

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

RAUL MORALES,

Plaintiff,

v.

**CAPITAL ONE FINANCIAL
CORPORATION, *et al.*,**

Defendants.

Civil No. 1:21-cv-1454-AJT-IDD

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**

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I. INTRODUCTION

This case is one of the latest in a rash of putative class-action lawsuits asserting that the fiduciaries of an employer's 401(k) retirement plan breached their duties under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*, by allegedly utilizing an imprudent process to administer the plan. As in many such cases, the Complaint here does not include any allegations about the actual process the fiduciaries of the Capital One Financial Corporation Associate Savings Plan (the "Plan" or "Capital One Plan") used, however. Instead, the Complaint rests on a small handful of circumstantial assertions. Specifically, Plaintiff Raul Morales alleges that the Court should infer the Plan's fiduciary process must have been flawed because: (1) the Plan included three allegedly imprudent investments with "excessively high" investment-management fees during part of the relevant period (out of dozens of options available to participants), and (2) the amount of fees Plaintiff and other participants paid to the Plan's recordkeeper were, in his view, "excessive." For multiple reasons, Plaintiff's claims fail.

For starters, Plaintiff's lead claim challenging the prudence of three (former) Plan investment options fails because he lacks Article III standing to pursue it. That claim focuses on three domestic-equity funds available to Plan participants between 2015 and 2020. Compl. ¶ 63. Plaintiff never invested in any of those funds, however. Instead, since he began participating in the Plan in early 2019, Plaintiff has always invested his Plan assets in a different investment option that the Complaint does not challenge. This means Plaintiff has not suffered any injury-in-fact related to the three challenged funds and therefore lacks Article III standing to pursue this claim.

The Complaint fares no better on its merits. The Supreme Court just explained that even at the pleadings stage, courts evaluating ERISA fiduciary-breach claims "must give due regard to the range of reasonable judgments a fiduciary may make." *Hughes v. Nw. Univ.*, 142 S. Ct. 737, 742 (2022). Plaintiff's claims do not satisfy that legal framework.

First, the Complaint challenges three former investment options as “imprudent,” asserting the funds were more expensive than the “medians” and “averages” for their investment category and underperformed their “peers.” Compl. ¶¶ 63-65. These allegations are not enough to state a claim. For one, when claiming an investment was too expensive or underperformed, a plaintiff must provide a “meaningful benchmark” against which to base a comparison. But here, the Complaint merely alleges the funds were more expensive than “average” and underperformed their “peers”—citing a single study that courts routinely reject—without identifying *any specific investments* alleged to be prudent alternatives. Further, the Complaint does not allege that the challenged investments were outside the “range of reasonable judgments” that ERISA fiduciaries make—*i.e.*, that no other reasonable fiduciaries offered the challenged investments as options.

Second, the Complaint separately alleges imprudence based on the assertion that the Plan’s recordkeeping fees were more expensive—in a single year of the entire six-year putative class period—than the fees allegedly paid by seven other plans. Those allegations likewise fail. To start, even if a handful of other plans paid less in a single year, that does not show imprudence, *i.e.*, that the Plan’s fees were outside the range of fees other plans pay. Further, the Complaint’s fee numbers are meaningless because they compare the Capital One Plan’s total alleged fees (described as “direct” and “indirect”) to only some of the fees that the other plans reported paying (*i.e.*, “direct” only). Finally, the Complaint focuses only on the price that different recordkeepers purportedly charged other plans, without any allegations about the services those plans received or how they compared to the services Fidelity provided to the Capital One Plan. That incomplete assessment says nothing about the reasonableness of the Plan’s alleged fees, and it certainly does not allow an inference the Plan fiduciaries’ process was so flawed as to fall outside the “range of reasonable judgments” that fiduciaries make.

The Court should also dismiss Plaintiff's ancillary failure-to-monitor claim in Count II, as it is derivative of the Complaint's core claim of fiduciary breach, and so fails along with it.

For these reasons, Capital One Financial Corporation, the Board of Directors of Capital One Financial Corporation (the "Board"), and the Capital One Financial Corporation Investment Committee (the "Committee") (together, "Capital One") respectfully request that the Court grant this motion and dismiss Plaintiff's Complaint in its entirety with prejudice.

II. STATEMENT OF FACTS¹

A. The Plan.

Capital One is one of the largest consumer banks in the nation. *See* Compl. ¶ 21. Just as Capital One is dedicated to helping its customers achieve financial success, the same is true for its employees. One way that Capital One helps its employees to prepare for retirement is through the Plan. The Plan is a participant-directed defined-contribution 401(k) plan established under ERISA, 29 U.S.C. § 1002(34). *Id.* ¶ 40. The Plan allows Capital One employees to save for retirement on a tax-deferred basis, with Capital One adding to those savings through certain matching contributions. *Id.* ¶¶ 42-43. During the relevant period, Capital One matched up to 7.5%

¹ This summary comes from Plaintiff's allegations or from publicly available documents referenced in the Complaint, which are appropriately considered on a Rule 12(b)(6) motion. *See Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 165–66 (4th Cir. 2016). "[I]n the event of conflict between the bare allegations of the complaint and any exhibit attached ..., the exhibit prevails." *Id.* at 166 (quotation omitted); *see Fayetteville Invs. v. Com. Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991). In particular, the Court may consider the publicly available Forms 5500 filed with the DOL, *see, e.g., Marks v. Trader Joe's Co.*, 2020 WL 2504333, at *4 (C.D. Cal. Apr. 24, 2020), and the Plan's annual disclosures required by Department of Labor ("DOL") regulations, *Patterson v. Morgan Stanley*, 2019 WL 4934834, at *11 (S.D.N.Y. Oct. 7, 2019). Additionally, a court may take judicial notice of public records. Fed. R. Evid. 201; *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007); *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

of eligible compensation annually. *Id.* ¶ 43. Between 2015 and 2020 alone, Capital One contributed over \$1.6 billion in employer matches to Plan participants.²

During the putative class period, the Plan offered participants a diverse menu of investment options, including a suite of target-date funds (the BlackRock LifePath funds);³ another 12 to 19 investments (depending on the year) that covered different asset classes, investment styles (actively managed funds and passively managed “index” funds), and risk-reward profiles;⁴ the Capital One Stock Fund; and a self-directed mutual-fund window allowing participants to select even more investment options not offered by the Plan.⁵ Of these dozens of options, the Complaint challenges only three historical fund offerings: (1) the Northern Small Cap Value Fund; (2) the Fidelity Capital Appreciation Fund; and (3) the T. Rowe Price Institutional Large Cap Value Fund. As of 2020, the Plan no longer offers those investment options. Compl. ¶ 63. The Complaint does not allege this Plaintiff ever invested in any of those funds; he did not. *See infra* at 9-12.

