this headnote

[9] **Labor and Employment**

Prudence

Participants and beneficiaries of retirement plans stated claim against plan fiduciaries for breach of ERISA's duty of prudence, based on fiduciaries' use of three separate recordkeepers for the plans, where they alleged that the use of three recordkeepers was an inefficient and costly structure that caused participants to pay excessive and unreasonable fees for plan recordkeeping and administrative services and that similarly sized plans had single recordkeeper instead of multiple recordkeepers, which helped keep costs lower. Employee Retirement Income Security Act of 1974 § 404, 29 U.S.C.A. § 1104(a)(1)(B).

Cases that cite this headnote

[10] Labor and Employment

Prudence

Participants and beneficiaries of retirement plans stated claim against plan fiduciaries for breach of ERISA's duty of prudence, where they alleged that fiduciaries should have solicited bids for recordkeeping services every three years and their failure to do so caused plans to pay over 1140% and 1843% more than what was a reasonable fee for recordkeeping services. Employee Retirement Income Security Act of 1974 § 404, 29 U.S.C.A. § 1104(a)(1)(B).

Cases that cite this headnote

[11] Labor and Employment

Prudence

Participants and beneficiaries of retirement plans stated claim against plan fiduciaries for breach of ERISA's duty of prudence, based on fiduciaries allegedly allowing recordkeeper to mandate inclusion of a particular account in plans and require that it provide recordkeeping for its proprietary options, where they alleged that fiduciaries acted imprudently by "locking in" to a particular account and recordkeeper, had no process to remove those accounts, and failed to monitor them and remove imprudent investments. Employee Retirement Income Security Act of 1974 § 404, 29 U.S.C.A. § 1104(a)(1)(B).

Cases that cite this headnote

[12] Labor and Employment

Prudence

ERISA's duty of prudence involves a continuing duty to monitor investments and remove imprudent ones under trust law. Employee Retirement Income Security Act of 1974 § 404, 29 U.S.C.A. § 1104(a)(1)(B).

Cases that cite this headnote

[13] Federal Civil Procedure

Fact issues

Issue of whether prohibited transactions claim under ERISA by retirement plan participants and beneficiaries against plan fiduciaries was time-barred could not be resolved on fiduciaries' motion to dismiss for failure to state a claim, since it was not clear from the pleadings when the alleged prohibited transactions took place. Employee Retirement Income Security Act of 1974 §§ 406, 413, 29 U.S.C.A. §§ 1106(a), 1113.

Cases that cite this headnote

[14] Labor and Employment

Prohibited transactions;parties in interest

Participants and beneficiaries of retirement plans stated prohibited transaction claim under ERISA against plan fiduciaries, based on fiduciaries agreeing to lock in certain types of investments, by alleging that plans locked into an arrangement that required the plans to include particular stock account and use a particular recordkeeper, even though the fees were unreasonable for the services provided, that fiduciaries knew or should have known that the transactions were prohibited, that transactions occurred each time plans paid fees in connection with plans' investment in the challenged account. Employee Retirement

Income Security Act of 1974 §§ 3, 406, 29 U.S.C.A. §§ 1002(14)(B), 1106(A), (C), and (D).

Cases that cite this headnote

[15] **Labor and Employment**
Prohibited transactions;parties in interest

Retirement plan fiduciaries did not engage in prohibited transactions under ERISA by including mutual funds offered by investment companies, which also served as recordkeepers for the plans, as investment options in the plans, since mutual funds were exempt from being a party-in-interest under ERISA. 15 U.S.C.A. § 80a-1 et seq.; Employee Retirement Income Security Act of 1974 §§ 3, 406, 29 U.S.C.A. §§ 1002(14)(B), 1002(21)(B), 1106(a).

2 Cases that cite this headnote

[16] **Labor and Employment**
Prohibited transactions;parties in interest

Retirement plan fiduciaries did not engage in prohibited transactions under ERISA when plans paid fees collected from mutual funds to a vendor through revenue sharing, since fees collected from a mutual fund did not become assets of the plans. Employee Retirement Income Security Act of 1974 § 406, 29 U.S.C.A. § 1106(a)(1)(D).

1 Cases that cite this headnote

[17] **Labor and Employment**
Duties in general

Participants and beneficiaries of retirement plans stated claim against plan fiduciaries for breach of ERISA's duty of loyalty by alleging that plans did not act for the benefit of the plans' participants. Employee Retirement Income Security Act of 1974 § 404, 29 U.S.C.A. § 1104(a)(1)(A).

Cases that cite this headnote

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Opinion

*1348 **ORDER**

CHARLES A. PANNELL, JR., United States District Judge

This matter is before the court on the defendants' motion to dismiss the first amended complaint [Doc. No. 41]. As an initial matter, the defendants' previously-filed motion to dismiss the complaint [Doc. No. 27] is dismissed as MOOT.

I. Facts

The plaintiffs bring this case "individually and as representatives of a class of participants and beneficiaries of the Emory University Retirement Plan and the Emory Healthcare, Inc. Retirement Savings and Matching Plan (the "Plans")." Am. Compl. ¶ 1 [Doc. No. 30]. The plaintiffs' primary allegations are that the Plans' fiduciaries did not use their bargaining power to negotiate for lower expenses, exercise proper judgment in deciding what investment options to include in the Plans, allowing the recordkeepers to tie the Plans to certain investment options, and collecting "unlimited asset-based compensation from their own proprietary products." Am. Compl. ¶ 4 [Doc. No. 30]. "The Plans provide for retirement income for employees of Emory University, Emory Healthcare, Inc., Emory–Children's Center, Inc. (fka Emory Children's Center, Inc.), Wesley Woods Center of Emory University, Inc., and Emory Specialty Associations, LLC, each of which have adopted the Plans with the consent of Emory University or Emory Healthcare, Inc." Am. Compl. ¶ 11 [Doc. No. 30].

The Emory University Retirement Plan had $2.6 billion in net assets and 20,261 participants with account balances as of December 31, 2014. Am. Compl. ¶ 12 [Doc. No. 30]. As of that same date, the Emory Healthcare, Inc. Retirement Savings and Matching Plan had $1.06 billion in net assets and 21,536 participants with account balances. Am. Compl. ¶ 12 [Doc. No. 30]. The Emory University Investment Office develops the Plan investment strategy and investment policies. Am. Compl. ¶ 30 [Doc. No. 30]. The Emory University Investment Office manages the assets of the Plans. Am. Compl. ¶ 30 [Doc. No. 30]. "Emory Investment Management is responsible for selecting, retaining, and terminating the external investment managers and investment vehicles for the Plans, monitoring those investments, and implementing and ensuring compliance with the investment policies established by the Investment Committee." Am. Compl. ¶ 32 [Doc. No. 30]. The Emory University Board of Trustees oversees Emory Investment Management, and sets the investment policies for the Plans. Am. Compl. ¶ 33 [Doc. No. 30]. "The Investment Committee sets the Statement of Investment Objectives, Policies, and Guidelines (also known as an investment policy statement, or IPS) for the Plans ... [and sets investment objectives, establishing investment standards] and reviewing the reasonableness of Plan fees at least annually." Am. Compl. ¶ 33 [Doc. No. 30]. The plaintiffs assert that the Emory Investment Management, the Emory Pension Board, and the individual members are fiduciaries to the Plans. Am. Compl. ¶ 39 [Doc. No. 30].

The Emory Plans are known as 403(b) plans. Am. Compl. ¶ 81 [Doc. No. 30]. "Tax-exempt organizations, public schools (including state colleges and universities), and churches are eligible to offer plans qualified under § 403(b), commonly known as 403(b) plans. 26 U.S.C. § 403(b)(1)(A)." Am. Compl. ¶ 81 [Doc. No. 30].

II. Legal Standard

When evaluating a motion to dismiss pursuant to Rule 12(b)(6), the court must take the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *Resnick v. Avmed, Inc.*, 693 F.3d 1317, 1321–22 (11th Cir. 2012). To survive Rule 12(b)(6) scrutiny, ***1349** "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "[F]acial plausibility" exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

III. Analysis

A. Plaintiffs' Prudence Claims

"[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and ... with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). The defendants' first argument is that the plaintiffs' prudence claims fail as a matter of law.

1. Count V

The defendants make two broad arguments to dismiss Count V. They argue that the plaintiffs fail to state a plausible claim that the Plans' investment management fees were excessive. Additionally, the defendants claim that the plaintiffs fail to plausibly allege that the defendants imprudently retained underperforming funds.

a. The Defendants' Assertion that the Plans' Investment Management Fees Fall Within the Range that Courts have held to be Prudent

[1] The Plans have over $3 billion in assets. Am. Compl. ¶ 12 [Doc. No. 30]. The plaintiffs' complaint alleges that jumbo retirement plans, similar to the Plans, have great bargaining power when choosing what type of shares to offer its participants. Am. Compl. ¶ 169 [Doc. No. 30]. For instance, the plaintiffs assert that many of the Plans' retail class investment options also offered a similar lower-cost institutional class share, but that the Plans failed to use its bargaining power to obtain the institutional class shares for the Plans. Am. Compl. ¶ 170 [Doc. No. 30]. Additionally, the plaintiffs' complaint states that Vanguard and TIAA–CREF mutual funds routinely allow a waiver for large investment funds (similar to the Plans) to obtain lower cost shares even if they have not met the usual minimum asset threshold necessary to offer lower-cost institutional class shares to the Plans participants. Am. Compl. ¶ 174 [Doc. No. 30]. The complaint sets out close to 100 mutual funds used by the Plans with higher costs than identical mutual funds the Plans could have attempted to negotiate for with lower costs. Am. Compl. ¶ 176 [Doc. No. 30]. The defendants argue that the Plans' investment options offer a range of expense ratios from 0.07% to 1.41%, and that many courts have found this range to be reasonable. Defs.' Br. [Doc. No. 41–1 at 17].

The plaintiffs have properly stated a claim that choosing retail-class shares over institutional-class shares is imprudent.[1] *See Braden v. Wal–Mart Stores, Inc.*, 588 F.3d 585, 595–96 (8th Cir. 2009). The plaintiffs claim that offering retail-class shares with a higher expense ratio versus institutional-class shares with a lower expense ratio may be unacceptable. The plaintiffs' complaint asserts that the retail-class shares and the institutional-class shares were the exact same except for the expenses ***1350** charged to participants. While, the defendants argue and point to cases that hold that a motion to dismiss should be granted if based solely on retail versus institutional class shares, those cases also point out many other reasons why a plan chose one class over the other. In this case, the plaintiffs allege that the defendants did not use their bargaining power to obtain the lower cost fees and that the lower cost options are the exact same as the higher cost shares except for the actual fees charged. The plaintiffs assert that no reasonable fiduciary would choose or be complacent with being provided retail-class shares over institutional-class shares.

[2] Lastly, the plaintiffs argue that having too many investment options is imprudent. The plaintiffs asserted that the Plans offered 111 investment options, and that many of those options were duplicative. Instead, the plaintiffs allege that the Plans should have offered fewer options and used more bargaining leverage with those investment options to obtain lower fees. The court does not agree with the plaintiffs' theory. Having too many options does not hurt the Plans' participants, but instead provides them opportunities to choose the investments that they prefer. *Loomis v. Exelon Corp.*, 658 F.3d 667, 673–74 (7th Cir. 2011). The plaintiffs' allegations that the defendants acted imprudently by offering too many investment options does not state a claim for relief.

b. The Defendants' Assertion that the Plaintiffs Cannot State a Claim for Imprudence Based on the Use of Actively Managed Funds

[3] The defendants contend that the plaintiffs have not stated a claim that they acted imprudently by including actively managed funds instead of solely passively managed funds. The plaintiffs argue that the Plans' administrative and recordkeeping providers required the defendants to include their preferred investment lineup in the plan as investment options for participants. Am. Compl. ¶¶ 78, 137 [Doc. No. 30]. The plaintiffs contend that these fund options were not included in the Plans based on the best interest of the participants, but instead to benefit the Plans' service providers. Am. Compl. ¶¶ 78, 137 [Doc. No. 30]. TIAA–CREF required the Plans to "offer its flagship CREF Stock Account and Money Market Account, and to also use TIAA as recordkeeper for its proprietary products." Am. Compl. ¶ 136 [Doc. No. 30]. The plaintiffs argue that the Plans should have instead used an open architecture model. That would allow the Plans' fiduciaries to choose funds independently and in the best interest of the participants because the Plans would not be subject to using only the provider's investment products. Am. Compl. ¶ 79 [Doc. No. 30]. The plaintiffs contend that the defendants failed to properly analyze the funds allowed in the Plans, and that if they had analyzed the funds they would have learned that the actively managed funds (including the funds the recordkeepers required the Plans to use) would not outperform similar passively managed funds. Am. Compl. ¶ 206 [Doc. No. 30]. Even if an investment was no longer prudent, the plaintiffs argue that the defendants' agreement with the Plans' providers would not allow many of the funds to be removed because the contract with the providers required the Plans to retain the investment options. Am. Compl. ¶ 217 [Doc. No. 30].

The defendants argue generally that the plaintiffs' claim fails because simply having an actively managed fund instead of a passive fund is not imprudent. Defs.' Br. [Doc.

No. 41–1 at 18–19]. However, the plaintiffs' claims are not that simplistic. The plaintiffs contend that the defendants acted imprudently because they did not properly analyze the funds used in the Plans, were ***1351** forced to use certain funds provided by the recordkeepers, and the Plans' fiduciaries were persuaded by certain recordkeepers to use their funds without researching or choosing other funds. The plaintiffs have sufficiently alleged that the defendants' process for choosing and analyzing certain funds was flawed. *See Braden*, 588 F.3d at 595–96 (finding that "the process by which appellees selected and managed the funds in the Plan would have been tainted by failure of effort, competence, or loyalty"). The defendants' assertion that the plaintiffs have not properly alleged that the defendants' use of actively managed funds was imprudent fails.

c. The Defendants' Assertion that the Plaintiffs' Fee "Layering" Claim Fails to State a Claim

[4] The defendants argue that the fees assessed for the annuities offered by the Plans were reasonable and not excessive. Defs.' Br. [Doc. No. 41–1 at 19]. The plaintiffs allege that two of the accounts included in the Plans charge unnecessary fees. They allege that the CREF Variable Annuity Accounts include unneeded layers of expense charges, including: an administrative expense charge, a distribution expense charge, a mortality and expense risk charge, and an investment advisory expense charge. Am. Compl. ¶ 140 [Doc. No. 30]. Additionally, they contend that the TIAA Real Estate Account includes those same four expenses, and a fifth expense for a liquidity guarantee. Am. Compl. ¶ 143 [Doc. No. 30]. The plaintiffs argue that the distribution expenses and mortality and expense risk charges are unnecessary for the Plans. Am. Compl. ¶ 141 [Doc. No. 30]. The plaintiffs' first allegation is that the administrative and investment management expenses were excessive for the services provided. The amended complaint then alleges that distribution expenses are charged for marketing and advertising the fund to potential investors, but the plaintiffs claim that this is unnecessary since the funds are selected by the Plans' sponsor and the participants have no choice. Am. Compl. ¶ 141 [Doc. No. 30]. Additionally, the plaintiffs state that the mortality and expense risk charges assessed are not relevant to all participants, but benefit only those participants that elect to annuitize their holdings upon retirement. Am. Compl. ¶ 141 [Doc. No. 30]. Finally, the plaintiffs allege that all five of the expenses aid the fund companies but not the Plans' participants. Am. Compl. ¶¶ 141, 144, 278 [Doc. No. 30].

