UNITED STATES DISTRICT COURT
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, Plaintiff, v. AMERICAN AIRLINES, INC., et al, Defendants.	§ § § § § § § § § § §	Case No. 4:23-cv-00552-O

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Dee J. Kelly, Jr. (S.B. # 11217250)
Russell D. Cawyer (S.B. # 00793482)
KELLY HART & HALLMAN LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Tel: (817) 332–2500
Fax: (817) 335–2820
dee.kelly@kellyhart.com
russell.cawyer@kellyhart.com

Mark W. Robertson (*pro hac vice*)
(N.Y. Bar # 4508248)
Jeffrey A. N. Kopczynski (*pro hac vice*)
(N.Y. Bar # 4592267)
William D. Pollak (*pro hac vice*)
(N.Y. Bar # 4737037)
Charles J. Mahoney (*pro hac vice*)
(N.Y. Bar # 5502885)
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
Tel.: (212) 326–2000
Fax: (212) 326–2061

Brian D. Boyle (*pro hac vice*)
(D.C. Bar # 419773)
Shannon M. Barrett (*pro hac vice*)
(D.C. Bar # 476866)
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Tel.: (202) 383–5300
Fax: (202) 383–5414
bboyle@omm.com
sbarrett@omm.com

Attorneys for Defendants American Airlines, Inc. and the Employee Benefits Committee

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Northern District of Texas Local Rule 56.3, Defendants American Airlines, Inc. ("American") and the American Airlines Employee Benefits Committee (collectively, "Defendants") respectfully move for summary judgment as a matter of law on all claims asserted by Plaintiff Bryan P. Spence ("Plaintiff") against Defendants and show the Court the following:

SUMMARY

Plaintiff, who is a participant in an American-sponsored 401(k) plan, alleges that (1) Defendants breached their fiduciary duties of loyalty and prudence in violation of ERISA § 404(a), and (2) Defendants are liable under ERISA §§ 405(a) and 409(a) for failing to adequately monitor other fiduciaries. Pursuant to Local Rule 56.3(b), Defendants set forth all matters required by Local Rule 56.3(a) in their concurrently filed Brief in Support of Motion for Summary Judgment and Appendix filed in Support of Motion for Summary Judgment.

Respectfully submitted,

Dated: February 26, 2024

/s/ Russell Cawyer

Dee J. Kelly, Jr. (S.B. # 11217250)
Russell D. Cawyer (S.B. # 00793482)
KELLY HART & HALLMAN LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Tel.: (817) 332–2500
Fax: (817) 335–2820
dee.kelly@kellyhart.com
russell.cawyer@kellyhart.com

Mark W. Robertson (*pro hac vice*)
(N.Y. Bar # 4508248)
Jeffrey A. N. Kopczynski (*pro hac vice*)
(N.Y. Bar # 4592267)
William D. Pollak (*pro hac vice*)
(N.Y. Bar # 4737037)
Charles J. Mahoney (*pro hac vice*)
(N.Y. Bar # 5502885)
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
Tel.: (212) 326–2000
Fax: (212) 326–2061
mrobertson@omm.com
jkopczynski@omm.com
wpollak@omm.com
cmahoney@omm.com

Brian D. Boyle (*pro hac vice*)
(D.C. Bar # 419773)
Shannon M. Barrett (*pro hac vice*)
(D.C. Bar # 476866)
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Tel.: (202) 383–5300
Fax: (202) 383–5414
bboyle@omm.com
sbarrett@omm.com

Attorneys for Defendants American Airlines, Inc. and the Employee Benefits Committee

CERTIFICATE OF SERVICE

On February 26, 2024, 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 Cawyer
Russell Cawyer

UNITED STATES DISTRICT COURT
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, Plaintiff, v. AMERICAN AIRLINES, INC., et al, Defendants.	§ § § § § § § § § § §	Case No. 4:23-cv-00552-O

DEFENDANTS' BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Dee J. Kelly, Jr. (S.B. # 11217250)
Russell D. Cawyer (S.B. # 00793482)
KELLY HART & HALLMAN LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Tel: (817) 332–2500
Fax: (817) 335–2820
dee.kelly@kellyhart.com
russell.cawyer@kellyhart.com

Mark W. Robertson (*pro hac vice*)
(N.Y. Bar # 4508248)
Jeffrey A. N. Kopczynski (*pro hac vice*)
(N.Y. Bar # 4592267)
William D. Pollak (*pro hac vice*)
(N.Y. Bar # 4737037)
Charles J. Mahoney (*pro hac vice*)
(N.Y. Bar # 5502885)
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
Tel.: (212) 326–2000
Fax: (212) 326–2061

Brian D. Boyle (*pro hac vice*)
(D.C. Bar # 419773)
Shannon M. Barrett (*pro hac vice*)
(D.C. Bar # 476866)
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Tel.: (202) 383–5300
Fax: (202) 383–5414
bboyle@omm.com
sbarrett@omm.com

Attorneys for Defendants American Airlines, Inc. and the Employee Benefits Committee

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Statutes

Defendants American Airlines, Inc. ("American") and the American Airlines Employee Benefits Committee (collectively, "Defendants") file this Motion for Summary Judgment and Brief in Support thereof and respectfully submit the following:

PRELIMINARY STATEMENT

Plaintiff cannot prove the claims actually asserted in his Amended Complaint. As the Court has recognized, Dkt. 98, Order Denying Def.'s Motion to Dismiss ("MTD Order") at 2, Plaintiff is no longer pursuing his "Challenged Fund" theory—i.e., that Defendants breached ERISA fiduciary duties to two American Airlines-sponsored 401(k) plans[1] (the "Plans") by offering funds with environmental, social or governance ("ESG") portfolio strategies. And while the Court recently held that Plaintiff adequately pleaded the Amended Complaint's separate theory that Defendants improperly offered funds with traditional strategies whose managers nevertheless pursue illicit ESG objectives through proxy voting (the "Challenged Manager Theory"), Plaintiff has not developed any evidence in support of that theory in discovery. To the contrary, the record establishes that Defendants' process for selecting and monitoring investment options was at all times state of the art and Defendants secured contractual commitments from all investment managers to pursue investors' financial interests when voting the Plans' proxies. There is no evidence, in particular, that the Plans' fiduciaries were motivated in their investment decision making by any improper considerations—including American Airlines' business goals (ESG-related or not). His sole expert's reports offer no criticism of the selection or retention of any fund, and he has not purported to calculate any losses or damages on a fund-selection theory. Plaintiff has simply failed to compile proof to substantiate the allegations the Court found sufficient to

[1] The American Airlines, Inc. 401(K) Plan (the "AA 401(k) Plan") and the American Airlines 401(k) Plan for Pilots (the "Pilots Plan").

survive Defendants' motion to dismiss. Defendants are accordingly entitled to summary judgment on all theories actually set forth in the Amended Complaint. And that should be the end of this case, as a Plaintiff obviously cannot avoid summary judgment by relying on claims or a theory found nowhere in his complaint.

Unable to prove the complaint's allegations, Plaintiff has pivoted (through his expert's report) to an unpleaded theory that Defendants should have ***maintained*** their investments in managers with misguided proxy votes and capitalized on the Plans' continuing investment with one such manager—BlackRock Inc.—in order to change a single BlackRock proxy vote in a May 2021 election of Exxon board members. Plaintiff speculatively contends that, facing pressure from Defendants alone, BlackRock would have voted the shares it held for ***all*** BlackRock fund investors differently in that election. Like his pleaded theories, however, Plaintiff's unpleaded theory fails for want of proof. Plaintiff cannot establish that Defendants refrained from objecting to BlackRock's vote out of disloyalty to the Plans or that Defendants' conduct otherwise fell short of accepted fiduciary practice. Indeed, there is no evidence that any fiduciary of any retirement plan or pension fund sought to change BlackRock's vote in the May 2021 Exxon election even for ***that plan's*** shares—much less for all BlackRock-managed shares. Plaintiff likewise cannot establish a loss under this theory. Although Plaintiff's expert purports to calculate how much Exxon shares moved in the few days around the vote, his own admissions make clear that he has been unable to assess whether the vote has had any enduring effect on the Plans' level of wealth today.

