UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FERNANDO COPPEL et al., individually and as a representative of a Putative Class of Participants and Beneficiaries on behalf of the SWBG, LLC, 401(K) PLAN, f/k/a "SEAWORLD PARKS AND ENTERTAINMENT 401(K) PLAN,"

Plaintiffs,

v.

SEAWORLD PARKS & ENTERTAINMENT, INC., et al.,

Defendants.

Case No.: 21-cv-1430-RSH-DDL

ORDER DENYING DEFENDANTS' PARTIAL MOTION TO DISMISS

[ECF No. 112]

Defendants move to dismiss parts of the Second Amended Class Action Complaint in this putative class action alleging mismanagement of the retirement plan for employees of SeaWorld Parks and Entertainment. ECF No. 112. For the reasons below, the Court denies the motion.

I. BACKGROUND

A. The Employee Retirement Income Security Act

After almost a decade of studying the Nation's private pension plans, Congress enacted the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et*

seq., on September 2, 1974. *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 361 (1980). "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). ERISA "does not mandate that employers provide any particular benefits . . . ." *Id.* at 91. Instead, it "imposes participation, funding, and vesting requirements on pension plans[,]" and "sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans." *Id.* "As part of this closely integrated regulatory system Congress included various safeguards to preclude abuse and 'to completely secure the rights and expectations brought into being by this landmark reform legislation.'" *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (quoting S. Rep. No. 93-127, at 36 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4872).

Among these safeguards, and relevant here, ERISA defines "fiduciary" of a benefit plan broadly and imposes strict duties of loyalty and care on those fiduciaries. A "fiduciary" under ERISA includes not only the persons the benefit plan names as fiduciaries, but also anyone who exercises discretionary control or authority over the benefit plan's management, administration, or assets. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (citing 29 U.S.C. § 1002(21)(A) (defining fiduciary), then citing *id.* § 1102(a)(2) (named fiduciaries)). ERISA imposes on these fiduciaries duties of loyalty and care. ERISA's duty of loyalty generally prohibits self-dealing and transactions between a plan and certain "parties in interest." *See* 29 U.S.C. § 1106; *see also id.* § 1002(14) (defining "party in interest"). ERISA's duty of care generally requires fiduciaries to discharge their duties solely in the interests of the benefit plan's participants and beneficiaries using the care, skill, prudence, and diligence of a "prudent" person. *See id.* § 1104(a)(1). In addition to these duties, ERISA assigns fiduciaries a range of specific responsibilities, including "the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the

avoidance of conflicts of interest." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142–43 (1985).

ERISA "makes fiduciaries liable for breach of these duties, and specifies the remedies available against them: The fiduciary is personally liable for damages ('to make good to [the] plan any losses to the plan resulting from each such breach'), for restitution ('to restore to [the] plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary'), and for 'such other equitable or remedial relief as the court may deem appropriate,' including removal of the fiduciary." *Mertens*, 508 U.S. at 252 (alterations in original) (quoting 29 U.S.C. § 1109(a)). Participants, beneficiaries, fiduciaries, and the Secretary of the U.S. Department of Labor may file suit seeking relief for a breach of the duties ERISA imposes. 29 U.S.C. § 1132.

In addition to its statutory framework, ERISA delegates to the Secretary of Labor the authority to prescribe regulations as necessary and appropriate to carry out certain ERISA provisions related to reporting, disclosure, participation, vesting, funding, fiduciary responsibilities, administration, and enforcement, among others. 29 U.S.C. § 1135 (authorizing the Secretary of Labor to "prescribe such regulations as . . . necessary or appropriate to carry out the provisions of this subchapter"); *see Massachusetts v. Morash*, 490 U.S. 107, 116 (1989) ("The Secretary[] is specifically authorized to define ERISA's 'accounting, technical, and trade terms[]' . . . ." (quoting 29 U.S.C. § 1135)); *see also* 29 C.F.R. § 2509.75-2 *et seq.*

B. The Plan

SeaWorld Parks and Entertainment, Inc. ("SeaWorld"), offers its employees a defined contribution 401(k) retirement savings plan, the SWBG, LLC 401(k) Plan, formerly known as the SeaWorld Parks & Entertainment 401(k) Plan (the "Plan"). ECF No. 105 ¶¶ 3–6. "In such plans, participating employees maintain individual investment accounts, which are funded by pretax contributions from the employees' salaries and, where applicable, matching contributions from the employer." *Hughes v. Nw. Univ.*, 595 U.S. 170, 173 (2022). "Each participant chooses how to invest her funds, subject to an

important limitation: She may choose only from the menu of options selected by the plan administrators . . . .” *Id.* “The performance of her chosen investments, as well as the deduction of any associated fees, determines the amount of money the participant will have saved for retirement.” *Id.* As a 401(k) retirement savings plan, ERISA governs the Plan. ECF No. 105 ¶¶ 2–7; ECF No. 50-2, Ex. B at 81; *see* 26 U.S.C. § 401.

When the Plan was first established on March 1, 2010, the Plan document named SeaWorld as the Plan’s sponsor, fiduciary, and administrator. ECF No. 105 ¶¶ 3–6; ECF No. 50-2, Exs. A & D at 2, 169, 279. On January 1, 2016, the Plan’s sponsor changed from SeaWorld to SWBG Orlando Corporate Operations Group, LLC (“OCOG”), and the Plan’s name changed from “SeaWorld Parks & Entertainment 401(k) Plan” to “SWBG, LLC 401(k) Plan.” ECF No. 105 ¶ 6. During their respective time as sponsors of the Plan, SeaWorld and OCOG’s Board of Directors subsequently appointed the Plan’s 401(k) Investment Committee to supervise, monitor, control, and manage the operation and administration of the Plan. *Id.* ¶¶ 7, 30.

As is common among small-to-middle-market retirement plans, SeaWorld entered into three types of contracts with various service providers for the Plan: (1) a group annuity contract, (2) an administrative services agreement, and (3) a consulting agreement.

First, SeaWorld entered into a group annuity contract with Massachusetts Mutual Life Insurance Company (“MassMutual”) effective March 1, 2010, to offer investment options to the Plan’s participants. ECF No. 105 ¶¶ 31, 54; ECF No. 50-2, Ex. F at 326–67. Under the group annuity contract, MassMutual provided a universe of pooled investment options from which SeaWorld selected a subset to offer its employees. *See* ECF No. 105 ¶¶ 61–62; ECF No. 50-2, Ex. G at 379–81.

Second, SeaWorld entered into an administrative services agreement with MassMutual effective March 1, 2010. ECF No. 105 ¶¶ 31, 250; ECF No. 50-2, Ex. G at 369–75. Under the administrative services agreement, MassMutual would provide recordkeeping and administrative services to the Plan. ECF No. 105 ¶¶ 31, 250; ECF No.

50-2, Ex. G at 369.[1] In exchange, the Plan paid MassMutual for its services through "revenue sharing," which entitled MassMutual to a portion of the expense ratios the Plan's mutual fund providers charged. ECF No. 105 ¶¶ 75–77; ECF No. 50-2, Ex. G at 379–81.[2] SeaWorld later replaced MassMutual with Prudential Retirement Insurance and Annuity Company ("Prudential") as recordkeeper effective January 1, 2020. ECF No. 105 ¶¶ 31, 102; ECF No. 50-2, Ex. K at 516.

Third, SeaWorld entered into a consulting agreement on May 1, 2010, with LPL Financial, LLC ("LPL"), for financial advising services and assistance with fiduciary oversight responsibilities, until sometime in 2014 when Alliant Insurance Services, LLC ("Alliant"), replaced LPL. ECF No. 105 ¶¶ 31, 108; ECF No. 50-2, Ex. L at 522–27. In exchange for Alliant's services, MassMutual paid Alliant's fees on SeaWorld's behalf out of the revenue sharing payments MassMutual collected from the Plan's investment options. ECF No. 105 ¶¶ 75–76, 108; ECF No. 50-2, Ex. G at 401, 506, 526.

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[1] "Recordkeepers help plans track the balances of individual accounts, provide regular account statements, and offer informational and accessibility services to participants. Like investment management fees, recordkeeping fees may be calculated as a percentage of the assets for which the recordkeeper is responsible; alternatively, these fees may be charged at a flat rate per participant account." *Hughes*, 595 U.S. at 174.

[2] "[I]nvestment options typically offered in retirement plans, such as mutual funds and index funds, often charge a fee for investment management services. Such fees compensate a fund for designing and maintaining the fund's investment portfolio. These fees are usually calculated as a percentage of the assets the plan participant chooses to invest in the fund, which is known as the expense ratio. Expense ratios tend to be higher for funds that are actively managed according to the funds' investment strategies, and lower for funds that passively track the makeup of a standardized index, such as the S&P 500." *Hughes*, 595 U.S. at 173–74.

"'Revenue sharing' is a general term that refers to the practice by which mutual funds collect fees from mutual fund assets and distribute them to service providers, such as recordkeepers and trustees—services the mutual funds would otherwise provide themselves." *Tibble v. Edison Int'l*, No. 7-cv-5359, 2017 WL 3523737, at *2 (C.D. Cal. Aug. 16, 2017).

By the end of its inaugural year in 2010, the Plan had 17,208 participants with account balances and $109,062,444 in net assets. ECF No. 105 ¶ 71; ECF No. 50-2, Ex. B at 51, 70. The Plan ended 2020 with 18,401 participants with account balances and $292,465,160 in net assets. ECF No. 105 ¶ 5; ECF No. 50-2, Ex. C at 112, 126.

