No. 23-

In the Supreme Court of the United States

CASEY CUNNINGHAM, ET AL.,
PETITIONERS,
v.
CORNELL UNIVERSITY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1106(a)(1)(C), prohibits a plan fiduciary from "engag[ing] in a transaction, if he knows or should know that such transaction constitutes a direct or indirect furnishing of goods, services, or facilities between the plan and a party in interest." The statute elsewhere defines "party in interest" broadly to include a variety of parties that may contract with or provide services to a plan. *See* 29 U.S.C. § 1002(14)(B).

The Eighth and Ninth Circuits have applied the text of this prohibition as written. The Second, Third, Seventh, and Tenth Circuits have, on the other hand, required plaintiffs to allege additional elements to state a claim, because a "literal reading" of 29 U.S.C. § 1106(a)(1)(C) would purportedly produce "results that are inconsistent with ERISA's statutory purpose." *Albert v. Oshkosh Corp.*, 47 F.4th 570, 585 (7th Cir. 2022). The question presented is:

Whether a plaintiff can state a claim by alleging that a plan fiduciary engaged in a transaction constituting a furnishing of goods, services, or facilities between the plan and a party in interest, as proscribed by 29 U.S.C. § 1106(a)(1)(C), or whether a plaintiff must plead and prove additional elements and facts not contained in the provision's text.

PARTIES TO THE PROCEEDING

Petitioners Casey Cunningham, Charles E. Lance, Stanley T. Marcus, Lydia Pettis, and Joy Veronneau were plaintiffs in the district court proceedings and appellants in the court of appeals proceedings.

Respondents Cornell University, The Retirement Plan Oversight Committee, and Mary G. Opperman were defendants in the district court proceedings and appellees in the court of appeals proceedings. CapFinancial Partners, LLC d/b/a CAPTRUST Financial Advisors was a defendant in the district court proceedings and appellee in the court of appeals proceedings, but Petitioners do not seek relief before this Court on claims as applied to CapFinancial.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Cunningham v. Cornell University, No. 1:16-cv-06526, 2017 WL 4358769 (Sept. 29, 2017)

Cunningham v. Cornell University, No. 1:16-cv-06526, 2019 WL 4735876 (Sept. 27, 2019)

United States Court of Appeals (2d Cir.):

Cunningham v. Cornell University, No. 21-88, 86 F.4th 961 (2d Cir. 2023)

TABLE OF CONTENTS

Question presented i
Parties to the proceeding ii
Related proceedings iii
Table of authorities i
Jurisdiction 1
Statutory provisions involved 1
Introduction 2
Statement of the case 5
- A. Statutory framework. 5
- B. Factual background. 6
- C. Proceedings below. 7

Reasons for granting the petition 12
I. Courts are divided on what ERISA plaintiffs must plead to show a prohibited transaction under 29 U.S.C. § 1106(a)(1)(C). 12
- A. The Eighth and Ninth Circuits have applied the text of § 1106 as written. 12
- B. The Third, Seventh, and Tenth Circuits have narrowed § 1106's scope through atextual requirements. 15
- C. The Second Circuit's interpretation of § 1106 and its relationship to § 1108 represents yet another approach. 18

II. The Second Circuit's decision is incorrect. 19
- A. The Second Circuit's decision is contrary to ERISA's text. 19

B. The Second Circuit's decision is contrary to administrative guidance and rules of statutory construction. 22
C. The Second Circuit's approach is inconsistent with trust law. 25
III. This case presents an ideal vehicle for review. 28
Conclusion 33

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott v. Veasey,
580 U.S. 1104 (2017).. 32

Aetna Health Inc. v. Davila,
542 U.S. 200 (2004)..12, 28

Alas v. AT&T Servs.,
2021 WL 4893372 (C.D. Cal. Sept. 28, 2021).......... 30

Albert v. Oshkosh Corp.,
47 F.4th 570 (7th Cir. 2022) 3, 14, 16, 17

Allen v. GreatBanc Trust Co.,
835 F.3d 670 (7th Cir. 2016).........................17, 23, 28

Am. Constr. Co. v. Jacksonville, Tampa & Key W. R.R. Co.,
148 U.S. 372 (1893).. 31

Azar v. Allina Health Serv.,
139 S. Ct. 1804 (2019) 20

Bhd. of Locomotive Fireman & Enginemen v. Bangor & Aroostook R.R. Co.,
389 U.S. 327 (1967)... 31

Braden v. Wal-Mart Stores, Inc.,
588 F.3d 585 (8th Cir. 2009).................3, 4, 12, 13, 14

Bugielski v. AT&T Services, Inc.,
76 F.4th 894 (9th Cir. 2023) 3, 4, 14, 15, 30, 31, 32

Page(s)

Cases—cont'd

Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.,
472 U.S. 559 (1985).. 25

Comm'r of Internal Revenue v. Keystone Consol. Indus., Inc.,
508 U.S. 152 (1993).. 5

Conkright v. Frommert,
559 U.S. 506 (2010)..15, 28

Crooks v. Harrelson,
282 U.S. 55 (1930).. 20

Dixon v. United States,
548 U.S. 1 (2006) 24

Donovan v. Bierwirth,
680 F.2d 263 (2d Cir. 1982) 2

FTC v. Morton Salt Co.,
334 U.S. 37 (1948)...13, 19, 23

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,
240 U.S. 251 (1916).. 31

Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.,
530 U.S. 238 (2000)..........................2, 5, 19, 25, 26, 27

Henderson v. Emory Univ.,
252 F. Supp. 3d 1344 (N.D. Ga. 2017)..................... 29

Herman v. NationsBank Tr. Co.,
126 F.3d 1354 (11th Cir. 1997)................................. 22

Page(s)

Cases—cont'd

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999).. 19

Hughes v. Nw. Univ.,
63 F.4th 615 (7th Cir. 2023) 6

Ingersoll-Rand Co. v. McClendon,
498 U.S. 133 (1990).. 4

Intel Corp. Inv. Pol'y Comm. v. Sulyma,
140 S. Ct. 768 (2020) 27

Javierre v. Cent. Altagracia,
217 U.S. 502 (1910)...22, 23

Jones v. Harris Assocs. L.P.,
559 U.S. 335 (2010)..11, 12, 26

LaRue v. DeWolff, Boberg & Assocs., Inc.,
552 U.S. 248 (2008).. 25

Lockheed Corp. v. Spink,
517 U.S. 882 (1996).. 27

McKelvey v. United States,
260 U.S. 353 (1922).. 24

Meacham v. Knolls Atomic Power Lab.,
554 U.S. 84 (2008).. 23

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993)..5, 15

Metro. Life Ins. Co. v. Glenn,
554 U.S. 105 (2008).. 25

Pub. Citizen v. Dep't of Just.,
491 U.S. 440 (1989)...20, 21

Page(s)

Cases—cont'd

Ramos v. Banner Health,
1 F.4th 769 (10th Cir. 2021) 3, 17, 23

Ramos v. Banner Health,
461 F. Supp. 3d 1067 (D. Colo. 2020) 7

Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon,
541 U.S. 1 (2004) 22

Roth v. CitiMortgage Inc.,
756 F.3d 178 (2d Cir. 2014) 23

Rutledge v. Pharm. Care Mgmt. Ass'n,
592 U.S. 80 (2020)... 4

SEC v. Ralston Purina Co.,
346 U.S. 119 (1953).. 23

Sellers v. Anthem Life Ins.,
316 F. Supp. 3d 25 (D.D.C. 2018) 29

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983)... 2

Skidmore v. Swift & Co.,
323 U.S. 134 (1944)... 22

Sweda v. University of Pennsylvania,
923 F.3d 320 (3d Cir. 2019) 3, 14-17

United States v. Carey,
929 F.3d 1092 (9th Cir. 2019)................................... 24

United States v. Guess,
629 F.2d 573 (9th Cir. 1980)..................................... 25

Page(s)

Cases—cont'd

United States v. Vuitch,
402 U.S. 62 (1971)....................23, 24

Va. Mil. Inst. v. United States,
508 U.S. 946 (1993).................... 31

Page(s)

Rules, Statutory, and Regulatory Provisions

28 U.S.C.
§ 1254....................1, 31

29 U.S.C.
§ 1001....................1, 5
§ 1002.................... 2
§ 1104.................... 2
§ 1106....................1-5, 7-21, 23-30
§ 1108.................... 1-6, 9-13, 15, 17-24, 26, 28, 30, 32

29 C.F.R.
§ 2550....................15, 22

77 Fed. Reg. 5632 (Feb. 3, 2012).................... 22

Fed. R. Civ. P. 11.................... 28

Page(s)

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PETITION FOR WRIT OF CERTIORARI

Petitioners Casey Cunningham, Charles E. Lance, Stanley T. Marcus, Lydia Pettis, and Joy Veronneau respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit is published at 86 F.4th 961 (2d Cir. 2023) and is reproduced in the appendix to this petition at App. 2a–41a. The order of the district court addressing Defendants-Respondents' motion for summary judgment is unpublished and is reproduced at App. 43a–86a. The order of the district court addressing Defendants-Respondents' motion to dismiss is unpublished and is reproduced at App. 88a–115a.

JURISDICTION

The Second Circuit issued its opinion on November 14, 2023. It denied a petition for rehearing on December 20, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, including 29 U.S.C. § 1106 and § 1108, are reproduced at App. 120–160a.

INTRODUCTION

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). To protect these interests, ERISA imposes duties of loyalty and prudence on the fiduciaries who manage these plans. *See* 29 U.S.C. § 1104. But even these duties—considered the "highest known to the law," *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982)—were not considered sufficiently comprehensive.

Consequently, and "[r]esponding to deficiencies in prior law regulating transactions by plan fiduciaries, Congress enacted ERISA § 406(a)(1), which supplements the fiduciary's general duty of loyalty . . . by categorically barring certain transactions." *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241–42 (2000). Among the list of prohibited transactions are those that "constitute[] a direct or indirect furnishing of goods, services, or facilities between the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(C). A party in interest includes nine separate entities that may contract with or provide services to a plan. 29 U.S.C. § 1002(14). A separate provision, 29 U.S.C. § 1108, enumerates more than twenty exemptions to § 1106(a)(1)'s list of prohibited transactions.[1]

The federal courts of appeals are divided over the standards for pleading a prohibited-transaction claim under § 1106(a)(1). Some, like the Eighth Circuit, apply the text as written and require only plausible allegations

[1] Unless otherwise noted, all statutory citations in this petition are to the U.S. Code.

of an "arrangement" under which plan payments are "exchange[d] for services rendered" by a "party in interest." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 601 (8th Cir. 2009). Defendants must then invoke 29 U.S.C. § 1108's exemptions as affirmative defenses to protect themselves against liability. *Id.* at 601 & n.10.

Other circuits have held that, on top of the statutory elements, plaintiffs must plead facts suggestive of more traditional fraud or breach of fiduciary duty—such as facts indicating that the transaction was "intended to benefit" the party in interest, *Sweda v. Univ. of Pa.*, 923 F.3d 320, 340 (3d Cir. 2019); that the transaction looks like "self-dealing," *Albert v. Oshkosh Corp.*, 47 F.4th 570, 585 (7th Cir. 2022); or that "some prior relationship . . . exist[ed] between the fiduciary and the service provider," *Ramos v. Banner Health*, 1 F.4th 769, 787 (10th Cir. 2021).

Two cases, decided just months apart last year, magnify this preexisting circuit split and amplify the need for the Court's guidance. In *Bugielski v. AT&T Services, Inc.*, the Ninth Circuit joined the Eighth Circuit and rejected the Third, Seventh, and Tenth Circuit's efforts "to read additional limitations, requirements, or exceptions into the statutory text." 76 F.4th 894, 901 (9th Cir. 2023). In the case below, the Second Circuit held that along with the statutory elements contained in § 1106(a), the plaintiff must also plausibly allege facts negating "at least some of [the] exemptions" codified in § 1108. App. 18a.

The Second Circuit thus effectively joined the Third, Seventh, and Tenth Circuits in holding that it is not enough to plead the statutory elements of § 1106. But it also charted a unique course that breaks from how every

other circuit has understood the relationship between § 1106 and § 1108, by placing the onus on plaintiffs to negate, rather than on defendants to prove, exemptions to liability. Such an approach departs from the foundational understanding in trust law that "the fiduciary bears the burden of justifying [its] transactions." *Braden*, 588 F.3d at 602.

The many interpretations taken by the federal courts of appeals undercuts Congress's intent to establish, through ERISA, a "uniform body of benefits law." *Rutledge v. Pharm. Care Mgmt. Ass'n*, 592 U.S. 80, 86 (2020) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990)). This split is important and ripe for this Court's review.

The appellees in *Bugielski* have notified the Court of their intention to seek a writ of certiorari. *See* Applications to Extend Time, *AT&T Servs., Inc. v. Bugielski*, 23A637 (Feb. 26, 2024 & Jan. 8, 2024). Yet between these two matters, this case is the better vehicle.

The prohibited-transaction claims in *Bugielski* were decided on summary judgment with an extensive discovery record that could present complicating issues. 76 F.4th at 898–99. *Bugielski* also is now in an interlocutory posture, after the Ninth Circuit remanded for further proceedings. 76 F.4th at 917. AT&T may, on remand, well prove a § 1108 exemption, thereby mooting the question of whether the *Bugielski* plaintiffs should have borne some higher burden of pleading or proof. *See id.* at 909. By contrast, this case comes to the Court after a final dismissal on the merits, with the prohibited-transaction claims resolved in a motion to dismiss posture that crisply presents the legal question that has divided courts of appeals. This case thus offers an ideal vehicle

for the Court to provide much-needed clarity on a significant issue of federal law.

STATEMENT OF THE CASE

A. Statutory framework.

ERISA is "the product of a decade of congressional study," *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993), and its detailed, careful framework recognizes that "the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans." 29 U.S.C. § 1001(a).

Section 1106(a), which enumerates "prohibited transactions" between the plan and a "party in interest," is central to that statutory scheme. Prior to ERISA's enactment, transactions between plans and parties in interest were governed by "the customary arm's-length standard of conduct." *Comm'r of Internal Revenue v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993). But that standard "provided an open door for abuses" by plan administrators, sponsors, and service providers. *Id.* Consequently, Congress used "broad language" in § 1106(a) to "bar categorically [any] transaction that was likely to injure the pension plan." *Id.* Section 1106(a) "supplements" the other "duties and responsibilities" that ERISA imposes on plan fiduciaries. *Harris Tr.*, 530 U.S. at 241; *Mertens*, 508 U.S. at 251.

Section 1108 separately enumerates various exemptions to Section 1106(a)'s list of prohibited transactions. 29 U.S.C. § 1108. Both § 1106(a) and § 1108 are drawn broadly. For example, as relevant here, § 1106(a)(1)(C) broadly prohibits transactions that constitute a "furnishing of goods, services, or facilities

between the plan and a party in interest." But § 1108(b)(2)(A) provides a correspondingly broad exemption for "[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor."

B. Factual background.

Petitioners comprise a class of current and former employees who participated in Cornell University's two retirement plans, the Cornell University Retirement Plan for Employees of the Endowed Colleges at Ithaca ("Retirement Plan") and the Cornell University Tax Deferred Annuity Plan ("TDA Plan") (together, the "Plans"), from August 2010 to August 2016. App. 5a–6a. The Plans are defined-contribution, tax-deferred plans, serving over 30,000 participants and managing approximately $3.34 billion in assets. App. 6a. Due to their substantial size and assets, the Plans are considered "jumbo plans," with significant bargaining power in the retirement plan services market. App. 90a; *Hughes v. Nw. Univ.*, 63 F.4th 615, 635 (7th Cir. 2023).

Respondents are Cornell University, Cornell's Retirement Plan Oversight Committee, and the Oversight Committee chairperson. Each of these Respondents is a Plan fiduciary.[2]

[2] Respondents chose CapFinancial Partners, LLC "to serve as a fiduciary under ERISA with regard to the selection of mutual funds available to the Plans." App. 7a. Although Petitioners brought claims against CapFinancial in district court and before the Second Circuit, Petitioners do not seek review before this Court of any of their claims as applied to CapFinancial.

Respondents also retained two investment providers, Teachers Insurance and Annuity Association of America-College Retirement Equities Fund ("TIAA") and Fidelity Investments Inc. ("Fidelity"). App. 8a. Cornell paid TIAA and Fidelity investment management and recordkeeping fees. Investment management fees "are associated with the services of buying, selling, and managing investments." *Id.* Recordkeeping fees "cover necessary administrative expenses such as tracking account balances and providing regular account statements." *Id.*

There are two common models for collecting recordkeeping fees. First, plans can pay a flat fee indexed to the number of Plan participants. *Id.* Because of economies of scale, jumbo plans generally obtain lower flat fees than smaller plans. *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1102 (D. Colo. 2020). Second, plans can choose a revenue sharing model, with fees calculated based on a set portion of plan assets. App. 8a. As assets grow, fees grow, even if the number of participants and the services provided do not increase. While there is no ceiling, there is typically a floor—since recordkeepers often demand additional direct payments if assets decline below a certain level. Respondents here opted to pay recordkeeping fees through a revenue sharing, rather than flat fee, model. App. 8a.

C. Proceedings below.

In February 2017, Petitioners filed suit in the Southern District of New York, asserting that Respondents had engaged in transactions prohibited under § 1106(a). Specifically, "because TIAA and Fidelity are service providers and hence parties in interest, their furnishing of recordkeeping and administrative services

to the Plans is a prohibited transaction unless Cornell proves an exemption." App. 25a (cleaned up). Petitioners also alleged that Respondents had "failed to seek bids from other recordkeepers," had "neglected to monitor the amount of revenue sharing received" by TIAA and Fidelity, and had "paid substantially more than . . . a reasonable recordkeeping fee." App. 25a (internal quotation marks omitted). According to Petitioners, a reasonable recordkeeping fee for the Plans would have been "$35 per participant." *Id.* Petitioners instead paid several times that, between $115 and $183 per participant in the Retirement Plan, and between $145 and $200 per participant in the TDA Plan. App. 26a.

Petitioners also alleged, in several related claims, that Respondents' failure to address TIAA and Fidelity's recordkeeping fees breached their fiduciary duties of loyalty and prudence. App. 10a. Finally, Petitioners claimed that Respondents imprudently offered, selected, or retained investment options with "high fees and poor performance relative to other investment options that were readily available." App. 11a.

In September 2017, the district court granted Respondents' motion to dismiss Petitioners' prohibited-transaction claims. The district court held that, to plead a § 1106 violation, plaintiffs must allege "some evidence of self-dealing or other disloyal conduct." App. 109a. Petitioners had, in the court's view, "offered only conclusory allegations" on this front. App. 140a. The court also dismissed Petitioners' duty of loyalty claims. App. 98a, 115a. A subset of Petitioners' duty of prudence claims survived dismissal. App. 100a–104a, 115a.

At summary judgment, the district court ruled for Respondents "on nearly all the remaining claims." App.

12a. Only one claim, alleging breach of the duty of prudence by Cornell University, survived. App. 13a. In December 2020, the district court approved a settlement of this remaining claim. *Id.* The settlement left the earlier, dismissed claims available for appeal.

Petitioners subsequently filed a notice of appeal to the Second Circuit, seeking review of the district court's disposition of (1) the prohibited-transaction claim, (2) a claim for breach of fiduciary duty by "failing to monitor and control recordkeeping fees," and (3) a claim over the retention of certain high-cost or underperforming investment options. App. 10a. Respondents filed a conditional cross-appeal.

On November 14, 2023, the Second Circuit affirmed the district court's judgment and dismissed Respondents' cross-appeal as moot. App. 41a. The court began by observing that § 1106(a)(1)(C), which prohibits transactions that constitute a "furnishing of goods, services, or facilities between the plan and a party in interest," would, if read "in isolation of the exemptions in § 1108, . . . appear to prohibit payments to any entity providing it with any services." App. 15a–16a (quoting 29 U.S.C. §§ 1106(a)(1)(C), 1108(b)(2)(A)).

The Second Circuit noted that the Third, Seventh, and Tenth Circuits had "adopted different means of narrowing the statute," by imposing atextual requirements on plaintiff seeking to proceed under § 1106(a). App. 16a. And, in like manner, the district court in this case had "declined to read § 1106(a)(1)(C) expansively and instead" required Petitioners to allege "self-dealing or disloyal conduct." App. 18a.

But the Second Circuit also recognized that "[t]wo circuits, on the other hand, have embraced the expansive

reading of the statute that these other circuits have rejected as absurd." App. 17a. These courts—the Eighth and Ninth Circuits—acknowledged the potential reach of such a broad reading. But they "justified" their conclusion by looking to "the language of the statute and traditional principles of trust law." *Id.* The Second Circuit further observed that the Seventh and Eighth Circuits, though on different sides of the split, had both "treat[ed] the § 1108 exemptions as affirmative defenses to § 1106(a)." App. 17a n.6.

After outlining these various approaches, the Second Circuit reached for a seeming middle ground. It agreed with the Eighth and Ninth Circuits that "the language of § 1106(a)(1) cannot be read to demand explicit allegations of self-dealing or disloyal conduct." App. 18a (internal quotation marks omitted). But it disagreed with the Eighth Circuit that "the § 1108 exemptions should be understood merely as affirmative defenses to the conduct proscribed in § 1106(a)." *Id.* Instead, the Second Circuit held that "at least some of those exemptions—particularly, the exemption for reasonable and necessary transactions codified by § 1108(b)(2)(A)—are incorporated into § 1106(a)'s prohibitions." *Id.* According to the Second Circuit, to plead a violation of § 1106(a)(1)(C), a complaint must not only show that a transaction involved the "furnishing of services between the plan and a party in interest," but also that the "transaction was unnecessary or involved unreasonable compensation" so as to fall outside the § 1108(b)(2)(A) exemption. App. 18a–19a (ellipses omitted).

The Second Circuit gave three reasons behind its conclusion. First, it pointed to the structure of the statute. Section 1106(a)'s text "begins with [a] carveout: 'Except as provided in section 1108 of this title.'" App. 19a

(quoting 29 U.S.C. § 1106(a)). Neither § 1106(b), which covers transactions between a plan and its fiduciaries, nor § 1106(c), which covers transfers of property to a party in interest, contains such language. The Second Circuit concluded, from this difference, that "the exemptions set out in § 1108" are "incorporated directly into § 1106(a)'s definition of prohibited transactions." *Id.*

Second, drawing largely from a series of criminal cases, the Second Circuit noted that § 1108's exceptions are so "integral to the offense" that they have become "part of the offense's ingredients." App. 20a (cleaned up). The court of appeals reasoned that one cannot "articulate what the statute seeks to prohibit without reference to the exception," and therefore "the exception should be understood as part of the definition of the prohibited conduct." App. 21a.

Finally, the court acknowledged that its decision might seem in tension with common law trust principles, which place the burden on the fiduciary to prove exemptions to liability. App. 24a. But the court observed that in an "analogous" context—i.e., claims under the Investment Company Act—plaintiffs must first plead that a fee is "so disproportionately large that it bears no reasonable relationship to the services rendered." App. 22a (quoting *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 346 (2010)). That same framework, the panel ruled, should apply to § 1106(a) claims: ERISA plaintiffs must first allege "facts calling into question the fiduciary's loyalty by challenging the necessity of the transaction or the reasonableness of the compensation provided," before the burden of persuasion shifts to fiduciaries. App. 24a.

In applying this framework to Petitioners' complaint, the Second Circuit acknowledged that § 1106(a) claims might in fact face a higher bar than breach-of-fiduciary-

duty claims. Here, for instance, "Cornell failed to seek bids from other recordkeepers and neglected to monitor the amount of revenue sharing"—which were sufficient to "state [a] claim for a breach of the duty of prudence." App. 25a. But because Petitioners had not shown that the recordkeeping fees at issue were "disproportionately large," they could not state a claim under § 1106(a)(1)(C). App. 26a (quoting *Jones*, 559 U.S. at 346). After disposing of the prohibited-transaction claim, the Second Circuit affirmed the district court's judgment as to each of Petitioners' other claims. The Second Circuit denied a petition for rehearing on December 20, 2023.

REASONS FOR GRANTING THE PETITION

I. COURTS ARE DIVIDED ON WHAT ERISA PLAINTIFFS MUST PLEAD TO SHOW A PROHIBITED TRANSACTION UNDER 29 U.S.C. § 1106(A)(1)(C).

"The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). The growing division among the federal courts of appeals over § 1106(a)'s scope, and its interplay with § 1108, upends that uniformity.

A. The Eighth and Ninth Circuits have applied the text of § 1106 as written.

The Eighth Circuit was the first court of appeals to address whether § 1106(a)(1)(C) applied to recordkeeping and investment management expenses. In *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 601 (8th Cir. 2009), the plaintiff asserted that fiduciaries of Wal-Mart's

retirement plan had "caused the Plan to enter into an arrangement with Merrill Lynch, a party in interest, under which Merrill Lynch received undisclosed amounts of revenue sharing payments in exchange for services rendered to the Plan." The *Braden* case, in other words, mirrored the allegations in this case. Unlike the Second Circuit here though, the Eighth Circuit held that such allegations were sufficient to state a § 1106(a)(1)(C) claim. *Id.* As the court observed, the revenue sharing "arrangement amounts to a 'direct or indirect furnishing of services between the plan and a party in interest.'" *Id.* (ellipses omitted) (quoting 29 U.S.C. § 1106(a)(1)(C)). Such allegations "are sufficient to shift the burden to appellees to show that 'no more than reasonable compensation [was] paid' for Merrill Lynch's services." *Id.* (alteration in original) (quoting 29 U.S.C. § 1108(b)(2)).

As with Respondents here, defendants in *Braden* contended that a plain text reading of § 1106(a)(1)(C) would turn "any business between a covered plan and a service provider [into] a prima facie 'prohibited transaction.'" *Id.* Unless plaintiffs are "required to plead facts plausibly suggesting a transaction is not exempted under § 1108," they argued, ERISA fiduciaries would "be forced to defend the reasonableness of every service provider transaction." *Id.*

The Eighth Circuit rejected such contentions. It pointed to § 1106's text, noting that the statute "does not by its terms demand that a plaintiff make any allegation of unreasonableness." *Id.* Instead, so long as § 1106's terms are met, the baton passes to Defendants to invoke § 1108's exemptions in order to "claim[] its benefits." *Id.* at 602 (quoting *FTC v. Morton Salt Co.*, 334 U.S. 37, 45 (1948)). *Braden* observed that this construction of § 1106 was "in keeping with traditional principles of trust law,"

which require that the fiduciary "bear[] the burden of justifying" its transactions. *Id.* Finally, the agreement between Wal-Mart and Merrill Lynch required the amounts of the revenue-sharing payments to be kept secret. It would "be perverse to require plaintiffs bringing prohibited transaction claims to plead facts that remain in the sole control of the parties who stand accused of wrongdoing." *Id.*

Last year, the Ninth Circuit joined the Eighth Circuit in embracing a "literal reading" of § 1106. *Bugielski*, 76 F.4th at 908. Again, the § 1106 claim in *Bugielski* involved fees paid to Fidelity. *Id.* at 898. Fidelity accrued its fees in three ways: It (1) obtained "a flat fee" from each plan participant, (2) "receive[d] 'revenue-sharing fees' from the mutual funds" offered on its "brokerage account platform," and (3) shared fees with a third party, which provided "investment advisory" and "manage[ment]" services to plan participants. *Id.*

Reversing the district court's grant of summary judgment, the Ninth Circuit held that plaintiffs had put forward a triable case that the plan fiduciaries had entered into a prohibited transaction. *Id.* at 901. The court acknowledged but found "unpersuasive the Third Circuit's decision in *Sweda v. University of Pennsylvania*" and "disagree[d] with [the] analysis" in *Albert v. Oshkosh Corp.*, 47 F.4th 570 (7th Cir. 2022). *Bugielski*, 76 F.4th at 905, 908. As discussed below, those courts of appeals require plaintiffs proceeding under § 1106 to show an intent to benefit the party in interest or allegations of self-dealing.

The Ninth Circuit, consistent with the Eighth Circuit, disclaimed that approach and instead relied on § 1106's "plain and unambiguous statutory text." *Id.* at 901. The Ninth Circuit acknowledged concerns over the expansive

reach that such a construction might engender. But it was "particularly reluctant to adopt an atextual interpretation" because ERISA is "an enormously complex and detailed statute." *Id.* (quoting *Conkright v. Frommert*, 559 U.S. 506, 509 (2010)). Given the law's "carefully crafted nature," reflecting "a decade of congressional study," the panel "decline[d] to read additional limitations, requirements, or exceptions into the statutory text." *Id.* (quoting *Mertens*, 508 U.S. at 251).

Because *Bugielski* reached the Ninth Circuit after summary judgment, the panel did not address whether, at the pleading stage, § 1108's exemptions are affirmative defenses for a defendant to invoke or elements that a plaintiff must negate. Instead, the Ninth Circuit reviewed the factual and legal record and determined that the district court "did not engage in" a correct § 1108 analysis, because it did not "consider the compensation Fidelity received from" its brokerage account platform or from third parties "when determining whether 'no more than reasonable compensation' was paid for Fidelity's services." *Id.* at 912 (quoting 29 C.F.R. § 2550.408b-2(a)(3)). The Ninth Circuit reversed and remanded, leaving the district court to "conduct this analysis in the first instance." *Id.*

B. The Third, Seventh, and Tenth Circuits have narrowed § 1106's scope through atextual requirements.

In sharp relief to the Eighth and Ninth Circuits, three circuits have looked outside of § 1106's text to inform their interpretation and application of the statute.

In *Sweda v. University of Pennsylvania*, 923 F.3d 320, 324 (3d Cir. 2019), TIAA and Vanguard were the designated recordkeepers for the University of

Pennsylvania's 403(b) plan. Both earned recordkeeping fees through revenue sharing. *Id.* at 325. Although plaintiffs had alleged that the University and its fiduciaries had "overpaid certain fees by up to 600%," those allegations were, in the Third Circuit's view, insufficient to "show[] that Penn intended to benefit" TIAA or Vanguard. *Id.* at 324, 340.

The Third Circuit acknowledged that "§ 1106(a)(1) could be read to have an extremely broad application"—a reading that "[s]ome courts have embraced." *Id.* at 335. But such a reading, in the court's view, "would be absurd," and would "miss the balance that Congress struck in ERISA" between safeguarding private enforcement on the one hand and encouraging employers to offer retirement plans on the other. *Id.* at 337. Instead, the Third Circuit reasoned, "absent factual allegations that support an element of intent to benefit a party in interest" "at the expense of [plan] participants," "a plaintiff does not plausibly allege" a prohibited transaction under § 1106(a)(1)(C). *Id.* at 338.

The Seventh Circuit, in *Albert v. Oshkosh Corp.*, 47 F.4th 570, 584 (7th Cir. 2022), was similarly guided by policy concerns when it rejected a "literal reading" of § 1106(a)(1)(C) in response to a claim that a plan provider engaged in prohibited transactions "by paying excessive fees for plan services." The court reasoned that a plain reading of § 1106 would be "nonsensical" because it would (presumptively) "prohibit transactions for services that are essential for defined contribution plans." *Id.* at 585. To avoid these "absurd results," the Seventh Circuit added its own pleading requirement: Plaintiffs must allege not only that a transaction falls within the ambit of § 1106(a)(1)(C)'s text, but also that the transaction "look[s] like self-dealing." *Id.*

Albert, however, did reaffirm the Seventh Circuit's earlier decision in *Allen v. GreatBanc Trust Co.*, 835 F.3d 670 (7th Cir. 2016), "that the exemptions for prohibited-transaction claims outlined in § 1108 are affirmative defenses that a plaintiff need not anticipate in a complaint." *Albert*, 47 F.4th at 585. The court of appeals ruled that plaintiffs must plead plausible allegations of self-dealing but that the burden remains on defendants to prove § 1108 exemptions from liability.

Finally, in *Ramos v. Banner Health*, 1 F.4th 769, 787 (10th Cir. 2021), the Tenth Circuit reasoned that a plain language reading of § 1106(a) would "put an end to run-of-the-mill service agreements" and "open[] plan fiduciaries up to litigation." In the panel's view, "some prior relationship must exist between the fiduciary and the service provider to make the provider a party in interest under § 1106." *Id.* That said, while "[p]laintiffs bear the initial burden of proving a . . . prohibited transaction[,]" defendants in the Tenth Circuit have "the opportunity to prove the prohibited transaction qualifies for one of ERISA's exemptions." *Id.* at 786.