For these reasons and the reasons set forth in greater detail below, Defendants are entitled to summary judgment.

STATEMENT OF FACTS

A. The Plans' Investment Options

The Plans allow eligible employees to invest a percentage of their earnings on a pre-tax basis (in addition to employer contributions from American) in a "core menu" of "designated investment alternatives" selected and monitored by the American Airlines Employee Benefits Committee (the "EBC") (the "Designated Investment Alternatives"). AA-APP002 ¶ 8. The Designated Investment Alternatives include approximately ten passively managed index funds, each of which invests exclusively in a collective investment trust managed by BlackRock Institutional Trust Co. ("BlackRock") or State Street Global Advisors. *E.g.*, AA-APP0062–80; AA-APP0002–03 ¶ 9. The Plans also include (i) a suite of custom target date funds; (ii) a series of approximately six actively-managed multi-manager custom funds designed exclusively for participants in the Plans; (iii) an option that makes deposits in the American Airlines Federal Credit Union; and (iv) a stable value fund. *E.g.*, AA-APP0049–61; AA-APP0081–96; AA-APP003–04 ¶¶ 10–11. Notably, none of the funds in the Designated Investment Alternatives has a mandate to pursue ESG goals. AA-APP0004 ¶ 12.

As in many other defined contribution plans, the Plans also allow participants the freedom to reject the options selected by the EBC and to invest in a broad array of stocks, bonds, and mutual funds through an individual, self-directed brokerage account. AA-APP0100. The range of investment options available to participants through the brokerage window includes thousands of investment options[2] designed to reflect the broader securities market, including mutual funds,

[2] As of the end of the first quarter of 2023, participants in the Pilots Plan were invested through their brokerage accounts in over 2,000 different mutual funds or exchange-traded funds representing more than 200 different investment management firms. AA-APP0004 ¶ 13.

exchange traded funds, real estate investment trusts, certificates of deposit, and direct investments in individual companies. *E.g.*, *id.*; AA-APP0004 ¶ 13.

Plaintiff Brian Spence is a pilot at American Airlines and a participant in the Pilots' Plan. Dkt. 41, Amended Complaint ("Am. Compl.") ¶ 15. Since 2017, all of the funds in Plaintiff's account have been invested in the Plans' Designated Investment Alternatives. AA-APP0532–666.

B. The EBC's Selection And Monitoring of Investment Options

The EBC is responsible for selecting and monitoring the Plans' investment options. AA-APP0002 ¶¶ 5, 14; AA-APP0028–29; AA-APP0043–44; AA-APP0127. Throughout the relevant period, the EBC met at least quarterly to review the performance of the Plans' investment options, including the underlying investment managers, and to assess whether any changes to the Plans' investment lineups were warranted. AA-APP0005 ¶ 17; AA-APP0684 at 23:8–23:12; AA-APP0736 at 23:4–23:8.[3] At each quarterly meeting, the EBC reviewed and considered detailed reporting regarding market developments as well as the Plans' investment managers (and potential alternative managers), including fees, overall performance relative to benchmarks and peer groups, and any noteworthy qualitative information. AA-APP0006 ¶ 19; *E.g.*, AA-APP0145–68; AA-APP0177–200; *see also* AA-APP0302–07.[4]

The EBC relied upon the assistance of both external and internal experts to review, monitor, and evaluate the Plans' investment options across numerous dimensions. AA-APP0005 ¶ 18; AA-

[3] It is common practice in the industry for a fiduciary committee to meet quarterly. AA-APP1391–92 at ¶ 13, 15; *see also* AA-APP1423–27 ¶¶ 44, 48; AA-APP0889 at 21:14–21:16 (Plaintiff's expert testifying that the fiduciary committee he served on also met quarterly).

[4] These quarterly reports showed that the Plans' investment options were generally performing well with returns that were in line with or ahead of benchmarks and alternative peer investment options. For example, as of June 30, 2023, all but one of the Plans' index funds, all of the Plans' target date funds, and all but one of the Plans' actively managed funds were ahead of their benchmarks, net of fees, since inception. AA-APP0265–80.

APP0670–671 at 24:1–25:8; AA-APP0687–88 at 41:19–42:25. First, the EBC relied upon the well-established and highly respected investment consulting firm, Aon Investments USA, Inc. ("Aon"), to act as the Plans' investment advisor. AA-APP0005–06 ¶ 18. Aon operates specialized manager research teams comprised of over 100 dedicated research professionals that analyze a wealth of quantitative data and conduct qualitative reviews and interviews of managers to assess their business structure, activities, operations, and compliance practices, among other factors. AA-APP0007–8 ¶¶ 22, 27–28; AA-APP0115, 118–20; AA-APP0302–06; AA-APP309–14; AA-APP0743; AA-APP0749–50;[5] *see also* AA-APP0718–19 at 64:25–65:22; (testifying to awareness that Aon applied an "army of resources" to monitoring and advising on the Plans' investment options); AA-APP0676 at 30:12–30:15 (explaining that investment managers were being "very fulsomely reviewed" by Aon's research team).

Second, the EBC also received advice from an internal team of investment professionals in American's asset management group, who provided their own expertise and served as an additional layer of oversight over Aon's work. AA-APP0009–10 ¶¶ 29–34. The asset management group met with all the Plans' investment managers (as well as prospective investment managers) on at least a quarterly basis to better understand their investment strategies. AA-APP0010 ¶ 33; AA-APP0696–97 at 20:6–21:9; AA-APP0698–99 at 25:13–26:15; AA-APP0702–03 at 36:6–37:18; AA-APP0670–71 at 24:1–25:8. They also met with Aon regularly, reviewed extensive quantitative data and qualitative information, and conducted their own independent analyses of the

[5] It is well-established that "SEC filings [] may be properly judicially noticed." *Petrobras Am., Inc. v. Samsung Heavy Indus. Co., Ltd.*, 9 F.4th 247, 255 (5th Cir. 2021); *Lovelace v. Software Spectrum*, 78 F.3d 1015, 1018 (5th Cir. 1996); *Reed v. LKQ Corp.*, 436 F. Supp. 3d 892, 901 (N.D. Tex. 2020); *Fener v. Belo Corp.*, 513 F. Supp. 2d 733, 737 (N.D. Tex. 2007).

Plans' investments. AA-APP705–06 at 44:20–45:15; AA-APP0724–25 at 90:14–91:20; AA-APP008–10 ¶¶ 25, 32–34.

The EBC relied on the asset management group and Aon's investment professionals to apply their professional judgment to identify any issues that they deemed sufficiently material for the EBC to consider in selecting and monitoring the Plans' investment managers. AA-APP700 at 31:9–18; AA-APP0717–18 at 63:14–64:2; AA-APP0679 at 96:14–96:18. Aon and the asset management group, in fact, raised such issues on multiple occasions, such as when a fund's portfolio manager was replaced with someone Aon viewed as less qualified. *See, e.g.*, AA-APP0158; AA-APP091; AA-APP0273; AA-APP305. The EBC also made several changes to the Plans' investment options when the EBC's experts identified concerns or opportunities for improved risk/return expectations or lower fees.[6] AA-APP0010–11 ¶¶ 36–38.

