IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BRYAN P. SPENCE, individually and as a representative of a class of similarly situated, and on behalf of the AMERICAN AIRLINES, INC. 401(k) PLAN and the AMERICAN AIRLINES, INC. 401(k) PLAN FOR PILOTS,	§	Case No. 4:23-cv-00552-O
Plaintiff,	§	
v.	§	
AMERICAN AIRLINES, INC., et al,	§	
Defendants.	§	

REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT BY DEFENDANTS AMERICAN AIRLINES, INC. AND THE AMERICAN AIRLINES EMPLOYEE BENEFITS COMMITTEE

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INTRODUCTION

Count I of the Amended Complaint asserts two distinct theories of liability—the *Challenged Fund theory*, which challenges the Plans' alleged inclusion of so-called "ESG funds" as investment options, and the *Challenged Manager theory*, which challenges the Plans' use of managers who allegedly use their proxy voting power to support ESG initiatives. Plaintiff has no stake in the former theory and has failed to state a claim as to either. Plaintiff's Response in Opposition ("Opposition" or "Opp.") does not establish otherwise.

Plaintiff lacks standing to pursue the Challenged Fund theory because he has never invested in any of the "ESG funds" he challenges under that theory, and he does not argue that he has. Rather, he contends that because he can assert an interest in ***some*** grievance that can be framed as a fiduciary breach (his Challenged Manager theory), he can pursue any other supposed breaches, regardless of whether those other breaches have had any effect on him. That contention is as wrong as it sounds, and it runs headlong into the Supreme Court's instruction that "standing is not dispensed in gross." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021).

Standing is not Plaintiff's only problem in pressing the Challenged Fund theory. Because the Challenged Funds appear only in the Plans' self-directed brokerage window or "SDBA," the theory is also legally groundless. Defendants have shown that the duty to monitor individual investments does not extend to brokerage windows. Mot. at 12-14. Plaintiff's only rejoinder is to argue that the Court must credit his contrary allegations, but the rule that a plaintiff's allegations must be accepted as true does not apply to conclusions of law. As Plaintiff offers no response to Defendants' argument that the duty does not apply as a matter of law, he concedes the issue.

Plaintiff's separate theory that a long list of Challenged Managers must be avoided because of their proxy voting practices likewise fails to state a cognizable claim. Despite Plaintiff's effort to reframe the issue, the critical pleading flaw in this theory is not his failure to allege an injury.

Rather, it is that he has failed to allege facts sufficient to infer a breach. Though Plaintiff admits that the focus of ERISA's duty of prudence is a fiduciary's process, Am. Compl. ¶¶ 53, 64-65, he offers no allegations of any flaws in Defendants' processes. Plaintiff urges only an indirect inference—that the Challenged Managers' funds that Defendants chose are so awful from a financial perspective that Defendants' process must be flawed. But his allegations fall short on this score, as they do not address the financial performance of the Plans' funds at all. The Opposition confirms, in turn, that Plaintiffs' disloyalty claim rests on no more than flawed speculation that because American pursues certain ESG goals where it legally may (as a corporation), it must be doing so where it legally may not (as a plan fiduciary). Finally, Plaintiff does not dispute that his remaining count, Count II, depends on his successfully pleading a claim under Count I and so fails along with that other count.

ARGUMENT

I. PLAINTIFF'S CHALLENGED FUND THEORY SHOULD BE DISMISSED FOR LACK OF STANDING AND FOR FAILURE TO STATE A CLAIM

A. Plaintiff's Standing to Pursue the Challenged Manager Theory Does Not Give Him Standing to Assert the Separate Challenged Fund Theory.

Plaintiff agrees that he suffered no injury from the Plan's alleged inclusion of "ESG funds," *i.e.*, the "Challenged Funds." He could scarcely contend otherwise. He has never invested in the Challenged Funds, or even accessed the SDBA—the only place where those funds are available. Under established principles, Plaintiff lacks standing to pursue this theory because he has not personally been injured by the conduct he challenges. *See* Mot. at 8-11.