In sum, while the Third, Seventh, and Tenth Circuits all read additional, atextual requirements into § 1106, they differ about what is required. The Tenth Circuit only requires plaintiffs to allege some prior, preexisting relationship between fiduciary and service provider; that alone "rais[es] concerns of impropriety." *Id.* The Third Circuit insists on allegations reflecting an intent to benefit the service provider. *Sweda*, 923 F.3d at 338. And the Seventh Circuit demands allegations of facts suggesting self-dealing, an arguably even more demanding standard. *Albert*, 47 F.4th at 585.

C. The Second Circuit's interpretation of § 1106 and its relationship to § 1108 represents yet another approach.

In disposing of Petitioners' claims, the district court here read § 1106 largely consistent with the rule in the Seventh Circuit: requiring a § 1106(a) plaintiff to "allege that the challenged transaction involved 'self dealing or disloyal conduct.'" App. 18a. But the Second Circuit rejected that approach, stating "that the language of § 1106(a)(1) cannot be read to demand explicit allegations" not found in the text. The Second Circuit, though, declined to endorse the "expansive" reading taken by the Eighth and Ninth Circuits. *Id.* Instead, it held that "at least some of [§ 1108's] exemptions" are "incorporated into § 1106(a)'s prohibitions." *Id.* Plaintiffs therefore must plead and prove facts tending to negate the applicability of § 1108's exemptions.

The Second Circuit reasoned that "one cannot articulate what the statute seeks to prohibit without reference to the exception," and therefore the "exception should be understood as part of the definition of the prohibited conduct." App. 21a. Put another way, standing on its own, § 1106(a) "miss[es] an ingredient of the offense." App. 23a (cleaned up). "[O]nly by incorporating" some of § 1108's exemptions into § 1106(a), "thus limiting [§ 1106(a)(1)(C)'s] reach to unnecessary or unreasonable compensation," could the proscription on prohibited transactions "be accurately and clearly described." *Id.* (citation omitted).

The Second Circuit's decision thus deepens two separate, related splits. It joined the Third, Seventh, and Tenth Circuits in spurning the plain language reading of § 1106(a) embraced by the Eighth and Ninth Circuits.

And it parted ways from the Seventh, Eighth, and Tenth Circuits in treating "at least some of" § 1108's exemptions as elements of the plaintiff's prima facie case rather than as affirmative defenses a defendant must invoke.

II. THE SECOND CIRCUIT'S DECISION IS INCORRECT.

The Second Circuit's holding—that "some of those exemptions" codified in § 1108 are "incorporated into § 1106(a)'s prohibitions"—errs, for three reasons.

A. The Second Circuit's decision is contrary to ERISA's text.

To start, "[i]n ERISA cases, as in any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well." *Harris Tr.*, 530 U.S. at 254 (cleaned up) (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)). Here that language is clear. It is undisputed (1) that Respondents are plan fiduciaries, (2) who "cause[d] the plan to engage in a transaction" that (3) "constitute[d] a direct . . . furnishing of goods, services, or facilities," (4) with its record-keepers, TIAA and Fidelity, (5) who are "part[ies] in interest." 29 U.S.C. § 1106(a)(1)(C); App. 14a–15a, 106a–107a. With these boxes checked, the onus shifts to Respondents to assert whether an exemption might apply, since "the burden of proving [a] justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC v. Morton Salt Co.*, 334 U.S. 37, 44–45 (1948).

Yet out of a concern that such a plain reading of § 1106(a) "would encompass a vast array of routine transactions," App. 21a, the Second Circuit—alongside the Third, Seventh, and Tenth Circuits—has imposed pleading and proof requirements on plaintiffs that simply are not present in the statute Congress wrote. ERISA's scheme designates, through § 1106(a), a broad array of ordinary transactions as presumptively suspect. And it places the burden on the Plan and its fiduciaries to prove that those transactions were conducted at arm's length and on reasonable terms via the § 1108 exemptions.

To be sure, judges and jurists might think that such a structure strikes the wrong balance between facilitating challenges to potentially suspicious transactions and preventing litigation that turns out to lack merit. But ERISA plan administration has not collapsed in the Eighth and Ninth Circuits. Nor did *Braden* seemingly gum up prohibited-transaction litigation in the Eighth Circuit. Even if the balance struck by the plain statutory language were wrong here, that is a question for Congress to address. "[C]ourts aren't free to rewrite clear statutes under the banner of our own policy concerns." *Azar v. Allina Health Serv.*, 139 S. Ct. 1804, 1815 (2019).

The Second Circuit's gesture toward the absurdity canon is unavailing. For one, the consequences of a plain language reading of this statute are a far cry from what the canon against *genuinely* absurd constructions could reasonably encompass. *See Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) ("[T]o justify a departure from the letter of the law . . . the absurdity must be so gross as to shock the general moral or common sense."); *see also Pub. Citizen v. Dep't of Just.*, 491 U.S. 440, 470–71 (1989) (Kennedy, J., concurring) (noting that the anti-absurdity canon should

only apply when "the plain language would be, in a genuine sense, absurd . . . where it is quite impossible that Congress could have intended the result"). Moreover, the atextual rules imposed by the Second, Third, Seventh and Tenth Circuits all require plan participants to plead facts that they would, in most cases, have no way of knowing before discovery.

The Second Circuit's *ad hoc* "fix" to this perceived problem creates particularly unique difficulties. The Second Circuit requires plaintiffs to allege "in the first instance" the absence of "at least some of th[e] exemptions" from § 1108 and, at summary judgment stage to "produce evidence of" their absence. App. 18a, 24a–25a. But § 1108 sets out nearly two dozen exemptions to § 1106(a). Aside from "the exemption for reasonable and necessary transactions codified by § 1108(b)(2)(A)," which, if any, other exemptions must a plaintiff address at the pleading stage and at summary judgment? Must a plaintiff guess whether a defendant will try to characterize a particular prohibited transaction as an investment "in a bank or similar financial institution supervised by the United States," § 1108(b)(4); a "privilege to convert [certain] securities," § 1108(b)(7); a "block trade," § 1108(b)(15); or a covered "foreign exchange transaction[]," § 1108(b)(18)? And if a plaintiff guesses wrong, and a defendant asserts an exemption the plaintiff has neglected to address, does that give the defendant a free pass on liability?

On all of these questions, the Second Circuit is silent. Its decision thus puts plaintiffs in the precarious position of having to plead the absence of exemptions that may (or may not) apply based on information that, absent discovery, they may (or may not) know. Faced with this

dilemma, applying the text as written proves the far more administrable and workable interpretation.

B. The Second Circuit's decision is contrary to administrative guidance and rules of statutory construction.

A plain text reading, moreover, tracks the administrative guidance and follows from customary rules of statutory construction.

The Department of Labor is the agency "charged with enforcing ERISA and its fiduciary duties." *Herman v. NationsBank Tr. Co.*, 126 F.3d 1354, 1363 (11th Cir. 1997); *see also Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 18 (2004) (noting that the DOL "agency view" reflects a "body of experience and informed judgment" (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Its regulations provide that "a service relationship between a plan and a service provider"—i.e., the very situation at issue here—"would constitute a prohibited transaction." Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. 5632, 5632 (Feb. 3, 2012) (to be codified at 29 C.F.R. pt. 2550). A separate regulation, 29 C.F.R. § 2550.408b-2, expounds on what must be shown to qualify for a § 1108 exemption. These include disclosure requirements, description of administration and recordkeeping services, and certain other reporting and monitoring obligations—all information generally residing with the fiduciary and service provider, rather than the plaintiff.

Furthermore, as a matter of statutory construction, it is axiomatic that "[w]hen a provis[ion] . . . carves an exception out of the body of a statute or contract, those

who set up such exception must prove it." *Javierre v. Cent. Altagracia*, 217 U.S. 502, 508 (1910). That is how this Court reads the Age Discrimination in Employment Act, *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 91 (2008); the Securities Act, *SEC v. Ralston Purina Co.*, 346 U.S. 119, 120, 126 (1953); the Clayton Act, *Morton Salt*, 334 U.S. at 43–45; and almost every other civil statute. It is also, until the decision below, how circuits have treated the interplay between § 1106 and § 1108. *See, e.g.*, *Ramos*, 1 F.4th at 786 ("[D]efendants then have the opportunity to prove the prohibited transaction qualifies for one of ERISA's exemptions."); *Allen*, 835 F.3d at 676 ("It is the defendant who bears the burden of proving a section 408 exemption.").

The authority the Second Circuit marshaled for its contrary ruling is inapt. For one, much of this authority rests on criminal, rather than civil, decisions.[3] *See* App. 19a–23a. Yet criminal and civil statutory interpretation are not one and the same. Courts read criminal statutes under background principles, like the presumption of innocence, that are absent from civil statutory interpretation. That is why, in *United States v. Vuitch*, 402 U.S. 62, 69–70 (1971), this Court required the prosecution to prove both the criminal act and the absence of a corresponding exception. Otherwise, "presumed guilt whenever the mere [act] was established[] would at the very least present serious constitutional problems

[3] The Second Circuit cited a single civil matter, *Roth v. CitiMortgage Inc.*, 756 F.3d 178 (2d Cir. 2014), in support of its holding on this point. But that decision is off the mark. As *Roth* notes, the plaintiff's Fair Debt Collection Practices Act claim failed because the plaintiff did not allege that the defendant was, in fact, a debt collector. *Id.* at 183. Here, there is no dispute that TIAA and Fidelity are parties in interest and provided services to the Plan.

under . . . the Fifth Amendment." *Id.* at 70 (internal quotation marks omitted).

Even so, courts have declined to read *Vuitch* broadly. *See United States v. Carey*, 929 F.3d 1092, 1098–99 (9th Cir. 2019) (noting that *Vuitch* hinged on the history of the District of Columbia's laws, societal presumptions about the medical profession, and structures of medical malpractice law). As *Carey* observes, the government must "prove (or negate) [an] exception" to an offense where the "'exception is incorporated in the enacting clause of a statute' such that the exception becomes an element of the offense." *Id.* at 1098–99 (quoting *Vuitch*, 402 U.S. at 70). That happens when both the crime and its exception are set forth in the same statutory provision—or, in *Vuitch*, when they are part of the same sentence. But where "a statute includes an exception to criminal liability separate from the elements of the offense," a different rule governs. *Id.* at 1098.

That rule, as summarized in *McKelvey v. United States*, 260 U.S. 353, 357 (1922), states that a "pleading founded on a general provision defining the elements of an offense . . . need not negative the matter of an exception made by a proviso or other distinct clause." Instead, consistent with the rule in civil cases, "it is incumbent on one who relies on such an exception to set it up and establish it." *Id.*; *see also Dixon v. United States*, 548 U.S. 1, 13–14 (2006) (footnote omitted) (reaffirming *McKelvey*). In other words, when the exception is in a "distinct clause," it is not an element of the offense—and *McKelvey* controls.

As relevant here, § 1108's exemptions reside in a wholly separate statutory provision, "distinct" from § 1106's list of prohibited transaction claims. When that

happens, whether in a criminal or civil matter, the result is the same: the "defendant who relies upon [the] exception" bears "the burden of establishing and showing that he comes within the exception." *United States v. Guess*, 629 F.2d 573, 576 (9th Cir. 1980).

C. The Second Circuit's approach is inconsistent with trust law.

The decision below fails for a final reason. As this Court has emphasized, "Congress invoked the common law of trusts to define the general scope of" the "authority and responsibility" of ERISA fiduciaries. *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985); *see also Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 111 (2008). "[T]he common law of trusts" thus "informs our interpretation of ERISA's fiduciary duties." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 253 n.4 (2008); John H. Langbein, *What ERISA Means By "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 Colum. L. Rev. 1317, 1319 (2003) ("Congress made a deliberate choice" to "absorb[] the core fiduciary duties of loyalty and prudence from trust law and extend[] them to govern all aspects of plan administration."). And § 1106(a)(1)'s set of prohibited transactions "supplements the fiduciary's general duty of loyalty," by "categorically barring certain transactions." *Harris Tr.*, 530 U.S. at 241–42.

The Second Circuit did allude to several of these foundational principles. It acknowledged, for instance, that under "common law rules" governing trusts, "it is typically the fiduciary—with better access to information concerning the transaction in question and thus in the best position to demonstrate the absence of self-dealing—

who ultimately bears the burden of proving the fairness of the transaction." App. 24a (internal quotation marks and citations omitted). But "before the burden shifts to the defendant," the plaintiff must establish his prima facie case. *Id.* It "follows," according to the Second Circuit, "that while the fiduciary retains the ultimate burden of proving the appropriateness of the transaction pursuant to § 1108(b)(2)(A)," the plaintiff must "in the first instance" plead "facts calling into question the fiduciary's loyalty by challenging the necessity of the transaction or the reasonableness of the compensation provided." *Id.*

But the Second Circuit's conclusion does not follow from its premise. After all, ERISA's text *already* says what a plaintiff must plead to show a prima facie case: that a fiduciary engaged in a transaction of "furnishing of goods, services, or facilities between the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(C).

More importantly, in examining § 1108(b)(2)(A)'s exemption for reasonable arrangements between a plan and a party in interest, the Second Circuit imported a liability standard from Section 36(b) of the Investment Company Act ("ICA"). App. 22a. That standard, the panel explained, requires plaintiffs to show that a fee is "so disproportionately large that it bears no reasonable relationship to the services rendered." *Id.* (citing *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 346 (2010)).

But borrowing from Section 36(b) of the ICA is inappropriate: For one, "no plaintiff ever has prevailed on a Section 36(b) claim." David Kotler et al., *Navigating the Recent Wave of Section 36(b) Litigation: What Have We Learned?*, 29 Investment Lawyer 1, 2 (2022). Thus, while Congress enacted ERISA's prohibited-transaction provision to "categorically bar[]" certain transactions,

Harris Tr., 530 U.S. at 241–42, the Second Circuit's reading makes it so that no transactions are categorically barred. Indeed, by looking to the ICA rather than trust law, the Second Circuit's approach might well suggest that no transactions are barred at all.

This Court's statement in *Lockheed Corp. v. Spink*, 517 U.S. 882, 893 (1996), that § 1106(a) aims to prohibit transactions that "involve uses of plan assets that are potentially harmful to the plan," also does not compel a different result.

That is because *Lockheed* does not instruct courts to apply § 1106(a) only to those transactions a *court* may find potentially harmful. Rather, *Lockheed* was describing what Congress intended to do when it drafted § 1106(a): to "supplement[]" ERISA's fiduciary duties by "categorically barring" certain transactions, which *Congress* deemed "potentially harmful." *Harris Tr.*, 530 U.S. at 241–42; *Lockheed*, 517 U.S. at 893. The call as to what to include and exclude in § 1106(a) is for Congress to make, not the courts.

Lockheed also, as it were, concerned the scope of an undefined term in § 1106(a)(1)(D)—specifically, whether an individual's release of their age discrimination claims constituted a "benefit" to a party in interest. 517 U.S. at 892–93. But ERISA defines every pertinent term in the provision at issue here, § 1106(a)(1)(C), and there is no dispute that the transactions at issue fall within a "'literal reading' of § 1106(a)(1)(C)." App. 17a; *see also Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020) ("We must enforce plain and unambiguous statutory language in ERISA, as in any statute, according to its terms.") (internal quotation marks and citation omitted).

Again, a plain language reading of § 1106(a) could require plan fiduciaries and service providers to justify a wide array of transactions, even routine and necessary ones. But whether that concern should outweigh the "fair and prompt enforcement of rights" by beneficiaries is a judgment best left to Congress. *See Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (quoting *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004)). Congress knows, for instance, that litigation is quite expensive. It could have reasonably believed that plaintiffs, given these prospective expenses, are not actually likely to shoulder the cost of challenging routine service agreements unless they have good reason to suspect that the defendant will be unable to prove a § 1108 exemption. And Congress could have drafted ERISA knowing that there are plenty of existing incentives against frivolous litigation—including the constraints of Rule 11 and that unsuccessful litigants bear their own costs and fees. *Allen*, 835 F.3d at 677. These considerations, taken together, provide a reasonable and workable framework for handling prohibited-transaction cases.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR REVIEW.

This case bears all the hallmarks of a matter that should be heard by this Court. The question involves the interpretation of a landmark federal statute, has divided the federal courts of appeals, and carries wide-ranging implications.

What is more, district courts in circuits that have yet to weigh in on § 1106(a)'s reach have likewise taken different approaches to the statute's scope. *Compare*

Henderson v. Emory Univ., 252 F. Supp. 3d 1344, 1355–56 (N.D. Ga. 2017) (citing *Braden*, concluding that allegations were "sufficient to state a claim for relief" under § 1106(a)(1)(C), and that "[t]he reasonableness of the [challenged] fees is a defense and did not have to be pleaded by the plaintiffs"), *with Sellers v. Anthem Life Ins.*, 316 F. Supp. 3d 25, 34, 38 (D.D.C. 2018) (dismissing § 1106(a)(1) claim because the "statute only prohibits such service relationships with persons who are 'parties in interest' by virtue of some other relationship").

Such diverging views create confusion for practitioners, beneficiaries, fiduciaries, and service providers alike. As one commentator recently noted, the Second Circuit's reasoning is "directly opposite" that of the Eighth Circuit's in *Braden*, meaning that plaintiffs in the Second Circuit now face a "much higher burden" than the Eighth Circuit's "plaintiff-friendly" standard. Jacklyn Wille, *Cornell Retirement Plan Win Adds to Growing ERISA Circuit Split*, Bloomberg Law (Nov. 16, 2023, 5:00 AM), https://perma.cc/5TGA-6RSC.

Other onlookers have suggested that the decision below puts ERISA doctrine "on a 'collision course' with the Labor Department's 'long-held doctrine' that all transactions between a plan and a party in interest are prohibited and the burden is on the defendant to show that a statutory exemption applies." *Id.* This "[u]ncertainty" in the circuits "put[s] benefits advisers on edge" and leaves relevant stakeholders without much-needed guidance. Austin R. Ramsey & Jacklyn Wille, *9th Cir. AT&T Ruling 'Watershed Moment' for Benefit Contractors*, Bloomberg Law (Aug. 8, 2023, 3:22 PM), https://perma.cc/2QEC-RY7E.

Indeed, if the Eighth and Ninth Circuits are right, then case law from the Second, Third, Seventh, and Tenth

Circuits already flouts the balance struck by Congress to protect plan participants. If the Eighth and Ninth Circuits are wrong, then all of the dire warnings invoked by circuits on the other side of the split—that a plain language reading of § 1106(a) could "encompass a vast array of routine transactions," with "all payments by plan fiduciaries to third parties in exchange for plan services" "presumptively prohibited," App. 21a—could play out in sixteen states.

This split, in short, is robust, open, and acknowledged. It is more than ready for this Court's guidance. The follow-up question, then, is how this Court should handle the petition here and the anticipated petition in *Bugielski*.

Between these two matters, this case is the superior vehicle for review. That is because here the Second Circuit affirmed the district court's dismissal of the prohibited-transaction claims at the motion to dismiss stage. It also affirmed the dismissal of all of Petitioners' other claims; no causes of action were remanded for further proceedings. This case therefore cleanly presents questions of law ready for the Court's resolution.

On the other hand, *Bugielski* reviewed a summary judgment ruling, replete with a dense factual record and significant discovery. *See, e.g.*, *Alas v. AT&T Servs.*, 2021 WL 4893372, at *8–12 (C.D. Cal. Sept. 28, 2021) (discussing exhibit evidence, deposition testimony, document appendices, and parties' prior motions practice). Moreover, on the prohibited-transaction claims at issue, the Ninth Circuit could not and did not answer several open questions that have divided federal courts. Because of the case's summary judgment posture, for instance, the Ninth Circuit could not opine on whether a plaintiff must plead the absence of § 1108 exemptions, or

whether these exemptions constitute affirmative defenses. 76 F.4th at 907. Nor did the Ninth Circuit address whether the revenue sharing in *Bugielski* was unreasonable or unnecessary, holding instead that the district court had not "engage[d]" in the correct "analysis," and should do so "in the first instance" on remand. *Id.* at 912. The Ninth Circuit also reversed in full or in part the district court's ruling as to many of plaintiffs' other claims, remanding the case for further proceedings. *Id.* at 917.

For cases in such a posture, this Court "generally await[s] final judgment in the lower courts before exercising . . . certiorari jurisdiction." *Va. Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., statement respecting the denial of certiorari); *Bhd. of Locomotive Fireman & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

To be sure, this Court may review matters in an interlocutory posture. 28 U.S.C. § 1254. But it seldom exercises that discretion "unless it is necessary to prevent extraordinary inconvenience and embarrassment." *Am. Constr. Co. v. Jacksonville, Tampa & Key W. R.R. Co.*, 148 U.S. 372, 384 (1893). Such considerations are lacking in *Bugielski*. Had the defendants there been at risk of irreparable injury or prejudice, they could have sought a stay of the Ninth Circuit's mandate. They did not. To the contrary, on the district court docket in February 2024, new attorney appearances were filed by both sides. The case was assigned to a different district judge, who has set a status conference for April 2024. At that conference or

in subsequent proceedings, the district court might well still decide that AT&T falls under § 1108's ambit, discharging it from liability. That is exactly why *Bugielski*'s posture counsels against review at this moment. *See Abbott v. Veasey*, 580 U.S. 1104, 1104 (2017) (Roberts, C.J., statement respecting the denial of certiorari). If the district court decides that AT&T acted in accordance with one of the § 1108 exemptions, then its claim to this Court is moot. If the district court decides otherwise, then defendants could readily appeal again and seek relief from the Ninth Circuit. By contrast, Petitioners here have a realized and unwavering stake in this appeal that only this Court can vindicate. Thus, although both cases present similar issues, Petitioners respectfully submit that the Court should grant certiorari here, not in *Bugielski*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 11, 2024

APPENDIX

APPENDIX

TABLE OF CONTENTS

Page

Appendix A — Court of appeals opinion (Nov. 14, 2023) ... 1a

Appendix B — District court opinion and order (Sept. 27, 2019) ... 42a

Appendix C — District court memorandum and order (Sept. 29, 2017) ... 87a

Appendix D — Court of appeals denial of rehearing/rehearing en banc (Dec. 20, 2023) ... 116a

Appendix E — 29 U.S.C. § 1106 ... 119a

Appendix F — 29 U.S.C. § 1108 ... 122a

APPENDIX A

21-88-cv (L)
Cunningham v. Cornell University

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2022

(Argued: October 19, 2022
Decided: November 14, 2023)

Nos. 21-88-cv; 21-96-cv; 21-114-cv

CASEY CUNNINGHAM, CHARLES E. LANCE, STANLEY T. MARCUS, LYDIA PETTIS, AND JOY VERONNEAU, individually and as representatives of a class of participants and beneficiaries on behalf of the Cornell University Retirement Plan for the Employees of the Endowed Colleges at Ithaca and the Cornell University Tax Deferred Annuity Plan

Plaintiffs-Appellants-Cross-Appellees,

-v.-

CORNELL UNIVERSITY, THE RETIREMENT PLAN OVERSIGHT COMMITTEE, MARY G. OPPERMAN, AND CAPFINANCIAL PARTNERS, LLC D/B/A CAPTRUST FINANCIAL ADVISORS,

Defendants-Appellees-Cross-Appellants.*

Before: LIVINGSTON, *Chief Judge,* and KEARSE and PARK, *Circuit Judges*.

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* The Clerk of Court is respectfully directed to amend the caption accordingly.

The plaintiff-appellant class participates in "403(b)" retirement plans administered by Cornell University ("Cornell"). Plaintiffs brought this suit against Cornell and its appointed fiduciaries alleging a number of breaches of their fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA"). Following motion practice in the United States District Court for the Southern District of New York (Castel, *J.*), plaintiffs appeal from entry of judgment in defendants' favor on all but one claim, which was settled by the parties. On appeal, plaintiffs challenge: (1) the dismissal of their claim that Cornell entered into a "prohibited transaction," pursuant to 29 U.S.C. § 1106(a)(1)(C), by paying the plans' recordkeepers unreasonable compensation, (2) the "parsing" of a single count alleging a breach of fiduciary duty into separate sub-claims at the motion to dismiss stage, (3) the award of summary judgment against plaintiffs for failure to show loss on their claim that defendants breached their duty of prudence by failing to monitor and control recordkeeping costs, and (4) the award of summary judgment to defendants on plaintiffs' claims that Cornell breached its duty of prudence by failing to remove underperforming investment options and by offering higher-cost retail share classes of mutual funds, rather than lower-cost institutional shares. Because we agree with the ultimate disposition of each of these claims, we AFFIRM the district court's judgment.

Defendants-appellees conditionally cross-appeal, in the event that the judgment is not affirmed, to challenge the district court's ruling that plaintiffs were entitled to a jury trial rather than a bench trial. As the judgment is affirmed, we dismiss the cross-appeals as moot.

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Jaime A. Santos and William M. Jay, Goodwin Procter LLP, Washington, DC; James O. Fleckner and Alison V. Douglass, Goodwin Procter LLP, Boston, MA; Stephanie A. Maloney, U.S. Chamber Litigation Center, Washington, DC, *for Chamber of Commerce of the United States of America and American Benefits Council, amici curiae in support of Defendants-Appellees-Cross-Appellants.*

DEBRA ANN LIVINGSTON, *Chief Judge:*

This case is one of a number of similar actions filed in federal courts across the country alleging that university pension plans, known as "403(b) plans," have been improperly managed in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq*. Plaintiffs- Appellants-Cross-Appellees Casey Cunningham, Charles E. Lance, Stanley T. Marcus, Lydia Pettis, and Joy Veronneau ("Plaintiffs") are participants in and beneficiaries of the Cornell University Retirement Plan for Employees of the Endowed Colleges at Ithaca ("Retirement Plan") or the Cornell University Tax Deferred Annuity Plan ("TDA Plan") (together, the "Plans").

Plaintiffs, individually and as representatives of a class of beneficiaries to the Plans, brought this action in the Southern District of New York (Castel, *J.*) against Cornell University ("Cornell") and its appointed fiduciaries (together, "Defendants"), alleging that they, among other things, failed to employ adequate processes for monitoring the Plans in violation of 29 U.S.C. § 1104, resulting in the retention of underperforming investment options and the payment of excessive fees, and engaged in transactions prohibited under 29 U.S.C. § 1106. Following motion practice, the district court dismissed or granted summary judgment to Defendants on all but one of Plaintiffs' claims. After a settlement was reached on the remaining claim, the district court entered judgment on December 22, 2020.

Plaintiffs challenge the district court's award of summary judgment on two counts alleging that Defendants breached their duty of prudence. In addition, Plaintiffs argue that the district court erred in dismissing one of their prohibited transactions claims for failure to state a claim and in parsing one of their claims for a breach of the duty of prudence at the motion-to-dismiss stage. Should the case be remanded to the district court,

Plaintiffs also argue that the end date of the class period should be vacated. Defendants conditionally cross-appeal, in the event that the judgment is not affirmed, from the district court's denial of their motion to strike the jury demand.

We conclude that the district court correctly dismissed Plaintiffs' prohibited transactions claim and certain duty-of-prudence allegations for failure to state a claim and did not err in granting partial summary judgment to Defendants on the remaining duty-of-prudence claims. In so doing, we hold as a matter of first impression that to state a claim for a prohibited transaction pursuant 29 U.S.C. § 1106(a)(1)(C), it is not enough to allege that a fiduciary caused the plan to compensate a service provider for its services; rather, the complaint must plausibly allege that the services were unnecessary or involved unreasonable compensation, *see id.* § 1108(b)(2)(A), thus supporting an inference of disloyalty. Because we affirm the district court's judgment, we do not reach the issues related to the end date of the class period, and we dismiss Defendants' conditional cross-appeals as moot.

BACKGROUND

I. Factual Background

Plaintiffs represent a class of current and former Cornell employees who participated in Cornell's two retirement plans, the Retirement Plan and the TDA Plan, from August 17, 2010 to August 17, 2016 (the "class period"). As of 2016, the Retirement Plan had over 19,000 participants and nearly $2 billion in net assets and the TDA Plan had over 11,000 participants and $1.34 billion in net assets. Both Plans are defined-contribution savings plans that are tax-deferred under 26 U.S.C. § 403(b), which applies to certain tax-exempt organizations. In a defined-contribution plan (of which the more familiar "401(k)"

plans are another type) participants maintain individual investment accounts, the value of which "is determined by the market performance of employee and employer contributions, less expenses." *Tibble v. Edison Int'l*, 575 U.S. 523, 525 (2015); *see* 29 U.S.C. § 1002(34).[1] The administrators of defined-contribution plans are responsible for choosing a menu of investment options, and plan participants then choose their investments from that menu.

A. Administration of the Plans

Cornell University is the named administrator for the Plans. Cornell delegated administrative responsibilities to Mary G. Opperman, Cornell University's Vice President for Human Resources, who in turn delegated certain responsibilities to Paul Bursic, Senior Director of Benefits Services and Administration (the "Benefits Department"), and employees under his direction. Opperman chaired the Retirement Plan Oversight Committee ("RPOC," and, together with Opperman and Cornell, the "Cornell Defendants"). The RPOC was established in 2010, in response to Internal Revenue Service regulations, to oversee the Plans. In 2011, the RPOC issued a Request for Proposal for a third-party consultant to assist the RPOC with selecting investment options and recordkeeping. After reviewing bids, the RPOC selected CapFinancial Partners, LLC Financial Advisors ("CAPTRUST") as the Plans' investment advisor and plan administration consultant. As part of its agreement with Cornell, CAPTRUST agreed to serve as a fiduciary under ERISA with regard to the selection of mutual funds available to the Plans.

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[1] Participants' accounts in the Retirement Plan are funded by a combination of employer and participant contributions, while the TDA Plan is funded entirely by employee contributions.

B. Recordkeeping Fees and Investment Options

In any defined-contribution plan, participants incur certain fees and expenses. Two kinds of fees are at issue in this case: investment management fees and recordkeeping fees. Investment management fees are charged by the investment providers and are associated with the services of buying, selling, and managing investments. Investment fees are typically expressed as an "expense ratio," that is, a percentage of the assets under management. For mutual funds, some providers offer different share classes of the same fund: a "retail" share class available to all investors at one expense ratio and "institutional" share classes with lower expense ratios available only to investors that satisfy certain minimum investment amounts—typically institutional investors.

Recordkeeping fees cover necessary administrative expenses such as tracking account balances and providing regular account statements. Recordkeeping fees are charged either as a flat fee, with each fund participant paying a set amount, or by "revenue sharing," in which the fund pays the recordkeeper a set portion of the fund's expense ratio. Recordkeeping services may be provided by the investment providers themselves or by third parties. Throughout the class period, Cornell retained two investment providers who also both served as the Plans' recordkeepers: Teachers Insurance and Annuity Association of America-College Retirement Equities Fund ("TIAA-CREF" or "TIAA") and Fidelity Investments Inc. ("Fidelity"). Both TIAA and Fidelity received recordkeeping fees through a revenue sharing model.

The Plans offered approximately 300 investment options throughout the class period, including fixed annuities (in which the investment returns a contractually specified minimum interest rate), variable annuities (in

which the investment returns a variable interest rate), and mutual funds.

II. Procedural History

Plaintiffs filed their Corrected Amended Complaint (the "Complaint") on February 24, 2017, and named as defendants Cornell, the RPOC, Opperman, and CAPTRUST. The Complaint alleged that Defendants violated their fiduciary duties under ERISA by failing to monitor and control the recordkeeping fees paid to TIAA and Fidelity, by failing to review the fees and performances associated with the Plans' investment options, and by entering into certain prohibited transactions.

A. The Alleged ERISA Violations

ERISA imposes various duties on fiduciaries, two of which are relevant here. The first is the duty of loyalty, which requires that the fiduciary act "solely in the interest of the participants and beneficiaries . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries[] and . . . defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A)(i)–(ii). The second is the duty of prudence, which requires that the fiduciary act "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." *Id.* § 1104(a)(1)(B); *see also Pension Benefit Guar. Corp. ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.* ("*PBGC*"), 712 F.3d 705, 715–17 (2d Cir. 2013) (discussing the "prudent man" standard of care).

Another section of ERISA, 29 U.S.C. § 1106, "codif[ies]," *Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1213 (2d Cir. 1987), and "supplements the fiduciary's

general duty of loyalty to the plan's beneficiaries, [29 U.S.C. § 1104(a)(1)], by categorically barring certain transactions deemed 'likely to injure the [retirement] plan,'" *Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 241–42 (2000) (citation omitted). These barred transactions are known as "prohibited transactions." 29 U.S.C. § 1106. Though "[t]he standards for fiduciary conduct in §§ 1104 and 1106 may overlap," breaching one of these provisions "does not necessarily" imply that the other has been violated as well. *Sweda v. Univ. of Pa.*, 923 F.3d 320, 327 (3d Cir. 2019).

