UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MELINA N. JACOBS, On Behalf of Herself and All Others Similarly Situated,

Plaintiff,

- against -

VERIZON COMMUNICATIONS, INC.; VERIZON INVESTMENT MANAGEMENT CORP.; THE VERIZON EMPLOYEE BENEFITS COMMITTEE; MARC C. REED; MARTHA DELEHANTY; ANDREW H. NEBENS; CONNIA NELSON; SHANE SANDERS; ROBERT J. BARISH; DONNA C. CHIFFRILLER; FIDELTY MANAGEMENT TRUST COMPANY; AND FIDELITY INVESTMENTS INSTITUTIONAL OPERATIONS COMPANY, INC.,

Defendants.

ORDER

16 Civ. 1082 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

Plaintiff Melina N. Jacobs brings this putative class action pursuant to Sections 404 and 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001 et. seq. Plaintiff claims that Verizon Communications Inc. ("Verizon"), Verizon Investment Management Corp. ("VIMCO"), the Verizon Employee Benefits Committee (the "Benefits Committee"), and certain individual members of the Benefits Committee (collectively, the "Verizon Defendants"), breached their fiduciary duties under ERISA by providing 401(k) plans to Verizon employees that were "overly complex, overly risky, and . . . layered with [excessive] fees." (Cmplt. (Dkt. No. 1) ¶ 9) Plaintiff further asserts that Defendants Fidelity Management Trust Company and Fidelity Investments Institutional Operations Company, Inc.

(the "Fidelity Defendants") – which provided "trust services, recordkeeping and information management services" for Verizon's 401(k) plans (id. ¶¶ 39-40) – and the Verizon Defendants, "failed in their separate fiduciary obligation to disclose to [Plan] participants sufficient information to enable them to effectively manage their accounts and exercise their rights under the Verizon Plans and ERISA." (Id. ¶ 10)

The Verizon Defendants and the Fidelity Defendants have moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6). (Notice of Motion (Dkt. Nos. 52, 57))

BACKGROUND[1]

I. THE COMPLAINT'S FACTUAL ALLEGATIONS

Jacobs is a participant in the Verizon Savings Plan for Management Employees, and the Complaint purports to assert claims on behalf of participants in and beneficiaries of this Plan, as well as on behalf of participants in and beneficiaries of the Verizon Savings & Security Plan for Mid-Atlantic Associates, the Verizon Savings & Security Plan for New York & New England Associates, and the Verizon Savings & Security Plan for West Region Hourly Employees (the "Verizon Plans)."[2] (Cmplt. (Dkt. No. 1) ¶¶ 34, 110(a), 111(a)) The Complaint does not allege when any of the Verizon Plans were created, nor does it specify a class period. It appears that Plaintiff's claims are directed at circumstances as of 2014, however. (See, e.g., id. ¶ 3(d) (alleging that the Verizon Plans held more than $30 billion in assets as of December 31, 2014); id. ¶ 111(a) (alleging that the Verizon Plans had "more than 140,000 participants . . . at the end of the 2014 plan year"))

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[1] The facts set forth in this opinion are drawn from the Complaint and are presumed true for purposes of resolving Defendants' motions to dismiss. See Kassner v. 2nd Ave. Delicatessen Inc., 496 F.3d 229, 237 (2d Cir. 2007).

[2] The Complaint alleges that all of the Verizon plans are "employee pension benefit plans within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A)." (Cmplt. (Dkt. No. 1) ¶ 35)

The Complaint alleges that

> Verizon created a multi-dimensional labyrinth of actively-managed "custom" investment choices [for participants in the Verizon Plans], each with multiple layers of investment management for which there is very little publicly-available information, and for which there are undisclosed and undiscoverable layers of fees that are nearly impossible for participants in Verizon's retirement plans to understand or evaluate. Each of these designated investment alternatives (the "Verizon Custom Funds") is effectively a fund-of-funds. For example, the "Large Company Fund" is a pool of assets that are divided among seven different other funds. The "U.S. Small Company Fund" allocates its assets equally among six different asset managers. The International Company Fund is invested in seven underlying funds. VIMCO selected each of those underlying funds and determined the percentage of each fund [that would] be allocated to each manager.

(Id. ¶ 12)

One of the investment options offered by the Verizon Plans is a Target Date Fund, or "TDF." Target Date Funds

> are a type of asset allocation fund[]. . . . TDFs are designed to allow retirement plan participants to invest in a single fund with a professionally-managed and broadly-diversified portfolio that becomes more conservative as the participant approaches retirement age. . . .
>
> . . . .
>
> The risk profile of each fund in the Verizon TDF series is managed by allocating assets of each TDF in varying percentages among the Verizon Custom Funds, which are designated investment alternatives (investment choices) for the Verizon Plans, and among four other custom funds. . . .

(Id. ¶¶ 14-15, 17) "During the period of [Plaintiff's] participation in the [Verizon Savings Plan for Management Employees], her account has been invested in the Verizon 2040 TDF, the Emerging Markets Fund, the Conservative Fixed Income Fund, and the Verizon Company Stock Fund." (Id. ¶ 34)

Plaintiff alleges that "Defendants' introduction of the Global High Yield Fund, the Commodities Fund, the Global Equity With Currency Overlay Fund[,] and the Global Listed Infrastructure Fund (collectively, the 'Alternative Investments') to the asset allocation mix of the Verizon TDFs imposed significant additional risk on all ten of the TDFs." (Id. ¶ 102) "[A]dding higher-risk investments to the TDFs at the time was . . . inconsistent with the conduct of a reasonable fiduciary." (Id. ¶ 103)

Plaintiff further alleges that

> [a]ll of the [Verizon] TDFs have substantially underperformed popular, low-fee, passively-managed TDFs offered by Vanguard. . . . Verizon employees would have fared far better had Defendants simply offered them the option of investing in "off-the-shelf" Vanguard TDFs rather than riskier actively-managed custom-designed funds with higher and more complex fee structures.

(Id. ¶¶ 62-63)

According to Plaintiff, Defendant VIMCO did not

> effectively monitor the managers it [] selected to invest the assets of its custom funds, as evidenced by the persistently poor performance of the Global Opportunity Fund. Over a ten-year period, this fund had an average annual return of 1.74% compared to its benchmark, which returned 10.37% over that same ten-year period. The investment earnings of the Global Opportunity Fund barely beat a money market fund that returned 1.70% annually for the ten-year measurement period.
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> Despite this poor performance, the Global Opportunity Fund has the highest expense ratio of any of the Verizon Plans' investment choices and remains one of the core investment choices for the Verizon Plans and one of the funds that receives an allocation from each of the TDFs. And again, despite this poor performance, the allocation to the Global Opportunity Fund within the TDF family increases over time. . . .

