UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LANELL PIERCY, WILLA G. WARD, THOMAS L. MAZZEO, and SUE RUSH, individually and as representatives on behalf of a class of similarly situated persons, Plaintiffs, v. AT&T INC., AT&T SERVICES, INC., and STATE STREET GLOBAL ADVISORS TRUST CO., Defendants.	Civil Action No. 1:24-cv-10608-NMG **ORAL ARGUMENT REQUESTED**

AT&T DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendants AT&T Inc. and AT&T Services, Inc. (together, "AT&T") hereby move to dismiss the Class Action Complaint ("Compl.," Dkt. 1) filed by Plaintiffs Lanell Piercy, Willa G. Ward, Thomas L. Mazzeo, and Sue Rush, on March 11, 2024, in the above-captioned case. For the reasons stated in the accompanying Memorandum of Law, all claims against AT&T should be dismissed in their entirety and with prejudice because Plaintiffs lack Article III standing under Rule 12(b)(1) of the Federal Rules of Civil Procedure and they have failed to state any claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

WHEREFORE, AT&T respectfully requests that the Court grant its motion to dismiss in full and dismiss the Complaint as against AT&T.

[*intentionally blank; signature block follows*]

Dated: June 5, 2024

Respectfully Submitted,

/s/ Meaghan VerGow
O'MELVENY & MYERS LLP
Meaghan VerGow (*pro hac vice*)
Brian D. Boyle (*pro hac vice* forthcoming)
Shannon M. Barrett (*pro hac vice*)
1625 Eye Street, NW
Washington, DC 20006-4001
Tel: (202) 383-5300
Fax: (202) 383-5414
mvergow@omm.com
bboyle@omm.com
sbarrett@omm.com

O'MELVENY & MYERS LLP
William Pollak (*pro hac vice*)
1301 Avenue of the Americas, 17th Floor
New York, NY 10019
Tel: (212) 326-2000
Fax: (212) 326-2061
wpollak@omm.com

NUTTER, McCLENNEN & FISH LLP
Ian D. Roffman, BBO# 637564
Mark C. Jensen, BBO# 646662
155 Seaport Blvd.
Boston, MA 02210
Tel: (617) 439-2000
Fax: (617) 310-9000
iroffman@nutter.com
mjensen@nutter.com

Counsel for Defendants AT&T Inc. and AT&T Services, Inc.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(d), AT&T respectfully submits that oral argument will assist the Court and requests a hearing on its motion to dismiss.

LOCAL RULE 7.1(a)(2) CERTIFICATION

I, William D. Pollak, hereby certify that counsel for AT&T informed Plaintiffs' counsel on June 4, 2024, that AT&T intended to move to dismiss Plaintiffs' complaint for lack of Article III standing under Fed. R. Civ. P. 12(b)(1) and for failure to state any claim against AT&T under Fed. R. Civ. P. 12(b)(6). Counsel for Plaintiffs stated that Plaintiffs intend to oppose the motion.

/s/ William D. Pollak
William D. Pollak

Counsel for Defendants AT&T Inc. and AT&T Services, Inc.

CERTIFICATE OF SERVICE

I, Meaghan VerGow, hereby certify that on June 5, 2024, I electronically filed the foregoing document, captioned "AT&T Defendants' Motion to Dismiss Plaintiffs' Complaint," using the CM/ECF system, which will send notification of such filing to all parties and counsel of record in the above-captioned case.

/s/ Meaghan VerGow
Meaghan VerGow

Counsel for Defendants AT&T Inc. and AT&T Services, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LANELL PIERCY, WILLA G. WARD, THOMAS L. MAZZEO, and SUE RUSH, individually and as representatives on behalf of a class of similarly situated persons,

Plaintiffs,

v.

AT&T INC., AT&T SERVICES, INC., and SSGA GLOBAL ADVISORS TRUST CO.,

Defendants.

Civil Action No. 1:24-cv-10608-NMG

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF AT&T'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Meaghan VerGow (*pro hac vice*)
Brian D. Boyle (*pro hac vice* forthcoming)
Shannon M. Barrett (*pro hac vice*)
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006-4001
Tel: (202) 383-5300
Fax: (202) 383-5414
mvergow@omm.com
bboyle@omm.com
sbarrett@omm.com

William Pollak (*pro hac vice*)
O'MELVENY & MYERS LLP
1301 Avenue of the Americas
New York, NY 10019
Tel: (212) 326-2000
Fax: (212) 326-2061
wpollak@omm.com

Ian D. Roffman, BBO# 637564
Mark C. Jensen, BBO# 646662
NUTTER, McCLENNEN & FISH LLP
155 Seaport Blvd.
Boston, MA 02210
Tel: (617) 439-2000
Fax: (617) 310-9000
iroffman@nutter.com
mjensen@nutter.com

Counsel for Defendants AT&T Inc. and AT&T Services, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

RULES

REGULATIONS

INTRODUCTION

Plaintiffs seek to hold AT&T Inc. and AT&T Services, Inc. (together, "AT&T") liable under ERISA's fiduciary rules for a non-fiduciary decision that ERISA expressly authorizes—the purchase of annuities from a third-party insurer to cover the retirement benefits that accrued to Plaintiffs under the AT&T Pension Benefit Plan (the "Plan"). Plaintiffs' claims against AT&T fail because Plaintiffs are attempting to attach fiduciary liability to a non-fiduciary decision. ERISA explicitly protects the ability of defined benefit pension plan sponsors like AT&T to annuitize pension risk and a sponsor's decision to purchase an annuity is a *settlor* decision that is unassailable under ERISA's fiduciary requirements. Plaintiffs' claims against AT&T founder on this principle: AT&T's decision to proceed with annuitization was not a fiduciary decision, and thus AT&T couldn't have breached any ERISA fiduciary duties in making that decision.

Plaintiffs' Complaint also rails against the selection of Athene Annuity and Life Company and Athene Annuity & Life Assurance Company of New York (collectively, "Athene") as the annuity provider. But AT&T did not make that fiduciary decision, as the Complaint establishes; SSGA Global Advisors Trust Co. ("SSGA") did. SSGA—an independent, well-established financial institution with expertise in annuitization or "pension risk transfers" ("PRTs")—was specifically retained for that very purpose, and AT&T is not subject to fiduciary liability for a decision it did not make.

While Plaintiffs' inability to allege that AT&T had fiduciary responsibility for the selection of Athene is sufficient to defeat all of Plaintiffs' ERISA claims against AT&T, it is not the Complaint's only fatal infirmity. Plaintiffs' claims fail at the outset for lack of Article III standing because Plaintiffs have not suffered any actual, cognizable injury or imminent threat of harm. They cannot and do not allege that they have been denied even a penny of their pension benefits to date, or that the terms of the annuities are insufficient to replace every penny of their future pension

entitlements. And while Plaintiffs allege that Athene might default on its obligations at some unknown point in the future if it does a poor job of managing its assets, this allegation is far too speculative to give rise to Article III standing. To establish a case or controversy under Article III, Plaintiffs must allege an imminent threat of harm, and none of Plaintiffs' allegations, either individually or in the aggregate, comes close to meeting that requirement.