The Complaint alleged that Cornell and its appointed fiduciaries violated their duties of prudence and loyalty under ERISA by: (1) offering certain products—namely, the CREF Stock Account and Money Market Account, as well as the TIAA Traditional Annuity ("Count I"); (2) failing to monitor and control recordkeeping fees ("Count III"); and (3) failing to monitor and offer appropriate investment options ("Count V"). Plaintiffs also brought prohibited transactions claims on each of these three theories ("Counts II, IV, and VI," respectively). And in Count VII, Plaintiffs brought a claim premised on Cornell's and Opperman's general failure to monitor the appointed fiduciaries.[2]

As noted by the district court, Count V spans a number of allegations that Defendants breached their fiduciary duty, specifically that they breached by:

(1) continuing to offer the CREF Stock Account and TIAA Real Estate Account despite their high fees and poor performance;

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[2] Plaintiffs' failure to monitor claim is the seventh claim for relief though it is incorrectly labeled in the Complaint as "Count VIII."

(2) selecting and retaining investment options, including actively managed funds, with high fees and poor performance relative to other investment options that were readily available to the Plans;

(3) selecting and retaining high-cost retail [class shares of] mutual funds instead of materially identical lower[-]cost institutional mutual funds [(i.e., the "share-class claim")];

(4) selecting and retaining investment options with unnecessary layers of fees;

(5) failing to consolidate the Plans' investment options into a "core lineup," depriving the Plans of their ability to qualify for lower cost share classes of certain investments and causing confusion among plan participants; [and]

(6) failing to monitor any of the Plans' options until October 1, 2014, and monitoring only "core" investment options after that date.

Cunningham v. Cornell Univ., No. 16-CV-6525 (PKC), 2017 WL 4358769, at *6 (S.D.N.Y. Sept. 29, 2017).[3]

B. Defendants' Motion to Dismiss

On September 29, 2017, the district court granted Defendants' motion to dismiss in part as to several claims, but it held that Plaintiffs plausibly alleged that Defendants failed to monitor recordkeeping fees and underperforming funds. The court dismissed the duty of loyalty claims in Counts I, III, and V, as well as the duty of prudence claim in Count I. The court also dismissed the prohibited transactions claims in Counts II, IV, and VI. In addition, the court dismissed Count III as to CAPTRUST. Within

[3] Citations in the form "A. _," "S.A. _," and "D.J.A. _" are to Appellants' Appendix, Appellants' Special Appendix, and Defendants-Appellees-Cross-Appellants' Appendix, respectively.

Count V, the district court found that certain allegations encompassed by the count (allegations 4, 5, and 6, as identified above) failed plausibly to allege a breach of the duty of prudence and accordingly dismissed them. This left within Count V only the claim premised on the retention of certain investments (allegations 1 and 2) and the share-class claim (allegation 3).

Thus, at that stage, the surviving claims were the duty of prudence claim in Count III as to the Cornell Defendants, the duty of prudence claim in Count V as to both the Cornell Defendants and CAPTRUST, and the duty to monitor claim in Count VII as to Cornell and Opperman. With regard to Count VII, the district court noted, however, that "the duty to monitor claim is only as broad as the surviving prudence claims and is otherwise dismissed." S.A. 77.

C. Defendants' Motion for Summary Judgment

On September 27, 2019, the district court granted summary judgment for Defendants on nearly all the remaining claims. On the duty of prudence claim in Count III, relating to the recordkeeping fees, the district court found that material issues of fact remained as to whether the Cornell Defendants breached their duty of prudence. However, because Plaintiffs did not present evidence of loss and abandoned any request for equitable relief, the district court granted summary judgment to the Cornell Defendants on Count III.

On the duty of prudence claim in Count V, the district court awarded summary judgment to the Cornell Defendants and CAPTRUST for the retention-of-certain-investments claim. The court also awarded summary judgment to CAPTRUST on the share-class claim in its entirety and to Cornell on the share-class claim with the exception of Plaintiffs' claim that Cornell breached the

duty of prudence by failing to swap out the retail TIAA-CREF Lifecycle target date funds for their identical institutional share-class funds. By awarding summary judgment to Defendants on most of Counts III and V, the district court also disposed of what remained of Count VII, which the district court had deemed to be derivative of the other claims. Thus, following the district court's summary judgment decision, all that remained was the duty of prudence claim against Cornell relating to the failure to adopt a lower-cost share class of the TIAA-CREF Lifecycle target date funds.

On December 22, 2020, the district court approved the parties' settlement of that remaining portion of the case. This appeal followed.

DISCUSSION

On appeal, Plaintiffs contend that the district court erred in granting in part both Defendants' motion to dismiss and Defendants' motion for summary judgment. Regarding the dismissed claims, Plaintiffs argue that Count IV of the Complaint stated a plausible claim that Cornell[4] caused the Plans to enter into prohibited transactions involving the Plans' recordkeepers, and that the district court erred in dismissing portions of Count V.[5] In addition, Plaintiffs challenge the district court's grant of summary judgment to Defendants on Counts III and V. In particular, as to Count III, Plaintiffs argue that the district court erred in holding that Plaintiffs had the burden of proving loss resulting from the alleged fiduciary

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[4] Throughout their briefs, the parties refer to "Cornell" without distinguishing between Cornell University as an individual party and the collective "Cornell Defendants." Because the distinction does not affect our analysis, we do the same except where explicitly noted.

[5] Plaintiffs do not appeal the dismissal of Counts I, II, VI, and VII. Accordingly, we do not address these claims.

breach. We first address the dismissed claims, and then turn to the district court's grant of partial summary judgment.

I. Dismissed Claims

We review a district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) *de novo*. *Bacon v. Phelps*, 961 F.3d 533, 540 (2d Cir. 2020). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility 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.*

Plaintiffs contend on appeal that the district court erred in dismissing their prohibited transactions claim for failure to state a claim and in parsing Count V by dismissing certain allegations that Defendants breached their duty of prudence. We address each of Plaintiffs' claims in turn.

A. Dismissal of Prohibited Transactions Claim (Count IV)

Plaintiffs challenge the district court's dismissal of their allegation, in Count IV, that Cornell violated 29 U.S.C. § 1106(a)(1)(C) by causing the Plans to engage in prohibited transactions with its recordkeepers, TIAA-CREF and Fidelity. Section 1106, entitled "Prohibited Transactions," consists of three provisions restricting the set of transactions in which plan fiduciaries may engage, two of which are relevant here: § 1106(b) "codifie[s]" certain core tenets of the duty of loyalty "by prohibiting [a plan's fiduciary from engaging in] transactions tainted by a conflict of interest and thus highly susceptible to self-

dealing," *Lowen*, 829 F.2d at 1213, while § 1106(a) "supplements the fiduciary's general duty of loyalty . . . by categorically barring certain transactions" involving a "party in interest," *Harris Trust*, 530 U.S. at 241–42 (quoting 29 U.S.C. § 1106(a)).

Plaintiffs' claim is premised on this supplementary provision, § 1106(a), entitled "[t]ransactions between plan and party in interest," which provides, in relevant part:

> Except as provided in section 1108 of this title:
>
> (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)(1) (emphasis added). In turn, ERISA defines a "party in interest" of an employee benefit plan to include "a person providing services to such plan." *Id.* § 1002(14)(B).

Section 1108, which, as reflected above, is expressly referenced in the text of § 1106(a), then provides certain "[e]xemptions from prohibited transactions," including, as relevant here, § 1108(b)(2)(A), which permits "[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." *Id.* § 1108(b)(2)(A).

Reading § 1106(a)(1)(C) in isolation of the exemptions in § 1108, ERISA would appear to prohibit payments by a plan to any entity providing it with any services. Invoking the precept that "[a] statute should be interpreted in a way that avoids absurd results," *United States v. Venturella*, 391 F.3d 120, 126 (2d Cir. 2004) (quoting *United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000)), "[s]everal courts," including the Third, Tenth, and Seventh Circuits, "have declined to read ERISA [in this manner] because it would prohibit fiduciaries from paying third parties to perform essential services in support of a plan," including "recordkeeping and administrative services," *Albert v. Oshkosh Corp.*, 47 F.4th 570, 584–85 (7th Cir. 2022). The courts to follow this tact have adopted different means of narrowing the statute. The Third Circuit, in *Sweda v. University of Pennsylvania*, read the provision to require allegation of "an element of intent to benefit a party in interest." 923 F.3d at 338. The Tenth Circuit, in *Ramos v. Banner Health*, limited the statute's apparent scope by holding that "some prior relationship must exist between the fiduciary and the service provider to make the provider a party in interest under § 1106." 1 F.4th 769, 787 (10th Cir. 2021). And the Seventh Circuit, in *Albert*, held that, to state a claim, the alleged transaction must "look[] like self-dealing," as opposed to "routine payments for plan services." 47 F.4th at 585.

Two circuits, on the other hand, have embraced the expansive reading of the statute that these other circuits have rejected as absurd. *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 601 (8th Cir. 2009); *Bugielski v. AT&T Servs., Inc.*, No. 21-56196, 2023 WL 4986499, at *9–10 (9th Cir. Aug. 4, 2023). In *Braden*, the Eighth Circuit held that the plaintiffs had stated a claim under § 1106(a)(1)(C) by alleging that a plan sponsor caused the plan to enter into an agreement with a party in interest in which it received "undisclosed amounts of revenue sharing payments in exchange for services rendered to the [p]lan." 588 F.3d at 601. Notably, in reaching this conclusion, the court rejected the defendant's argument that § 1106(a)(1)(C) should be read to require an allegation that the compensation paid was unreasonable, explaining that the exemption for "reasonable compensation" paid for "necessary" services, reflected in § 1108(b)(2)(A) is an affirmative defense that need not be addressed in order for a complaint to survive a motion to dismiss. *Id.* Though acknowledging that this would require "ERISA fiduciaries . . . to defend the reasonableness of every service provider transaction," the court reasoned that this result was justified by the language of the statute and traditional principles of trust law. *Id.* at 601–02.[6] Similarly, in *Bugielski*, the Ninth Circuit embraced what it characterized as a "literal reading" of § 1106(a)(1)(C), though—because the appeal arose from a grant of summary judgment—it did so without addressing whether the § 1108 exemptions are treated as affirmative defenses

[6] The Seventh Circuit, in *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 676 (7th Cir. 2016), later joined the Eighth Circuit in treating the § 1108 exemptions as affirmative defenses to § 1106(a), though, as discussed above, the court's subsequent opinion in *Albert* narrowed the scope of § 1106(a) to avoid what it characterized as the "absurd results" of this reading, 47 F.4th at 585.

at the pleading stage. 2023 WL 4986499, at *10 (quoting *Albert*, 47 F.4th at 584).

Following reasoning similar to that embraced by the Third, Tenth, and Seventh Circuits, the district court here declined to read § 1106(a)(1)(C) expansively and instead concluded that to state a claim under this provision a complaint must allege that the challenged transaction involved "self-dealing or disloyal conduct." *Cunningham*, 2017 WL 4358769, at *10 (internal quotation marks omitted). Holding that Plaintiffs' Complaint failed to make such allegations adequately, the district court dismissed the prohibited transaction claims, including Count IV. On appeal, Plaintiffs urge this Court to reject the district court's interpretation of the statute and instead adopt the Eighth and Ninth Circuits' more expansive reading.[7]

We agree—but only in part. While we agree that the language of § 1106(a)(1) cannot be read to demand explicit allegations of "self-dealing or disloyal conduct," we do not agree with the Eighth Circuit that, at the pleadings stage, the § 1108 exemptions should be understood merely as affirmative defenses to the conduct proscribed in § 1106(a). To the contrary, we conclude that at least some of those exemptions—particularly, the exemption for reasonable and necessary transactions codified by § 1108(b)(2)(A)—are incorporated into § 1106(a)'s prohibitions. And, accordingly, we hold that to plead a

[7] In support of their argument, Plaintiffs cite the preamble of a regulation not implicated here which broadly summarizes the structure of §§ 1106 and 1108. *See* Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. 5632, 5632 (Feb. 3, 2012). Because this prefatory text does not, in our view, bear on the issue of what conduct is prohibited by § 1106(a)(1)(C), we need not address what, if any, deference ought to be accorded to the agency's interpretation. In any case, to the extent this regulatory language is relevant, it supports our conclusion that § 1106(a)(1)(C) does not require explicit allegations of self-dealing.

violation of § 1106(a)(1)(C), a complaint must plausibly allege that a fiduciary has caused the plan to engage in a transaction that constitutes the "furnishing of . . . services . . . between the plan and a party in interest" *where that transaction was unnecessary or involved unreasonable compensation*. 29 U.S.C. §§ 1106(a)(1)(C), 1108(b)(2)(A).

Our reading flows directly from the text and structure of the statute. The text of § 1106(a) begins with the carveout: "Except as provided in section 1108 of this title . . . ." 29 U.S.C. § 1106(a). Thus, the exemptions set out in § 1108—including, most pertinently, the exemption for "reasonable compensation" paid for "necessary" services, § 1108(b)(2)(A)—are incorporated directly into § 1106(a)'s definition of prohibited transactions. This is in contrast to the language of § 1106(b), governing "[t]ransactions between plan and fiduciary," which makes no direct reference to the § 1108 exemptions in setting out the scope of the transactions it prohibits. *See id.* § 1106(b). Thus, while § 1106(a) explicitly incorporates the § 1108 exemptions, that those exemptions also extend to § 1106(b), to the extent they do, is signaled only by the text of § 1108. *See id.* § 1108(b) ("[T]he prohibitions provided in section 1106 of this title shall not apply to any of the following transactions . . . ."); *see also Mendez v. Barr*, 960 F.3d 80, 87 (2d Cir. 2020) ("[W]hen Congress uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." (internal quotation marks omitted)).

This difference is significant in light of the "familiar principle[s]" that guide our interpretation of statutory text. *Meacham v. Knolls Atomic Power Lab'y*, 554 U.S. 84, 91 (2008). Typically, when a statute is drafted "with exemptions laid out apart from the prohibitions," the exemptions are understood to serve as defenses that must

be raised affirmatively by the defendant. *Id.* However, that presumption does not apply when the exemptions are incorporated directly into the text of the relevant provision. *See United States v. Vuitch*, 402 U.S. 62, 70 (1971) ("[W]hen an exception is incorporated in the enacting clause of a statute, the burden is on the prosecution to plead and prove that the defendant is not within the exception."); *see also Roth v. CitiMortgage Inc.*, 756 F.3d 178, 183 (2d Cir. 2014) (holding that a plaintiff alleging a violation of the Fair Debt Collection Practices Act must plead that an exception to the definition of a debt collector does not apply). Thus, the fact that Congress drafted § 1106(a)—but not § 1106(b)—to reference the § 1108 exemptions supports the view that the burden of raising those exemptions lies, at least in part, with the plaintiff.

Further support for this view arises from the role the exceptions play in articulating the nature of the prohibited conduct. Typically, when "a statutory prohibition is broad and an exception is quite narrow, it is more probable that the exception constitutes an affirmative defense." *United States v. Durrani*, 835 F.2d 410, 421 (2d Cir. 1987). However, when "the exception [is] not narrow," such that it can be "presumed in most cases" that the exemption will ultimately remove the challenged conduct from the prohibition's scope, the logical inference cuts in the opposite direction. *United States v. Carey*, 929 F.3d 1092, 1103 (9th Cir. 2019). In such cases, the exception is so "integral . . . to the offense" that it is "part of the offense's 'ingredients.'" *Id.* at 1101. As the Supreme Court articulated in the criminal context long ago, "[w]here a statute defining an offense contains an exception," the pleadings must allege that the conduct at issue does not fall within the exception whenever the exception "is so incorporated with the language defining the offense that

the ingredients of the offense cannot be accurately and clearly described if the exception is omitted." *United States v. Cook*, 84 U.S. (17 Wall.) 168, 173 (1872). In other words, when one cannot articulate what the statute seeks to prohibit without reference to the exception, then the exception should be understood as part of the definition of the prohibited conduct—and thus its inapplicability must be pled.

In our view, this is such a statute. Section § 1106(a) seeks to prohibit transactions that "involve uses of plan assets that are potentially harmful to the plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 893 (1996). And yet, when read in isolation from its exemptions, § 1106(a) would encompass a vast array of routine transactions the prohibition of which cannot be consistent with that statutory purpose.[8] To the contrary, if all payments by plan fiduciaries to third parties in exchange for plan services were presumptively prohibited, then the plan would be severely compromised: "Employee benefit plans would no longer be able to outsource tasks like recordkeeping, investment management, or investment

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[8] Relatedly, when read in such an expansive manner, § 1106(a) would pull within its scope various transactions that would not ultimately be deemed prohibited once the exemptions are considered, thus creating tension with the section's heading: "Prohibited Transactions." *See* 29. U.S.C. § 1106. [sic] As the Supreme Court recently remarked, "[t]he title of a statute and the heading of a section" have "long [been] considered" to be "tools available for the resolution of a doubt about the meaning of a statute." *Dubin v. United States*, 143 S. Ct. 1557, 1567 (2023) (internal quotation marks omitted). Reliance on a section heading is particularly appropriate where, as is the case here, the text of the heading was enacted along with the statutory text, *see* ERISA, Pub. L. 93-406, § 406, 88 Stat. 829, 879 (codified as 29. U.S.C. § 1106), as opposed to added later during the codification process, *see* Daniel B. Listwa, Comment, *Uncovering the Codifier's Canon: How Codification Informs Interpretation*, 127 YALE L.J. 464, 475–76 (2017) (explaining this distinction).

advising, which in all likelihood would result in lower returns for employees and higher costs for plan administration." *Albert*, 47 F.4th at 586.[9] Such a result would be inconsistent with the Supreme Court's "recogni[tion] that ERISA represents a careful balancing" intended to "induce[] employers to offer benefits by assuring a predictable set of liabilities." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (internal quotation marks omitted).

The broad scope of § 1106(a) thus places greater weight on the § 1108 exemptions, in particular § 1108(b)(2)(A), to limit the scope of the statute's prohibitions to only those transactions that actually present a risk of harm to the plan and raise the sort of concerns implicated by the duty of loyalty—the duty § 1106(a) has been held to "supplement[]." *Harris Trust*, 530 U.S. at 241–42. This is because, while it is true that a fee "so disproportionately large that it bears no reasonable relationship to the services rendered" raises an inference that it was not "the product of arm's length bargaining," *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 346 (2010) (discussing an analogous provision of the Investment Company Act of 1940, 15 U.S.C. § 80a-35(b)), the same cannot be said of routine payments made to service providers. *Cf. In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 748–49 (Del. Ch. 2005) (explaining that an inference of "bad faith"—and thus of breach of the duty of loyalty—is permissible when the transaction is one in

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[9] A prohibition on such outsourcing would also create tension with other provisions in ERISA. For example, under § 1104(a)(1)(A), a fiduciary must discharge his duties solely in the interests of the participants and their beneficiaries and for the exclusive purpose of "providing benefits to participants and their beneficiaries" and "defraying reasonable expenses of administering the plan," thus seemingly contemplating that there would be expenses associated with plan administration. 29 U.S.C. § 1104(a)(1)(A).

which "no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration"), *aff'd*, 906 A.2d 27 (Del. 2006). By contrast, § 1106(b) on its face is restricted only to transactions carrying indicia of a conflict of interest—and, as already noted, does not directly incorporate the § 1108 exemptions. *See* 29 U.S.C. § 1106(b).

Put simply, when read on its own, § 1106(a)—and in particular, § 1106(a)(1)(C), which addresses the "furnishing of goods, services, or facilities between the plan and a party in interest"—is missing an "ingredient[] of the offense." *Cook*, 84 U.S. (17 Wall.) at 173. That ingredient is the exemption for "reasonable compensation" paid for "necessary" services, reflected in § 1108(b)(2)(A). It is only by incorporating that exemption into the prohibition set out in § 1106(a)(1)(C), and thus limiting its reach to unnecessary or unreasonable compensation, that the offensive conduct the statute discourages can "be accurately and clearly described." *Cook*, 84 U.S. (17 Wall.) at 174.

In reaching this decision, we leave undisturbed our prior decisions holding that it is ultimately the defendant fiduciary that bears the burden of persuasion with regard to the applicability of the § 1108 exemptions. *See Lowen*, 829 F.2d at 1215 ("We believe that a fiduciary charged with a violation of Section 406(b)(3) . . . must prove by a preponderance of the evidence that the transaction in question fell within an exemption."); *Henry v. Champlain Enters., Inc.*, 445 F.3d 610, 618–19 (2d Cir. 2006) ("Under ERISA, the fiduciary bears the burden of proving by a preponderance of the evidence that the [plan] received 'adequate consideration' [pursuant to 29 U.S.C. § 1108(e)] for its purchase of company stock" where the seller was a "party in interest.")

As we explained in *Lowen*, when construing ERISA's provisions, we look to "common law rules regarding trustees" for guidance, and, under such rules, it is typically the fiduciary—with better access to "information concerning the transaction in question" and thus "in the best position to demonstrate the absence of self-dealing"—who ultimately bears the burden of proving the fairness of the transaction. 829 F.2d at 1215; *see also Marshall v. Snyder*, 572 F.2d 894, 900 (2d Cir. 1978) ("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."). But, "[i]n the law of trusts," before the burden shifts to the defendant, it falls on the "beneficiaries [to] establish[] their *prima facie* case by demonstrating the trustees' breach of fiduciary duty." *N.Y. State Teamsters Council Health & Hosp. Fund v. Est. of DePerno*, 18 F.3d 179, 182 (2d Cir. 1994). In the present case, where Congress has "supplement[ed] the fiduciary's general duty of loyalty" with enumerated prohibitions on certain types of transactions, *Harris Trust*, 530 U.S. at 241–42, it follows that while the fiduciary retains the ultimate burden of proving the appropriateness of the transaction pursuant to § 1108(b)(2)(A), it falls on the plaintiff in the first instance to allege—and, at the summary judgment stage, to produce evidence of—facts calling into question the fiduciary's loyalty by challenging the necessity of the transaction or the reasonableness of the compensation provided.[10]

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[10] Accordingly, this case presents an example of the fact that, particularly with regard to statutory regimes where the "exceptions . . . are numerous," "[t]he burden[] of proof will not always follow the burden of pleading." 2 MCCORMICK ON EVID. § 337 (8th ed.).

Turning to the allegations of Count IV, Plaintiffs allege simply that "[b]ecause TIAA and Fidelity are service providers and hence 'part[ies] in interest,' their 'furnishing of' recordkeeping and administrative services to the Plans is a prohibited transaction unless Cornell proves an exemption." Appellants' Br. at 61 (quoting 29 U.S.C. §§ 1106(a)(1), 1108(b)(2)(A)). But, as we have explained, it falls on Plaintiffs—not Cornell—to allege in the first instance that the transactions were unnecessary or that the compensation was unreasonable. Plaintiffs have done neither.

Our conclusion is unchanged when we look—as Plaintiffs ask us to do in the alternative—beyond the allegations of Count IV and to those of Count III, which asserts a claim that Cornell breached the duty of prudence by allowing the Plans to pay unreasonable administrative fees. While Plaintiffs have alleged several forms of procedural deficiencies with regard to recordkeeping, their complaint does not plausibly allege that the compensation was itself unreasonable. For example, Plaintiffs claim that Cornell failed to seek bids from other recordkeepers and neglected to monitor the amount of revenue sharing received by TIAA-CREF and Fidelity. Such process-oriented allegations may well be sufficient to state claim for a breach of the duty of prudence, as the district court here found, but they cannot sustain a claim pursuant to § 1106(a)(1)(C) and § 1108(b)(2)(A).

Closer, yet still insufficient, are Plaintiffs' allegations that the Plans paid substantially more than what the Complaint identified as a "reasonable recordkeeping fee." A. 111. According to the Complaint, "a reasonable recordkeeping fee for the Plans would have been $1,050,000 in the aggregate for both Plans combined," calculated using "a flat fee based on $35 per participant." *Id.* The Plans allegedly paid many times more than that:

Plaintiffs alleged that "the Retirement Plan paid between $2.9 and $3.4 million (or approximately $115 to $183 per participant) per year from 2010 to 2014" and "the TDA Plan paid between $1.8 and $2.2 million (or approximately $145 to $200 per participant) per year from 2010 to 2014." A. 111–12. But it is not enough to allege that the fees were higher than some theoretical alternative service. Whether fees are excessive or not is relative "to the services rendered," *Jones*, 559 U.S. at 346, and it is not unreasonable to pay more for superior services. Yet, here, Plaintiffs have failed to allege any facts going to the relative quality of the recordkeeping services provided, let alone facts that would suggest the fees were "so disproportionately large" that they "could not have been the product of arm's-length bargaining." *Id.* Consequently, we affirm the district court's dismissal of Count IV.

B. "Parsing" of Count V

Plaintiffs also argue that the district court improperly parsed Count V at the motion-to-dismiss stage by separately addressing each of the six categories of allegations made in connection with the count and holding that only two—those relating to the retention of certain high-cost investment options and those relating to the share-class claim—succeeded in stating claims, while dismissing the others. When a "complaint relies on circumstantial factual allegations to show a breach of fiduciary duties under ERISA," the question on a motion to dismiss is whether those particular allegations "give rise to a 'reasonable inference' that the defendant committed the alleged misconduct." *PBGC*, 712 F.3d at 718–19 (quoting *Iqbal*, 556 U.S. at 678) (emphasis omitted). This evaluation "requires assessing 'the allegations of the complaint as a whole'" and drawing all "reasonable inference[s]" in the plaintiff's favor. *Id.* at 719 (quoting

Matrixx Initiatives Inc. v. Siracusano, 563 U.S. 27, 47 (2011)). Where, as here, a plaintiff's claim of breach depends on a fiduciary's process in managing a plan, a court may appropriately find that the allegations "considered as a whole" state a claim for relief even if no single allegation "directly addresses the process." *Braden*, 588 F.3d at 596.

But the imperative that a court consider the complaint "as a whole" does not mean that in all cases the entirety of any particular count must stand or fall as one. Far from it. Under the Federal Rules of Civil Procedure, "a plaintiff may plead two or more statements of a claim, even within the same count, regardless of consistency." *Henry v. Daytop Vill., Inc.*, 42 F.3d 89, 95 (2d Cir. 1994) (citing Fed. R. Civ. P. 8(e)(2) (1987) (current version at Fed. R. Civ. P. 8(d)(2))); *see* Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones."). Thus, in a single count, a plaintiff may plead multiple—sometimes contradictory—theories of liability. When that is the case, it is incumbent on the court to address each theory on its own merit, separating out as necessary the allegations underlying the various claims. *See, e.g.*, *Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 66–67 (2d Cir. 2016) (noting that "[p]laintiffs allege in Count II" two different "theor[ies]" of imprudence and assessing each theory separately). That is precisely what the district court did in this case when it assessed individually each of the categories of allegations included in Count V to determine whether any supported an inference that there were flaws in Defendants' processes that could, in turn, give rise to a cause of action for fiduciary breach.

In challenging the district court's evaluation, Plaintiffs misunderstand the limited nature of the district court's

dismissal order. Central to Plaintiffs' contention of error is their argument that by dismissing the allegations relating to Cornell's alleged failure to streamline the investment menus and to engage in adequate monitoring (the fifth and sixth categories of allegations in Count V, respectively), the district court precluded consideration of relevant pieces of "circumstantial evidence supporting the overall claim in Count V that Defendants had a flawed investment-review process." Appellants' Br. at 23. But that is not what the district court did. The district court's summary judgment decision, as well as its Rule 37 order denying Defendants' motion to exclude evidence purportedly unrelated to the non-dismissed allegations, made clear that the court's determination at the motion-to-dismiss stage was essentially limited to rejecting claims that breaches of "a procedural duty" could support a claim for relief even in the absence of allegations of harm resulting to the plan and its participants. *Cunningham v. Cornell Univ.*, No. 16-CV-6525 (PKC), 2019 WL 4735876, at *11 (S.D.N.Y. Sept. 27, 2019) (quoting *In re SunEdison, Inc. ERISA Litig.*, 331 F. Supp. 3d 101, 114 (S.D.N.Y. 2018), *aff'd sub nom. O'Day v. Chatila*, 774 F. App'x 708 (2d Cir. 2019)); *see also Cunningham,* 2017 WL 4358769, at *6 ("[W]hile plaintiffs claim that the Plans offered too many options to participants, they do not allege that any plan participant was actually harmed by defendants' failure to reduce the number of options available.").

Significantly, the district court did not preclude Plaintiffs from relying on evidence related to those alleged procedural errors to support its theory of breach and loss premised on the retention of imprudent investment options. To the contrary, in ruling on summary judgment, the district court extensively discussed the evidence of Defendants' putative deficiencies in monitoring the Plans' options and their retention of numerous investment

options in addressing whether Defendants had acted imprudently in not removing various underperforming funds. *Cunningham*, 2019 WL 4735876, at *11–16. In this context, it is clear that the district court's decision on the motion to dismiss was not an improper "parsing" of Count V, but rather a refining of it so as to identify clearly the theories upon which Plaintiffs had stated a claim. We accordingly find no merit in Plaintiffs' objections to the district court's evaluation of Count V at the motion-to-dismiss stage.

II. Grant of Summary Judgment

"We review a grant of summary judgment *de novo* and may affirm on any basis that finds support in the record." *Tolbert v. Smith*, 790 F.3d 427, 434 (2d Cir. 2015) (internal citations omitted). Summary judgment is appropriate "only when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law." *Riegel v. Medtronic, Inc.*, 451 F.3d 104, 108 (2d Cir. 2006), *aff'd*, 552 U.S. 312 (2008); *see also* Fed. R. Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* In determining whether summary judgment is appropriate, we must "construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Aulicino v. N.Y.C. Dep't of Homeless Servs.*, 580 F.3d 73, 79–80 (2d Cir. 2009) (internal quotation marks omitted).

Plaintiffs contend on appeal that the district court erred in granting summary judgment to Defendants on the duty of prudence claim in Count III, premised on recordkeeping fees, and those duty of prudence claims in Count V that survived the motion to dismiss, premised on

the retention of underperforming investment options and on the failure to transition to lower-cost institutional shares.[11] We address each of Plaintiffs' claims in turn.

A. Recordkeeping Fees Claim (Count III)

Plaintiffs argue that the district court erred in awarding summary judgment to the Cornell Defendants on Plaintiffs' claim that they breached their duty of prudence by failing to monitor and control the recordkeeping fees paid to TIAA and Fidelity. In particular, Plaintiffs argue that the Cornell Defendants acted imprudently by failing (1) to determine whether the amount of revenue sharing with the recordkeepers was competitive or reasonable; (2) to solicit bids from competing recordkeepers on a flat fee or per participant basis; and (3) to engage in a reasoned decision-making process to determine whether the Plans should move to a single recordkeeper. The district court concluded that genuine issues of material fact remained with respect to whether the Cornell Defendants breached the duty of prudence, but nevertheless granted summary judgment in favor of the Cornell Defendants because Plaintiffs failed to establish that any breach resulted in loss. *Cunningham*, 2019 WL 4735876, at *5–7. Because we agree that Plaintiffs failed to meet their burden as to loss, we affirm.[12]

To obtain damages for a fiduciary breach pursuant to 29 U.S.C. § 1104(a), it is not enough to show that the defendant's conduct failed to meet the high standard

[11] As discussed *supra*, the district court granted only partial summary judgment on Count V.