(Id. ¶¶ 70-71)

Plaintiff also alleges that Defendants failed to fulfill their fiduciary duties pertaining to disclosures. Plaintiff states that Fidelity – as recordkeeper for the Verizon Plans – was obligated to provide Verizon with information to be disclosed under ERISA § 408(b)(2) and 29 C.F.R. § 2550.408b-2(c), as well as the Form 5500 Annual Return. (Id. ¶ 78)[3] Plaintiff

[3] The Department of Labor ("DOL") issued regulations requiring 401(k) plan service providers to file certain disclosures through an annual report called "Form 5500." (Id. ¶ 45 (citing 29 C.F.R. § 104a-5)) "The Form 5500 is an 'Annual Return/Report of Employee Benefit Plan.'" Malinowski v. Lichter Grp., LLC, No. Civ. WDQ-14-917, 2015 WL 857511, at *1 n.9 (D. Md. Feb. 26, 2015) (citing 29 C.F.R. § 2520.103–1(b)(1) (2013)); see U.S. Department of Labor, Form 5500 Series, https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-

asserts that Fidelity was also delegated the authority to design and produce a participant fee disclosure statement on behalf of Verizon that would comply with ERISA's disclosure requirements. (Id. ¶ 79) According to Plaintiff, "Fidelity persistently failed to accurately report information required to be provided to Verizon as Plan Administrator for purposes of filing the Verizon Plans' Annual Return on Form 5500 in order to conceal the amount of compensation Fidelity was receiving for providing recordkeeping services to the Verizon Plans." (Id. ¶ 108)

Plaintiff further contends that "Fidelity failed to report the amount of indirect compensation it has received in connection with participants' investments in the Verizon Plans' designated investment alternatives for both [Form] 5500 reporting purposes and in preparing the Participant Fee Disclosure." (Id. ¶ 85; see id. ¶¶ 88-91) Plaintiff asserts that Fidelity "deliberately" concealed the total amount of compensation it received and the portion of the expense ratio of the Verizon Plans' investment choices that was applied to pay recordkeeping expenses, and that the "failure to disclose that compensation is a violation of Fidelity's and Verizon's reporting requirements under [the Employee Benefit Security Administration ('EBSA')] and [Department of Labor ('DOL')] regulations, and a violation of Verizon's and Fidelity's fiduciary obligation under ERISA § 404(a)." (Id. ¶¶ 91-92)

II. THE COMPLAINT'S CAUSES OF ACTION

The Complaint was filed on February 11, 2016. (Cmplt. (Dkt. No. 1)) In the First Claim for Relief, Plaintiff asserts an ERISA § 502(a)(2) and (3) breach of fiduciary duty claim against both the Verizon Defendants and Fidelity. Plaintiff alleges that

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administration-and-compliance/reporting-and-filing/form-5500 (last visited Sept. 27, 2017) ("[T]he Form 5500 Series forms [satisfy] annual reporting requirements under Title I and Title IV of ERISA and under the Internal Revenue Code."). Form 5500 is required to be filed with the Internal Revenue Service ("IRS") and DOL. See In re Ins. Brokerage Antitrust Litig., No. Civ. 04-5184 (GEB), 2008 WL 141498, at *3 (D.N.J. Jan. 14, 2008).

> Defendants' appointment of fiduciaries, design of the TDFs and the underlying custom funds, and monitoring of the performance of and fees charged by the various managers of those funds, violated their fiduciary duties to act prudently and solely in the interests of plan participants. . . .
>
> Defendants' failure to properly disclose investment-related information required by 29 U.S.C. § 2550.404a-5 is a breach of the Defendants' express fiduciary obligation to ensure that participants have adequate information to effectively exercise their rights under the Verizon plans.

(Id. ¶¶ 119-20)

In the Second Claim for Relief – asserted against the Verizon Defendants – Plaintiff asserts an ERISA § 502(a)(2) and (3) breach of fiduciary duty claim. Plaintiff contends that Verizon breached its fiduciary duty to monitor Verizon Plan investment choices, and to remove imprudent investment options. More specifically, Plaintiff contends that the Global Opportunity Fund was not a prudent investment option:

> The Global Opportunity Fund has performed poorly for many years despite having the highest fees of any of the Verizon Plans' available investment choices, yet the Verizon Defendants persistently failed to take any corrective action and continued to maintain significant allocations of TDF assets to the Global Opportunity Fund.
>
> The Verizon Defendants' failure to adequately monitor the performance of the Global Opportunity Fund and the failure to take any corrective action regarding that fund despite obvious and long-term underperformance has caused the Verizon Plans to incur losses from diminution of investment returns as well as excessive fees in an amount to be proven at trial and Defendants are liable for such losses.

(Id. ¶¶ 127-28)

In the Third Claim for Relief – asserted against the Verizon Defendants and Fidelity – Plaintiff asserts an ERISA § 404(a)(1) breach of fiduciary duty claim premised on Fidelity's failure to disclose its compensation, and the Verizon Defendants' failure to correct Fidelity's alleged defective disclosures:

> The Fidelity Defendants delivered false and misleading information regarding its direct and indirect compensation for purposes of the filing [of] the Verizon Plans' Annual Return on Form 5500.

> Fidelity designed the Participant Fee Disclosure [but] failed to disclose its compensation in any meaningful manner, in direct contravention of DOL regulations that focus specifically on the disclosure of administrative expenses charged directly or indirectly to participant accounts.
>
> The Verizon Defendants knew or should have known [that] Fidelity's disclosures were incomplete, false and misleading, and failed to take any reasonable action to require that those deficiencies be corrected, and either actively participated in the disclosure failure or chose to be willfully ignorant of Fidelity's failure.
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> As a result of Defendants' failures to satisfy their disclosure requirements, Plaintiff and the proposed Class have suffered from an inability [to] properly [] understand and enforce their rights under the Verizon Plans and to manage their accounts.

(Id. ¶¶ 131-34)

III. DEFENDANTS' RULE 12(b)(6) MOTIONS TO DISMISS

In support of their Rule 12(b)(6) motion to dismiss, the Verizon Defendants contend

> as to the First Claim for Relief, that Plaintiff has not pled facts sufficient to demonstrate that (1) the Target Date Funds or their investment choices were imprudent, (2) the fees associated with the Target Date Funds were excessive; or (3) that Verizon's disclosures regarding the Target Date Funds were inadequate;
>
> as to the Second Claim for Relief, that Plaintiff has not pled facts sufficient to demonstrate that the Verizon Defendants' monitoring of the Global Opportunity Fund was inadequate; and
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> as to the Third Claim for Relief, that Plaintiff lacks standing and that, in any event, the regulations on which Plaintiff relies do not require the disclosures she seeks.