Plaintiff confuses this straightforward issue by swatting at standing objections Defendants have not asserted. Contrary to Plaintiff's suggestions, Opp. at 8-12, Defendants do not argue that standing principles preclude him from framing his ***class allegations*** to include funds beyond those in which he has invested, funds in the SDBA, or plans other than his own—where the funds/plans share a common alleged defect. Defendants' argument is instead that Plaintiff cannot use his standing on one theory of liability to advance another theory of liability altogether. Plaintiff's

vision of Article III conflicts with the bedrock rule that "standing is not dispensed in gross." *TransUnion*, 141 S. Ct. at 2208. Plaintiff must show harm that "flow[s] from each of the [defendant's challenged] actions." *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210, 238 (5th Cir. 2023) (quotations omitted).

Here, Plaintiff's two theories challenge two distinctly different sets of actions. The Challenged Manager theory asserts that Defendants breached their fiduciary duties by offering certain funds whose managers have allegedly used proxy-voting privileges to support ESG resolutions. The Challenged Fund theory is entirely different. Under that theory, Plaintiff contends that Defendants should have excluded a set of funds, not because of their managers' proxy-voting practices, but because their investment mandates include non-pecuniary ESG objectives. The two theories are plainly divisible not only in that they target different conduct and require different proof,[1] but also because the Court's resolution of one of them would not dictate its adjudication of the other. Dismissing the Challenged Fund theory would not impair Plaintiff's ability to remedy any injuries incurred by him or others under his Challenged Manager theory. And, if the Court determines that Plaintiff has failed to plead his Challenged Manager theory, he will have no claim in this case—no matter what one thinks of the Challenged Funds.

Where theories of liability can be so cleanly separated, Supreme Court and Fifth Circuit precedent requires that standing be assessed separately as to each. *TransUnion*, 141 S. Ct. at 2208 ("[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek."); *All. for Hippocratic Med.*, 78 F.4th at

[1] Even if Plaintiff's claims targeted overlapping conduct, that alone would not be enough to warrant evaluating Plaintiff's differing theories as one for standing purposes. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (rejecting argument that standing as to one claim confers standing as to all claims arising from the same nucleus of operative fact).

238; *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) ("Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject."); *see also Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (similar).

It makes no difference that Plaintiff elected to bundle his disparate theories into the same count or that both are framed as ERISA fiduciary breach claims. Allowing such considerations to decide the extent of a plaintiff's standing would nullify the Supreme Court's mandate that standing be examined on a claim-by-claim, remedy-by-remedy basis. For instance, ERISA plaintiffs habitually package demands for monetary and injunctive relief in a common count and seek both forms of relief under the same statutory provision. Yet, courts have had little difficulty parsing the plaintiff's interest in each such remedy, finding standing as to one but not the other.[2] More generally, courts have regularly found standing as to some alleged ERISA fiduciary breaches but not others—even where those breaches were aggregated into the same count.[3]

Nor is it significant that Plaintiff purports to be suing on behalf of the Plans. The Supreme Court has rejected the notion that an injury to a plan confers standing on a participant who is unaffected by that injury. *Thole v. U. S. Bank, N.A*, 140 S. Ct. 1615, 1620 (2020) ("[I]n order to claim the interests of others, the litigants themselves still must have suffered an injury in fact, thus giving them a sufficiently concrete interest in the outcome of the issue in dispute.") (internal

[2] *See, e.g.*, *Trauernicht v. Genworth Fin. Inc.*, 2023 WL 5961651, at *3-4, 14 (E.D. Va. Sept. 13, 2023); *Fitzpatrick v. Nebraska Methodist Health Sys., Inc.*, 2023 WL 5105362, at *4–6 (D. Neb. Aug. 9, 2023).

[3] *See, e,g.*, *Garthwait v. Eversource Energy Co.*, 2021 WL 4441939, at *2 (D. Conn. Sept. 28, 2021) (where plaintiffs asserted multiple theories of fiduciary breach under single count, court dismissed two theories for lack of standing while allowing third to proceed); *see also McCaffree Fin. Corp. v. ADP, Inc.*, 2023 WL 2728787, at *3–4 (D.N.J. Mar. 31, 2023) (similar).

citation omitted). Plaintiff does not confront this Supreme Court holding, and the district court cases he cites to suggest a different rule do not and cannot overrule it. The courts in those cases instead concluded that, where plaintiffs have invested in funds implicated by a liability theory, standing concerns did not prevent them from framing their class claims to include other funds implicated by the same theory.[4] Defendants have not argued otherwise.