[12] Having concluded that Plaintiffs did not meet their burden regarding loss, we do not address the district court's determination that genuine issues of material fact precluded summary judgment on whether the Cornell Defendants breached the duty of prudence.

erected by the duty of prudence; the plaintiff must also prove that a "loss resulted from that failure." *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 104 (2d Cir. 1998); *see* 29 U.S.C. § 1109(a) ("Any person who is a fiduciary . . . shall be personally liable to make good to [the] plan any losses to the plan resulting from [a] breach."). "Losses are measured by the difference between the plan's actual performance and how the plan would have performed if the funds had been [operated] like other funds being [properly operated] during the same period." *Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 567 (2d Cir. 2016) (internal quotation marks and citation omitted). However, in recognition of the "superior access to information" the fiduciary commonly has, when a plaintiff alleges excessive fees, we do not require that the plaintiff prove that the "alternative fee ranges" established by the plaintiff are "the *only* plausible or prudent ones." *Sacerdote v. New York Univ.*, 9 F.4th 95, 113 (2d Cir. 2021) (citation omitted). Instead, once the plaintiff has "prove[n] that the charged fees were imprudent," in the sense that the charges were the result of the fiduciary's imprudent actions, and "shown a prudent alternative," "the burden under ERISA shifts to the defendant[] to disprove any portion of potential damages by showing that the loss was not caused by the breach of fiduciary duty"—that is, by showing that some or all of the loss would have still occurred had "the fiduciary . . . not breached its duty." *Id.*[13]

[13] Though some of our sister circuits have described this burden-shifting regime in terms of the distinction between the elements of "loss" and "causation," *see, e.g.*, *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 33 (1st Cir. 2018), we have generally refrained from doing so because of the confusion such terminology may generate in cases concerning one fiduciary's liability for losses relating to another fiduciary's actions, *see Silverman*, 138 F.3d at 106 (Jacobs, J., with Meskill, J., concurring) (noting that requiring the plaintiff to prove

On appeal, Plaintiffs contend that, having advocated a genuine dispute regarding the Cornell Defendants' breach of duty, they need only "show an expenditure for recordkeeping fees" to "establish a genuine dispute regarding loss." Appellants' Br. at 51. Mere proof that "the Plans paid TIAA and Fidelity recordkeeping fees (though the exact amount is disputed)" is all Plaintiffs argue they must show to make out their *prima facie* claim. *Id.* This misunderstands our precedent. While it is true that Defendants ultimately bear the burden of proof as to the objective reasonableness of improvidently paid fees, Plaintiffs must do more than establish only that some payment was made; they must also show, at a minimum, that there was a "prudent alternative" to the allegedly imprudent fees paid. *Sacerdote*, 9 F.4th at 113. That is, Plaintiffs must provide evidence of a "suitable benchmark[]" against which loss could be measured. *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 34 (1st Cir. 2018). This they have not done.

At the summary judgment stage, Plaintiffs sought to establish loss primarily through the testimony of two putative experts on the subject of the market for contribution plan recordkeeping, Al Otto and Ty Minnich. Both declared that, in their "experience," a reasonable recordkeeping rate for the Plans would have been $35 to $40 per participant. *Cunningham*, 2019 WL 4735876, at *9–10. But neither offered any cognizable methodology in support of their conclusions, instead simply referencing their knowledge of the relevant industry and a few examples of other university plans that paid lower fees, though without explaining how these putative comparators were selected. Given these deficiencies, the

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causation served as a check on the "broadly sweeping liability" of a new fiduciary for plan losses caused by a prior fiduciary's breaches).

district court did not abuse its discretion in excluding Otto's and Minnich's testimony on the recordkeeping fees. *See In re Pfizer Inc. Sec. Litig.*, 819 F.3d 642, 665 (2d Cir. 2016) ("If the opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)] and Rule 702 [of the Federal Rules of Evidence] mandate the exclusion of that unreliable opinion testimony." (internal quotation marks omitted)).

After the exclusion of Plaintiffs' expert testimony, what remains are numerical data from TIAA and CAPTRUST—scattered numbers of plan participants, assets, and recordkeeping fees for certain plans—which are insufficient standing alone to show loss. In particular, Plaintiffs cite (1) TIAA's pricing data showing the Plans paid fees higher than the 25th percentile of TIAA's "200 largest clients," A. 2167, 2301–02, and (2) CAPTRUST's data identifying a handful of plans with over 10,000 participants that paid lower recordkeeping fees than the Plans based on certain measures, A. 2303, 2496. But a district court is not required to "scour the record" to find losses. *CILP Assocs., L.P. v. PriceWaterhouse Coopers LLP*, 735 F.3d 114, 125 (2d Cir. 2013) (internal quotation marks omitted). And, as the district court explained, absent admissible "expert testimony opining on why [these data are] based upon relevant comparators or would lead a reasonable juror to conclude that Cornell could have achieved lower fees," *Cunningham*, 2019 WL 4735876, at *6, such data are not enough, on their own, to establish a "prudent alternative" fee, *Sacerdote*, 9 F.4th at 113, or otherwise prove loss.

Accordingly, having concluded that Plaintiffs' evidence was insufficient to demonstrate a genuine dispute of material fact as to whether the Plans suffered loss, we

affirm the award of summary judgment to the Cornell Defendants on Count III.[14]

B. Retention of Certain Investment Options Claim (Count V)

Next, Plaintiffs challenge the district court's grant of summary judgment to Defendants on the claim, found in Count V, that Cornell and CAPTRUST employed a flawed process in reviewing the set of investment options made available through the Plans and, as a result, failed to remove underperforming options. Plaintiffs' theory of liability separates the class period into two parts, with the dividing line being July 2013, when CAPTRUST presented the RPOC with a quantitative assessment of the Plans' investment options.

As to the pre-July 2013 period, Plaintiffs argue that Cornell lacked a sufficient process for reviewing the performance of the investment options, instead relying on the "opinions of conflicted non-fiduciary third parties (TIAA and Fidelity) as to whether their proprietary investments complied with ERISA." Appellants' Br. at 33. As to the post-July 2013 period, Plaintiffs largely take issue with what they characterize as a five-year delay on the part of the RPOC to act on CAPTRUST's

[14] In the alternative, Plaintiffs argue that it was improper for the district court to grant summary judgment on Count III based on the failure to show loss because, in addition to seeking damages, Plaintiffs sought equitable relief, including reformation of the Plans to require bids for recordkeeping. *See Brock v. Robbins*, 830 F.2d 640, 647 (7th Cir. 1987). However, as the district court noted, Plaintiffs failed to make this argument below and thus can be inferred to have abandoned it. *See Jackson v. Fed. Express*, 766 F.3d 189, 198 (2d Cir. 2014) ("[A] court may . . . infer from a party's partial opposition that relevant claims or defenses that are not defended have been abandoned"); *Katel Ltd. Liab. Co. v. AT & T Corp.*, 607 F.3d 60, 68 (2d Cir. 2010) ("An argument raised for the first time on appeal is typically forfeited.").

identification of underperforming funds. They also argue that CAPTRUST breached its duties by "fail[ing] to review the Plans' investments for the first 19 months of its tenure" and then conducting a review that "was of generally lower quality than its work for other clients." *Id.* at 34–35. Because we conclude that a review of the record fails to reveal sufficient evidence for a rational trier of fact to find in Plaintiffs' favor on any of these theories, we affirm the district court's grant of summary judgment to Defendants on this claim.

To establish a breach of the duty of prudence, a plaintiff must, as discussed above, show that the fiduciary's conduct fell below the "[p]rudent man standard of care." 29 U.S.C. § 1104(a). An ERISA fiduciary acts imprudently "by failing to properly monitor investments and remove imprudent ones." *Tibble*, 575 U.S. at 530. Accordingly, "plan fiduciaries are required to conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options" and they must "remove [any] imprudent investment from the plan within a reasonable time." *Hughes v. Nw. Univ.*, 142 S. Ct. 737, 742 (2022).

That said, "[b]ecause the content of the duty of prudence turns on 'the circumstances . . . prevailing' at the time the fiduciary acts, the appropriate inquiry will necessarily be context specific." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014) (quoting 29 U.S.C. § 1104(a)(1)(B)). Moreover, "[a]t times, the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes*, 142 S. Ct. at 742. So, when we ask "whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment," we do so "based upon

information available to the fiduciary at the time of each investment decision and not from the vantage point of hindsight." *PBGC*, 712 F.3d at 716 (internal quotation marks and citations omitted).

Given this context-sensitive inquiry, we conclude that no reasonable trier of fact could determine that Cornell's process was flawed such that Cornell violated its duty of prudence. Turning first to the pre-July 2013 period, Plaintiffs have failed to put forward any evidence suggesting that Cornell's process for evaluating the performance of its investment line-up fell below the then-prevailing fiduciary standard. While Cornell's oversight did improve with time, it had processes to review the Plan's investment options at all points during the class period. As Paul Bursic, the Senior Director of the Benefits Department, testified, Cornell's Benefits Department regularly "received and reviewed detailed performance and investment disclosures for all the plans' investment options"—prior to the RPOC's formation—which were prepared by TIAA and Fidelity and included "performance benchmarking information." D.J.A. 283. In addition to distributing these disclosures to plan participants, *id.*, the Benefits Department used them to identify "potential problems," such as "funds that may be in trouble," D.J.A. 194. Though Bursic acknowledged that this level of monitoring may fall below the expectations for plan fiduciaries today, he testified that it was consistent with then-prevailing standards, *see* D.J.A. 193—a point that Plaintiffs' evidence does not refute.[15]

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[15] Indeed, though we do not rely on it, we observe that the fact that Plaintiffs' counsel have brought claims premised on similar purported process failures against numerous other university plan fiduciaries, *see* Petition for Writ of Certiorari at 8, *Hughes*, 142 S. Ct. 737 (No. 19-1401) (noting that the actions against various university 403(b) plans have all involved "substantively identical" allegations), tends to

After the Internal Revenue Service updated its regulations on 403(b) plans, Cornell formed the RPOC for the purpose of enhancing oversight of the plans. Cornell then engaged CAPTRUST as an outside consultant and launched a multi- year process focused on redesigning and streamlining the investment menu. The process, unsurprisingly, took time to implement. Initially, there was a "set-up period" during which Cornell "continued to do [its] work as [it] had for years before through the Benefits [Department]," while also developing an Investment Policy Statement ("IPS") with CAPTRUST to guide the evaluation of investment options going forward. A. 1007, 1056–60. Once the IPS was approved in late 2012, Cornell initiated a much more systematized and in-depth review of the investment options, beginning in earnest with CAPTRUST's presentation of its performance analysis in July 2013.

In this context, Cornell considered not only CAPTRUST's bottom-line recommendations, but also the quantitative and qualitative criteria described in the IPS, the availability of options among peer institutions, and the popularity of options among plan participants in developing a revised menu of investment options. With regard to the post-July 2013 period, Plaintiffs accuse Cornell of merely "passively accept[ing]" CAPTRUST's proposal without engaging more deeply in the monitoring process. Appellants' Br. at 37. But, as the district court explained, such an accusation is inconsistent with the record. The undisputed evidence shows that the RPOC engaged critically with CAPTRUST's presentation, asking questions and, at times, expressing concerns about

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undermine the argument that such processes fell below the then-prevailing fiduciary standard.

CAPTRUST's methodologies for evaluating particular investments.

Cornell's review of the Plans ultimately led to the rollout of a new investment menu beginning in 2017. Plaintiffs argue that this delay in removing the underperforming investment options fell below the fiduciary standard. But, given ERISA's command to evaluate a fiduciary's actions "based upon information available to the fiduciary at the time of" the decision, *PBGC*, 712 F.3d at 716, we conclude there is no genuine dispute at to whether Cornell acted to streamline the investment menu "within a reasonable time," *Hughes*, 142 S. Ct. at 742. As Plaintiffs acknowledge, the delay in rolling out the streamlined investment menu was largely due to the time the RPOC took to assess the risk of disruption to participants associated with a drastic change to the investment line-up and to ensure that alternative investment options would still remain available to participants.

Though Plaintiffs dismiss these concerns as "nonpecuniary goals" that an ERISA fiduciary should not be permitted to rely on, Appellants' Reply Br. at 24, we disagree. "An ERISA defined[-]contribution plan is designed to offer participants meaningful choices about how to invest their retirement savings." *Renfro v. Unisys Corp.*, 671 F.3d 314, 327 (3d Cir. 2011). Accordingly, in the context of a defined-contribution plan, one "component of the duty of prudence" is "a fiduciary's obligation to assemble a diverse menu of options" for participants. *Hughes*, 142 S. Ct. at 741–42. It is thus consistent with the fiduciary's duty to take steps to ensure that participants' ability to make selections among "a broad range of investment alternatives," 29 C.F.R. § 2550.404c-(b)(3)(i), is not merely illusory.

We also conclude that no reasonable jury could find that CAPTRUST was imprudent in its conduct. Plaintiffs' allegations of delayed and deficient performance do not find support in the record. As discussed above, upon retention, CAPTRUST began working with Cornell to develop its process for reviewing investment-option performance, helping to create and then effectuate the IPS. Plaintiffs offer no evidence that it carried out these tasks in a subpar way, instead merely pointing out differences in the amount of detail between CAPTRUST's July 2013 presentation and an analysis provided to a different university. But Plaintiffs offer no reason to assign to this difference the significance they suggest. Accordingly, we affirm the district court's award of summary judgment to Defendants on this claim.

C. Share Class Claim (Count V)

Finally, Plaintiffs argue that the district court erred in awarding partial summary judgment to the Cornell Defendants on the share-class claim. With regard to this claim, the district court concluded that issues of material fact precluded summary judgment as to whether Cornell violated its fiduciary duty by failing to swap out the higher-cost retail shares offered through the Plans for lower-cost, but otherwise identical, institutional shares. Nevertheless, the district court held that for all the funds other than one in particular—the TIAA-CREF Lifecycle fund—Plaintiffs had not come forward with evidence that the funds in question met the eligibility threshold for the lower-cost share classes, thus precluding any finding of loss attributable to Cornell's purported deficiencies. Accordingly, the court granted summary judgment to the Cornell Defendants except with regard to the Lifecycle fund. On appeal, Plaintiffs challenge the district court's conclusions regarding loss. In opposition, Cornell Defendants, in addition to defending the district court's

loss holding, urge us to affirm on the alternative ground that Plaintiffs' evidence was insufficient to create a genuine issue as to whether Cornell acted imprudently. Because we agree that Plaintiffs failed to produce evidence of imprudence, we affirm.

In its summary judgment decision, the district court explained that Plaintiffs had presented evidence that, although TIAA began offering identical institutional share classes for its mutual funds to certain defined contribution plans in 2009, Cornell did not transition any of its funds to institutional shares with TIAA until early 2012. The district court held that this was sufficient evidence of imprudence, relying on its determination that "[t]here is no evidence in the form of affidavits or otherwise that anyone at Cornell attempted to transition to the institutional share class funds before February 22, 2012." *Cunningham*, 2019 WL 4735876, at *17. But this analysis overlooked that Cornell did, in fact, present evidence that it had tried to effectuate such a transition but was rebuffed.

Specifically, according to his deposition testimony, prior to 2011, Bursic had "lobbied the president of TIAA" on numerous occasions to allow Cornell's Plans to transition to institutional shares, arguing that it was not appropriate for large plans like Cornell's to be paying the same fees as the much less sizable plans associated with small liberal arts colleges like nearby Ithaca College. D.J.A. 189. Bursic testified that although TIAA "very clearly and very firmly" denied the requests, he continued to "tr[y] very hard" to push for this change, even as Fidelity began to permit Cornell to transition to lower-cost share classes in 2010. D.J.A. 130, 136, 189–90. These efforts remained unsuccessful until 2012, when CAPTRUST became involved and helped Cornell negotiate a new contract with TIAA that capped the total

revenue TIAA could collect from the Plans and had TIAA refund excess revenue to the Plans.[16]

Given this evidence, a reasonable finder of fact could not conclude that Cornell could have forced, or should have tried harder to force, TIAA to offer the Plans the lower-cost share funds at an earlier date. Accordingly, we affirm the grant of summary judgment for Defendants on this claim.

CONCLUSION

We have considered all of Plaintiffs' contentions on appeal and have found in them no basis for reversal. For the foregoing reasons, we AFFIRM the judgment of the district court.[17] Defendants' conditional cross-appeals are dismissed as moot.

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[16] Additionally, though it was undisputed that TIAA began offering institutional share classes for its mutual funds in 2009 and that some non-Cornell 403(b) clients transitioned to using those share classes around that time, Plaintiffs did not identify any evidence supporting its contention that TIAA would have then considered the Plans to be eligible categorically for these types of shares. In particular, although Plaintiffs' Local Rule 56.1 statement asserted that all defined contribution plans were eligible for institutional share classes if they had over $2 million invested in most of the funds, the record evidence cited therein does not support this claim. *See* A. 954–60, 2303, 2377–78. On appeal, Plaintiffs have identified no alternative support for this proposition and, in any case, "[a] court is permitted to rely solely upon Local Rule 56.1 statements [and the materials cited therein] in deciding motions for summary judgment" and may do so "to the exclusion of other facts in the record." *Tompkins v. Metro-N. Commuter R.R. Co.*, 983 F.3d 74, 81 n.26 (2d Cir. 2020).

[17] Because we do not remand any claims to the district court, Plaintiffs' arguments regarding the class period end date and Defendants' appeal of the district court's denial of Cornell's motion to strike Plaintiffs' jury demand are moot.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CASEY CUNNINGHAM, CHARLES E. LANCE, STANLEY T. MARCUS, LYDIA PETTIS, and JOY VERONNEAU, individually and as representatives of a class of participants and beneficiaries on behalf of the Cornell University Retirement Plan for the Employees of the Endowed Colleges at Ithaca and the Cornell University Tax Deferred Annuity Plan,

Plaintiffs,

-against-

CORNELL UNIVERSITY, THE RETIREMENT PLAN OVERSIGHT COMMITTEE, MARY G. OPPERMAN, and CAPFINANCIAL PARTNERS, LLC d/b/a CAPTRUST FINANCIAL ADVISORS,

Defendants.

16-cv-6525 (PKC)

OPINION AND ORDER

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CASTEL, U.S.D.J.

Plaintiffs are a certified class of participants and beneficiaries of certain benefit plans associated with Cornell University ("Cornell"). In broad terms they allege that fiduciaries of the plans have not managed the plans prudently and have allowed the plans to underperform and accrue excessive administrative fees. The plans at issue

are the defined-contribution Cornell University Retirement Plan for the Employees of the Endowed Colleges at Ithaca (the "Retirement Plan") and the Cornell University Tax Deferred Annuity Plan (the "TDA Plan") (together, the "Plans.") Plaintiffs assert that defendants Cornell, the Retirement Plan Oversight Committee (the "Committee"), the Committee's head Mary G. Opperman (collectively, "Cornell Defendants"), and the investment advisory firm Capfinancial Partners, LLC d/b/a CAPTRUST Financial Advisors ("CAPTRUST"), have breached their duties as fiduciaries of the Plans.

In September 2017, the Court granted in part defendants' motions to dismiss claims in the Amended Complaint and determined that plaintiffs had plausibly alleged claims under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1104, 1106 for breach of ERISA's fiduciary duty of prudence based on failure to monitor recordkeeping fees and underperforming funds. Cunningham v. Cornell Univ., 16 cv 6525 (PKC), 2017 WL 4358769, at *13 (S.D.N.Y. Sept. 29, 2017), upheld in part Counts III, V, and VII of the Amended Complaint.[1] Defendants now move for summary judgment on these remaining claims. (Docs 221, 233.) Both sides also move for exclusion of certain expert testimony. (Docs 225, 228, 278.) For the following reasons, the Court grants in part and denies in part defendants' motions for summary judgment and motions to exclude.[2]

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[1] Count III has been dismissed as to CAPTRUST. Cunningham, 2017 WL 4358769, at *13. Count VII was only plead against Cornell Defendants. (See Am. Compl. at 136; Doc 81.)

[2] Plaintiffs filed a motion in limine to exclude the Declaration of Scott Matheson, Managing Director of CAPTRUST (Doc 248-12) and to preclude Matheson from testifying at trial (see Doc 278). Defendants filed a motion in limine to exclude the testimony of Plaintiffs' experts Wendy Dominguez and Gerald Buetow. The Court does not rely on Matheson's declaration in its ruling on summary judgment and need

BACKGROUND

The Court assumes familiarity with the facts of the case as discussed in the Court's previous decisions. See Cunningham v. Cornell Univ., 16 cv 6525, 2019 WL 275827 (S.D.N.Y. Jan. 22, 2019) (class certification opinion); Cunningham v. Cornell Univ., 16 cv 6525, 2018 WL 4279466 (S.D.N.Y. Sept. 6, 2018) (partial denial of motion to strike jury demand); Cunningham, 2017 WL 4358769 (partial denial of motion to dismiss). A brief overview is provided below. The following facts are either undisputed or described in the light most favorable to plaintiffs as the non-moving party. See Costello v. City of Burlington, 632 F.3d 41, 45 (2d Cir. 2011).[3]

I. The Parties

Plaintiffs are members of a certified class of employees or former employees of Cornell from August 17, 2010 through August 17, 2016 who were participants in the Plans. (Pls.' 56.1 ¶1; Doc 287; Cornell Defs.' 56.1 ¶1; Doc 232.) The Plans are organized under Section 403(b) of the

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not determine whether Matheson can testify at trial at this stage. Accordingly, plaintiffs' motion is denied without prejudice to renewal at the Final Pretrial Conference. The Court similarly need not decide the motion to exclude Dominguez and Buetow's testimony to rule on the summary judgment motion and denies this motion without prejudice to renewal. (Docs 225, 253.)

[3] Plaintiffs and Cornell Defendants engaged in improper Rule 56.1 practices. Cornell Defendants' Reply to the Response contains citations to material not cited in their original statement, and both the Reply and Plaintiffs' 56.1 Response are rife with legal argument improper in a Rule 56.1 Statement. See Sattar v. U.S. Dep't of Homeland Sec., 669 F. App'x 1, 3 (2d Cir. 2016). "Local Civil Rule 56.1 does not provide for a 'reply' in further support of a Rule 56.1 statement of undisputed facts." Capital Records, LLC v. Vimeo, LLC, 09 cv 10101 (RA), 2018 WL 4659475, at* l (S.D.N.Y. Sept. 7, 2018). The Court will not consider legal argument in the 56.1 Statements or Defendants' Reply except to the extent it responds to new facts in Plaintiffs' Counterstatement.

Internal Revenue Code, 26 U.S.C. § 403(b). (Pls.' 56.1 ¶4; Cornell Defs.' 56.1 ¶4.) The Retirement Plan is funded through employer contributions of up to 10% of each participant's base pay up to $275,000. As of December 31, 2016, the Retirement Plan had over 19,000 participants and nearly $2 billion in net assets. (Pls.' 56.1 ¶8; Cornell Defs.' 56.1 ¶8.) The TDA Plan is funded entirely through employee contributions. As of December 31, 2016, the TDA plan had over 11,000 participants and $1.34 billion in net assets. (Pls.' 56.1 ¶9; Cornell Defs.' 56.1 ¶9.) Cornell is the named administrator for the Plans. (Pls.' 56.1 ¶13; Cornell Defs.' 56.1 ¶13.)

Prior to the formation of the Committee and the retention of CAPTRUST, review of the Plans fell to Cornell's Benefits Services and Administration Department. (Pls.' 56.1 ¶¶36-37; Defs' 56.1 ¶¶36-37.) In July 2007, the Internal Revenue Service published updated regulations governing plans organized under section 403(b), effective January 1, 2009. See Revised Regulations Concerning Section 403(b) Tax-Sheltered Annuity Contracts, 72 Fed. Reg. 41128, 41128-59 (July 26, 2007). In November 2010 the Committee had its first meeting. It was explained that the new committee was "needed[] to establish a formal committee with fiduciary responsibility for overseeing the retirement plans as required by the recent IRC Section 403(b) regulations." (Meeting Minutes November 29, 2010 at 1; Doc 250-19.) The Committee was formally chartered in April 2011 and listed as its primary duties "policy oversight for the selection of investment options for the Plans by means of [a to-be-created Investment Policy Statement], and establish[ment of] criteria to review and monitor the investment performance of the investment options." (Pls.' 56.1 ¶15; Cornell Defs.' 56.1 ¶15; Charter at 2; Doc 250-17.)

The Committee and Cornell solicited a Request for Proposal ("RFP") in April 2011 for outside consulting services. The RFP noted Cornell sought "professional assistance to determine the proper investment vehicles" and help with "recordkeeping." (RFP at 1; Doc 246-1.) Cornell retained CAPTRUST in December 2011 as its outside consultant. (Pls.' 56.1 ¶¶40, 73; Cornell Defs.' 56.1 ¶¶40, 73; CAPTRUST Services Agreement of December 8, 2011; Doc 246-2.) CAPTRUST agreed to serve as a fiduciary under ERISA "with regard to the selection of . . . mutual fund(s) available to the Plans within the platform provided by the Plan's Administrator." (See Doc 246-2.) CAPTRUST is an investment advisory firm that has "developed an expertise in working with colleges and universities . . . as well as the providers of 403(b) administrative services." (Doc 224-2 at 9). CAPTRUST gave its first presentation to the Committee regarding Cornell's investment lineup in January 2012. (Pls.' 56.1 ¶41; Cornell Defs.' 56.1 ¶41).

II. Review of the Plans' Recordkeeping Fees

The Plans used two outside vendors for recordkeeping and administrative services: Teachers Insurance and Annuity Association of America-College Retirement Equities Fund ("TIAA-CREF" or "TIAA'") and Fidelity Investments Inc. ("Fidelity"). (Pls.' 56.1 ¶¶10, 19-20; Cornell Defs.' 56.1 ¶¶10, 19-20.) The parties dispute whether it was common for section 403(b) plans to employ more than one recordkeeper and the feasibility of consolidating to a single recordkeeper for plans that have historically employed multiple recordkeepers. (E.g., Pls.' 56.1 ¶¶26-27; Cornell Defs.' 56.1 ¶¶26-27.)

Recordkeepers may be compensated for their services with fees charged as a percent of assets in funds (a

"revenue sharing" model)[4] or with fees charged on a per participant basis. (Pls.' 56.1 ¶¶28, 30; Cornell Defs.' 56.1 ¶¶28, 30.) In revenue sharing arrangements, fund managers collect asset-based fees known as an "expense ratio" and pass a portion of those fees on to vendors as compensation for administrative and recordkeeping services. (Pls.' 56.1 ¶28; Cornell Defs.' 56.1 ¶28.) Some investment managers will introduce different "share classes" of the same investment option that will have different revenue sharing percentages owed. (Pls.' 56.1 ¶29; Cornell Defs.' 56.1 ¶29.) During the relevant period, TIAA and Fidelity received fees based on a revenue sharing model. (Pls.' 56.1 ¶28; Cornell Defs.' 56.1 ¶28.)

At the January 2012 Committee meeting, CAPTRUST presented information regarding possible recordkeeper consolidation. (Pls.' 56.1 ¶41; Cornell Defs.' 56.1 ¶41; see January 2012 Meeting Materials at 38-39; Doc 248-3.) CAPTRUST presented to the Committee advantages and disadvantages of four possible recordkeeping approaches, including a single recordkeeper scenario. (Id.) Minutes from the July 2012 Committee meeting state that the Committee chose to "validate[] the current multi-vendor arrangement" and instead transition to a tiered approach to their investment lineup to "provide[] symmetry among the three vendors." (Id.; July 2012 Meeting Minutes at 3; Doc 248-9.)[5]

In addition to considering recordkeeper consolidation, CAPTRUST requested and received fee reductions of 0.05% from TIAA and 0.10% from Fidelity in 2012. (Pls.' 56.1 ¶50; Cornell Defs.' 56.1 ¶50.) TIAA and Fidelity

[4] These percentages are known as "basis points." One basis point is 0.01%. (Pls.' 56.1 ¶50; Cornell Defs.' 56.1 ¶50.)

[5] Weill Cornell Medical Center, whose plans are also governed by the Committee, maintained Vanguard as a third recordkeeper. (Pls.' 56.I ¶¶57, 145; Cornell Defs.' 56.1 ¶¶57, 145; see Doc 246-1 at 3.)

agreed to retroactively refund $1.2 million in fees paid for 2011 as one-time revenue credits. (Id.) CAPTRUST asked for and received fee reductions from TIAA or Fidelity eight additional times between 2012 and January 2018. (Pls.' 56.1 ¶51; Cornell Defs.' 56.1 ¶51.) The annual recordkeeping fee paid by the Plans to TIAA and Fidelity over the period of 2010-2016, whether measured in basis points or per participant, is disputed. (E.g., Pls.' 56.1 ¶¶50-51, 62-63; Defs.' 56.1 ¶¶50-51, 62-63.)

In 2016, the issue of possible recordkeeper consolidation briefly arose again. Some Committee members emailed CAPTRUST to evaluate alternative recordkeeping arrangements and place the issue on the Committee's agenda. (See Doc 247-2.) The issue was not placed on the agenda for the March 2016 meeting and was not discussed at subsequent Committee meetings. (See, e.g., Docs 238-9 (March 31, 2016 meeting minutes); 290-19 (June 29, 2016 meeting minutes); 290-20 (September 28, 2016 meeting minutes).)

III. Review of the Plans' Investment Lineups

Prior to January 2012, Benefits Services was charged with reviewing the investment lineup and monitoring fund performance. (Pls.' 56.1 ¶¶36-37; Defs' 56.1 ¶¶36-37.) Benefits Services sent performance summaries developed by vendors to participants, developed a two-tier preferred fund lineup, and grouped funds into asset classes to help participants more easily make fund choices. (Bursic Dep. at 70-77; Doc 248-1.) Benefits Services did not engage in benchmarking fund performance. (Id. at 77:24-83:1.) In January 2012, at the first Committee meeting CAPTRUST attended, CAPTRUST reviewed its methodology for monitoring investments. (Pls.' 56.1 ¶74; Cornell Defs.' 56.1 ¶74; see Doc 248-8 at 3.) CAPTRUST noted for TIAA-CREF and Fidelity that there were "[s]everal underperforming funds that we would eliminate

on a go forward basis" and "[m]any funds in asset classes that we would not recommend the plan utilize." (Doc 248-3 at 30, 31,) They discussed objectives of adopting methodology for ongoing plan monitoring and redesigning the plans' investment lineups to create a "tiered" investment structure consisting of target date funds (Tier I), core investment options (Tier II), and non-core secondary asset classes (Tier III). (Doc 248-3 at 34; see Doc 248-13 at 6-9 (April 13, 2012 Presentation discussing tiered options).) This restructuring was approved by the Committee in July 2012. (Doc 248-9.)

CAPTRUST and Cornell also discussed creating an Investment Policy Statement ("IPS"), which was approved by the Committee in November 2012. (Pls.' 56.1 ¶¶74-75; Cornell Defs.' 56.1 ¶¶74-75; Docs 248-3 at 47, 252-5, 252-6.) The IPS contains policies "intended to serve as guidelines for the Investment Fiduciaries in fulfilling their responsibilities" under ERISA. (Doc 252-6 at 4.) It discusses criteria for evaluating and potentially replacing investments and states that, "[w]ith few exceptions, all actively managed investments should rank in the top 50% of their given peer group for the 3- or 5-year annualized period at the time of their selection." (Doc 252- 6 at 7, 9; see Pls.' 56.1 ¶76; Cornell Defs.' 56.1 ¶76.) Under Investment Evaluation, the IPS states that CAPTRUST shall provide the Committee with "relative rankings [of investment alternatives] against appropriate indexes and within appropriate peer groups" and that the "Committee will review the Plans' investment alternatives" at least on an annual basis. (Doc 252-6 at 5, 8.)

In July 2013 CAPTRUST presented its first three and five-year benchmarking analysis of Plan investments. (July 2013 Meeting Presentation; Doc 241-1.) The presentation offered a "high level review" of performance using a series of green, yellow, or red signs to designate

funds with average, below average, or severely-below average performance in comparison to their peer groups. (July 31, 2013 Meeting Minutes at 3; Doc 290-12; see Doc 241-1.) The TIAA Real Estate Account, one of the two primary funds plaintiffs accuse defendants of imprudently retaining, did not have any comparative review and the CREF Stock Fund Account, the second main fund at issue, had yellow squares indicating it ranked below the 50th percentile of its peer group for the three and five-year periods. (Doc 241-1 at 49.) Neither fund was in the "failing criteria" category based on the quantitative review. (Pls.' 56.1 ¶¶238-39.) The presentation also offered recommended investment menus for the core lineup of Tier II funds, and included both the TIAA and CREF funds. (Doc 241-1 at 13.)

In September 2013 CAPTRUST and Cornell further discussed the new proposed investment lineup. They stated that minimization of disruption was a priority as was adequate consideration to funds already being used. (Doc 252-8 at 3.) Members of the Committee testified that Cornell was concerned with making overwhelming changes to the plan lineups regarding fund selection because in the years following the 2008-09 financial crisis Cornell had already begun restructuring compensation and retirement plans and worried about too much disruption for plan participants. (See Doc 224-2 at 11-12.)

In September 2014, CAPTRUST again benchmarked fund performance and included detailed performance data for all funds. (Doc 291-45.) The TIAA Real Estate Account and CREF Stock Fund Account's fund fact sheets showed underperformance based on metrics used by CAPTRUST for their one, three, five, and ten-year benchmarks (Doc 291-45 at 28, 29, 40, 52.) The fund sheets contained additional information related to returns, investment profile, style exposure, and performance versus risk. (Id.)

CAPTRUST gave an overall "green dot" ranking to both funds and stated that the funds "meet[] the guidelines set forth by CAPTRUST for distinct investments in the [IPS]" based on "qualitative and quantitative data." (Id. at 21.) The TIAA and CREF funds are still offered in the Plans.