The fees charged by funds in a plan should benefit the participants. *See Braden*, 588 F.3d at 595–96. Additionally, the fund options chosen for a plan should not favor the fund provider or the fiduciary over the participants. *See id.* at 596. Thus, the plaintiffs' allegations that the Plans' funds charged fees that were excessive and/or provided a benefit to TIAA but not to the benefit of the participants are sufficient to state a claim for relief.

d. The Defendants' Assertion that the Plaintiffs Fail to Plausibly Allege that Defendants Imprudently Retained Underperforming Funds

[5] The defendants argue that the plaintiffs' claim that the defendants retained underperforming stocks should be dismissed. Specifically, the defendants point to the CREF Stock Account and TIAA Real Estate Account. The plaintiffs' complaint alleges that "The CREF Stock Account ... had a long history of substantial underperformance compared to ... actively managed alternatives over the one-, five-, and ten-year periods ending December 31, 2009." Am. Compl. ¶ 226 [Doc. No. 30]. Likewise, the plaintiffs contend that "The TIAA Real Estate Account had a long history of substantial underperformance relative to the Vanguard REIT Index over the one-, five-, and ten-year periods ending December 31, 2009." Am. ***1352** Compl. ¶ 238 [Doc. No. 30]. The plaintiffs allege that "The CREF Stock Account has excessive and unnecessary fees, has consistently underperformed for years, and continues to underperform its benchmark ... and underperformed lower-cost actively and passively managed investments that were available to the Plans, yet has not been removed from the Plans nor frozen to new investments." Am. Compl. ¶ 210 [Doc. No. 30]. Further, the plaintiffs state, "Historical performances of the CREF Stock Account has been persistently poor for many years compared to ... [the] benchmark index (Russell 3000 Index), and also as compared to available low-cost index funds." Am. Compl. ¶ 222 [Doc. No. 30]. Presently, the parties disagree as to what the correct benchmark is for the CREF Stock Account. The proper benchmark can be more appropriately determined on summary judgment.

Similarly to the CREF Stock Account, the plaintiffs allege that the "Defendants failed to conduct such a process and continue to retain the TIAA Real Estate Account as a Plan Investment option despite its continued underperformance and higher cost compared to available investment alternatives." Am. Compl. ¶ 240 [Doc. No. 30]. The defendants again argue that the plaintiffs used incorrect comparisons to the TIAA Real Estate Account. As set forth above, the proper benchmark can be more appropriately determined on summary judgment.

[6] The plaintiffs have properly alleged that the defendants acted imprudently by retaining underperforming funds. "A plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." *Tibble v. Edison Int'l*, ––– U.S. ––––, 135 S.Ct. 1823, 1829, 191 L.Ed.2d 795 (2015). The plaintiffs' allegations sufficiently state that the defendants failed to remove the CREF Stock Account and TIAA Real Estate Account after periods of underperformance and higher costs compared to similar funds. Am. Compl. ¶¶ 210, 240 [Doc. No. 30]. Therefore, the plaintiffs' claim that the defendants acted imprudently by retaining the CREF Stock Account and TIAA Real Estate Account will not be dismissed.

e. The TIAA Traditional Annuity

[7] The plaintiffs allege in their complaint that the defendants should have used a stable value fund instead of the TIAA Traditional Annuity. Am. Compl. ¶ 98 [Doc. No. 30]. The defendants argue that stable value funds have underperformed the TIAA Traditional Annuity over the last one, three, five, and ten years. Defs.' Br. [Doc. No. 41–1 at 25]. The defendants are improperly arguing questions of fact at this stage. Taking the plaintiffs allegations as true, a stable fund could have been an alternative option to the TIAA Traditional Annuity. Therefore, the court will not dismiss the plaintiffs' claim related to an alternative investment option to the TIAA Traditional Annuity.

2. Count III

Count III relates to the Plans charging unreasonable administrative fees. The defendants argue that the types of fees charged are reasonable and commonly used.

a. The Defendants' Argument that "Revenue Sharing" is a Common and Accepted Practice

[8] Revenue sharing is "a common method of compensation whereby the mutual funds on a defined contribution plan pay a portion of investor fees to a third party." *Tussey v. ABB, Inc.*, 746 F.3d 327, 331 (8th Cir. 2014). The defendants argue that "revenue sharing" is common industry practice. Defs.' Br. [Doc. No. 41–1 at 26]. They contend that "revenue sharing" is ***1353** more beneficial to participants with lower balances (because the participants with lower balances will pay fees proportional to their total assets instead of paying the same fee as all participants in the Plan) than a flat-rate per-participant fee where each participant pays identical fees. Defs.' Br. [Doc. No. 41–1 at 26].

The plaintiffs' complaint alleges that "Revenue sharing, while not a *per se* violation of ERISA, can lead to excessive fees if not properly monitored and capped." Am. Compl. ¶ 74 [Doc. No. 30]. The plaintiffs argue that a recordkeeper's fee should depend on the number of participants and not the amount of assets in a plan. Am. Compl. ¶ 71 [Doc. No. 30]. The plaintiffs' allege that the defendants' "revenue sharing" method is improper and overcompensates the recordkeepers. Am. Compl. ¶¶ 74–75 [Doc. No. 30].

At this point, the plaintiffs' do not have the burden "to rule out every possible lawful explanation" for the allegedly overcharged recordkeepers' fees used in the Plan. *Braden*, 588 F.3d at 596–97. The defendants can be held accountable for failing to monitor and making sure that the recordkeepers charged appropriate fees and did not receive overpayments for their services. *Tussey*, 746 F.3d at 336. Therefore, the plaintiffs' claim regarding "revenue sharing" will not be dismissed.

b. The Defendants' Assertion that ERISA does not Require Fiduciaries to Utilize a Single Recordkeeper or Solicit Recordkeeping Bids

[9] The defendants continue to argue issues of fact at the motion to dismiss stage instead of attempting to show that the plaintiffs have failed to state a claim. They argue that the plaintiffs failed to allege that one vendor would have been able to provide the needed investment options. Defs.' Br. [Doc. No. 41–1 at 27]. The defendants suggest that it may be reasonable that Fidelity, TIAA, and Vanguard (all three of which the defendants use as recordkeepers) are the best options to use. Defs.' Br. [Doc. No. 41–1 at 27]. On the other hand, the plaintiffs' complaint states "Despite the long-recognized benefits of a single recordkeeper for a defined contribution plan, Defendants have continued to contract with *three* separate recordkeepers for the Plans: TIAA–CREF, Fidelity, and Vanguard. This inefficient and costly structure has caused Plan participants to pay excessive and unreasonable fees for Plan recordkeeping and administrative services." Am. Compl. ¶ 150 [Doc. No. 30]. The plaintiffs also allege that similarly-sized plans have a single recordkeeper instead of multiple recordkeepers, which helps keep costs lower. Am. Compl. ¶ 149 [Doc. No. 30]. The plaintiffs' allegation that a prudent fiduciary would have chosen one recordkeeper instead of three is sufficient to state a claim for relief.

[10] Additionally, the defendants argue that the plaintiffs' claim to have a competitive bidding process to choose a recordkeeper should be dismissed. Defs.' Br. [Doc. No. 41–1 at 27]. The plaintiffs allege in their amended complaint that the defendants should have put the recordkeeping services out for competitive bidding every three years. Am. Compl. ¶ 148 [Doc. No. 30]. The amended complaint states, "the Plan's fiduciaries caused the Retirement Plan to pay well over 1140% and 1843% more than what was a reasonable fee for recordkeeping services." Am. Compl. ¶ 161 [Doc. No. 30]. The defendants argue that nothing in ERISA requires competitive bidding. However, the plaintiffs' allegation of the absence of competitive bidding for the recordkeeping services was imprudent; therefore, the plaintiffs' claim is sufficient to state a claim for relief. *See George v. Kraft Foods Glob., Inc.*, 641 F.3d 786, 798–99 (7th Cir. 2011).

*1354 3. Count I

[11] The defendants argue that the plaintiffs' "Locking In" claim (Count I) fails as a matter of law and is time-barred. The plaintiffs' allege in their amended complaint that:

> By allowing TIAA–CREF to mandate the inclusion of the CREF Stock Account and Money Market Account in the Plans, as well as the TIAA Traditional Annuity, and to require that it provide recordkeeping for its proprietary options, Defendants committed the Plans to an imprudent arrangement in which certain investments had to be included and could not be removed from the plan *even if they were no longer prudent investments*, and prevented the Plans from using alternative recordkeepers who could provide superior services at a lower cost. In so doing, Defendants abdicated their duty to independently assess the prudence of each option in the Plans on an ongoing basis, and to act prudently and solely in the interest of participants in selecting the Plans' recordkeeper. By allowing TIAA–CREF to dictate these terms, Defendants favored the financial interests of TIAA–CREF in receiving a steady stream of revenues from TIAA–CREF's proprietary funds over the interest of participants.

Am. Compl. ¶ 250 [Doc. No. 30]. The plaintiffs allege that the defendants failed to engage in reasoned decision-making to determine the prudence of the investment options. Am. Compl. ¶ 251 [Doc. No. 30]. "By allowing the Plans to be bound by this requirement, Defendants failed to conduct an independent evaluation of the prudence of this option, which contradicts every principle of prudent investing because an investment that was no longer prudent could not be removed from the Plans." Am. Compl. ¶ 217 [Doc. No. 30]. The defendants argue that they did not follow an imprudent process and that the plaintiffs rely on only hindsight to determine that the account underperformed. Defs.' Br. [Doc. No. 41–1 at 28]. Additionally, the defendants claim that the plaintiffs' "Locking In" allegation is time-barred because the challenged actions occurred more than six years prior to the filing of the complaint. Defs.' Br. [Doc. No. 41–1 at 29].

[12] "A plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." *Tibble*, 135 S.Ct. at 1829. "[T]he duty of prudence involves a continuing duty to monitor investments and remove imprudent ones under trust law." *Id.* Here, the plaintiffs have alleged that the defendants acted imprudently by "locking in" to the CREF Stock Account and TIAA Recordkeeping—that the defendants had no process to remove these accounts and failed to monitor them and remove imprudent investments. These allegations are sufficient to state a claim for relief.

As to the defendants' assertion that the plaintiffs' claim is time-barred, "[n]o action may be commenced ... with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part ... (1) six years after (A) the date of the last action which constituted a part of the breach or violation." 29 U.S.C. § 1113(1). The plaintiffs argue that their claim is timely and "Plaintiffs do not challenge the *initial* arrangement, but maintaining the arrangement and the failure to monitor and remove CREF Stock within the six years preceding the complaint." Pls.' Resp. [Doc. No. 48 at 16]. With this limitation, the plaintiffs' claim with respect to the failure of the defendants to properly monitor and/or remove the allegedly imprudent "locked in" accounts that occurred may proceed. The claims in Count I will be dismissed to the extent the plaintiffs are seeking any damages that occurred more ***1355** than six years prior to the complaint being filed caused by imprudence.

B. The Plaintiffs' Prohibited Transactions Claims

1. Counts II, IV, and VI

[13] The defendants first argue that the plaintiffs' prohibited transactions claims are time-barred by the six-year statute of limitations under 28 U.S.C. § 1113. The court will take this matter up at a later date. It is not clear from the pleadings when the prohibited transactions took place. For instance, the defendants argue that all the alleged prohibited transactions took place over six years prior to this case being filed. Defs.' Br. [Doc. No. 41–1 at 31]. However, the plaintiffs' amended complaint alleges that the CREF Stock Account, for example, was included in the Plans beginning in 2010. Am. Compl. ¶ 210 [Doc. No. 30]. Therefore, depending on the exact date that account was included in the Plans, that transaction may have occurred within six years of this suit being filed. Furthermore, the court will not determine at this time whether there is a duty by the defendants to continually monitor and remove prohibited transactions like in *Tibble*, 135 S.Ct. at 1829, or if the plaintiffs have a claim for only the original transaction that took place.

[14] The defendants next argue that Count II's prohibited transaction claim should be dismissed because there is no relevant case law prohibiting a plan from agreeing to lock in a certain type of investment. The prohibited transactions statute states:

> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—(A) sale or exchange, or leasing, of any property between the plan and a party in interest; (B) lending of money or other extension of credit between the plan and a party in interest; (C) furnishing of goods, services, or facilities between the plan and a party in interest; (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or (E) acquisition on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

29 U.S.C. § 1106(a). "The term 'party in interest' means, as to an employee benefit plan ... a person providing services to such plan." 29 U.S.C. § 1002(14)(B). Count II of the amended complaint alleges that the Plans locked into an arrangement that required the Plans to include the CREF Stock Account and use TIAA as a recordkeeper, even though the fees were unreasonable for the services provided. Am. Compl. ¶ 256 [Doc. No. 30]. The plaintiffs contend that the defendants knew or should have known that these transactions were prohibited by 29 U.S.C. § 1106(A), (C), and (D). The amended complaint states "These transactions occurred each time the Plans paid fees to TIAA–CREF in connection with the Plans' investments in the CREF Stock Account and other proprietary options that paid revenue sharing to TIAA." Am. Compl. ¶ 256 [Doc. No. 30]. The defendants argue that ERISA does not prohibit a plan from making a stock account mandatory. Defs.' Br. [Doc. No. 41–1 at 33]. However,

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the plaintiffs' allegations that TIAA–CREF is a party in interest, and that the Plans improperly engaged in a transaction prohibited by 29 U.S.C. § 1106(a)(1)(A), (C), and (D) are sufficient to state a claim for relief.

Next, the defendants argue that Counts IV and VI should be dismissed because ERISA has an exemption that allows the recordkeeping and investment payments that the plaintiffs challenge. Defs.' Br. [Doc. No. 41–1 at 34]. "In particular, 29 U.S.C. § 108(b)(2) exempts arrangements for plan services so long as no more than 'reasonable compensation' is paid." Defs.' ***1356** Br. [Doc. No. 41–1 at 34]. Whether the fees were unreasonable is an issue that should be taken up at summary judgment. The reasonableness of the fees is a defense and did not have to be pleaded by the plaintiffs. *Braden*, 588 F.3d at 602 ("In short, the prohibited transactions [under § 1106(a)(1)] involve self-dealing [and the] settled law is that in such situations the burden of proof is always on the party to the self-dealing transaction to justify its fairness."). Therefore, the plaintiffs have alleged facts sufficient to state a claim for a prohibited transaction. The defendants may raise reasonableness as a defense to the plaintiffs' allegations.

