

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL F. DORMAN, individually
as a participant in the SCHWAB
PLAN RETIREMENT SAVINGS AND
INVESTMENT PLAN and on behalf
of a class of all those
similarly situated,

Plaintiff,

v.

THE CHARLES SCHWAB
CORPORATION; CHARLES SCHWAB &
CO INC.; SCHWAB RETIREMENT
PLAN SERVICES INC.; CHARLES
SCHWAB BANK; CHARLES SCHWAB
INVESTMENT MANAGEMENT, INC.;
WALTER W. BETTINGER III;
CHARLES R. SCHWAB; JOSEPH R.
MARTINETTO; MARTHA TUMA; JAY
ALLEN; DAVE CALLAHAN; BRADLEY
PETERSON; JOHN C. CLARK; KATHY
ANDERSON; NAUREEN HASSAN; ED
OBUCHOWSKI; DIANE RUSSELL;
BRIAN MCDONALD; JONATHAN
BEATTY; JOHN DOES 12-50; and
XYZ CORPORATIONS 1-5,

Defendants.

Case No. 17-cv-00285-CW

ORDER ON DEFENDANTS' MOTION
TO DISMISS IN PART SECOND
AMENDED COMPLAINT

(Dkt. No. 113)

Defendants The Charles Schwab Corporation, Charles Schwab &
Co. Inc., Schwab Retirement Plan Services Inc., Charles Schwab
Bank, Charles Schwab Investment Management, Inc., Schwab
Retirement Plan Services, Inc., Charles Schwab Bank, Walter W.
Bettinger III, Charles R. Schwab, Joseph Martinetto, Martha Tuma,
Jay Allen, Dave Callahan, Bradley Peterson, John C. Clark, Kathy
Anderson, Naureen Hassan, Ed Obuchowski, Diane Russell, Brian
McDonald, and Jonathan Beatty move to dismiss in part Plaintiff

1 Michael F. Dorman's Second Amended Complaint (SAC). Defendants
2 also filed a request for judicial notice in support of their
3 motion. Dorman opposes the motion to dismiss but does not oppose
4 the request for judicial notice. Having considered the papers,
5 the Court DENIES in part and GRANTS in part Defendants' motion to
6 dismiss without leave to amend. The Court also GRANTS
7 Defendants' request for judicial notice.

8 BACKGROUND

9 This is an action brought under the Employee Retirement
10 Security Act of 1974 (ERISA) by Dorman on behalf of himself and
11 similarly situated participants in the Plan, an employee pension
12 benefit plan. All eligible employees of Charles Schwab
13 Corporation (CSC) and its affiliates may participate in the Plan.
14 SAC ¶ 32. Participants in the Plan may choose to invest in
15 various Schwab-affiliated and unaffiliated investment options.
16 In his SAC, Dorman has sued three groups of Defendants. The
17 first is the Entity Defendants: CSC; Charles Schwab & Co, Inc.
18 (CS&Co), allegedly the Plan administrator; Charles Schwab
19 Investment Management, Inc. (CSIM), a participating employer in
20 the Plan; Charles Schwab Bank (CSBank), a Schwab subsidiary that
21 allegedly became the Plan's trustee; and Schwab Retirement Plan
22 Services, Inc. (SRPS), a participating employer in the Plan which
23 allegedly provided recordkeeping and related services to the
24 Plan. The second group is the Fiduciary Defendants, which
25 includes the Entity Defendants listed above as well as members of
26 the Plan's Employee Benefits Administration Committee (EBAC), who
27 allegedly chose the investments, paid fees from the Plan's
28 assets, generally administered the Plan and periodically reported

1 to CSC's Board. Individual members named as Fiduciary Defendants
2 are Tuma, Allen, Callahan, Peterson, Clark, Anderson, Hassan,
3 Obuchowski, Russell, McDonald and Beatty. The third group is the
4 Board of Director Defendants, which consists of several
5 individual members of the board of CS&Co. They are Bettinger
6 III, Schwab and Martinetto.

7 Dorman participated in the Plan from 2009 to 2015. During
8 his participation, Dorman invested in both affiliated and
9 unaffiliated options. SAC ¶ 43.

10 Dorman's First Amended Complaint (FAC) alleged five counts:
11 (I) that the Fiduciary Defendants breached their ERISA §§
12 404(a)(1)(A) and (B) duties of loyalty and prudence by including
13 certain funds without investigating cheaper, better performing
14 alternatives; (II) that the Fiduciary Defendants violated ERISA §
15 406(a), which proscribes ERISA fiduciaries from causing ERISA
16 plans to engage in certain enumerated prohibited transactions
17 with parties in interest; (III) that the Board of Director
18 Defendants violated their duties of prudence and loyalty under
19 ERISA § 404(a)(1)(A) and (B); (IV) that the Fiduciary Defendants
20 are liable under ERISA § 405 for the misconduct of other
21 fiduciaries; and, (V) that he is entitled to equitable relief
22 under ERISA § 502(a)(3) against the Entity Defendants who
23 knowingly participated and received the benefits of the fiduciary
24 breaches and transactions above.