Plaintiffs' prohibited transaction claims against AT&T fail for additional reasons. While ERISA constrains transactions between a plan and so-called "parties in interest" (such as entities that already provide services to the plan), the transactions Plaintiffs challenge do not involve any parties in interest. The Complaint also establishes that exemptions from the prohibited transaction rules apply here.

Plaintiffs' Complaint is missing the critical ingredients of harm and liability. The claims against AT&T should accordingly be dismissed.

FACTUAL BACKGROUND[1]

AT&T Inc. is a holding company that sponsors the Plan for the benefit of its employees. Compl. ¶ 2. The Plan is a defined benefit plan that offers eligible employees monthly pension benefits upon retirement that are backed by, but do not depend on, the value of assets contributed by AT&T Inc. *Id.* ¶¶ 36–38. As the Plan sponsor, AT&T Inc. established the Plan, but has no responsibility for its ongoing administration.[2]

[1] All "Ex. __" cites are to the exhibits attached to the accompanying Declarations of George Goeke (Exs. A-C), Juli Galloway (Exs. D-E), and William Pollak (Exs. F-_). Unless otherwise indicated, all emphasis is added and internal quotations and citations are omitted. In addition, AT&T expressly incorporates SSGA's motion to dismiss ("SSGA MTD") and the arguments contained therein.

[2] *See* Ex. D, AT&T Pension Benefit Plan Document ("Plan Document") § 17.1. Courts routinely take judicial notice of ERISA plan documents. *See, e.g.*, *Borden v. Blue Cross & Blue Shield of W. N.Y.*, 418 F. Supp. 2d 266, 273 (W.D.N.Y. 2006) (considering plan document on motion to dismiss); *Forgione v. Gaglio*, 2015 WL 718270, at *17 (S.D.N.Y. Feb. 13, 2015) (considering ERISA "Plan document and adoption agreement" on motion to dismiss as "undoubtedly integral to the Complaint"); *In re Lehman Bros. Sec. & ERISA Litig.*, 2012 WL 6000575, at *1 n.2 (S.D.N.Y. Dec. 3, 2012) (same); *Kling v. Fid. Mgmt. Tr. Co.*, 270 F. Supp. 2d 121, 127–28 (D. Mass. 2003) (same).

AT&T Services, Inc. ("AT&T Services") is a wholly owned subsidiary of AT&T Inc. and is responsible for administering the Plan. *Id.* ¶ 29.[3] The governing Plan Documents and charters, however, assigned the Investment Management Committee ("IMC") fiduciary responsibility for hiring trustees and investment managers, including independent fiduciaries, for the Plan.[4]

On January 27, 2023, AT&T Inc. decided to amend the Plan document to permit the transfer of Plan assets in exchange for the purchase of annuity contracts covering a specified portion of the Plan's liability for future benefits.[5] The Plan Amendment directed that an independent fiduciary be appointed and given the "sole discretion" to select the PRT annuity provider. *Id.* at Appendix A. Pursuant to this Plan Amendment, the IMC hired SSGA to serve as the Plan's independent fiduciary. Compl. ¶¶ 90–91.[6] In turn, after evaluating multiple candidates, SSGA selected Athene as the annuity provider for the transaction. *Id.* ¶ 3.[7] Athene is a large insurance organization with substantial experience in PRT transactions. Since 2017, it has closed 47 PRT transactions resulting in the insurance or reinsurance of group annuities totaling $51.8 billion and involving more than 560,000 participants.[8]

---

[3] Ex. D, Plan Document § 17.1.

[4] *See* Ex. A, Charter for the Benefit Plan Investment Committee ("BPIC Charter") § 8.1; *see also* Ex. B, Letter Agreement Between SSGA Global Advisors Trust Co. and AT&T Services (Jan. 26, 2023) ("SSGA Agreement") at 1, 3. The Court may properly consider the BPIC Charter and the SSGA Agreement because courts routinely consider the governing Plan documents, including agreements with service providers, on a motion to dismiss ERISA claims. *See, e.g.*, n.2, *supra*; *Terraza v. Safeway Inc.*, 241 F. Supp. 3d 1057, 1066–67 (N.D. Cal. 2017) (considering services agreement); *In re Lehman Bros.*, 2012 WL 6000575, at *1 n.2 (considering recordkeeping agreement). Indeed, the court may consider the SSGA Agreement because "the complaint relies heavily upon its terms and effect, thereby rendering the document integral to the complaint." *Manigault v. Spry*, 2024 WL 1345340, at *3 (N.D.N.Y. Mar. 28, 2024).

[5] Ex. E, Ninth Amendment to the AT&T Pension Benefit Plan (Apr. 26, 2023) ("Ninth Amendment to Plan").

[6] *See also* Ex. B, SSGA Agreement at 2–3.

[7] Ex. B, SSGA Agreement at 2; Ex. C, Commitment Agreement between Athene Annuity and Life Company, Athene Annuity & Life Assurance Company of New York, AT&T Inc., and SSGA Global Advisors Trust Company (April 26, 2023) ("Athene Commitment Agreement") § 8(e). The Athene Commitment Agreement may be considered because "its terms and effect" are integral to the Complaint. *Manigault*, 2024 WL 1345340, at *3; *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993) (holding that "documents central to plaintiffs' claim" and "documents sufficiently referred to in the complaint" may be considered on a motion to dismiss); *Freeman v. Town of Hudson*, 714 F.3d 29, 36 (1st Cir. 2013) (same); *Beddall v. State St. Bank & Tr. Co.*, 137 F.3d 12, 17 (1st Cir. 1998) (same).

[8] Ex. F, Athene Holding Ltd., Annual Report (Form 10-K) (Feb. 28, 2024) ("Athene 2023 Annual Report") at 16. On a motion to dismiss, the Court may consider "public disclosure documents required by law to be, and that have been,

On April 26, 2023, pursuant to SSGA's independent fiduciary judgment, the Plan purchased from Athene approximately $8 billion in annuity contracts that cover the future pension benefit obligations of approximately 96,000 Plan participants. *Id.* ¶¶ 3, 96.

LEGAL STANDARD

As a threshold requirement, the "party invoking federal jurisdiction bears the burden" of establishing the elements of Article III standing: (1) that the plaintiff has suffered an injury in fact that is (2) fairly traceable to the defendant's challenged conduct and (3) likely to be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Dismissal of a plaintiff's claims for lack of standing is required where, as here, the complaint does not plausibly allege a cognizable injury in fact that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560; *e.g.*, *Kerin v. Titeflex Corp.*, 770 F.3d 978, 981 (1st Cir. 2014).