Finally, *Chavez v. Plan Benefit Services, Inc.*, offers no basis for Plaintiff to pursue a liability theory in which he has no cognizable interest. *Chavez* involved review of a class certification order, and the issue before the court was whether a participant who had standing to pursue a theory of fiduciary liability could assert that theory on behalf of participants in other plans in a class action. 77 F.4th 370, 379 (5th Cir. 2023). The Fifth Circuit held that the plaintiffs could represent class members who were participants in different plans because the claims all "challenge[d] the same general practices that each member of the class was subjected to." *Id*. at 385. But it did not hold that an ERISA plaintiff can represent other participants on theories of liability as to which the plaintiff has no interest. *Cf. Thole*, 140 S. Ct. at 1622 ("There is no ERISA exception to Article III."). And it did not address the question before this Court on a motion to dismiss—whether a plaintiff has individual standing to pursue two distinct theories in a complaint when he can allege a personal interest only in one.[5]

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[4] *See, e.g.*, *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2016 WL 4507117, at *4 (C.D. Cal. Aug. 5, 2016) (finding standing to bring ERISA claim on plan-wide basis where plaintiffs invested in subset of investments affected by breach); *Khan v. PTC, Inc.*, 2021 WL 1550929, at *2-4 (D. Mass. Apr. 20, 2021); *Cunningham v. Cornell Univ.*, 2019 WL 275827, at *2-4 (S.D.N.Y. Jan. 22, 2019); *Hay v. Gucci Am., Inc.*, 2018 WL 4815558, at *3-4 (D.N.J. Oct. 3, 2018).

[5] For this reason, Plaintiff's suggestion that the rulings in *Perkins v. United Surgical Partners International, Inc.*, 2022 WL 824839 (N.D. Tex. Mar. 18, 2022), and *Locasio,* 2023 WL 320000, were overruled by *Chavez* is just wrong. And Plaintiff's effort to distinguish those cases on the ground that the plaintiffs in them did not invest in the funds they challenged, Opp. 10, is doubly wrong. One of the plaintiffs in *Locasio* did invest in some of the challenged funds. *Locasio,*

For that threshold question, the framing of this case as a class action is irrelevant. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n.6 (2016), *as revised* (May 24, 2016) ("That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.") (citation omitted). The inquiry rests on whether Plaintiff has a personal stake in each of the controversies he seeks to present. As to the Challenged Funds theory, the answer to that inquiry is plainly no.

B. The Challenged Fund Theory Also Fails to State a Claim.

Plaintiff's Challenged Fund Theory is also dismissible for the separate reason that it fails to state a cognizable claim. The Amended Complaint makes clear that the Challenged Funds were ***not*** among the Plans' menu of Designated Investment Alternatives, but were solely available "through the SDBA option." Am. Compl. ¶¶ 33, 97. This is fatal, as ERISA's curatorial duties do not apply to individual options available only through a brokerage account. Mot. at 12-14.

Plaintiff insists that the Court must accept that ERISA's selection and monitoring duties apply because he alleges they do. Opp. at 13 n.4. But, while the Court must accept Plaintiff's well-pleaded ***facts***, Rule 12 does not require the Court to defer to Plaintiff's view of the ***law***. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."). Defendants have made a legal argument supported by regulations—including legal authority that Plaintiff himself cited before being alerted to its ramifications. Mot. at 12-14. Plaintiff offers no response to that legal

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2023 WL 320000, at *3 (indicating investment in three challenged investments). And, while Plaintiff invested in a few funds implicated by his Challenged Manager theory, he has invested in no funds at issue in his Challenged Funds theory. He is thus in the same position as to that theory that he contends the plaintiffs in *Perkins* and *Locasio* were as to theirs.

argument and so concedes it. *MCR Oil Tools, LLC v. DMG Mori USA, Inc.*, 2020 WL 13133311, at *9 (N.D. Tex. Sept. 15, 2020) ("Failure of a party to respond to arguments raised in a motion to dismiss constitutes waiver or abandonment of that issue.").[6]

II. THE CHALLENGED MANAGER THEORY ALSO FAILS TO STATE A CLAIM

A. The Amended Complaint Does Not Adequately Allege that Fiduciaries Following a Prudent Process Would Avoid the Challenged Managers.