C. Plaintiffs' Putative Class Action Lawsuit

Plaintiffs Fernando Coppel, Pablo Martinez, Tyler Mitchell, Judith Uriostegui, and Elizabeth Usselman (collectively, "Plaintiffs") are former employees of SeaWorld in San Diego, California. ECF No. 105 ¶¶ 15–23.[3] Plaintiffs are (or were) participants and beneficiaries of the Plan sometime after it was established on March 1, 2010. *Id.* Plaintiffs filed this putative class action on behalf of the Plan, individually and as representatives of participants and beneficiaries of the Plan, against the Plan's former sponsor, SeaWorld; the Plan's current sponsor, OCOG; the Boards of Directors of SeaWorld and OCOG; the Plan's Investment Committee; Board and/or Investment Committee members John Does 1-50; SeaWorld CEO Mark G. Swanson; and former SeaWorld CFO Elizabeth Gulacsy. *Id.* ¶¶ 1, 24–31.

Plaintiffs allege Defendants breached their fiduciary duties of care and loyalty under ERISA by engaging in six categories of misconduct:

1. Offering and maintaining higher cost share classes when identical lower cost class shares were available and could have been offered to participants;
2. Overpaying for covered service providers by paying variable direct and indirect compensation fees through revenue sharing arrangements with the funds offered as investment options under

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[3] Although the Second Amended Class Action Complaint names three additional plaintiffs, on September 21, 2023, the Parties jointly filed a Federal Rule of Civil Procedure 41(a)(1)(A)(ii) stipulation voluntarily dismissing all claims without prejudice as to Elizabeth Flores, Miriam Garcia, and Micheli Ortega. ECF No. 126. As such, the Parties' arguments regarding these plaintiffs are moot.

the Plan, which exceeded costs incurred by plans of similar size with similar services;

3. Imprudently choosing and retaining expensive mutual funds while less expensive index funds were available and could have been offered to participants;
4. Selecting conflicted dual registered investment advisors and brokers who were incentivized to choose higher fee mutual funds because they received not only brokerage commissions from funds but insurance commissions for annuity products;
5. Failing to engage in a competitive bidding process by submitting a request for proposal to multiple service providers including recordkeepers, shareholder service, and financial advisers; and
6. Imprudently selecting and maintaining needlessly risky and undiversified stable value options with excessive fees and low crediting rates.

See id. ¶¶ 8–10, 279.

Plaintiffs' Second Amended Class Action Complaint ("SACAC" or the "operative Complaint") asserts two causes of action: (1) breach of the duties of prudence and loyalty, pursuant to 29 U.S.C. §§ 1104(a)(1), 1105(a), 1109(a), 1132(a)(2)–(3), as well as 29 C.F.R. § 2550.404a-1(b); and (2) breach of the duty of prudence for failing to investigate and monitor the Plan's investments and covered service providers, pursuant to 29 U.S.C. §§ 1104(a)(1), 1109(a), 1132(a)(2)–(3), and as articulated in *Tibble v. Edison Int'l*, 575 U.S. 523, 530 (2015) ("A plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones."). ECF No. 105 ¶¶ 266–81.

D. Procedural History

Plaintiffs filed their original Complaint on August 9, 2021. ECF No. 1. After Defendants moved to dismiss, Plaintiffs amended their Complaint on December 22, 2021,

adding Alliant as a defendant. ECF Nos. 29, 34. On March 15, 2022, Defendants filed two separate motions to dismiss the First Amended Complaint. ECF Nos. 50–51. This case was reassigned to the undersigned on June 24, 2022. ECF No. 61.

On March 22, 2023, this Court granted in part Defendants' motion to dismiss as to the American Century target-date funds and the actively managed funds in Claim One, but denied the motion to dismiss in all other respects. ECF No. 84 at 40. The Court also granted Alliant's motion to dismiss, and dismissed all claims against Alliant without prejudice. *Id.*

After the Court granted Plaintiffs' motion for leave to amend the complaint, Plaintiffs filed the operative Complaint on July 21, 2023. ECF Nos. 93, 103, 105. Defendants filed a partial motion to dismiss the operative Complaint and a request for judicial notice on August 21, 2023, which are now fully briefed. ECF Nos. 112 (motion), 113 (request for judicial notice), 125 (response), 134 (reply).

II. MOTION TO DISMISS FOR LACK OF JURISDICTION

A. Legal Standard

Federal courts are courts of limited jurisdiction, empowered only to hear disputes "authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). As such, "[a] plan participant suing under ERISA must establish both statutory standing and constitutional standing, meaning the plan participant must identify a statutory endorsement of the action and assert a constitutionally sufficient injury arising from the breach of a statutorily imposed duty." *Slack v. Int'l Union of Operating Eng'rs*, No. 13-cv-5001, 2014 WL 4090383, at *11 (N.D. Cal. Aug. 19, 2014); *see, e.g.*, *Wells v. Cal. Physicians' Serv.*, No. 5-cv-01229, 2007 WL 926490, at *3 (N.D. Cal. Mar. 26, 2007). A lack of "statutory standing" requires dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), but a lack of constitutional standing requires dismissal for want of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See Nw. Requirements Util. v. F.E.R.C.*, 798 F.3d 796, 808 (9th Cir. 2015) ("Unlike Article III standing, however, 'statutory standing' does not implicate our subject-matter jurisdiction." (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572

U.S. 118, 128 n.4 (2014))). Defendants do not dispute Plaintiffs' statutory standing here. *See* ECF No. 112-1 at 5–6.[4] Instead, Defendants move to dismiss this case for lack of subject matter jurisdiction under Rule 12(b)(1) by challenging Plaintiffs' constitutional standing. *See id.*[5]

"When assessing Article III standing in class action lawsuits, the Ninth Circuit has adopted the so-called 'class certification approach.'" *Johnson v. Providence Health & Servs.*, No. 17-cv-1779, 2018 WL 1427421, at *3 (W.D. Wash. Mar. 22, 2018) (quoting *Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015)). Under the class certification approach, "once the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded . . . ." *Melendres*, 784 F.3d at 1262 (quoting 1 William B. Rubenstein, *Newberg & Rubenstein on Class Actions* § 2:6 (5th ed.)).[6] "[A]ny issues regarding the relationship between the class representative and the passive class members—such as dissimilarity in injuries suffered—are relevant only to class certification, not to standing." *Id.* (quoting Rubenstein, *supra*, § 2:6). Courts will decline

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[4] A plaintiff has statutory standing under ERISA if he or she is a "plan participant." *Poore v. Simpson Paper Co.*, 566 F.3d 922, 925 (9th Cir. 2009); *see* 29 U.S.C. § 1132(a)(2). A plan participant is "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." 29 U.S.C. § 1002(7).

[5] A jurisdictional attack under Rule 12(b)(1) may be factual or facial. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Unlike their first motion to dismiss, Defendants' second motion to dismiss is a factual attack. "[I]n a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* Unlike a motion to dismiss under Rule 12(b)(6), a court may resolve a factual attack by "review[ing] evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Id.*

[6] "As a practical matter, this conclusion makes sense. ERISA lawsuits may be efficiently alleged through class actions because some companies may offer plans with hundreds of investment options. Forcing plaintiffs who allege widespread misconduct affecting all investment options to find named plaintiffs who hold every affected offering is arguably contrary to the purpose of a class action suit." *Enos*, 2021 WL 5622121, at *2 (internal citation omitted).

to address the question of "whether [plaintiffs] may be allowed to present claims on behalf of others who have similar, but not identical, interests[,]" until evaluating the Federal Rule of Civil Procedure 23(a) "typicality and adequacy" factors of class certification. *Id.* (quoting 7AA Charles A. Wright et al., *Fed. Prac. & Proc. Civ.* § 1785.1 (3d ed.)). Therefore, if Plaintiffs establish their individual standing to bring their ERISA claims, they will survive Defendants' Rule 12(b)(1) motion to dismiss.

B. Plaintiffs' Constitutional Standing

A plaintiff has standing under Article III of the U.S. Constitution if: (1) the plaintiff has suffered an injury-in-fact; (2) the injury is fairly traceable to the challenged conduct of the defendant to support a theory of causation; and (3) there is a likelihood that the injury will be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Defendants challenge two aspects of Plaintiffs' constitutional standing, but both relate only to the injury-in-fact requirement. "In the context of ERISA claims regarding defined contribution plans, plaintiffs can establish Article III standing by pleading injury to their own plan account." *In re Sutter Health ERISA Litig.*, No. 1:20-cv-1007, 2023 WL 1868865, at *5 (E.D. Cal. Feb. 9, 2023).[7] Because Plaintiffs in this case adequately demonstrate injury-in-fact, the Court rejects both of Defendants' challenges.