There are two species of 12(b)(1) attacks on subject-matter jurisdiction: facial and factual challenges. *See Torres-Negrón v. J & N Recs., LLC*, 504 F.3d 151, 162 (1st Cir. 2007). When the attack is facial, the relevant facts are the well-pleaded allegations in the complaint and any incorporated or judicially noticeable documents. *Toddle Inn Franchising, LLC v. KPJ Assocs., LLC*, 8 F.4th 56, 61 n.5 (1st Cir. 2021); *Wiener v. MIB Grp., Inc.*, 86 F.4th 76, 83 (1st Cir. 2023) (when reviewing a motion to dismiss for lack of standing "based on the face of the . . . complaint," a court takes the "complaint's well-pleaded facts as true" and may "also consider (a) implications from documents attached to or fairly incorporated into the . . . complaint" and "(b) facts susceptible to judicial notice"). The question is whether the plaintiff's complaint—after considering all incorporated documents and discarding legal conclusions and threadbare recitations of the elements, *see Zell v. Ricci*, 957 F.3d 1, 7

filed" with the Securities and Exchange Commission. *In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745, 756 (S.D.N.Y. 2003); *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007); *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000); *Tracey v. Mass. Inst. of Tech.*, 2017 WL 4453541, at *3 (D. Mass. Aug. 31, 2017).

(1st Cir. 2020)—contains enough factual heft to demonstrate that the court has subject-matter jurisdiction. *See Katz v. Pershing, LLC*, 672 F.3d 64, 70 (1st Cir. 2012). "Allegations of standing, even in the context of a motion to dismiss, must be reasonably definite, factual, and relate either directly or inferentially to each material element necessary to establish standing." *Conservation L. Found., Inc. v. Plourde Sand & Gravel Co.*, 2014 WL 5781457, at *3 (D.N.H. Nov. 6, 2014) (citing *United States v. AVX Corp.*, 962 F.2d 108, 115 (1st. Cir. 1992)).

On a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a complaint must be dismissed if it does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In ERISA cases, motions to dismiss are an "important mechanism for weeding out meritless claims." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). If a complaint raises no more than the "*mere possibility*" of misconduct, it must be dismissed. *Iqbal*, 556 U.S. at 679.

ARGUMENT

I. Plaintiffs lack Article III standing to pursue their claims against AT&T.

Plaintiffs fail to allege that the transaction has resulted in any shortfall in their defined benefit payments to date, or that the annuities purchased pursuant to the PRT do not promise payment of their properly computed defined benefit amounts in the future. Plaintiffs' inability to allege actual or imminent harm deprives this Court of Article III jurisdiction. Plaintiffs' contentions that the PRT has deprived them of procedural protections under ERISA, and that Athene might someday default because of mismanagement of its reserves, do not allege any actual or imminent harm and are therefore constitutionally inadequate as a matter of law.

A. Plaintiffs' pension benefits have not been impaired by the PRT, and thus Plaintiffs have not suffered a cognizable injury.

Plaintiffs' claims fail at the outset for want of subject-matter jurisdiction because they have not suffered a "concrete and particularized" injury. *Lujan*, 504 U.S. at 560–61; *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). If Plaintiffs "had not received their vested pension benefits, they would of course have Article III standing to sue." *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 542 (2020). But Plaintiffs are entitled to the same stream of future benefit payments now as they were before the PRT. Plaintiffs do not (and cannot) allege that they haven't received all of the benefits the Plan afforded them, and they do not allege an imminent threat of losing their benefit payments in the future or experiencing any other concrete injury. Without these prerequisites for Article III standing, the entire Complaint must be dismissed.

The Supreme Court's recent decision in *Thole* reinforces the analytical framework that dooms Plaintiffs' claim of standing. In *Thole,* the Supreme Court affirmed dismissal of claims brought by participants in a defined benefit plan because the plaintiffs "had received all of their vested pension benefits so far" and thus had not suffered any "concrete and particularized" injury as required for Article III standing. *Id.* at 547. Plaintiffs face the same obstacle here: they do not and cannot allege that they have been deprived of even a penny of their defined benefit payments to date, or that the annuities fail to provide for payment of such defined benefits in the future. *Id.* at 541; *accord, e.g.*, *Duncan v. Muzyn*, 885 F.3d 422, 427–29 (6th Cir. 2018) (defined benefit plan participants lacked standing where, as here, plaintiffs alleged misconduct and possible future harm, but participants had not been denied benefit payments); *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 544–48 (5th Cir. 2016) (same); *David v. Alphin*, 704 F.3d 327, 334–39 (4th Cir. 2013) (same). Under the principle of *Thole*, Plaintiffs' theoretical grievance is beyond the jurisdiction of the federal courts.

B. Plaintiffs' suggestion that the PRT resulted in a "loss of ERISA's protections" cannot be traced to any fiduciary decision.

Plaintiffs' apparent theory that the PRT caused them to lose "ERISA's protections" (*e.g.*, Compl. ¶ 146) fails to establish Article III standing because that theory does not describe a cognizable injury at all, and cannot trace any injury to a fiduciary decision, as opposed to a settlor one. *Lujan*, 504 U.S. at 560; *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013); *Spokeo*, 578 U.S. at 338.

At the outset, it is true that as a result of AT&T Inc.'s decision as Plan sponsor to pursue a PRT in the first place, the benefit obligations owed to Plaintiffs are no longer covered by ERISA. Compl. ¶¶ 38–42 (explaining that, following the PRT, retirement benefits are no longer backed by employers or guaranteed by the Pension Benefit Guaranty Corporation ("PBGC")); 29 U.S.C. § 1081 (providing that ERISA's funding requirements cover employee pension benefit plans); 29 U.S.C. § 1321 (providing that the PBGC insurance provisions of ERISA apply to employee pension benefit plans). But, as Plaintiffs concede, Compl. ¶¶ 14, 49, ERISA *expressly protects* the right of employers to annuitize pension plan obligations. 29 U.S.C. § 1341; *see also generally Beck v. PACE Int'l Union*, 551 U.S. 96, 101–09 (2007) (describing the pension risk transfer process). It thus makes little sense to treat the loss of ERISA procedural protections in connection with a PRT as a cognizable "loss" within the meaning of the statute.