² These amounts increased every year. *See* Ex. 1, 2015 Form 5500, Fin. Stmts. at 4 (\$224,138,201); Ex. 2, 2016 Form 5500, Fin. Stmts. at 4 (\$239,177,561); Ex. 3, 2017 Form 5500, Fin. Stmts. at 4 (\$268,876,156); Ex. 4, 2018 Form 5500, Fin. Stmts. at 4 (\$278,359,198); Ex. 5, 2019 Form 5500, Fin. Stmts. at 4 (\$298,868,827); Ex. 6, 2020 Form 5500, Fin. Stmts. at 4 (\$330,193,523).

³ Target-date funds are common investment options in retirement plans, offering participants a straightforward way to invest their retirement savings in a fund with an asset allocation formula based on an estimated retirement date. *See Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1094 (D. Colo. 2020), *aff'd*, 2021 WL 2387909 (10th Cir. June 11, 2021). The asset allocations within a particular target-date fund are adjusted from more aggressive to more conservative as the retirement target year approaches. *Id.*

⁴ With actively managed funds, “investment advisers try to find and buy underpriced securities while selling ones that the advisers think are overvalued,” with an eye toward beating the index. *Loomis v. Exelon Corp.*, 658 F.3d 667, 669-70 (7th Cir. 2011). The associated work and resources render actively managed funds more costly than passively managed “index funds,” which “do not make any independent investment choices but simply track a designated portfolio such as the Standard & Poor’s 500 Index.” *Id.*

⁵ *See* Exs. 7–12, 2015-2020 Participant Discl. Notices at 3 (describing Fidelity BrokerageLink).

B. The Plan's Fees and Expenses.

Like all 401(k) plans, there are expenses associated with the management and administration of the Plan. These include: (1) investment-management fees, *i.e.*, “ongoing charges for managing the assets of the investment fund;” and (2) administrative or “recordkeeping” fees that encompass the “day-to-day” expenses for “basic administrative services ... necessary for administering the plan as a whole.”⁶

An investment option states its investment-management fee in the form of an “expense ratio”—*i.e.*, a percentage-based deduction against a participant’s total assets in the investment. Compl. ¶ 59. For instance, an expense ratio of .75% means that the plan participant will pay \$7.50 annually for every \$1,000 in assets. *Id.* In 2015, the Plan offered investments with expense ratios ranging from 0.015% to 1.24%, and by 2020, the Plan’s investment options were offered at even lower fees, ranging from just 0.006% to 0.50%.⁷ Each of the three investments challenged by the Complaint had its own expense ratio—as disclosed in the Plan’s annual fee disclosures—ranging from 0.40% to 1.24% during the relevant years they were offered in the Plan.⁸

The Plan also contracts with a recordkeeper, Fidelity, which provides “essential” plan-wide services for all participants. *See id.* ¶ 72. According to the Complaint, Fidelity received fees for services “*including, but not limited to*” recordkeeping services, as well as a variety of other

⁶ *See* DOL, Understanding Retirement Plan Fees and Expenses at 3, 5 (Dec. 2011), <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/understanding-retirement-plan-fees-and-expenses.pdf> (last visited March 10, 2021). Beyond these two general categories of fees, 401(k) plans or their recordkeepers often charge separate fees for individual transactions (*e.g.*, participant loans), but those fees are not at issue.

⁷ *See* Ex. 7, 2015 Participant Discl. Notice at 6-13; Ex. 12, 2020 Participant Discl. Notice at 8-13.

⁸ The Complaint states an incorrect expense ratio (0.82%) for the Fidelity Capital Appreciation Fund. Compl. ¶ 63. The 2019 Participant Disclosure Notice (available to Plaintiff and all participants) shows that its expense ratio was 0.45%. *See* Ex. 11., 2019 Participant Discl. Notice at 10A. The Court need not accept as true allegations that are contradicted by matters properly subject to judicial notice or by exhibit. *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002).

administrative, consulting, accounting, and compliance services. *Id.* (emphasis added). The Complaint identifies other “recordkeeping” services specific to individual participants that can vary considerably “based on the conduct of individual participants[.]” *Id.* ¶ 74.

As the Complaint states, recordkeeping expenses may be paid directly from plan assets, indirectly through a process called “revenue sharing,” or through some combination of both. *Id.* ¶ 77. Revenue sharing is “an arrangement allowing mutual funds to share a portion of the fees that they collect from investors with entities that provide services to the mutual funds,” such as recordkeepers. *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 907-08 (7th Cir. 2013). When a plan uses revenue-sharing on certain investments, the total fees paid by participants (for investment management and recordkeeping) are reflected in the investments’ expense ratios.⁹

The Complaint alleges that the Plan used a combination of direct and indirect payments to cover recordkeeping costs to Fidelity. Compl. ¶ 51. Throughout the relevant period, participants paid a fixed annual fee for recordkeeping services, assessed as a quarterly charge against each participant’s account. As reflected by the Plan’s annual fee disclosures—which Plaintiff and all participants receive every year per DOL regulations, 29 C.F.R. § 2550.404a-5—the annual recordkeeping fees paid to Fidelity decreased from \$33 per participant at the start of the relevant period, to \$30 per participant beginning in 2020.¹⁰ The Complaint alleges the Plan also used a revenue-sharing model against the Plan assets of certain investments. Compl. ¶ 51. But Plaintiff does not allege that he invested in any of the investment options that paid revenue sharing.

⁹ In the example above, the investment manager could pay a portion of the 0.75% expense ratio that it collects (*i.e.*, “sharing” some of its “revenue”) to the plan’s recordkeeper for services. Compl. ¶ 77. Under a revenue-sharing structure, a recordkeeper often “rebates” back to the plan the unused portion of fees it collects through expense ratios, and those rebates “can be used to pay for services like third-party consultants, plan audits, or paid back to plan participants.” *Wildman v. Am. Century Servs., LLC*, 2018 WL 2326627, at *2 (W.D. Mo. May 22, 2018).

¹⁰ See Exs. 9–12, 2017-2020 Participant Discl. Notices at 5.

In criticizing the Plan’s fees, the Complaint purports to tabulate the Plan’s “average” annual fees per participant by using data from the Plan’s Forms 5500 to divide the total estimated fees paid to Fidelity for all services each year by the number of Plan participants with account balances. In turn, the Complaint alleges that from 2015 through 2020, the Plan paid Fidelity between \$38.59 and \$81.15 annually per participant, albeit in amounts that are alleged to have steadily decreased during each year of the relevant period. Compl. ¶¶ 83-84.