[15] Fourth, the defendants argue that Count VI should be dismissed because a mutual fund is exempted from being a party-in-interest. The defendants state "when a plan invests in a mutual fund, it is not transacting with [a] party-in-interest." Defs.' Br. [Doc. No. 41–1 at 35]. The plaintiffs' amended complaint alleges that "By placing investment options in the Plans in investment options managed by TIAA–CREF, Fidelity, and Vanguard in which the entirety of the Plans' approximately $3.7 billion in combined assets were invested, the Defendants caused the plans to engage in" prohibited transactions. Am. Compl. ¶ 290 [Doc. No. 30]. 29 U.S.C. § 1002(21)(B) states:

> If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a–1 et seq.], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this subchapter ....

The Investment Company Act of 1940 regulates mutual funds. Here, the Plans had investment options that included mutual funds, bond account, annuities, real estate accounts, and others. Am. Compl. ¶¶ 127–132 [Doc. No. 30]. The investment options offered by Fidelity and Vanguard are exclusively mutual funds. Am. Compl. ¶ 132 [Doc. No. 30]. TIAA–CREF's investment options include many types of investments, including mutual funds. Am. Compl. ¶¶ 127–131 [Doc. No. 30]. The exception from 29 U.S.C. § 1002(21)(B) excluding mutual funds is applicable to this case. The court will dismiss Count VI to the extent that the plaintiffs allege the Plans participated in a prohibited transaction concerning TIAA–CREF, Fidelity, and Vanguard mutual funds. 29 U.S.C. § 1002(21)(B). Count VI will proceed as to all other investment accounts other than mutual funds included in the Plans.

[16] Lastly, the defendants argue that "Counts II, IV, and VI must fail because Plaintiffs do not allege that the Plans' fiduciaries intended to benefit TIAA, Fidelity, and Vanguard, as opposed to the Plans and their participants." Defs.' Br. [Doc. No. 41–1 at 36]. Whether the Plans' fiduciaries intended to benefit TIAA, Fidelity, and Vanguard is an issue that can be better determined at the motion for summary judgment stage. Therefore, the court will not dismiss the plaintiffs' claims based on the defendants' theory that the plaintiffs failed to properly allege that the fiduciaries intended to benefit a party-in-interest. The defendants also argue that the allegations in the amended complaint that "a prohibited transaction occurred each time the Plans paid fees to a vendor through 'revenue sharing fails as a matter of law because revenue sharing payments are not plan assets ...." Defs.' Br. [Doc. No. 41–1 at 36]. The defendants rely on *Hecker v. Deere & Co.*, 556 F.3d 575, 584 (7th Cir. 2009) regarding 29 U.S.C. § 1106(a)(1)(D) that "Once the fees are collected from the mutual fund's assets and transferred to one of the Fidelity entities, ***1357** they become Fidelity's assets again, not the assets of the Plans." The *Hecker* case is fact specific to mutual funds. The court agrees that fees collected from a mutual fund do not become assets of the plan, therefore, to the extent the plaintiffs allege that revenue sharing from a mutual fund is a prohibited transaction under 29 U.S.C. § 1106(a)(1)(D), those allegations cannot go forward under Counts II, IV, and VI.

C. Plaintiffs' Disloyalty Claims

[17] The duty of loyalty requires fiduciaries to act "solely in the interest" of plan participants and beneficiaries and "for the exclusive purpose of providing benefits to participants" and "defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A). The plaintiffs have alleged that the Plans did not act for the benefit of the Plans' participants. Am. Compl. ¶ 248–49, 260–61, 284 [Doc. No. 30]. The plaintiffs' loyalty claims are sufficient to state a claim for relief.

IV. Conclusion

For the reasons set for above, the defendants' motion to dismiss [Doc. No. 41] is GRANTED in part and DENIED in part. The defendants' first motion to dismiss [Doc. No. 27] is dismissed as MOOT. The plaintiffs' claim in Count V alleging that the defendants acted imprudently by offering too many investment options is DISMISSED. The claims in Count I will be DISMISSED to the extent the plaintiffs are seeking any damages that occurred more than six years prior to the complaint being filed caused by imprudence. Count VI is DISMISSED to the extent the plaintiffs allege the Plans participated in a prohibited transaction concerning TIAA–CREF, Fidelity, and Vanguard mutual funds. Additionally, to the extent the plaintiffs allege that revenue sharing from a mutual fund is a prohibited transaction under 29 U.S.C. § 1106(a)(1)(D), these allegations cannot go forward under Counts II, IV, and VI. All other claims remain.

SO ORDERED this 10th day of May, 2017.

All Citations

252 F.Supp.3d 1344, 347 Ed. Law Rep. 1012

Footnotes

1 The court notes that the actual fee range of 0.07% to 1.41% may generally be acceptable when the best investment options are chosen; that range may be unacceptable when lower-cost institutional shares could have been chosen instead.

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Majority Opinion >

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JENNIFER SWEDA et al., Plaintiffs, v. THE UNIVERSITY OF PENNSYLVANIA and JACK HEUER, Defendants.

CIVIL ACTION NO. 16-4329

September 21, 2017, Filed September 21, 2017, Decided

For JENNIFER SWEDA, BENJAMIN A. WIGGINS, ROBERT L. YOUNG, FAITH PICKERING, PUSHKAR SOHONI, REBECCA N. TONER, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS OF PARTICIPANTS AND BENEFICIARIES ON BEHALF OF THE UNIVERSITY OF PENNSYLVANIA MATCHING PLAN, Plaintiffs: DAVID M. PROMISLOFF, LEAD ATTORNEY, PROFY PROMISLOFF & CIARLANTO PC, PHILADELPHIA, PA; SEAN E. SOYARS, SCHLICHTER, BOGARD & DENTON, LLP, ST. LOUIS, MO; HEATHER LEA, MICHAEL A. WOLFF, SCHLICHTER BOGARD DENTON, ST LOUIS, MO; JEFFREY J. CIARLANTO, Profy Promisloff & Ciarlanto, P.C., Philadelphia, PA; JEROME J. SCHLICHTER, TROY A. DOLES, SCHLICHTER BOGARD & DENTON, ST LOUIS, MO; KURT C. STRUCKHOFF, SHLICHTER BOGARD & DENTON LLP, ST LOUIS, MO; STEPHEN M. HOEPLINGER, SCHLICHTER BOGARD & DENTON LLP, ST LOUIS, MO.

For THE UNIVERSITY OF PENNSYLVANIA, JACK HEUER, Defendants: BRIAN T. ORTELERE, MICHAEL L. BANKS, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA; CHRISTOPHER J. BORAN, MORGAN LEWIS & BOCKIUS, CHICAGO, IL.

GENE E.K. PRATTER, United States District Judge.

GENE E.K. PRATTER

MEMORANDUM

PRATTER, J.

A group of University of Pennsylvania Matching Plan participants and beneficiaries bring this ERISA action against the University of Pennsylvania and Jack Heuer, Penn's Vice President of Human Resources. The Plan participants allege that Defendants enabled third-party service providers—here, TIAA-CREF and Vanguard—to collect excessive fees, increased costs by including duplicative investments in the Plan, and retained underperforming funds in the Plan. Plaintiffs claim this violated two provisions of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq* ("ERISA"). First, they claim a breach of fiduciary duties, in violation of 29 U.S.C. § 1104(a)(1) (Counts I, III, V and VII1). Second, they claim the contracts with TIAA-CREF and Vanguard were prohibited transactions, in violation of 29 U.S.C. § 1106(a)(1) (Counts II, IV and VI).

The Penn parties urge dismissal of the complaint, arguing that the Third Circuit Court of Appeals' decision in *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011), controls and demands dismissal of the breach of fiduciary duties claims (Counts I, III, and V), and that the prohibited transaction claims (Counts II, IV, and VI) are duplicative of the breach claims. For the following reasons, the Court grants the motion as to all counts.

BACKGROUND 2

The Plan participants bring this action, individually and as representatives of a purported class, as beneficiaries in the University of Pennsylvania Matching Plan ("Plan"), against the University of Pennsylvania and its Vice President of Human Resources, for breach of fiduciary duties under 29 U.S.C. § 1132(a)(2) . They allege three main failures of the defendants. First, they claim that the defendants breached their fiduciary duty by "locking in" Plan investment options into two investment companies. Amended Complaint, ¶¶ 184-95 (*hereinafter* "Am. Compl."). Second, they claim that the administrative services and fees were unreasonably high due **[*2]** to the defendants' failure to seek competitive bids to decrease administrative costs. Am. Compl. ¶¶ 196-209. Third, they argue that the fiduciaries charged unnecessary fees while the portfolio underperformed. Am. Compl. ¶¶ 210-28. Plaintiffs seek to certify a class encompassing all participants and beneficiaries of the Plan from August 10, 2010, through the date of judgment, excluding the defendants. Am. Compl. ¶ 237.

I. Defendants' § 403(b) Program

Defendants' § 403(b) Plan is a defined contribution, individual account, employee pension benefit plan as defined under 29 U.S.C. §§ 1002(2)(A) and (34) that provides for retirement income benefits for certain employees of the University of Pennsylvania. Am. Compl. ¶ 9. It is funded through deferrals of employee compensation, employer contributions, and investment performance, net of fees and expenses. Am. Compl. ¶ 11. At the end of 2014, the Plan had $3.8 billion in net assets and 21,412 participants, making it among the largest 0.02% of defined contribution plans in the United States based on total assets. Am. Compl. ¶ 12.

There are generally two main costs associated with investment accounts: plan administration and investment options management. Am. Compl. ¶ 35. Plan administration includes the use of recordkeepers, entities that track the amount of each participant's investments in various options in the plan. Recordkeepers usually provide participants with quarterly account statements, a website, call center, and investment education materials. Am. Compl. ¶¶ 40-41. A recordkeeper's fee is often partially covered by "revenue sharing" agreements. In revenue sharing arrangements, a mutual fund itself (rather than the participant) pays a portion of these expenses. The Plan at issue here operates on a revenue sharing model. Am. Compl. ¶ 119. The second main cost associated with investment accounts is investment options management. Investment options differ by offering different share classes. "Retail share" classes are geared toward small investments, whereas "institutional share" classes are aimed at large investments. Investment companies hope to persuade large plans to invest in these institutional funds by charging lower fees. Am. Compl. ¶ 45. The same way big box chains like Costco arguably can offer savings over the local convenience store by selling in bulk, institutional shares offer fee savings for bulk investments.

ERISA requires each plan to have one or more named fiduciaries that have the authority to operate and administer the plan. 29 U.S.C. § 1102(a)(1) . The Plan at issue here is managed by an investment committee, designated by the Trustees of the University of Pennsylvania as a named fiduciary, responsible for the "selection, monitoring, and removal of Plan investment options and providers." Am. Compl. ¶ 21. Jack Heuer as the Vice President of Human Resources is also a named fiduciary under the plan and designated as the Plan Administrator responsible for "Plan-related matters" including "establishing rules and procedures for the Plan's operation." Am. Compl. ¶ 23.

Employees (the beneficiaries, or participants, of the plan) may opt into **[*3]** the Plan, but as in all § 403(b) plans, they are limited in where they can invest. The Plan managers determine the range of options available to the beneficiaries, who then choose where their money is placed. The University of Pennsylvania, as manager of one of the largest funds in the country, has a diverse array of beneficiaries to serve, from grounds and cleaning crews to renowned Wharton School and Law professors, physicists, anthropologists, hockey coaches and endless others.3 These individuals have different goals, risk tolerances, investment acumen and income.

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To make it easier for potential investors, plan managers divided the investment options (which ranged between 76 and 118 options) into four tiers. Motion to Dismiss (*hereinafter* "Mot.") Ex. 6.4 Tier 1 is for the "do it for me" investor; tier 2 is geared toward the "help me do it" investor; tier 3 is designed for the "mix my own" investor; and tier 4 is built for the "self-directed" investor. Mot. Ex. 6. In each of these plans, options are presented to the beneficiaries from TIAA-CREF and Vanguard, the two companies used in the Plan. The options range from one option from each company in the "do it for me" category to complete customization of available options in tier 4. Mot. Ex. 6. Beneficiaries are informed that each mutual fund's prospectus is available online. Mot. Ex. 3. They are given detailed statistics on each of the investment options, including 1, 5 and 10 year returns, as well as total operating expenses. Mot. Ex. 3.

Since 2010, the Plan has offered as many as 118 investment options, and as of December 31, 2014, the Plan offered 78 options. Am. Compl. ¶ 77. Vanguard Group, Inc. manages 48 mutual fund options (totaling $1.3 billion) and TIAA-CREF manages the other 30 options including mutual funds and fixed and variable annuities (totaling $2.5 billion). Am. Compl. ¶¶ 77, 79. The Plan includes multiple recordkeepers; Vanguard and TIAA-CREF each serve as the recordkeeper for their respective offerings. Am. Compl. ¶ 78.

II. Plaintiffs' Claims

The Amended Complaint includes seven claims: Breach of fiduciary duties for locking the Plan into the CREF stock account and TIAA recordkeeping, in violation of 29 U.S.C. § 1104 (a)(1) (Count I); breach of fiduciary duties for unreasonable administrative fees, in violation of 29 U.S.C. § 1104 (a)(1) (Count III); breach of fiduciary duties for unreasonable fees in violation of 29 U.S.C. § 1104(a)(1) (Count V); and failure to monitor fiduciaries (Count VII). The plaintiffs allege that these actions also violate the "prohibited transactions" clause of ERISA, 29 U.S.C. § 1106(a)(1) (Counts II, IV & VI).

DISCUSSION

I. Standard of Review

A Rule 12(b)(6) motion to dismiss tests the sufficiency of a complaint. Although Rule 8 of the Federal Rules of Civil Procedure requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2) , "to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,'" the plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 , 555 , 127 S. Ct. 1955 , 167 L. Ed. 2d 929 (2007) (citation omitted) (alteration in original).

To survive a motion to dismiss, the plaintiff must plead "factual content that allows **[*4]** the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662 , 678 , 129 S. Ct. 1937 , 173 L. Ed. 2d 868 (2009). Specifically, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 . The question is not whether the claimant "will ultimately prevail . . . but whether his complaint [is] sufficient to cross the federal court's threshold." *Skinner v. Switzer*, 562 U.S. 521 , 530 , 131 S. Ct. 1289 , 179 L. Ed. 2d 233 (2011) (citation and internal quotation marks omitted). Thus, assessment of the sufficiency of a complaint is "a context-dependent exercise" because "[s]ome claims require more factual explication than others to state a plausible claim for relief." *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85 , 98 (3d Cir. 2010).