Moreover, Plaintiffs' alleged "loss" of ERISA protections cannot confer Article III standing for any prohibited transaction or fiduciary breach claim because the transaction is not traceable to any fiduciary act—even SSGA's fiduciary selection of an annuity provider. Rather, as the Complaint concedes, the loss of ERISA coverage was the inherent effect of AT&T Inc.'s decision, as sponsor and settlor of the Plan, to amend the Plan to provide for annuitization of certain Plan liabilities. It is well established that the decision to amend or terminate a plan to provide for the purchase of annuities covering the promised benefits is a settlor decision, not a fiduciary act, and so cannot give

rise to a claim of fiduciary breach under ERISA. *See Beck*, 551 U.S. at 101–02 (explaining, in case involving PRT, that "an employer's decision whether to terminate an ERISA plan is a settlor function immune from ERISA's fiduciary obligations"); *Lee*, 837 F.3d at 535–36 (considering "the decision to transfer pension assets outside ERISA coverage as a sponsor decision immune from fiduciary obligations"); *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 251 (5th Cir. 2008) (same); *see also Lockheed Corp. v. Spink*, 517 U.S. 882, 890–91 (1996) (extending to pension benefit plans the rule that amending or terminating a plan is a settlor rather than fiduciary act); *Hill v. State St. Corp.*, 2013 WL 6909524, at *2 (D. Mass. Dec. 30, 2013) ("settlor acts" "involve the adoption, funding, amendment, modification, or termination of an employee benefit plan"); Compl. ¶ 101.[9] When a plan sponsor decides to amend or terminate a plan, by law its decision is not a fiduciary act at all, and thus cannot be the basis of a claim of fiduciary breach.

Once AT&T Inc. made the settlor decision to move assets out of the Plan and purchase annuities, it did not matter how the relevant fiduciary (here, SSGA) chose to exercise its power over the selection of an annuity provider. The transfer of the assets, and the end of ERISA's governance of those assets, was the direct result of that settlor decision. It therefore follows that to the extent the loss of ERISA protections qualifies as a concrete injury at all, it cannot be traced to any fiduciary conduct.

C. Plaintiffs' speculation that Athene might default at some unknown point in the future is also insufficient to sustain standing.

Plaintiffs also cannot establish a cognizable injury by speculating that Athene might mismanage its reserves and subsequently default on its annuity coverage obligations at some unknown point in the future. *E.g.*, Compl. ¶¶ 127–29. As AT&T has already explained, to the extent this theoretical change in risk derives from the mere fact that Plaintiffs' benefits are no longer

[9] Ex. E, Ninth Amendment to Plan Document.

separately backed by "the Plan, AT&T, or the PBGC[,]" *id.* ¶ 128, these are unavoidable consequences of AT&T Inc.'s decision—as settlor—to pursue annuitization as expressly permitted by ERISA, and cannot be connected to the independent fiduciary's choice of an annuity provider. *See supra* at 7–8. But even if Plaintiffs' perceptions of risk can be traced to the selection of a specific annuity provider, they do not describe cognizable injuries capable of supporting standing to pursue a claim of fiduciary breach.

While Plaintiffs assert that Athene was "riskier" than alternatives, *e.g.*, Compl. ¶¶ 84–86, their speculation about remote contingencies comes nowhere close to satisfying Article III's requirement that Plaintiffs allege and prove an "imminent" injury. *Ramirez*, 594 U.S. at 423. As courts have recognized, the "risk that . . . pension benefits will at some point in the future be adversely affected . . . is too speculative to give rise to Article III standing." *David*, 704 F.3d at 338; *Lee v. Verizon Commc'ns Inc.*, 954 F. Supp. 2d 486, 498 (N.D. Tex. 2013) (allegation that PRT transaction "jeopardize[d] the financial security of the pension benefits" insufficient to create standing); *Thole*, 590 U.S. at 546. Rather, Plaintiffs must establish that the selection of Athene over other providers so greatly increased the risk of non-payment as to render an injury to Plaintiffs "imminent." *Lujan*, 504 U.S. at 560; *Ramirez*, 594 U.S. at 435: *Lee*, 837 F.3d at 546 ("[C]onstitutional standing for defined-benefit plan participants requires imminent risk of default by the plan, such that the participant's benefits are adversely affected."); *Duncan*, 885 F.3d at 428 (holding that the alleged harm resulting from the breach "did not put the Plan at risk of default. So, Plaintiffs suffered no concrete harm.").

Plaintiffs' allegations do not come close to meeting that standard. Plaintiffs criticize Athene's use of Bermuda-based reinsurers to spread risk. Compl. ¶¶ 68–70. But imminent harm to Plaintiffs' benefits cannot be inferred from the mere use of a Bermuda-based reinsurer. Indeed, as Plaintiffs

concede, numerous "other insurers" also utilize Bermuda-based reinsurers (*id.* ¶ 67).[10] Moreover, Athene requires its Bermuda subsidiaries to adhere to the same capital, risk, and disclosure standards as its U.S. subsidiaries.[11] Plaintiffs' allegation that Bermuda law *permits* reinsurers to operate with less extensive disclosures than required by other jurisdictions gets them nowhere when Athene *provides* robust public disclosures beyond Bermuda requirements, including filing consolidated financials with the SEC, publishing annual risk testing, and disclosing every individual asset backing a pension group annuity in an annual U.S. regulatory filing.[12]

Plaintiffs' allegations about the supposed riskiness of Athene's investment portfolio likewise do not plausibly allege an imminent risk of default on Plaintiffs' benefits, as they would have to do to clear Article III's threshold requirements. But those allegations are also belied by judicially noticeable materials. For example, Athene's regulatory filings show that it is well capitalized, with $26 billion in regulatory capital and a risk-based capital ratio[13] of 416%, nearly double the amount required by the NAIC model statute[14] and exceeding the risk-based capital ratios of other large

---

[10] *See also* Ex. G, N. Foley-Fisher et al., "Are US Life Insurers the New Shadow Banks?" (Apr. 2023) (listing eleven other annuity providers with Bermuda-based reinsurers, including MetLife and AIG). This article is quoted in paragraph 60 of the Complaint and accordingly incorporated therein by reference.

[11] Ex. F, Athene 2023 Annual Report at 19 ("We maintain the same reserving principles for our Bermuda reinsurance subsidiaries as we do for our US insurance subsidiaries."); *id.* at 25 ("Under the Bermuda rules, our Bermuda reinsurance subsidiaries are required to file with the BMA group audited financial statements prepared using accounting principles generally accepted in the US (US GAAP)."); *see also id.* at 24. In addition, the Athene companies domiciled in Iowa and New York can only take balance sheet credit for reinsurance that conforms with US standards. See n.14, *infra*.

[12] *See* Ex. M, Annual Statement for the Year Ended December 31, 2023 of the Conditions and Affairs of the Separate Accounts of Athene Annuity & Life Co. ("Annual Statement of Separate Accounts"); Ex. N, Fourth Quarter 2023 Statutory Financial Statement for Athene Annuity Life Company (Dec. 31, 2023) ("Athene Statutory Financial Statement") at 2.