(See Verizon Br. (Dkt. No. 58))

In support of its Rule 12(b)(6) motion to dismiss, Fidelity argues that (1) the Participant Fee Disclosure Rule does not require the disclosures Plaintiff seeks; (2) only a plan administrator has a fiduciary duty of disclosure, and Fidelity is a mere recordkeeper; (3) Plaintiff has not alleged that Fidelity had any duty with respect to Form 5500 and, in any event, there is no private right of action to challenge Form 5500 filings; and (4) Plaintiff lacks Article III standing to assert her disclosure claims. (See Fidelity Br. (Dkt. No. 53))

DISCUSSION

I. MOTION TO DISMISS STANDARD

A Rule 12(b)(6) motion challenges the legal sufficiency of the claims asserted in a complaint. "To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must 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)). These factual allegations must be "sufficient 'to raise a right to relief above the speculative level.'" ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) (quoting Twombly, 550 U.S. at 555). "In considering a motion to dismiss . . . the court is to accept as true all facts alleged in the complaint[,]" Kassner v. 2nd Ave. Delicatessen Inc., 496 F.3d 229, 237 (2d Cir. 2007) (citing Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 87 (2d Cir. 2002)), and must "draw all reasonable inferences in favor of the plaintiff." Id. (citing Fernandez v. Chertoff, 471 F.3d 45, 51 (2d Cir. 2006)).

A complaint is inadequately pled "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement,'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557), and does not provide factual allegations sufficient "to give the defendant fair notice of what the claim is and the grounds upon which it rests." Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121 (2d Cir. 2007) (citing Twombly, 550 U.S. at 555).

"When determining the sufficiency of plaintiff['s] claim for Rule 12(b)(6) purposes, consideration is limited to the factual allegations in plaintiff['s] . . . complaint, . . . to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiff['s] possession or of which plaintiff[] had knowledge and relied on in bringing suit." Brass v. Am. Film Tech., Inc., 987 F.2d 142, 150 (2d Cir. 1993).

II. ANALYSIS

A. Defendants' Motions to Dismiss Plaintiff's First Claim for Relief

In the Complaint's First Claim for Relief, Plaintiff alleges that the

> [Verizon] Defendants' appointment of fiduciaries, design of the TDFs and the underlying custom funds, and monitoring of the performance of and fees charged by the various managers of those funds, violated their fiduciary duties to act prudently and solely in the interests of plan participants. . . .

(Cmplt. (Dkt. No. 1) ¶ 119)[4]

As an initial matter, with respect to Plaintiff's complaint concerning the Verizon Defendants' "appointment of fiduciaries," the Complaint does not contain any allegations regarding the allegedly imprudent appointment of VIMCO. Plaintiff's conclusory assertion that the Verizon Defendants' breached their fiduciary duties by their appointment of fiduciaries is not sufficient under Iqbal and Twombly. See Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 570; Fisher v. JP Morgan Chase & Co., 703 F. Supp. 2d 374, 389 (S.D.N.Y. 2010), aff'd, 469 F. App'x 57 (2d Cir. 2012) (plaintiffs' allegation that the "defendants failed to appoint fiduciaries with the knowledge, skill, and expertise necessary to manage the Plan assets" was – by itself – "conclusory" and "insufficient to state a plausible claim to relief").

[4] The First Claim for Relief also alleges that the Verizon Defendants and Fidelity failed "to properly disclose investment-related information required by 29 C.F.R. § 2550.404a-5." (Id. ¶ 120) Because Plaintiff's Third Claim for Relief is premised on Defendants' alleged disclosure violations, this aspect of the First Claim for Relief is discussed below in connection with Defendants' motions to dismiss Plaintiff's Third Claim for Relief.

Plaintiff also alleges that the Verizon Defendants' "design of the TDFs and the underlying custom funds . . . violated their fiduciary duties to act prudently," as "the Verizon Defendants designed an investment structure for the Verizon Plans that was overly complex, overly risky, and inappropriate for the average Verizon employee." (Cmplt. (Dkt. No. 1) ¶¶ 9, 119; see id. at ¶ 102 (the introduction of the "Alternative Investments" to the Verizon Target Date Funds "imposed significant additional risk on all ten of the TDFs"))

With respect to Plaintiff's complaint that the Verizon Plans included "risky" investments, "[p]ursuant to ERISA implementing regulations . . . a fiduciary's compliance with the prudent-man standard requires that the fiduciary give 'appropriate consideration' to whether an investment 'is reasonably designed, as part of the portfolio . . . to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment." St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 716 (2d Cir. 2013) (citing 29 C.F.R. § 2550.404a–1(b)(2)(i)). "Accordingly, the prudence of each investment is not assessed in isolation but, rather, as the investment relates to the portfolio as a whole." Id. at 716-17 (citing Cal. Ironworkers Field Pension Trust v. Loomis Sayles & Co., 259 F.3d 1036, 1043 (9th Cir. 2001); Laborers Nat'l Pension Fund v. N. Trust Quantitative Advisors, Inc., 173 F.3d 313, 322 (5th Cir. 1999)).

A plan is not per se imprudent merely because it incorporates risky investments. The structure of target date funds has been recognized by the U.S. Department of Labor as a prudent structure that can be offered as a qualified default investment alternative. See 29 C.F.R. § 2550.404c-5(e)(4)(i) ("[A] qualified default investment alternative . . . [includes a]n investment fund product or model portfolio that applies generally accepted investment theories, is diversified so as to minimize the risk of large losses and that is designed to provide varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures based on the participant's age, target retirement date . . . or life expectancy. Such products and portfolios change their asset allocations and associated risk levels over time with the objective of becoming more conservative . . . with increasing age. . . . [A]sset allocation decisions for such products and portfolios are not required to take into account risk tolerances, investments or other preferences of an individual participant. An example of such a fund or portfolio may be a 'life-cycle' or 'targeted-retirement-date' fund or account."). Moreover, the DOL requires a plan to offer a "broad range of investment alternatives" that are "diversified" and have "materially different risk and return characteristics." 29 C.F.R. § 2550.404c-1(b)(3). Here – a year after the Alternative Funds were added to the asset allocation mix – the rate of return for Plaintiff's Plan – Verizon 2040 TDF – actually increased from 13.47% to 15.50%. (See Cmplt. (Dkt. No. 1-2) Ex. 2 at S-21)

"[N]othing in the [ERISA] statute [] requires plan fiduciaries to include any particular mix of investment vehicles in their plan." Hecker v. Deere & Co., 556 F.3d 575, 586 (7th Cir. 2009). Therefore, to the extent that the First Claim for Relief can be understood to allege a breach of fiduciary duty premised on the Verizon Defendants' inclusion of "risky" investment options in the Target Date Funds, those allegations are insufficient.

Plaintiff also alleges that the "[Verizon] Defendants' . . . monitoring of the performance of and fees charged by the various managers of [the Target Date Funds], violated their fiduciary duties to act prudently and solely in the interests of plan participants." (Cmplt. (Dkt. No. 1) ¶ 119) Plaintiff complains that

> [a]ll of the [Verizon] TDFs have substantially underperformed popular, low-fee, passively-managed TDFs offered by Vanguard. . . . Verizon employees would have fared far better had Defendants simply offered them the option of investing in "off-the-shelf"

> Vanguard TDFs rather than riskier actively-managed custom-designed funds with higher and more complex fee structures.