First, Defendants argue that three of the five named Plaintiffs—Martinez, Mitchell, and Uriostegui—"closed their accounts prior to 2019" and therefore "lack standing to bring

[7] In an ERISA class action, there are two ways to establish standing. "[C]ourts have found that plaintiffs bringing claims regarding underperforming funds can demonstrate the requisite injury where they either (i) invested in at least one of the challenged funds or (ii) challenge a 'plan-wide' decision-making process that injures all plan participants." *In re Sutter Health ERISA Litig.*, 2023 WL 1868865, at *5 (collecting cases). Because Plaintiffs demonstrate standing under the former basis, the Court does not address whether Plaintiffs establish standing under the latter basis.

claims that accrued during or after 2019." ECF No. 112-1 at 5.[8] However, Defendants do not contest that "two Plaintiffs [] were participants post-2019 (Mr. Coppel and Ms. Usselman) . . . ." ECF No. 134 at 5 n.4. "In a class action, standing is satisfied if at least one named plaintiff meets the requirements." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc); *see NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 926 F.3d 528, 532 (9th Cir. 2019) ("In a class action, this standing inquiry focuses on the class representatives."). Accordingly, Plaintiffs have established standing to assert claims accrued during or after 2019.

Second, Defendants contend that named Plaintiffs Martinez, Mitchell, and Uriostegui lack standing to challenge the Prudential Guaranteed Income Fund ("GIF") stable value fund ("SVF"),[9] because none of these plaintiffs invested in it. ECF No. 112-1 at 6.[10] However, Defendants do not dispute that these three named Plaintiffs invested in other funds at issue in action, namely, mutual funds, or that they alleged they suffered harm as a result. Nor do Defendants dispute that the other two named Plaintiffs—Coppel and Usselman—have standing to challenge the Prudential GIF SVF. ECF No. 134 at 5 n.4 (withdrawing standing argument as to Plaintiffs Coppel and Usselman). Under the Ninth Circuit's class certification approach, Plaintiffs have sufficiently alleged standing. *See*

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[8] Defendants' motion initially included named Plaintiff Coppel in their standing challenge regarding claims that accrued during or after 2019. ECF No. 112-1 at 5–6. Defendants subsequently withdrew this argument in their reply brief. ECF No. 134 at 5 n.4.

[9] "A stable value fund ('SVF') is similar to a traditional bond fund in that the underlying assets are a collection of fixed income instruments, i.e. bonds." *Austin v. Union Bank & Tr. Co.*, No. 3:14-cv-706, 2016 WL 8732420, at *1 (D. Or. Feb. 19, 2016) (citations omitted).

[10] Initially, Defendants' motion argued no plaintiff had standing to assert claims regarding either the Prudential GIF SVF or the MassMutual Separate Account Guaranteed Investment Account Core I ("SAGIC") SVF. ECF No. 112-1 at 6. However, in their reply brief, "Defendants withdr[e]w the Motion's arguments that, at the pleadings stage, (i) Plaintiffs lack standing to challenge the MassMutual SAGIC, and (ii) the two Plaintiffs who were participants post-2019 (Mr. Coppel and Ms. Usselman) lack standing to bring claims regarding the Prudential GIF." ECF No. 134 at 5 n.4.

Melendres, 784 F.3d at 1262; *Bouvy v. Analog Devices, Inc.*, No. 19-cv-881-DMS-BLM, 2020 WL 3448385, at *7 (S.D. Cal. June 24, 2020) ("Defendants do not dispute that Plaintiff has standing related to the claims he himself invested in, or that members of the putative class invested in the contested options. . . . Accordingly, Plaintiff demonstrates standing on behalf of himself and the putative class."); *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, 250 F. Supp. 3d 460, 465 (N.D. Cal. 2017) (declining to address defendants' "challenge [] to plaintiffs' standing on investment options which they did not invest" because "once the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded" and "whether the named plaintiffs are appropriate class representatives will be resolved at the class certification stage." (quoting *Melendres*, 784 F.3d at 1262)).

Therefore, the Court denies Defendants' Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.[11]

III. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

A. Legal Standards

1. Federal Rule of Civil Procedure 12(b)(6)

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). However, plaintiffs must also plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see* Fed. R. Civ. P. 12(b)(6). The plausibility standard demands more than a "formulaic recitation of the elements of a cause of action," or "'naked assertions' devoid

[11] The Court denies as moot Defendants' request for judicial notice of Exhibit A, which contains copies of the named Plaintiffs' Plan account statements, because judicial notice is unnecessary to resolve this dispute, and Plaintiffs do not contest Defendants' claim that none of the named Plaintiffs invested in the Prudential GIF SVF. *See* ECF No. 113 at 3; *see* ECF No. 112-1 at 3–4, 5 n.3.

of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555, 557). Instead, a complaint "must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

When reviewing a motion to dismiss under Rule 12(b)(6), courts must assume the truth of all factual allegations and construe them in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996) (citing *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1340 (9th Cir. 1995)). The court need not take legal conclusions as true "merely because they are cast in the form of factual allegations." *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (quoting *W. Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Similarly, "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) (citing *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 926 (9th Cir. 1996)).

"In an ERISA case, 'a complaint does not need to contain factual allegations that refer directly to the fiduciary's knowledge, methods, or investigations at the relevant times,' because '[t]hese facts will frequently be in the exclusive possession of the breaching fiduciary.'" *Bouvy*, 2020 WL 3448385, at *3 (citations omitted) (quoting *Terraza v. Safeway, Inc.*, 241 F. Supp. 3d 1057, 1070 (N.D. Cal. 2017), then quoting *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995)). "Thus, '[e]ven when the alleged facts do not directly address[] the process by which the Plan was managed, a claim alleging a breach of fiduciary duty may still survive a motion to dismiss if the court, based on circumstantial factual allegations, may reasonably 'infer from what is alleged that the process was flawed.'" *Wehner v. Genentech, Inc.*, No. 20-cv-06894, 2021 WL 507599, at *4 (N.D. Cal. Feb. 9, 2021) (quoting *Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Ctr. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 718 (2d Cir. 2013)).

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2. Breach of the Duty of Prudence

ERISA requires that a fiduciary act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] 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. "These duties are the highest known to the law." *Tibble v. Edison Int'l*, 843 F.3d 1187, 1197 (9th Cir. 2016) (en banc) (citations omitted) (quoting *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996)). ERISA's duty of prudence applies not only to the investigation and initial selection of investments, but also to the ongoing monitoring of those investments to remove imprudent ones. *Tibble*, 575 U.S. at 529.

"When applying the prudence rule, the primary question is whether the fiduciaries, 'at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment.'" *Cal. Ironworkers Field Pension Tr. v. Loomis Sayles & Co.*, 259 F.3d 1036, 1043 (9th Cir. 2001) (quoting *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983)). "Because 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." *Hughes*, 595 U.S. at 177 (internal citations omitted) (quoting *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014)). "At 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." *Id.*

3. Breach of the Duty of Loyalty

"ERISA requires a 'fiduciary' to 'discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.'" *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996) (quoting 29 U.S.C. § 1104(a)). The duty of loyalty prohibits plan fiduciaries from "'engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests.'" *Terraza*, 241 F. Supp. 3d at 1069 (quoting Restatement (Third) of Trusts § 78 (Am. L. Inst. 2007)). But

"[t]he duty of loyalty may [also] be breached by acting contrary to the participants['] interests, regardless of whether the fiduciary personally receives the benefit." *Lauderdale v. NFP Ret., Inc.*, No. 21-cv-301, 2022 WL 422831, at *12 (C.D. Cal. Feb. 8, 2022). "As such, plan fiduciaries must act 'with an eye single to the interests of the participants and fiduciaries.'" *Anderson v. Intel Corp. Inv. Pol'y Comm.*, 579 F. Supp. 3d 1133, 1155–56 (N.D. Cal. 2022) (quoting *White v. Chevron Corp.*, No. 16-cv-793, 2016 WL 4502808, at *4 (N.D. Cal. Aug. 29, 2016)).

"To state a claim of disloyalty, a plaintiff must allege plausible facts supporting an inference that the defendant acted for the purpose of providing benefits to itself or someone else." *Thomson v. Caesars Holdings Inc.*, 661 F. Supp. 3d 1043, 1054 (D. Nev. 2023) (quoting *In re Allianz Glob. Invs. U.S. LLC Alpha Series Litig.*, No. 20-cv-10028, 2021 WL 4481215, at *24 (S.D.N.Y. Sept. 30, 2021)). "Other courts in the Ninth Circuit have denied motions to dismiss when plaintiffs have sufficiently alleged that defendants made investment management decisions to benefit the plan sponsor at the expense of the plan participants." *Id.* (citing *Johnson*, 2018 WL 1427421, at *8–9).

B. Share Class Allegations

SeaWorld offered its employees various mutual funds to invest in through the Plan. "A mutual fund is a pool of assets, consisting primarily of portfolio securities, and belonging to the individual investors holding shares in the fund." *Burks v. Lasker*, 441 U.S. 471, 480 (1979). "In general, institutional share classes are available to institutional investors, such as 401(k) plans, and may require a certain minimum investment." *Tibble*, 2017 WL 3523737, at *1. "Institutional share classes often charge lower fees (i.e., a lower expense ratio) because the amount of assets invested is far greater than the typical individual investor." *Id.* "The investment management of all share classes within a single mutual fund is identical, and managed within the same pool of assets." *Id.* "In other words, with the exception of the expense ratio (including revenue sharing), the retail share class and the institutional share class are managed identically." *Id.* Among the various allegations in the operative Complaint, Plaintiffs claim that Defendants breached their

duties of prudence and loyalty by causing the Plan's participants to pay excessive fees and lose returns by failing to offer, monitor, and investigate available lower cost mutual fund share classes as plan investment options. ECF No. 105 ¶¶ 52–84.