As the Plans assets have grown over time, the EBC has used their increasing assets under management to obtain better economic terms for participants in the Plans. AA-APP APP0012 ¶ 43. For instance, in 2017, the asset management group, on behalf of the EBC, negotiated for reduced asset-based fees from BlackRock that resulted in forecasted savings of approximately [redacted] for participants per year (based on asset levels as of September 30, 2017). AA-APP0170; AA-

[6] In or around February 2020, the EBC considered the possibility of adding a fund with an ESG-focused investment mandate to the lineup in light of a desire expressed by the Allied Pilots Association (the pilot's union) for such a fund. AA-APP0711–13 at 56:24–58:6. The Chair of the EBC, Elise Eberwein, expressed reluctance to offer an ESG fund if it did not have excellent performance and asked American's asset management group to help her "understand general trends as it relates to ESG in the investment arena." AA-APP0708–13 53:21–58:6; AA-APP0318. Per Eberwein's request, the asset management group researched ESG trends among 401(k) Plans, solicited information from Aon, the Plans' recordkeeper, Fidelity, and American's defined benefit plan investment advisor, American Beacon, and prepared a short presentation for the EBC's March 2, 2020 meeting. AA-APP0711 at 56:10–13; AA- APP0011–12 ¶¶ 39–40. The presentation emphasized that Plan fiduciaries may not put other considerations ahead of pecuniary factors such as risk-adjusted investment returns. AA-APP0322. Ultimately, the EBC did not include an ESG fund in the Plans' core investment lineups. AA- APP0012 ¶ 42.

APP0325–26; AA-APP0012–13 ¶ 44. In 2018, American's asset management group again negotiated with BlackRock to obtain even more favorable fee terms, including an increase in the Plans' share of securities lending revenues[7] from [redacted]. AA-APP0183–84; AA-APP0013 ¶ 45.

In 2022, the EBC, with Aon's assistance, conducted a competitive RFI for index fund providers and evaluated Vanguard, State Street, BlackRock, and Mellon Capital Management across numerous metrics, including fees, performance, assets under management, and securities lending returns. AA-APP0331; AA-APP0013 ¶ 46. The RFI confirmed that BlackRock's fees were generally lower than its competitors across nearly all strategies and that BlackRock offered more favorable projected securities lending yields. AA-APP0335–38, 349–353; AA-APP0013 ¶ 46. In particular, BlackRock's fees were materially lower than Vanguard's fees. *Id.* For example, the cost to invest in [redacted] annually) the cost to invest in BlackRock's U.S. Large Cap Equity Index fund [redacted] AA-APP0337. In addition, BlackRock's funds had superior long term performance relative to these peers across nearly every strategy. AA-APP0340–47.[8] Through the RFI process, the EBC

[7] Investment managers are able to obtain additional returns by engaging in "securities lending," which involves temporarily loaning securities to other investors or firms who will pay a small fee for borrowing the securities. The Plans' investment managers retain a share or "split" of the revenues and provide the rest to the Plans in the form of incremental returns.

[8] Defendants expert, Dr. Russell Wermers, is a professor of finance (and the former chair of the finance department) at the Smith School of Business at the University of Maryland, with over thirty years of experience and numerous peer reviewed publications on finance and investments. AA-APP1069–72 ¶¶ 1–8. Wermers concluded that ten out of twelve of the Plans' index funds (which invest exclusively with BlackRock) consistently outperformed their benchmarks and peer groups cumulatively as well as based on trailing three- and five-year periods over the relevant period, (except for the High Yield Bond Index Fund, which was removed from the Plan). AA-APP1073–79 ¶¶ 6–7, Tables 17–20. Moreover, all six of the Plans' index options for which there is a Vanguard index counterpart outperformed the Vanguard offering over the relevant period. AA-APP1079–81 ¶ 8, Tables 22–23.

negotiated further fee concessions from BlackRock—including a [redacted] gross fee reduction and a further increase in the [redacted]—which resulted in a forecasted [redacted] economic benefit for participants in the Plans based on the asset levels as of December 31, 2021. AA-APP0222; AA-APP0013–14 ¶ 47. Ultimately, the deals struck by the EBC allowed the Plans to obtain splits of securities lending revenues that were [redacted] *See, e.g.,* AA-APP0265–266 (compare the far right two columns).

C. Contractual Terms Regarding Proxy Voting

Consistent with the Plans' investment policy statement,[9] the EBC delegated the responsibility for proxy voting[10] to the Plans' investment managers. AA-APP0717 at 63:4–10; AA-APP0673–74 at 27:21–28:2; AA-APP0014 ¶ 48. Such delegations are commonplace. The Securities and Exchange Commission has reported that retirement plan fiduciaries "usually delegate [their] authority completely, without retaining authority to vote any of their proxies." AA-APP0782; *see also* AA-APP765–67.[11]

Defendants' expert, Charles Meythaler,[12] explained that fiduciaries tend to delegate proxy voting to investment professionals in part due to the sheer volume of proxy votes. AA-APP1390–

---

[9] The Plans' investment policy statement expressly provides that "[t]he Committee understands that proxy voting is typically delegated to the investment managers." AA-APP0132.

[10] U.S. publicly traded firms hold annual meetings, wherein shareholders are asked to vote on a slate of proposals, which are known as "proxy votes." AA-APP1258 ¶ 13; AA-APP0715 at 61:1–16

[11] *See* n. 5, *supra* (collecting cases holding that it is appropriate to take judicial notice of SEC filings).

[12] Meythaler has over 40 years of experience at leading consulting firms, including Mercer Investment Management, providing investment consulting and asset management services to defined contribution plans. AA-APP1387–89 ¶¶ 1–10.

91 ¶ 13. For example, in 2020 alone, a single manager out of the 14 investment managers in the Plans' core lineup, Artisan Partners, reported having exercised more than 970 votes involving 100 portfolio companies. AA-APP1392–93 ¶ 17; *see also* AA-APP0403–32 (proxy voting records for Artisan Partners). Other managers used by the Plans invest in far more than 100 companies' securities and will vote on far more than 970 proxy proposals in a given year. *See* AA-APP1393 ¶ 18. For example, as its name implies, the BlackRock Russell 1000 Value Fund invests in the securities of roughly 1,000 different companies. AA-APP0064.[13]

The EBC's delegation of proxy voting responsibility to the Plans' investment managers is reflected in the investment management agreements ("IMAs") between the Plans and their investment managers. For those managers who managed separate accounts consisting only of the Plans' assets, the IMAs expressly required managers to vote proxies consistent with the financial interests of the Plans' participants. AA-APP0014 ¶ 49; *see e.g.*, AA-APP0371–72 (Jackson Square Partners IMA); AA-APP0376–78 (Morgan Stanley IMA); *see also* AA-APP0290; AA-APP0675

---

[13] In the atypical instances in which defined contribution fiduciaries choose to retain proxy voting authority, they often rely on proxy voting advisory services such as Glass Lewis & Co. and Institutional Shareholder Services. AA-APP1394–94 ¶ 20. Such firms, however, charge as much as $1 million annually for their services. *Id.* (citing AA-APP0787–803 at 794). Moreover, recent research suggests such firms are typically more supportive of shareholder initiatives concerning environmental and social issues than investment management firms, including BlackRock. *Id.* (citing AA-APP0818–50 at 831).

It is appropriate for the court to take judicial notice of these types of peer-reviewed articles. *See Palmetto Pharms. LLC v. AstraZeneca Pharms. LP*, 2014 WL 1334215, at *11 (D.S.C. Apr. 2, 2014) (taking judicial notice at summary judgment of "peer-reviewed journal [as] a reliable authority"); *Hirtenstein v. Cempra, Inc.*, 348 F. Supp. 3d 530, 551 (M.D.N.C. 2018), *aff'd sub nom. Janies v. Cempra, Inc.*, 816 F. App'x 747 (4th Cir. 2020) (taking judicial notice of articles in "peer-reviewed medical journals . . . reflecting market knowledge of information that had allegedly been withheld"); *see also U.S. ex rel. Lam v. Tenet Healthcare Corp.,* 481 F. Supp. 2d 673, 680 (W.D. Tex. 2006) (taking judicial notice of "an article published by UBS Warburg's Global Equity Research [which] provides customers with economic forecasts, investment strategy, and recommendations").

at 29:13–22. For example, the IMA with Jackson Square Partners provided that "[t]he Investment Manager shall . . . have responsibility for ensuring that proxies are voted in the best interests of the Plans' participants and beneficiaries." AA-APP0371–72.