[13] The risk-based capital ("RBC") ratio is a primary measure by which the Company and its insurance regulators evaluate the capital adequacy of insurers. RBC is determined by NAIC-prescribed formulas that consider, among other things, risks related to the type and quality of the invested assets, insurance-related risks associated with an insurer's products and liabilities, interest rate risks, and general business risks. Ex. J, Prudential Financial, Inc. Annual Report (Form 10-K) (Feb. 21, 2024) at 304.

[14] Regulatory capital is the amount of capital or financial resources held by a bank or financial institution to secure its debts and liabilities. The Athene companies are subject to the prudential regulation of Iowa and New York insurance departments. Both states have adopted the risk-based capital and credit for reinsurance model laws recommended by the National Association of Insurance Commissioners ("NAIC"). *See* Iowa Code § 521B (credit for reinsurance); *id.* § 521E (risk-based capital requirement for insurers); N.Y. Ins. Law § 1322 (risk-based capital for life insurance companies [ ]); *id.* § 1308 (reinsurance); N.Y. Comp. Codes R. & Regs. tit. 11, § 125.4 (credit for reinsurance).

pension annuity providers, including Prudential and MetLife.[15] Similarly, Athene's financial statements preclude Plaintiffs' assertion that Athene is unduly exposed to riskier assets such as collateralized loan obligations, Compl. ¶ 57, by showing that those assets constitute a small fraction of Athene's portfolio.[16] 95% of Athene's investments are in fixed income instruments, over 97% of which are "investment grade" with the highest NAIC rating of 1 or 2.[17] Against this backdrop, it is not surprising that *all* of the credit ratings agencies have affirmed Athene and its subsidiaries' creditworthiness with A or A+ ratings.[18]

Moreover, Plaintiffs overlook that their annuity payments are protected against default by multiple layers of insulation, each of which would have to fail before Plaintiffs could lose a penny in benefits. *First*, the $8 billion in assets that Athene received through the annuity purchase, Compl. ¶ 98, are "ring-fenced" in a separate account and shielded from all of Athene's other liabilities.[19] Plaintiffs' Complaint makes no suggestion that these assets are inadequate to cover their benefit payments going forward. *See New Orleans ILA Pensioners Ass'n v. Bd. of Trs. of New Orleans Emps. Int'l Longshoremen's Ass'n AFL-CIO Pension Fund*, 2008 WL 215654, at *3 (E.D. La. Jan. 24, 2008) (defined benefit plan participants lacked standing where they failed to "establish that the remaining pool of

[15] *Compare* Ex. F, Athene 2023 Annual Report, Item 7, at 80–81, *with* Ex. J, Prudential 2023 Annual Report at 122, 126, 304 (risk-based capital ratio of 383%); Ex. L, MetLife, Inc., Annual Report (Form 10-K) (Feb. 16, 2024) at 15 (risk-based capital ratio of 380% as of Dec. 31, 2023 and 340% as of Dec. 31, 2022).

[16] *See* Ex. F, Athene 2023 Annual Report at 86–87.

[17] Ex. H, Athene Holding Ltd., Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Quarterly Period Ended March 31, 2024 (Form 10-Q) at 78; Ex. F, Athene 2023 Annual Report at 86 ("96.5% and 95.8% as of December 31, 2023 and 2022, respectively, was invested in assets considered investment grade with an NAIC designation of 1 or 2."). "NAIC 1 is assigned to obligations exhibiting the highest quality. Credit risk is at its lowest and the issuers' credit profile is stable." Ex. I, Nat'l Ass'n of Ins. Comm'rs, *Purposes and Procedures Manual of the NAIC Investment Analysis Office* (Dec. 2023), available at https://content.naic.org/sites/default/files/ppm-oss-2023_0.pdf.

[18] Ex. F, Athene 2023 Annual Report, Item 1 at 20–21 ("As of December 31, 2023, each of our significant insurance subsidiaries is rated 'A+', 'A1' or 'A' by the four rating agencies[.]").

[19] Ex. C, Athene Commitment Agreement § 3.a.iii; *see also* Ex. F, Athene 2023 Annual Report at 14; Ex. M, Annual Statement of Separate Accounts at 13 (indicating that Athene holds $67 billion in assets in separate accounts related to group annuity contracts like the ones purchased in this transaction, *see* Compl. ¶ 70); Ex. N, Athene Statutory Financial Statement at 2.

assets will be inadequate to pay for the plan's outstanding liabilities"). *Second*, if these earmarked assets were somehow exhausted, Plaintiffs' benefits would still be backed by over $250 billion in assets held in Athene's general account to cover all of its liabilities.[20] *Third*, Athene has reinsured a portion of the annuity liabilities, enlisting the protection of additional pools of insurer assets.[21] *Finally*, if all these protections failed and Athene defaulted on its annuity obligations, Plaintiffs' benefits would still be protected by state insurance guaranty associations, which are funded by industry participants and provide an additional safety net for state policyholders if an insurer is declared insolvent.[22] This additional layer of protection is uniquely associated with the Plan's purchase of annuities to fund Plaintiffs' benefits, and was not available to Plaintiffs beforehand.

Plaintiffs offer no factual allegations that *any one* of these distinct layers of protection is at imminent risk of failing, much less that *all* of them are hanging by a thread. At best, Plaintiffs' allegations establish that they perceive Athene as a somewhat "riskier" annuity provider than some other providers. Those perceptions of relative risk do not place Athene on the verge of defaulting on its benefit obligations to Plaintiffs, which is what Plaintiffs would have to show to establish Article III standing. *See Lujan*, 504 U.S. at 560; *Ramirez*, 594 U.S. at 423; *Lee*, 954 F. Supp. 2d at 546. Where, as here, the alleged injuries rest on a "highly attenuated chain of possibilities," Plaintiffs' Complaint "does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410; *Sea Shore Corp. v. Sullivan*, 158 F.3d 51, 56 (1st Cir. 1998) (holding that injury is not "imminent" if "it depends upon several tenuous contingencies"); *Lee*, 837 F.3d at 546 (when

[20] Ex. F, Athene 2023 Annual Report at 66; *see also id.* at 80, 96 (Athene holds net assets of $217 billion).

[21] Compl. ¶ 65; *see also* Ex. F, Athene 2023 Annual Report at 15.