Plaintiff has similarly failed to plead sufficient facts to establish his separate theory that Defendants "selected, included, and retained" funds whose managers have allegedly engaged in improper proxy voting in favor of ESG goals. Am. Compl. ¶¶ 68-69, 93-94, 118. Although the Amended Complaint acknowledges that ERISA's prudence inquiry focuses on a fiduciary's process, Plaintiff has not provided any factual allegations concerning Defendants' decision-making process, Mot. at 15—and he does not argue that he has. Plaintiff instead asks the Court to infer a flawed process from the mere inclusion of the Challenged Managers' funds in the Plans.[7] But, as addressed in Defendants' Motion, that effort falls well short: Despite contending that a fiduciary must select investment options based solely on financial considerations, Plaintiff offers no allegations concerning the financial performance of ***any*** investment option managed by the Challenged Managers, much less any allegations purporting to tie any Challenged Manager's proxy voting practices to poor financial performance of any of the Plans' portfolios. Mot. at 15-20. This shortcoming is fatal to Plaintiff's claim not because "Plaintiff must show how he suffered

[6] In any event, the Amended Complaint does not actually allege that Defendants have a duty to monitor the individual investments within an SDBA. Am. Compl. ¶¶ 32, 33, 97, 99. Though Plaintiff cites one paragraph's quotation of regulatory language, neither the paragraph nor the regulation assert a duty to monitor investments in an SDBA. They instead state that a fiduciary offering an SDBA option must still monitor the "designated investment alternatives" offered alongside it. Am. Compl. ¶ 32; 29 C.F.R. § 2550.404(c)-1(d)(1)(iv).

[7] Plaintiff's claims as to most of the Challenged Managers' funds fail for the additional reason that they appear solely within the Plans' SDBA, where the duty to monitor individual investments does not apply. Mot. at 12-15.

injuries stemming from Defendants' investment of Plan assets." Opp. at 20. Rather, to logically support an inference from the Plans' investment offerings that Defendants failed to reasonably pursue the financial interests of participants, Plaintiff must at least allege sufficient facts that those investment offerings were financially inferior to other alternatives and some nexus between that inferior financial performance and the factors that Defendants allegedly failed to properly consider.

Plaintiff's Opposition does not meaningfully engage Defendants' arguments in support of this point. While Plaintiff notes that some courts have ruled that the propriety of a particular benchmark invoked by plaintiff to criticize an investment is an inherently factual issue, he ignores that the plaintiffs in those cases at least ***alleged some*** benchmark. Mot. at 16.[8] And Plaintiff disregards the cases cited by Defendants—including the *Locasio* decision in this District—that required plaintiffs not only to invoke a benchmark, but also to plead facts that the benchmark is a plausible one for judging the challenged investment. Mot. at 20. Plaintiff alleges nothing: No comparison to a benchmark (plausible or not), and no other basis to conclude that a fiduciary focused solely on financial considerations would have excluded the Challenged Managers' funds.

To be sure, Plaintiff cites the Amended Complaint's allegations generally concerning the performance of ESG-themed ***funds***. Opp. at 22-23. But these allegations deal only with the Challenged Fund theory, and have nothing to do with the proxy-voting practices criticized under the Challenged Manager theory. As to the few invoked allegations that concern Plaintiff's proxy

[8] Plaintiff asserts that the plaintiffs in *Blackmon v. Zachary Holding, Inc.*, 2021 WL 2190907 (W.D. Tex. Apr. 22, 2021) "did not offer an alternative benchmark option." Opp. at 20. Yet, the decision recites: "[r]egarding the Mid Cap Fund, Plaintiffs allege that it has consistently and significantly underperformed its benchmark[.]" *Blackmon*, 2021 WL 2190907 at *4. Plaintiff's other cited cases also reflect that the plaintiffs offered benchmark comparisons. *See* Order, ECF No. 53, *Laliberte v. Quanta Servs., Inc.*, No. 4:22-CV-03290, at 2, 5 (S.D. Tex. Sept. 29, 2023) (referencing complainant's comparison of challenged target date funds' returns to the returns of other "TDFs"); *see also Cunningham v. Cornell Univ.*, 2017 WL 4358769, at *7 (S.D.N.Y. Sep. 29, 2017) (same); *In re MedStar ERISA Litig.*, 2021 WL 391701, at *5 (D. Md. Feb. 4, 2021).

voting claim, Defendants have explained why those allegations undermine rather than support an inference that Defendants have imprudently ignored any financial consequences of proxy voting on the Plans' portfolios. Mot. at 16-20. Plaintiff makes no attempt to counter those explanations.