(Id. ¶¶ 62-63)

In the Complaint, Plaintiff offers two charts labelled "Verizon vs Vanguard Target Date Funds" and "Verizon vs Custom Index Target Date Funds." (Id. ¶¶ 62, 64) Neither chart identifies what year or years is being analyzed, nor do the charts provide numerical values demonstrating Vanguard's alleged superior performance. Although Plaintiff states – in a footnote – that "[t]he data used in [one of the charts] is derived from reported returns for the Vanguard Total Bond Market Index, the Vanguard Total Stock Market Index, and the Vanguard Total International Stock Index," none of the referenced Vanguard funds is a target date fund. (Id. ¶ 64 n.16)

Even if the Complaint plausibly alleged that Vanguard's target date funds outperformed the Verizon TDFs, "[t]he ultimate outcome of an investment is not proof of imprudence or breach of fiduciary duties." Laboy v. Bd. of Trustees of Bldg. Serv. 32 BJ SRSP, No. 11 Civ. 5127 (HB), 2012 WL 701397, at *2 (S.D.N.Y. Mar. 6, 2012) (quoting Flanigan v. Gen. Elec. Co., 93 F. Supp. 2d 236, 254 (D. Conn. 2000) (citing Debruyne v. Equitable Life Assurance Co., 920 F.2d 457, 465 (7th Cir. 1990))). Instead, a plaintiff must allege sufficient "nonconclusory factual content raising a plausible inference of misconduct [that] does not rely on the vantage point of hindsight." St. Vincent, 712 F.3d at 718 (internal citation and emphasis omitted). "Decisions in which courts have allowed allegations of imprudence to go forward rested on allegations that the defendants selected certain funds out of self-interest or demonstrated clear incompetence." Laboy, 2012 WL 701397, at *2 (granting motion to dismiss despite plaintiff's allegation that eight funds outperformed the defendant fund and observing that there was no claim of self-dealing) (citing Braden v. Wal–Mart Stores, Inc., 588 F.3d 585, 592-

93 (8th Cir. 2009) (concluding that "the process by which [fiduciaries] selected and managed the funds in the plan [was] tainted by failure of effort, competence, or loyalty")).

Plaintiff does not allege self-interest here. As to incompetence, Plaintiff's conclusory allegations that Vanguard stock funds fared better are not sufficient to sustain a claim for breach of the duty of prudence.

As discussed above, Plaintiff also complains that "the Verizon Defendants designed an investment structure for the Verizon Plans that was overly complex, overly risky, and inappropriate for the average Verizon employee." (Cmplt. (Dkt. No. 1) ¶¶ 9, 119) As alleged in the Complaint, however, "[t]he investment strategy of each [TDF] fund is based on a level of risk generally deemed appropriate for someone who expects to retire in the year of the fund's target date." (Cmplt. (Dkt. No. 1) ¶ 15) "The investment strategy assumes greater risk in the fund's early years and grows more conservative over time." (Id. ¶ 51) Moreover, the structure of target date funds has been recognized by the DOL as a prudent design structure. See 29 C.F.R. § 2550.404c-5(e)(4)(i). Moreover, the DOL requires ERISA savings plans to offer a "broad range of investment alternatives" that are "diversified" and have "materially different risk and return characteristics." 29 C.F.R. § 2550.404c-1(b)(3).

While offering plan participants a broad array of investment options brings more complexity to the exercise of choosing appropriate investments, "courts have bristled at 'paternalistic' theories that suggest ERISA 'forbids plan sponsors to allow participants to make their own choices.'" Sacerdote v. New York Univ., No. 16 Civ. 6284 (KBF), 2017 WL 3701482, at *11 (S.D.N.Y. Aug. 25, 2017) (quoting Loomis v. Exelon Corp., 658 F.3d 667, 673 (7th Cir. 2011)); see id. ("find[ing] that plaintiff[s'] allegations regarding unnecessary and excessive fee layers are insufficient (as pled) to support a prudence claim"; "the Court agree[d] with defendant that plaintiffs' allegations regarding [defendant's] purportedly 'dizzying array' of investments [and] 'investment style' do not support a prudence claim").

Plaintiff's conclusory allegations that the Verizon Plans' offerings were "overly complex, overly risky, and inappropriate for the average Verizon employee" (Cmplt. (Dkt. No. 1) ¶¶ 9, 119) are not sufficient. The First Claim for Relief will be dismissed.

B. Verizon Defendants' Motion to Dismiss Plaintiff's Second Claim for Relief

In the Complaint's Second Claim for Relief, Plaintiff alleges that the Verizon Defendants breached their fiduciary duty to monitor the performance of the Global Opportunity Fund, which – according to Plaintiff – had "obvious and long-term underperformance" over a ten-year period. (Cmplt. (Dkt. No. 1) ¶¶ 70, 127-28)

1. Pleading a Breach of Fiduciary Duty Claim Founded on an Imprudent Investment Option

"ERISA imposes 'a duty of care with respect to the management of existing trust funds, along with liability for breach of that duty, upon plan fiduciaries' who administer benefit-plan assets." St. Vincent, 712 F.3d at 709 (quoting Lockheed Corp. v. Spink, 517 U.S. 882, 887 (1996)). "In particular, ERISA requires fiduciaries to use 'the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.'" Id. (quoting 29 U.S.C. § 1104(a)(1)(B)).

"[A] claim for a breach of fiduciary duty under ERISA may survive a motion to dismiss – even absent any well-pleaded factual allegations relating directly to the methods employed by the ERISA fiduciary – if the complaint 'allege[s] facts that, if proved, would show that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident.'" Id. at 718 (quoting In re Citigroup ERISA Litig., 662 F.3d 128, 141 (2d Cir. 2011) (internal quotation marks omitted)).

The "prudent person" standard asks whether "the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." Katsaros v. Cody, 744 F.2d 270, 279 (2d Cir. 1984), cert. denied, 464 U.S. 1040 (1984) (quoting Donovan v. Mazzola, 716 F.2d 1226, 1232 (9th Cir. 1983)). "Fiduciaries' prudence is measured against an objective standard, and their own 'lack of familiarity with investments is no excuse' for failing to act with the care, skill, prudence and diligence required under the circumstances then prevailing." Sacerdote, 2017 WL 3701482, at *4 (quoting Katsaros, 744 F.2d at 279).

In Tibble, the Supreme Court held that "[a] plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." Tibble, 135 S. Ct. at 1829; see Sacerdote, 2017 WL 3701482, at *7. "[T]he Second Circuit requires that, in order to state a claim for breach of the duty of prudence connected to the retention of certain investment Options, plaintiffs must raise a plausible inference that 'the investments at issue were so plainly risky at the relevant times that an adequate investigation would have revealed their imprudence, or that a superior alternative investment was readily apparent such that an adequate investigation would have uncovered that alternative'; that is, that 'a prudent fiduciary in like circumstances would have acted differently.'" Sacerdote, 2017 WL 3701482, at *7 (quoting St. Vincent, 712 F.3d at 719-20); see Leber v. Citigroup 401(K) Plan Inv. Comm., 129 F. Supp. 3d 4, 14 (S.D.N.Y. 2015) (same).