Many other funds were identified in July 2013 as underperforming compared to peer groups based on three and five-year annual returns. (See Doc 241-1 at 41-49.) In December 2014, CAPTRUST advised Cornell Defendants to consider phasing out some of these funds. (December 3, 2014 Meeting Minutes at 4; Doc 239-4.) The Committee continued to discuss criteria to evaluate these funds at subsequent meetings such as meeting guidelines of the IPS and achieving minimal disruption. (Doc 252-9 at 4.) In March 2016 the Committee identified funds that failed the IPS and agreed to eliminate those funds from the investment lineup. (March 31, 2016 Meeting Minutes at 3; Doc 238-9.) The Committee continued to discuss elimination of funds failing IPS guidelines and freezing other funds throughout 2016. (E.g., Doc 290-19; Doc 292-11.) Funds were scheduled to be phased out in the spring of 2017. (June 29, 2016 Meeting Minutes at 3; Doc 290-19; see Committee Presentation of December 2016 at 9, 11, 15; Doc 292-11 (stating "[f]ailing funds must be closed"); Doc 252-10.)

CAPTRUST in its January 2012 presentation also recommended that Cornell consider the "[u]se of lowest priced share classes." (Doc 248-3 at 41.) Prior to CAPTRUST's engagement, the Committee replaced certain Fidelity funds with lower cost institutional shares beginning in September 2010. (Pls.' 56.1 ¶59; Cornell Defs.' 56.1 ¶59.) It replaced certain TIAA funds with their institutional share class versions in February 2012 and December 2014. (Id.)

SUMMARY JUDGMENT STANDARD

Summary judgment "shall" be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a), Fed. R. Civ. P. A fact is material if it "might affect the outcome of the suit under the governing law . . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). On a motion for summary judgment, the court must "construe the facts in the light most favorable to the non-moving party and resolve all ambiguities and draw all reasonable inferences against the movant." Delaney v. Bank of Am. Corp., 766 F.3d 163, 167 (2d Cir. 2014) (quotation marks omitted).

A court is not required to "scour the record on its own in a search for evidence" on a motion for summary judgment. CJLP Assocs., L.P. v. PriceWaterhouse Coopers LLP, 735 F.3d 114, 125 (2d Cir. 2013). It is the initial burden of the movant to come forward with evidence on each material element of his claim or defense, demonstrating that he is entitled to relief, and the evidence on each material element must be sufficient to entitle the movant to relief in its favor as a matter of law. Vt. Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004). If the moving party meets its burden, "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." Jaramillo v. Weyerhaeuser Co., 536 F.3d 140, 145 (2d Cir. 2008). "A dispute regarding a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (quoting Anderson, 477 U.S. at 248).

DISCUSSION

ERISA imposes a duty on plan fiduciaries to act "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). It also requires fiduciaries to act "in accordance with the documents and instruments governing the plan . . . insofar as such documents and provisions are consistent with the provisions" of ERlSA. Id. § 1104(a)(1)(D).

"ERISA's central purpose is to protect beneficiaries of employee benefits plans." Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Retirement Plan v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 715 (2d Cir. 2013). Courts evaluate the duty of prudence under an objective standard by considering "a fiduciary's conduct in arriving at an investment decision, not on its results," and asking "whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." Id. at 716 (quotations omitted). "[S]o long as the 'prudent person' standard is met, ERISA does not impose a duty to take any particular course of action if another approach seems preferable." Chao v. Merino, 452 F.3d 174, 182 (2d Cir. 2006) (internal quotations and citation omitted). The inquiry will "necessarily be context specific." Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 425 (2014).

I. The Administrative Fees and Recordkeeping Claim (Count III)

Plaintiffs first argue that the Cornell Defendants acted imprudently by failing to (1) determine whether the amount of revenue sharing with the recordkeepers was competitive or reasonable; (2) solicit bids from competing recordkeepers on a flat fee, or per participant, basis; and (3) engage in a reasoned decision-making process to

determine whether the Plans should move to a single recordkeeper.

Material issues of fact remain with respect to whether the Cornell Defendants' process to monitor recordkeeping fees breached a duty of prudence. However, as explained below, because plaintiffs have not come forward with evidence that any breach resulted in loss, summary judgment will be granted on Count III to the extent monetary damages are requested.

While "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund," Hecker v. Deere & Co., 556 F.3d 575, 586 (7th Cir. 2009), see Loomis v. Exelon Corp., 658 F.3d 667, 670 (7th Cir. 2011), fiduciaries are required to engage in a prudent review process which includes review of fees for reasonableness. In reviewing a fiduciary's monitoring of recordkeeping fees, courts have taken a "holistic approach." Sacerdote v. New York Univ., 16 cv 6284 (KBF), 2017 WL 3701482, at *9 (S.D.N.Y. Aug. 25, 2017); see White v. Chevron Corp., 16 cv 0793 (PJH), 2016 WL 4502808, at *15 (N.D. Cal. Aug. 29, 2016) (reviewing "indicia of imprudence").

For purposes of the summary judgment motion the Court accepts that one or more of plaintiffs' theories on recordkeeping states a material issue of fact as to breach. For example, while competitive bidding is not required under ERISA, summary judgment has been denied where fiduciaries failed to solicit competitive bidding over a fifteen-year period and there was evidence that such failure resulted in a monetary loss. George v. Kraft Foods Glob., Inc., 641 F.3d 786, 800 (7th Cir. 2011). Cornell Defendants admit they never issued an RFP or Request for Information ("RFI") that would have enabled them to evaluate recordkeeping fees for the Plans, either individually or as an assessment of a larger bundle of

administrative services. (Pls.' 56.1 ¶167; Defs.' 56.1 ¶167.) Because an "expense ratio doesn't show whether there is a revenue sharing agreement with the recordkeeper or for how much," a reasonable trier of fact could conclude that evaluating fees only as a bundled expense ratio was imprudent. Tussey v. ABB, Inc., 06 cv 4305 (NKL), 2012 WL 1113291, at *16 (W.D. Mo. Mar. 31, 2012), aff'd in relevant part, 764 F.3d at 336-37 (8th Cir. 2014). Cornell Defendants did not know what the actual fees were before CAPTRUST performed a review, only the total bundled expense ratios. The head of Benefit Services, Paul Bursic, testified that: "The fee is the fee. We didn't know what it was before. . . .CAPTRUST came in; they discovered what the fee is." (Bursic Dep. at 100:21-23; Doc 290-8.)

The Court must consider whether plaintiffs have come forward with evidence which would entitle a reasonable jury to conclude that the assumed breach caused a loss to the Plans. It concludes that they have not.

"Any person who is a fiduciary with respect to a plan who breaches any of the . . . duties imposed upon fiduciaries . . . shall . . . make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). "If, but for the breach, the plan would have earned even more than it actually earned, there is a 'loss' for which the breaching fiduciary is responsible." Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt., 843 F.3d 561, 567 (2d Cir. 2016) (internal quotation marks and citation omitted). Where alternative strategies are possible, courts "presume that the funds would have been used in the most profitable of these." Donovan v. Bierwirth, 754 F.2d 1049, 1056 (2d Cir. 1985).

Because loss is a necessary element of an ERISA claim, the absence of a genuine issue of material fact on loss warrants grant of summary judgment in a defendant's favor. Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan

Chase Bank, N.A., 806 F. Supp. 2d 662, 681-82 (S.D.N.Y. 2011); see Severstal Wheeling, Inc. v. WPN Corp., 10 cv 954 (LTS)(GWG), 2012 WL 3561243, at *6 (S.D.N.Y. Aug. 17, 2012); Salovaara v. Eckert, 94 cv 3430 (KMW), 1998 WL 276186, at *4 (S.D.N.Y. May 28, 1998); see also Brotherston v. Putnam Invs., LLC, 907 F.3d 17, 39 n.17 (1st Cir. 2018); Kopp v. Klein, 894 F.3d 214, 221 (5th Cir. 2018) (assuming that a fiduciary is liable for breach, plaintiff must still identify losses resulting from breach).[6]

To demonstrate loss plaintiffs rely on (1) TIAA's pricing data that shows the Plans paid higher fees than the top quartile of TIAA's Top 200 clients and (2) CAPTRUST's data that shows two plans in 2014 with over 10,000 participants had higher recordkeeping fees by basis point than Cornell and four plans in 2017 with over 10,000 participants had higher fees by per participant total than Cornell. (Pls.' 56.1 ¶¶189-91; Cornell Defs.' 56.1 ¶¶189-91.) Plaintiffs offer no expert testimony opining on why this data is based upon relevant comparators or would lead a reasonable juror to conclude that Cornell could have achieved lower fees based solely on these numbers.

Plaintiffs offer the expert testimony of Ty Minnich and Al Otto, claiming that defendants' failure to review reasonableness of fees caused approximately $35 million in losses. The Court considers below whether Minnich and Otto's testimony on recordkeeping fees is admissible.

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[6] The parties dispute whether the burden of proving (or disproving) causation of loss rests with the plaintiffs or defendants, citing Second Circuit cases they assert are in tension. Silverman v. Mutual Ben. Life Ins. Co., 138 F.3d 98, 106 (2d Cir. 1998); N.Y. Teamsters Council Health & Hosp., Fund v. Estate of DePerno, 18 F.3d 179, 182-83 (2d Cir. 1994); see Brotherston, 907 F.3d at 35 n.15 (recognizing apparent tension in Second Circuit jurisprudence). Because plaintiffs have come forward with no evidence demonstrating a genuine issue with respect to loss, the Court need not consider who bears the burden of proving causation.

Finding that it is not, the Court will dismiss Count III's claim for monetary damages because plaintiffs have not demonstrated a material issue of fact on their loss as a result of recordkeeping fees.

Plaintiffs in their Complaint also sought equitable relief in the form of removal of fiduciaries of the Plans and reformation to "obtain bids for recordkeeping and to pay only reasonable recordkeeping expenses." (Doc 81 at 139-40.) Breach of a fiduciary duty without proof of loss may warrant grant of equitable relief. Brock v. Robbins, 830 F.2d 640, 647-48 (7th Cir. 1987); Liss v. Smith, 991 F. Supp. 278, 295 (S.D.N.Y. 1998). But in response to Cornell's motion for summary judgment, in which Cornell sought dismissal of Count III based on the absence of evidence of a loss to the Plans, plaintiffs did not come forward in their opposition with any argument that their equitable claims would survive even in the absence of evidence demonstrating fact of loss. Plaintiffs have abandoned the recordkeeping claim insofar as it sought equitable relief. Felix v. City of New York, 344 F. Supp. 3d 644, 654 (S.D.N.Y. 2018) ("[A court] may, and generally will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed."); see also Jackson v. Fed. Exp., 766 F.3d 189, 196 (2d Cir. 2014) ("Where abandonment by a counseled party is not explicit but such an inference may be fairly drawn from the papers and circumstances viewed as a whole, district courts may conclude that abandonment was intended.").

1. Motion to Exclude Expert Testimony of Minnich and Otto (Doc 228)

Courts perform the same "gatekeeper" role at summary judgment as at trial. Raskin v. Wyatt Co., 125 F.3d 55, 66 (2d Cir. 1997); see Fed. R. Civ. P. 56(e) (requiring affidavits submitted on summary judgment "set

forth such facts as would be admissible in evidence"). Rule 702, Fed. R. Evid., states "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593-94 (1993), the Supreme Court ruled that factors relevant to determining reliability include a theory's "testability," the extent to which it has "been subject to peer review and publication" and "standards controlling the technique's operation," the "known or potential rate of error," and the "degree of acceptance" within the "relevant scientific community."

When deciding whether to admit expert testimony under Rule 702, a district court may "consider the gap between the data and the conclusion drawn by the expert from that data, and exclude opinion evidence where the court conclude[s] that there is simply too great an analytical gap between the data and the opinion proffered." Restivo v. Hessemann, 846 F.3d 547, 577 (2d Cir. 2017) (internal quotation and citation omitted). A trial judge has "broad discretion" in the matter of including expert evidence. Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 21 (2d Cir. 1996). While testimony should be excluded if it is "based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison . . . other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony." Id.

(internal quotation marks and citations omitted). The Daubert inquiry is a "flexible one," and the Daubert factors "do *not* constitute a definitive checklist or test." Restivo, 846 F.3d at 576 (internal quotations omitted).[7]

a. Challenges to Qualifications

Cornell Defendants' challenges to Otto and Minnich's qualifications do not provide a basis to exclude their testimony. Otto spent over twenty years in the retirement plan services industry. (Expert Report of Al Otto ("Otto Rep.") ¶6; Doc 327-1.) He has created or overseen RFPs and RFIs for hundreds of retirement plans including those with more than 15,000 participants. (Id.) He has served as a co-fiduciary to plans and has published articles on best fiduciary practices regarding recordkeeping and administrative fees. (Otto Dep. at 21:21-22:5; Doc 299-6.) While at Shepard Kaplan, an investment advisory firm, he served on an investment committee which consulted with non-university 403(b) plans (Otto Rep. ¶6; see Otto Dep. at 21:21-22:18; Doc 299-6.) He has been admitted as an expert and testified at trials regarding recordkeeping fees. (Otto Rep. at pp. 53-54.)

Cornell Defendants argue Otto is not qualified as an expert because he has no experience working on recordkeeping for university 403(b) plans, for plans with multiple recordkeepers, or for plans that conduct recordkeeping for TIAA annuities. Such specific experiences are not necessary for Otto to opine on best practices of a prudent fiduciary for large-scale retirement plans. See Katsaros v. Cody, 744 F.2d 270, 279 (2d Cir. 1984) ("A trustee's lack of familiarity with investments is

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[7] The Court in its discretion concluded that the "formality of a separate [Daubert] hearing [was] not required" based on the extensive briefing and record. United States v. Williams, 506 F.3d 151, 161 (2d Cir. 2007).

no excuse: under an objective standard trustees are to be judged according to the standards of others acting in a like capacity and familiar with such matters." (internal quotations and citation omitted)); Arista Records LLC v. Lime Grp. LLC, 06 cv 5936 (KMW), 2011 WL 1674796, at *10 (S.D.N.Y. 2011) (explaining that courts allow expert testimony where individual does not have industry-specific knowledge but testifies to "broader economic principles"). Based on Otto's familiarity with negotiating recordkeeping fees for retirement plans, including 403(b) plans, and his own role serving as a fiduciary for 403(b) plans, his credentials are "certainly not so flawed as to require exclusion under Daubert." AFTRA Ret. Fund, 2011 WL 6288415, at *6.

Minnich has experience pricing recordkeeping agreements for vendors that offer financial products to medium to large scale 403(b) plans, including public and private university higher education plans. (Expert Report of Ty Minnich ("Minnich Rep.") ¶7; Doc 229-6.) He has experience with recordkeeping at vendors who served as single and co-recordkeepers for 403(b) plans and has experience participating in RFPs and RFIs. (Minnich Dep. at 24:1-18; Doc 299-1; Minnich Rep. ¶¶5-6.) Cornell Defendants argue that he has directly engaged in recordkeeping for only three 403(b) plans of private universities with more than 5,000 participants and has no familiarity with how much TIAA charged as a recordkeeper. (Mot. to Exclude at 10; Doc 230.) To the extent defendants argue Minnich lacks expertise to testify based on the nature of his experience, the Court disagrees. Such requirements would destroy the "flexible" approach courts are instructed to take to qualifying experts. Restivo, 846 F.3d at 576.

b. Challenges to Methodology

Cornell Defendants claim Otto and Minnich do not use a reliable methodology to determine what a prudent fiduciary would have secured as a recordkeeping fee for the Plans. The Court agrees and will grant defendants' motion to exclude their testimony concerning the fact or amount of loss as a result of a lack of monitoring of recordkeeping fees on this basis.

Expert opinions must have "a traceable, analytical basis in objective fact." Bragdon v. Abbott, 524 U.S. 624, 653 (1998). "[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997). "[W]hen an expert opinion is based on data . . . that [is] simply inadequate to support the conclusions reached, Daubert and Rule 702 mandate the exclusion of that unreliable opinion testimony." Nimely v. City of New York, 414 F.3d 381, 396-97 (2d Cir. 2005) (quoting Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 266 (2d Cir. 2002)).

The Court will examine the methodologies of Otto and Minnich, which are similar, beginning with Otto. Otto states that "[b]ased on his knowledge of the recordkeeping industry," the Plans could have achieved fees of $40 per participant from 2010-2014 and $35 per participant from 2015-2018. (Otto Rep. ¶ 180.)

He achieved this range of fees "after evaluating relevant documents produced in this case" and "appl[ying his] knowledge and experience," assuming that the plans would have engaged in a competitive bidding process every five years and that a prudent fiduciary would have consolidated to a single vendor by August 2010. (Id. ¶¶78, 81; see Otto Dep. at 83:16-20, 84:6-8; Doc 299-6 (Q: "What

is the basis for your opinion that the range of reasonable fees would have been 35 to $40?" A: "Well, there's my experience, just in the market place. . . . And that comes from the RFPs that I've done on, you know, larger plans in my experience.").) He does not detail how his knowledge and experience led him to calculate the fees for the time periods listed, or why those numbers are reasonable in light of any features of the Plans. Without more, this conclusory statement of applied knowledge of the industry's customs and practices is insufficient under Rule 702 because "general references" to an expert's "experience" "do not provide a reliable basis for his proposed testimony. [sic] Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 691 F. Supp. 2d 448, 475-76 (S.D.N.Y. 2010); cf. Snyder v. Wells Fargo Bank, N.A., 11 cv 4496 (SAS), 2012 WL 4876938, at *3 (S.D.N.Y. Oct. 15, 2012) (admitting similar expert testimony where expert "articulated how the specifics of his experiences led to his conclusions").

Otto includes a section of his report entitled "Multiple 403(b) plans paid lower recordkeeping expenses than the Plans" (Otto Rep. p.33), in which he offers five university plans that paid less than the Plans for recordkeeping (*id.* ¶¶85-89 (comparing fees of Harvard, Caltech, University of Pittsburgh Medical Center, North Carolina schools, and the Nevada System of Higher Education).) His commentary and analysis of other plans and comparison to the plans at issue are not grounded in a reliable methodology.[8] He concedes that he picked the plans only

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[8] His fifth paragraph of this section does not discuss other university retirement plans but alludes to the fact that 403(b) plans' negotiation based on per participant fees is similar to that of 401(k) plans. Despite opining on this similarity and offering that he is qualified as an expert based in part on his work with 401(k) plans, (see, e.g., Otto Dep. at 71:20-24; Doc 299-6), he does not offer any examples of 401(k) plans'

to support his numbers, rather than using any type of traceable methodology. (Otto Dep. at 85:8-14; Doc 299-6 (Q: "So to understand the order of operations here, did you [] identify the 35 to $40 range before reviewing the data from these 403(b) plans?" A: "My thought process was, as I say, influenced by my experience, and the information I already had. And then I went and looked at these plans and saw well, yeah, this is very possible.").)

Beyond this, the report offers no rationale for why or how the five universities were selected. Otto admits that Harvard University maintained multiple recordkeepers (Otto Rep. ¶85), despite assuming for purposes of his fee calculation that the Plans would have consolidated to a single recordkeeper by August 2010 (id. ¶78). Although Otto stated that recordkeeping costs are "primarily dependent on the number of plan participant accounts" (id. ¶20; see id. ¶48), he admits that Harvard has half the participants that the Cornell plans have (id. ¶85). Apart from Caltech, he does not give the size or number of assets of any of the other plans mentioned in his report.

Otto offers no explanation for how he arrived at the tiered pricing structure of $40 for 2010-2014 and $35 for 2015-2018 and makes no attempt to tie these numbers to his exemplary plans' fees. To put these fees in perspective, the per participant fees for the top 25th percentile of TIAA's top 200 clients with at least one 403(b) program, which Cornell Defendants rely on as evidence of the absence of loss, range from $122-$166 during the relevant period. (Decl. of Erich Podzinski at 4, Doc 249-21.) Otto cites one recordkeeping price for each of the five named plans over the eight-year time frame. (See id. ¶¶85-88 (Harvard (2018); Caltech (2016); University of Pittsburgh

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reasonable record keeping [sic] fees during the relevant period to support his computation of fees for the Cornell Plans.

Medical Center (2016); North Carolina 403(b) (2016); Nevada System of Higher Education (2014).) Only one of these fees, that of the Nevada System of Higher Education, is in the time frame of 2010-2014. The record keeping fee listed is $31 (id. ¶88), less than the fee Otto claims could be achieved by prudent fiduciaries for the Cornell Plans in either 2010-2014 or 2015-2018.

The absence of "some recognizable, describable methodology," In re LIBOR-Based Fin. Instrs. Antitrust Litig., 299 F. Supp. 3d 430, 502 (S.D.N.Y. 2018) is a flaw that is large enough to warrant exclusion of Otto's testimony, Nimely, 414 F.3d at 396; Amorgianos, 303 F.3d at 267. An expert must "employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999). Otto has not done so here, and his testimony is properly excluded.

Minnich's analysis of the fact and amount of loss is based on the same unreliable methodology. He opines that reasonable fees per participant would have been $40 between 2010-2012, $38 between 2013-2015, and $36 from 2016 to present day. (Minnich Rep. ¶¶18, 157; Doc 249-20.) Similar to Otto, he states in a conclusory fashion that these rates are "consistent with [his] own 30 years of experience," but does not explain how his experiences led to his conclusions. (Id. ¶158; see Minnich Dep. at 115:12-14; Doc 299-1 (stating his opinion is based on "30 years plus of experience and significant analytic analysis of recordkeeping define[d] contribution plans across multiple markets").)

Minnich offers six university plan rates that "happen to be indicative . . . of the analytic components" he "was looking at to come up with the reasonable fee." (Minnich Dep. at 116:13-14; see id. at 116:22-24 (Q: "How did you select these six institutions?" A: "Um, both on what I felt

was comparable in analytically looking at what a reasonable fee would be and the timeline of the years in question."); Minnich Rep. ¶¶137-56.) But he too offers no explanation as to how the schools were chosen, no example for reasonable rates in the 2010-2012 time period, and only one rate per school to cover the entire time period at issue. To the extent he offers as examples the same schools considered by Otto, such as Harvard, his methodology is unreliable for the reasons discussed above. (See Minnich Rep. ¶¶147-48.)[9]

Plaintiffs attempt to add additional comparator plans in their Opposition to the Motion to Exclude Otto and Minnich's Expert Testimony. (See Opp. Br. at 13; Doc 298 (discussing Aurora Health Care and Trinity Health Savings Plan).) Plaintiffs offer no evidence that Otto or Minnich considered these plans in their reports. Because this evidence would not be admissible at trial, it will not be considered on the summary judgment motions. The Court grants Cornell Defendants' motion to exclude Otto and Minnich's testimony regarding the fact or amount of losses attributable to recordkeeping fees.[10]

II. The Review of Investment Options Claim Against the Cornell Defendants (Count V)

Plaintiffs claim the Cornell Defendants imprudently selected and retained specific investment options including the TIAA Real Estate Account and CREF Stock Fund Account with high fees and poor performance relative to other readily available investment options based on underperformance of funds over one, five and ten-year periods. Cunningham, 2017 WL 4358769, at *6-7.

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[9] Evidence cited as to Harvard and North Carolina, moreover, is outside the class period. (See e.g., Minnich Rep. ¶¶148, 154 (citing disclosure information as of January 1, 2018 and September 15, 2016).)

[10] Otto and Minnich's testimony regarding general characteristics of fund structure and 403(b) plans will likely be admissible.

The TIAA Real Estate Account is a variable annuity contract offered by TIAA that seeks long-term returns through rental income and appreciation of real estate and real estate-related investments. (Pls.' 56.1 ¶107; Cornell Defs.' 56.1 ¶107.) It invests between 75-85% of its assets in real estate and the remaining 15-25% in non-real-estate publicly-traded securities and short-term liquid investments that are easily converted to cash. (Id.) A small portion of the fund is invested in real estate securities such as real estate investment trusts ("REITs") and commercial mortgage-backed securities. (Id). [sic] As of September 2014, CAPTRUST noted that all Cornell retirement plans had nearly 4% of plan assets maintained by TIAA-CREF invested in this fund. (Doc 291-45 at 16.) The CREF Stock Fund Account is a variable annuity managed by TIAA that invests in a diversified portfolio of common stocks. (Pls.' 56.1 ¶94; Defs.' 56.1 ¶94.) It holds 70-75% domestic equities and 25-30% foreign equities, some of which may be in emerging markets. (Id.) It employs a diversified management strategy that combines active management, quantitative indexing, and passive indexing. (Id.) As of September 2014, CAPTRUST noted that all Cornell retirement plans had just over 28% of plan assets maintained by TIAA-CREF invested in this fund. (Doc 291-45 at 15.)

At the motion to dismiss stage, the combination of a historical record of underperformance and inaction was found to plausibly support a claim. Id. at *3 (adopting reasoning set forth in Sacerdote); see Sacerdote, 2017 WL 3701482, at *10. Plaintiffs' allegations include that fiduciaries imprudently chose specific retail funds over

lower-cost but otherwise identical institutional funds. Cunningham, 2017 WL 4358769, at *6-7.[11]

The Cornell Defendants' now move for summary judgment on Count V on two bases. They argue plaintiffs have not demonstrated that any of the challenged funds underperformed appropriate benchmarks and, even if there is evidence of underperformance when measured against appropriate benchmarks, plaintiffs offer no evidence that Cornell's process for monitoring the underperforming funds and choosing to maintain funds in the investment lineups was imprudent. For the reasons stated below, Cornell Defendants' motion for summary judgment on Count V will be granted in part.

a. Selection and Retention of the TIAA and CREF Funds

Plaintiffs claim related to selection and retention of the TIAA and CREF funds may be divided into two time periods. Between August 2010 and at least July 2013,[12] Cornell Defendants did not conduct benchmarking on the TIAA or CREF funds to monitor their performance compared to peer groups. (Doc 248-3 at 30, 31; see Doc 241-1 at 41-49 (July 2013 Presentation); Bursic Dep. at 79:18-80:11; Doc 290-8; Bursic Dep. at 83-85; Doc 248-1.)

Tibble v. Edison International determined that fiduciaries have a "continuing duty to monitor trust

[11] Plaintiffs argue Cornell followed a "flawed process" by failing to monitor before 2014 and reviewing only core investment options after September 2014. This claim has already been dismissed. Cunningham, 2017 WL 4358769, at *8 ("Plaintiffs' claim that defendants breached their fiduciary duties by failing to monitor any of the Plans' options before October 1, 2014, and monitoring only 'core' investment options after that date fails to plausibly allege a breach of fiduciary duty.").

[12] The TIAA Real Estate fund's performance was not compared to its relative peer group until sometime in late 2014. (Doc 241-1 at 49.)

investments and remove imprudent ones" separate and apart from the duty to prudently select investment options. 135 S. Ct. 1823, 1828 (2015). "Tibble does not stand for the proposition that ERISA provides an actionable claim based solely on a procedural duty to monitor, and instead includes the next step of removing imprudent investments." In re SunEdison, Inc. ERISA Litig., 331 F. Supp. 3d 101, 114 (S.D.N.Y. 2018); see Kopp, 894 F.3d at 221.

Plaintiffs do not present evidence that gives rise to a triable issue of fact that a prudent fiduciary would have removed the TIAA and CREF funds before July 2013, even if the fiduciaries knew of alleged underperformance. "Investment losses are not proof that an investor violated his duty of care." Jenkins v. Yager, 444 F.3d 916, 926 (7th Cir. 2006) (citing DeBruyne v. Equitable Life Assuranc Soc. of the United States, 920 F.2d 457, 465 (7th Cir. 1990)) [sic]. Long-term investment options, like those offered in a retirement plan, may have varying levels of performance over the course of time. Id. That is why it is not necessarily sufficient to show that at one point in time "better investment opportunities were available." Pension Ben. Guar. Corp., 712 F.3d at 718; see Hecker, 556 F.3d at 586; Loomis, 658 F.3d at 670. Plaintiffs offer no evidence, affidavits, or testimony beyond the conclusory assertion of their expert Wendy Dominguez that the level of underperfo1mance of the TIAA and CREF funds alone, as measured by the benchmarks listed above, would lead a prudent fiduciary to conclude the funds should be removed from the plans before July 2013. "An expert's opinions that are without factual basis" are "inappropriate material for consideration on a motion for summary judgment." Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 310 (2d Cir. 2008).

Plaintiffs do not offer evidence that other fiduciaries removed TIAA, CREF, or any other fund from their plan lineups based on the performance measures identified, and Dominguez herself states that prudent fiduciaries evaluate funds for inclusion in plans based on additional characteristics such as "peer group rankings," "historical performance," "risk metrics," "expenses," and "other quantitative and qualitative measures." (Dominguez Rep. ¶50.) The evidence shows not that fiduciaries at the time were removing the funds but rather that similarly sized plans continued to offer the TIAA and CREF funds. As of 2016, 99% of TIAA's 200 largest clients had a portion of their defined contribution plans' assets invested in the CREF fund and 84% in TIAA. (Pls.' 56.1 ¶¶99, 112; Defs.' 56.1 ¶¶99, 112.)[13] Measured another way, thirty-five of thirty-seven plan sponsors of ERISA higher educational plans with more than $1 billion in net assets offered CREF fund to their participants in 2010 and 2013, and thirty-three of thirty-seven of those plan sponsors offered the TIAA fund. (Chalmers Expert Report, Doc 240-7 ¶34.)

In addition, plaintiffs do not offer evidence that the benchmarks they cite to demonstrate underperformance in the August 2010 to July 2013 period would have been used by prudent fiduciaries at the time or would have led a prudent fiduciary to remove the funds from the plans' lineups. See Pension Ben. Guar. Corp., 712 F.3d at 716 ("We judge a fiduciary's actions based upon information

[13] Defendants offer a declaration from Sacerdote by a TIAA Executive Douglas Chittenden in support of this fact. Plaintiffs claim it is inadmissible. But Chittenden is a witness in this case as well (see Doc 249-24) and plaintiffs offer no persuasive reason why his testimony would be inadmissible in this case. The Court considers it on summary judgment. See Highland CDO Opportunity Master Fund, L.P. v. Citibank, N.A., 270 F. Supp. 3d 716, 720 n.3 (S.D.N.Y. 2017) (considering on summary judgment testimony offered by individuals in a separate case who were available to testify).

available to the fiduciary at the time of each investment decision . . . ."). They stated in their Complaint that the CREF fund did not rank in the top 50% of its peer group when measured by the Russell 3000 Index as of 2009. (Doc 81 at 101.) They offer evidence in their expert report that the CREF fund did not rank in the top 50% of its peer group when measured by a benchmark developed by their expert for the ten-year period before June 2010. (Expert Report of Wendy Dominguez ¶75; Doc 331-1.) For the TIAA Real Estate Account, plaintiffs offered evidence of underperformance of the fund relative to certain Vanguard funds, TIAA's own benchmarks, and benchmarks in a presentation by the investment advisory firm Cammack LaRhette to New York University that was offered for trial in Sacerdote, 328 F. Supp. 3d 273. (Doc 81 at 110-11; Doc 331-1 ¶¶103-04; see Sacerdote, 16 cv 2684, Doc 253-106.)

There is no evidence that any prudent fiduciary used the Russell 3000 Index as a benchmark for the CREF fund between 2010 and 2013. Even plaintiffs' expert does not rely on the Russell 3000 Index as a proper benchmark for the CREF fund. (See Doc 331-1.) There is no evidence that any prudent fiduciary would benchmark to the "70%/30% mix of domestic and internal [sic] equities" benchmark developed by plaintiffs' expert in her expert report. (Id. ¶95.) Cornell's IPS, which was in place during the latter portion of this time period, lists certain benchmarks in Appendix A as preferred peer group benchmarks; neither Russell 3000 nor Plaintiffs' expert's custom benchmark are listed for funds in CREF Stock's asset class (Large Cap U.S. Equity). (Doc 252-6 at 12; see id. at 11; Cornell Defs.' 56.1 ¶104 (identifying CREF Stock as a large cap asset).)

For TIAA Real Estate, plaintiffs have offered no evidence that prudent fiduciaries would benchmark

against the Vanguard funds used as comparisons of underperformance in the Amended Complaint. (See Doc 81 at 110-11.) Instead, plaintiffs' expert analyzes TIAA's own benchmarks and those used by an investment advisor for a different university. (Doc 331-1 at ¶¶103-04.) While TIAA's custom benchmark could be used by prudent fiduciaries, no reasonable trier of fact would conclude that a fiduciary would consider the TIAA fund an imprudent investment based on TIAA's custom benchmark. Using this methodology, the TIAA Real Estate Account overperforms the custom index as of December 31, 2009 for five and ten-year periods but underperforms on the one-year return. (TIAA Real Estate Account Quarterly Performance Analysis of September 30, 2014 at 5; Doc 292-8.)