C. The Complaint’s Claims.

The Complaint asserts two claims. In Count I, the Complaint asserts that the Committee breached its fiduciary duty of prudence under ERISA, 29 U.S.C. § 1104(a)(1)(B), because the Plan: (i) allegedly included three investments (out of dozens of participant investment options) with “excessively high” investment-management fees during part of the relevant period, and that supposedly “lagged well behind their peers” during an indeterminate period; and (ii) allegedly “saddl[ed] Plan participants with above-market recordkeeping fees.” Compl. ¶¶ 63-64, 80, 83-89, 90-97.¹¹ In Count II, the Complaint alleges that Capital One failed to adequately monitor the Committee with respect to the Plan’s fees. *Id.* ¶¶ 98-104. The Complaint seeks to pursue claims on a class-wide basis on behalf of more than 60,000 participants. *Id.* ¶¶ 32-38.

III. ARGUMENT

A. Standards of Review.

Rule 12(b)(1). “Article III standing is part and parcel of the constitutional mandate that the judicial power of the United States extend only to ‘cases and ‘controversies.’” *Baehr v. Creig*

¹¹ Although the Complaint makes an oblique reference to ERISA’s duty of loyalty—which requires fiduciaries to “discharge [their] duties ... for the exclusive purpose of ... providing benefits to participants and their beneficiaries,” 29 U.S.C. § 1104(a)(1)(A)(i), *see* Compl. ¶ 92—the only fiduciary-breach claim the Complaint actually asserts is one for breach of the duty of prudence, *see* Compl. ¶¶ 13, 90-97.

Northrop Team, P.C., 953 F.3d 244, 252 (4th Cir. 2020). As the Fourth Circuit has put it, “[t]hat constitutional mandate ... requires a party invoking a federal court’s jurisdiction to demonstrate standing.” *Id.*; accord *Ali v. Hogan*, -- F.4th --, 2022 WL 497346, at *6 (4th Cir. Feb. 18, 2022) (“The plaintiff bears the burden of establishing standing to sue as of the time he commenced the litigation.”). In considering a challenge to subject-matter jurisdiction pursuant to Rule 12(b)(1), including on Article III standing grounds, “the district court ... may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.” *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999); see also *Duku v. Soc. Sec. Admin.*, 2020 WL 9423180, at *2 (E.D. Va. Mar. 4, 2020) (Trenga, J.) (explaining that under Rule 12(b)(1), the court may “go beyond the allegations of the complaint to determine independently the existence of jurisdiction”).

Rule 12(b)(6). In assessing ERISA claims of fiduciary breach under Rule 12(b)(6), courts must apply the pleading standards described in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), by evaluating a complaint’s allegations “as a whole” and “giv[ing] due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise.” *Hughes*, 142 S. Ct. at 742. “Because the content of the duty of prudence turns on ‘the circumstances ... prevailing’ at the time the fiduciary acts,” courts must undertake a “careful, context-sensitive scrutiny of a complaint’s allegations” to “divide the plausible sheep from the meritless goats.” *Id.* at 742; *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014)). In turn, where there are “two possible explanations, only one of which can be true and only one of which results in liability, plaintiff [] cannot offer allegations that are ‘merely consistent with’ [its] favored explanation but are also consistent with [an] alternative explanation.” *White v. Chevron Corp. (“White III”)*, 752 F. App’x 453, 454 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2646 (2019); see also *Iqbal*, 556 U.S. at 678-79, 682 (holding that “a complaint

[that] pleads facts that are ‘merely consistent with’ a defendant’s liability” will not survive) (citation omitted). The Supreme Court has emphasized that Rule 12(b)(6) is an “important mechanism for weeding out meritless claims” in the ERISA context. *Dudenhoeffer*, 134 S. Ct. at 2471. This is because “the prospect of discovery” is “ominous” and “elevates the possibility that a plaintiff with a largely groundless claim will simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.” *Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.* (“*St. Vincent*”), 712 F.3d 705, 718-19 (2d Cir. 2013).

B. Plaintiff Lacks Article III Standing to Pursue the Complaint’s Claim That Three Investments Were Imprudent Because He Never Invested in Them.

Before even turning to the legal and factual implausibility of the Complaint’s allegations, the Court should dismiss the Complaint’s lead imprudent-investment claim at the threshold because Plaintiff does not and cannot demonstrate Article III standing to pursue it.

In the Supreme Court’s words, “[t]here is no ERISA exception to Article III” and its standing requirements. *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1622 (2020). Where, as here, Plaintiff alleges fiduciary misconduct, he must demonstrate that the alleged misconduct injured him *personally* even when he purports to be suing “on behalf of” an ERISA plan. *Id.* at 1620 (rejecting argument that plaintiffs had standing because they were suing on behalf of the plan and therefore “assert standing as representatives of the plan itself”).

The “irreducible constitutional minimum of standing consists of three elements”—a plaintiff must have “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The injury-in-fact element requires a showing that a plaintiff “suffered ‘an invasion of a legally protected interest’ that is ‘concrete and

particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Id.* at 339. This burden applies to “each claim” and “each form of relief that is sought.” *Davis v. FEC*, 554 U.S. 724, 734 (2008); *Dezelan v. Voya Ret. Ins. & Annuity Co.*, 2017 WL 2909714, at *5 (D. Conn. July 6, 2017) (explaining, in an ERISA fiduciary-breach case, that “with respect to each asserted claim ... a plaintiff must always have suffered a distinct and palpable injury to herself”).

The Plan here is a defined-contribution individual-account plan. Compl. ¶ 40. This means that a participant’s benefit is “based *solely* on the amounts allocated to each individual’s account.” *Id.* (emphasis added); see *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999) (in a defined contribution plan “each beneficiary is entitled to whatever assets are dedicated to his individual account”). The necessary corollary to this principle is that the performance or fees associated with investment options that a plan participant *did not select* for his individual account do not and cannot impact that participant’s benefit. For these reasons, “[s]ince *Thole*, district courts across the country have largely held that ERISA plaintiffs do not have standing to challenge the offering of specific funds that they did not allege that they personally invested in.” *In re LinkedIn ERISA Litig.*, 2021 WL 5331448, at *4 (N.D. Cal. Nov 16, 2021) (collecting cases).