Defendants move to dismiss the operative Complaint to the extent that it is premised on these alleged share class violations, because an "obvious alternative explanation" for Defendants' decision to select higher cost institutional share classes is that such share classes included revenue sharing, which Defendants could use to offset Plan expenses. ECF No. 112-1 at 6. This argument is virtually identical to an argument Defendants asserted in their first motion to dismiss, which the Court rejected. In their first motion to dismiss, Defendants argued that "[c]ourts have routinely rejected claims of imprudence, where, as here, revenue sharing provides an 'obvious alternative explanation' for the decision to offer something other than the lowest share class of a given investment option." ECF No. 50-1 at 15. In support of their argument, Defendants pointed to MassMutual's Administrative Services Agreement, under which Defendants claimed the higher cost share classes made revenue sharing available to pay MassMutual and Alliant's fees. *Id.* at 14–15. The Court rejected Defendants' argument as contrary to Ninth Circuit precedent, and found that Plaintiffs' share class violation allegations "state[d] a claim for breach of the duty of prudence." ECF No. 84 at 22–24 (collecting cases).

The Court's prior analysis applies here with equal force. Although Plaintiffs have amended their Complaint since, the allegations regarding share class violations remain unchanged. *See* ECF No. 93-2, Ex. B at 14–39 (containing redline of amended pleading). Nor has there been an intervening change in the relevant controlling law.[12] The only difference in Defendants' second motion to dismiss is that they now request judicial notice of the Plan's 2018 5500 form, which they argue confirms that revenue sharing was used to

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[12] The cases Defendants cite in their briefing are inapposite for the same reasons that the Court expressed in its prior order. *Compare* ECF No. 112-1 at 7–8 (citing various cases); *with* ECF No. 84 at 22–24 (distinguishing cases cited by Defendants).

pay Plan expenses. ECF No. 112-1 at 6–8; *see* ECF No. 113 at 3, 7.[13] Specifically, Defendants point to a table included in the operative Complaint that purports to compare the expense ratios of the share classes included in the Plan against comparable share classes available to the Plan with cheaper expense ratios. *See* ECF No. 112-1 at 7–8; *see also* ECF No. 105 ¶¶ 65, 67. Of the 26 mutual funds included in the table, Defendants note that all 11 of the American Century Target Date Funds ("TDFs") are alleged to have an expense ratio that is 0.35% greater than the comparable mutual fund. *See* ECF No. 112-1 at 7–8. Put differently, Plaintiffs allege that the Plan overpaid 0.35% in expenses for the 11 American Century TDFs. However, Defendants claim that the Plan's 2018 5500 form shows that this differential in expense ratios is due to the fact that—unlike the lower cost share classes Plaintiffs included in the table—the higher cost share classes included 0.35% in revenue sharing, which was used to offset the expenses of the American Century TDFs. *Id.* Therefore, Defendants argue that the operative Complaint fails to state a claim for breach of the duty of prudence because "moving to the retail share class would force the Plan participants to pay the Plan expenses through some other mechanism, such as direct payments from each participant." *Id.* at 8.

The Court takes judicial notice of the existence and filing of the Plan's 2018 5500 form, ECF No. 112-2, Ex. B at 845–48. "But a court cannot take judicial notice of disputed facts contained in such public records." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018); *see Baird v. BlackRock Institutional Tr. Co., N.A.*, 403 F. Supp. 3d 765, 775 (N.D. Cal. 2019) ("[W]hile a court 'may assume [an incorporated document's]

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[13] "The Department of Labor ('DOL') issued regulations requiring 401(k) plan service providers to file certain disclosures through an annual report called 'Form 5500.'" *Jacobs v. Verizon Commc'ns, Inc.*, No. 16-cv-1082, 2017 WL 8809714, at *2 n.3 (S.D.N.Y. Sept. 28, 2017); *see* 29 C.F.R. § 104a-5. "The Form 5500 is an 'Annual Return/Report of Employee Benefit Plan.'" *Malinowski v. Lichter Grp., LLC*, No. 14-cv-917, 2015 WL 857511, at *1 n.9 (D. Md. Feb. 26, 2015) (citing 29 C.F.R. § 2520.103-1(b)(1)). Form 5500 is required to be filed with the Internal Revenue Service ("IRS") and DOL. *See In re Ins. Brokerage Antitrust Litig.*, No. 4-cv-5184, 2008 WL 141498, at *3 (D.N.J. Jan. 14, 2008).

contents are true for purposes of a motion to dismiss . . . it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint.'" (quoting *Khoja*, 899 F.3d at 1002)).

Here, the Plan's 2018 5500 form does not change the result of the Court's ruling here. The allegations in the operative Complaint regarding share class include, but go beyond, allegations about expense ratios. Plaintiffs allege "[s]ince the inception of the Plan on March 1, 2010, Defendants offered higher cost mutual fund share classes as investment options for the Plan even though 90% of the time lower cost class shares of those exact same mutual funds with the same attributes were readily available to the Plan throughout its duration." ECF No. 105 ¶ 64. Plaintiffs claim "Defendants did not attempt to negotiate a flat fee as opposed to an asset-based [fee] for recordkeeping, nor did they attempt to negotiate lower fees or request to be moved into lower share classes with less asset-based fees." *Id.* ¶ 71. Plaintiffs further allege "Defendants did not systematically and regularly review or institute other processes in place to fulfill their continuing obligation to monitor Plan investments and reduce Plan costs, or in the alternative, failed to follow the processes . . . ." *Id.* ¶ 82. According to Plaintiffs, "[b]y choosing and maintaining higher cost share classes for a decade instead of available lower cost shares . . . , Defendants caused Plan participants/beneficiaries harm. The harm was not simply just forcing them to pay higher fees, but also lost yield and returns participants rely on for retirement income as a result of those higher fees on nearly every mutual fund offered through the Plan." *Id.* ¶ 66. Plaintiffs allege Defendants' imprudence and disloyalty "resulted in over ten million dollars of damages to participants." *Id.* ¶ 84.

Plaintiffs include in the operative Complaint two tables comparing the expense ratios of the share classes Defendants included in the Plan for 26 mutual funds as of December 31, 2019, against comparable share classes with cheaper expense ratios that Defendants could have chosen instead. *Id.* ¶¶ 65, 67. The tables also compare the investment returns for various performance periods ending December 31, 2019, of the comparable share classes available to the Plan against the share classes Defendants included in the Plan. *Id.*

For 25 of the mutual funds, the allegations in the tables reflect that the comparable share classes Plaintiffs identified performed better than the share classes Defendants included in the Plan, according to the average annualized 3-year returns, the average annualized 5-year returns, the cumulative total 5-year returns, and the average annual 5-year returns. *Id.* Data for the 5-year returns of the share class for the remaining mutual fund, the American Century One Choice 2060 Inv, is not available, but the comparable share class Plaintiffs identified performed better, according to its available 12-month yield, average annualized 1-year returns, and average annualized 3-year returns. *Id.* ¶ 67.

The 5500 form reflects that revenue sharing of 0.35% occurred for 11 American Century TDFs for one year: 2018. *See* ECF No. 112-2, Ex. B at 845–48 (reporting "for the period of: 01/01/2018 – 12/31/2018"). While the tables in the operative Complaint do allege that the expense ratios for the share classes of the 11 American Century TDFs included in the Plan exceeded comparable share classes by 0.35%, the tables purport to be based on data "as of December 31, 2019" and take issue with the 26 mutual funds since Defendants added them to the Plan in either 2015 or 2016. *Id.* ¶¶ 65, 67. Even if accepted as true, the 5500 form would not respond to the entirety of Plaintiffs' allegations, nor would it undermine Plaintiffs' allegations that the revenue sharing amount was "NOT 'reasonable' for recordkeeping." *Id.* ¶ 71; *see id.* ¶¶ 8(b), 61, 69–76, 91–93, 96–101, 108, 111, 118, 241–45, 251–57.

Indeed, as explained in the Court's prior order, the Ninth Circuit rejected a similar argument relying on judicially noticed 5500 forms at the pleading stage:

> Defendants further argue that the R6 class did not include revenue sharing, which explains why that class of shares had a lower expense ratio than the R5 class, and thus provides an obvious alternative explanation for why defendants offered beneficiaries the R5 class rather than the R6 class. That explanation is plausible, and defendants may well be able to substantiate it at the summary judgment stage. But the judicially noticed documents on which defendants rely to support their argument are not sufficient at the pleading stage to render plaintiffs' facially plausible allegations inadequate.

ECF No. 84 at 22 (quoting *Davis v. Salesforce.com, Inc.*, No. 21-15867, 2022 WL 1055557, at *1 (9th Cir. Apr. 8, 2022)).[14] Other courts in the Ninth Circuit have ruled similarly. *See Johnson*, 2018 WL 1427421, at *5 (denying motion to dismiss and rejecting defendant's argument that the "use of higher-cost share classes permitted revenue sharing to be applied to defray the Plan's recordkeeping expenses."); *Terraza*, 241 F. Supp. 3d at 1083 ("Terraza has plausibly alleged that the Defendants allowed the Plan to compensate the record-keeper through revenue-sharing payments that exceeded the underlying administrative fees that were supposed to cover all necessary services, thus resulting in unreasonable compensation and a breach of fiduciary duty.").