For the collective investment trusts in the Plans consisting of pools of assets that included both the Plans' assets and assets from other plans, the IMAs required the investment managers to comply with proxy voting policies disclosed to the EBC. AA-APP0014 ¶ 50. For example, the IMA between BlackRock and the EBC required BlackRock to provide quarterly attestations that it had "voted all proxies in compliance with [BlackRock's] proxy voting policy." AA-APP0397. BlackRock's proxy voting policy, in turn, specified that BlackRock would "vote proxies in the best long-term economic interests of their assets." AA-APP0436; *see also* AA-APP0715 at 61:22–25.

The IMAs also required investment managers to provide materials regarding their proxy voting practices, including an annual summary report of how proxies were voted in a given fund and quarterly certifications affirming that they had voted the Plans' proxies in the best financial interests of participants in the Plans. AA-APP0015 ¶ 51; *see, e.g.*, AA-APP0720 at 66:19–67:6; AA-APP0726–27 at 107:11–108:6; AA-APP0374 (Jackson Square Partners IMA); AA-APP0382 (Morgan Stanley IMA); AA-APP0399; *see also, e.g.*, AA-APP0401 (Loomis Sayles attestation); AA-APP0403 (Morgan Stanley attestation); AA-APP0405–34 (Artisan Partners proxy voting summary report).[14] The Plans' investment managers also regularly disclosed their proxy voting policies as such policies were updated. AA-APP0015 ¶ 51; AA-APP at 128:1–24; *see also, e.g.*,

[14] These IMAs also required managers to comply with DOL regulations requiring that a fiduciary must carry out the responsibility of voting proxies and monitoring proxy voting "solely in the participants' and beneficiaries' interest in the economic value of the plan assets." *E.g.*, AA-APP0374 (Jackson Square Partners IMA) (citing 29 C.F.R. § 2509.08-2).

AA-APP0463–82 (Loomis Sayles proxy voting policy); AA-AAP0436–61 (BlackRock proxy voting policy).

In September 2023, Aon made a presentation to the EBC regarding its due diligence efforts regarding investment managers' proxy voting. AA-APP0290–91; AA-APP0016 ¶ 52. Aon confirmed that, as part of its due diligence in evaluating Aon-rated investment strategies,[15] Aon had an established process for monitoring proxy voting that included, among other things, reviewing the proxy voting decision making process and noting whether and why votes deviated from the "default position." *Id.*; AA-APP0016 ¶ 53; *see also* AA-APP0718–19 at 64:25–65:22. Aon further explained that, in response to recent Department of Labor "guidance," Aon would present additional information to the EBC regarding the results of its proxy voting due diligence on an annual basis. *Id.*; AA-APP0290.

D. Plaintiff's Critique Of The EBC's Failure To Intervene To Alter BlackRock's Proxy Vote In The May 2021 Exxon Board Election

In his reports, Plaintiff's sole expert, J.B. Heaton, opines that the Plans incurred losses as the result of BlackRock and other investors, including Vanguard, voting in May 2021 in favor of candidates for the Exxon board nominated by Engine No. 1, which Heaton described as a "climate activist invest[ment] firm." Dkt. 50-1, Expert Report of J.B. Heaton ("Heaton Rpt.") ¶¶ 29–30; 59, 62, 84, 85–87, 107. Heaton's theory is that the vote caused investors to fear that Exxon would adopt financially disadvantageous ESG policies, hurting its bottom line, and that BlackRock would vote similarly at other energy companies, likewise leading to poor financial performance. Those fears, Heaton speculates, caused the value of Exxon's and other energy company's stocks to dip in

[15] Aon explained that it was also in the process of developing a questionnaire for non-rated strategies to align with the questions asked to the managers of rated strategies. AA-APP0291. All of the BlackRock strategies in the Plans were strategies rated by Aon. AA-APP0016 ¶ 53; AA-APP0302–07.

May 2021, reducing the value of the Plans' index funds that held positions in energy stocks. *Id.* ¶¶ 134–47.

Heaton then argues that the EBC could have averted this harm by convincing BlackRock not to vote in favor of the Engine No. 1 director slate at Exxon. Specifically, Heaton claims that had the EBC demanded that BlackRock vote differently in the May 2021 Exxon board election, BlackRock would have heeded the demand and would not have used ***any*** of its invested shares to support the dissident directors. *Id.* ¶¶ 127–32. Heaton acknowledges that only by convincing BlackRock to change its vote across all shares in its portfolios would the EBC have been able to change the outcome of the director vote. AA-APP0974 at 135:11–14; AA-APP1264–65 ¶¶ 32–34. Heaton also concedes that a "large" or "meaningful" percentage of the assets managed by BlackRock for institutions are attributable to public pension funds, which he characterized as "quite left-leaning" and likely supportive of the dissident directors. AA-APP0938 at 82:6–22; AA-APP0970 at 131:18–23.[16] It follows that the EBC would have needed to convince BlackRock to act against the expressed preferences of other large investors in order to change the Exxon vote.

In concluding that BlackRock's vote impaired the energy companies' stock values, Heaton evaluated the stocks' prices only during an eight-day window ending the day after BlackRock cast its vote in the May 2021 Exxon election. Heaton Rpt. ¶¶ 63, 88; Dkt. 60-1, Rebuttal Expert Report

---

[16] Indeed, the New York State Common Retirement Fund (the "NY Common"), the nation's fourth largest pension fund, publicly supported Engine No. 1 candidates. AA-APP1263 ¶ 29; AA-APP1266 ¶ 39. As of March 31, 2021, NY Common invested roughly $14.5 billion with BlackRock and paid BlackRock a combined $13.4 million in equity and credit management fees in 2020. *Id.*; AA-APP0810–812; AA-APP0815–16.

Courts typically take judicial notice of these types of State "agency records and reports." *Terrebonne v. Blackburn*, 646 F.2d 997, 1000 n.4 (5th Cir. 1981) (en banc); *Kirschenbaum v. Spraggins*, 752 F. Supp. 2d 728, 736 n.4 (E.D. La. 2010) ("The Court takes judicial notice of the fact [] as indicated in the records of the Michigan Department of Energy . . . ."); *Zollicoffer v. Livingston*, 169 F. Supp. 3d 687, 691 n.3 (S.D. Tex. 2016) ("The Court takes judicial notice of the BJS reports and other government reports and websites cited in this Order.").

of J.B. Heaton ("Heaton Reb. Rpt.") ¶ 47. Because Heaton ended his analysis before the dissident directors assumed their board positions, he did not attempt to measure the effects of any actions by the newly-constituted Exxon board or any corporate policies they may have affected. AA-APP0944 at 96:6–13. Yet the Plans and other investors that have remained invested in the energy companies' stocks would have experienced not only the immediate (eight-day) effect of BlackRock's vote in 2021 based on the market's initial fears, but also subsequent gains in the shares as those fears dissipated. AA-APP1007 at 232:4–19 (testifying that long-term investors feel only the "net effect over time of any fluctuations from fears and dissipation of fear"). This is important because substantial information has arisen since the May 2021 Exxon board election that has calmed any initial market concerns that the dissident directors would cause Exxon to pursue environmentally-friendly policies at the expense of financial performance or that BlackRock would support similar shareholder actions at other energy companies. Though Heaton conceded that these events would logically have a positive influence on the energy companies' stock prices, AA-APP1003–07 at 228:13–232:3, he did not attempt to take these events into account so as to measure the net effect of BlackRock's Exxon proxy vote on the value of the Plan's shareholdings today, AA-APP0945–46 at 97:11–98:20.