In attempting to demonstrate a breach of fiduciary duty founded on making available an imprudent investment option, a plaintiff cannot rely solely on an investment's drop in price or value. "[T]he decline in the price of a security does not, by itself, give rise to a plausible inference that the security is no longer a good investment." St. Vincent, 712 F.3d at 721 (citing Gearren v. The McGraw–Hill Cos., 660 F.3d 605, 610 (2d Cir. 2011) (an investment in company stock is not imprudent "'mere[ly]'" because the price "'trend[s] downward significantly'" (quoting Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1099 (9th Cir. 2004)))); see id. at 718 ("plaintiffs 'cannot rely, after the fact, on the magnitude of the decrease in the [relevant investment's] price'"(quoting In re Citigroup, 662 F.3d at 140)). "Nor is it necessarily sufficient to show that better investment opportunities were available at the time of the relevant decisions." Id. at 718 (citing Braden, 588 F.3d at 596 n.7 ("It is clear that 'nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund.'" (quoting Hecker, 556 F.3d at 586))). "[T]he ultimate outcome of an investment is not proof of imprudence or breach of fiduciary duties." Flanigan, 93 F. Supp. 2d at 254 (citing DeBruyne v. Equitable Life Assur. Soc. of U.S., 920 F.2d 457, 465 (7th Cir. 1990)).

"Of course, in some cases, it would be reasonable to infer from a decline in the price of a security, combined with other alleged facts, that the security no longer was a sound investment." St. Vincent, 712 F.3d at 721 (citing In re Citigroup, 662 F.3d at 141) (emphasis omitted).

"Decisions in which courts have allowed allegations of imprudence to go forward rested on allegations that the defendants selected certain funds out of self-interest or demonstrated clear incompetence." Laboy, 2012 WL 701397, at *2 (citing Braden, 588 F.3d at 592-93).

2. Application

Here, Plaintiff alleges that VIMCO did not "effectively monitor the managers . . . as evidenced by the persistently poor performance of the Global Opportunity Fund. Over a ten-year period, this fund had an average annual return of 1.74% compared to its benchmark, which returned 10.37% over that same ten-year period. The investment earnings of the Global Opportunity Fund barely beat a money market fund that returned 1.70% annually for the ten-year measurement period. (Cmplt. (Dkt. No. 1) ¶ 70) In opposing the Verizon Defendants' motion to dismiss, Plaintiff argues that VIMCO's investment in the Global Opportunity Fund was imprudent because (1) the fund's expense ratio was the highest among other investment choices available to participants; (2) the fund was a "core asset" of most of the Verizon Plan investment choices; (3) for ten years, the fund significantly underperformed its benchmark; and (4) the fund "barely outperformed a money market fund during the same measurable time period." (Pltf. Opp. To Verizon Br. (Dkt. No. 64) at 26)

The Verizon Defendants argue, however, that they "closely monitored" the Global Opportunity Fund, noting that its benchmark was adjusted twice – in 2012, and 2015. (Verizon Br. (Dkt. No. 58) at 28) The Verizon Defendants also note that the Global Opportunity Fund's fees were decreased when the benchmark was changed "to better reflect the investment objectives of the fund." (Id. (citing Cmplt. (Dkt. No. 1) Ex. 2 at S-20; Ex. 1 at 44))

The Court concludes that Plaintiff's allegations in the Second Claim for Relief are sufficient to state a claim. The Complaint pleads that the Verizon Defendants kept – as a "core asset" of most of the Verizon Plans' investment options – a fund that had wildly underperformed its benchmark over a ten-year period. This fund also barely surpassed the return of a money market investment, which offered much less risk. Finally, the Global Opportunity Fund – despite its poor performance – featured an expense ratio higher than any other investment option available to Verizon Plan participants. These allegations are sufficient to defeat a motion to dismiss. See Sacerdote, 2017 WL 3701482, at *10 (denying motion to dismiss imprudent investment claim where "[p]laintiffs allege[d] that [defendant's] funds underperformed comparable lower-cost alternatives over the preceding one-, five-, and ten-year periods"); Henderson v. Emory Univ., No. 1:16 Civ. 2920 (CAP), 2017 WL 2558565, at *4 (N.D. Ga. May 10, 2017) (denying motion to dismiss where complaint alleged that investment options "had a long history of substantial underperformance compared to . . . actively managed alternatives over the one-, five-, and ten-year periods ending December 31, 2009"); Troudt v. Oracle Corp., No. 116 Civ. 00175 (REB) (CBS), 2017 WL 1100876, at *2 (D. Colo. Mar. 22, 2017) (allegations that defendant improperly retained underperforming funds were "sufficient to suggest a lack of prudence"; allegations that a fund "greatly underperformed its benchmark in four out of five years before it was removed from the plan" was sufficient "to state a plausible claim for breach of fiduciary duty"); see also Main v. Am. Airlines Inc., No. 4:16 Civ. 00473 (O), 2017 WL 2609992, at *6-7 (N.D. Tex. Mar. 31, 2017) (plaintiffs adequately alleged a duty to monitor claim where defendants "fail[ed] to remove fiduciaries whose performance was inadequate in that they continued to maintain imprudent, excessively costly, and poorly performing investments within the Plan, all to the detriment of the Plan" (citing Urakhchin v. Allianz Asset

Mgmt. of Am., L.P., No. SACV151614JLSJCGX, 2016 WL 4507117, at *7 (C.D. Cal. Aug. 5, 2016))).

C. Defendants' Motions to Dismiss Plaintiff's Third Claim for Relief

In the Third Claim for Relief – asserted against the Verizon Defendants and Fidelity – Plaintiff asserts an ERISA § 404(a)(1) breach of fiduciary duty claim premised on Fidelity's failure to disclose its compensation, and the Verizon Defendants failure to correct Fidelity's allegedly defective disclosures:

> The Fidelity Defendants delivered false and misleading information regarding its direct and indirect compensation for purposes of the filing [of] the Verizon Plans' Annual Return on Form 5500.
>
> Fidelity designed the Participant Fee Disclosure [but] failed to disclose its compensation in any meaningful manner, in direct contravention of DOL regulations that focus specifically on the disclosure of administrative expenses charged directly or indirectly to participant accounts.
>
> The Verizon Defendants knew or should have known [that] Fidelity's disclosures were incomplete, false and misleading, and failed to take any reasonable action to require that those deficiencies be corrected, and either actively participated in the disclosure failure or chose to be willfully ignorant of Fidelity's failure.
>
> As a result of Defendants' failures to satisfy their disclosure requirements, Plaintiff and the proposed Class have suffered from an inability [to] properly [] understand and enforce their rights under the Verizon Plans and to manage their accounts.