Cammack LaRhette's benchmark, as that used by an investment advisory firm to fiduciaries of ERISA plans (Pls.' 56.1 ¶80), may have been used by prudent fiduciaries at the time. Cammack's report specifically notes that the TIAA fund had "steep losses in 2009" and "[wa]s predicted to recover with [the] commercial real estate market." (Sacerdote, 16 cv 2684; Doc. 253-106 at 49.) It states that the fund should be placed on a "watch list" given its aberrational performance in 2009 but does not advocate for removal. (Id.)

Plaintiffs present evidence that, in July 2013, Cornell Defendants received their first quantitative review of TIAA and CREF fund performance from CAPTRUST. (Doc 241-1 at 49.) It showed the CREF fund underperformed three and five-year benchmarks compared to its peer group by more than 50% and gave the fund yellow triangles indicating below average performance. (Id.) The report did not have performance data for the TIAA fund. (Doc 241-1 at 49.) CAPTRUST's September 2014 benchmarking presentation showed fund

underperformance of three and five-year benchmarks for both the TIAA and CREF funds. (Doc 291-45 at 40, 52.)[14] Despite these results, Cornell Defendants kept the TIAA and CREF funds in the plans' core lineups.

No reasonable trier of fact could conclude that Cornell Defendants' "conduct in arriving at [their] investment decision" to keep the TIAA and CREF funds in the plans' lineups despite evidence of fund underperformance relative to peer groups was imprudent. Pension Ben. Guar. Corp., 712 F.3d at 716; see Tibble v. Edison Int'l, 729 F.3d 1110 (9th Cir. 2013), vacated on other grounds by 135 S. Ct. 1823 (2015) (considering "the thoroughness of the investigation into the merits of the transaction" for prudence of fiduciaries' fund selection). Cornell hired CAPTRUST to review and select investments for a core lineup of funds. Appointment of an independent investment advisor, while not alone sufficient, George, 641 F.3d at 799-800 (surveying case law), provides "evidence of a thorough investigation" and of "'procedural' prudence and proper monitoring," DiFelice v. U.S. Airways, Inc., 49 F.3d 410, 421 (4th Cir. 2007) (quoting Howard v. Shay, 100 F.3d 1484, 1489 (9th Cir. 1996)). In November 2012, CAPTRUST recommended to maintain TIAA and CREF in the investment plan core lineups (Tier II) as "existing fund[s] or strong recommendation[s]." (Doc 241-2 at 6.) A

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[14] The parties vigorously dispute what the appropriate benchmark is by which to measure performance of the TIAA and CREF funds. A party alleging imprudence based on retaining a specific fund must demonstrate that a comparator is an "equivalent investment vehicle." Taylor v. United Techs. Corp., 06 cv 1494 (WWE), 2009 WL 535779, at *10 (D. Conn. Mar. 3, 2009), aff'd, 354 F. App'x 525 (2d Cir. 2009); see Meiners v. Wells Fargo & Co., 898 F.3d 820, 823 (8th Cir. 2018). Benchmarks used by CAPTRUST as co-fiduciary in reports given to and relied on by Cornell to assess their investment line up are evidence of appropriate comparator benchmarks.

CAPTRUST representative explicitly stated CREF Stock "meet[s] selection criteria." (Id. at 2.)

CAPTRUST reviewed and recommended to select and retain both funds in the investment lineups in 2013 and 2014, stating that they "meet the guidelines set forth by CAPTRUST for distinct investments in the [IPS]." (Doc 291-45 at 21; see Doc 241-1 at 13.) These guidelines were not restricted to quantitative review of fund performance; CAPTRUST's commentary in its 2014 presentation stated that they included things like "quality of management" and "excess return." (E.g., Doc 291-45 at 21.) CAPTRUST and Cornell continued to monitor the CREF and TIAA funds after retaining them in the core investment lineup. (Doc 252-8; see e.g., Doc 290-15 (discussing review of Tier II funds and fund lineup).)

Cornell Defendants did not "passively accept[]" the proposals provided by CAPTRUST." In re Unisys Sav. Plan Litig., 74 F.3d 420, 435 (3d Cir. 1996); see Donovan v. Bierwirth, 680 F.2d 263, 273 (2d Cir. 1982) (fiduciary must independently "ascertain[] the facts with respect to" funds). The undisputed evidence shows that the Committee reviewed the results of CAPTRUST's presentations, which included investment alternatives in the same asset classes of the TIAA and CREF funds, and asked questions related to the relative amount of "disruption" that would occur with the new fund menu for plan participants. (Doc 252-8 at 3.) Bursic testified that members of the Committee "express[ed] concern" at the underperformance of CREF but decided to keep it, recognizing that the benchmark used by CAPTRUST was "inadequa[te] . . . because there is no good benchmark for CREF stock" and recognizing a "legacy concern" given the large number of participants invested in the funds. (Bursic Dep. at 218 11:1-24; 221 11:1-19; Doc 290-8; see Doc 224-2 at 11-12 (discussing disruption concerns).) And

CAPTRUST too later determined that the CREF fund's benchmarks were not reflective of its peer group and began evaluating based on a custom benchmark to more accurately assess fund performance. (Pls.' & CAPTRUST's 56.1 ¶12; see id. ¶¶15-16.) A sub-committee of Cornell Defendants evaluated the funds and noted they both "provided strong historical returns, were valuable from a diversification perspective, and were popular among plan participants." (Bursic Decl. Doc 234-16 ¶10.)

Evidence of "discussions about the pros and cons" of investment alternatives is "fatal to" plaintiffs' claims. Tibble, 729 F.3d at 1136. Assessing fund lineup for "a reasonable range of investment options with a variety of risk profiles" satisfies the duty of a prudent fiduciary. Renfro v. Unisys Corp., 671 F.3d 314, 327 (3d Cir. 2011). On this record, no reasonable fact finder could conclude that the defendants breached their fiduciary duties in retaining the TIAA and CREF funds as investment options open to participants in the Plans. "[P]articipant choice is the centerpiece of what ERISA envisions for defined-contribution plans." Tibble, 729 F.3d at 1134-35.

Nor could a reasonable trier of fact conclude that fiduciaries failed to act in accordance with the IPS based on fund underperformance. Performance of a fund that "f[a]ll[s] below . . . benchmarks established by plan documents" or "some other metric or method used by prudent investors at the time" may signal an imprudent investment subject to additional review or monitoring. Pension Ben. Guar. Corp., 712 F.3d at 722 n.20; see Dardaganis v. Grace Capital Inc., 889 F.2d 1237, 1241-42 (2d Cir. 1989) (finding failure to act in accordance with plan documents is evidence of imprudent conduct); see also Cal. Ironworkers Field Pension Tr. v. Loomis Sayles & Co., 259 F.3d 1036, 1042 (9th Cir. 2001).

Cornell Defendants' IPS stated funds selected for the new plan lineups should "rank in the top 50% of their given peer group for the 3 or 5 year annualized period at the time of their selection." (Doc 252-6 at 7.) Based on this language, plaintiffs contend evidence of underperformance in CAPTRUST presentations demonstrates a material issue whether Cornell Defendants' acted imprudently. The language of the IPS is not so circumscribed. It states that funds selected for the plans would be assessed based on additional criteria such as "fees," "style consistency," "volatility and diversification," "management and organization," and "additional factors" including "fund specific situations and anomalies in the capital markets of in the Plans' unique situations." (Doc 252-6 at 7-8.) With respect to performance, the IPS offers additional flexibility for fiduciaries to make investment decisions, stating performance in the top 50% of a peer group should be true "[w]ith few exceptions," and that the Committee should consider "other variables . . . in order to develop a holistic view about a strategy and its appropriateness within the Plans." (Id.) The IPS states that the Committee's goal is to "offer a set of diversified investment alternatives that represent a broad range of different asset classes with different risk and return characteristics." (Id. at 6.)

The IPS does not require Cornell to select only funds that meet the top 50% performance criteria for peer groups based on three and five-year performance. Funds are selected based on a holistic combination of factors of which performance is one factor. The IPS does not mandate removal of funds based on performance. It acknowledges that the funds are "long-term wealth management" strategies and "it is not expected that either the investment universe or specific investment

alternatives normally will be changed or deleted frequently." (Id. at 9.)

The prudence of each investment is analyzed as it relates "to the portfolio as a whole." Pension Ben. Guar. Corp., 712 F.3d at 717. By 2014, TIAA and CREF were determined to be "distinct asset classes" (Doc 291-45 at 21) with portfolios that did not track standard benchmarks (see Schmitt Dep. at 113:15-114:10; Doc 238-3 (CREF Stock has no "true published benchmark by which to evaluate" it); Strodel Dep. at 142:12-145:7; Doc 290-23.) Their retention tracked one of the goals of the IPS, to offer "diversified investment alternatives," and did not violate the terms of the IPS. (Doc 252-6 at 6.)

The motion for summary judgment of the Cornell Defendants dismissing Count V insofar as it alleges imprudence in retaining TIAA and CREF funds will be granted.

B. Additional Funds that Underperformed Their Benchmarks

Although briefing at all stages has focused on the TIAA and CREF funds, the Court granted plaintiffs leave to proceed with their theory based on underperformance as to hundreds of additional funds. (See Cunningham, 2017 WL 4358769, at *7 n.2 ("[P]laintiffs claim that as of June 30, 2016, over 66% of the funds with at least five years of performance history underperformed their respective benchmarks over the previous five years. (Compl. at 132.) This additional allegation does not materially affect the Court's analysis because plaintiffs' claim that defendants breached their fiduciary duties by retaining underperforming investment options survives the motions to dismiss."); Am. Compl. at 89-95 (listing additional 178 funds).)

On April 1, 2019, this Court held a hearing to discuss defendants' proposed motion to exclude evidence related to the additional funds under Rule 37(c)(1), Fed. R. Civ. P. Defendants argued that plaintiffs should be precluded from submitting evidence as to the underperformance of the 178 investment options in the Plans based on look-back periods before the June 2016 period disclosed in the Complaint or should be precluded from basing damages on anything other than performance of the CREF and TIAA funds based on late disclosure of damages in Dominguez report. (Tr. of April 1, 2019; Doc 332.) The Court ruled it would not preclude any evidence under Rule 37. (Id. at 34:15-18.) It further stated that when the expert reports were served and plaintiffs' Rule 26(a)(l) disclosure was supplemented in August 2018, defendants were placed on notice of which accounts formed the basis for Count V. (Id. at 33:6-9.) In response, both parties submitted supplemental briefing on the issue of the remaining funds. (Docs 330, 336.)

While the Complaint listed 178 funds that allegedly underperformed in addition to TIAA Real Estate and CREF Stock, plaintiffs in their supplemental briefing now claim only 87 imprudently maintained funds. (Doc 336 at 6.) A list of the 87 funds is attached in a supplemental Rule 56.1 Statement. (Doc 337 at 4-11.)[15] Plaintiffs group the funds into three buckets. They claim funds should have been removed from the Plans' lineups that a) underperformed peer groups over the three and five-

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[15] Only 63 of these were identified by name in the Amended Complaint (see Doc 336 at 6 n.4), but, as described in the Supplemental Rule 56.1 Statement, all 87 of them are referenced in Dominguez's expert report, (see Doc 337 at 4-11). The Court held on April 1, 2019 that Dominguez's expert report gave notice to defendants as to the allegedly imprudent funds, and will consider plaintiffs' evidence with respect to the funds not listed in the Amended Complaint. (Tr. of April 1, 2019 at 33:6-34:1; Doc 332.)

year periods beginning in August 2010 b) exhibited high performance volatility, lacked diversification, or had high expense ratios, and c) had short performance histories that would not have allowed for a prudent review in August 2010. (See Doc 336 at 6-9; Pls.' Suppl. 56.1 ¶¶353-55.) As explained, only the first theory related to imprudent retention based on underperformance was previously raised. The other two theories may not be raised for the first time on summary judgment. Greenidge v. Allstate Ins. Co., 446 F.3d 356, 361 (2d Cir. 2006).

There are 38 funds flagged for underperforming their respective peer groups by at least 50% over the three and five-year periods as of August 2010, based on data from 2009. (Dominguez Rep. ¶¶114-16; Doc 226-1; see Pls.' Suppl. 56.1 at 3-10 (listing funds marked with "X" in "Dominguez 2010" column as those underperforming benchmarks as of 2010).) Beyond the conclusory statement of Dominguez that prudent fiduciaries would have removed "at least 100 funds" by the end of 2009 (Dominguez Rep. ¶114), which is insufficient to raise a material issue of fact, see Major League Baseball, 542 F.3d at 310, plaintiffs have otherwise offered no evidence that this information alone would lead a prudent fiduciary to remove these funds. They offer no evidence that other fiduciaries were removing these funds from lineups in 2010, or that underperformance of certain percentages was considered at the time indicative of imprudence.

Plaintiffs cite to the IPS's language that actively managed funds should generally perform in the top 50% of their peer group categories for three and five-year periods, but the IPS was not adopted until 2012 and, for the reasons stated above, does not by itself mandate exclusion of funds based on past performance. That higher performing funds were available at the time does not without more create a triable issue of fact because

"nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund." Hecker, 556 F.3d at 586; cf. Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 596 (8th Cir. 2009) (acknowledging that a fiduciary might "have chosen funds with higher fees for any number of reasons, including the potential for higher return, lower financial risk, more services offered, or greater management flexibility").

Plaintiffs alternatively look to July 2013 "at the latest" when prudent fiduciaries would have removed additional funds in Tier III from the investment lineup or conducted additional monitoring on these funds based on three and five-year underperformance identified in CAPTRUST's presentation. (See Doc 241-1 at 41-49.)[16] CAPTRUST reviewed these funds in December 2014 and proposed some funds for elimination based on whether they passed Cornell's IPS guidelines and whether they had more than 50 active participants (Doc 338-1.) In 2016, the Committee agreed to close over one hundred funds and they were removed and mapped to investment alternatives in the spring of 2017. (Doc 290-19 at 3; Doc 292-11; see Docs 338-3; 338-4.) Cornell admitted it did not have a process to remove underperforming funds from the Plans prior to December 2016. (Pls.' 56.1 ¶339; Defs.' 56.1 ¶339.)

To defeat the Cornell Defendants' summary judgment motion, plaintiffs must come forward with evidence which, if believed, would permit a reasonable fact finder to conclude that defendants acted imprudently in failing to remove these funds. They have not done so. Plaintiffs have not offered evidence that they failed to follow advice of CAPTRUST, failed to conduct review of the Tier III funds to determine which should be closed, violated their IPS, or

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[16] The July 2013 presentation does not review all 87 funds. Funds not reviewed are noted in plaintiffs' Second Rule 56.1 Statement. (See Doc 337 at 3-10.)

failed to monitor or investigate the funds. Plaintiffs' argument is that the timeline over which Cornell Defendants eliminated underperforming funds was longer than a prudent fiduciary would take. They offer no evidence as to the timeline of a prudent fiduciary.

No reasonable fact finder could conclude that the defendant fiduciaries acted objectively imprudent by not eliminating underperforming funds the very day that CAPTRUST presented its results in July 2013. (Doc 241-1.) After being presented with this high-level overview, defendants continued to monitor and review the performance of these funds as part of a larger strategy to streamline the Plans' lineups. They reviewed proposals for a tiered structure, found investment alternatives for underperforming funds, and assessed participant disruption with eliminating funds in the Plans. These issues were important because the fiduciaries were not discussing removal of one or even a few funds. The proposed removal involved hundreds of funds that would significantly change the lineup of the Plan offerings. The obligation to investigate the merits of removing plan options is "not a general one, but rather must depend[] on the character and aim of the particular plan and decision at issue and the circumstances prevailing at the time." DiFelice, 497 F.3d at 20 (quoting Bussian v. RJR Nabisco, Inc. 223 F.3d 26, 299 (5th Cir. 2000)); see Katsaros, 744 F.2d at 279. Plaintiffs offer no evidence that the time defendants took to remove the Tier III funds from the Plans was imprudent, particularly in light of the large-scale changes Cornell and CAPTRUST considered. CAPTRUST advocated what it considered to be a "preferable" approach based on a reasoned analysis; it was not required to take "any particular course of action." Chao, 452 F.3d at 183. Summary judgment will be granted on Count V as to these additional funds.

C. Maintaining Retail-Class Mutual Funds Instead of Identical Institutional Share Funds

Plaintiffs proceeded on a theory that "defendants breached their fiduciary duties by selecting specific retail funds over lower-cost, but otherwise identical, institutional funds." Cunningham, 2017 WL 4358769, at *8. Plaintiffs present evidence that TIAA offered identical institutional share classes for its mutual funds in February 2009 to defined contribution plans with more than $2 million invested in most of the funds. (Pls.' 56.1 ¶345; Cornell Defs.' 56.1 ¶345.) Cornell did not transition any of its funds to institutional shares with TIAA until February 22, 2012. (Pls.' 56.1 ¶348; Cornell Defs.' 56.1 ¶348.) Plaintiffs have presented a material issue of fact on the prudence of Cornell fiduciaries in retaining higher-cost retails shares of funds in the Plans prior to the transition. There is no evidence in the form of affidavits or otherwise that anyone at Cornell attempted to transition to the institutional share class funds before February 22, 2012. And unlike for the TIAA and CREF funds, where the fact that comparable alternatives exist does not alone offer evidence of imprudent retention, a fiduciary would have no reason not to switch to an identical share class fund. See Braden, 588 F.3d at 596 (finding inference of flawed review process where specific identical institutional shares were available); Tibble v. Edison Int'l, 07 cv 5359 (SVW)(AGRx), 2017 WL 3523737, at *12-13 (C.D. Cal. Aug. 16, 2017) (determining a prudent fiduciary would switch to identical lower-cost share classes immediately).

Cornell's 2012 negotiations with TIAA included the Plans' receipt of revenue credits to be refunded across all TIAA mutual funds retroactive for the 2011 plan year. (Pls.' 56.1 ¶¶50, 53; Cornell Defs.' 56.1 ¶¶50, 53.) Cornell argues this, in combination with the fact that TIAA did not permit 403(b) plan clients to offer institutional shares in

2010, means that plaintiffs cannot prove they suffered a loss from any alleged breach. Defendants offer no evidence that the Plans could not have transitioned to institutional shares in 2010. Defendants state that "revenue credits . . . refund[ed] some portion of [administrative] expenses back to participants after they were collected by the fund manager." (Defs.' 56.1 ¶53; see id. ¶61.) There is still a dispute of material fact whether an earlier switch to institutional funds would have resulted in savings to the Plans that could have been reinvested in the Plans and whether the process (or lack thereof) up to CAPTRUST's 2012 negotiation of revenue credit was prudent.

To defeat summary judgment, plaintiffs must come forward with evidence which if believed would allow a reasonable fact-finder to conclude that there was some loss attributable to the failure to swap out a retail fund for an institutional fund. Plaintiffs contend that they suffered losses from the failure to swap out many funds, but they offer evidence only as to the TIAA-CREF Lifecycle target date funds. (Pls.' Suppl. 56.1 ¶349; Defs.' Suppl. 56.1 ¶349; Dominguez Rep. ¶¶122-24; see Pls.' Suppl. 56.1 ¶346-47; Defs.' Suppl. 56.1 ¶346-47 (stating Cornell had more than $2 million invested in the TIAA-CREF Lifecycle target date funds).)

Dominguez states that her methodology of calculating losses based on retaining higher cost shares should be applied to "each investment option in the Plans for which Defendants failed to provide the lower-cost version of the same mutual fund investment option." (Dominguez Rep. ¶123.) Plaintiffs present no evidence as to which additional funds had lower-cost options available or whether Cornell had over $2 million invested in these funds, to the extent it was necessary to switch share classes. Nor is the determination of whether there was a fact of loss "simple

arithmetic" not requiring expert testimony. Stratton v. Dep't for the Aging for the City of New York, 132 F.3d 869, 877 (2d Cir. 1997). Plaintiffs' claim will be limited to the TIAA-CREF Lifecycle target date funds. See CILP Assocs., 735 F.3d at 125 (the Court will not "scour the record" for evidence on summary judgment). Accordingly, Cornell Defendants' motion for summary judgment will be granted except insofar as plaintiffs allege that Cornell Defendants breached a duty of prudence by failing to swap out the TIAA-CREF Lifecycle target date funds for their identical institutional share class funds.[17]

D. Count V as to CAPTRUST

CAPTRUST was hired by Cornell in December 2011. (Pls.' 56.1 ¶4; CAPTRUST's 56.1 ¶4.) CAPTRUST agreed to serve as a fiduciary under ERISA "with regard to the selection of . . . mutual fund(s) available to the Plans within the platform provided by the Plan's Administrator." (Id. ¶5.)

For the same reasons discussed with respect to Cornell, CAPTRUST is entitled to summary judgment on the breach of prudence claim for monitoring and retaining funds with underperforming benchmarks. The initial absence of benchmarking until July 2013 does not provide evidence of imprudence on the current record given failure to demonstrate the TIAA and CREF funds would have been removed. The recognition that certain funds underperformed in relation to peer groups for three and five-year periods was not the only criteria used to evaluate

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[17] As noted in the Opinion on the motion to dismiss, Count VII, violation of the Cornell Defendants' duty to monitor, is a "derivative" claim of Counts III and V. Cunningham, 2017 WL 4358769, at *11. It is "only as broad as the surviving prudence claims." Id.; see Pls.' 56.1 ¶3 n.5; Cornell Defs.' 56.1 ¶3 n.5 (acknowledging derivative nature of claim). Count VII survives to the extent it is based on the remaining allegations in Count V.

fund selection and retention, nor do plaintiffs argue it necessarily should have been. As discussed, the IPS does not mandate exclusion or removal of funds that do not meet the quantitative criteria of benchmarking relative to peer group. For those funds other than the TIAA Real Estate and CREF Stock funds, no reasonable trier of fact could conclude that the investigation and process leading to the eventual removal of funds was imprudent given the goals of the defendants and the major restructuring of the plans.

CAPTRUST is entitled to summary judgment on Count V with respect to allegations that it breached its duties with respect to retail share class funds. The institutional share class claim has been limited only to the TIAA-CREF Lifecycle Target Funds as to which there is some evidence of the fact of loss. See supra Discussion Section II.C. CAPTRUST was hired on December 8, 2011. (Pls.' 56.1 ¶4; CAPTRUST's 56.1 ¶4.) In its first presentation to Cornell in January 2012, CAPTRUST advised that Cornell consider the "[u]se of lowest priced share classes." (Id. ¶24.) No reasonable trier of fact could determine CAPTRUST breached a duty of prudence in failing to review the switch to institutional class funds that resulted in a loss to the Plans within the three weeks after it was retained.

CONCLUSION

For the reasons explained, Cornell Defendants' motion to exclude the expert testimony of Otto and Minnich is GRANTED in part, the motions to exclude the expert testimony of Buetow, Dominguez, and Matheson are DENIED, and the motion for summary judgment is GRANTED for all counts except for Count V insofar as it alleges imprudent retention of TIAA-CREF Lifecycle target date funds. CAPTRUST's motion for summary judgment is GRANTED. The Clerk is respectfully

directed to terminate the motions (Docs 221, 225, 228, 278, 233.) An order addressing the parties' requests to seal parts of the summary judgment record will follow.

SO ORDERED.

/s/ P. Kevin Castel
P. Kevin Castel
United States District Judge

Dated: New York, New York
September 27, 2019

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CASEY CUNNINGHAM, CHARLES E. LANCE, STANLEY T. MARCUS, LYDIA PETTIS, and JOY VERONNEAU, individually and as representatives of a class of participants and beneficiaries on behalf of the Cornell University Retirement Plan for the Employees of the Endowed Colleges at Ithaca and the Cornell University Tax Deferred Annuity Plan, Plaintiffs, -against- CORNELL UNIVERSITY, THE RETIREMENT PLAN OVERSIGHT COMMITTEE, MARY G. OPPERMAN, and CAPFINANCIAL PARTNERS, LLC d/b/a CAPTRUST FINANCIAL ADVISORS, Defendants.	16-cv-6525 (PKC) MEMORANDUM AND ORDER

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CASTEL, Senior District Judge:

Plaintiffs are participants and beneficiaries of the Cornell University Retirement Plan for the Employees of the Endowed Colleges at Ithaca (the "Retirement Plan") and the Cornell University Tax Deferred Annuity Plan (the "TDA Plan") (together, the "Plans"). They bring this action on behalf of the Plans against Cornell University,

The Retirement Plan Oversight Committee, Mary G. Opperman (the "Cornell Defendants") and CAPTRUST Financial Advisors ("CAPTRUST") alleging violations of sections 404 and 406 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1104, 1106.

The Cornell Defendants and CAPTRUST have separately moved to dismiss the corrected amended complaint (the "Complaint") (Dkt. 81). (Dkts. 71, 76.) For reasons to be explained, defendants' motions to dismiss will be granted in part and denied in part.

THE COMPLAINT

The following factual allegations are taken from the Complaint and accepted as true for the purposes of defendants' motions. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). All reasonable inferences are drawn in favor of the plaintiffs as the non-movants. See In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007).

I. The Plans.

The Retirement Plan and the TDA Plan are defined contribution, individual account, employee pension benefit plans sponsored by Cornell University ("Cornell") for eligible employees. (Compl. at 7-8.)[1] According to the Complaint, the Retirement Plan is funded by contributions from Cornell on behalf of its employees while the TDA Plan is funded through employee contributions of their own pre-tax earnings. (Id. at 7, 9, 16.) As of December 2014, the Plans each held over $1 billion in net assets and were among the largest 0.06% and 0.087% of all defined contribution plans in the United States based on asset size.

[1] The Court notes that the Complaint is not consistently numbered sequentially and includes several paragraphs with the same number. (See, e.g., ¶ 32 on page 13 and ¶ 32 on page 16.) Therefore, all citations to the Complaint are to the page number rather than paragraph number.

(Id. at 7, 9.) According to plaintiffs, such "jumbo plans" have "tremendous bargaining power to demand low-cost administrative and investment management services" from third-party service providers. (Id. at 2, 9.)

The Plans' fiduciaries choose the investment options included in the Plans and participants may decide to invest in any of the options available under the Plans. (Id. at 9.) Participants have sole discretion to direct their investments. (See id.) Plaintiffs allege that defendants violated their fiduciary duties by including imprudent and expensive investment options in the Plans and by allowing the Plans' "conflicted third-party service providers—TIAA-CREF and Fidelity—to dictate the Plans' investment lineup." (Id. at 3-4.)

The Complaint alleges that as of December 31, 2014, the Retirement Plan offered 299 investment options including 68 TIAA-CREF investments and 231 Fidelity investments. (Id. at 53.) The TDA Plan offered 301 investment options including 70 TIAA-CREF investments and 231 Fidelity investments. (Id.) Both plans offered the TIAA Traditional Annuity, which is a fixed annuity contract that returns a contractually specified minimum interest rate. (Id.) TIAA-CREF requires plans that offer the TIAA Traditional Annuity to also offer the CREF Stock Account and Money Market Account and to use TIAA as a recordkeeper for its proprietary products. (Id. at 38.) The other investment options in the Plans include retail and institutional mutual funds, an insurance separate account (the TIAA Real Estate Account), variable annuity options, and a fixed annuity option. (Id. at 53-54.)

Both plans use two separate recordkeepers, TIAA-CREF and Fidelity, a system plaintiffs claim is inefficient and costly. (Id. at 63.) Plaintiffs allege that a prudent fiduciary would have moved to a single recordkeeper and

cite several examples of other university retirement plans that have done so. (Id. at 41-46.) Plaintiffs also cite industry literature indicating that multi-recordkeeper models are inefficient, expensive and confusing for participants. (Id. at 46-51.)

II. The Parties.

Plaintiffs are Casey Cunningham, Charles E. Lance, Stanley T. Marcus, Lydia Pettis and Joy Veronneau. (Id. at 1.) Each is a current or former Cornell employee who is a participant in the Plans. (Id. at 10.) They bring this action on behalf of the Plans pursuant to 29 U.S.C. § 1132(a)(2). (Id. at 1.) Plaintiffs allege that they have invested in many, but not all, of the options offered under the Plans. (Id. at 5-6.)

According to the Complaint, Cornell is the Plan Administrator and "the fiduciary responsible for the control, management and administration of the Plans under 29 U.S.C. § 1102(a)." (Id. at 11.) Plaintiffs allege that Cornell has authority and discretionary control over the "selection and compensation of providers of administrative services to the Plans," and the "selection, monitoring, and removal of the investment options made available to participants for the investment of their contributions and provisions of their retirement income." (Id.) Plaintiffs claim that Cornell is a fiduciary to the Plans "because it exercised discretionary authority or discretionary control respecting the management of the Plans or exercised authority or control respecting the management or disposition of its assets, and has discretionary authority or discretionary responsibility in the administration of the Plans." (Id. (citing 29 U.S.C. § 1002(21)(A)(i), (iii)).)

Plaintiffs also allege that Cornell formed the Retirement Plan Oversight Committee (the "Committee") to oversee the investment options provided by the Plans

"or otherwise administer the Plans." (Id. at 12.) Defendant Mary G. Opperman serves as Cornell's Vice President for Human Resources and Chair of the Committee. (Id.) Plaintiff claims that both the Committee and Opperman are fiduciaries of the Plans because they "exercised discretionary authority or discretionary control respecting the management of the Plans or exercised authority or control respecting the management or disposition of its assets, and have discretionary authority or discretionary responsibility in the administration of the Plans." (Id. (citing 29 U.S.C. § 1002(21)(A)(i), (iii)).)

Defendant CAPTRUST is an investment advisory firm allegedly hired by the Committee. (Id.) Plaintiffs claim that CAPTRUST is also a fiduciary of the Plans because "it rendered investment advice to the Plans for a fee or other compensation . . . with respect to any moneys or other property of the Plans, or had the authority or responsibility to do so." (Id. (citing 29 U.S.C. § 1002(21)(A)(ii)).) Plaintiffs also claim that, like the Cornell Defendants, CAPTRUST exercised discretionary authority or control over the management of the Plans, the management or disposition of the Plans' assets and had discretionary authority or responsibility for the Plans' administration. (Id. at 13.)

III. Alleged Fiduciary Breaches.

Plaintiffs contend that defendants breached their fiduciary duties by failing to leverage the Plans' size to reduce expenses, failing to exercise independent judgment in choosing the investments included in the Plans, and allowing TIAA-CREF and Fidelity to require inclusion of particular proprietary funds, link their recordkeeping services to the placement of proprietary funds in the Plans, and collect "nearly unlimited asset-based compensation from their proprietary products." (Id. at 3.) Plaintiffs also allege that defendants selected and retained

unnecessarily expensive and underperforming investment options in the Plans and failed to monitor and control the Plans' administrative fees. (Id. at 126-28, 130-34.) Finally, plaintiffs allege that defendants failed to monitor other fiduciaries and caused the Plans to engage in prohibited transactions by paying unreasonable fees. (Id. at 124-25, 128-29, 134-35, 137-38.)

IV. Litigation Background.

This action is one of several filed by the same counsel in federal courts across the country against different university pension plans alleging breaches of the fiduciary duties imposed by ERISA. Several courts have, in the context of a motion to dismiss, had occasion to speak to whether a parallel complaint states a claim for relief. See, e.g., Henderson v. Emory Univ., No. 16 cv 2920 (CAP), 2017 WL 2558565 (N.D. Ga. May 10, 2017); Clark v. Duke Univ., No. 16 cv 1044 (CCE) (LPA), Dkt. 48 (M.D.N.C. May 11, 2017); Sweda v. Univ. of Pennsylvania, No. 16-4329, 2017 WL 4179752 (E.D. Pa. Sept. 21, 2017). In this district, Judge Katherine Forrest recently issued a decision in Sacerdote v. New York Univ., No. 16 cv 6284 (KBF), 2017 WL 3701482 (S.D.N.Y. Aug. 25, 2017) and in Cates v. Trs. of Columbia Univ. in the City of New York, No. 16 cv 6524 (KBF), Dkt. 116 (S.D.N.Y. Aug. 28, 2017), granting in part and denying in part defendants' motions to dismiss. In both of these cases, plaintiffs brought claims against New York University ("NYU") and Columbia University ("Columbia") that are nearly identical to those asserted against the Cornell defendants and CAPTRUST. The Court agrees in substantial part with Judge Forrest and adopts her reasoning as set forth in both Sacerdote and Cates, except where noted below.