Nor would the Plan's 5500 forms have any bearing on Plaintiffs' allegations that the higher cost share classes Defendants included in the Plan did not perform as well as the comparable lower cost share classes Plaintiffs identified. *See Bouvy*, 2020 WL 3448385, at *9 (denying motion to dismiss because the "Plaintiff alleges facts regarding a fee differential as well as specific examples of funds that underperformed their peers, 'concrete examples of cheaper better performing funds,' and allegations that 'these particular Transamerica investments were poor investment options and that Transamerica benefitted at the expense of participants by retaining one third of the Plan's assets in its proprietary funds.'" (footnote omitted)).

Accordingly, the Court concludes that Plaintiffs' share class allegations sufficiently state a claim for breach of the duty of prudence, and denies Defendants' motion to dismiss as to these allegations.

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[14] The district court that the Ninth Circuit reversed took judicial notice of the plan's 5500 forms, which "indicate[d] the fees charged in connection with the JPMorgan SmartRetirement funds 'were used to pay for recordkeeping and other administrative services provided to the Plan, an arrangement which frequently inure[s] to the benefit of ERISA plans.'" *Davis v. Salesforce.com, Inc.*, No. 20-cv-1753, 2021 WL 1428259, at *3 & n.7 (N.D. Cal. Apr. 15, 2021) (alterations in original) (citation omitted).

C. Mutual Fund Underperformance

Plaintiffs allege Defendants imprudently selected and maintained certain mutual funds in the Plan, despite their poor performance. ECF No. 105 ¶¶ 113–76. Defendants move to dismiss Plaintiffs' imprudence claim—to the extent that it is based on underperformance of the mutual funds—because "the challenged funds did not underperform their benchmarks in the sustained and material way that infers an imprudent fiduciary process[.]" ECF No. 112-1 at 9. Defendants argue that Plaintiffs must allege "material and persistent underperformance" against an appropriate benchmark to state a claim for breach of fiduciary duty. *Id.* at 8.

The "material and persistent underperformance" standard to which Defendants refer is not the law of the Ninth Circuit. Rather, the phrase comes from a plaintiff's unsuccessful argument as recited in a district court opinion, *Dorman v. Charles Schwab Corp.*, No. 17-cv-285, 2019 WL 580785, at *6 (N.D. Cal. Feb. 8, 2019) ("Dorman offers new allegations, which he argues cure the deficiencies identified by the Court because these allegations now show 'material' and 'persistent' underperformance. These new allegations do not remedy the previous deficiencies."). In dismissing the plaintiff's imprudence claim, the district court in *Dorman* noted that stating a claim for breach of the duty of prudence required allegations of "other indicia of imprudence" in addition to underperformance. *Id.* The plaintiff argued that the allegations in his amended complaint demonstrated "material" and "persistent" underperformance, and the court disagreed. *Id.* ("Dorman has not provided factual allegations of 'other indicia' and his new allegations pertain only to underperforming funds, which alone, as the Court has said, are insufficient to survive a motion to dismiss and fail for that reason. Separately, the allegations here do not, as Dorman argues, indicate the SMRT Funds 'persistent[ly]' or 'materially' underperformed." (alteration in original)).[15] The other cases Defendants cite from within

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[15] *Dorman* is also factually distinguishable from this case. There, the court noted "in 2013, all ten SMRT Funds outperformed or matched the Index benchmark in the previous

the Ninth Circuit neither apply the "material and persistent underperformance" standard, nor compel a similar outcome.

In *White v. Chevron Corp.*, the Ninth Circuit affirmed a district court's dismissal of an ERISA putative class action because "[n]one of the allegations made it more plausible than not that any breach of a fiduciary duty had occurred." 752 F. App'x 453, 455 (9th Cir. 2018). The plaintiffs in *White* alleged that the defendants breached their duty of prudence by failing to remove a specific fund sooner than April 2014, despite the fund beginning to underperform "around 2012." *White v. Chevron Corp.*, No. 16-cv-793, 2017 WL 2352137, at *20 (N.D. Cal. May 31, 2017). The plaintiffs neither alleged that the defendants were imprudent in investigating or selecting the challenged fund as an option in the plan, nor alleged any other indicia of imprudence. *See id.* In dismissing the plaintiffs' claims, the district court reasoned, "plaintiffs must plead some other objective indicia of imprudence. . . . Plaintiffs continue to base this claim solely on the fact that the Fund did not perform well, which approach the court has already rejected." *Id.* at 21.

Likewise, the district court in *Bracalente v. Cisco Systems, Inc.*, dismissed the plaintiffs' claim for breach of the duty of prudence because "the case law teaches that underperformance *alone* cannot substantiate an ERISA imprudence claim." No. 5:22-cv-4417, 2023 WL 5184138, at *4 (N.D. Cal. Aug. 11, 2023). In *Bracalente*, the "[p]laintiffs d[id] not dispute that their claims [we]re primarily premised on the BlackRock TDFs' underperformance," and "the Complaint's own allegations cut against an inference of imprudence, noting that the BlackRock TDFs charged 'low fees' and enjoyed significantly improved performance in early 2022." *Id.* at 4. When describing the deficiencies in the plaintiffs' allegations, the district court in *Bracalente* distinguished two out-of-circuit district court cases as "involv[ing] much more than mere underperformance—the plaintiffs

five years, and eight out of the ten funds outperformed or matched the Universe Median in the previous five years." *Dorman*, 2019 WL 580785, at *6. In contrast, the challenged funds did not consistently outperform or match the benchmarks Plaintiffs provided here.

1 there had also alleged that 'the recordkeeping and administrative costs of the Plan were
2 excessive; the majority of funds chosen by the Committee were more expensive than
3 comparable funds . . . ; the Committee should have considered whether lower-cost
4 comparable collective trusts were available; the Committee could and should have selected
5 at least one identical but lower-cost share class; the Committee failed to consider materially
6 similar but cheaper, passively-managed alternatives.'" *Id.* at 5. As such, the court in
7 *Bracalente* dismissed the plaintiffs' claim because "the Court [could] []not reasonably infer
8 from underperformance alone that the BlackRock TDFs were imprudent investments." *Id.*

9 The cases Defendants cite advise that "poor performance, standing alone, is not
10 sufficient to create a reasonable inference that plan fiduciaries failed to conduct an adequate
11 investigation . . . ERISA requires a plaintiff to plead some other indicia of imprudence."
12 *Dorman*, 2019 WL 580785, at *6 (quoting *White*, 2017 WL 2352137, at *20). However,
13 they do not hold that allegations of "material and persistent underperformance" are
14 necessary to state a claim for breach of the duty of prudence. Indeed, the Ninth Circuit
15 reversed a district court that attempted to apply a similar standard. In *Davis*, the district
16 court dismissed the plaintiffs' claim for breach of the duty of prudence because "the periods
17 during which the JPMorgan SmartRetirement funds are alleged to have underperformed
18 relative to the JPMorgan CITs [we]re not of sufficient length to support an inference of
19 imprudence, nor [wa]s the degree of alleged underperformance substantial enough to
20 support such an inference." 2021 WL 1428259, at *7 (internal citations omitted). The Ninth
21 Circuit reversed the district court, holding, "Plaintiffs have [] adequately alleged . . . that
22 defendants imprudently failed to investigate and timely switch to available collective
23 investment trusts, which plaintiffs allege had 'the same underlying investments and asset
24 allocations as their mutual fund counterparts' but had better annual returns and a lower net
25 expense ratio." *Davis*, 2022 WL 1055557, at *2.

26 For this reason, district courts across the Ninth Circuit have denied motions to
27 dismiss claims for breach of the duty of prudence in ERISA cases where the plaintiffs have
28 alleged fund underperformance in addition to some other indicia of imprudence. *See, e.g.*,

1 *Thomson v. Caesars Holdings Inc.*, 661 F. Supp. 3d 1043, 1056 (D. Nev. 2023) (alleging
2 "the challenged funds were underperforming at the time RITC selected them to replace the
3 Plan's prior investment menu[,]" "at the time RITC made its decision to switch the Plan's
4 assets to its own age-based funds, the prior Plan funds were outperforming RITC's
5 funds[,]" and "the Plan's prior age-based funds . . . mostly outperformed RITC's age-based
6 funds over the three- and five-year periods leading up to RITC's decision, as well as over
7 the life cycles of the RITC funds"); *In re LinkedIn ERISA Litig.*, No. 5:20-cv-5704, 2021
8 WL 5331448, at *7 (N.D. Cal. Nov. 16, 2021) (alleging "two of the Active Suite's top three
9 domestic equity funds underperformed their benchmark indices by 2.99% and 3.69% over
10 their lifetimes[,]" "[t]he Active Suite has a significantly higher expense ratio than the Index
11 Suite, despite underperforming the Index Suite based on three- and five-year annualized
12 returns[,]" "the Active Suite 'underwent a strategy overhaul' in 2013 and 2014 that granted
13 its managers discretion to deviate from the glide path allocations[,]" and "the Active Suite
14 experienced an estimated $5.4 billion in net outflows"); *In re: Prime Healthcare ERISA
15 Litig.*, No. 8:20-cv-1529, 2021 WL 3076649, at *4 (C.D. Cal. July 16, 2021) (alleging 17
16 of 29 funds in the plan "trailed their respective benchmarks . . . as of September 2020[,]"
17 "had a significantly higher expense ratio than the Index suite, despite consistently
18 underperforming the Index suite based on three-and five-year annualized returns[,]"
19 "underwent a 'strategy overhaul' in 2013 and 2014 that gave its managers discretion to
20 deviate from glide path allocations[,]" and had "significant capital outflow" in 2018); *Gotta
21 v. Stantec Consulting Servs. Inc.*, No. 20-cv-1865, 2021 WL 1986469, at *2 (D. Ariz. May
22 18, 2021) (alleging defendants "select[ed] high-cost share classes where a lower-cost share
23 class was available for the exact same investments; [] fail[ed] to choose funds with
24 substantially the same benefits and significantly lower expense ratios than the funds
25 offered; [] fail[ed] to utilize lower-cost collective trusts in their offerings; [] retain[ed]
26 underperforming investments with unreasonably high expense ratios; and [] fail[ed] to
27 monitor the record-keeping and administrative expenses of the plan."); *Baird*, 403 F. Supp.
28 3d at 780 (alleging challenged funds "underperformed 'after taking into account the

compounding of returns realized every year' by almost 20%" compared to the benchmark indices and "by 5.6% on average" compared to "nearly identical" funds offered to another plan, because of "undisclosed fees and layering structure[s]").