Here, the Complaint’s investment claim focuses on three—and only three—investment options that were allegedly too “expensive” and “imprudently selected”: (1) the Northern Small Cap Value Fund; (2) the Fidelity Capital Appreciation Fund; and (3) the T. Rowe Price Institutional Large Cap Value Fund. Compl. ¶¶ 63-65. But Plaintiff does not allege that he invested his Plan account in any of those offerings. He did not. Instead, since he began participating in the Plan in early 2019, Plaintiff has always invested his plan assets in a single investment: the BlackRock

LifePath 2030 Fund.¹² Declaration of Michelle Merringer (“Merringer Decl.”) ¶¶ 2-4. As such, Plaintiff could not have suffered any personalized, concrete injury-in-fact related to any of the three challenged investments, whether with respect to the fees associated with those investments or their performance. None of those issues affected in any way Plaintiff’s individual Plan account, which was invested exclusively in another (single) investment option. *See LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 256 (2008) (confirming that ERISA “authorize[s] recovery for fiduciary breaches that impair the value of plan assets in a participant’s individual account”).

Applying these same standing principles to similar facts, courts routinely dismiss ERISA fiduciary-breach claims challenging investment options that a plaintiff did not select for lack of Article III standing. *Lange v. Infinity Healthcare Physicians*, 2021 WL 3022117, at *2-4 (W.D. Wis. July 16, 2021) (holding that “a plaintiff lacks standing to challenge investment decisions that did not personally affect her” and dismissing investment-related ERISA fiduciary-breach claims on this basis); *accord In re LinkedIn Litig.*, 2021 WL 5331448, at *4 (similar); *Patterson*, 2019 WL 4934834, at *5 (holding that plaintiff had no Article III standing to pursue investment-related fiduciary-breach claims as to investments he never selected for his personal account); *David v. Alphin*, 817 F. Supp. 2d 764, 781-82 (W.D.N.C. 2011) (similar, dismissing ERISA fiduciary-breach claims where plaintiffs could not show or “explain how [allegedly] improper or excessive fees ha[d] any effect on their ... benefits”), *aff’d*, 704 F.3d 327 (4th Cir. 2013).¹³

¹² In mid-2020, the Plan adjusted its target-date funds such that the BlackRock LifePath Index Funds mapped to the BlackRock LifePath Index Non-Lendable Funds. Merringer Decl. ¶ 4.

¹³ *See also Wilcox v. Georgetown Univ.*, 2019 WL 132281, at *9-10 (D.D.C. Jan. 8, 2019); *Johnson v. Delta Air Lines, Inc.*, 2017 WL 10378320, at *2 (N.D. Ga. Dec. 12, 2017); *Dezelan*, 2017 WL 2909714, at *6; *Marshall v. Northrop Grumman Corp.*, 2017 WL 2930839, at *8 (C.D. Cal. Jan. 30, 2017); *Yost v. First Horizon Nat’l Corp.*, 2011 WL 2182262, at *6 (W.D. Tenn. June 3, 2011).

The same result should follow here. Because Plaintiff never invested a cent in any of the three (former) Plan investments challenged by the Complaint, he cannot have suffered any injury-in-fact related to those investments and thus lacks Article III standing to pursue claims about them.

C. The Complaint Fails to State Any Plausible Claims of Fiduciary Breach.

As explained, the Complaint ventures two sets of allegations in attempting to create an inference of imprudence surrounding the Capital One Plan’s fiduciary process, namely that the Plan allegedly: (1) offered three historical investments that the Complaint contends were too costly and imprudent; and (2) allowed the Plan to pay what the Complaint calls “excessive” recordkeeping fees to Fidelity. These allegations do not state a claim.

1. The Complaint’s Criticisms of Three Former Plan Investments Fail to Create Any Plausible Inference of Imprudence.

The Complaint’s lead claim is that because the Plan previously offered three Plan investment options (out of dozens of available offerings) that were allegedly imprudent, the Court should infer that the Plan’s fiduciary process for selecting and monitoring these funds was deficient. Even setting aside Plaintiff’s inability to establish the requisite constitutional standing to pursue this claim, the Complaint’s allegations fall well short of the plausibility bar.

To start, and as a general matter, the Complaint does not offer any well-pled allegations to show that these three investment options were outside the “range of reasonable judgments” the Plan’s fiduciaries were empowered to consider when shaping the Plan’s investment lineup. *Hughes*, 142 S. Ct. at 742. In other words, the Complaint does not allege that *no reasonable fiduciaries* offered these funds as investment options for their participants. Nor could it. All three

continue to have billions of assets under management, demonstrating that other prudent investors believe they are reasonable and appropriate investments.¹⁴

Further, even putting aside the fundamental problem with the Complaint’s investment claim under Supreme Court precedent, the Complaint’s specific criticisms—which focus almost entirely on the investments’ alleged fees—do not allow any plausible inference of imprudence.

a. The Complaint’s Narrow Focus on Fees Fails to Create an Inference of Imprudence Because Fiduciaries Are Not Required to Offer Only the Cheapest Fund.

The Complaint’s chief criticism of the challenged investments is that they were allegedly too expensive. Compl. ¶¶ 63-65. In fact, as to all the investments except one (the Northern Small Cap Value Fund), it is the *only criticism*. But allegations that focus solely on cost are insufficient to create an inference of imprudence because “[f]iduciaries have latitude to value investment features other than price (and, indeed, are required to do so).” *White v. Chevron Corp.* (“*White P*”), 2016 WL 4502808, at *10 (N.D. Cal. Aug. 29, 2016). As one Court of Appeals explained, “nothing in ERISA requires [a] fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems).” *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009); *accord Loomis*, 658 F.3d at 670 (“The fact that ... some other funds might have had even lower ratios is beside the point.”). Thus, courts routinely agree that “[a]n ERISA fiduciary does not breach its duty of prudence by failing to offer the cheapest investment option.” *Kendall v. Pharm. Prod. Dev., LLC*, 2021 WL 1231415, at *6 (E.D.N.C. Mar. 31, 2021);

¹⁴ As of this filing, the Northern Small Cap Value Fund (NOSGX) reported than \$2.4 billion in portfolio net assets (<https://www.northerntrust.com/united-states/what-we-do/investment-management/northern-funds/funds-and-performance/equity/NOSGX>), the Fidelity Capital Appreciation Fund (FDCAX) reported more than \$6.2 billion (<https://fundresearch.fidelity.com/mutual-funds/summary/316066109>), and the T. Rowe Price Large-Cap Value Fund (TILCX) reported \$3.6 billion (<https://www.troweprice.com/financial-intermediary/us/en/investments/mutual-funds/us-products/large-cap-value-i-class.html>).