(Cmplt. (Dkt. No. 1) ¶¶ 131-34)

In the Complaint's First Claim for Relief, Plaintiff makes what appears to be a closely related allegation:

> [The Verizon Defendants and Fidelity failed] to properly disclose investment-related information required by 29 U.S.C. § 2550.404a-5 [and thereby] breach[ed] [their] express fiduciary obligation to ensure that participants have adequate information to effectively exercise their rights under the Verizon plans.

(Id. ¶ 120)[5]

In support of her claim that the Verizon Defendants and Fidelity breached their fiduciary duties by failing to disclose Fidelity's fee structure to participants in the Verizon Plans, Plaintiff makes two arguments. First, Plaintiff contends that

> ERISA and its supporting regulations, in particular 29 C.F.R. § 2550.404a-5 (the "Participant Fee Disclosure Rule" or "2250.404a-5") require Defendants to disclose the dollar amount of administrative expenses – including the Fidelity Defendants' compensation – that they charge directly to the individual accounts of participants in the Verizon Plans who invested in the funds designed by the Target Date Fund ("TDF") models. But they each failed to do this.

(Pltf. Opp. To Fidelity Br. (Dkt. No. 63) at 7-8) Second, Plaintiff argues that "the Fidelity Defendants failed to provide [information] about their compensation information to the Verizon Defendants, which the Verizon Defendants were required to include on the Form 5500 annual reports that the plans file with the DOL." (Id. at 23) This Court will address each argument in turn.

1. The Participant Fee Disclosure Rule

On October 20, 2010, the U.S. Department of Labor ("DOL") issued a regulation – known as the Participant Fee Disclosure Rule – outlining the disclosure requirements that ERISA plan administrators must follow to comply with their fiduciary duties. See 29 C.F.R. § 2550.404a–5. Pursuant to this regulation, the plan administrator

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[5] Although it is not clear from the Complaint what Plaintiff means when she alleges, in the First Claim for Relief, that the Verizon Defendants and Fidelity "fail[ed] to properly disclose investment-related information" (id. ¶ 120), Plaintiff states in her opposition brief that "Counts I and III state a claim that all defendants failed to make required disclosures to participants regarding fees paid by the plans." (Pltf. Opp. To Fidelity Br. (Dkt. No. 63) at 8) Because the Complaint does not disclose what "investment-related information" was required to be disclosed beyond the fee-related allegations set forth in the Third Claim for Relief, this Court regards the disclosure issue alleged in the First Claim for Relief as duplicative of the allegations set forth in the Third Claim for Relief.

> must take steps to ensure . . . that such participants and beneficiaries, on a regular and periodic basis, are made aware of their rights and responsibilities with respect to the investment of assets held in, or contributed to, their accounts and are provided sufficient information regarding the plan, including fees and expenses . . . attendant thereto, to make informed decisions with regard to the management of their individual accounts.

29 C.F.R. § 2550.404a–5(a).

The requirements for disclosing "administrative" costs are set forth in 29 C.F.R. § 2550.404a-5(c)(2).[6] Required disclosures for administrative expenses include "[t]he dollar

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[6] Section 2550.404a-5(c)(2)'s requirements for disclosing "administrative expenses" are as follows:

> (c) Disclosure of plan-related information. A plan administrator (or person designated by the plan administrator to act on its behalf) shall provide to each participant or beneficiary the plan-related information described in paragraphs (c)(1) through (4) of this section, based on the latest information available to the plan.
>
> . . . .
>
> (2) Administrative expenses.
>
> (i)(A) On or before the date on which a participant or beneficiary can first direct his or her investments and at least annually thereafter, an explanation of any fees and expenses for general plan administrative services (e.g., legal, accounting, recordkeeping), which may be charged against the individual accounts of participants and beneficiaries and are not reflected in the total annual operating expenses of any designated investment alternative, as well as the basis on which such charges will be allocated (e.g., pro rata, per capita) to, or affect the balance of, each individual account.
>
> . . . .
>
> (ii) At least quarterly, a statement that includes:
>
> (A) The dollar amount of the fees and expenses described in paragraph (c)(2)(i)(A) of this section that are actually charged (whether by liquidating shares or deducting dollars) during the preceding quarter to the participant's or beneficiary's account for such services;
> (B) A description of the services to which the charges relate (e.g., plan administration, including recordkeeping, legal, accounting services); and
> (C) If applicable, an explanation that, in addition to the fees and expenses disclosed pursuant to paragraph (c)(2)(ii) of this section, some of the plan's administrative expenses for the preceding quarter were paid from the total annual operating expenses of one or more of the plan's designated investment alternatives (e.g., through revenue sharing arrangements, Rule 12b-1 fees, sub-transfer agent fees).

amount of the fees and expenses . . . that are actually charged . . . to the participant's or beneficiary's account for such services." 29 C.F.R. § 2550.404a-5(c)(2)(ii)(A). Plaintiff concedes, however, that the Verizon Defendants' disclosure "explicitly states that each participant's account is charged an annual recordkeeping fee of $25." (Cmplt. (Dkt. No. 1) ¶ 91)

Where recordkeeping services are paid for through revenue-sharing arrangements, however – for example, where an investment fund offered in an ERISA plan transfers to a record-keeper some portion of its fees – Plan administrators need not disclose the exact amounts remitted to the record-keeper. Instead, the regulation instructs Plan administrators to provide in quarterly statements

> an explanation that . . . some of the plan's administrative expenses for the preceding quarter were paid from the total annual operating expenses of one or more of the plan's designated investment alternatives (e.g., through revenue sharing arrangements, Rule 12b–1 fees, sub-transfer agent fees).

29 C.F.R. § 2550.404a-5(c)(2)(ii)(C).

Here, according to Plaintiff, the Verizon Defendants' disclosure statement reads: "Remaining Plan administrative fees that are paid by the Plan are charged to the Tier 1 and Tier 2 investment options other than the PIMCO Real Return Bond Fund. These fees are included in determining the asset-based fees of each affected investment option." (Cmplt. (Dkt. No. 1) ¶ 91)[7]

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29 C.F.R. § 2550.404a-5(c)(2).