[22] Ex. F, Athene 2023 Annual Report at 32. As the Department of Labor has recognized, "there is no material difference" between the protections offered by the federal Pension Benefit Guaranty Corporation ("PBGC")—the federal agency charged with insuring pension benefits (Compl. ¶¶ 7, 39)—and the protections offered by state guaranty associations ("SGAs"). Ex. K, U.S. Dep't of Labor, *Statement of the 2023 Advisory Council on Employee Welfare and Pension Benefit Plans to the U.S. Department of Labor Regarding Interpretive Bulletin 95-1* (Aug. 29, 2023), https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/statement-regarding-interpretive-bulletin-95-1 (last visited May 30, 2024).

an alleged "direct injury to a participant['s] benefits is dependent on the realization of several additional risks," those contingencies "collectively render the injury too speculative to support standing"); *Johansen v. Verizon Commc'ns, Inc.*, 2008 WL 11511712, at *8 (D. Mass. Sept. 29, 2008) (deeming "the envisioned chain of events . . . too speculative to make th[e] injury imminent"); *Fishman Haygood Phelps Walmsley Willis & Swanson, L.L.P. v. State St. Corp.*, 2010 WL 1223777, at *6 (D. Mass. Mar. 25, 2010) (finding no imminent injury where unrealized losses could eventually injure plan, but only under particular circumstances).

D. Any alleged risk associated with the selection of Athene is not traceable to conduct by AT&T.

Finally, even if Plaintiffs could plausibly establish that their annuity payments were at imminent risk of default, that purported injury would not be "traceable" to any action by AT&T. AT&T was not the fiduciary responsible for selecting Athene. Rather, as the Complaint acknowledges, SSGA was hired as the independent fiduciary responsible for choosing an annuity provider on behalf of the Plan. Compl. ¶ 13 ("SSGA, an 'independent fiduciary' of the Plan which was paid to recommend, assess, and bless the transaction."); *see also id.* ¶¶ 91, 94, 114, 121–23, 164, 167 ("SSGA caused the Plan to engage in the annuity transaction.").[23] Plaintiffs allege no facts implying that AT&T somehow constrained SSGA's exercise of discretion in such a fashion as to require it to pick Athene; indeed, to the contrary, the essential premise of their claims against SSGA is that SSGA had the discretion to select other options. *Id.* ¶¶ 17, 115, 117–19, 121, 150. SSGA was thus an "independent actor" whose separate discretionary decisions preclude tracing to AT&T any of the purported consequences stemming from the selection of Athene. *Clapper*, 568 U.S. at 413 (holding no traceability for purposes of Article III where asserted injury rested on the "decisions of

[23] *See also* Ex. B, SSGA Agreement at 2–4 ("As Independent Fiduciary," SSGA had "full discretionary authority" to "select one or more insurers to provide annuities in accordance and compliance with ERISA.").

independent actors"); *Johnson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 719 F.3d 601, 606 (7th Cir. 2013) (holding that intervening independent action defeated traceability).

II. Plaintiffs do not plausibly allege that AT&T was a fiduciary with respect to the challenged conduct.

Count I, which asserts a fiduciary breach claim against AT&T for the selection of Athene as the annuity provider, fails for the simple reason that neither AT&T entity was the fiduciary responsible for that decision, as the Complaint acknowledges. Compl. ¶¶ 142–46.

A. AT&T Inc. was not a fiduciary to the Plan in any respect.

ERISA imposes duties only on plan fiduciaries and only with respect to conduct undertaken when acting as a fiduciary. 29 U.S.C. §§ 1104, 1106(a)–(b); *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). Accordingly, in "every case charging breach of ERISA fiduciary duty," the "threshold question" is "whether that person was acting as a fiduciary . . . *when taking the action subject to complaint*." *Pegram*, 530 U.S. at 226; *see also Livick v. Gillette Co.*, 524 F.3d 24, 29 (1st Cir. 2008) (similar); *Turner v. Schneider Elec. Holdings, Inc.*, 530 F. Supp. 3d 127, 139 (D. Mass. 2021) (Gorton, J.) ("A party's status as a fiduciary 'is not an all or nothing proposition.'").

Plaintiffs cannot plead a breach of fiduciary duty claim against AT&T Inc. because it had no fiduciary role with respect to the Plan whatsoever.[24] While Plaintiffs assert in conclusory fashion that both AT&T entities "were, at all relevant times, Plan fiduciaries" (*e.g.*, Compl. ¶ 140),[25] they offer no factual allegations to support that legal conclusion. The governing Plan document, in turn, is clear that AT&T Inc.'s only role is as the Plan's sponsor, and it is well established that acting as "an ERISA plan sponsor does not [ ] convert an employer into a plan fiduciary." *E.g.*, *Moon v. BWX Techs., Inc.*, 577 F. App'x 224, 229 (4th Cir. 2014); *Coriale v. Xerox Corp.*, 775 F. Supp. 2d 583, 599

[24] Ex. D, Plan Document § 17.1.

[25] In any event, these types of conclusory allegations, without more, are insufficient to meet Plaintiffs' pleading burden. *See Daggett v. Waters Corp.*, 2024 WL 1677421, at *7 (D. Mass. Apr. 18, 2024) (on a motion to dismiss, "conclusory legal allegations [ ] need not be credited").

(W.D.N.Y. 2011) (a corporation's "status as the plan sponsor does not render it a fiduciary with respect to the plans"); *In re Mut. Fund Inv. Litig.*, 403 F. Supp. 2d 434, 447 (D. Md. 2005) (same).

In any event, ERISA's test for fiduciary status is "functional"—it attaches only to specific functions identified in the statute as fiduciary in nature. *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 654 (9th Cir. 2019) ("a person may be a fiduciary with respect to some actions but not others"). The only specific conduct ascribed to AT&T Inc. in the Complaint is that it determined to move forward with partial annuitization of its benefit obligations under the Plan by amending the Plan Document to so provide. *E.g.*, Compl. ¶¶ 90–112. To the extent Plaintiffs intend Count I to include a challenge to that decision, the challenge necessarily fails because, as noted earlier, a plan sponsor's decisions to modify, amend, or terminate the plan—including the decision to engage in a PRT—are settlor decisions that "do[] not implicate . . . fiduciary duties." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999); *see also Beck*, 551 U.S. at 101–02 ("an employer's decision whether to terminate an ERISA plan is a settlor function immune from ERISA's fiduciary obligations"); *see* Ex. E, Ninth Amendment to Plan; *supra* at 7–8 (collecting cases).

B. AT&T Services did not have fiduciary responsibility for selecting Athene.

Plaintiffs' claims against AT&T Services for the selection of Athene are likewise deficient. Compl. ¶¶ 142–46. Although AT&T Services had some fiduciary responsibilities with respect to the Plan, under ERISA a person is a fiduciary only "to the extent" that person performs fiduciary functions, *see supra* at 7–8 (collecting cases), and AT&T Services performed no such functions here.