DISCUSSION

I. Legal Standard.

Defendants move to dismiss the complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P., for failure to state a claim. "To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678 (quoting Bell Atlantic v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility 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. "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." Id. When reviewing a motion to dismiss pursuant to Rule 12(b)(6), a court "may consider all papers and exhibits appended to the complaint, as well as any matter of which judicial notice may be taken." Hirsch v. Arthur Andersen & Co., 72. F.3d 1085, 1092 (2d Cir. 1995). "[D]ocuments upon which the complaint relies and which are integral to the complaint" are also appropriate for consideration. Subaru Distribs. Corp. v. Subaru of Am., Inc., 425 F.3d 119, 122 (2d Cir. 2005).

II. Judicial Notice.

The Cornell defendants ask the Court to take judicial notice of several documents. Those documents are: (1) Cornell University's Investment Policy Statement, available on Cornell's website; (2) TIAA's Restated Charter, filed with the State of New York; (3) Forms 5500 filed with the U.S. Department of Labor ("DOL") by Cornell and other universities; (4) excerpts from 2016 prospectuses for several investment funds, filed with the U.S. Securities and Exchange Commission ("SEC"); (5) 2016 plan disclosures for both Plans and a 2012 notice of midyear benefits change; (6) TIAA Annuity contracts; and, (7) the complaint filed in Doe v. Columbia Univ., No. 16 cv 6488 (S.D.N.Y.) on August 17, 2016. (Request for

Judicial Notice in Connection with Cornell Defs.' Mot. to Dismiss ("Judicial Notice Request"), Dkt. 74, Exs. A-G.) Pursuant to Rule 201 of the Federal Rules of Evidence, a court may take judicial notice, "at any stage of the proceeding," of any fact that is "not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Rule 201, Fed. R. Evid. A court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Id.

Courts regularly take notice of publicly available documents including regulatory filings. See Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991) (SEC filings); Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp., Inc., 99 F. Supp. 3d 1110, 1126 (C.D. Cal. 2015) (Form 5500 filings). Courts may also take judicial notice of information contained on websites where "the authenticity of the site has not been questioned." Hotel Emps. & Rest. Emps. Union, Local 100 of New York, N.Y. & Vicinity, AFL CIO v. City of New York Dep't of Parks & Recreation, 311 F.3d 534, 549 (2d Cir. 2002). Judicial notice may also be taken "of a document filed in another court . . . to establish the fact of such litigation and related filings." Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc., 146 F.3d 66, 70 (2d Cir. 1998) (internal quotation marks omitted).

Plaintiffs do not dispute the authenticity of any of the proffered documents. Rather, they argue that even if judicial notice may be taken of these materials, they cannot be used for the purposes the Cornell defendants seek to use them – namely, to resolve disputed issues of fact in the Cornell defendants' favor. The Court will take judicial notice of all but the TIAA annuity contracts and 2012 notice of midyear benefits change as publicly

available online (Cornell University's Investment Policy Statement), publicly filed with a government regulatory agency (TIAA's Restated Charter, DOL Forms 5500, prospectuses), court filings (Doe v. Columbia University complaint), or referenced in, and integral to, the complaint (plan disclosures). However, these documents may only be considered for the fact that they contain a statement therein but not to prove the truth of the statement. See Staehr v. Hartford Fin. Servs. Grp., Inc., 547 F.3d 406, 425 (2d Cir. 2008). The TIAA annuity contracts and the 2012 notice of midyear benefits change are not proper subjects of judicial notice as they are neither integral to the complaint nor publicly available.

III. ERISA Fiduciary Duties.

ERISA imposes upon fiduciaries "a number of detailed duties and responsibilities, which include the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." Mertens v. Hewitt Assocs., 508 U.S. 248, 251-52 (1993) (internal quotation marks omitted) (alteration in original). ERISA is a "comprehensive and reticulated statute" which statutorily defines these duties. Id. at 251 (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980)). An ERISA fiduciary has a duty of loyalty, which requires that he "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1)(A). An ERISA fiduciary also has a duty of prudence, which requires that the fiduciary act "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." Id. § 1104(a)(1)(B). To state a claim for breach of fiduciary duty, a complaint must allege that (1) the defendant was a fiduciary who (2) was acting in a fiduciary capacity, and (3) breached his fiduciary duty. See id. § 1109.

IV. Duty of Loyalty – Counts I, III and V.

As in Sacerdote and Cates, plaintiffs claim that all defendants failed to act "for the exclusive purpose of providing benefits to participants and their beneficiaries." Id. § 1104(a)(1)(A). Specifically, plaintiffs allege that defendants breached the duty of loyalty by:

(1) "favor[ing] the financial interests of TIAA-CREF in receiving a steady stream of revenues from TIAA-CREF's proprietary funds over the interests of participants" by allowing TIAA to mandate the inclusion of its own funds in the Plans and to require that it provide recordkeeping services for its proprietary options (Count 1);

(2) "allowing TIAA-CREF and Fidelity to put their proprietary investments in the Plans without scrutinizing those providers' financial interest in using funds that provided them a steady stream of revenue sharing payments" (Count III); and

(3) failing to consider the recordkeepers' financial interest in including their own proprietary investments in the Plans and failing to make investment decisions based solely on the merits of the investment funds (Count V).

(Compl. at 122-23, 127, 132.)

Because these claims do not support an inference that defendants' actions were *for the purpose* of providing

benefits to themselves or someone else and did not simply have that incidental effect, the loyalty claims in Count I, Count III and Count V are dismissed. See Sacerdote, 2017 WL 3701482, at *5-6.

V. Duty of Prudence – Counts I, III and V.

a. Count I.

ERISA imposes a duty on plan fiduciaries to manage plan assets with prudence. 29 U.S.C. § 1104(a)(1)(B). In Count I, plaintiffs allege that defendants breached their fiduciary duties by:

(1) "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 by

(2) allowing TIAA-CREF to "require that it provide recordkeeping for its proprietary options."

(Compl. at 122.) According to plaintiffs, these two "lock-in" agreements violated the duty of prudence because they interfered with the Plan's ability to remove certain investments, even if they became imprudent, and prevented the Plans from using lower-cost recordkeepers. (Id.) Plaintiffs assert that by agreeing to these arrangements, 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." (Id.)

In Sacerdote and Cates, Judge Forrest dismissed identical allegations for failing to plausibly allege a breach of fiduciary duty. See Sacerdote, 2017 WL 3701482, at *7-8; Cates, No. 16 cv 6524, Dkt. 116 at 3. But see Henderson, 2017 WL 2558565, at *6. As was the case in Sacerdote, the

three challenged investments represent a small fraction of the 299 and 301 options available in the Plans, and there is no allegation that plaintiffs were required to invest in any particular option. See Sacerdote, 2017 WL 3701482, at *7. Similarly, the Court agrees with Judge Forrest that the Plans' contractual agreement with TIAA-CREF requiring it to place certain investment options in the Plans and use TIAA-CREF's recordkeeping services does not, on its own, demonstrate imprudence. See id. at *7-8. Even if the agreement with TIAA-CREF limited defendants' ability to remove particular investment options, there is no allegation that defendants were unable to terminate the entire agreement with TIAA-CREF if they believed that to be a prudent action. Finally, the Complaint fails to allege that an agreement with TIAA-CREF that restricted defendants' ability to contract with lower-cost recordkeepers breached the duty of prudence. See id. at *7-8 (quoting Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Medical Ctrs. Retirement Plan v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 719-20 (2d Cir. 2013)).

Henderson relied on the Supreme Court's decision in Tibble v. Edison Int'l, 135 S. Ct. 1823 (2015) ("Tibble III") in denying a motion to dismiss similar claims against Emory University. See 2017 WL 2558565, at *6. While considering a statute of limitations issue, the Tibble III Court suggested that a plan fiduciary has a continuing duty to monitor investment options and remove any that become imprudent. 135 S. Ct. at 1828-29. However, the Court also specifically declined to define the precise scope of that continuing duty. Id. at 1829. Therefore Tibble III does not preclude dismissal at this stage.

Defendants' motions to dismiss the prudence claims in Count I are granted.

b. Count III.

In Count III, plaintiffs allege that defendants acted imprudently by allowing the Plans to pay unreasonable administrative fees. Specifically, plaintiffs allege defendants breached their fiduciary duties by:

(1) failing to monitor and control the Plans' recordkeeping fees by (a) failing to monitor the amount of revenue sharing received by the Plans' recordkeepers, (b) failing to determine if the amount of revenue sharing paid to the recordkeepers was competitive or reasonable, and (c) failing to use the Plans' size to reduce fees or obtain sufficient rebates to the Plans for excessive fees paid by participants;

(2) failing to solicit bids from competing recordkeeping providers on a flat per-participant fee basis; and

(3) failing to engage in a timely and reasoned decision-making process to determine whether the Plans would benefit from moving to a single recordkeeper.

(Compl. at 126-27.) In Sacerdote and in Cates, Judge Forrest concluded that identical claims plausibly stated a claim for relief at this stage. See Sacerdote, 2017 WL 3701482, at *8-10; Cates, No. 16 cv 6524, Dkt. 116 at 3; see also Henderson, 2017 WL 2558565, at *5-6 (denying motion to dismiss similar claims); Clark, No. 16 cv 1044, Dkt. 48 at 3 (same). But see Sweda, 2017 WL 4179752, at *8 (granting motion to dismiss similar claims). This Court agrees and denies defendants' motions to dismiss the prudence claims in Count III for the reasons explained in Sacerdote.

c. Count V.

In Count V, plaintiffs allege that defendants breached their duty of prudence by selecting investment options with excessive and unreasonable fees and by failing to remove investment options with a history of poor performance. Specifically, plaintiffs allege defendants breached their fiduciary duties by:

(1) continuing to offer the CREF Stock Account and TIAA Real Estate Account despite their high fees and poor performance;

(2) selecting and retaining investment options, including actively managed funds, with high fees and poor performance relative to other investment options that were readily available to the Plans;

(3) selecting and retaining high-cost retail mutual funds instead of materially identical lower cost institutional mutual funds;

(4) selecting and retaining investment options with unnecessary layers of fees;

(5) failing to consolidate the Plans' investment options into a "core lineup," depriving the Plans of their ability to qualify for lower cost share classes of certain investments and causing confusion among plan participants;

(6) failing to monitor any of the Plans' options until October 1, 2014, and monitoring only "core" investment options after that date.

(Compl. at 131-34.) This Court agrees with Judge Forrest that the fourth and fifth allegations fail to plausibly allege a breach of the duty of prudence. See Sacerdote, 2017 WL 3701482, at *11. Simply alleging that the Plans included investment options with unnecessary "layers" of fees does not plausibly allege that the overall fee was unreasonable,

and while plaintiffs claim that the Plans offered too many options to participants, they do not allege that any plan participant was actually harmed by defendants' failure to reduce the number of options available. See id.; see also Cates, No. 16 cv 6524, Dkt. 116 at 3 (noting that while the Columbia plans had more investment options than the NYU plans at issue in Sacerdote, that fact did not change the analysis); Henderson, 2017 WL 2558565, at *3 (111 options not imprudent). But see Clark, No. 16 cv 1044, Dkt. 48 at 3 (denying, without analysis, motion to dismiss a claim that offering 400 options was imprudent). Defendants' motions to dismiss the prudence claims based on the layers of fees and the number of investment choices are granted.

This Court also agrees that the first and second allegations adequately support plaintiffs' prudence claim. See Sacerdote, 2017 WL 3701482, at *10.[2] Plaintiffs' allegations that specific funds underperformed over one, five and ten year periods and that lower-cost, higher performing investments were available plausibly states a claim. (Compl. at 101-106, 108-11.) In addition, defendants' argument that plaintiffs used inappropriate benchmarks to assess the performance of the challenged options raises factual questions that are not properly addressed on a motion to dismiss. See Sacerdote, 2017 WL 3701482, at *10.

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[2] In addition to the allegations present in the Sacerdote complaint, plaintiffs claim that as of June 30, 2016, over 66% of the funds with at least five years of performance history underperformed their respective benchmarks over the previous five years. (Compl. at 132.) This additional allegation does not materially affect the Court's analysis because plaintiffs' claim that defendants breached their fiduciary duties by retaining underperforming investment options survives the motions to dismiss.

However, this Court respectfully disagrees with Sacerdote's conclusion, in part, as to plaintiffs' claim that defendants breached their fiduciary duty by including retail mutual funds instead of identical, lower-cost, institutional mutual funds. In the Complaint, plaintiffs identify over 90 higher cost mutual fund share classes in the Plans for which a "significantly lower-cost, but otherwise identical, share class of the same mutual fund was available." (Compl. at 69.) Sacerdote relied on the decisions of the Third, Seventh and Ninth Circuits in Renfro v. Unisys Corp., 671 F.3d 314 (3d Cir. 2012), Loomis v. Exelon Corp., 658 F.3d 667 (7th Cir. 2011), Hecker v. Deere & Co., 556 F.3d 575 (7th Cir. 2009), and Tibble v. Edison Int'l, 729 F.3d 1110 (9th Cir. 2013) ("Tibble II"), vacated on other grounds by 135 S. Ct. 1823 (2015), in finding that "[w]hen retail funds are just several of a wide range of options," and where the fees associated with those retail funds fall within ranges permitted by other courts, their inclusion is not imprudent. See Sacerdote, 2017 WL 3701482, at *11. However, the courts in those cases considered challenges to the overall range of investment options offered by the plans rather than the prudence of including any particular investment options. See, e.g., Renfro, 671 F.3d at 325-28 (dismissing plaintiffs' claims challenging the "plan's mix and range of investment options" but not "the prudence of the inclusion of any particular investment option" because the plan offered "a reasonable range of investment options with a variety of risk profiles and fee rates"); Hecker, 556 F.3d at 586-87 (dismissing plaintiffs' claims challenging the fee distribution and the fact that the plans only included high-fee options because "the Deere Plans offered a sufficient mix of investments for their participants," including a "wide range of expense ratios"); Loomis, 658 F.3d at 670 ("Plaintiffs contend that Exelon should have arranged for access to 'wholesale' or 'institutional' investment vehicles.

Some mutual funds offer a separate 'institutional' class of shares, and Exelon's Plan also could have participated in trusts and investment pools to which the general public does not have access.").

Here, plaintiffs' allegations include the claim that the range of investment options in the Plans was imprudent because it included retail funds. (See Compl. at 131-32.) Therefore, to the extent plaintiffs claim that the Plans' menu of investment options should have included lower-cost options such as "lower-cost insurance company variable annuities and insurance company pooled separate counts," (Id. at 132), this Court agrees that plaintiffs' claims are foreclosed by the principles set out in Loomis, Hecker, Renfro, and Tibble II. See Sacerdote, 2017 WL 3701482, at *11 (citing Renfro, 671 F.3d at 319; Loomis, 658 F.3d at 669-70; Hecker, 556 F.3d at 586; Tibble II, 729 F.3d at 1135).

However, to the extent plaintiffs claim that defendants breached their fiduciary duties by selecting specific retail funds over lower-cost, but otherwise identical, institutional funds, (see Compl. at 67-78), these allegations are sufficient to survive the motions to dismiss. When faced with this type of claim, several courts have found similar allegations to plausibly allege a breach of fiduciary duty. See, e.g., Braden v. Wal-Mart Stores, 588 F.3d 585, 595-96 (8th Cir. 2009) (allegations that plan included only retail share funds despite being able to obtain comparatively cheaper institutional funds due its size stated a claim for breach of fiduciary duty); Kruger v. Novant Health, Inc., 131 F. Supp. 3d 470, 476 (M.D.N.C. 2015) ("This court is not persuaded the Hecker analysis controls this case at the pleadings stage, . . . [in part because] Plaintiffs have alleged these fees are excessive, not by virtue of their percentage as in Hecker and its progeny [including Loomis and Renfro], but because there are different

versions of the same investment vehicle available to the Plan that have lesser fees."); Tibble v. Edison Int'l, No. 07-5359 (SVW)(AGRX), 2010 WL 2757153, at *30 (C.D. Cal. July 8, 2010) ("Tibble I") (granting judgment to plaintiffs after bench trial), aff'd, 711 F.3d 1061 (9th Cir. 2013), aff'd, 729 F.3d 1110 (9th Cir. 2013), aff'd, 820 F.3d 1041 (9th Cir. 2016), vacated and remanded on other grounds, 843 F.3d 1187 (9th Cir. 2016); Henderson, 2017 WL 2558565, at *2. But see Sweda, 2017 WL 4179752, at *9 (relying on Loomis, Renfro and Hecker), White v. Chevron Corp., No. 16 cv 0793 (PJH), 2017 WL 2352137, at *14 (N.D. Cal. May 31, 2017) (same).

Similarly, the Ninth Circuit's decision in Tibble II relied on Loomis, Hecker and Renfro to affirm the district court's summary judgment ruling that including retail mutual funds in a plan is not categorically imprudent. 729 F.3d at 1134–35. However, the court also affirmed the district court's conclusion, after a bench trial, that including specific retail mutual funds was imprudent where fiduciaries had failed to investigate available institutional class alternatives that the court found to be identical apart from cost. Id [sic] at 1137-39 ("The basis of liability was not the mere inclusion of retail-class shares, as the court had rejected that claim on summary judgment. Instead, beneficiaries prevailed [in the district court] on a theory that Edison ha[d] failed to investigate the possibility of institutional-share class alternatives. . . . On this record we have little difficulty agreeing with the district court that Edison did not exercise the 'care, skill, prudence, and diligence under the circumstances' that ERISA demands in the selection of these retail mutual funds."). While it may turn out that defendants had legitimate and prudent reasons for making the challenged investments available to participants—or that the retail and corresponding institutional mutual funds were not

truly identical—accepting the Complaint's allegations as true and drawing all reasonable inferences in favor of the plaintiffs, plaintiffs' allegations are sufficient, at this stage, to survive a motion to dismiss. See Braden, 588 F.3d at 596.

Plaintiffs' claim that defendants breached their fiduciary duties by failing to monitor any of the Plans' options before October 1, 2014, and monitoring only "core" investment options after that date fails to plausibly allege a breach of fiduciary duty.[3] Defendants concede that the Plans distinguished between "core" investment options which were "vetted by fiduciaries," and all other investment options which were not similarly monitored, but argue that this practice is common in the industry and not a breach of fiduciary duty. (Cornell Defs.' Mem. at 20.) The Supreme Court suggested that fiduciaries normally have a continuing duty "of some kind" to "monitor investments and remove imprudent ones," Tibble III, 135 S. Ct. at 1828–29, however, the Court specifically declined to define the precise scope of this continuing duty. Id. at 1829. Plaintiffs have not provided the Court with any principled reason to believe that reviewing a subset of core investment options would not satisfy this duty. Therefore, this claim is insufficient to survive a motion to dismiss.

VI. Prohibited Transactions – Counts II, IV and VI.

"Congress enacted ERISA § 406(a)(1), which supplements the fiduciary's general duty of loyalty to the plan's beneficiaries, § 404(a), by categorically barring certain transactions deemed 'likely to injure the pension plan' . . . ." Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 241-42 (2000) (quoting Comm'r

[3] This claim was not plead in either Sacerdote, 2017 WL 3701482 or Cates, No. 16 cv 6524 (KBF), Dkt. 116. Plaintiffs allege that the un-monitored, non-core investment options constitute roughly seventy-four percent of the total offerings in the Plans. (Compl. at 87-88.)

v. Keystone Consol. Indus., Inc., 508 U.S. 152, 160 (1993)). The portions of section 406(a)(1) invoked by plaintiffs provide 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 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 . . . .

29 U.S.C. § 1106. "What the 'transactions' identified in § 406(a) thus have in common is that they generally involve uses of plan assets that are potentially harmful to the plan." Lockheed Corp. v. Spink, 517 U.S. 882, 893 (1996). The statute defines a "party in interest" to include any "person providing services" to a plan. 29 U.S.C. § 1002(14)(B). Plaintiffs claim that TIAA-CREF and Fidelity are both parties in interest because they provide services to the Plans. (Compl. at 124, 128, 134.)

In Count II, plaintiffs claim that by "allowing the Plans to be locked into an unreasonable arrangement that required the Plans to include the CREF Stock Account and to use TIAA as the recordkeeper for its proprietary products," despite the CREF Stock Account's high fees and poor performance and TIAA's unreasonable recordkeeping fees, defendants caused the Plans to engage in prohibited transactions under section 406(a)(1)(A), (C), and (D) each time the Plans paid fees to TIAA-CREF in connection with the Plan's investments in

the CREF Stock Account and other options that paid revenue sharing to TIAA. (Compl. at 124-25.)

In Count IV, plaintiffs claim that "[b]y causing the Plans to use TIAA-CREF and Fidelity as the Plans' recordkeepers from year to year," defendants caused the Plans to engage in prohibited transactions" under section 406(a)(1)(A), (C), and (D) each time the Plans paid fees to TIAA-CREF or to Fidelity in connection with the Plan's investments in funds that paid revenue sharing to TIAA-CREF or Fidelity. (Compl. at 128-29.)

In Count VI, plaintiffs claim that "[b]y placing investment options in the Plans managed by TIAA-CREF and Fidelity, in which nearly all of the Plans' combined $3.1 billion in assets were invested," defendants caused the Plans to engage in prohibited transactions under section 406(a)(1)(A), (C), and (D) each time the Plans paid fees to TIAA-CREF or to Fidelity in connection with the Plan's investments in TIAA-CREF and Fidelity funds. (Compl. at 134-35.)[4]

Essentially, plaintiffs argue that by entering into contractual agreements with TIAA-CREF and Fidelity, defendants caused the Plans to engage in prohibited transactions each time the Plans paid fees to TIAA-CREF and Fidelity. Plaintiffs' claims under section 406(a)(1)(A) and (D) fail because revenue sharing payments drawn from mutual fund assets and paid to TIAA-CREF and Fidelity are not transactions involving plan assets, and payments for recordkeeping services do not constitute an impermissible "sale or exchange" of property as that term is commonly understood. See Sacerdote, 2017 WL 3701482, at *12-13.

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[4] The wording of this claim is slightly different from that in Sacerdote but mirrors the allegation in Cates. See Cates, No. 16 cv 6524 (KBF), Dkt. 76-1 ¶ 250.

In addition, plaintiffs have failed to plausibly allege that the Plans engaged in an impermissible provision of services by compensating the Plans' service providers in violation of section 406(a)(1)(C). "The transactions prohibited by § [406] tend to be those in which 'a fiduciary might be inclined to favor [a party in interest] at the expense of the plan's beneficiaries.'" Braden, 588 F.3d at 602 (quoting Harris Tr. & Sav. Bank, 530 U.S. at 242); see also Marshall v. Snyder, 572 F.2d 894, 900 (2d Cir. 1978) (noting that "prohibited transactions [under § 406(a)(1)] involve self-dealing"). Thus, absent some evidence of self-dealing or other disloyal conduct,

> allegations that the Plans violated § 406(a) by paying [Fidelity] and TIAA-CREF for recordkeeping services—even allegations that the Plans paid too much for those services—do not, without more, state a claim. To hold otherwise would transform § 406—a statutory provision meant to "categorically bar[] certain transactions deemed 'likely to injure the pension plan,'" Harris Tr. & Sav. Bank, 530 U.S. at 241—into a statutory provision that proscribes retirement pension plan's most basic operations.

Sacerdote, 2017 WL 3701482, at *14; see Sweda, 2017 WL 4179752, at *11 (dismissing similar claims in part because "the transactions at issue . . . 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") (quoting Reich v. Compton, 57 F.3d 270, 275 (3d Cir. 1995)). Like the plaintiffs in Sacerdote and Sweda, plaintiffs have "offered only conclusory allegations suggesting self-dealing or disloyal conduct." Sacerdote, 2017 WL 3701482, at *14; see Sweda, 2017 WL 4179752, at

*11. Therefore, plaintiffs' prohibited transaction claims are dismissed.

VII. Fiduciary Status of CAPTRUST.

The surviving prudence claims in Count III and Count V are plead against all defendants. CAPTRUST does not claim that it is not a fiduciary as to the conduct alleged in Count V, however, it contends that it had no fiduciary responsibilities as to the decisions regarding plan administration alleged in Count III. This Court agrees.

Under ERISA:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). A plan service provider "may be an ERISA fiduciary with respect to certain matters but not others," such that "fiduciary status exists only to the extent" that the plan service provider "has or exercises the described authority or responsibility over a plan." Coulter v. Morgan Stanley & Co. Inc., 753 F.3d 361, 366 (2d Cir. 2014) (internal quotation marks omitted). Thus, "[i]n every case charging breach of ERISA fiduciary duty . . . the threshold question is . . . whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." Id. (quoting

Pegram v. Herdrich, 530 U.S. 211, 226 (2000)) (alterations in original).

As to CAPTRUST, the Complaint simply alleges that it is an investment advisory firm hired by the Committee. The Complaint does not describe the services CAPTRUST provided or the role CAPTRUST played in the actions alleged in the Complaint. In fact, in the 140-page complaint, there is not a single allegation of misconduct that is specifically plead against CAPTRUST as opposed to the "defendants" as a group. Count III alleges that defendants imprudently allowed the Plans to pay unreasonable administrative fees to the Plans' recordkeepers. (Compl. at 126-27.) This conduct relates to plan administration rather than particular investment options. If plaintiffs wish to allege that CAPTRUST and the Cornell Defendants acted as a single unit in matters of plan administration, or that all defendants jointly engaged in the alleged misconduct, they must have a factual basis for doing so. Simply reciting the statute and alleging that "upon information and belief" CAPTRUST exercised discretionary authority or control over the management of the Plans, the management or disposition of the Plans' assets and had discretionary authority or responsibility for the Plans' administration, (Id. at 13), is insufficient.

As there are no facts alleged indicating that CAPTRUST served as a fiduciary with respect to the particular activities at issue in Count III, that count will be dismissed as to CAPTRUST.

VIII. Duty to Monitor – Count VII.[5]

The text of ERISA does not explicitly impose on plan fiduciaries a duty to monitor, however, several courts have

[5] Plaintiffs' failure to monitor claim is the seventh claim for relief but it is incorrectly labeled in the Complaint as "Count VIII." (See Compl. at 136.)

held that there is a duty to monitor appointed fiduciaries under ERISA. See, e.g., In re Polaroid ERISA Litig., 362 F. Supp. 2d 461, 477 (S.D.N.Y 2005) (collecting cases and concluding that an "appointing fiduciary's duty to monitor is well-established"); see also 29 C.F.R. § 2509.75–8, at FR–17 ("At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan.").

Plaintiffs claim that Cornell and Opperman breached their fiduciary duties by, among other things, failing to monitor their appointees, including the Committee and its members, failing to have a system in place to monitor the appointees' performance, and failing to remove appointees whose performance was inadequate. (Compl. at 137-38.) Unlike the plaintiffs in Sacerdote, who claimed only that NYU was in sole possession of information regarding any potential delegation of fiduciary duties, 2017 WL 3701482, at *14, plaintiffs allege that Cornell created the Committee to oversee the Plans' investment options or otherwise administer the Plans. (Compl. at 12.) Plaintiffs also allege that Opperman was Chair of the Committee and was given authority to appoint and remove other members of the Committee. (Id.)

Defendants' sole argument for dismissing plaintiffs' duty to monitor claim is that plaintiffs have failed to adequately allege any underlying fiduciary breach, thereby defeating their derivative monitoring claim. However, the Court has determined that plaintiffs have plausibly alleged a breach of the fiduciary duty of prudence. Therefore, defendants' motion to dismiss the monitoring claim for failure to adequately allege an

underlying breach is denied. However, the duty to monitor claim is only as broad as the surviving prudence claims and is otherwise dismissed.

IX. Co-Fiduciary Duty.

Counts III and V assert that all defendants are liable to plaintiffs under a theory of co-fiduciary liability. Under ERISA, a plan fiduciary is liable for another's fiduciary breach with respect to the same plan: "(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; (2) if, by his failure to comply with section 1104(a)(1) . . . in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach." 29 U.S.C. § 1105(a).

To the extent the prudence claims in Count III and Count V survive against the Cornell Defendants and CAPTRUST, the claims of co-fiduciary liability under those counts survive as well.

X. Statute of Limitations.

Defendants urge that plaintiffs' claims are time-barred by ERISA's three-year statute of limitations. Under ERISA, claims must be brought within the earlier of "(1) six years after . . . the date of the last action which constituted a part of the beach or violation, or . . . (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach . . . ." 29 U.S.C. § 1113. "[A] plaintiff has 'actual knowledge of the breach or violation' . . . when he has knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated the Act." Caputo v. Pfizer, Inc., 267 F.3d 181, 193 (2d Cir. 2001)

(citing 29 U.S.C. § 1113). These material facts "could include necessary opinions of experts, knowledge of a transaction's harmful consequences, or even actual harm." Id. (quoting Gluck v. Unisys Corp., 960 F.2d 1168, 1177 (3d Cir. 1992)). "However, the disclosure of a transaction that is not inherently a statutory breach of fiduciary duty . . . cannot communicate the existence of an underlying breach." Id. (internal citations and quotation marks omitted). The "actual knowledge [standard] is strictly construed and constructive knowledge will not suffice." L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cty., Inc., 710 F.3d 57, 67 (2d Cir. 2013).

Defendants claim that plaintiffs had notice of the excessive fees they complain of as a result of disclosures they received over three years ago detailing the number of investment options and the amount of fees for each option. (Cornell Defs.' Mem. at 24-25 (citing 2016 prospectuses for the College Retirement Equities Fund ("CREF") and the TIAA Real Estate Account and 2016 plan disclosures for the Retirement Plan and the TDA Plan, Request for Judicial Notice Exs. D, E.) However, defendants identify no disclosure that notified plaintiffs of the excessive recordkeeping fees alleged in Count III. In addition, defendants effectively ask the Court to assume, based on fund prospectuses and plan disclosures from 2016, that plaintiffs had actual knowledge of the excessive investment fees alleged in Count V prior to 2013. Notice of a particular investment's fee alone does not constitute actual knowledge that the particular fee is excessive and thus imprudent. See Leber v. Citigroup 401(k) Plan Inv. Comm., No. 07 cv 9329 (SHS), 2014 WL 4851816, at *4-5 (S.D.N.Y. Sept. 30, 2014) (awareness of challenged fees insufficient for actual knowledge because "[p]laintiffs could not have known that the fees were excessive, and

thus a basis for an ERISA claim, without the relevant comparison point for assessing excessiveness: fees for comparable funds."). But see Young v. Gen. Motors Inv. Mgmt. Corp., 550 F. Supp. 2d 416, 419-20 (S.D.N.Y. 2008), aff'd, 325 F. App'x 31 (2d Cir. 2009) (dismissing excessive fee claim where allegedly excessive fees had been disclosed to plaintiffs through quarterly summaries and prospectuses more than three years before plaintiffs filed suit). Moreover, defendants may not rely on documents from 2016 as evidence of plaintiffs' knowledge three years prior.

Accordingly, at the pleading stage, defendants have failed to show that plaintiffs had actual knowledge of all the material facts necessary to bring suit three years before filing this action.

CONCLUSION

Defendants' motions to dismiss (Dkts. 71, 75, 76) are GRANTED in part and DENIED in part. Counts I, II, IV and VI are DISMISSED in their entirety as to all defendants. Count III is DISMISSED as to CAPTRUST. Counts III, V and VII are DISMISSED in part as discussed above.

SO ORDERED.

/s/ P. Kevin Castel
P. Kevin Castel
United States District Judge

Dated: New York, New York
September 29, 2017

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of December, two thousand twenty-three.

Casey Cunningham, Charles E. Lance, Stanley T. Marcus, Lydia Pettis, and Joy Veronneau, individually and as representatives of a class of participants and beneficiaries on behalf of the Cornell University Retirement Plan for the Employees of the Endowed Colleges at Ithaca and the Cornell University Tax Deferred Annuity Plan,

Plaintiffs-Appellants-Cross Appellees,

v.

Cornell University, The Retirement Plan Oversight Committee, Mary G. Opperman, and Capfinancial Partners, LLC d/b/a CAPTRUST Financial Advisors,

Defendants-Appellees-

ORDER

Docket Nos:
21-88 (Lead)
21-96 (XAP)
21-114 (XAP)

Cross-Appellants.

Appellants-Cross-Appellees, Casey Cunningham, Charles E. Lance, Stanley T. Marcus, Lydia Pettis and Joy Veronneau, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

UNITED STATES
SECOND CIRCUIT
COURT OF APPEALS
/s/ Catherine O'Hagan Wolfe

APPENDIX E

TITLE 29—LABOR

§1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(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.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or

represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

(Pub. L. 93–406, title I, §406, Sept. 2, 1974, 88 Stat. 879.)