[7] Plaintiff asserts in her opposition brief that the Target Date Funds are not designated investment alternatives, and that therefore the dollar amount – rather than a general explanation – should have been disclosed under 29 C.F.R. § 2550.404a-5(c)(2)(ii)(C). (Pltf. Opp. To Fidelity Br. (Dkt. No. 63) at 12) Plaintiff's argument that Target Date Funds are not designated investment alternatives contradicts the Complaint, however, which pleads that "the Verizon Custom Funds[] [-- which include the Target Date Funds --] are designated investment alternatives (investment choices) for the Verizon Plans." (Cmplt. (Dkt. No. 1) ¶ 17) Indeed, in opposing the Verizon Defendants' motion to dismiss, Plaintiff refers to the Target Date Funds as "designated investment alternatives." (See Pltf. Opp. To Verizon Br. (Dkt. No. 64) at 15 ("the TDF series was the designated investment alternative for every participant in the Plans that did

Although Plaintiff argues that the Verizon Defendants' participant fee disclosures are deficient because they do not disclose what "portion of the expense ratio of the Verizon Plans' investment choices [was] being applied to pay recordkeeping expenses" (Cmplt. (Dkt. No. 1) ¶ 91), the DOL has instructed that "the revenue sharing explanation required by paragraph (c)(2)(ii)(C)" need not "itemize or identify the specific plan administrative expenses being paid from the total annual operating expenses of one or more of the plan's designated investment alternatives." DOL, Fee Disclosure Guidance, Field Assistance Bulletin No. 2012-02R, at Q-10 (July 30, 2012); available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2012-02r (last visited Sept. 28, 2017).[8] See Terraza

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not make an affirmative investment selection")) Moreover, and contrary to Plaintiff's assertion (see Pltf. Opp. To Fidelity Br. (Dkt. No. 63) at 12), the Participant Fee Disclosure Rule expressly defines the term "designated investment alternative" as "any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts." 29 C.F.R. § 2550.404a-5(h)(4). Accordingly, Plaintiff's argument that Target Date funds are not designated investment alternatives is not persuasive.

[8] The DOL issued "Field Assistance Bulletin No. 2012-02R" in order to "provid[e] guidance on some of the most frequently asked questions concerning the participant-level disclosure regulation and how it may be implemented." Id. DOL's guidance bulletin includes the following question and answer relevant to the instant dispute:

> Q10: Must the revenue sharing explanation required by paragraph (c)(2)(ii)(C) of the regulation itemize or identify the specific plan administrative expenses being paid from the total annual operating expenses of one or more of the plan's designated investment alternatives?
>
> A10: No. Paragraph (c)(2)(ii)(C) of the regulation requires at least quarterly, "[i]f applicable, an explanation that, in addition to the fees and expenses disclosed pursuant to paragraph (c)(2)(ii) of this section, some of the plan's administrative expenses for the preceding quarter were paid from the total annual operating expenses of one or more of the plan's designated investment alternatives . . . [.]" This explanation would be required, for example, when a plan's administrative expenses are paid through revenue sharing arrangements, Rule 12b-1 fees, or sub-transfer agent fees. The Department is concerned that, without this explanation, some participants and beneficiaries would believe that there are few or no administrative expenses associated with their participation in the plan when, in fact, significant amounts may be paid for administrative services from investment-related charges. As the Department explained in the preamble to the final regulation, some information, even if general, would

v. Safeway Inc., No. 16 Civ. 03994 (JST), 2017 WL 952896, at *9 (N.D. Cal. Mar. 13, 2017) ("Nor are fiduciaries [] required to disclose the 'breakdown' of the gross expense ratio associated with each investment option – e.g., the percentage of the total fee that ultimately goes to the trustee as opposed to the record-keeper.").

Only an "explanation" that "some of the plan's administrative expenses for the preceding quarter were paid from the total annual operating expenses of one or more plan's designated investment alternatives" is necessary. Fee Disclosure Guidance, Field Assistance Bulletin No. 2012-02R, at Q-10. The "exact dollar amount" that Plaintiff demands (see Cmplt. (Dkt. No. 1) ¶ 91) – is not required. As the Seventh Circuit explained in Hecker, "[t]he total fee, not the internal, post-collection distribution of the fee, is the critical figure for someone interested in the cost of including a certain investment in her portfolio and the net value of that investment." Hecker, 556 F.3d at 586. Information regarding "[t]he later distribution of the fees . . . is not information the participants need[] to know to keep from acting to their detriment," and "thus [is] not material." Id.

> help participants and beneficiaries to better understand that there are administrative fees and expenses attendant to the operation of their plan and that some of those fees and expenses might be indirectly paid by the plan's designated investment alternatives.
>
> Consistent with that view, the Department does not interpret paragraph (c)(2)(ii)(C) of the regulation as requiring an identification of the specific plan administrative expense or expenses being paid or an identification of the specific designated investment alternative or alternatives making the payment. Rather, a statement that some or all of the plan's administrative expenses are paid indirectly through some or all of the plan's designated investment alternatives will satisfy this specific requirement. Of course, paragraph (c)(2)(ii)(C) does not preclude a more detailed explanation identifying the specific administrative expense or expenses being underwritten or an identification of the specific designated investment alternative or alternatives from which the payment is being made.

Id. (emphasis omitted).

The Second Circuit has held that an ERISA fiduciary "has no duty to disclose to plan participants information additional to that required by ERISA." Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 99, 102 (2d Cir. 2005) (rejecting claim that health insurer breached ERISA disclosure obligations by failing to inform participants that it based coverage decisions on undisclosed cost-based criteria because ERISA contained no such disclosure requirement); Slaymon v. SLM Corp., 506 F. App'x 61, 64 (2d Cir. 2012) (rejecting plaintiff's claim that Plan fiduciaries breached their fiduciary duty by failing to disclose nonpublic investment information to Plan participants because "ERISA fiduciaries do not have a general duty to disclose nonpublic investment information to plan participants beyond what is called for in ERISA's comprehensive set of reporting and disclosure requirements") (internal quotation marks omitted); Krauss v. Oxford Health Plans, Inc., 418 F. Supp. 2d 416, 430 (S.D.N.Y. 2005), aff'd, 517 F.3d 614 (2d Cir. 2008) (dismissing disclosure claim for failure to distribute particular schedules and policies because "ERISA in no way requires such disclosure") (emphasis omitted).

The Third Claim for Relief will be dismissed to the extent it is premised on the argument that the Verizon Defendants and Fidelity violated the Participant Fee Disclosure Rule, 29 C.F.R. § 2550.404a–5.

2. Form 5500

Plaintiff also claims that "[t]he Fidelity Defendants delivered false and misleading information regarding [their] direct and indirect compensation for purposes of the filing [of] the Verizon Plans' Annual Return on Form 5500 [with the U.S. Department of Labor]," and that "[t]he Verizon Defendants knew or should have known [that] Fidelity's disclosures were incomplete, false and misleading, and failed to take any reasonable action to require that those deficiencies be corrected, and either actively participated in the disclosure failure or chose to be willfully ignorant of Fidelity's failure." (Cmplt. (Dkt. No. 1) ¶¶ 131, 133) According to Plaintiff, the allegedly deficient disclosures caused Plaintiff and the proposed Class to "suffer[] from an inability [to] properly [] understand and enforce their rights under the Verizon Plans and to manage their accounts." (Id. ¶ 134)

"ERISA contains two express causes of action to remedy reporting and disclosure violations as such": Section 502(a)(4) and Section 502(a)(1)(A). Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1167 (3d Cir. 1990). Neither provision provides a private remedy for an insufficient filing with the Department of Labor. Where, as here, ERISA does not expressly provide a private remedy for a violation of a disclosure requirement, courts have consistently declined to read a cause of action into the statute. See id. at 1169 ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. ERISA is a prime example of just such a statute.") (internal citation omitted); see also Watson v. Deaconess Waltham Hosp., 298 F.3d 102, 113 (1st Cir. 2002) (dismissing claim that plan administrator failed to satisfy statutory disclosure requirement for which ERISA does not provide a private remedy).