Plaintiffs' allegations here are likewise sufficient to state a claim for breach of the duty of prudence. The operative Complaint includes allegations that all four challenged funds underperformed compared to at least one meaningful benchmark at some point during the time they were included in the Plan within the limitations period. *See* ECF No. 105 ¶¶ 117 (alleging ClearBridge Appreciation Fund lagged its primary prospectus benchmark five of the seven years between 2013 and 2020), 124–43 (alleging American Century TDFs underperformed four comparable funds between 1.46% and 12.49% at various times from 2016 to 2019), 151–60 (alleging Columbia Mid Cap Index A Fund underperformed three comparable funds between 3.03% and 5.66% at various times from 2016 to 2019), 161–76 (alleging American Funds AMCAP R5 Fund underperformed three comparable funds between 4.88% and 34.07% at various times from 2016 to 2019).

Plaintiffs also plead other indicia of imprudence. The operative Complaint alleges Defendants imprudently investigated and selected the four challenged funds, given that each of them underperformed at least one comparable fund prior to their inclusion in the Plan. *Id.* ¶¶ 117 (alleging ClearBridge Appreciation Fund lagged its primary prospectus benchmark seven of the ten years prior to Defendants' selection of the fund in 2013, with a prior annual median return of a loss of 0.56% per year from 1997 to 2012), 142 (alleging Defendants added the "INV" share class of the American Century TDFs to the Plan in 2016, despite the TDFs underperforming three comparable funds between 0.38% and 17.17% at various times from 2012 to 2016), 158 (alleging Defendants added the Columbia Mid Cap Index A Fund to the Plan in 2010, despite it "lag[ing] its PBM all the way back to 2001"), 171 (alleging the American Funds AMCAP R5 Fund "underperformed its MCI and PBM in thirteen of the twenty-six years of its existence prior to selection").

Plaintiffs also claim Defendants selected higher cost share classes for nearly 90% of the mutual funds offered in the Plan, which did not perform as well as lower cost share

classes "of those exact same mutual funds with the same attributes[,]" but instead benefitted the Plan's recordkeeper and other service providers through revenue sharing payments for unreasonably excessive asset-based fees. *Id.* ¶¶ 64–81 (alleging share class violations as to all four challenged funds). Specifically, Plaintiffs allege that Defendants selected and maintained the American Century TDFs during the class period, which paid out the highest amount of revenue sharing and attracted over 70% of the Plan's assets as the qualified default investment alternative ("QDIA"). *Id.* ¶ 120. Plaintiffs also allege that Defendants imprudently selected and maintained undiversified SVF options offered by the Plan's recordkeepers, despite their higher fees and lower crediting rates compared to substantially similar investment options, by failing to competitively bid and negotiate with providers who were not also the Plan's recordkeepers. *Id.* ¶¶ 177–240. The operative Complaint further claims that Defendants imprudently selected and monitored the Plan's service providers by failing to competitively bid the Plan's service providers, failing to negotiate lower fees, and paying unreasonably excessive fees compared to similar sized plans. *Id.* ¶¶ 85–112. Finally, Plaintiffs allege Defendants were aware—or should have been aware—of the imprudence of their actions and omissions. *Id.* ¶¶ 74, 148, 159, 172, 204, 273.

Taken together, Plaintiffs' allegations sufficiently state a claim for breach of the duty of prudence. Although Defendants may ultimately demonstrate that they did not act imprudently, Plaintiffs have satisfied their burden at this stage of the litigation by alleging facts from which the Court can reasonably infer that Defendants' decision-making process was flawed. *See, e.g.*, *Bouvy*, 2020 WL 3448385, at *9 (denying motion to dismiss where plaintiffs pleaded fund underperformance in addition to alleging that defendants "fail[ed] to investigate the lower-cost shares, where the use of higher-cost shares was not necessary to pay recordkeeping fees nor [to] provide any other benefit to the plan[,]" "retained funds that historically underperformed," and "used expensive, actively managed Transamerica funds as default selections."); *Terraza*, 241 F. Supp. 3d at 1075–77 (alleging "investment options all charged higher expense ratios than, and underperformed relative to, comparable

options offered[,]" "investment options . . . underperformed compared to their benchmark[,]" "Defendants did not even secure the least expensive share class available," and the Plan's trustee and recordkeeper "inappropriately affected and compromised the Plan's investment options" by selecting and retaining certain expensive and underperforming options that it benefited from).[16]

D. The Stable Value Funds

In addition to the various mutual funds discussed above, the Plan offered participants a type of "stable value fund" investment option. ECF No. 105 ¶ 55. As described by one district court:

> A stable value fund is a contract-based investment vehicle designed to preserve principal and generate steady rates of return, while allowing participants to make withdrawals at contract value (principal plus accrued income), regardless of market conditions. In the context of a retirement plan, a stable value fund is similar to a money market fund in that it provides liquidity and principal protection, and similar to a bond fund in that it provides consistent returns over time. A stable value fund differs from both in that it seeks to generate returns greater than a money market and equivalent to a short– to intermediate–term bond fund. Stable value funds are able to do this because the amount of

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[16] Defendants request judicial notice of numerous exhibits. ECF No. 113; *see* ECF No. 112-1 at 3–4; ECF No. 134 at 1–4. Plaintiffs oppose Defendants' request. ECF No. 125 at 9–11. A court may take judicial notice of "a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). "But a court cannot take judicial notice of disputed facts contained in such public records." *Khoja*, 899 F.3d at 999. Likewise, a court may take judicial notice of certain documents under the incorporation-by-reference doctrine, if the complaint refers extensively to the document or the document forms the basis of a plaintiff's claim. *Id.* at 1002. However, "it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint." *Id.* at 1003. Accordingly, the Court grants in part Defendants' request by acknowledging the existence of Exhibits D through O, but denies Defendants' request to the extent that Defendants seek judicial notice of these documents to dispute facts in the operative Complaint. *See, e.g.*, *Lauderdale*, 2022 WL 422831, at *8 (declining to consider judicially noticed documents purporting to reflect a reasoned decision-making process at the motion to dismiss stage).

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money invested in the account is relatively stable over time. This enables fund providers to offer better crediting rates (the rate of return that a participant will receive base[d] on contributions and accrued interest) and to guarantee participants will not lose money by guaranteeing the fund transacts at book value. Stable value accounts also "stabilize" the returns through the use of an imbedded formula which is part of the contract with the plan that smooths out the volatility of the fund resulting from fluctuations in interest rates associated with bond funds.

Stable value funds are common in large 401(k) plans and are typically structured as: (1) an insurance company general account; (2) an insurance company separate account; or, (3) a synthetic fund. A synthetic stable value fund is a diversified portfolio of fixed income securities and is insulated from interest rate volatilities through wrap contracts with insurers. Synthetic stable value funds are generally the least risky because principal is guaranteed by multiple wrap providers and plan participants own the assets of the underlying funds. . . .

In a separate account product, the assets of the underlying funds are held in the separate account of an insurance carrier and are riskier because there is only one "wrap" provider. As a result, these funds offer higher crediting rates—higher risk, higher reward. Unlike synthetic stable value products, however, separate account investors do not actually own the underlying assets in the separate account.

With a general account product, the investment funds are deposited by an insurance company in its general account. The insurance company then generates revenue by investing said funds in instruments with a higher yield than what it guaranteed to its contract holders. The resulting "spread" (i.e., the difference between the crediting rate and the returns earned by the insurance company) is kept by the insurance company. In contrast to the other types of investment products, general account products do not have a stated expense ratio. Rather, the fees charged are typically implicit and may be used to cover investment management expenses, insurance fees, administrative costs, and any revenue sharing that has been built into the product.

As with separate account products, the general account investors own the contract but not the underlying investments. Assets in a general account product would be available to the insurance company's creditors in the event said insurance company became insolvent. As a result, general account products . . . are the riskiest type of stable value fund and consequently must offer the highest credit rates.

Miller v. AutoZone, Inc., No. 2:19-cv-2779, 2020 WL 6479564, at *4–5 (W.D. Tenn. Sept. 18, 2020) (internal citations and footnotes omitted); *see Austin v. Union Bank & Tr. Co.*, No. 3:14-cv-706, 2016 WL 8732420, at *1 (D. Or. Feb. 19, 2016) (describing stable value funds).