Heaton did not provide any opinions regarding the EBC's selection, inclusion, or retention of BlackRock funds or the funds of any manager who allegedly used their proxy voting power to support ESG-focused shareholder initiatives. He has not opined that such managers have "continually underperformed compared to other similarly situated funds due . . . to investment managers casting proxy votes for ESG measures." MTD Order at 6 (summarizing allegations in ¶¶ 47, 68-69, 93-95 of Amended Complaint). And he confirmed that he has not attempted to calculate purported losses on the Amended Complaint's pleaded theory that Defendants

improperly selected or retained BlackRock funds. AA-APP0994 at 156:12–17. Indeed, he testified to the contrary that the Plans could not have avoided any economic effects of BlackRock's 2021 proxy vote by having instead invested in comparable funds by other managers with different proxy-voting policies. AA-APP0993–94 at 155:11–156:11; *see also* Heaton Reb. Rpt. ¶ 73.

LEGAL STANDARD

A party is entitled to summary judgment when the movant "show[s] that there is no genuine issue as to any material fact and the [movant] is entitled to judgment as a matter of law." *Celotex Corp. v. Catlett*, 477 U.S. 317, 322–25 (1986). Only disputes over "facts that might affect the outcome of the suit under the governing law" will properly preclude the entry of summary judgment. *Merritt-Campbell, Inc. v. RxP Prods., Inc.*, 164 F.3d 957, 961 (5th Cir. 1999). The movant can discharge its burden under Rule 56(a) by pointing out the absence of evidence supporting one or more essential elements of the nonmoving party's claim, "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323. Once the movant has carried its burden, "the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." *In re Ark-La-Tax Timber Co., Inc.*, 482 F.3d 319, 329 (5th Cir. 2007).

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT I.

Since filing their Amended Complaint, Plaintiff has not developed a record as to his pleaded theories. *See* Am. Compl. ¶¶ 41–45, 68–95, 97–98. Plaintiff has expressly disavowed his Challenged Fund Theory. And he has failed to develop any evidence that Defendants' selection and monitoring efforts fall short of prevailing fiduciary practice. He is unable to identify any comparable funds that Defendants could have selected instead consistent with their fiduciary

responsibilities. And his only expert has not purported to calculate any losses on that theory. As a result, Plaintiff cannot prevail on either of the claims actually asserted in Count I as a matter of law.[17]

Through his expert's reports, Plaintiff has instead shifted to a new theory found nowhere in the Amended Complaint (and was thus not addressed in the Court's Order on Defendants' motion to dismiss). Under this new theory, Defendants' supposed breach was not the selection or retention of any managers or funds but instead the EBC's failure to demand that one particular manager—BlackRock—***change*** its proxy voting activity. Specifically, Plaintiff suggests that the EBC should have used the Plans' leverage as investors in BlackRock index funds to dictate that BlackRock change its vote in a May 2021 Exxon board election. But, here again, Plaintiff does not have the evidence necessary to back his theory. He has no evidence that the EBC's conduct was out of line with normal fiduciary practice. And while Plaintiff's expert has calculated how shares of energy company held by the Plans fluctuated in value during an eight-day period in 2021, the expert has not addressed the question whether there has been any enduring economic effect on the Plans' wealth. Thus, even if the Court were to entertain Plaintiff's unpleaded theory, it provides no more basis to proceed to trial than the claims set forth in the Amended Complaint.

---

[17] In addition to the arguments set forth below, Count I fails as a matter of law as to American because American was not a fiduciary with respect to the conduct challenged in that Count. Under ERISA, "the threshold question is . . . whether [the defendant] was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). Count I alleges that Defendants breached fiduciary duties when they purportedly "selected, included, and retained" certain investment managers and funds for the Plans. Am. Compl. ¶ 118. The Plans' governing documents, however, expressly assign the EBC, not American, responsibility for choosing those managers and funds. AA-APP0028–29; AA-APP0043–44; *see also* Am. Compl. ¶ 18 (acknowledging that EBC was responsible for selecting, monitoring and removing Plan's core investment options). Thus, American was not a fiduciary with respect to the functions challenged in Count I and cannot be liable because it was not responsible for those functions and did not perform them.

A. Plaintiff's Pleaded Claim that Defendants Breached ERISA Fiduciary Duties By Selecting, Including, and Retaining Funds Whose Managers Have Allegedly Engaged in Improper ESG-Focused Proxy Voting Fails as a Matter of Law.

In his Amended Complaint, Plaintiff alleges that Defendants should have selected different investment managers for the Plans (who allegedly did not engage in ESG-friendly proxy votes). In its February 21st Order, this Court held that the "specific actions" alleged in the Amended Complaint—namely, "selecting, including, and retaining ESG-oriented investment managers"—were sufficient to allow the Court to infer that Defendants breached their fiduciary duties. MTD Order at 9; *see also, e.g., id.* at 2 (addressing Amended Complaint's "Challenged Manager Theory" that Defendants breached their fiduciary duties by "including funds" whose managers pursued ESG policies through proxy voting). But while the Amended Complaint's allegations were determined to be sufficient to survive dismissal, Plaintiff has not developed ***evidence*** of breach to support that claim at summary judgement.

1. *There is No Evidence of Breach.*

In cases involving the selection and retention of plan investments, ERISA's "prudence standard normally focuses on the fiduciary's conduct in making investment[sic] decisions, and not on the results." *Main v. Am. Airlines, Inc.*, 248 F. Supp. 3d 786, 793 (N.D. Tex. 2017) (O'Connor, J.); *see also, e.g.*, *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983). Here, there is no evidence or expert testimony that the EBC's process in selecting or monitoring the Plans' investment options fell short of prevailing fiduciary behavior or any other established standard. And Plaintiff's own expert has established that Plaintiff cannot prove a loss under the theory. The record reflects that, in selecting and monitoring investment options, the EBC followed a robust process by meeting regularly and reviewing extensive information with the assistance of both Aon, an outside investment advisor, and American's internal asset management group. AA-APP0670–

71 at 24:1–25:8; *supra* at 4–6. The EBC relied on Aon to employ its standard manager evaluation process to assess managers, considering any factors Aon believed necessary to a complete evaluation, and, along with the asset management group, to identify for the EBC any concerns or issues that they believed warranted the EBC's attention. AA-APP0717–18 at 63:14–64:2; AA-APP0718–19 at 64:25–65:22; AA-APP0670 at 24:7–24:21; AA-APP0676 at 30:12–30:15; AA-APP0679 at 96:14–96:18; AA-APP0005 at ¶ 18.

As the Fifth Circuit has held, ERISA fiduciaries may appropriately rely on such experts, provided the fiduciaries do not do so "blindly." *See Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 300–01 (5th Cir. 2000). And the EBC did not do so blindly. The EBC picked Aon through a formal request for proposal process, in which the merits of Aon's advisory services were vetted and compared to those of other investment advisory firms. AA-APP0006–07 ¶¶ 20–23. Through that process and subsequent interactions, the EBC and supporting American asset management group became familiar with Aon's experience and resources and the robustness of Aon's manager evaluation process.[18] AA-APP0008 ¶ 26; *see also* AA-APP0118–21; *supra* at 4–6. The EBC, moreover, did not rely exclusively on Aon's input. Rather, the asset management group conducted their own ongoing review of the Plans' managers. The team met with the managers on a quarterly basis and reviewed Aon's quarterly investment reviews, providing input and raising questions on those reviews prior to delivering them to EBC members. AA-APP0009–10 ¶¶ 32–34.[19]

---

[18] Among other things, Aon both presented to the EBC and provided the EBC written investment reviews on a quarterly basis, containing detailed information on the performance and fees of the Plans' managers as well as additional information that Aon deemed useful for the EBC's review. *E.g.*, E.g., AA-APP0145–68; AA-APP0177–200; AA-APP0006 ¶ 19; *see also* AA-APP0302–07.