As discussed above, *supra* at 3, the Complaint itself concedes that SSGA was hired to be the independent fiduciary responsible for selecting an annuity provider. Compl. ¶¶ 13, 91, 94, 114, 121–23, 164, 167. The commitment agreement with Athene confirms that SSGA, not AT&T Services, was the fiduciary responsible for selecting an annuity provider and otherwise representing the Plan and its participants in the PRT transaction:

> [SSGA] has been duly appointed as independent fiduciary of the Plan with respect to the purchase of one or more group annuity contracts *to be the designated fiduciary responsible for (1) selecting one or more insurers to provide annuities in accordance and compliance with the ERISA Requirements, . . . (3) representing the interests of the Plan and all its participants and beneficiaries in connection with the negotiation of a commitment agreement* . . . .[26]

The decision to select Athene was SSGA's. AT&T Services "cannot be liable for breaching fiduciary duties that [it] simply did not have." *Burke v. Boeing Co.*, 42 F.4th 716, 728 (7th Cir. 2022).

III. Plaintiffs fail to plead a prohibited transaction claim against AT&T.

Plaintiffs allege in Counts III (as to SSGA) and IV (as to Athene) that, by allegedly engaging with these entities in support of the PRT, AT&T violated ERISA § 406(a), which prohibits fiduciaries from engaging in certain transactions between plans and statutorily defined "parties in interest." Compl. ¶¶ 155–61. Both counts fail for multiple reasons.

A. Counts III & IV fail because Plaintiffs do not plausibly allege that AT&T was a fiduciary with respect to the challenged conduct.

At the threshold, Counts III and IV both fail for the same reason as Count I—AT&T did not act as a fiduciary with respect to the PRT transaction. By its terms, § 1106(a) prohibits only those acting as *fiduciaries* from causing a plan to engage in a prohibited transaction and only fiduciaries can violate that provision. 29 U.S.C. § 1106(a)(1) ("A *fiduciary* with respect to a plan shall not cause the plan to engage in a transaction […]"); *Harris Tr. & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 245 (2000) ("§ 406(a) imposes a duty only on the fiduciary that causes the plan to engage in the transaction"); *Turner*, 530 F. Supp. 3d at 139 ("The terms of § 1106 make it clear that only fiduciaries are prohibited from engaging in the listed transactions.").

As AT&T has already explained, neither AT&T entity acted as a fiduciary to cause the Plan to enter into the annuity transaction with Athene. *Supra* at 14–16. AT&T Inc. participated in the annuity transaction "solely in its capacity as the sponsor of the Plan," consistent with the well-

[26] Ex. C, Athene Commitment Agreement § 8(e); *see also id.* § 9.

established legal authority that a plan sponsor acts in a settlor rather than fiduciary capacity when deciding whether to provide for annuitization in a plan amendment and to pursue a PRT.[27] The commitment agreement reflects that it was, instead, SSGA that "in its capacity as the independent fiduciary . . . represent[ed] the interests of the Plan and all of its participants" in selecting the annuity provider and negotiating the PRT transaction's terms. *Id.* at 1 & § 9(b). Nor does the Complaint plausibly allege that AT&T Services "caused" the allegedly "prohibited" transaction in any fashion. AT&T Inc., not AT&T Services, made the settlor decision to proceed with the PRT transaction in the first place and—like AT&T Inc.—AT&T Services had nothing to do with selection of the annuity provider (that was SSGA's decision as independent fiduciary). *See supra* at 15–16. For this reason alone, there is no legal basis for Plaintiffs' prohibited transaction claims against AT&T.[28]

B. Count III fails because there was no prohibited transaction between the Plan and SSGA.

AT&T's lack of fiduciary status, however, is not the only flaw in Count III, which asserts that the PRT involved a prohibited transaction between the Plan and SSGA in violation of ERISA § 406(a)(1)(C). Compl. ¶¶ 160–61. This claim also misconstrues the nature of the PRT transaction. By the terms of the statute, ERISA § 406(a) only prohibits fiduciaries from causing transactions between a plan and a "party in interest." 29 U.S.C. § 1106(a); *Fleming*, 2017 WL 4225624, at *8 (to state a claim under § 406(a), "a plaintiff must show that a fiduciary caused the plan to engage in the allegedly unlawful transaction" with a "party in interest"); *Torchetti v. Int'l Bus. Machs. Corp.*, 986 F. Supp. 49, 56 (D. Mass. 1997) ("§ 406(a) of ERISA [ ] sets forth various commercial transactions which are prohibited as between a plan and a party in interest"); *Haley v. Teachers Ins. & Annuity Ass'n*

[27] Ex. C, Athene Commitment Agreement, at 1; *supra* at 7–8; *see also Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 87 (2d Cir. 2001) ("prohibited transaction rules apply only to decisions by an employer acting in its fiduciary capacity").

[28] *See, e.g.*, *Fleming v. Fid. Mgmt. Tr. Co.*, 2017 WL 4225624, at *8–9 (D. Mass. Sept. 22, 2017) (dismissing prohibited transaction claim in part because complaint failed to allege any plan fiduciary caused the challenged fee-sharing agreements); *Rosen v. Prudential Ret. Ins. & Annuity Co.*, 2016 WL 7494320, at *7–8 (D. Conn. Dec. 30, 2016) (dismissing prohibited transaction claim because complaint failed to plausibly allege defendant was acting as a fiduciary).

of Am., 2021 WL 4481598, at *4 (S.D.N.Y. Sept. 30, 2021). The annuity transaction Plaintiffs challenge here was not a transaction between the Plan and SSGA at all. Rather, as the contractual documents confirm, SSGA's role in the transaction was solely as the Plan's independent fiduciary acting on the Plan's behalf. It was, in other words, acting on the very same side of the transaction as the Plan.

The only "transaction" *between* the Plan and SSGA was the agreement under which SSGA was retained as an independent fiduciary to make a selection of the annuity provider on behalf of the Plan. Plaintiffs, however, do not challenge that transaction. And even if they had chosen to attack this distinct transaction under ERISA § 406(a), their claims would still fail. ERISA does not prohibit routine arm's-length agreements with service providers. To state a claim for a violation of the prohibited transaction provision, a plaintiff must plead that the fiduciary entered a service agreement with an "intent to benefit a party in interest." *Sweda v. Univ. of Pa.*, 923 F.3d 320, 338 (3d Cir. 2019). And a "party in interest" is limited to "persons providing services" to the plan at the time of the transaction (for instance, because of a pre-existing service or fiduciary relationship). *See, e.g., D.L. Markham DDS, MSD, Inc. 401(k) Plan v. Variable Annuity Life Ins. Co.*, 88 F.4th 602, 609 (5th Cir. 2023) (the definition of "party in interest" under 29 U.S.C. § 1002(14)(B) "is limited to entities that have *already begun* providing services to the plan at issue"). Plaintiffs can't clear a single one of those obstacles. Plaintiffs plead no facts suggesting that the relationship between AT&T and SSGA was anything other than arm's length, or that AT&T had any "intent to benefit" SSGA through its agreement with SSGA. And plaintiffs do not allege that SSGA assumed any role with respect to the Plan (Compl. ¶ 158) *before* it was retained as an independent fiduciary for the PRT transaction. Plaintiffs accordingly have not alleged a prohibited transaction in connection with the Plan's retention of SSGA as independent fiduciary. *See Sweda*, 923 F.3d at 339 (dismissing prohibited transaction claim because defendant was not yet a party in interest at the time of the transaction);