White I, 2016 WL 4502808, at *10; *Kong v. Trader Joe's Co.* (“*Kong II*”), 2020 WL 7062395, at *4 (C.D. Cal. Nov. 30, 2020), *appeal filed*, No. 20-56415 (9th Cir.). Yet, with one (flawed) exception, that is all the Complaint alleges here—that a handful of the Plan’s investments could have been less expensive. Compl. ¶¶ 63-65, 69 (“Defendants’ failure to obtain reasonably-priced investments from 2015 to 2019 is circumstantial evidence of their imprudent process[.]”). This narrowminded approach fails to state a claim.

b. The Complaint Offers No “Meaningful Benchmark” for the Challenged Funds and Courts Consistently Reject Reliance on the ICI Study Cited in the Complaint.

The Complaint’s unduly narrow focus on investment cost is particularly flawed here because it fails to compare the challenged investments to any meaningful benchmark. “To show that a prudent fiduciary in like circumstances would have made a different decision, plaintiffs must provide a ‘meaningful benchmark’ against which to base a comparison.” *Kendall*, 2021 WL 1231415, at *4 (quoting *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018); *Davis v. Wash. U. in St. Louis*, 960 F.3d 478, 484 (8th Cir. 2020)). A “meaningful benchmark” is a *specific* investment that must be “more than a less expensive alternative fund with some similarity.” *Meiners*, 898 F.3d at 823-24; *Davis*, 960 F.3d at 486 (similar); *Kendall*, 2021 WL 1231415, at *6 (explaining that a complaint must show that a plan “could have offered the exact same investment option for a lower price based on the Plan’s size”).¹⁵

¹⁵ See also, e.g., *Meiners*, 898 F.3d at 823 (affirming dismissal of claims for lack of “meaningful benchmark”); *Tobias v. NVIDIA Corp.*, 2021 WL 4148706, at *13 (N.D. Cal. Sept. 13, 2021) (dismissing complaint challenging prudence of investment offerings because the plaintiffs fails to offer any “meaningful benchmark”); *Cho v. Prudential Ins. Co. of Am.*, 2021 WL 4438186, at *8 n.7 (D.N.J. Sept. 27, 2021) (similar); *Forman v. TriHealth, Inc.*, 2021 WL 4346764, at *7 (S.D. Ohio Sept. 24, 2021) (similar), *appeal filed*, No. 21-3977 (6th Cir.); *Smith v. CommonSpirit Health*, 2021 WL 4097052, at *9 (E.D. Ky. Sept. 8, 2021) (similar), *appeal filed*, No. 21-5964 (6th Cir.); *Patterson*, 2019 WL 4934834, at *12 (similar); *Bekker v. Neuberger Berman Grp. LLC*, 2018 WL 4636841, at *7 (S.D.N.Y. Sept. 27, 2018) (similar).

The Complaint here offers nothing of the sort. Instead, it purports to compare the challenged fees to the “median” and “average” fees for all “domestic equity” investments writ large, but not against the fees of any specific alternative investment(s). “Median” or “average” fees are not meaningful benchmarks. *See, e.g., Kendall*, 2021 WL 1231415, at *7 (“Plaintiffs do not compare sufficiently similar funds A median value for an entire category cannot be said to be identical save for price.”). Accordingly, “[m]erely arguing that ... the Plan’s investment options are above the median for their investment category does not plausibly suggest a breach.” *Id.*; *CommonSpirit Health*, 2021 WL 4097052, at *10 (“Plaintiff’s sole allegation that the total amount of investment management fees paid was higher than average is insufficient to plead a claim[.]”).¹⁶

In fact, federal courts across the country have consistently granted Rule 12(b)(6) motions and rejected fiduciary-breach claims based on the *same ICI Study* the Complaint relies on here.¹⁷ *See, e.g., Davis v. Salesforce.com, Inc.*, 2020 WL 5893405, at *2 n.3 (N.D. Cal. Oct. 5, 2020) (refusing to rely on the ICI Study and explaining that it lumps together too many disparate investments); *see also Parmer v. Land O’Lakes, Inc.*, 518 F. Supp. 3d 1293, 1306-07 (D. Minn. 2021); *Rosenkranz v. Altru Health Sys.*, 2021 WL 5868960, at *10 (D.N.D. Dec. 10, 2021); *Wehner v. Genentech, Inc.*, 2021 WL 507599, at *8 (N.D. Cal. Feb. 9, 2021); *CommonSpirit Health*, 2021 WL 4097052, at *9. This is not surprising considering that the ICI Study itself

¹⁶ The reason courts reject reliance on above median or average fees to infer imprudence is simple. If that were the test, every investment with fees above their category’s median—by definition, *half of all investment options*—would be deemed imprudent. *See Obeslo v. Great-W. Capital Mgmt., LLC*, 2020 WL 4558982, at *7 n.4 (D. Colo. Aug. 7, 2020) (observing that the mere fact that a given mutual fund has higher expenses than “industry average fees” does not render the fees excessive; otherwise, “half of all mutual funds would have ‘excessive’ fees”), *aff’d*, 6 F.4th 1135 (10th Cir. 2021). That sort of framework would be completely contrary to ERISA, which contemplates a “range of reasonable judgments,” *Hughes*, 142. S. Ct. at 742, including by empowering plan fiduciaries to value considerations other than costs and fees.

¹⁷ ICI Study, https://www.ici.org/system/files/2021-07/21_ppr_deplan_profile_401k.pdf (cited in Compl. ¶ 63 n.7).

explains that “[t]his material is *not intended for benchmarking* the costs of specific plans to the broad averages presented here.” ICI Study at Introduction (emphasis added). In turn, courts recognize that the ICI Study’s fund categories include a wide amalgamation of funds that do not differentiate between passively and actively managed funds,¹⁸ and do not address asset allocation or risk among the different funds that are grouped together. In other words, they do not offer a meaningful benchmark. *Davis*, 2020 WL 5893405, at *2 n.3; *Parmer*, 518 F. Supp. 3d at 1306-07; *Rosenkranz*, 2021 WL 5868960, at *10; *Wehner*, 2021 WL 507599, at *8; *CommonSpirit Health*, 2021 WL 4097052, at *9. This Court should hold the same.

c. The Complaint’s Conclusory and Hindsight Performance Critiques Are Insufficient as a Matter of Law.

The Complaint also hints at a criticism of the challenged funds’ performance when it comes to investment returns, but those allegations likewise fall short on multiple grounds.