In evaluating the sufficiency of a complaint, the Court adheres to certain well-recognized parameters. For one, the Court "must consider only those facts alleged in the complaint and accept all of the allegations as true." *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855 , 859 (3d Cir. 1994); *see also Twombly*, 550 U.S. at 555 (stating that courts must "assum[e] that all the allegations in the complaint are true (even if doubtful in fact)"); *Mayer v. Belichick*, 605 F.3d 223 , 230 (3d Cir. 2010) ("[A] court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents"). Also, the Court must accept as true all reasonable inferences emanating from the allegations, and view those facts and inferences in the light most favorable to the nonmoving party. *See Rocks v. City of Philadelphia*, 868 F.2d 644 , 645 (3d Cir. 1989); *see also Revell v. Port Auth.*, 598 F.3d 128 , 134 (3d Cir. 2010).

That admonition does not demand that the Court ignore or discount reality. The Court "need not accept as true unsupported conclusions and unwarranted inferences," *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173 , 183-84 (3d Cir. 2000) (citations and internal quotation marks omitted), and "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft*, 556 U.S. at 678 ; *see also Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902 , 906 (3d Cir. 1997) (explaining that a court need not accept a plaintiff's "bald assertions" or "legal conclusions" (citations omitted)). If a claim "is vulnerable to 12(b)(6) dismissal, a district court must permit a curative amendment, unless an amendment would be inequitable or futile." *Phillips v. County of Allegheny*, 515 F.3d 224 , 236 (3d Cir. 2008).5

II. Fiduciary Duty Under ERISA

Both sides agree that the defendants are fiduciaries to the plaintiffs under the Plan. ERISA imposes the "prudent man standard of care." 29 U.S.C. § 1104(a) . This requires the fiduciary to

> (1) . . . discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> > (A) for the exclusive purpose of:
> >
> > > (i) providing benefits to participants and their beneficiaries; and
> > >
> > > (ii) defraying reasonable expenses of administering the plan;
> >
> > (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity **[*5]** and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

29 U.S.C. § 1104(a) .

"The fiduciary standard is 'flexible, such that the adequacy of a fiduciary's independent investigation and ultimate investment selection is evaluated in light of the character and aims of the particular type of plan he serves.'" *Renfro*, 671 F.3d at 322 (quoting *Meinhardt v. Unisys Corp. (In re Unisys Sav. Plan Litig* .) (*Unisys I*), 74 F.3d 420 , 434 (3d Cir. 1996)). An ERISA fiduciary acts prudently when it gives "appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the . . . investment course of action involved . . . ." *Renfro*, 671 F.3d at 322 (quoting 29 C.F.R. § 2550.404a-1(b)(1)(i)). Accordingly, in evaluating a questioned decision, courts focus upon the fiduciary's "conduct in arriving at [that] investment decision." *Unisys I*, 74 F.3d at 434 .

The Supreme Court has "often noted that an ERISA fiduciary's duty is 'derived from the common law of trusts.'" *Tibble v. Edison Int'l*, 135 S. Ct. 1823 , 1828 , 191 L. Ed. 2d 795 (2015) (quoting *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport Inc.*, 472 U.S. 559 , 570 , 105 S. Ct. 2833 , 86 L. Ed. 2d 447 (1985)). "In administering the trust the trustee may perform or fail to perform an act that results in loss to the trust beneficiaries. He is only liable when his conduct causing the loss failed to conform to the standard of care and skill applicable to trustees in the administration of trusts." GEORGE BOGERT ET AL, LAW OF TRUSTS AND TRUSTEES § 541, (3d ed. 2009) (June 2017 Update).

"A determination of what is due care or appropriate skill depends upon the circumstances of time and place as they

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appeared at the time the trustee took the action in question[, but t]here is no fixed formula which enables the court to determine what is due care under all circumstances." *Id.* In evaluating the effectiveness of an ERISA fiduciary's obligations, "the range of investment options and the characteristics of those included options—including the risk profiles, investment strategies, and associated fees—are highly relevant" factors. *Renfro*, 671 F.3d at 327 . The touchstone of an effective ERISA defined contribution plan is if it "offer[s] participants meaningful choices about how to invest their retirement savings." *Id.* Such a duty to offer choice is more pronounced in plans as large as Penn's, which serves a broad array of needs and desires.

III. Breach of Fiduciary Duty Claims (Counts I, III, & V)

The issues in this case primarily rise and fall with the inquiry of whether the defendants breached their fiduciary duty to the plaintiffs, and such an inquiry must begin with *Renfro*.

A. *Renfro v. Unisys Corp*.

In *Renfro v. Unisys Corp.*, retirement savings plan participants filed a putative class action against their employer for breach of fiduciary duty under ERISA. 671 F.3d 314 (3d Cir. 2011). The breach of duty alleged in *Renfro* was similar to the case at hand. The putative class challenged "the selection and periodic evaluation of the Unisys defined contribution plan's mix and range of investment options" in a § 401(k) plan. *Id.* at 325-26. In upholding the dismissal of the claim, the Third Circuit Court of Appeals held that courts must look to the "mix **[*6]** and range of options and . . . evaluate[] the plausibility of claims challenging fund selection against the backdrop of the reasonableness of the mix and range of investment options." *Id.* at 326. Under that framework, the Court concluded that in light of the available options—which included 73 investments with fees ranging from 0.10% to 1.21%—plaintiffs had "provided nothing more than conclusory assertions" of fiduciary breach and affirmed dismissal of the case. *Id.* at 327-28. This standard stops plan participants from second-guessing a plan fiduciary's investment decisions just because they lose money, while allowing plan participants latitude to bring suit for improper management. It requires plaintiffs to show more than just a single sub-optimality in a given mutual fund. Instead, they must show systemic mismanagement such that individuals are presented with a Hobson's choice between a poorly-performing § 401(k) portfolio or no §401(k) at all.

This still allows multiple avenues for plaintiffs to challenge a breach of fiduciary duty. A plaintiff can allege an inadequate "mix and range of options" by alleging insufficient choice, that all (or the vast majority of) options breach the fiduciary duty, an insufficient variety among the range of options, or a kickback scheme where the fiduciaries directly benefit at the expense of plan participants. *See Renfro*, 671 F.3d 314 (insufficient mix and range; lack of options); *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009) (assuming insufficient variety among investment vehicles gives rise to a claim); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009) (endorsed by the *Renfro* court for its denial of dismissal due to allegations of a kickback scheme). At the same time, it effectively discharges Congress' "careful balancing of the need for prompt and fair" administration "against the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 , 42 , 107 S. Ct. 1549 , 95 L. Ed. 2d 39 (1987).

B. The *Renfro* Standard and § 403(b)

At issue in this case are § 403(b) tax plans, the non-profit analogue to the far more common § 401(k) tax retirement plans used by private companies. *Renfro* and other similar cases have dealt with a § 401(k) retirement plan, while the Plan here is a § 403(b) tax advantaged retirement plan. While § 401(k) and § 403(b) plans have different historical roots and historical structures that demand different fiduciary duties for administrators, those differences have largely eroded over time. Today, the obligation of beneficiaries and fiduciaries in § 401(k) and § 403(b) plans are nearly identical.

ERISA was enacted in 1974 as "the growth in size, scope, and numbers of employee benefit plans" became "rapid and substantial," necessitating federal intervention to create a comprehensive enforcement mechanism. 29 U.S.C. § 1001(a) . As retirement systems began to take shape in America in the late 1800s, there were few protections for employees. "There was no federal law applicable to such plans, and under state law, such plans were generally regarded as nonbinding expressions of the employers' present intent to make a future gift to aged employees."

American Bar Administration, **[*7]** Employee Benefits Law 1-1 (3rd Ed. 2012).

The modern-day understanding of retirement plans did not begin to take shape until the income tax legislation was enacted in 1913, forcing the government to give special status to pension plans in the Revenue Acts of 1921 and 1926. *Id.* at 1-4. This special status led to patchwork legislation about how the plans could be used and administered. *Id.* at 1-5. The economic boom of post-war America created a dramatic rise in retirement plans. *Id.* at 1-8. Employee benefits plans increased in size and scope as states tried to keep pace by passing their own regulations. As companies and unions operated increasingly across state lines, they were forced to "deal with different and sometimes inconsistent state laws." *Id.*

By the 1960s, a national consensus arguably formed that retirement funds needed comprehensive regulation. *Id.* at 1-9. As the "inadequacy of current minimum standards" became apparent, concerns arose that "the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered." 29 U.S.C. § 1001(a) . In response to these concerns, Congress enacted ERISA in 1974 to provide a comprehensive mechanism for regulating nationwide tax-advantaged retirement plans. Employee Benefits Law at 2-2. "ERISA's detailed provisions set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Pilot Life*, 481 U.S. at 42 .

Despite the uniform language of ERISA, coverage "of a plan under ERISA (i.e., the labor provisions) is unrelated to the tax status of that plan under the Code." EMPLOYEE BENEFITS LAW at 2-5. This is because tax advantaged retirement plans are created and administered through the IRS under a different (more dynamic) chapter of the U.S. Code than the one that created ERISA. *Compare* 29 U.S.C. § 1001 *et seq.* (ERISA) *with* 26 U.S.C. § 401 *et seq.* (tax). Over the years, Congress has amended Chapter 26 (and the IRS has supplemented it with regulations) such that the tax-advantaged retirement plans we know today are a far cry from those in place when ERISA was enacted. *See*, *e.g.*, 26 C.F.R. §§ 1, 31, 54 (2007) (promulgating rules under the IRS regarding § 403(b) plans).

Initially, § 403(b) and § 401(k) plans differed dramatically in both scope and structure. Section 403(b) plans initially were limited to annuity contracts (which function like a pension, paying a fixed amount for the remainder of the person's lifetime) and pre-dated § 401(k) plans by nearly 20 years. *See*, *e.g.*, Technical Amendments Act of 1958, Pub. L. No. 85-866 , § 23, 72 Stat 1606 (1958) (outlining the requirements for tax advantaged § 403(b) accounts). While still governed by ERISA, these salient differences resulted in different management and fiduciary requirements, since the duties by a fiduciary to an annuity contract differs dramatically from the duties of a fiduciary managing mutual funds. Over the years, § 403(b) plans have moved away from annuity offerings to offer a range of options that are nearly identical to those offered by § 401(k) plans, such as the plan **[*8]** at issue here. Today, the fiduciary requirements by § 403(b) plan administrators are nearly identical to those requirements for § 401(k) administrators, especially with respect to their duties to plan beneficiaries.

ERISA's fiduciary duty standard does not differentiate between § 403(b) and § 401(k) plans. Rather, it defines a blanket fiduciary duty standard. ERISA "aims 'to provide *a uniform regulatory regime over employee benefit plans*' in order to ease administrative burdens and reduce employers' costs." *Nat'l Sec. Sys., Inc. v. Iola*, 700 F.3d 65 , 82 (3d Cir. 2012) (emphasis added) (quoting *Aetna Health Inc. v. Davila*, 542 U.S. 200 , 208 , 124 S. Ct. 2488 , 159 L. Ed. 2d 312 (2004)). Because of the modern-day similarity between the two retirement plans and the historical roots of ERISA's goal to create a uniform regulatory system for retirement plans, the analysis of the fiduciary standards for § 403(b) and § 401(k) retirement plans must be the same. The *Renfro* reasoning (and other interpretations of § 401(k) cases) therefore serve as a guiding light for analyzing the different theories advanced by the plaintiffs.

C. Claim I: Locking the Plan into CREF Stock Accounts and TIAA Recordkeeping

The plaintiff's first claim is that by "allowing TIAA-CREF to mandate the inclusion of the CREF Stock Account and Money Market Account in the Plan" the defendants committed the plan to an "imprudent arrangement in which certain investments had to be included and could not be removed from the plan" even if the investments underperformed. Am. Compl. ¶ 187. In support of this assertion, Plaintiffs point to recent Supreme Court dicta in *Tibble v. Edison Int'l*, 135 S.

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Ct. 1823 , 1829 , 191 L. Ed. 2d 795 (2015). There, the Court noted (while addressing a statute of limitations question) that "under trust law, a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones." *Id.* at 1828-29. However, the Court "express[ed] no view on the scope of respondents' fiduciary duty" and remanded the case to the Ninth Circuit. *Id.* at 1829.

Such a quibble over *Tibble*'s applicability misses the fact that, even assuming the dicta is binding, the plaintiffs' complaint here fails to allege conduct that violates the *Tibble* principle. The only fact that the plaintiffs have pled is that the defendants "locked in" the Plan to TIAA CREF. Am. Compl. ¶ 187. This, standing alone, is insufficient to create a plausible inference that this was a breach of fiduciary duty. Locking in rates and plans is a common practice used across the business and personal world. Companies often offer better terms to induce customers to "lock in" for a longer period. Cable companies offer discounts for signing a two-year contract, landlords offer cheaper rates for longer leases, and cell phone companies give free phones for signing a two-year agreement. Often times, locking in a plan for a stated period is better for all sides because customers save money with the discount offered by the company, and companies save money by eliminating the costs associated with customer acquisition while having an arguably reliable income stream to rely on.

The plaintiffs' claim that this violates the defendants' fiduciary **[*9]** duty does not meet the plausibility threshold. As in *Twombly*, the actions are at least "just as much in line with a wide swath of rational and competitive business strategy" in the market as they are with a fiduciary breach. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 , 554 , 127 S. Ct. 1955 , 167 L. Ed. 2d 929 (2007).6

D. Claim III: Unreasonable Administrative Fees

Plaintiffs next claim that Defendants allowed TIAA-CREF and Vanguard to charge unreasonable administrative fees in two ways: First, allowing TIAA-CREF and Vanguard to operate as their own recordkeepers (rather than consolidating all funds with a singular third-party recordkeeper) supposedly increased fees. Am. Compl. ¶ 107. Second, Plaintiffs claim that the plan administrators should have arranged a flat per-person fee rather than an "asset-based" fee. Am. Compl. ¶ 99.

1. Multiple Recordkeepers

The argument that TIAA-CREF and Vanguard operated as their own recordkeepers fails in the face of the same realities discussed above. Bundling of services is not inconsistent with lawful, free market behavior in the best interests of those involved, including beneficiaries. Companies, for example, often "bundle" phone service in with the more popular cable and internet services, even when the users do not want a land line. In those instances, it is still a rational self-interested action to purchase the bundle because the other equipment is worth the price for the consumer, *even with* the unnecessary or undesired product or fee. Here, it is rational to comply with Vanguard's requirement that they serve as recordkeeper if that is required to gain access to the desired Vanguard portfolio. Just as the actions in *Twombly* were "consistent with conspiracy, but just as much in line with a wide swath of rational" actions, so too are the actions here—perhaps consistent with fiduciary breach, but also well in line with a wide swath of other rational actions. *Twombly*, 550 U.S. at 554 .