The Plan offered participants two SVF options during the relevant time period. First, the Plan contracted with its recordkeeper, MassMutual, to offer participants MassMutual's SAGIC (Separate Account Guaranteed Investment Account Core I), a type of separate account SVF. *See* ECF No. 105 ¶¶ 177–87. When the Plan replaced MassMutual with Prudential as its recordkeeper at the beginning of 2020, the Plan also transitioned from MassMutual's SAGIC separate account SVF to Prudential's Guaranteed Income Fund ("GIF") general account fixed annuity type SVF. *Id.* ¶¶ 31, 211–12.

Among other things, Plaintiffs claim Defendants breached their fiduciary duties by selecting and maintaining both SVFs when substantially identical products with higher crediting rates existed. *Id.* ¶ 188. Defendants move to dismiss Plaintiffs' claim as to both SVFs. ECF No. 112-1 at 19–23.

1. MassMutual's SAGIC Separate Account SVF

In moving to dismiss Plaintiffs' claim as to the MassMutual SAGIC SVF, Defendants lodge three attacks on the benchmarks alleged in the operative Complaint. ECF No. 112-1 at 19–22. First, Defendants contend the crediting rates received by other MassMutual clients are not adequate benchmarks because they relate to general account SVFs when MassMutual's SAGIC is a separate account SVF, and Plaintiffs neither allege sufficient facts to infer that the funds of other MassMutual clients are appropriate comparators nor allege who the clients are. *See* ECF No. 112-1 at 21–22. Second, Defendants claim that one of the alleged benchmarks—the TIAA fund—is not an appropriate benchmark, because it is a general account product and the TIAA fund is only available to non-profit entities. *See* ECF No. 112-1 at 20–21; ECF No. 134 at 9–10. Third, Defendants claim MassMutual's SAGIC had a higher crediting rate than the two remaining alleged benchmarks, the Hueler Index and the five-year constant duration Treasury Index.

See ECF No. 112-1 at 19–20. Absent an appropriate benchmark, Defendants argue Plaintiffs' claim should be dismissed as to the MassMutual SAGIC SVF. *Id.*

The Court previously declined to analyze whether the comparator funds Plaintiffs provided to support their underperformance claim regarding the MassMutual SAGIC SVF were meaningful benchmarks, because the Court determined that Plaintiffs adequately asserted separate allegations that MassMutual charged excessive fees as the SVF's provider. *See* ECF No. 84 at 32. However, since Plaintiffs amended their Complaint to include additional underperformance and excessive fee allegations, Defendants reassert these arguments in their second motion to dismiss, which the Court now addresses.

When alleging that MassMutual's SAGIC SVF underperformed by providing the Plan unreasonably low crediting rates, the Complaint provides a table comparing the crediting rate of the Plan's SAGIC SVF "to the crediting rate of the same *general account* products offered by MassMutual to other plans[.]" ECF No. 105 ¶ 189 (emphasis added). However, MassMutual's SAGIC SVF is a "separate account" SVF. *Id.* ¶¶ 177, 183. "[G]eneral account products . . . are the riskiest type of stable value fund and consequently must offer the highest credit rates." *Miller*, 2020 WL 6479564, at *4–5. Indeed, the operative Complaint consistently disparages general account products as more risky. *See* ECF No. 105 ¶¶ 181 ("In recent years, large 401(k) plans fled fixed annuity products backed by the general account of a single insurance company due to concerns about single entity credit and liquidity risk. Following the high-profile default failures of GIC Issuers in 1992 and 1993 by Executive and Confederation Life, the Federal Reserve expressed concerns about the high risk of the insurance company general account products and the flimsy nature of the state guarantees backing the insurance contracts. The industry immediately responded by offering more separate account contracts, which put creditors in line ahead of general account contracts but still resulted in 100% single entity credit and liquidity exposure."), 208 ("Following the high-profile failure or near failure of a number of stable value providers during the credit crisis of 2008-9, the trend among fiduciaries in large plans is to avoid general account stable value funds because of credit risk concerns

and to select more diversified stable value products."). Therefore, MassMutual's general account SVFs cannot typically serve as a meaningful benchmark for the SAGIC separate account SVF absent "sufficient factual allegations from which it could be inferred that the [general account SVFs] at issue could serve as meaningful benchmarks." *In re LinkedIn ERISA Litig.*, 2021 WL 5331448, at *7. The operative Complaint does generally allege that "*identical or substantially identical* products were available to Defendants from MassMutual and other stable value providers[,]" ECF No. 105 ¶ 188. Nonetheless, "simply labeling funds as 'comparable' or 'materially similar' is insufficient to establish that those funds are meaningful benchmarks against which to compare the performance of the challenged funds." *Tobias v. NVIDIA Corp.*, No. 20-cv-6081, 2021 WL 4148706, at *13 (N.D. Cal. Sept. 13, 2021).

The operative Complaint offers two additional benchmarks, but they are also too deficient to serve as meaningful benchmarks. Plaintiffs first allege a TIAA fund would have offered better crediting rates to the Plan. ECF No. 105 ¶ 192. Plaintiffs then allege that "[o]ther Mass Mutual clients received even better crediting rates . . . ." *Id.* ¶ 194. But the operative Complaint does not include any factual allegations from which the Court can infer that the TIAA fund or the products MassMutual provided other clients can serve as meaningful benchmarks, such as what the investment vehicles are, what their investment purposes are, or how they are managed. *Id.* ¶¶ 192, 194. The only factual allegations that the operative Complaint includes are two tables listing the crediting rates of the two alleged benchmarks during the relevant time periods. *Id.* ¶¶ 192, 194, 236.[17] As noted above, the operative Complaint does generally allege that "*identical or substantially identical* products were available to Defendants from MassMutual and other stable value

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[17] In a later section of the operative Complaint discussing the Prudential GIF SVF, Plaintiffs refer to a "TIAA-CREF" fund and seem to compare its rates to those of the MassMutual SAGIC separate account SVF. ECF No. 105 ¶¶ 234–36. However, the operative Complaint explicitly refers to the TIAA-CREF fund as a "general account." *Id.* ¶ 235; *see id.* ¶ 236 (referring to the fund as "TIAA GA Investable").

providers . . . ." ECF No. 105 ¶ 188. "However, simply labeling funds as 'comparable' or 'a peer' is insufficient to establish that those funds are meaningful benchmarks . . . ." *Anderson v. Intel Corp.*, No. 19-cv-4618, 2021 WL 229235, at *8 (N.D. Cal. Jan. 21, 2021).[18] Although the Complaint contains allegations about more suitable benchmarks (e.g., the Hueler Index), the Complaint does not include any information about how the SAGIC SVF compares to these. *See* ECF No. 105 ¶¶ 201–04.[19]

Given that none of the comparator funds Plaintiffs offer include sufficient allegations to plead a meaningful benchmark, the Court concludes that Plaintiffs fail to state a claim for imprudent retention of the MassMutual SAGIC SVF based on underperformance. *See Stark v. Keycorp*, No. 1:20-cv-1254, 2021 WL 1758269, at *11 (N.D. Ohio May 4, 2021) ("[W]hile Plaintiffs have pled that some similarities existed between the MaGIC Fund and the fourteen comparator funds—namely, that they were each stable value accounts with at least $50 million in assets that were managed using similar targets for duration and credit quality of the underlying fixed income securities—they have not fully demonstrated that the funds all had the same investment strategy, which might account for the small difference in returns without any correlating breach of fiduciary duty." (internal citations omitted)).

However, underperformance is only one of the theories under which Plaintiffs claim Defendants breached their fiduciary duties by maintaining the MassMutual SAGIC SVF. Plaintiffs also allege Defendants acted imprudently by failing to competitively bid SVF providers, failing to monitor the costs and performance of the SAGIC SVF using the

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[18] Because the Court concludes that Plaintiffs do not allege sufficient facts to demonstrate that the TIAA fund is an appropriate benchmark, the Court declines to address Defendants' argument that the TIAA fund is only available to non-profits. *See* ECF No. 112-1 at 20–21. As such, the Court denies as moot Defendants' request for judicial notice of Exhibit R. *See* ECF No. 113 at 4; ECF No. 112-1 at 21.

[19] The Court denies as moot Defendants' request for judicial notice of Exhibits P and Q. *See* ECF No. 113 at 5; ECF No. 112-1 at 20.

appropriate benchmarks, allowing MassMutual to keep excessive "spread fees," and failing to diversify the SAGIC SVF. *See* ECF No. 105 ¶¶ 177–210. Indeed, the Court previously found Plaintiffs' allegation that Defendants imprudently allowed MassMutual to retain excessive spread fees stated a claim. ECF No. 84 at 30–32.

Defendants attack part of these remaining theories by arguing "Plaintiffs allege no facts showing how the SAGIC [] w[as] insufficiently diverse[,]" and "there are no facts to infer that a prudent fiduciary should have tried to change funds." ECF No. 112-1 at 23 n.6. The Court disagrees. The operative Complaint includes allegations regarding how the SAGIC was insufficiently diverse and that a prudent fiduciary would have changed funds. ECF No. 105 ¶¶ 180 ("Separate account products, such as the MassMutual GIC, where the assets of the underlying funds are held in the separate account of an insurance carrier are riskier, because they are not owned by the Plan but sit on the balance sheet of the insurer where they take on near 100% of the single entity credit and liquidity risk of MassMutual."), 181 ("Although prudent fiduciaries have shunned them for twenty years, some general[] account[s] and separate accounts have existed in plans under $1 billion because of a lack of litigation until recently."), 184 ("An insurance company GIC, such as the MassMutual GIC here, is subject to the single entity credit risk of the insurance company that issues the contract. The crediting rate, set in advance by the insurance company and reset from time to time in its sole discretion, is not tied to the performance of a diversified pool of assets in which the investors in the fund have an interest."), 205 ("The risk and return characteristic of the fund depended entirely on the creditworthiness and rates declared by a single entity, MassMutual.").