[19] In addition, prior to quarterly investment meetings, both members of the EBC and American's asset management group met with and received input from representation of the pilots' union, who were assisted by their own professional investment advisor, Milliman (providing a third layer of oversight). AA-APP0712 at 57:6–25; AA-APP0731–32 at 129:19-130:14; AA-APP0010 ¶ 35.

In addition, through American's asset management group, the EBC secured contractual commitments from the Plans' investment managers that proxy votes would be cast in the best financial interests of the Plans' participants. *E.g.,* AA-APP378–79 ("The Investment Manager shall . . . vote all proxies and respond to all tender offers with respect to the Account . . . and have responsibility for ensuring that proxies are voted in the best interests of the Plans' participants and beneficiaries."); *supra* at 9–10 (collecting IMAs). In the case of collective trust vehicles, the Plans secured contractual commitments that the managers would adhere to their public proxy voting guidelines—and those guidelines, in turn, promised the exercise of proxies in the long-term economic interests of the collective trust's assets. *See* AA-APP0399; AA-APP0438; AA-APP0014 ¶ 49.

In evaluating prudence under ERISA, courts regularly "look[] to the conduct of similarly situated fiduciaries to provide an objective standard." *Dupree v. Prudential Ins. Co. of Am.*, 2007 WL 2263892, at *46 (S.D. Fla. 2007). Here, Plaintiff simply has no evidence that these efforts fell short of accepted practices among the fiduciaries of large defined contribution plans. To the contrary, defense expert Meythaler has offered uncontradicted expert testimony that the EBC's monitoring efforts were consistent with those of other diligent defined contribution plan fiduciaries based on his experience as a professional investment advisor to such plans. AA-APP1391–92 ¶ 15.

Moreover, despite faulting Defendants' selection and retention of the challenged managers' funds, Plaintiff has not pointed, and cannot point, to any alternative funds that the EBC could have instead selected consistent with its fiduciary obligations.[20] Plaintiff cannot reasonably criticize the

[20] Defendants served an interrogatory (Interrogatory No. 11) specifically asking Plaintiff to identify, for each fund to which he allocated his account (including the BlackRock-managed index funds), the "alternative funds with the same or similar investment strategies" that Plaintiff

EBC's selection and retention of the challenged managers' funds without identifying some other funds that the EBC could have chosen instead without violating its fiduciary obligations. *Cf.* MTD Order at 9 ("defer[ring] evaluation of any comparators for future stages of litigation"). This is particularly so given that the managers that Plaintiff contends the EBC should have jettisoned are among the most prevalent in retirement plan and pension fund portfolios nationwide. For example, more than 72,000 defined contribution plans use BlackRock's investment services, including the plans of 60% of Fortune 100 companies, the Teachers' Retirement System of Texas (the largest retirement plan in Texas), and the Federal Thrift Savings Plan (the largest retirement plan in the United States). AA-APP1081–82 ¶ 9.

2. *There Is No Evidence of Loss.*

In addition, Plaintiff cannot identify any losses under his pleaded proxy-voting fund selection theory. While Plaintiff may have sufficiently alleged loss in his Complaint, *see* MTD Order at 9, he adduced no evidence of loss in discovery. Indeed, when asked at his deposition whether he had prepared any loss or damage calculations on the theory that Defendants improperly selected or retained BlackRock funds, Plaintiff's sole expert, Heaton, confirmed that he had "not

---

contended "Defendants could have included in the Pilots Plan consistent with their fiduciary duties under ERISA." AA-APP0494. In response, Plaintiff did not identify any such funds but instead asserted that, "Defendants can identify those funds through their own investigation and were obligated to do so as ERISA fiduciaries." *Id.* Defendant moved to compel complete responses to that and other interrogatories, and, in an ensuing hearing, Magistrate Judge Ray addressed Plaintiff's responses, explaining, "[w]hat you can't do is you can't have an interrogatory that says, tell me the ten fish that you're complaining about in this case, and instead of listing the fish, you say, go to the pond and find it for yourself, they're in there, unless all ten of the fish are there and they're easily found." AA-APP0503. After the hearing, Magistrate Judge Ray entered an order overruling Plaintiff's objections to the interrogatories at issue and ordering Plaintiff to serve "prompt and complete supplemental responses to the interrogatories . . . ." Dkt. 73, Order Granting Defs.' Mot. to Compel at 2. Following that order, Plaintiff served supplemental responses, but nowhere in his response to Interrogatory No. 11 did he identify a single alternative fund. AA-APP0521–22. Accepting Plaintiff's response as "complete" in accordance with Magistrate Judge Ray's Order, the only conclusion is that Plaintiff cannot point to any such funds.

offered that opinion." AA-APP0994 at 156:12–17.[21] For this additional reason, Defendants are entitled to summary judgment as to Plaintiff's Challenged Manager Theory in Count I.

B. Plaintiff Cannot Salvage Count I By Relying On An Unpleaded Theory That Is Inconsistent With The Challenged Manager Claim.

Rather than develop his pleaded theory that Defendants breached their fiduciary duties by failing to replace managers with allegedly suspect proxy-voting practices, Plaintiff has pivoted to a new theory that the EBC breached its duties by not using the Plans' leverage as an investor in BlackRock funds to convince BlackRock to vote all of its shares differently in the May 2021 Exxon election. Heaton Rpt. ¶¶ 125–32; AA-APP0899 at 32:6–13. Relying on this unpleaded theory, however, cannot save Count I.

1. *Plaintiff Cannot Save Count I by Advancing a Theory That Is Absent From, and Inconsistent With, the Allegations in His Complaint*.

As an initial matter, Plaintiff's newly-minted theory is not only absent from the operative complaint, it is also inconsistent with the claim that Plaintiff actually alleges. According to Count I, the EBC was duty-bound to liquidate the Plans' investments in BlackRock funds (or avoid them in the first place). Am. Compl. ¶ 118 (alleging that Defendants acted imprudently and disloyally by selecting, including, and retaining BlackRock and other challenged managers). And it is on that theory that Plaintiff survived dismissal. MTD Order at 9 (evaluating "these specific actions—selecting, including, and retaining ESG-oriented investment managers"). But disinvesting from BlackRock's funds would have prevented the EBC from doing what Plaintiff's new theory contends they should have done. After all, to exercise leverage as an investor in BlackRock funds, one must ***be*** an investor in BlackRock funds. Moreover, where Count I purports

[21] Nor could plaintiff establish a loss because the uncontroverted evidence is that the two BlackRock funds challenged by Plaintiff outperformed their peer funds over the relevant period at a significantly lower cost. AA-APP1072–81 ¶¶ 5–8, Tables 16–23.

to seek losses stemming from the selection and retention of BlackRock-managed funds, Plaintiff's own expert has asserted that the Plans would not have avoided the losses he calculated—the only proxy voting-related losses Plaintiff has proffered in this case—by instead investing in comparable funds offered by other managers. AA-APP0993–94 at 155:11–156:11; *see also* Heaton Reb. Rpt. ¶ 73 (asserting that stock price decline resulting in purported losses "affects all index funds tracking the affected index, not just those managed by BlackRock"). Plaintiff cannot preserve Count I by offering a theory that is not found in the Amended Complaint, and is so plainly at odds with its express allegations.

2. *Plaintiff Cannot Establish a Breach Under His Unpleaded Theory.*

Even if Plaintiff's new theory could somehow be read into the Amended Complaint, Defendants would still be entitled to summary judgment on Count I because Plaintiff cannot establish breach under that theory. By its terms, ERISA's prudence standard requires that a fiduciary's conduct be compared to that of a "prudent man acting in a like capacity[.]" 29 U.S.C. § 1104(a)(1)(B); *Dupree*, 2007 WL 2263892, at *46. Here, however, Plaintiff has no evidentiary basis to conclude that, by not trying to persuade BlackRock to vote differently, the EBC failed to do what a prudent fiduciary would have done.