Although the Second Circuit has not ruled on this issue, lower courts have found that an ERISA plan participant lacks standing to assert a claim based on an alleged misrepresentation in a Form 5500. In Pappas v. Buck Consultants, Inc., No. 89 Civ. 6137, 1989 WL 157517, at *2 (N.D. Ill. Dec. 12, 1989), aff'd, 923 F.2d 531 (7th Cir. 1991), plaintiff similarly attempted to assert a private right of action based on defendants' alleged misrepresentations in its Form 5500. In dismissing this claim, the court observed that

> Count IV seeks to impose liability on defendants for stating on ERISA-required actuarial reports that the information supplied was complete and accurate, that it reasonably

> related to the experience of the plan and to reasonable expectations, and that it represented their best estimate of anticipated experience under the plan. Since these reports contained estimates of the lump sum benefit liability which was allegedly erroneously calculated based upon a seven percent interest rate, plaintiffs seek to hold defendants liable for their misrepresentations on these ERISA-required reports. In essence, plaintiffs seek to create a private right of action based upon ERISA reporting requirements.
>
> Plaintiffs cite no explicit provisions of ERISA creating such a cause of action. As we discussed above, we do not think Congress intended for courts to imply causes of action under ERISA where it did not explicitly provide them, in light of the comprehensive remedial scheme enacted under the statute. Therefore, we hold that no such cause of action exists.

Pappas, 1989 WL 157517, at *4 (internal citation omitted); see Koslof v. Smith, No. 13 Civ. 1466 (JTM), 2015 WL 4429169, at *4 n.3 (D. Kan. July 20, 2015) ("The court [] notes that a misrepresentation of the transfer of funds from the [] plan to Smith's IRA cannot form the basis of a breach of fiduciary duty by plaintiffs because they would have no legally protected interest in the [] plan's Form 5500 and would therefore lack standing to make such a claim." (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) for the proposition that "standing requires injury in fact of a legally protected interest")); In re Ins. Brokerage Antitrust Litig., No. Civ. 04-5184 (GEB), 2008 WL 141498, at *7 (D.N.J. Jan. 14, 2008) ("The Court is . . . not persuaded by Plaintiffs' argument that Defendants breached a fiduciary duty in allegedly failing to properly disclose contingent commissions on Schedules A and C of Form 5500. The Third Circuit has 'repeatedly held that under ordinary circumstances[,] defects in fulfilling the reporting and disclosure requirements of ERISA do not give rise to a substantive remedy other than that provided for in section 502(a)(1)(A) of that Act.'" (quoting Ackerman v. Warnaco, Inc., 55 F.3d

117, 124 (3d Cir. 1995); citing Hozier, 908 F.2d at 1168; Berger v. Edgewater Steel Co., 911 F.2d 911, 920 (3d Cir. 1990))).[9]

Finally, in arguing that Defendants breached their fiduciary duty by filing a Form 5500 that contained misrepresentations, Plaintiff has not asserted that she relied on the allegedly inaccurate Form 5500 in any way. Plaintiff merely asserts that the allegedly deficient disclosures led to the "depriv[ation] of information that was essential to a complete understanding of Plan operations and the fees and expenses being charged to [participants'] accounts, and prevented them from exercising their rights under the Verizon Plans and under ERISA." (Cmplt. (Dkt. No. 1) ¶ 109) "[N]o court in this circuit has ever found that a plaintiff successfully pled informational standing." Liberty Glob. Logistics LLC v. U.S. Mar. Admin., No. 13 Civ. 0399 (ENV) (JMA), 2014 WL 4388587, at *7 (E.D.N.Y. Sept. 5, 2014); see Atl.

[9] The court in Ins. Brokerage Antitrust Litig. observed that "Plaintiffs cite no published cases to support their claim that Defendants violated fiduciary duties owed to Plaintiffs under ERISA in improperly filling out Form 5500s," and explained that

> [o]nly "where the plaintiff can demonstrate the presence of extraordinary circumstances" is a substantive remedy available. Register v. PNC Fin. Servs. Group, Inc., 477 F.3d 56, 74 (3d Cir. 2007) (citing Jordan v. Fed. Express Corp., 116 F.3d 1005, 1011 (3d Cir. 1997) (quoting Ackerman, 55 F.3d at 124)). "Such circumstances include situations where the employer has acted in bad faith, or has actively concealed a change in the benefit plan, and the covered employees have been substantively harmed by virtue of the employer's actions." Ackerman, 55 F.3d at 125. The court in Engers v. AT & T, 428 F. Supp. 2d 213, 239 (D.N.J. 2006) likened a showing of extraordinary circumstances to "an equitable estoppel claim under § 502(a)(3)(B) of ERISA, 29 U.S.C.S. § 1132(a)(3)(B)," which requires a showing of "(1) the existence of a material representation; (2) reasonable and detrimental reliance on the misrepresentation, and (3) extraordinary circumstances." Id. As a matter of law, Plaintiffs have not demonstrated extraordinary circumstances under Ackerman. Even if Plaintiffs are able to demonstrate that Defendants purposely mislead them in inaccurately filling out Form 5500s, Plaintiffs utterly fail to demonstrate that they relied on this misrepresentation and were substantively harmed. Plaintiffs' failure to demonstrate reliance is fatal to a claim for extraordinary circumstances under Ackerman.

Ins. Brokerage Antitrust Litig., 2008 WL 141498, at *7. The same reasoning applies with equal force here.

States Legal Found. v. Babbitt, 140 F. Supp. 2d 185, 192 (N.D.N.Y. 2001) ("the legal viability of informational standing in this circuit is not clear").

The Third Claim for Relief will be dismissed to the extent it is based on Plaintiff's argument that Defendants breached their fiduciary duties by failing to disclose information in, or making misrepresentations in, a Form 5500.

CONCLUSION

For the reasons stated above, Defendants' motions to dismiss the First and Third Claims for Relief are granted. The Verizon Defendants' motion to dismiss the Second Claim for Relief is denied. The Clerk of the Court is directed to terminate the motions (Dkt. Nos. 52, 57, 62, 65), and to terminate Fidelity Management Trust Company and Fidelity Investments Institutional Operations Company, Inc. as defendants.

Dated: New York, New York
September 28, 2017

SO ORDERED.

Paul G. Gardephe
Paul G. Gardephe
United States District Judge