25 On September 20, 2018, the Court granted in part and denied
26 in part Defendants' first motion to dismiss, addressing Dorman's
27 FAC. Docket No. 104 (Order). The Court granted leave to amend
28 counts I, III and IV, except as to the self-directed brokerage

1 fund, which the Court dismissed without leave to amend. The
 2 Court denied Defendants' motion to dismiss counts II and V.
 3 Dorman subsequently filed his SAC alleging the same five counts.
 4 Defendants now move to dismiss counts I, III and IV. Dorman's
 5 SAC includes new allegations to support his breach of fiduciary
 6 duty claim (count I); he argues that his failure to monitor claim
 7 (count III) and breach of co-fiduciary duty claim (count IV)
 8 survive to the extent count I now survives.

9 Dorman's SAC alleges three main actions which he argues were
 10 breaches of Fiduciary Defendants' fiduciary duties. The first is
 11 EBAC's process in selecting affiliated capital preservation
 12 options to replace the Schwab Stable Value Fund (SVF). Schwab's
 13 SVF was terminated in 2012. SAC ¶ 70. EBAC delegated the task
 14 of selecting alternative funds to its independent consultant,
 15 Mercer LLC (Mercer), because EBAC was conflicted. EBAC then
 16 chose a blend of affiliated and unaffiliated funds. Seventy
 17 percent of the Plan's Schwab SVF investment was transferred to
 18 the JPMorgan Short Duration Bond Fund and PIMCO Low Duration
 19 Fund, which were unaffiliated funds. Id., ¶ 79. Thirty percent
 20 was transferred to the Schwab Value Advantage Money Market Fund
 21 (Schwab Money Market Fund), an affiliated fund.¹ Dorman alleges
 22 that, after two years, the funds from JPMorgan Short Duration
 23 Bond, PIMCO Low Duration and Schwab Money Market Fund were all
 24 transferred to the Schwab Bank Savings Cash Account (Schwab
 25 Savings Account). Id., ¶¶ 79-80. He further alleges that EBAC

26
 27 ¹ This decision to allocate seventy percent of the Schwab SVF
 28 investment to unaffiliated funds and thirty percent to Schwab's
 Money Market Fund will hereinafter be referred to as the
 "Seventy/Thirty Plan."

1 ignored a recommendation from Mercer, and that the Seventy/Thirty
2 Plan was only an interim plan, which resulted in losses to Plan
3 participants while EBAC tried to devise a plan to transfer these
4 funds back into a Schwab fund that would fit into a prohibited
5 transaction exemption.

6 The second action Dorman alleges as breaches of Fiduciary
7 Defendants' fiduciary duties relates to EBAC's decision to
8 continue investing in certain affiliated funds, specifically the
9 Schwab International Index Fund, Schwab Small-Cap Index Fund,
10 Schwab's Managed Retirement Trust Funds (SMRT Funds), which
11 comprise a family of ten target date funds, and Schwab Money
12 Market Fund, along with selecting the Schwab Savings Account.
13 Dorman alleges all these affiliated funds and Schwab Savings
14 Account persistently and materially underperformed and charged
15 excessive management fees. Id., ¶¶ 60-68, 87.

16 The third action pertains to unallocated cash from the Plan,
17 which consisted of new contributions, other assets awaiting
18 investment pending distributions, and rollovers. Dorman alleges
19 the unallocated cash was loaned to CSC's affiliated entity CSBank
20 without enough limitations. Specifically, Fiduciary Defendants
21 allegedly loaned CSBank the money without requiring interest on
22 the loan, violating § 406(a). Id., ¶¶ 101-03.

23 LEGAL STANDARD

24 A complaint must contain a "short and plain statement of the
25 claim showing that the pleader is entitled to relief." Fed. R.
26 Civ. P. 8(a). The plaintiff must proffer "enough facts to state
27 a claim to relief that is plausible on its face." Ashcroft v.
28 Iqbal, 556 U.S. 662, 697 (2009) (quoting Bell Atl. Corp. v.

1 Twombly, 550 U.S. 544, 570 (2007)). On a motion under Rule
2 12(b)(6) for failure to state a claim, dismissal is appropriate
3 only when the complaint does not give the defendant fair notice
4 of a legally cognizable claim and the grounds on which it rests.
5 Twombly, 550 U.S. at 555. A claim is facially plausible "when
6 the plaintiff pleads factual content that allows the court to
7 draw the reasonable inference that the defendant is liable for
8 the misconduct alleged." Iqbal, 556 U.S. at 678.