The performance of an ERISA fiduciary is properly judged by the conduct of "fiduciaries of other pension plans and non-pension-plan investment funds[.]" *Pfiel v. State St. Bank & Tr. Co.*, 806 F.3d 377, 388 (6th Cir. 2015) ("the decision of other expert professionals both to invest and not to divest on or near the dates that State Street made those decisions demonstrates the reasonable nature of those decisions").[22] That analytical framework is fatal to Plaintiff's claim because his

[22] *See also Sweda v. Univ. of Pa.*, 923 F.3d 320, 330 (3d Cir. 2019) (ERISA fiduciaries' performance must be evaluated against "contemporary industry practices"); *Cal. Ironworkers Field Pension Tr. v. Sayles*, 259 F.3d 1036, 1044 (9th Cir. 2001) (finding no error in reliance on evidence that "the

own expert agrees that ***no*** fiduciaries of any large retirement plans or pension funds that had delegated proxy-voting authority to BlackRock intervened to try to change BlackRock's vote in the 2021 Exxon board election. AA-APP0969 at 130:16–24. As Plaintiff's expert agrees that the fiduciaries of other plans with large investments in BlackRock index funds would each "have had had the same obligation and the same information that the EBC had and at the same time," there is no basis to criticize the EBC's actions as falling short of prevailing standards. AA-APP0936–37 at 80:18–81:11.[23]

That no other large retirement plans or pension funds that had similarly delegated proxy voting authority conducted an "intervention" with BlackRock is hardly surprising. As Heaton indicates in his initial report, BlackRock's support for the dissident directors was only reported in the media one day before the vote occurred. Heaton Rpt. ¶ 46. BlackRock also contemporaneously articulated an economic rationale for its vote, explaining, among other things, that "unlike many of its peers," Exxon had done little to protect against a possible decline in demand for fossil fuels by diversifying into other energy technologies. *Id.* ¶ 47. This articulated rationale was consistent with the proxy-voting policies (incorporated in the Plans' IMAs) requiring BlackRock to vote proxies according to its analysis of the economic interests of investors. AA-APP0438. And

---

Bloomberg system was the tool prevalently used in the industry" to conclude that fiduciaries had acted prudently); *Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273, 312 (S.D.N.Y. 2018) (holding that the defendant did not breach its fiduciary duty by offering the TIAA Real Estate Account, which "is also widely accepted as an appropriate and desirable investment by other market participants"); *In re Huntington Bancshares Inc. ERISA Litig.*, 620 F. Supp. 2d 842, 851 (S.D. Ohio 2009) (dismissing complaint where "the plan fiduciaries of large public pension funds (*i.e.*, individuals acting in a like capacity to Defendants), continued to invest in [the] stock, and indeed increased their investments, during the Class Period").

[23]Notably, Heaton testified that during his tenure on the lay committee responsible for his former law firm's 401(k) plan—his only practical experience to any retirement plan—the committee did not review managers' proxy votes to his recollection and it never tried to get a manager to change its proxy vote. AA-APP0901 at 34:1–9.

BlackRock was joined in its support of at least some of the dissident directors by the major proxy advisory firms and other large investment firms—including Vanguard, an investment firm whose investment approach the Amended Complaint frames as being "[i]n stark contrast to the ESG agenda pursued by other investment managers[.]" Am. Compl. ¶ 48; AA-APP0934 at 78:6–9; *see also* AA-APP0935 at 79:17–80:3 (acknowledging that State Street also voted in favor of Exxon's outside board members).

Moreover, any fiduciary that managed to learn of BlackRock's intended director vote the day before it was cast and concluded that it could not be squared with investors' financial interests would likely have realized that trying to pressure BlackRock to cast ***all*** of its Exxon shares differently would have been a pointless exercise. Even a large retirement plan would have then accounted for a very small fraction of BlackRock's revenues and invested assets; for example, as of the end of 2022, the Plans accounted for only 0.1% of BlackRock's assets under management, and, according to Heaton's calculations, the Plans have accounted for an even smaller percentage of BlackRock's revenues. AA-APP1262 ¶¶ 22, 25; AA-APP1264 ¶¶ 30–31; Heaton Rpt. ¶¶ 152–53. Any potential intervenor would have had strong reasons to believe that BlackRock would weigh any desire to retain the complaining plan's business against the desire to retain other large investors in BlackRock or BlackRock funds who had publicly expressed a belief that ESG factors should be considered as part of investment decisions. AA-APP1262–63 ¶¶ 26–29, AA-APP1265–67 ¶¶ 35–41 (identifying examples of large pension funds supporting the consideration of ESG factors and the dissident directors specifically); AA-APP0938 at 82:9–22 (testifying that public pension funds such as CalPERS "tend to be quite left-leaning"); AA-APP0970 at 131:18–23 (estimating that a "large" percentage of the assets managed by BlackRock for institutions are attributable to public pension funds).

Plaintiff's failure to marshal any evidence that a prudent fiduciary would have applied leverage to dictate BlackRock's action on a specific proxy vote for all investors is all the more glaring given the undisputed evidence that the EBC ***did*** exercise the Plans' leverage for more concrete economic benefits. In particular, with the assistance of the asset management group, the EBC applied the Plans' leverage to repeatedly negotiate better financial terms for the Plans' participants in the form of lower investment management fees and a greater share of securities lending revenues. AA-APP0012–14 ¶¶ 43–47; AA-APP0170; AA-APP0222; *supra* at 6–8. [redacted] AA-APP0013–14 ¶ 47; AA-APP0265; *see also* AA-APP0336–38. Leverage is a finite resource, and, even assuming that the EBC could have persuaded BlackRock to follow the EBC's direction as to how to vote all of its proxies, Plaintiff and his expert offer no basis to conclude that the EBC could have done so while still garnering the same favorable financial terms for the Plans. And Plaintiff offers no reason why it was imprudent for the EBC to use the Plans' leverage to achieve those concrete, year-in, year-out financial benefits rather than seeking to alter BlackRock's approach on one specific proxy vote.

Plaintiff likewise cannot establish a breach of loyalty under his intervention theory. To establish a breach of the duty of loyalty, a plaintiff must show "that the defendant acted for the purpose of providing benefits to itself or someone else," rather than furthering participants' interests. *Patterson v. Morgan Stanley*, 2019 WL 4934834, at *12 (S.D.N.Y. Oct. 7, 2019); *see also Reetz v. Aon Hewitt Inv. Consulting, Inc.*, 74 F.4th 171, 181 (4th Cir. 2023) (holding that, to establish breach of loyalty, plaintiff must prove that fiduciary "failed to act as if it were free of any conflict."); *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 40 (1st Cir. 2018) (disloyalty is established only where the "operative motive" behind the fiduciary's action "was to further its own

interests"). There is no evidence that the EBC refrained from interfering in BlackRock's proxy voting process for a disloyal reason. And it is not only speculative but illogical to assume disloyalty from conduct that was consistent with that of every large private or public investor in BlackRock funds at the time.

3. *Plaintiff Cannot Establish a Loss Under His Unpleaded Theory Either.*

Plaintiff's intervention theory also fails because he cannot establish a loss. *See McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995) (plaintiff must prove "a prima facie case of loss to the plan"). For investors (like the Plans here) who hold securities for the long term, transitory dips in stock prices do not establish losses. Between January 1, 2020, and the end of the first quarter of 2020, at the outset of COVID pandemic, the S&P 500 had lost nearly 30% of its value—and an investor who bought at the beginning of that year and sold a quarter later would have realized a significant loss. *See* AA-APP0486 ¶ 19; AA-APP0852–859.[24] But if the same investor held his S&P 500 investment through the end of 2020, he would have realized a significant gain. *Id.* As an investor, it matters when you sell.