But even if this were not true, the argument also fails as a factual matter because there is a reasonable "range of investment options with a variety of risk profiles and fee rates." *Renfro*, 671 F.3d at 327 . Here, the fees range from 0.04% to 0.87%, markedly lower than the 0.10% to 1.21% at issue in *Renfro*. Mot. at 11-12. The plan offered 17 investment options with fees lower than the lowest fees in *Renfro* (0.10%) and only one plan above 0.57%. Mot. at 12. With such low fees, it is not inevitable to say that recordkeeping fees were unnecessarily high, especially when there are rational bundling reasons to allow separate recordkeepers. Even if there *were* cheaper options available for recordkeeping fees, ERISA mandates that fiduciaries consider options besides cost. Fiduciaries must balance "providing benefits to participants and their beneficiaries" *and* "defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1) . Without plausibly pleading that these two options were not met, a plaintiff cannot state a claim for relief.

2. Asset-Based v. Flat Fee Charges

The plaintiffs next claim that the plan administrators breached their fiduciary duty by allowing recordkeepers to charge "excessive asset-based" fees rather than cheaper " **[*10]** per-participant fees." Am. Compl. ¶ 108.

This is a pure question of where the burden of recordkeeping costs should be placed—a question open to the discretion of a reasonable plan administrator. In flat per-participant fee systems, the burden is disproportionately placed on the lower income and lower investment individuals to subsidize higher income individuals. In the asset-based model, individuals must pay a pro rata share based on their investments, placing the burden disproportionately on the higher income individuals. For example, in a flat fee system, a young individual with only a $10,000 balance would pay the same as an older individual who has invested longer with a $100,000 balance. If there is a flat fee of $44, both parties would pay the same price, but a different percentage of their total account: the young investor would pay 0.44% of her account balance, while the older investor would pay 0.044% of the account balance. However, if there is a fee of 0.08% of asset value, the young investor pays only $8, while the older investor pays $80. In both instances, the fees collected by the recordkeeper are the same but collected differently among plan beneficiaries.

The plan administrators are fiduciaries to every plan member, whether she invests $10 or $10 million. It is not up to courts to second-guess how fiduciaries allocate that cost, only that the fiduciary "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" as a whole. 29 U.S.C. § 1104(a)(1) . To the extent that this argument claims the arrangement increased fees, it fails on the same reasoning as above: there are lawful explanations for such an arrangement, and the plaintiffs need something more than a claim that there may be (or even are) cheaper options available. The plaintiffs must show that there were no reasonable alternatives given to plan participants to choose from, which the plaintiffs have not pled. *Cf. Renfro*, 671 F.3d at 329 (holding that affording a reasonable mix of plan options to participants was sufficient to meet the fiduciary standard).

E. Claim V: Unreasonable Investment Management Fees; Unnecessary Marketing, Distribution, Mortality and Expense Risk Fees; and Performance Losses

The plaintiffs next claim a litany of costly measures that they claim amount to a breach of fiduciary duty, including unnecessary fees, duplicative investments, retention of higher cost funds, retention of underperforming funds, and poor performance relative to the market. Am. Compl. ¶¶ 210-23. These claims broadly break down into three categories: (1) unnecessary fees, (2) participant confusion, and (3) poor market performance.

1. Unnecessary fees

A variant on the argument above (that a necessary fee arrangement could have been cheaper) the plaintiffs also point to a number of charged fees that they claim were unnecessary or duplicative. *See* Am. Compl. ¶¶ 211-23. The majority of these "excessive fee" arguments fail to state a claim because the mix and range of fee options included fees as low as 0.04%, which neither side claims is excessive. The strongest argument advanced **[*11]** by the plaintiffs is that the plan contained "retail class" shares, rather than other identical options with lower fees, known as "institutional class" shares. Am. Compl. ¶¶ 121-30. Retail shares are generally available to regular market participants who have small investments, while institutional shares are only available to larger institutions with more bargaining power and larger capital pools. Am. Compl. ¶ 121; Mot. at 16-18.

The plaintiffs overstate their argument. While some shares in the Plan are retail shares that could be replaced with institutional shares, nearly half of the shares (37 of 78) are already these lower-fee funds. Mot. Ex. 3. The plaintiffs' argument also ignores that these institutional class shares would only be available if significantly more money were funneled into each of them.7 Switching from retail to institutional shares is not a matter of checking a different box. It requires fiduciaries to balance the menu of options given to plan beneficiaries against the fees. Sometimes, institutional shares are unavailable as an option because investment levels are too low in that fund. But these "institutional investment vehicles [also] come with a drawback: lower liquidity." *Loomis v. Exelon Corp.*, 658 F.3d 667 , 672 (7th Cir. 2011). While retail funds allow daily transfers, where participants can withdraw money without fees, "[i]nstitutional trusts and pools do not offer that choice." *Id.*

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The plaintiffs' argument that fiduciaries must maintain a myopic focus on the singular goal of lower fees was soundly rejected in *Renfro* . 671 F.3d at 327. ERISA requires fiduciaries to balance "providing benefits to participants" with "defraying reasonable expenses" in the plan. 29 U.S.C. § 1104(a)(1)(A) . The plaintiffs here have not pled that these reductions in expenses could be achieved without changing the variety of benefits to participants. These same considerations motivated the Seventh Circuit's rejection of identical "institutional versus retail" arguments. *Loomis*, 658 F.3d at 671-72 ; *Hecker*, 556 F.3d at 580-81 . Plaintiffs have only pled that the failure to replace these shares was a breach of fiduciary duty, which is insufficient to pass through the 12(b)(6) threshold.

2. Participant Confusion

The plaintiffs next allege that defendants "provided a dizzying array of duplicative funds in the same investment style" leading to "'decision paralysis' for participants." Am. Compl. ¶ 132. This assertion is unsupported by the pleading. The plaintiffs have not alleged any participant who was confused by the different options, an omission that on its own causes the amended complaint to fail to state a factual basis for the claim. Moreover, the plan administrators broke the options down into four categories based on the participants' investment acumen to help guide them. *See generally* Mot. Ex. 6. Offering 78 different choices is not an unreasonably high number, especially with the tiered descriptive guidance given to participants. As a practical matter, plan administrators must offer a sufficient amount of choice to participants, while not overwhelming them to the point participants cannot actually **[*12]** choose. Providing 78 different investment options satisfies the "reasonable mix and range of investment options" required by *Renfro* without being unduly overwhelming. 671 F.3d at 327 .

The plaintiffs' derivative claim, namely that offering duplicative funds was unnecessary, fails as well. On the contrary, duplicative investment options are necessary based on the structure of the Plan. Each of the four tiers becomes progressively more complex for plan participants. The "do it for me" tier (tier 1) has only one option from each of the two providers, but had a number of different underlying mutual funds or annuities in its umbrella. Mot. Ex. 6. In contrast, the "self-directed" plan (tier 4) allowed complete customization by participants. Mot. Ex. 6. That these tiers contained some of the same funds is unsurprising and raises no plausible inference of a breach of fiduciary duty. Indeed, if there was no overlap there could be greater cause for criticism or frustration.

3. Poor Market Performance

Finally, the plaintiffs claim that select funds were outperformed by the rest of the market, claiming that 60% of the Plan's investment options "underperformed their respective benchmarks over the previous 5-year period." Am. Compl. ¶ 151. To begin, there is no cause of action in ERISA for "underperforming funds." The statutory text requires fiduciaries to discharge their duties "with the care, skill, prudence, and diligence *under the circumstances then prevailing*" when they make decisions. 29 U.S.C. § 1104(a)(1)(B) . (emphasis added). This standard requires courts to look at the actions taken by the fiduciary *at the time* that they took those actions. *See*, *e.g.*, *Tussey v. ABB, Inc.*, 746 F.3d 327 , 338 (8th Cir. 2014) ("While it is easy to pick an investment option in retrospect (buy Apple Inc. at $7 a share in December 2000 and short Enron Corp. at $90 a share), selecting an investment beforehand is difficult. The Plan administrator deserves discretion to the extent its *ex ante* investment choices were reasonable given what it knew at the time"). Sophisticated investors and rank amateurs both look to buy low and sell high and wonder why they did not have clear enough vision to see the path for doing so early enough to make their fortunes. Chagrin does not inexorably become a cause of action.

Moreover, when examined closely, the plaintiffs' claims do not withstand scrutiny. A statistical sampling of funds would expect (all things being equal) half of the funds to be above benchmarks and half to be below benchmarks. Here, as opposed to what the simplistic statistical average would show, that 38 (half) of the 76 funds underperformed, the plaintiffs pled that 45 investment options performed below benchmarks. Am. Compl. ¶ 151. Such a *post hoc* analysis of market performance, where only 7 more funds underperformed than would be expected, *may* be consistent with a breach of fiduciary duty, but does not show that the plaintiffs have "nudged their claims across the line from conceivable to plausible" and "their complaint must be dismissed." *Twombly*, 550 U.S. at 570 .

IV. Prohibited Transaction Claims

Plaintiffs recast the same arguments above as violating the **[*13]** prohibited transactions clause of ERISA, § 1106 (a).8 This clause states that:

> [A] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect -
>
> > (A) sale or exchange, or leasing, of any property between the plan and a party in interest . . .
> >
> > (C) furnishing of goods, services, or facilities between the plan and party in interest;
> >
> > (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan . . .

29 U.S.C. § 1106(a)(1)

This prohibited transaction requirement in ERISA imposes an additional duty on fiduciaries not to engage in deals using the plan assets and a "party in interest." A party in interest is defined as, *inter alia*, "a person providing services to such plan" 29 U.S.C. § 1002(14)(B) . The prohibited transactions provision supplements the "foundational [fiduciary] obligation" by prohibiting "plan fiduciaries from entering into certain transactions. Subsection (a) erects a categorical bar to transactions between the plan and a 'party in interest' deemed likely to injure the plan." *Nat'l Sec. Sys., Inc. v. Iola*, 700 F.3d 65 , 82 (3d Cir. 2012); *see also Reich v. Compton*, 57 F.3d 270 , 275 (3d Cir.1995).

Congress adopted the prohibited transactions provision of ERISA "to prevent plans from engaging in certain types of transactions that had been used in the past to benefit other parties at the expense of the plans' participants and beneficiaries." *Reich*, 57 F.3d at 275 (quoting *Commissioner of Internal Revenue v. Keystone Consolidated Indus.*, 508 U.S. 152 , 160 , 113 S. Ct. 2006 , 124 L. Ed. 2d 71 (1993)). In the decades before ERISA, plans could "engage in transactions with related parties so long as the transactions were 'arms-length.' Unfortunately, this rule was difficult to police and thus 'provided an open door for abuses' by plan trustees." *Id.* Congress amended ERISA "with the goal of creating a categorical bar to certain types of transactions that were regarded as likely to injure a plan." *Reich*, 57 F.3d at 275 .9

The plaintiffs seek recovery under this section of ERISA under the theory that the contractual arrangement with TIAA-CREF and Vanguard constituted a prohibited transaction. This cannot be correct. Plaintiffs argue that paying these companies constitutes a sale of property under § 1106(a)(1)(A), a furnishing of services under § 1106(a)(1)(C), and a transfer of assets in the plan under § 1106(a)(1)(D). If such an argument were true, then any time plan administrators contracted with another party to provide services to plan participants in exchange for money (which includes the basic elements of retirement plans, including making mutual funds available or recordkeeping services) it would qualify as a prohibited transaction. After all, fees charged by these companies necessarily requires "transfer of assets." Plaintiffs claim this all while maintaining that there are no *per se* ERISA violations in the revenue sharing arrangement. *See generally*, Am. Compl.; *See also*, Opp. at 34.

Perhaps Plaintiffs attempt to balance on such an analytical tightrope because they cite no court that has been persuaded by such a novel argument. Moreover, the transactions at issue here were not done "to benefit other parties **[*14]** at the expense of the plans' participants and beneficiaries" but were simply operating expenses necessary to operate the plan on behalf of the plan beneficiaries. *Reich*, 57 F.3d at 275 . While a kickback scheme such as that in *Braden*, where the fiduciaries are benefitting by engaging in these transactions, may be actionable under the prohibited transactions provision, the plaintiffs must plead that there is a "subjective intent to benefit a party in interest." *Id.* at 279. They have not done so here. The plaintiffs' attempts to shoehorn their fiduciary duty claims into the prohibited transaction provision simply fail as a matter of law.

CONCLUSION

For the foregoing reasons, the motion to dismiss is granted. Counts I through VII of the complaint are dismissed

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pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

An appropriate Order follows.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

ORDER

AND NOW, this 21st day of September, 2017, upon consideration Defendants' Motion to Dismiss for Failure to State a Claim (Doc. No. 33), responses thereto, oral argument, and supplemental briefing, it is **hereby ORDERED** that the Motion (Doc. No. 33) is GRANTED. The Clerk of Court shall mark this case **CLOSED** for all purposes, including statistics.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

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fn 1

Count VII is styled as "failure to monitor fiduciaries" in violation of 29 U.S.C. § 1104(a)(1) . Given that the plaintiffs did not press this argument in their briefings, or dispute the defense contention that this was simply duplicative of the breach of fiduciary duty claims, Count VII will be treated as incorporated into Counts I, III, and V.

fn 2

In a motion to dismiss, the Court "must consider only those facts alleged in the complaint and accept all of the allegations as true." *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855 , 859 (3d Cir. 1994). The facts discussed in this Memorandum are taken as true from the complaint and documents referenced within the complaint.

fn 3

Of course, the Court does not hazard a guess about the investment acumen or even instincts for "a good deal" of anyone on any campus—or Court for that matter—anywhere.

fn 4

Plaintiffs argue that this exhibit cannot properly be considered at this stage of the proceeding. Plaintiffs' Opposition to Defendants' Motion to Dismiss, Doc. No. 36 (*hereinafter*Opp.) at 13 n.12. A "court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." *Pension Benefit Guar Corp. v. White Consol. Indus.*, 998 F.2d 1192 , 1196 (3d Cir. 1993). Plaintiffs do not dispute the authenticity of any exhibits attached to the motion to dismiss, only that they are not referenced in the complaint. Exhibit 6 (the array of options given to plan participants) was incorporated by reference in the Amended Complaint, and therefore can properly be considered. *See* Am. Compl. ¶ 132 ("Defendants provided a dizzying array of duplicative funds in the same investment style" to participants causing "decision paralysis").

fn 5

Plaintiffs filed a complaint on August 8, 2016 (Doc. No. 1). Following the defense's initial motion to dismiss on October 28, 2016 (Doc. No. 25), Plaintiffs filed an amended complaint on November 21, 2016 (Doc. No. 27). Defendants filed a new motion to dismiss on January 5, 2017 (Doc. No. 33) and that motion is the subject of this memorandum. The parties took the offered opportunities for oral argument and supplemental briefing.

fn 6

This Count fails to meet the requirements under Rule 12(b)(6), so the Court need not address the question of whether the claim is time-barred under 29 U.S.C. § 1113(1) .

fn 7

For example, the Vanguard Institutional Index Fund Institutional Shares require a $5 million minimum investment. *Vanguard*, VINIX Share Mutual Fund Profile (2017).

fn 8

Defendants also claim that the prohibited transaction claims are time-barred. Mot. at 30. Because the "prohibited transaction" claims fail to state a claim, the Court offers no opinion as to whether the claims were timely.

fn 9

The Senate Report leading to the amendment to ERISA provided a (non-exhaustive) list of examples of the prohibited transactions the provision sought to stop: "lending funds without adequate security and a reasonable rate of interest to the creator of the plan, his family, or corporations controlled by him . . . payment of excessive salaries, purchase of property for more than an adequate consideration, sale of property for less than an adequate consideration, or any other transactions which result in a substantial diversion of funds to such individuals." S.Rep. No. 93-383 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4903.