***Fidelity Capital Appreciation Fund and
T. Rowe Price Institutional Large Cap Value Fund***

As an initial matter, the Complaint includes *zero* factual allegations as to the performance of the Fidelity Capital Appreciation Fund or the T. Rowe Price Institutional Large Cap Value Fund. At most, the Complaint simply asserts that these funds “lagged well behind their peers.” Compl. ¶ 65. Beyond that, it says nothing about what those supposed “peers” were, whether those peers provide a meaningful benchmark, or the timing (three months, one year) or magnitude (10% or 0.1%) of any alleged performance differences. The Complaint does not even allege that these funds underperformed during the time they were in the Plan. The Complaint’s generalized and

¹⁸ The ICI Study itself makes this very point: “actively managed mutual funds can offer investors the chance to earn superior returns, access specialized sectors, or take advantage of alternative investment strategies, all of which can make a fund *more expensive to manage*.” See ICI Study at 56 (emphasis added).

conclusory allegation that the Fidelity Capital Appreciation Fund or the T. Rowe Price Institutional Large Cap Value Fund “lagged” and “underperformed” falls well below the plausibility bar. *Hughes*, 142 S. Ct. at 742; *Iqbal*, 556 U.S. at 686; *Twombly*, 550 U.S. at 555-57.

Northern Small Cap Value Fund

As for the Northern Small Cap Value Fund, the Complaint alleges that it “performed worse than 71% of its 403 peers at the 3 year mark and performed worse than 67% of its peers at the 5 year mark.” Compl. ¶ 68. But this, too, cannot state a claim for at least three reasons.

First, the Complaint does not identify the time period during which the fund supposedly underperformed. If the Complaint is focused on returns from 2020 or 2021 (as the other charts in the Complaint would suggest),¹⁹ that would be irrelevant because the Plan no longer offered the Northern Small Cap Value Fund (nor the other challenged investments) by that point in time.

Second, the Complaint does not identify the so-called “peers” that allegedly performed better. Just as a comparison to “average” and “median” fees does not provide a meaningful benchmark, neither does a comparison of an investment’s alleged performance to a generalized and unspecified group of “peers.” *Anderson v. Intel Corp.*, 2021 WL 229235, at *8 (N.D. Cal. Jan. 21, 2021) (“Simply labeling funds as ‘comparable’ or ‘a peer’ is insufficient to establish that those funds are meaningful benchmarks.”); *CommonSpirit Health*, 2021 WL 4097052, at *6-9 (rejecting claims based on investment “underperformance” for failure to provide meaningful benchmarks); *Rosenkranz*, 2021 WL 5868960, at *9-11 (same). In reality, the Northern Small Cap Value Fund outperformed its actual prospectus benchmark in the last few years it was included as an investment offering in the Plan:

¹⁹ See Compl. ¶¶ 63-64 (identifying alleged expense ratios from 2021 and 2020, respectively).

Returns from 2018 Fee Disclosure ²⁰		
	5-year	10-year
Northern Small Cap Value Fund	13.65%	9.19%
<i>Russell 2000 Value (Benchmark)</i>	13.01%	8.17%
Returns from 2019 Fee Disclosure		
	5-year	10-year
Northern Small Cap Value Fund	3.71%	10.51%
<i>Russell 2000 Value (Benchmark)</i>	3.61%	10.40%

This data renders the Complaint’s generalized performance criticism all the more implausible. *See, e.g., CommonSpirit Health*, 2021 WL 4097052, at *8 (finding underperformance allegation implausible where challenged fund outperformed its chosen benchmark on a five-year basis).²¹

Last, as a matter of law, merely alleging that a fund underperformed—in hindsight—is not enough to show that the fund was imprudent. *See* 29 U.S.C. § 1104(a)(1)(B) (requiring fiduciaries to act prudently “under the circumstances then prevailing”). This makes sense because “[n]o authority requires a fiduciary to pick the best performing fund.” *Meiners*, 898 F.3d at 823. Said another way, “[p]oor performance, standing alone, is not sufficient to create a reasonable inference that [fiduciaries] failed to conduct an adequate investigation—either when the investment was selected or as its underperformance emerged.” *White v. Chevron Corp. (“White II”)*, 2017 WL

²⁰ *See* Ex. 10, 2018 Participant Fee Discl. Notice at 10; Ex. 11, 2019 Participant Fee Discl. Notice at 10. The Court may consider the Plan’s annual participant fee disclosures in deciding Capital One’s motion to dismiss. *See, e.g., Patterson*, 2019 WL 4934834, at *11.

²¹ Moreover, the Complaint’s bald assertion that the investment underperformed its “peers” over some unspecified three- and five-year periods rests on an unduly narrow measurement period, as multiple courts have recognized. *See, e.g., Dorman*, 2019 WL 580785, at *6 (noting that “three to five years ... [is] considered [a] relatively short period[] of underperformance” that does not imply imprudence); *Cho*, 2021 WL 4438186, at *9 (claim based on five-year performance period insufficient to state an imprudence claim); *Salesforce*, 2020 WL 5893405, at *4 (allegations “based on five-year returns are not sufficiently long-term to state a plausible claim of imprudence”). This case should be no different.

2352137, at *20 (N.D. Ca. May 31, 2017); *see also Dorman v. Charles Schwab Corp.*, 2019 WL 580785, at *6 (N.D. Cal. Feb. 8, 2019) (“[O]ffering and retaining funds that have underperformed modestly and have somewhat higher fees is not enough to show malfeasance.”); *Patterson*, 2019 WL 4934834, at *11 (“[T]he duty of prudence does not compel ERISA fiduciaries to reflexively jettison investment options in favor of the prior year’s top performers.”). Accordingly, the Complaint’s allegation that the Northern Small Cap Value Fund may have underperformed some unidentified “peers,” at some unidentified point in time, fails to show imprudence.