APPENDIX F

§1108. Exemptions from prohibited transactions

(a) Grant of exemptions

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 1106 and 1107(a) of this title. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this chapter. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 1106(a) or 1107(a) of this title, the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 1106(b) of this title unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

(b) Enumeration of transactions exempted from section 1106 prohibitions

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees (within the meaning of section 414(q) of title 26) in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured. A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of title 26.

(2)(A) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(B)(i) No contract or arrangement for services between a covered plan and a covered service provider, and no extension or renewal of such a contract or arrangement, is reasonable within the meaning of this paragraph unless the requirements of this clause[1] are met.

(ii)(I) For purposes of this subparagraph:

[1] So in original. Probably should be "this subparagraph".

(aa) The term “covered plan” means a group health plan as defined section[2] 1191b(a) of this title.

(bb) The term “covered service provider” means a service provider that enters into a contract or arrangement with the covered plan and reasonably expects $1,000 (or such amount as the Secretary may establish in regulations to account for inflation since December 27, 2020, as appropriate) or more in compensation, direct or indirect, to be received in connection with providing one or more of the following services, pursuant to the contract or arrangement, regardless of whether such services will be performed, or such compensation received, by the covered service provider, an affiliate, or a subcontractor:

(AA) Brokerage services, for which the covered service provider, an affiliate, or a subcontractor reasonably expects to receive indirect compensation or direct compensation described in item (dd), provided to a covered plan with respect to selection of insurance products (including vision and dental), recordkeeping services, medical management vendor, benefits administration (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness services, transparency tools and vendors, group purchasing organization preferred vendor panels, disease management vendors and products, compliance services, employee assistance programs, or third party administration services.

(BB) Consulting, for which the covered service provider, an affiliate, or a subcontractor reasonably expects to receive indirect compensation or direct compensation described in item (dd), related to the development or implementation of plan design, insurance

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[2] So in original. Probably should be preceded by “in”.

or insurance product selection (including vision and dental), recordkeeping, medical management, benefits administration selection (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness design and management services, transparency tools, group purchasing organization agreements and services, participation in and services from preferred vendor panels, disease management, compliance services, employee assistance programs, or third party administration services.

(cc) The term "affiliate", with respect to a covered service provider, means an entity that directly or indirectly (through one or more intermediaries) controls, is controlled by, or is under common control with, such provider, or is an officer, director, or employee of, or partner in, such provider.

(dd)(AA) The term "compensation" means anything of monetary value, but does not include non-monetary compensation valued at $250 (or such amount as the Secretary may establish in regulations to account for inflation since December 27, 2020, as appropriate) or less, in the aggregate, during the term of the contract or arrangement.

(BB) The term "direct compensation" means compensation received directly from a covered plan.

(CC) The term "indirect compensation" means compensation received from any source other than the covered plan, the plan sponsor, the covered service provider, or an affiliate. Compensation received from a subcontractor is indirect compensation, unless it is received in connection with services performed under a contract or arrangement with a subcontractor.

(ee) The term "responsible plan fiduciary" means a fiduciary with authority to cause the covered plan to enter into, or extend or renew, the contract or arrangement.

(ff) The term "subcontractor" means any person or entity (or an affiliate of such person or entity) that is not an affiliate of the covered service provider and that, pursuant to a contract or arrangement with the covered service provider or an affiliate, reasonably expects to receive $1,000 (or such amount as the Secretary may establish in regulations to account for inflation since December 27, 2020, as appropriate) or more in compensation for performing one or more services described in item (bb) under a contract or arrangement with the covered plan.

(II) For purposes of this subparagraph, a description of compensation or cost may be expressed as a monetary amount, formula, or a per capita charge for each enrollee or, if the compensation or cost cannot reasonably be expressed in such terms, by any other reasonable method, including a disclosure that additional compensation may be earned but may not be calculated at the time of contract if such a disclosure includes a description of the circumstances under which the additional compensation may be earned and a reasonable and good faith estimate if the covered service provider cannot otherwise readily describe compensation or cost and explains the methodology and assumptions used to prepare such estimate. Any such description shall contain sufficient information to permit evaluation of the reasonableness of the compensation or cost.

(III) No person or entity is a "covered service provider" within the meaning of subclause (I)(bb) solely on the basis of providing services as an affiliate or a subcontractor that is performing one or more of the

services described in subitem (AA) or (BB) of such subclause under the contract or arrangement with the covered plan.

(iii) A covered service provider shall disclose to a responsible plan fiduciary, in writing, the following:

(I) A description of the services to be provided to the covered plan pursuant to the contract or arrangement.

(II) If applicable, a statement that the covered service provider, an affiliate, or a subcontractor will provide, or reasonably expects to provide, services pursuant to the contract or arrangement directly to the covered plan as a fiduciary (within the meaning of section 1002(21) of this title).

(III) A description of all direct compensation, either in the aggregate or by service, that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with the services described in subclause (I).

(IV)(aa) A description of all indirect compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with the services described in subclause (I)—

(AA) including compensation from a vendor to a brokerage firm based on a structure of incentives not solely related to the contract with the covered plan; and

(BB) not including compensation received by an employee from an employer on account of work performed by the employee.

(bb) A description of the arrangement between the payer and the covered service provider, an

affiliate, or a subcontractor, as applicable, pursuant to which such indirect compensation is paid.

(cc) Identification of the services for which the indirect compensation will be received, if applicable.

(dd) Identification of the payer of the indirect compensation.

(V) A description of any compensation that will be paid among the covered service provider, an affiliate, or a subcontractor, in connection with the services described in subclause (I) if such compensation is set on a transaction basis (such as commissions, finder's fees, or other similar incentive compensation based on business placed or retained), including identification of the services for which such compensation will be paid and identification of the payers and recipients of such compensation (including the status of a payer or recipient as an affiliate or a subcontractor), regardless of whether such compensation also is disclosed pursuant to subclause (III) or (IV).

(VI) A description of any compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with termination of the contract or arrangement, and how any prepaid amounts will be calculated and refunded upon such termination.

(iv) A covered service provider shall disclose to a responsible plan fiduciary, in writing a description of the manner in which the compensation described in clause (iii), as applicable, will be received.

(v)(I) A covered service provider shall disclose the information required under clauses (iii) and (iv) to the responsible plan fiduciary not later than the date that is

reasonably in advance of the date on which the contract or arrangement is entered into, and extended or renewed.

(II) A covered service provider shall disclose any change to the information required under clause (iii) and (iv) as soon as practicable, but not later than 60 days from the date on which the covered service provider is informed of such change, unless such disclosure is precluded due to extraordinary circumstances beyond the covered service provider's control, in which case the information shall be disclosed as soon as practicable.

(vi)(I) Upon the written request of the responsible plan fiduciary or covered plan administrator, a covered service provider shall furnish any other information relating to the compensation received in connection with the contract or arrangement that is required for the covered plan to comply with the reporting and disclosure requirements under this chapter.

(II) The covered service provider shall disclose the information required under clause (iii)(I) reasonably in advance of the date upon which such responsible plan fiduciary or covered plan administrator states that it is required to comply with the applicable reporting or disclosure requirement, unless such disclosure is precluded due to extraordinary circumstances beyond the covered service provider's control, in which case the information shall be disclosed as soon as practicable.

(vii) No contract or arrangement will fail to be reasonable under this subparagraph solely because the covered service provider, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information required pursuant to clause (iii) (or a change to such information disclosed pursuant to clause (v)(II)) or clause (vi), provided that the covered

service provider discloses the correct information to the responsible plan fiduciary as soon as practicable, but not later than 30 days from the date on which the covered service provider knows of such error or omission.

(viii)(I) Pursuant to subsection (a), subparagraphs (C) and (D) of section 1106(a)(1) of this title shall not apply to a responsible plan fiduciary, notwithstanding any failure by a covered service provider to disclose information required under clause (iii), if the following conditions are met:

(aa) The responsible plan fiduciary did not know that the covered service provider failed or would fail to make required disclosures and reasonably believed that the covered service provider disclosed the information required to be disclosed.

(bb) The responsible plan fiduciary, upon discovering that the covered service provider failed to disclose the required information, requests in writing that the covered service provider furnish such information.

(cc) If the covered service provider fails to comply with a written request described in subclause (II) within 90 days of the request, the responsible plan fiduciary notifies the Secretary of the covered service provider's failure, in accordance with subclauses (II) and (III).

(II) A notice described in subclause (I)(cc) shall contain—

(aa) the name of the covered plan;

(bb) the plan number used for the annual report on the covered plan;

(cc) the plan sponsor's name, address, and employer identification number;

(dd) the name, address, and telephone number of the responsible plan fiduciary;

(ee) the name, address, phone number, and, if known, employer identification number of the covered service provider;

(ff) a description of the services provided to the covered plan;

(gg) a description of the information that the covered service provider failed to disclose;

(hh) the date on which such information was requested in writing from the covered service provider; and

(ii) a statement as to whether the covered service provider continues to provide services to the plan.

(III) A notice described in subclause (I)(cc) shall be filed with the Department not later than 30 days following the earlier of—

(aa) The covered service provider's refusal to furnish the information requested by the written request described in subclause (I)(bb); or

(bb) 90 days after the written request referred to in subclause (I)(cc) is made.

(IV) If the covered service provider fails to comply with the written request under subclause (I)(bb) within 90 days of such request, the responsible plan fiduciary shall determine whether to terminate or continue the contract or arrangement under section 1104 of this title. If the requested information relates to future services and is not disclosed promptly after the end of the 90-day period, the responsible plan fiduciary shall

terminate the contract or arrangement as expeditiously as possible, consistent with such duty of prudence.

(ix) Nothing in this subparagraph shall be construed to supersede any provision of State law that governs disclosures by parties that provide the services described in this section, except to the extent that such law prevents the application of a requirement of this section.

(3) A loan to an employee stock ownership plan (as defined in section 1107(d)(6) of this title), if—

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 1107(d)(5) of this title).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to

do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an

excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 1344 of this title (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of subchapter III.

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 1411 of this title.

(12) The sale by a plan to a party in interest on or after December 18, 1987, of any stock, if—

(A) the requirements of paragraphs (1) and (2) of subsection (e) are met with respect to such stock,

(B) on the later of the date on which the stock was acquired by the plan, or January 1, 1975, such stock constituted a qualifying employer security (as defined in section 1107(d)(5) of this title as then in effect), and

(C) such stock does not constitute a qualifying employer security (as defined in section 1107(d)(5) of this title as in effect at the time of the sale).

(13) Any transfer made before January 1, 2033, of excess pension assets from a defined benefit plan to a retiree health account in a qualified transfer permitted under section 420 of title 26 (as in effect on December 29, 2022).

(14) Any transaction in connection with the provision of investment advice described in section 1002(21)(A)(ii) of this title to a participant or beneficiary of an individual account plan that permits such participant or beneficiary to direct the investment of assets in their individual account, if—

(A) the transaction is—

(i) the provision of the investment advice to the participant or beneficiary of the plan with respect to a security or other property available as an investment under the plan,

(ii) the acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice, or

(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with an acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice; and

(B) the requirements of subsection (g) are met.

(15)(A) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a party in interest (other than a fiduciary described in section 1002(21)(A) of this title) with respect to a plan if—

(i) the transaction involves a block trade,

(ii) at the time of the transaction, the interest of the plan (together with the interests of any other plans maintained by the same plan sponsor), does not exceed 10 percent of the aggregate size of the block trade,

(iii) the terms of the transaction, including the price, are at least as favorable to the plan as an arm's length[3] transaction, and

(iv) the compensation associated with the purchase and sale is not greater than the compensation associated with an arm's length[3] transaction with an unrelated party.

(B) For purposes of this paragraph, the term "block trade" means any trade of at least 10,000 shares or with a

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[3] So in original. Probably should be "arm's-length".

market value of at least $200,000 which will be allocated across two or more unrelated client accounts of a fiduciary.

(16) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a party in interest if—

(A) the transaction is executed through an electronic communication network, alternative trading system, or similar execution system or trading venue subject to regulation and oversight by—

(i) the applicable Federal regulating entity, or

(ii) such foreign regulatory entity as the Secretary may determine by regulation,

(B) either—

(i) the transaction is effected pursuant to rules designed to match purchases and sales at the best price available through the execution system in accordance with applicable rules of the Securities and Exchange Commission or other relevant governmental authority, or

(ii) neither the execution system nor the parties to the transaction take into account the identity of the parties in the execution of trades,

(C) the price and compensation associated with the purchase and sale are not greater than the price and compensation associated with an arm's length[3] transaction with an unrelated party,

(D) if the party in interest has an ownership interest in the system or venue described in subparagraph (A), the system or venue has been authorized by the plan sponsor or other independent fiduciary for transactions described in this paragraph, and

(E) not less than 30 days prior to the initial transaction described in this paragraph executed through

any system or venue described in subparagraph (A), a plan fiduciary is provided written or electronic notice of the execution of such transaction through such system or venue.

(17)(A) Transactions described in subparagraphs (A), (B), and (D) of section 1106(a)(1) of this title between a plan and a person that is a party in interest other than a fiduciary (or an affiliate) who has or exercises any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of section 1002(21)(A)(ii) of this title) with respect to those assets, solely by reason of providing services to the plan or solely by reason of a relationship to such a service provider described in subparagraph (F), (G), (H), or (I) of section 1002(14) of this title, or both, but only if in connection with such transaction the plan receives no less, nor pays no more, than adequate consideration.

(B) For purposes of this paragraph, the term "adequate consideration" means—

(i) in the case of a security for which there is a generally recognized market—

(I) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934 [15 U.S.C. 78f], taking into account factors such as the size of the transaction and marketability of the security, or

(II) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of the party in interest, taking into account factors such as the size of the transaction and marketability of the security, and

(ii) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by a fiduciary or fiduciaries in accordance with regulations prescribed by the Secretary.

(18) FOREIGN EXCHANGE TRANSACTIONS.—Any foreign exchange transactions, between a bank or broker-dealer (or any affiliate of either), and a plan (as defined in section 1002(3) of this title) with respect to which such bank or broker-dealer (or affiliate) is a trustee, custodian, fiduciary, or other party in interest, if—

(A) the transaction is in connection with the purchase, holding, or sale of securities or other investment assets (other than a foreign exchange transaction unrelated to any other investment in securities or other investment assets),

(B) at the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arm's length[3] foreign exchange transactions between unrelated parties, or the terms afforded by the bank or broker-dealer (or any affiliate of either) in comparable arm's-length foreign exchange transactions involving unrelated parties,

(C) the exchange rate used by such bank or broker-dealer (or affiliate) for a particular foreign exchange transaction does not deviate by more than 3 percent from the interbank bid and asked rates for transactions of comparable size and maturity at the time of the transaction as displayed on an independent service that reports rates of exchange in the foreign currency market for such currency, and

D) the bank or broker-dealer (or any affiliate of either) does not have investment discretion, or provide investment advice, with respect to the transaction.

(19) CROSS TRADING.—Any transaction described in sections 1106(a)(1)(A) and 1106(b)(2) of this title involving the purchase and sale of a security between a plan and any other account managed by the same investment manager, if—

(A) the transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available,

(B) the transaction is effected at the independent current market price of the security (within the meaning of section 270.17a–7(b) of title 17, Code of Federal Regulations),

(C) no brokerage commission, fee (except for customary transfer fees, the fact of which is disclosed pursuant to subparagraph (D)), or other remuneration is paid in connection with the transaction,

(D) a fiduciary (other than the investment manager engaging in the cross-trades or any affiliate) for each plan participating in the transaction authorizes in advance of any cross-trades (in a document that is separate from any other written agreement of the parties) the investment manager to engage in cross trades at the investment manager's discretion, after such fiduciary has received disclosure regarding the conditions under which cross trades may take place (but only if such disclosure is separate from any other agreement or disclosure involving the asset management relationship), including the written policies and procedures of the investment manager described in subparagraph (H),

(E) each plan participating in the transaction has assets of at least $100,000,000, except that if the assets of a plan are invested in a master trust containing the assets of plans maintained by employers in the same controlled group (as defined in section 1107(d)(7) of this title), the master trust has assets of at least $100,000,000,

(F) the investment manager provides to the plan fiduciary who authorized cross trading under subparagraph (D) a quarterly report detailing all cross trades executed by the investment manager in which the plan participated during such quarter, including the following information, as applicable: (i) the identity of each security bought or sold; (ii) the number of shares or units traded; (iii) the parties involved in the cross-trade; and (iv) trade price and the method used to establish the trade price,

(G) the investment manager does not base its fee schedule on the plan's consent to cross trading, and no other service (other than the investment opportunities and cost savings available through a cross trade) is conditioned on the plan's consent to cross trading,

(H) the investment manager has adopted, and cross-trades are effected in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program, and that include a description of the manager's pricing policies and procedures, and the manager's policies and procedures for allocating cross trades in an objective manner among accounts participating in the cross-trading program, and

(I) the investment manager has designated an individual responsible for periodically reviewing such purchases and sales to ensure compliance with the written policies and procedures described in subparagraph (H),

and following such review, the individual shall issue an annual written report no later than 90 days following the period to which it relates signed under penalty of perjury to the plan fiduciary who authorized cross trading under subparagraph (D) describing the steps performed during the course of the review, the level of compliance, and any specific instances of non-compliance.

The written report under subparagraph (I) shall also notify the plan fiduciary of the plan's right to terminate participation in the investment manager's cross-trading program at any time.

(20)(A) Except as provided in subparagraphs (B) and (C), a transaction described in section 1106(a) of this title in connection with the acquisition, holding, or disposition of any security or commodity, if the transaction is corrected before the end of the correction period.

(B) Subparagraph (A) does not apply to any transaction between a plan and a plan sponsor or its affiliates that involves the acquisition or sale of an employer security (as defined in section 1107(d)(1) of this title) or the acquisition, sale, or lease of employer real property (as defined in section 1107(d)(2) of this title).

(C) In the case of any fiduciary or other party in interest (or any other person knowingly participating in such transaction), subparagraph (A) does not apply to any transaction if, at the time the transaction occurs, such fiduciary or party in interest (or other person) knew (or reasonably should have known) that the transaction would (without regard to this paragraph) constitute a violation of section 1106(a) of this title.

(D) For purposes of this paragraph, the term "correction period" means, in connection with a fiduciary or party in interest (or other person knowingly participating in the transaction), the 14-day period

beginning on the date on which such fiduciary or party in interest (or other person) discovers, or reasonably should have discovered, that the transaction would (without regard to this paragraph) constitute a violation of section 1106(a) of this title.

(E) For purposes of this paragraph—

(i) The term "security" has the meaning given such term by section 475(c)(2) of title 26 (without regard to subparagraph (F)(iii) and the last sentence thereof).

(ii) The term "commodity" has the meaning given such term by section 475(e)(2) of title 26 (without regard to subparagraph (D)(iii) thereof).

(iii) The term "correct" means, with respect to a transaction—

(I) to undo the transaction to the extent possible and in any case to make good to the plan or affected account any losses resulting from the transaction, and

(II) to restore to the plan or affected account any profits made through the use of assets of the plan.

(21) The provision of a de minimis financial incentive described in section 401(k)(4)(A) or section 403(b)(12)(A) of title 26.

(c) Fiduciary benefits and compensation not prohibited by section 1106

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from—

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

(d) Owner-employees; family members; shareholder employees

(1) Section 1107(b) of this title and subsections (b), (c), and (e) of this section shall not apply to a transaction in which a plan directly or indirectly—

(A) lends any part of the corpus or income of the plan to,

(B) pays any compensation for personal services rendered to the plan to, or

(C) acquires for the plan any property from, or sells any property to,

any person who is with respect to the plan an owner-employee (as defined in section 401(c)(3) of title 26), a member of the family (as defined in section 267(c)(4) of such title) of any such owner-employee, or any corporation in which any such owner-employee owns, directly or indirectly, 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

(2)(A) For purposes of paragraph (1), the following shall be treated as owner-employees:

(i) A shareholder-employee.

(ii) A participant or beneficiary of an individual retirement plan (as defined in section 7701(a)(37) of title 26).

(iii) An employer or association of employees which establishes such an individual retirement plan under section 408(c) of such title.

(B) Paragraph (1)(C) shall not apply to a transaction which consists of a sale of employer securities to an employee stock ownership plan (as defined in section 1107(d)(6) of this title) by a shareholder-employee, a member of the family (as defined in section 267(c)(4) of such title) of any such owner-employee, or a corporation in which such a shareholder-employee owns stock representing a 50 percent or greater interest described in paragraph (1).

(C) For purposes of paragraph (1)(A), the term "owner-employee" shall only include a person described in clause (ii) or (iii) of subparagraph (A).

(3) For purposes of paragraph (2), the term "shareholder-employee" means an employee or officer of an S corporation (as defined in section 1361(a)(1) of such title) who owns (or is considered as owning within the meaning of section 318(a)(1) of such title) more than 5 percent of the outstanding stock of the corporation on any day during the taxable year of such corporation.

(e) Acquisition or sale by plan of qualifying employer securities; acquisition, sale, or lease by plan of qualifying employer real property

Sections 1106 and 1107 of this title shall not apply to the acquisition or sale by a plan of qualifying employer

securities (as defined in section 1107(d)(5) of this title) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 1107(d)(4) of this title)—

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 1107(e)(1) of this title),

(2) if no commission is charged with respect thereto, and

(3) if—

(A) the plan is an eligible individual account plan (as defined in section 1107(d)(3) of this title), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 1107(a) of this title.

(f) Applicability of statutory prohibitions to mergers or transfers

Section 1106(b)(2) of this title shall not apply to any merger or transfer described in subsection (b)(11).

(g) Provision of investment advice to participant and beneficiaries

(1) In general

The prohibitions provided in section 1106 of this title shall not apply to transactions described in subsection (b)(14) if the investment advice provided by a fiduciary adviser is provided under an eligible investment advice arrangement.

(2) Eligible investment advice arrangement

For purposes of this subsection, the term "eligible investment advice arrangement" means an arrangement—

(A) which either—

(i) provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment option selected, or

(ii) uses a computer model under an investment advice program meeting the requirements of paragraph (3) in connection with the provision of investment advice by a fiduciary adviser to a participant or beneficiary, and

(B) with respect to which the requirements of paragraph (4), (5), (6), (7), (8), and (9) are met.

(3) Investment advice program using computer model

(A) In general

An investment advice program meets the requirements of this paragraph if the requirements of subparagraphs (B), (C), and (D) are met.

(B) Computer model

The requirements of this subparagraph are met if the investment advice provided under the investment advice program is provided pursuant to a computer model that—

(i) applies generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time,

(ii) utilizes relevant information about the participant, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments,

(iii) utilizes prescribed objective criteria to provide asset allocation portfolios comprised of investment options available under the plan,

(iv) operates in a manner that is not biased in favor of investments offered by the fiduciary adviser or a person with a material affiliation or contractual relationship with the fiduciary adviser, and

(v) takes into account all investment options under the plan in specifying how a participant's account balance should be invested and is not inappropriately weighted with respect to any investment option.

(C) Certification

(i) In general

The requirements of this subparagraph are met with respect to any investment advice program if an eligible investment expert certifies, prior to the utilization of the computer model and in accordance with rules prescribed by the Secretary, that the computer model meets the requirements of subparagraph (B).

(ii) Renewal of certifications

If, as determined under regulations prescribed by the Secretary, there are material modifications to a computer model, the requirements of this subparagraph are met only if a certification described in clause (i) is obtained with respect to the computer model as so modified.

(iii) Eligible investment expert

The term “eligible investment expert” means any person—

(I) which meets such requirements as the Secretary may provide, and

(II) does not bear any material affiliation or contractual relationship with any investment adviser or a related person thereof (or any employee, agent, or registered representative of the investment adviser or related person).

(D) Exclusivity of recommendation

The requirements of this subparagraph are met with respect to any investment advice program if—

(i) the only investment advice provided under the program is the advice generated by the computer model described in subparagraph (B), and

(ii) any transaction described in subsection (b)(14)(A)(ii) occurs solely at the direction of the participant or beneficiary.

Nothing in the preceding sentence shall preclude the participant or beneficiary from requesting investment advice other than that described in subparagraph (A), but only if such request has not been solicited by any person connected with carrying out the arrangement.

(4) Express authorization by separate fiduciary

The requirements of this paragraph are met with respect to an arrangement if the arrangement is expressly authorized by a plan fiduciary other than the person offering the investment advice program, any person providing investment options under the plan, or any affiliate of either.

(5) Annual audit

The requirements of this paragraph are met if an independent auditor, who has appropriate technical training or experience and proficiency and so represents in writing—

(A) conducts an annual audit of the arrangement for compliance with the requirements of this subsection, and

(B) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the arrangement which presents its specific findings regarding compliance of the arrangement with the requirements of this subsection.

For purposes of this paragraph, an auditor is considered independent if it is not related to the person offering the arrangement to the plan and is not related to any person providing investment options under the plan.

(6) Disclosure

The requirements of this paragraph are met if—

(A) the fiduciary adviser provides to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication)—

(i) of the role of any party that has a material affiliation or contractual relationship with the fiduciary adviser in the development of the investment advice program and in the selection of investment options available under the plan,

(ii) of the past performance and historical rates of return of the investment options available under the plan,

(iii) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

(iv) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

(v)[4] the manner, and under what circumstances, any participant or beneficiary information provided under the arrangement will be used or disclosed,

(vi) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser,

(vii) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and

(viii) that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property, and

(B) at all times during the provision of advisory services to the participant or beneficiary, the fiduciary adviser—

(i) maintains the information described in subparagraph (A) in accurate form and in the manner described in paragraph (8),

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[4] So in original. The word "of" probably should appear.

(ii) provides, without charge, accurate information to the recipient of the advice no less frequently than annually,

(iii) provides, without charge, accurate information to the recipient of the advice upon request of the recipient, and

(iv) provides, without charge, accurate information to the recipient of the advice concerning any material change to the information required to be provided to the recipient of the advice at a time reasonably contemporaneous to the change in information.

(7) Other conditions

The requirements of this paragraph are met if—

(A) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

(B) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

(C) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

(D) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length[3] transaction would be.

(8) Standards for presentation of information

(A) In general

The requirements of this paragraph are met if the notification required to be provided to participants and beneficiaries under paragraph (6)(A) is written in a clear

and conspicuous manner and in a manner calculated to be understood by the average plan participant and is sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

(B) Model form for disclosure of fees and other compensation

The Secretary shall issue a model form for the disclosure of fees and other compensation required in paragraph (6)(A)(iii) which meets the requirements of subparagraph (A).

(9) Maintenance for 6 years of evidence of compliance

The requirements of this paragraph are met if a fiduciary adviser who has provided advice referred to in paragraph (1) maintains, for a period of not less than 6 years after the provision of the advice, any records necessary for determining whether the requirements of the preceding provisions of this subsection and of subsection (b)(14) have been met. A transaction prohibited under section 1106 of this title shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

(10) Exemption for plan sponsor and certain other fiduciaries

(A) In general

Subject to subparagraph (B), a plan sponsor or other person who is a fiduciary (other than a fiduciary adviser) shall not be treated as failing to meet the requirements of this part solely by reason of the provision of investment advice referred to in section 1002(21)(A)(ii)

of this title (or solely by reason of contracting for or otherwise arranging for the provision of the advice), if—

(i) the advice is provided by a fiduciary adviser pursuant to an eligible investment advice arrangement between the plan sponsor or other fiduciary and the fiduciary adviser for the provision by the fiduciary adviser of investment advice referred to in such section,

(ii) the terms of the eligible investment advice arrangement require compliance by the fiduciary adviser with the requirements of this subsection, and

(iii) the terms of the eligible investment advice arrangement include a written acknowledgment by the fiduciary adviser that the fiduciary adviser is a fiduciary of the plan with respect to the provision of the advice.

(B) Continued duty of prudent selection of adviser and periodic review

Nothing in subparagraph (A) shall be construed to exempt a plan sponsor or other person who is a fiduciary from any requirement of this part for the prudent selection and periodic review of a fiduciary adviser with whom the plan sponsor or other person enters into an eligible investment advice arrangement for the provision of investment advice referred to in section 1002(21)(A)(ii) of this title. The plan sponsor or other person who is a fiduciary has no duty under this part to monitor the specific investment advice given by the fiduciary adviser to any particular recipient of the advice.

(C) Availability of plan assets for payment for advice

Nothing in this part shall be construed to preclude the use of plan assets to pay for reasonable expenses in providing investment advice referred to in section 1002(21)(A)(ii) of this title.

(11) Definitions

For purposes of this subsection and subsection (b)(14)—

(A) Fiduciary adviser

The term "fiduciary adviser" means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in section 1002(21)(A)(ii) of this title by the person to a participant or beneficiary of the plan and who is—

(i) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

(ii) a bank or similar financial institution referred to in subsection (b)(4) or a savings association (as defined in section 1813(b)(1) of title 12), but only if the advice is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities,

(iii) an insurance company qualified to do business under the laws of a State,

(iv) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

(v) an affiliate of a person described in any of clauses (i) through (iv), or

(vi) an employee, agent, or registered representative of a person described in clauses (i) through (v) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

For purposes of this part, a person who develops the computer model described in paragraph (3)(B) or markets the investment advice program or computer model shall be treated as a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in section 1002(21)(A)(ii) of this title to a participant or beneficiary and shall be treated as a fiduciary adviser for purposes of this subsection and subsection (b)(14), except that the Secretary may prescribe rules under which only 1 fiduciary adviser may elect to be treated as a fiduciary with respect to the plan.

(B) Affiliate

The term "affiliate" of another entity means an affiliated person of the entity (as defined in section 80a–2(a)(3) of title 15).

(C) Registered representative

The term "registered representative" of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)) (substituting the entity for the investment adviser referred to in such section).

(h) Provision of pharmacy benefit services

(1) In general

Provided that all of the conditions described in paragraph (2) are met, the restrictions imposed by subsections (a), (b)(1), and (b)(2) of section 1106 of this title shall not apply to—

(A) the offering of pharmacy benefit services to a group health plan that is sponsored by an entity described in section 1002(37)(G)(vi) of this title or to any other group

health plan that is sponsored by a regional council, local union, or other labor organization affiliated with such entity;

(B) the purchase of pharmacy benefit services by plan participants and beneficiaries of a group health plan that is sponsored by an entity described in section 1002(37)(G)(vi) of this title or of any other group health plan that is sponsored by a regional council, local union, or other labor organization affiliated with such entity; or

(C) the operation or implementation of pharmacy benefit services by an entity described in section 1002(37)(G)(vi) of this title or by any other group health plan that is sponsored by a regional council, local union, or other labor organization affiliated with such entity,

in any arrangement where such entity described in section 1002(37)(G)(vi) of this title or any related organization or subsidiary of such entity provides pharmacy benefit services that include prior authorization and appeals, a retail pharmacy network, pharmacy benefit administration, mail order fulfillment, formulary support, manufacturer payments, audits, and specialty pharmacy and goods, to any such group health plan.

(2) Conditions

The conditions described in this paragraph are the following:

(A) The terms of the arrangement are at least as favorable to the group health plan as such group health plan could obtain in a similar arm's length arrangement with an unrelated third party.

(B) At least 50 percent of the providers participating in the pharmacy benefit services offered by the arrangement are unrelated to the contributing

employers or any other party in interest with respect to the group health plan.

(C) The group health plan retains an independent fiduciary who will be responsible for monitoring the group health plan's consultants, contractors, subcontractors, and other service providers for purposes of pharmacy benefit services described in paragraph (1) offered by such entity or any of its related organizations or subsidiaries and monitors the transactions of such entity and any of its related organizations or subsidiaries to ensure that all conditions of this exemption are satisfied during each plan year.

(D) Any decisions regarding the provision of pharmacy benefit services described in paragraph (1) are made by the group health plan's independent fiduciary, based on objective standards developed by the independent fiduciary in reliance on information provided by the arrangement.

(E) The independent fiduciary of the group health plan provides an annual report to the Secretary and the congressional committees of jurisdiction attesting that the conditions described in subparagraphs (C) and (D) have been met for the applicable plan year, together with a statement that use of the arrangement's services are in the best interest of the participants and beneficiaries in the aggregate for that plan year compared to other similar arrangements the group health plan could have obtained in transactions with an unrelated third party.

(F) The arrangement is not designed to benefit any party in interest with respect to the group health plan.

(3) Violations

In the event an entity described in section 1002(37)(G)(vi) of this title or any affiliate of such entity

violates any of the conditions of such exemption, such exemption shall not apply with respect to such entity or affiliate and all enforcement and claims available under this chapter shall apply with respect to such entity or affiliate.

(4) Rule of construction

Nothing in this subsection shall be construed to modify any obligation of a group health plan otherwise set forth in this chapter.

(5) Group health plan

In this subsection, the term "group health plan" has the meaning given such term in section 1191b(a) of this title.