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General Information

Judge(s)	GENE E. K. PRATTER
Related Docket(s)	2:16-cv-04329 (E.D. Pa.);
Topic(s)	Employee Benefits; Torts; Civil Procedure
Industries	Colleges & Universities
Court	United States District Court for the Eastern District of Pennsylvania
Parties	JENNIFER SWEDA et al., Plaintiffs, v. THE UNIVERSITY OF PENNSYLVANIA and JACK HEUER, Defendants.

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Sweda v. Univ. of Pa., No. 16-4329, 2017 BL 334297, 2017 EBC 334297 (E.D. Pa. Sept. 21, 2017), Court Opinion

Direct History

1 **Sweda v. Univ. of Pa., No. 16-4329, 2017 BL 334297, 2017 EBC 334297 (E.D. Pa. Sept. 21, 2017)**
motion to dismiss granted, case dismissed

Direct History Summary	
Caution	0
Negative	0
Total	0

Case Analysis (4 cases)

1 Cited in , (See) — Cassell v. Vanderbilt Univ., No. 3:16-cv-02086, 2018 BL 4604, 2018 EBC 4604 (M.D. Tenn. Jan. 05, 2018)

Having too many options does not hurt Plan participants. Instead, it provides them with greater opportunities to choose the investments they prefer. *Henderson* , 252 F. Supp.3d at 1350 . ERISA encourages plan sponsors to allow more choices to participants and to allow participants to make their own choices. *Loomis v. Exelon Corp.* , 658 F.3d 667 , 673 (7th Cir. 2011). Here, there is no allegation of any specific harm to any specific person caused simply by the number of options available in the Plan. For these reasons, therefore, the claim that having too many options was a breach of the fiduciary duty of prudence will be dismissed. *See* *Sweda v. Univ. of Pa.* , [2017 BL 334297], 2017 U.S. Dist. LEXIS 153958 , [2017 BL 334297], 2017 WL 4179752 at * 9 (E.D. Pa. Sept. 21, 2017).
...

2 Discussed in — Nicolas v. Trs. of Princeton Univ., No. Civ. No. 17-3695, 2017 BL 455755 (D.N.J. Dec. 19, 2017)

On August 7, 2017, Defendant filed a Motion to Dismiss and for Summary Judgment. (ECF No 7.) On September 19, the Court granted in part and denied in part Defendant's Motion to Dismiss and for Summary Judgment (ECF Nos. 10, 11), filing an Amended Opinion on September 25, 2017 (ECF No. 14). The Amended Opinion dismissed Counts I—II of Plaintiff's Complaint with respect to the duty of loyalty and dismissed Count III of Plaintiff's Complaint in its entirety, granting Plaintiff leave to amend on all Counts. (Am. Op. at 4-10, ECF No. 14.) It also denied Defendant's alternative Motion for Summary Judgment on statute of limitations grounds. (Id. at 10-12 .) With Court approval, the parties agreed to a revised briefing schedule for Defendant to file a motion for reconsideration and for Plaintiff to file an Amended Complaint. (*See* ECF Nos. 15, 17, 18.) On October 31, 2017,

Case Analysis Summary	
Positive	4
Distinguished	0
Caution	0
Superseded	0
Negative	0
Total	4

Authorities Summary	
Positive	25
Distinguished	0
Caution	0
Superseded	0
Negative	0
Total	25

Case Analysis (4 cases)

Defendant timely filed its Motion for Reconsideration according to the court-approved schedule. (ECF No. 20.) Defendant simultaneously filed a Motion to Stay, in view of the docketed appeal to the Third Circuit in the similar but unrelated matter of *Sweda v. University of Pennsylvania* , [2017 BL 334297], 2017 U.S. Dist. LEXIS 153958 , [2017 BL 334297], 2017 WL 4179752 (E.D. Pa. Sept. 21, 2017), *appeal filed* , No. 17-3244 (3d Cir. Oct. 13, 2017). (ECF No. 21.) Plaintiff opposes both motions. (ECF Nos. 25, 26.) Defendant replied to Plaintiff's opposition to the Motion to Stay on November 27, 2017. (ECF No. 27.) The Court now considers the Motion to Stay, followed by the Motion for Reconsideration.

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Defendant has brought to the Court's attention an appeal pending before the Third Circuit Court of Appeals in *Sweda v. University of Pennsylvania* , [2017 BL 334297], 2017 U.S. Dist. LEXIS 153958 , [2017 BL 334297], 2017 WL 4179752 (E.D. Pa. Sept. 21, 2017), *appeal filed* , No. 17-3244 (3d Cir. Oct. 13, 2017). In that case, a plaintiff brought a putative class action claiming fiduciary breaches of ERISA by the University of Pennsylvania, on the basis of substantially overlapping factual allegations as those alleged by Plaintiff here. (*See* Def. Br. for Stay at 3-7, ECF No. 21-1.) Two days after this Court granted in part and denied in part Defendant's Motion to Dismiss (ECF No. 10), Judge Gene E.K. Pratter of the Eastern District of Pennsylvania granted the University of Pennsylvania's motion to dismiss on all claims, finding that Sweda's complaint failed to create a plausible inference of fiduciary breach sufficient to survive a motion to dismiss. *Sweda* , [2017 BL 334297], 2017 U.S. Dist. LEXIS 153958 , [2017 BL 334297], 2017 WL 4179752 , at *7-10; (*see also* Def.'s Br. for Stay at 7). Sweda appealed. Defendant seeks a stay of this action until that appeal is decided, asserting that the ERISA claims against each university defendant are strikingly similar and disposition of the appeal will clarify the controlling law, conserve judicial resources, and be highly instructive in this action going forward. (Def.'s Br. for Stay at 3-7, 9-10.)

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ORDERED that this case is hereby stayed until the Third Circuit's disposition of the pending appeal in *Sweda v. University of Pennsylvania* , [2017 BL 334297], 2017 U.S. Dist. LEXIS 153958 , [2017 BL 334297], 2017 WL

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Case Analysis (4 cases)

4179752 (E.D. Pa. Sept. 21, 2017), *appeal filed* , No. 17-3244 (3d Cir. Oct. 13, 2017); and it is further

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3	Discussed in , (But see) , Quoted	Cunningham v. Cornell Univ., No. 16-cv-6525 (PKC), 2017 BL 350951, 2017 EBC 350951 (S.D.N.Y. Sept. 29, 2017)
4	Cited in , (See)	Kelly v. The Johns Hopkins Univ., No. GLR-16-2835, 2017 BL 348010, 2017 EBC 348010 (D. Md. Sept. 28, 2017)

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1	Discussed , Quoted	Tibble v. Edison Int'l, 135 S. Ct. 1823, 191 L. Ed. 2d 795, 59 EBC 2461, 83 U.S.L.W. 4300 (2015)

The Supreme Court has "often noted that an ERISA fiduciary's duty is 'derived from the common law of trusts.'" *Tibble v. Edison Int'l* , 135 S. Ct. 1823 , 1828 , 191 L. Ed. 2d 795 (2015) (quoting *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport Inc.* , 472 U.S. 559 , 570 , 105 S. Ct. 2833 , 86 L. Ed. 2d 447 (1985)). "In administering the trust the trustee may perform or fail to perform an act that results in loss to the trust beneficiaries. He is only liable when his conduct causing the loss failed to conform to the standard of care and skill applicable to trustees in the administration of trusts." GEORGE BOGERT ET AL, LAW OF TRUSTS AND TRUSTEES § 541, (3d ed. 2009) (June 2017 Update).

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The plaintiff's first claim is that by "allowing TIAA-CREF to mandate the inclusion of the CREF Stock Account and Money Market Account in the Plan" the defendants committed the plan to an "imprudent arrangement in which certain investments had to be included and could not be removed from the plan" even if the investments underperformed. Am. Compl. ¶ 187. In support of this assertion, Plaintiffs point to recent Supreme Court dicta in *Tibble v. Edison Int'l* , 135 S. Ct. 1823 , 1829 , 191 L. Ed. 2d 795 (2015). There, the Court noted (while addressing a statute of limitations question) that "under trust law, a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones." *Id.* at 1828-29. However,

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the Court "express[ed] no view on the scope of respondents' fiduciary duty" and remanded the case to the Ninth Circuit. *Id.* at 1829.

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2 Cited , (See, e.g.) , Quoted — Tussey v. ABB, Inc., 746 F.3d 327, 58 EBC 1085 (8th Cir. 2014)

Finally, the plaintiffs claim that select funds were outperformed by the rest of the market, claiming that 60% of the Plan's investment options "underperformed their respective benchmarks over the previous 5-year period." Am. Compl. ¶ 151. To begin, there is no cause of action in ERISA for "underperforming funds." The statutory text requires fiduciaries to discharge their duties "with the care, skill, prudence, and diligence *under the circumstances then prevailing* " when they make decisions. 29 U.S.C. § 1104(a)(1)(B) . (emphasis added). This standard requires courts to look at the actions taken by the fiduciary *at the time* that they took those actions. *See* , *e.g.* , *Tussey v. ABB, Inc.* , 746 F.3d 327 , 338 (8th Cir. 2014) ("While it is easy to pick an investment option in retrospect (buy Apple Inc. at $7 a share in December 2000 and short Enron Corp. at $90 a share), selecting an investment beforehand is difficult. The Plan administrator deserves discretion to the extent its *ex ante* investment choices were reasonable given what it knew at the time"). Sophisticated investors and rank amateurs both look to buy low and sell high and wonder why they did not have clear enough vision to see the path for doing so early enough to make their fortunes. Chagrin does not inexorably become a cause of action.

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3 Cited , Quoted — Nat'l. Sec. Sys.,Inc. v. Iola, 700 F.3d 65, 55 EBC 2299 (3d Cir. 2012)

ERISA's fiduciary duty standard does not differentiate between § 403(b) and § 401(k) plans. Rather, it defines a blanket fiduciary duty standard. ERISA "aims 'to provide *a uniform regulatory regime over employee benefit plans* ' in order to ease administrative burdens and reduce employers' costs." *Nat'l Sec. Sys., Inc. v. Iola* , 700 F.3d 65 , 82 (3d Cir. 2012) (emphasis added) (quoting *Aetna Health Inc. v. Davila* , 542 U.S. 200 , 208 , 124 S. Ct. 2488 , 159 L. Ed. 2d 312 (2004)). Because of the modern-day similarity between the two retirement plans and the historical roots of ERISA's goal to create a uniform regulatory system for retirement plans, the analysis of the fiduciary standards for § 403(b) and § 401(k) retirement plans must be the same. The *Renfro* reasoning (and other interpretations of § 401(k) cases) therefore serve as a guiding light for analyzing the different theories advanced by the plaintiffs.

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This prohibited transaction requirement in ERISA imposes an additional duty on fiduciaries not to engage in deals using the plan assets and a "party in interest." A party in interest is defined as, *inter alia* , "a person providing services to such plan" 29 U.S.C. § 1002(14)(B) . The prohibited transactions provision supplements the "foundational [fiduciary] obligation" by prohibiting "plan fiduciaries from entering into certain transactions. Subsection (a) erects a categorical bar to transactions between the plan and a 'party in interest' deemed likely to injure the plan." *Nat'l Sec. Sys., Inc. v. Iola* , 700 F.3d 65 , 82 (3d Cir. 2012); *see also* *Reich v. Compton* , 57 F.3d 270 , 275 (3d Cir.1995).

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4 Cited , Quoted Loomis v. Exelon Corp., 658 F.3d 667, 51 EBC 1705 (7th Cir. 2011)

The plaintiffs overstate their argument. While some shares in the Plan are retail shares that could be replaced with institutional shares, nearly half of the shares (37 of 78) are already these lower-fee funds. Mot. Ex. 3. The plaintiffs' argument also ignores that these institutional class shares would only be available if significantly more money were funneled into each of them. 7 Switching from retail to institutional shares is not a matter of checking a different box. It requires fiduciaries to balance the menu of options given to plan beneficiaries against the fees. Sometimes, institutional shares are unavailable as an option because investment levels are too low in that fund. But these "institutional investment vehicles [also] come with a drawback: lower liquidity." *Loomis v. Exelon Corp.* , 658 F.3d 667 , 672 (7th Cir. 2011). While retail funds allow daily transfers, where participants can withdraw money without fees, "[i]nstitutional trusts and pools do not offer that choice." *Id.*

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The plaintiffs' argument that fiduciaries must maintain a myopic focus on the singular goal of lower fees was soundly rejected in *Renfro* . 671 F.3d at 327. ERISA requires fiduciaries to balance "providing benefits to participants" with "defraying reasonable expenses" in the plan. 29 U.S.C. § 1104(a)(1)(A) . The plaintiffs here have not pled that these reductions in expenses could be achieved without changing the variety of benefits to participants. These same considerations motivated the Seventh Circuit's rejection of identical "institutional versus retail" arguments. *Loomis* , 658 F.3d at 671-72 ; *Hecker* , 556 F.3d at 580-81 . Plaintiffs have only pled that the failure to

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replace these shares was a breach of fiduciary duty, which is insufficient to pass through the 12(b)(6) threshold.

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5 Discussed , Quoted Renfro v. Unisys Corp., 671 F.3d 314, 51 EBC 1609 (3d Cir. 2011)

The Penn parties urge dismissal of the complaint, arguing that the Third Circuit Court of Appeals' decision in *Renfro v. Unisys Corp.* , 671 F.3d 314 (3d Cir. 2011), controls and demands dismissal of the breach of fiduciary duties claims (Counts I, III, and V), and that the prohibited transaction claims (Counts II, IV, and VI) are duplicative of the breach claims. For the following reasons, the Court grants the motion as to all counts.