Heaton's calculation of purported "loss" ignores this principle. Heaton admitted that he calculated only the ***temporary*** effect of the May 2021 proxy vote on BlackRock index funds based (he says) on fears that the new directors would favor financially counterproductive policies and that BlackRock would continue voting proxies in favor of ESG objectives. *See* Heaton Rpt. ¶¶ 59–107, 133–50; Heaton Reb. Rpt. ¶¶ 65–71.[25] But he conceded that the market would correct those

[24] *See Catogas v. Cyberonics,* 292 F. App'x 311, 316 (5th Cir. 2008) (taking judicial notice of stock prices); *Vitellone v. Evans,* 2013 WL 6806179, at *3 (S.D. Tex. Dec. 20, 2013) (taking judicial notice of historical stock prices from Yahoo! Finance); *Linenweber v. Sw. Airlines Co.*, 2023 WL 6149106, at *4 (N.D. Tex. Sept. 19, 2023) (taking judicial notice of Southwest's stock price).

[25] During his deposition, Heaton noted, in particular, that Engine No. 1—the firm behind the effort to get the dissident directors elected—"at the time was talking to Chevron as well, and at that time

temporary effects as any such fears dissipated. AA-APP0945 at 97:11–98:20; AA-APP1003–07 at 228:13–232:19. And dissipated they have: Whatever investors' expectations in 2021, the Exxon director election that year has generally been recognized as having a negligible effect on Exxon's climate policies, as reflected in Exxon's recent acquisition of another carbon-intensive company, Pioneer Natural Resources. AA-APP1260 ¶ 18; *see also* AA-APP1259–61 ¶¶ 16–20; AA-APP0955 at 115:18-24. And Heaton himself admits that, since the May 2021 election, BlackRock has not provided "any support or any apparent action supporting dissident climate activist directors as opposed to those shareholder proposals that . . . are generally immaterial to stock performance[,]" AA-APP0988–99 at 150:24–151:11, and that his supposition is that BlackRock "would be highly unlikely to vote for a dissident director slate" were the opportunity to arise again. AA-APP0990–91 at 152:21–153:14.[26] By Heaton's own logic, these subsequent developments would have had a positive influence on the value of Exxon's and the other energy companies' stocks, just to the extent any initial fears from BlackRock's support of the dissident directors had a negative one.

It should almost go without saying that when an investor continues to hold stock over a period of time—as the Plans did through the BlackRock Funds here[27]—the investor does not

---

there would have been a fairly high probability that this was just the start for Engine No. 1." AA-APP0954–55 at 114:12–115:12.

[26] Notably, Chevron—the energy company whose stock Heaton first opined was impaired by fears that it would be subject to a similar action as Exxon, Heaton Rpt. ¶ 86—has become sufficiently unconcerned with Blackrock's proxy voting policies that it recently retained BlackRock as the manager of the index and target-date mandates in its 401(k) plans. *See* AA-APP1260–61 ¶¶ 20–21.

[27] The Plans have remained invested in the BlackRock funds since the challenged Exxon vote. AA-APP0016–17 ¶ 55; AA-APP1259 ¶ 15; AA-APP0064–67. And those funds continue to invest in the stock of Exxon and other energy companies. *See* AA-APP9964–68 (describing the index strategies of the American Large Cap Equity and Large Cap Value Equity Funds and indicating that Exxon and Chevron are among the top-ten holdings in those funds); AA-APP1018–68 (listing securities in the S&P 500 index as of February 23, 2024); AA-APP0861–82 (listing securities in

realize losses based on ***temporary*** movements in the stock's value. AA-APP1007 at 232:4–19. What matters is the value of the investor's position in the shares ***today*** relative to what the value would have been otherwise. *Id.* Here, Heaton did not analyze whether there were any such net, long-term effects stemming from BlackRock's Exxon proxy vote. Indeed, Heaton testified that he has not figured out a way to do so. AA-APP1006–07 at 231:6–232:3 ("The unfortunate thing is it's just hard to quantify the later effect. It's not that it's not there."); *see also* AA-APP0945–46 at 97:23–98:20 ("[T]here's no way to do an event study about that. So from our perspective as financial economists, you know, we just have to speculate about that.").

By focusing solely on the initial decline while ignoring subsequent, corresponding gains, Heaton's loss model fails basic market economics—he calculated a transitory loss that (if it existed at all) almost certainly was corrected. The Supreme Court rejected a similar theory in the securities fraud context in *Dura Pharms., Inc. v. Broudo,* 544 U.S. 336 (2005). In *Dura,* the Ninth Circuit had held that the plaintiffs had adequately alleged a loss by pleading that they had purchased stock at a time when the stock's price was artificially inflated as the result of the defendants' misrepresentation. *Id.* at 340. The Supreme Court disagreed, explaining that, even if an investor bought at an inflated price, whether the investor suffered a loss would depend on the circumstances under which the investor later sold the shares and what happened in between the purchase and the sale. "[I]f, say, the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss." *Id.* at 342. For the reasons just discussed, the same defect is present here. Heaton purported to measure only the transitory effects of the BlackRock proxy vote, frozen in time in May 2021. He did not measure the ultimate effect on the

---

the Russell 1000 as of February 15, 2024); *see also* n. 24, *supra* (collecting cases recognizing that it is appropriate to take judicial notice of these materials).

value of the Plans' investments as they exist today. As a result, Plaintiff has not identified, and cannot identify, any cognizable loss under his intervention theory, and the theory should be rejected for this additional reason.

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT AS TO COUNT II.

Plaintiff claims in Count II that Defendants breached their duty to monitor those Plan fiduciaries responsible for selecting the Plans' investment options. Am. Compl. ¶¶ 125–31. Count II has no practical application to the EBC because the EBC ***was*** the fiduciary entity responsible for selecting the Plans' investment options. *See* n. 17, *supra*. And, with respect to both Defendants, Count II is derivative of Count I and fails as a matter of law for the same reasons. Indeed, after reiterating that it has not recognized a fiduciary duty to monitor stemming from the power to appoint fiduciaries, the Fifth Circuit explained that, "[e]ven if the court were to adopt such a theory, duty-to-monitor claims recognized by other courts inherently require a breach of duty by the appointed fiduciary." *Singh v. RadioShack Corp.*, 882 F.3d 137, 150 (5th Cir. 2018). Accordingly, because Plaintiff cannot prevail on Count I as a matter of law, Defendants are entitled to summary judgment as to Count II as well.

CONCLUSION

For these reasons, Defendants' Motion for Summary Judgment should be granted.

Respectfully submitted,

Dated: February 26, 2024

/s/ Russell Cawyer

Dee J. Kelly, Jr. (S.B. # 11217250)
Russell D. Cawyer (S.B. # 00793482)
KELLY HART & HALLMAN LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Tel.: (817) 332–2500
Fax: (817) 335–2820
dee.kelly@kellyhart.com
russell.cawyer@kellyhart.com

Mark W. Robertson (*pro hac vice*)
(N.Y. Bar # 4508248)
Jeffrey A. N. Kopczynski (*pro hac vice*)
(N.Y. Bar # 4592267)
William D. Pollak (*pro hac vice*)
(N.Y. Bar # 4737037)
Charles J. Mahoney (*pro hac vice*)
(N.Y. Bar # 5502885)
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
Tel.: (212) 326–2000
Fax: (212) 326–2061
mrobertson@omm.com
jkopczynski@omm.com
wpollak@omm.com
cmahoney@omm.com

Brian D. Boyle (*pro hac vice*)
(D.C. Bar # 419773)
Shannon M. Barrett (*pro hac vice*)
(D.C. Bar # 476866)
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Tel.: (202) 383–5300
Fax: (202) 383–5414
bboyle@omm.com
sbarrett@omm.com

Attorneys for Defendants American Airlines, Inc. and the Employee Benefits Committee

CERTIFICATE OF SERVICE

On February 26, 2024, 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 Cawyer
Russell Cawyer