* * *

In sum, neither the Complaint’s pronouncement about the so-called “excessively high expense ratios” of three former Plan investment offerings, nor its conclusory statement that the performance of those investments “lagged” behind other unidentified “peers,” comes anywhere close to stating a plausible claim of fiduciary imprudence under ERISA.²²

²² As a separate but important point, the Complaint acknowledges that the Plan stopped offering the three challenged funds in 2020, in the middle of the putative class period. Compl. ¶¶ 63-65 & n.8. The Complaint says those changes support the claim, but the opposite is true. In other words, even if the Complaint did plausibly show that the three challenged funds were improper in some way (and it does not), the fact that the Plan’s fiduciaries removed them would show that the fiduciary process was working and therefore prudent. *CommonSpirit Health*, 2021 WL 4097052, at *9 (holding that fiduciaries’ removal of fund “suggest[s] that Defendants reasonably monitored its performance.”); *White II*, 2017 WL 2352137, at *20 (rejecting allegation that fiduciaries acted imprudently by failing to remove challenged investment earlier; instead the facts pled led to an inference that “Plan fiduciaries were attentively monitoring the Fund”), *aff’d*, 752 F. App’x 453 (9th Cir. 2018); *Laboy v. Bd. of Trs. of Bldg. Serv. 32 BJ SRSP*, No. 11-5127, 2012 WL 3191961, at *3 (S.D.N.Y. Aug. 7, 2012) (“It would turn the law on its head were we to embrace a concept where a plaintiff could use allegations of prudent measures to prove a defendant’s imprudence: a trustee might hesitate to replace a fund in its plan out of fears that such action could later be used to sustain a claim for breach of fiduciary duty.”), *aff’d*, 513 F. App’x 78 (2d Cir. 2013). This admitted fact provides another basis to reject the Complaint’s investment claim as implausible.

2. The Complaint’s Criticism of the Plan’s Alleged Recordkeeping Fees Fails to Create Any Plausible Inference of Imprudence.

The Complaint also asks the Court to infer that the Plan fiduciaries’ process was imprudent because the alleged recordkeeping fee amounts that the Plan paid to Fidelity during the relevant period were “excessive.” Compl. ¶¶ 70-89. The Complaint purports to make this inferential leap by comparing the Plan’s alleged fees to the alleged fees of seven other retirement plans from a single year. For several independent but mutually reinforcing reasons, these allegations fail.

a. Plaintiff Cannot State a Claim by Alleging That a Few Plans Paid Less in Recordkeeping Fees.

First, the very conceptual premise of the Complaint’s recordkeeping-fee claim—that the Plan’s fees are indicative of an imprudent process because a few other plans paid less—cannot be enough to state a plausible claim. There are thousands of 401(k) retirement plans. Even being conservative, and assuming there are only 1,000 retirement plans across the country, Plaintiff alleges the Plan paid more in recordkeeping fees than 0.7% of them (7 out of 1,000 = 0.7%). That cannot create an inference that the Plan’s fees were outside the “range of judgments” fiduciaries make. *Hughes*, 142 S. Ct. at 740; *see, e.g., Albert v. Oshkosh Corp.*, 2021 WL 3932029, at *5 (E.D. Wis. Sept. 2, 2021) (“[T]he mere existence of purportedly lower fees paid by other plans says nothing about the reasonableness of the Plan’s fee.”), *appeal filed*, No. 21-2789 (7th Cir.).

Further, the Complaint’s allegations are especially faulty here because they hinge on fee comparisons from *a single year* (2019) across the six-year putative class period. The Complaint offers zero allegations as to the fees that the alternate plans paid in any other year, let alone how those amounts might compare to the amounts allegedly paid by the Capital One Plan. That sort of superficial and spotty assessment is meaningless. After all, one need only apply the Complaint’s own rubric to the same publicly-available data for the following year (2020) to see that the apparent

fees for at least two of the comparator plans *increased*, landing right in step with the Capital One Plan’s alleged fees for that year—*i.e.*, \$38 or \$39 per participant. *See* Compl. ¶ 83.

Plaintiff’s “Comparable” Plans’ Recordkeeping Fees (2020)²³

Plan Name	Number of Participants	Assets Under Management	Total R&A Costs	R&A Costs/pp	Record-keeper
The Dow Chemical Company Employee Savings Plan	35,761	\$11,502,338,834	\$1,386,940	\$39	Fidelity
Kaiser Permanente Supplemental Savings and Retirement Plan	48,263	\$4,523,681,952	\$1,821,809	\$38	Vanguard

This exercise illustrates the self-serving and arbitrary nature of the Complaint’s recordkeeping-fee allegations. Indeed, by Plaintiff’s logic, the Kaiser Permanente plan also would be imprudent, because its fees were higher than those allegedly paid by the Deseret, Rite Aid, and WPP Group plans. *See* Compl. ¶ 87. In short, a limited set of supposed fee data related to a few different plans (many with different recordkeepers) from a single year says nothing about the reasonableness of the Capital One Plan’s fees, much less about the potential prudence of the Plan fiduciaries’ process.

b. Plaintiff’s Fee-Comparison Allegations Fail Because They Do Not Consider the Total Fees Paid by the Comparator Plans, as the Complaint Says Is Required.

Second, the Complaint’s proffered fee calculations are inconsistent because they are comparing apples to oranges. As the Complaint recognizes, “[r]ecordkeeping expenses can be ... paid”: (1) “directly from plan assets”; (2) “indirectly by the plan’s investments in a practice known

²³ The calculations are based on the plans’ 2020 Forms 5500. *See* Ex. 13, 2020 Form 5500 for the Dow Plan; Ex. 15, 2020 Form 5500 for the Kaiser Plan. Specifically, “Participants” are drawn from Line 6g, “Assets” are drawn from Schedule H, Part I, Line 1/ column (b), and “Total R&A Cost” comes from Schedule C. This is the same approach the Complaint uses. Compl. ¶ 87.

as revenue sharing”; or (3) “a combination of both.” Compl. ¶ 77. And the Complaint specifically alleges that any assessment of fees must “identify *all fees, including direct compensation and revenue sharing* being paid to the plan’s recordkeeper.” *Id.* ¶ 79 (emphasis added).

For the Capital One Plan, the Complaint adds together “direct” fees and “indirect” revenue sharing payments in calculating the Plan’s alleged fees. *Id.* ¶ 83. But for the comparator plans, the Complaint includes only the “direct” payments and ignores the indirect revenue sharing payments that the Complaint specifically alleges have to be considered—even though six out of the seven plans reported “indirect” revenue sharing payments to their recordkeepers as well.²⁴ In other words, the Complaint violates its own rules by comparing the Capital One Plan’s total alleged recordkeeping fees to only a portion of the recordkeeping fees paid by the alternative plans. That is like comparing car prices by just looking at the monthly payment, but not the down payment. One cannot infer that a car that costs \$200 per month for five years is cheaper than a car that costs \$300 per month for five years without knowing the amount of each car’s required down payment.