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"The fiduciary standard is 'flexible, such that the adequacy of a fiduciary's independent investigation and ultimate investment selection is evaluated in light of the character and aims of the particular type of plan he serves.'" *Renfro* , 671 F.3d at 322 (quoting *Meinhardt v. Unisys Corp. (In re Unisys Sav. Plan Litig* .) (*Unisys I*), 74 F.3d 420 , 434 (3d Cir. 1996)). An ERISA fiduciary acts prudently when it gives "appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the . . . investment course of action involved . . . ." *Renfro* , 671 F.3d at 322 (quoting 29 C.F.R. § 2550.404a-1(b)(1)(i)). Accordingly, in evaluating a questioned decision, courts focus upon the fiduciary's "conduct in arriving at [that] investment decision." *Unisys I* , 74 F.3d at 434 .

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"A determination of what is due care or appropriate skill depends upon the circumstances of time and place as they appeared at the time the trustee took the action in question[, but t]here is no fixed formula which enables the court to determine what is due care under all circumstances." *Id.* In evaluating the effectiveness of an ERISA fiduciary's obligations, "the range of investment options and the characteristics of those included options—including the risk profiles, investment strategies, and associated fees—are highly relevant" factors. *Renfro* , 671 F.3d at 327 . The touchstone of an effective ERISA defined contribution plan is if it "offer[s] participants meaningful choices about how to invest their retirement savings." *Id.* Such

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a duty to offer choice is more pronounced in plans as large as Penn's, which serves a broad array of needs and desires.

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This still allows multiple avenues for plaintiffs to challenge a breach of fiduciary duty. A plaintiff can allege an inadequate "mix and range of options" by alleging insufficient choice, that all (or the vast majority of) options breach the fiduciary duty, an insufficient variety among the range of options, or a kickback scheme where the fiduciaries directly benefit at the expense of plan participants. *See* *Renfro* , 671 F.3d 314 (insufficient mix and range; lack of options); *Hecker v. Deere & Co.* , 556 F.3d 575 (7th Cir. 2009) (assuming insufficient variety among investment vehicles gives rise to a claim); *Braden v. Wal-Mart Stores, Inc.* , 588 F.3d 585 (8th Cir. 2009) (endorsed by the *Renfro* court for its denial of dismissal due to allegations of a kickback scheme). At the same time, it effectively discharges Congress' "careful balancing of the need for prompt and fair" administration "against the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co. v. Dedeaux* , 481 U.S. 41 , 42 , 107 S. Ct. 1549 , 95 L. Ed. 2d 39 (1987).

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But even if this were not true, the argument also fails as a factual matter because there is a reasonable "range of investment options with a variety of risk profiles and fee rates." *Renfro* , 671 F.3d at 327 . Here, the fees range from 0.04% to 0.87%, markedly lower than the 0.10% to 1.21% at issue in *Renfro* . Mot. at 11-12. The plan offered 17 investment options with fees lower than the lowest fees in *Renfro* (0.10%) and only one plan above 0.57%. Mot. at 12. With such low fees, it is not inevitable to say that recordkeeping fees were unnecessarily high, especially when there are rational bundling reasons to allow separate recordkeepers. Even if there *were* cheaper options available for recordkeeping fees, ERISA mandates that fiduciaries consider options besides cost. Fiduciaries must balance "providing benefits to participants and their beneficiaries" *and* "defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1) . Without plausibly pleading that these two options were not met, a plaintiff cannot state a claim for relief.

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The plan administrators are fiduciaries to every plan member, whether she invests $10 or $10 million. It is not up to courts to second-guess how fiduciaries allocate that cost, only that the fiduciary "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" as a whole. 29 U.S.C. § 1104(a)(1) . To the extent that this argument claims the arrangement increased fees, it fails on the same reasoning as above: there are lawful explanations for such an arrangement, and the plaintiffs need something more than a claim that there may be (or even are) cheaper options available. The plaintiffs must show that there were no reasonable alternatives given to plan participants to choose from, which the plaintiffs have not pled. *Cf. Renfro* , 671 F.3d at 329 (holding that affording a reasonable mix of plan options to participants was sufficient to meet the fiduciary standard).

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The plaintiffs next allege that defendants "provided a dizzying array of duplicative funds in the same investment style" leading to "'decision paralysis' for participants." Am. Compl. ¶ 132. This assertion is unsupported by the pleading. The plaintiffs have not alleged any participant who was confused by the different options, an omission that on its own causes the amended complaint to fail to state a factual basis for the claim. Moreover, the plan administrators broke the options down into four categories based on the participants' investment acumen to help guide them. *See generally* Mot. Ex. 6. Offering 78 different choices is not an unreasonably high number, especially with the tiered descriptive guidance given to participants. As a practical matter, plan administrators must offer a sufficient amount of choice to participants, while not overwhelming them to the point participants cannot actually choose. Providing 78 different investment options satisfies the "reasonable mix and range of investment options" required by *Renfro* without being unduly overwhelming. 671 F.3d at 327 .

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6 Cited , Quoted Skinner v. Switzer, 562 U.S. 521, 131 S. Ct. 1289, 179 L. Ed. 2d 233, 79 U.S.L.W. 4157 (2011)

To survive a motion to dismiss, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal* , 556 U.S. 662 , 678 , 129 S. Ct. 1937 , 173 L. Ed. 2d 868 (2009). Specifically, "[f]actual allegations must

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be enough to raise a right to relief above the speculative level." *Twombly* , 550 U.S. at 555 . The question is not whether the claimant "will ultimately prevail . . . but whether his complaint [is] sufficient to cross the federal court's threshold." *Skinner v. Switzer* , 562 U.S. 521 , 530 , 131 S. Ct. 1289 , 179 L. Ed. 2d 233 (2011) (citation and internal quotation marks omitted). Thus, assessment of the sufficiency of a complaint is "a context-dependent exercise" because "[s]ome claims require more factual explication than others to state a plausible claim for relief." *W. Penn Allegheny Health Sys., Inc. v. UPMC* , 627 F.3d 85 , 98 (3d Cir. 2010).

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7	Cited , Quoted	W. Penn Allegheny Health Sys., Inc. v. Univ. of Pittsburgh Med. Ctr., 627 F.3d 85 (3d Cir. 2010)

To survive a motion to dismiss, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal* , 556 U.S. 662 , 678 , 129 S. Ct. 1937 , 173 L. Ed. 2d 868 (2009). Specifically, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly* , 550 U.S. at 555 . The question is not whether the claimant "will ultimately prevail . . . but whether his complaint [is] sufficient to cross the federal court's threshold." *Skinner v. Switzer* , 562 U.S. 521 , 530 , 131 S. Ct. 1289 , 179 L. Ed. 2d 233 (2011) (citation and internal quotation marks omitted). Thus, assessment of the sufficiency of a complaint is "a context-dependent exercise" because "[s]ome claims require more factual explication than others to state a plausible claim for relief." *W. Penn Allegheny Health Sys., Inc. v. UPMC* , 627 F.3d 85 , 98 (3d Cir. 2010).

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8	Cited , (See also) , Quoted	Mayer v. Belichick, 605 F.3d 223 (3d Cir. 2010)

In evaluating the sufficiency of a complaint, the Court adheres to certain well-recognized parameters. For one, the Court "must consider only those facts alleged in the complaint and accept all of the allegations as true." *ALA, Inc. v. CCAIR, Inc.* , 29 F.3d 855 , 859 (3d Cir. 1994); *see also Twombly* , 550 U.S. at 555 (stating that courts must "assum[e] that all the allegations in the complaint are true (even if doubtful in fact)"); *Mayer v. Belichick* , 605 F.3d 223 , 230 (3d Cir. 2010) ("[A] court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents"). Also, the Court must accept as true all reasonable inferences emanating from the allegations, and view those facts and inferences in the light most favorable to the nonmoving party. *See*

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Rocks v. City of Philadelphia , 868 F.2d 644 , 645 (3d Cir. 1989); *see also* *Revell v. Port Auth.* , 598 F.3d 128 , 134 (3d Cir. 2010).

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9 Cited , (See also) Revell v. Port Auth. of N.Y., 598 F.3d 128 (3d Cir. 2010)

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10 Discussed , (See) Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 48 EBC 1097 (8th Cir. 2009)

This still allows multiple avenues for plaintiffs to challenge a breach of fiduciary duty. A plaintiff can allege an inadequate "mix and range of options" by alleging insufficient choice, that all (or the vast majority of) options breach the fiduciary duty, an insufficient variety among the range of options, or a kickback scheme where the fiduciaries directly benefit at the expense of plan participants. *See* *Renfro* , 671 F.3d 314 (insufficient mix and range; lack of options); *Hecker v. Deere & Co.* , 556 F.3d 575 (7th Cir. 2009) (assuming insufficient variety among investment vehicles gives rise to a claim); *Braden v. Wal-Mart Stores, Inc.* , 588 F.3d 585 (8th Cir. 2009) (endorsed by the *Renfro* court for its denial of dismissal due to allegations of a kickback scheme). At the same time, it effectively discharges Congress' "careful balancing of the need for prompt and fair" administration "against the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co. v. Dedeaux* , 481 U.S. 41 , 42 , 107 S. Ct. 1549 , 95 L. Ed. 2d 39 (1987).

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11 Cited , Quoted Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 77 U.S.L.W. 4387 (2009)

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That admonition does not demand that the Court ignore or discount reality. The Court "need not accept as true unsupported conclusions and unwarranted inferences," *Doug Grant, Inc. v. Greate Bay Casino Corp.* , 232 F.3d 173 , 183-84 (3d Cir. 2000) (citations and internal quotation marks omitted), and "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft* , 556 U.S. at 678 ; *see also* *Morse v. Lower Merion Sch. Dist.* , 132 F.3d 902 , 906 (3d Cir. 1997) (explaining that a court need not accept a plaintiff's "bald assertions" or "legal conclusions" (citations omitted)). If a claim "is vulnerable to 12(b)(6) dismissal, a district court must permit a curative amendment, unless an amendment would be inequitable or futile." *Phillips v. County of Allegheny* , 515 F.3d 224 , 236 (3d Cir. 2008). 5
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12	Discussed	Hecker v. Deere & Co., 556 F.3d 575, 45 EBC 2761 (7th Cir. 2009)

This still allows multiple avenues for plaintiffs to challenge a breach of fiduciary duty. A plaintiff can allege an inadequate "mix and range of options" by alleging insufficient choice, that all (or the vast majority of) options breach the fiduciary duty, an insufficient variety among the range of options, or a kickback scheme where the fiduciaries directly benefit at the expense of plan participants. *See* *Renfro* , 671 F.3d 314 (insufficient mix and range; lack of options); *Hecker v. Deere & Co.* , 556 F.3d 575 (7th Cir. 2009)

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The plaintiffs' argument that fiduciaries must maintain a myopic focus on the singular goal of lower fees was soundly rejected in *Renfro* . 671 F.3d at 327. ERISA requires fiduciaries to balance "providing benefits to participants" with "defraying reasonable expenses" in the plan. 29 U.S.C. § 1104(a)(1)(A) . The plaintiffs here have not pled that these reductions in expenses could be achieved without changing the variety of benefits to participants. These same considerations motivated the Seventh Circuit's rejection of identical "institutional versus retail" arguments. *Loomis* , 658 F.3d at 671-72 ; *Hecker* , 556 F.3d at 580-81 . Plaintiffs have only pled that the failure to replace these shares was a breach of fiduciary duty, which is insufficient to pass through the 12(b)(6) threshold.

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13 Cited , Quoted Phillips v. Cty. of Allegheny, 515 F.3d 224 (3d Cir. 2008)

That admonition does not demand that the Court ignore or discount reality. The Court "need not accept as true unsupported conclusions and unwarranted inferences," *Doug Grant, Inc. v. Greate Bay Casino Corp.* , 232 F.3d 173 , 183-84 (3d Cir. 2000) (citations and internal quotation marks omitted), and "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft* , 556 U.S. at 678 ; *see also* *Morse v. Lower Merion Sch. Dist.* , 132 F.3d 902 , 906 (3d Cir. 1997) (explaining that a court need not accept a plaintiff's "bald assertions" or "legal conclusions" (citations omitted)). If a claim "is vulnerable to 12(b)(6) dismissal, a district court must permit a curative amendment, unless an amendment would be inequitable or futile." *Phillips v. County of Allegheny* , 515 F.3d 224 , 236 (3d Cir. 2008). 5

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14 Discussed , Quoted Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007 ILRC 1829, 23 ILRD 11, 41 CR 567, 75 U.S.L.W. 4337 (2007)

A Rule 12(b)(6) motion to dismiss tests the sufficiency of a complaint. Although Rule 8 of the Federal Rules of Civil Procedure requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2) , "to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,'" the plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly* , 550 U.S. 544 , 555 , 127 S. Ct. 1955 , 167 L. Ed. 2d 929 (2007) (citation omitted) (alteration in original).

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To survive a motion to dismiss, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal* , 556 U.S. 662 , 678 , 129 S. Ct. 1937 , 173 L. Ed. 2d 868 (2009). Specifically, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly* , 550 U.S. at 555 . The question is not whether the claimant "will ultimately prevail . . . but whether his complaint [is] sufficient to cross the federal court's threshold." *Skinner v. Switzer* , 562 U.S. 521 , 530 , 131 S. Ct. 1289 , 179 L. Ed. 2d 233 (2011) (citation and internal quotation marks omitted). Thus, assessment of the sufficiency of a complaint is "a context-dependent exercise" because "[s]ome claims require more factual explication than others to state a plausible claim for relief." *W. Penn Allegheny Health Sys., Inc. v. UPMC* , 627 F.3d 85 , 98 (3d Cir. 2010).

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In evaluating the sufficiency of a complaint, the Court adheres to certain well-recognized parameters. For one, the Court "must consider only those facts alleged in the complaint and accept all of the allegations as true." *ALA, Inc. v. CCAIR, Inc.* , 29 F.3d 855 , 859 (3d Cir. 1994); *see also Twombly* , 550 U.S. at 555 (stating that courts must "assum[e] that all the allegations in the complaint are true (even if doubtful in fact)"); *Mayer v. Belichick* , 605 F.3d 223 , 230 (3d Cir. 2010) ("[A] court must consider only

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the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents"). Also, the Court must accept as true all reasonable inferences emanating from the allegations, and view those facts and inferences in the light most favorable to the nonmoving party. *See Rocks v. City of Philadelphia* , 868 F.2d 644 , 645 (3d Cir. 1989); *see also Revell v. Port Auth.* , 598 F.3d 128 , 134 (3d Cir. 2010).