Sellers v. Anthem Life Ins. Co., 316 F. Supp. 3d 25, 34 (D.D.C. 2018) (same); *Divane v. Nw. Univ.*, 2018 WL 2388118, at *10 (N.D. Ill. May 25, 2018), *aff'd*, 953 F.3d 980 (7th Cir. 2020) (same); *Ramos v. Banner Health*, 1 F. 4th 769, 787 (10th Cir. 2021); *Goodman v. Columbus Reg'l Healthcare Sys., Inc.*, 2023 WL 4935004, at *2 (M.D. Ga. Aug. 2, 2023); *UFCW Loc. 56 Health & Welfare Fund v. Brandywine Operating P'ship*, 2005 WL 3555390 at *3 (D.N.J. Oct. 28, 2005).

C. Count IV fails because Athene was not a party in interest prior to the annuity transaction.

Count IV's prohibited transaction claim is likewise deficient because Plaintiffs have not adequately alleged that Athene was a "party in interest" at the time of the annuity transaction. Plaintiffs allege that Athene "was a person providing services to the Plan," Compl. ¶ 161, an apparent reference to Athene's provision of annuity coverage. But, as addressed in greater detail by SSGA in its motion to dismiss, Department of Labor guidance makes clear that annuity coverage to former participants of a plan is not a provision of services. *See* SSGA MTD at 20 (citing DOL Opinion Letter 76-36, 1976 WL 5051 (Jan. 15, 1976); *Marshall v. Carroll*, 1980 U.S. Dist. LEXIS 17767, at *27-28 (N.D. Cal. Apr. 18, 1980), *aff'd sub nom. Donovan v. Carroll*, 673 F.2d 1337 (9th Cir 1982)). And even if it were, Athene was not providing annuity coverage at the time of the annuity transaction—that coverage, after all, was the result of the annuity transaction. Nor do Plaintiffs allege that Athene was providing any other services to the Plan by the time of the PRT. That omission dooms Plaintiffs' prohibited transaction claim because § 406(a) prohibits transactions only if the counterparty is *already* a party in interest at the time of the transaction—the transaction that thereafter renders the counterparty a party in interest is not itself prohibited.[29] *See supra* at 17–19.

[29] Plaintiffs also do not plausibly allege that AT&T intended to benefit the party in interest (Athene) at participants' expense. *See Sweda*, 923 F.3d at 339–40 (to state a claim under Section 1106(a)(1)(D), a plaintiff must allege the fiduciary had subjective intent to benefit a party in interest by the use or transfer of plan assets).

In addition, the Department of Labor's Prohibited Transaction Exemption 84-24 exempts from ERISA's prohibitions transactions involving "[t]he purchase, with plan assets, of an insurance or annuity contract from an insurance company" (PTE 84–24),[30] so long as "no more than reasonable compensation is paid."[31] There are no allegations anywhere in the complaint that Athene's fees were unreasonable. To the contrary, the Complaint alleges that Athene was the cheapest annuity provider available, Compl. ¶ 17, and this allegation effectively establishes the PTE 84–24 exemption. *See Tracey v. Mass. Inst. of Tech.*, 404 F. Supp. 3d 356, 364 (D. Mass. 2019) (holding defendant met "reasonable compensation" condition for ERISA § 408(b)(8) where "the expense ratios of the Plan's non-mutual fund options were comparable to or less expensive than fees of similar investments during the class period"); *Turner*, 530 F. Supp. 3d at 138 (dismissing prohibited transaction claim because "plaintiffs 'must plead something to show why the exemption would not apply'"); *Cunningham v. Cornell Univ.*, 86 F.4th 961, 975 (2d Cir. 2023) (similar). And Plaintiffs lack standing to challenge the reasonableness of the transaction from the Plan's perspective in any case, since they are no longer participants in it. *See Becker v. Weinberg Grp., Inc. Pension Tr.*, 473 F. Supp. 2d 48, 67 (D.D.C. 2007) (defined benefit plan participant who had already received benefits lacked standing to assert prohibited transaction claim on behalf of plan because there was "no remedy recoverable by the Plan in which she ha[d] an interest").

CONCLUSION

For the foregoing reasons, AT&T respectfully requests that the Court grant its motion and dismiss the Complaint in its entirety.

[30] *See* 71 Fed. Reg. 5887, 5889 (Feb. 3, 2006).

[31] AT&T incorporates by reference SSGA's arguments that the PRT was also subject to the exemptions from the prohibited transaction rules in ERISA § 408(b)(17) and PTE 84-14. *See* SSGA MTD at 18–20.

Dated: June 5, 2024

Respectfully Submitted,

/s/ Meaghan VerGow

O'MELVENY & MYERS LLP
Meaghan VerGow (*pro hac vice*)
Brian D. Boyle (*pro hac vice* forthcoming)
Shannon M. Barrett (*pro hac vice*)
1625 Eye Street, NW
Washington, DC 20006-4001
Tel: (202) 383-5300
Fax: (202) 383-5414
mvergow@omm.com
bboyle@omm.com
sbarrett@omm.com

O'MELVENY & MYERS LLP
William Pollak (*pro hac vice*)
1301 Avenue of the Americas
New York, NY 10019
Tel: (212) 326-2000
Fax: (212) 326-2061
wpollak@omm.com

NUTTER, McCLENNEN & FISH LLP
Ian D. Roffman, BBO# 637564
Mark C. Jensen, BBO# 646662
155 Seaport Blvd.
Boston, MA 02210
Tel: (617) 439-2000
Fax: (617) 310-9000
iroffman@nutter.com
mjensen@nutter.com

Counsel for Defendants AT&T Inc. and AT&T Services, Inc.

CERTIFICATE OF SERVICE

I, Meaghan VerGow, hereby certify that on June 5, 2024, I electronically filed the foregoing document, captioned "Memorandum of Law in Support of AT&T's Motion to Dismiss Plaintiffs' Complaint," using the CM/ECF system, which will send notification of such filing to all parties and counsel of record in the above-captioned case.

/s/ Meaghan VerGow
Meaghan VerGow

Counsel for Defendants AT&T Inc. and AT&T Services, Inc.