Accordingly, the Court declines to dismiss Plaintiffs' claim as to the MassMutual SAGIC SVF because Plaintiffs' other theories of liability remain operative. *See Disselkamp v. Norton Healthcare, Inc.*, No. 3:18-cv-48, 2019 WL 3536038, at *5–8, 10–11 (W.D. Ky. Aug. 2, 2019) (declining to dismiss imprudence claim where the plaintiffs alleged the defendants "failed to implement a prudent methodology for selecting, monitoring, and replacing the Principal stable value product and, where appropriate,

diversifying into other, less-risky stable value products, based upon the risks, costs, and returns of other readily available investment products."); *Lau v. Metro. Life Ins. Co.*, No. 15-cv-9469, 2016 WL 5957687, at *5 (S.D.N.Y. Aug. 22, 2016) (denying motion to dismiss because, among other things, "[a]t this stage, the Court cannot definitively conclude that the minimum rate of return was reasonable, or that the formula for calculating the Crediting Rate did not allocate some investment risk to the Plans' participants. These determinations involve questions more appropriate for consideration on summary judgment.").

2. *Prudential's GIF General Account SVF*

Defendants move to dismiss Plaintiffs' claim as to the Prudential GIF general account SVF because the two comparator funds included in the operative Complaint are not meaningful benchmarks. ECF No. 112-1 at 20–23. First, Defendants contend the crediting rates received by CIGNA are not adequate benchmarks because Plaintiffs do not allege sufficient facts to infer that CIGNA is a comparable fund. *Id.* at 22–23. Second, Defendants claim that the TIAA-CREF fund is not an appropriate benchmark because it is only available to non-profit entities. *Id.* at 20–21; ECF No. 134 at 9–10. Given that neither fund is an appropriate benchmark, Defendants argue Plaintiffs' claim should be dismissed as to the Prudential GIF SVF. *Id.* The Court concludes that the Complaint fails to adequately allege that CIGNA is a meaningful benchmark, but does sufficiently allege that the TIAA-CREF fund is an appropriate benchmark.

The operative Complaint does not allege sufficient facts regarding the CIGNA fund to infer that it is a meaningful benchmark. Plaintiffs allege "Prudential paid 90 to 110 basis points less to the Plan for the very same fund as they did to an affiliated 401(k) Plan offered by CIGNA." ECF No. 105 ¶ 224. But the operative Complaint does not include any other factual allegations from which the Court can infer that the CIGNA fund is a meaningful benchmark, such as what its investment vehicles are or what its purpose is. The only additional factual allegation that the operative Complaint includes is a table listing the crediting rates CIGNA received during the relevant time period, and a general statement

that "*identical or substantially identical* products are available to Defendants from Prudential and other stable value providers with higher crediting rates and lower spread fees." *Id.* ¶¶ 223, 225. These conclusory allegations are insufficient to demonstrate that the investment vehicle Prudential offered CIGNA can serve as a meaningful benchmark for Prudential's GIF SVF. *Anderson*, WL 229235, at *8.[20]

The Court cannot say the same for the TIAA-CREF fund. The operative Complaint alleges "[a] comparable stable value product with the same investment purposes and design as the [] Prudential GIF with significantly higher returns is TIAA-CREF . . . ." ECF No. 105 ¶ 234. The Complaint further alleges that the TIAA-CREF fund is a "general account" SVF, like the Prudential GIF SVF. *Id.* ¶ 235. These allegations are sufficient to claim that the TIAA-CREF is a meaningful benchmark. Defendants' contention that the TIAA-CREF fund is only available to non-profit entities, as well as its related request for judicial notice of TIAA's website (Exhibit R), are not appropriate arguments at this stage of the litigation because they "only serve to dispute facts stated in a well-pleaded complaint." *Baird*, 403 F. Supp. 3d at 775 (quoting *Khoja*, 899 F.3d at 1002); *see Cryer v. Franklin Templeton Res., Inc.*, No. 16-cv-4265, 2017 WL 818788, at *4 (N.D. Cal. Jan. 17, 2017) ("Defendant may well be able to prove that these alternatives were not comparable or that they did not perform better in the long-run, but the Court may not resolve such factual questions at the motion to dismiss stage."). As such, the Court denies Defendants' motion as to both SVFs.

E. Excessive Advisory Fees

Defendants move to dismiss Plaintiffs' imprudence claim related to the Plan's advisory fees paid to one of its financial advisors, Alliant. ECF No. 112-1 at 23–24. Defendants argue that the one benchmark Plaintiffs offer to compare against Alliant's fees

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[20] The Court denies as moot Defendants' request for judicial notice of Exhibit S because judicial notice is unnecessary to resolve this dispute. *See* ECF No. 113 at 5; *see* ECF No. 112-1 at 22.

is inadequate and based on data from outside the limitations period. *Id.* This argument is unsuccessful.

The operative Complaint alleges Defendants breached their fiduciary duties by failing to competitively bid, monitor, and replace the Plan's financial advisor, Alliant, whose "asset-based fees charged to the Plan were disproportionately high for the 'services' provided to it." ECF No. 105 ¶ 108. Plaintiffs allege the Plan paid Alliant over $1 million—or an average of $168,000 a year—from 2014 to 2019. *Id.* In 2014, Plaintiffs claim Alliant charged the Plan $163,440. *Id.* ¶ 109. Yet, in that same year, Plaintiffs claim that Alliant Retirement Services charged the similarly sized LHC Group 401(k) plan $38,354. *Id.*

"Though some courts at this stage have opted to analyze whether plaintiffs have offered a proper 'apples to apples' comparison for complaints of excessive fees, it is not required in the Ninth Circuit. It is sufficient at this stage that Plaintiffs allege specific facts supporting their claims that the Plan's fees and Total Plan Cost were excessive for its size." *In re Sutter Health ERISA Litig.*, 2023 WL 1868865, at *10 (citation and footnote omitted) (declining to dismiss imprudence claim based on excessive fees where the plaintiffs provided benchmarks for only 2017 and 2019, despite the defendants' argument that "Plaintiffs' examples of comparative plans are not 'sufficient benchmarks' for the Plan"). Defendants argue they have been prudent by continually negotiating down the fees Alliant charges to the Plan. ECF No. 112-1 at 24. Defendants claim they paid Alliant 0.15% on all Plan assets from 2010 to 2013, which was negotiated down to 0.10% on all Plan assets from 2014 to 2020, and again negotiated down to 0.05% on all Plan assets with a cap of $110,000 from 2021 forward. *Id.* However, even if this were true, the reduction of Alliant's fees to 0.05% on all Plan assets with a cap of $110,000 in 2021, arguably supports Plaintiffs' argument that Alliant's fees of $163,440 in 2014 should have been negotiated down sooner. *See Creamer v. Starwood Hotels & Resorts Worldwide, Inc.*, No. 16-cv-9321, 2017 WL 2992739, at *3 (C.D. Cal. May 11, 2017) ("In 2015, Starwood cut the fees of its fund offerings by $4 million and changed its asset-based recordkeeping fee to a flat fee, further reducing costs. When viewed in the light most favorable to Plaintiffs, the Court can

infer from these facts that Starwood's recordkeeping and administrative fees were excessive prior to 2015 and are still excessive." (internal citations omitted)) (declining to dismiss excessive fees claim where the only benchmark the plaintiffs provided was a 2015 survey of fees for similar plans). Accordingly, the Court concludes Plaintiffs have adequately stated a claim regarding Alliant's excessive fees. [21]

F. Breach of the Duty to Monitor

Finally, Defendants move to dismiss Plaintiffs' second claim for breach of the duty to monitor because it is derivative of Plaintiffs' first claim, which Defendants argue fails to state a claim. ECF No. 112-1 at 24–25. Given that the Court has declined to dismiss the first claim in the operative Complaint, the Court likewise declines to dismiss the second. *See, e.g.*, *In re LinkedIn ERISA Litig.*, 2021 WL 5331448, at *12 (declining to dismiss claim for derivative knowing breach of trust claim where plaintiff stated a claim for breach of fiduciary duty).[22]

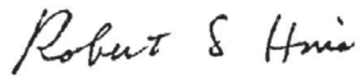
III. CONCLUSION

For the reasons above, the Court:

1. **DENIES** Defendants' motion to dismiss, ECF No. 112.
2. **ORDERS** Defendants to respond to the operative Complaint [ECF No. 105] within 14 days of this Order.

IT IS SO ORDERED.

Dated: January 31, 2024



Hon. Robert S. Huie
United States District Judge

[21] The Court denies as moot Defendants' request for judicial notice of Exhibits T to V, because judicial notice is unnecessary to resolve this dispute. *See* ECF No. 113 at 5–6; *see* ECF No. 112-1 at 24.

[22] The Court denies as moot the remainder of Defendants' request for judicial notice; even if the Court took judicial notice, the remaining exhibits would be irrelevant to the Court's analysis.