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The plaintiffs' claim that this violates the defendants' fiduciary duty does not meet the plausibility threshold. As in *Twombly* , the actions are at least "just as much in line with a wide swath of rational and competitive business strategy" in the market as they are with a fiduciary breach. *Bell Atl. Corp. v. Twombly* , 550 U.S. 544 , 554 , 127 S. Ct. 1955 , 167 L. Ed. 2d 929 (2007). 6

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The argument that TIAA-CREF and Vanguard operated as their own recordkeepers fails in the face of the same realities discussed above. Bundling of services is not inconsistent with lawful, free market behavior in the best interests of those involved, including beneficiaries. Companies, for example, often "bundle" phone service in with the more popular cable and internet services, even when the users do not want a land line. In those instances, it is still a rational self-interested action to purchase the bundle because the other equipment is worth the price for the consumer, *even with* the unnecessary or undesired product or fee. Here, it is rational to comply with Vanguard's requirement that they serve as recordkeeper if that is required to gain access to the desired Vanguard portfolio. Just as the actions in *Twombly* were "consistent with conspiracy, but just as much in line with a wide swath of rational" actions, so too are the actions here—perhaps consistent with fiduciary breach, but also well in line with a wide swath of other rational actions. *Twombly* , 550 U.S. at 554 .

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Moreover, when examined closely, the plaintiffs' claims do not withstand scrutiny. A statistical sampling of funds would expect (all things being equal) half of the funds to be above benchmarks and half to be below benchmarks. Here, as opposed to what the simplistic statistical average would show, that 38 (half) of the 76 funds underperformed, the plaintiffs pled that 45 investment options performed below benchmarks. Am. Compl. ¶ 151. Such a *post hoc* analysis of market performance, where only 7 more funds underperformed than would be expected, *may* be consistent with a breach of fiduciary duty, but does not show that the plaintiffs have "nudged their claims across the line from conceivable to plausible" and "their complaint must be dismissed." *Twombly* , 550 U.S. at 570 .

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15 Cited , Quoted — Aetna Health Inc. v. Davila, 542 U.S. 200, 124 S. Ct. 2488, 159 L. Ed. 2d 312, 32 EBC 2569, 72 U.S.L.W. 4516 (2004)

ERISA's fiduciary duty standard does not differentiate between § 403(b) and § 401(k) plans. Rather, it defines a blanket fiduciary duty standard. ERISA "aims 'to provide *a uniform regulatory regime over employee benefit plans* ' in order to ease administrative burdens and reduce employers' costs." *Nat'l Sec. Sys., Inc. v. Iola* , 700 F.3d 65 , 82 (3d Cir. 2012) (emphasis added) (quoting *Aetna Health Inc. v. Davila* , 542 U.S. 200 , 208 , 124 S. Ct. 2488 , 159 L. Ed. 2d 312 (2004)). Because of the modern-day similarity between the two retirement plans and the historical roots of ERISA's goal to create a uniform regulatory system for retirement plans, the analysis of the fiduciary standards for § 403(b) and § 401(k) retirement plans must be the same. The *Renfro* reasoning (and other interpretations of § 401(k) cases) therefore serve as a guiding light for analyzing the different theories advanced by the plaintiffs.

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16 Cited , Quoted — Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173 (3d Cir. 2000)

That admonition does not demand that the Court ignore or discount reality. The Court "need not accept as true unsupported conclusions and unwarranted inferences," *Doug Grant, Inc. v. Greate Bay Casino Corp.* , 232 F.3d 173 , 183-84 (3d Cir. 2000) (citations and internal quotation marks omitted), and "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft* , 556 U.S. at 678 ; *see also* *Morse v. Lower Merion Sch. Dist.* , 132 F.3d 902 , 906 (3d Cir. 1997) (explaining that a court need not accept a plaintiff's "bald assertions" or "legal conclusions" (citations omitted)). If a claim "is vulnerable to 12(b)

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(6) dismissal, a district court must permit a curative amendment, unless an amendment would be inequitable or futile." *Phillips v. County of Allegheny* , 515 F.3d 224 , 236 (3d Cir. 2008). 5
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17 Discussed , (See also) , Quoted — Morse v. Lower Merion Sch. Dist., 132 F.3d 902 (3d Cir. 1997)

That admonition does not demand that the Court ignore or discount reality. The Court "need not accept as true unsupported conclusions and unwarranted inferences," *Doug Grant, Inc. v. Greate Bay Casino Corp.* , 232 F.3d 173 , 183-84 (3d Cir. 2000) (citations and internal quotation marks omitted), and "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft* , 556 U.S. at 678 ; *see also* *Morse v. Lower Merion Sch. Dist.* , 132 F.3d 902 , 906 (3d Cir. 1997) (explaining that a court need not accept a plaintiff's "bald assertions" or "legal conclusions" (citations omitted)). If a claim "is vulnerable to 12(b)(6) dismissal, a district court must permit a curative amendment, unless an amendment would be inequitable or futile." *Phillips v. County of Allegheny* , 515 F.3d 224 , 236 (3d Cir. 2008). 5
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18 Cited , Quoted — In re Unisys Sav. Plan Litig. (Meinhardt v. Unisys Corp.), 74 F.3d 420, 19 EBC 2393 (3d Cir. 1996)

"The fiduciary standard is 'flexible, such that the adequacy of a fiduciary's independent investigation and ultimate investment selection is evaluated in light of the character and aims of the particular type of plan he serves.'" *Renfro* , 671 F.3d at 322 (quoting *Meinhardt v. Unisys Corp. (In re Unisys Sav. Plan Litig* .) (*Unisys I*), 74 F.3d 420 , 434 (3d Cir. 1996)). An ERISA fiduciary acts prudently when it gives "appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the . . . investment course of action involved . . . ." *Renfro* , 671 F.3d at 322 (quoting 29 C.F.R. § 2550.404a-1(b)(1)(i)). Accordingly, in evaluating a questioned decision, courts focus upon the fiduciary's "conduct in arriving at [that] investment decision." *Unisys I* , 74 F.3d at 434 .
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19 Cited , Quoted — Reich v. Compton, 57 F.3d 270, 19 EBC 1441 (3d Cir. 1995)

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This prohibited transaction requirement in ERISA imposes an additional duty on fiduciaries not to engage in deals using the plan assets and a "party in interest." A party in interest is defined as, *inter alia* , "a person providing services to such plan" 29 U.S.C. § 1002(14)(B) . The prohibited transactions provision supplements the "foundational [fiduciary] obligation" by prohibiting "plan fiduciaries from entering into certain transactions. Subsection (a) erects a categorical bar to transactions between the plan and a 'party in interest' deemed likely to injure the plan." *Nat'l Sec. Sys., Inc. v. Iola* , 700 F.3d 65 , 82 (3d Cir. 2012); *see also* *Reich v. Compton* , 57 F.3d 270 , 275 (3d Cir.1995).
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Congress adopted the prohibited transactions provision of ERISA "to prevent plans from engaging in certain types of transactions that had been used in the past to benefit other parties at the expense of the plans' participants and beneficiaries." *Reich* , 57 F.3d at 275 (quoting *Commissioner of Internal Revenue v. Keystone Consolidated Indus.* , 508 U.S. 152 , 160 , 113 S. Ct. 2006 , 124 L. Ed. 2d 71 (1993)). In the decades before ERISA, plans could "engage in transactions with related parties so long as the transactions were 'arms-length.' Unfortunately, this rule was difficult to police and thus 'provided an open door for abuses' by plan trustees." *Id.* Congress amended ERISA "with the goal of creating a categorical bar to certain types of transactions that were regarded as likely to injure a plan." *Reich* , 57 F.3d at 275 . 9
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Perhaps Plaintiffs attempt to balance on such an analytical tightrope because they cite no court that has been persuaded by such a novel argument. Moreover, the transactions at issue here were not done "to benefit other parties at the expense of the plans' participants and beneficiaries" but were simply operating expenses necessary to operate the plan on behalf of the plan beneficiaries. *Reich* , 57 F.3d at 275 . While a kickback scheme such as that in *Braden* , where the fiduciaries are benefitting by engaging in these transactions, may be actionable under the prohibited transactions provision, the plaintiffs must plead that there is a "subjective intent to benefit a party in interest." *Id.* at 279. They have not done so here. The plaintiffs' attempts to shoehorn their fiduciary duty claims into the prohibited transaction provision simply fail as a matter of law.

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20 Cited , Quoted ALA, Inc. v. CCAIR, Inc., 29 F.3d 855 (3d Cir. 1994)

In evaluating the sufficiency of a complaint, the Court adheres to certain well-recognized parameters. For one, the Court "must consider only those facts alleged in the complaint and accept all of the allegations as true." *ALA, Inc. v. CCAIR, Inc.* , 29 F.3d 855 , 859 (3d Cir. 1994); *see also Twombly* , 550 U.S. at 555 (stating that courts must "assum[e] that all the allegations in the complaint are true (even if doubtful in fact)"); *Mayer v. Belichick* , 605 F.3d 223 , 230 (3d Cir. 2010) ("[A] court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents"). Also, the Court must accept as true all reasonable inferences emanating from the allegations, and view those facts and inferences in the light most favorable to the nonmoving party. *See Rocks v. City of Philadelphia* , 868 F.2d 644 , 645 (3d Cir. 1989); *see also Revell v. Port Auth.* , 598 F.3d 128 , 134 (3d Cir. 2010).

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21 Cited , Quoted PBGC v. White Consol. Indus., Inc., 998 F.2d 1192, 26 Fed. R. Serv. 3d 173, 16 EBC 2601 (3d Cir. 1993)

To make it easier for potential investors, plan managers divided the investment options (which ranged between 76 and 118 options) into four tiers. Motion to Dismiss (*hereinafter* "Mot.") Ex. 6. 4 Tier 1 is for the "do it for me" investor; tier 2 is geared toward the "help me do it" investor; tier 3 is designed for the "mix my own" investor; and tier 4 is built for the "self-directed" investor. Mot. Ex. 6. In each of these plans, options are presented to the beneficiaries from TIAA-CREF and Vanguard, the two companies used in the Plan. The options range from one option from each company in the "do it for me" category to complete customization of available options in tier 4. Mot. Ex. 6. Beneficiaries are informed that each mutual fund's prospectus is available online. Mot. Ex. 3. They are given detailed statistics on each of the investment options, including 1, 5 and 10 year returns, as well as total operating expenses. Mot. Ex. 3.

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22 Cited , Quoted — Commissioner v. Keystone Consol. Industries, Inc., 508 U.S. 152, 113 S. Ct. 2006, 124 L. Ed. 2d 71, 16 EBC 2121 (1993)

Congress adopted the prohibited transactions provision of ERISA "to prevent plans from engaging in certain types of transactions that had been used in the past to benefit other parties at the expense of the plans' participants and beneficiaries." *Reich* , 57 F.3d at 275 (quoting *Commissioner of Internal Revenue v. Keystone Consolidated Indus.* , 508 U.S. 152 , 160 , 113 S. Ct. 2006 , 124 L. Ed. 2d 71 (1993)). In the decades before ERISA, plans could "engage in transactions with related parties so long as the transactions were 'arms-length.' Unfortunately, this rule was difficult to police and thus 'provided an open door for abuses' by plan trustees." *Id.* Congress amended ERISA "with the goal of creating a categorical bar to certain types of transactions that were regarded as likely to injure a plan." *Reich* , 57 F.3d at 275 . 9
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23 Cited , (See) — Rocks v. City of Philadelphia, 868 F.2d 644 (3d Cir. 1989)

In evaluating the sufficiency of a complaint, the Court adheres to certain well-recognized parameters. For one, the Court "must consider only those facts alleged in the complaint and accept all of the allegations as true." *ALA, Inc. v. CCAIR, Inc.* , 29 F.3d 855 , 859 (3d Cir. 1994); *see also Twombly* , 550 U.S. at 555 (stating that courts must "assum[e] that all the allegations in the complaint are true (even if doubtful in fact)"); *Mayer v. Belichick* , 605 F.3d 223 , 230 (3d Cir. 2010) ("[A] court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents"). Also, the Court must accept as true all reasonable inferences emanating from the allegations, and view those facts and inferences in the light most favorable to the nonmoving party. *See Rocks v. City of Philadelphia* , 868 F.2d 644 , 645 (3d Cir. 1989); *see also Revell v. Port Auth.* , 598 F.3d 128 , 134 (3d Cir. 2010).
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24 Cited , Quoted — Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39, 1 EXC 90, 8 EBC 1409 (1987)

This still allows multiple avenues for plaintiffs to challenge a breach of fiduciary duty. A plaintiff can allege an inadequate "mix and range of options" by alleging insufficient choice, that all (or the vast majority of) options breach the fiduciary duty, an insufficient variety among the range of options, or a

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kickback scheme where the fiduciaries directly benefit at the expense of plan participants. *See* *Renfro* , 671 F.3d 314 (insufficient mix and range; lack of options); *Hecker v. Deere & Co.* , 556 F.3d 575 (7th Cir. 2009) (assuming insufficient variety among investment vehicles gives rise to a claim); *Braden v. Wal-Mart Stores, Inc.* , 588 F.3d 585 (8th Cir. 2009) (endorsed by the *Renfro* court for its denial of dismissal due to allegations of a kickback scheme). At the same time, it effectively discharges Congress' "careful balancing of the need for prompt and fair" administration "against the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co. v. Dedeaux* , 481 U.S. 41 , 42 , 107 S. Ct. 1549 , 95 L. Ed. 2d 39 (1987).

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By the 1960s, a national consensus arguably formed that retirement funds needed comprehensive regulation. *Id.* at 1-9. As the "inadequacy of current minimum standards" became apparent, concerns arose that "the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered." 29 U.S.C. § 1001(a) . In response to these concerns, Congress enacted ERISA in 1974 to provide a comprehensive mechanism for regulating nationwide tax-advantaged retirement plans. *Employee Benefits Law* at 2-2. "ERISA's detailed provisions set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Pilot Life* , 481 U.S. at 42 .

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25 Cited , Quoted — Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 105 S. Ct. 2833, 86 L. Ed. 2d 447, 53 U.S.L.W. 4811, 6 EBC 1665 (1985)

The Supreme Court has "often noted that an ERISA fiduciary's duty is 'derived from the common law of trusts.'" *Tibble v. Edison Int'l* , 135 S. Ct. 1823 , 1828 , 191 L. Ed. 2d 795 (2015) (quoting *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport Inc.* , 472 U.S. 559 , 570 , 105 S. Ct. 2833 , 86 L. Ed. 2d 447 (1985)). "In administering the trust the trustee may perform or fail to perform an act that results in loss to the trust beneficiaries. He is only liable when his conduct causing the loss failed to conform to the standard of care and skill applicable to trustees in the administration of trusts." GEORGE BOGERT ET AL, LAW OF TRUSTS AND TRUSTEES § 541, (3d ed. 2009) (June 2017 Update).

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