If the Complaint used the same methodology for the Capital One Plan’s alleged fees as it used for the comparator plans (*i.e.*, dividing only the “direct” fee amounts reported in the 2019 Form 5500 by the total participants), the Plan’s fees in 2019 are approximately \$25—lower than the majority of the comparator plans put forward.²⁵ Courts reject those sorts of dissonant allegations. *See, e.g., Johnson v. PNC Fin. Servs. Grp.*, 2021 WL 3417843, at *4 (W.D. Pa. Aug.

²⁴ *See* Ex. 14, 2019 Form 5500 for the Dow Chemical Plan, Sch. C (reporting “indirect” payment to Fidelity); Ex. 16, 2019 Form 5500 for the Kaiser Plan, Sch. C (reporting “indirect” payment to Vanguard); Ex. 17, 2019 Form 5500 for the Publicis Plan, Sch. C (reporting “indirect” payment to Fidelity); Ex. 18, 2019 Form 5500 for the Deseret Plan, Sch. C (reporting “indirect” payment to Great-West); Ex. 19, 2019 Form 5500 for the WPP Group Plan, Sch. C (reporting “indirect” payment to Vanguard); Ex. 20, 2019 Form 5500 for the Danaher Plan, Sch. C (reporting “indirect” payment to Fidelity).

²⁵ \$1,515,885 in direct fees to Fidelity divided by 60,762 participants (Compl. ¶ 83) yields an average fee amount—under the Complaint’s methodology—of \$24.95 per participant.

3, 2021) (rejecting allegations as “apples to oranges” because they “account[ed] for only direct recordkeeping fees” and ignored “revenue sharing (*i.e.*, indirect fees),” which showed the other plans actually “pa[id] much more”); *see also Mator v. WESCO Distrib., Inc.*, 2021 WL 4523491, at * 7 (W.D. Pa. Oct. 4, 2021) (similar). This case should be no different. Because the Complaint is comparing apples to oranges in criticizing the Plan’s fees, it creates no inference of imprudence.

c. Plaintiff’s Fee-Comparison Allegations Fail Because They Do Not Consider the Services Provided to Each of the Plans.

Third, the Complaint’s recordkeeping-fee allegations are implausible because they fixate only on the purported *cost* of the Plan’s fees, without offering any allegations about the scope or caliber of the *services* being provided in exchange for those fees. It is true that ERISA fiduciaries should defray “reasonable expenses.” 29 U.S.C. § 1104(a)(1)(A)(ii). But “reasonable” does not mean cheapest, and what is “reasonable” depends on far more than price alone. As the DOL has explained, ERISA does not require fiduciaries “to pick the least costly provider,” whether for recordkeeping or any other administrative services, because “[c]ost is *only one factor to be considered in selecting a service provider.*”²⁶ Unlike the Complaint’s narrowminded theory, the DOL has made clear that fiduciaries cannot “consider fees in a vacuum” because “[t]hey are only one part of the bigger picture, including ... the extent and quality of the services provided.”²⁷ Courts agree and routinely hold that fee-related criticisms are meaningless where “[p]laintiffs fail to allege that the fees were excessive *relative to the services rendered.*” *See Young v. Gen. Motors*

²⁶ *See* DOL, Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan, available at, <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/tips-for-selecting-and-monitoring-service-providers.pdf> (emphasis added) (last visited Mar. 10, 2022).

²⁷ DOL, A Look at 401(k) Plan Fees at 9, available at <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf>. (last visited Mar. 10, 2022).

Inv. Mgmt. Corp., 325 F. App'x 31, 33 (2d Cir. 2009) (emphasis added); *Mator*, 2021 WL 4523491, at * 7 (dismissing claim where plaintiffs “allege[d] no facts about the level of services provided to the Plan’s participants in exchange for the fees paid”); *Forman*, 2021 WL 4346764, at *5-6 (same, without allegations as to “what services the ‘comparable 401(k) plans’ received in exchange for their less costly fees”); *Kong v. Trader Joe's Co.*, 2020 WL 5814102, at *5 (C.D. Cal. Sept. 24, 2020) (“*Kong I*”) (same, where no “facts suggesting that the fee charged ... [was] excessive in relation to the services”).

The Complaint here suffers from this same shortcoming. For one, the Complaint fails to allege any facts about the breadth and level of services that Fidelity provided to the Plan’s participants for the challenged fee amounts. The Complaint offers only an illustrative list of the general types of plan-wide services that can be “includ[ed]” in a recordkeeper’s service offerings. Compl. ¶ 72 (offering an illustrative list of “buffet style” services). Beyond that, the Complaint does not say anything about the types of services that the Plan received (or did not receive) from Fidelity during the relevant period. This falls short. *E.g.*, *Mator*, 2021 WL 4523491, at * 7. The Complaint is likewise silent about the specific services the alternative plans allegedly received from their recordkeepers in exchange for the purportedly lower fees, as well as how the scope and caliber of those services allegedly compared to those that Fidelity provided to the Capital One Plan. It simply asserts that “the Plan was paying higher recordkeeping fees than its peers.” (Compl. ¶ 87.) This, too, falls short. *E.g.*, *Forman*, 2021 WL 4346764, at *5-6. After all, even setting aside that several of the alternate plans used a *different* recordkeeper—not Fidelity—there are always differences in the packages and levels of services that plans negotiate with their recordkeepers, based on individual considerations relevant to a particular plan and its participants. The Complaint’s generalized and conclusory allegations ignore these important issues altogether.

For all these reasons—or any one of them standing alone—the Plan’s recordkeeping-fee allegations fail to create any plausible inference of fiduciary breach under ERISA.

D. The Complaint’s Derivative Failure-to-Monitor Claim Likewise Fails.

Count II of the Complaint alleges that Capital One failed to monitor the Plan’s Committee and other fiduciaries with respect to the Plan’s investments and recordkeeping fees. Compl. ¶¶ 98-104. This claim fails along with the Complaint’s primary fiduciary-breach claims because a failure-to-monitor claim under ERISA is a derivative theory of liability. *See, e.g., In re Constellation Energy Grp., Inc.*, 738 F. Supp. 2d 602, 614 (D. Md. 2010) (dismissing failure-to-monitor claim as “derivative,” as such a claim does “not provide independent grounds for relief, but rather depend[s] upon the establishment of an underlying breach of fiduciary duty cognizable under ERISA”); *In re Duke Energy ERISA Litig.*, 281 F. Supp. 2d 786, 795 (W.D.N.C. 2003) (similar). Thus, because Count I of the Complaint fails as deficient and implausible, so, too, does Count II.

IV. CONCLUSION

Accordingly, for the reasons set forth above, Capital One respectfully requests that the Court grant its motion and dismiss the Complaint in its entirety and with prejudice.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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