In a last bid to avoid dismissal, Plaintiff articulates a new theory that is absent from his Amended Complaint, stating: "this case is about Defendants handing over a significant portion of Plan assets to investment managers to pursue ESG objectives . . . and then doing nothing . . . to prevent the managers and funds from pursuing non-economic objectives or to otherwise prevent the financial harm to Plaintiff and the other Plan participants." Opp. at 21. To the extent Plaintiff suggests that Defendants should have "prevent[ed] the managers and funds from pursuing non-economic objectives" by means other than excluding the Challenged Managers' funds from the Plans, the contention finds no traction in Count I, which focuses solely on Defendants having "selected, included, and retained" the challenged investments. Am. Compl. ¶ 118. Plaintiff cannot amend his complaint through his Opposition. *Energy Coal v. CITGO Petroleum Corp.*, 836 F.3d 457, 462 n.4 (5th Cir. 2016) ("The complaint may not be amended by the briefs in opposition to a motion to dismiss."). Moreover, Plaintiff offers no facts in support of his newly minted theory. Plaintiff, for starters, does not allege how Defendants could or should have restrained the Challenged Managers; does not allege other fiduciaries have imposed such restraints; and offers no allegations that any such unidentified restraints would have had any effect on the performance of a Plan fund. Plaintiff's unpleaded theory thus does nothing to redeem the Amended Complaint.

B. Plaintiff Cannot Support His Conclusory Claim That Defendants Acted Disloyally Merely By Citing Lawful Conduct Taken in a Corporate Capacity.

Plaintiff's Opposition likewise does nothing to save Plaintiff's theory of disloyalty under his Challenged Manager claim. While Plaintiff purports to have offered factual allegations supporting this theory, all but one of the paragraphs he quotes from the Amended Complaint for

that position merely append conclusory assertions of disloyalty to the same allegations that purportedly support his claim of imprudence. Opp. at 15-16. As this District recognized in *Locasio*, that is not enough to state a disloyalty claim under ERISA.[9] The only unique allegation is that American has sought to meet ESG goals when acting in a corporate capacity. *Locascio v. Fluor Corp.*, 2023 WL 320000, at *6 (N.D. Tex. 2023). Opp. at 15; Mot. at 21-22. But inferring disloyalty from that allegation is akin to assuming that because someone lawfully drives 75 miles per hour on the freeway they must also do so unlawfully in a school zone. American does not owe ERISA duties when running its airline business and so is free, from an ERISA perspective, to pursue whatever goals it chooses when acting in that capacity. Mot. at 21. If allegations consistent with lawful conduct are insufficient to support a claim, lawful conduct cannot support a claim either. *Iqbal*, 556 U.S. at 681-82. Defendants do not contend that Plaintiff must plead "the details of Defendants' deliberations about their investment decisions." Opp. at 17. But he must allege more than conclusory assertions and illogical speculation. As that is all his pleading offers, his disloyalty theory should be dismissed.

III. COUNT II FAILS FOR THE SAME REASONS AS COUNT I.

Finally, Plaintiff's Count II, which asserts that Defendants failed to adequately monitor other fiduciaries, depends on his pleading a primary fiduciary breach under Count I. Mot. at 23. Although Plaintiff asserts his monitoring allegations are sufficient, he does not dispute that dependency, and so offers no basis for Count II to proceed in light of Count I's insufficiencies.

CONCLUSION

For these reasons, the Amended Complaint should be dismissed with prejudice.

[9] *Id.* at *6 (plaintiff "must do more than conclude that because Mercer has a relationship with BlackRock it necessarily infringed on its duty of loyalty by maintaining the [challenged funds]. . . . [Plaintiff] must plead specific facts regarding the breach of the duty of loyalty without simply recycling what he already stated regarding the duty of prudence.").

Respectfully submitted,

Dated: October 13, 2023

/s/ Russell D. Cawyer

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CERTIFICATE OF SERVICE

On October 13, 2023, a true and correct copy of the foregoing document was served upon all persons who have requested notice and service of pleadings in this case via the Court's CM/ECF system.

/s/ Russell D. Cawyer
Russell D. Cawyer