9 In considering whether the complaint is sufficient to state
10 a claim, the court will take all material allegations as true and
11 construe them in the light most favorable to the plaintiff.
12 Metzler Inv. GMBH v. Corinthian Colleges, Inc., 540 F.3d 1049,
13 1061 (9th Cir. 2008). The court's review is limited to the face
14 of the complaint, materials incorporated into the complaint by
15 reference, and facts of which the court may take judicial notice.
16 Id. at 1061. However, the court need not accept legal
17 conclusions, including threadbare "recitals of the elements of a
18 cause of action, supported by mere conclusory statements."
19 Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555).

20 DISCUSSION

21 I. Defendants' Request for Judicial Notice

22 As a preliminary matter, Defendants request the Court take
23 judicial notice of seventeen documents. Docket No. 115 (Request
24 for Judicial Notice). The first thirteen are documents
25 consisting of the Plan's summary plan description, the Plan's
26 2016 Form 5500, various notices to plan participants regarding
27 the Plan's investment options and a prospectus filed with the
28 Securities Exchange Commission. See Request for Judicial Notice

1 at 3-5. Defendants had requested the Court take judicial notice
2 of these documents in support of their first motion to dismiss.
3 Dorman did not oppose Defendants' request then nor does he now.
4 The Court finds they are judicially noticeable.

5 The other four documents are excerpted reports from Mercer
6 to EBAC specifying how various funds in the Plan performed.
7 Dorman does not oppose Defendants' request. These four reports
8 contain figures which Dorman has relied upon although he did not
9 cite them in his SAC. These four reports are judicially
10 noticeable for purposes of a Rule 12(b)(6) motion because the
11 documents are incorporated by reference into Dorman's SAC. See
12 Hoey v. Sony Elecs. Inc., 515 F. Supp. 2d 1099, 1103 (N.D. Cal.
13 2007) (granting party's request for judicial notice because
14 "[e]ven if a document is not attached to a complaint, it may be
15 incorporated . . . if the plaintiff refers extensively to the
16 document or the document forms the basis of the plaintiff's
17 claim") (internal citations omitted).

18 II. Breach of Fiduciary Duty Claim (Count I)

19 Defendants move to dismiss count I, Dorman's ERISA claim
20 against the Fiduciary Defendants for breach of the fiduciary
21 duties of prudence and loyalty. "An ERISA fiduciary must
22 discharge his responsibility with the care, skill, prudence, and
23 diligence that a prudent person acting in a like capacity and
24 familiar with such matters would use." Tibble v. Edison Int'l,
25 135 S. Ct. 1823, 1828 (2015). The duty of loyalty requires an
26 ERISA fiduciary to act "solely in the interest of the
27 participants and beneficiaries." White v. Chevron Corp., 16-cv-
28 0793-PJH, 2016 WL 4502808, at *1 (N.D. Cal. Aug. 29, 2016) (White

1 I) (quoting § 404(a)(1)(A)). Dorman has amended his complaint to
2 add facts to support three arguments, along with a catch-all
3 argument, as to how Fiduciary Defendants have breached their
4 fiduciary duties of loyalty and prudence. He argues that the SAC
5 now sufficiently alleges: (i) facts showing that EBAC's process
6 in replacing the Schwab SVF was deficient and that EBAC failed to
7 follow its own procedure and/or disregarded its independent
8 consultant's recommendation; (ii) facts showing that the
9 affiliated funds purportedly persistently and/or materially
10 underperformed; (iii) that because Dorman was found to have
11 sufficiently alleged a claim of prohibited transactions, he
12 therefore also sufficiently alleges a breach of fiduciary duty
13 claim as to the earnings from the unallocated cash; and, (iv)
14 lastly, as a catch-all, that viewing all of the allegations
15 together creates an inference of imprudence and disloyalty by
16 Defendants.

17 A. EBAC's Process of Selecting Alternative Funds to
18 Replace the Terminated Schwab SVF

19 The Court dismissed Dorman's breach of fiduciary duty claim
20 (count I) as to the terminated SVF alternatives because Dorman
21 had conceded that seventy-percent of the SVF was transferred to
22 unaffiliated funds, making a claim of improper self-dealing
23 "implausible," and because Defendants were not, per se, required
24 to include a stable value fund in their Plan. Order at 9.
25 Dorman now alleges facts challenging EBAC's process in selecting
26 SVF replacements. Specifically, Dorman asserts that EBAC had a
27 deficient selection process because he has alleged the following
28 facts: (i) the Seventy/Thirty Plan was a result of EBAC's

1 purported original failed plan to transfer all the funds from
2 Schwab's SVF to an affiliated fund; (ii) the Seventy/Thirty Plan
3 was an interim move as part of Defendants' prohibited transaction
4 exemption strategy; (iii) EBAC had already determined a stable
5 value fund was the most appropriate capital preservation option;
6 (iv) a majority of plans, as identified by Dorman, that
7 previously held the Schwab SVF had replaced it with another
8 stable value fund; and, (v) the unaffiliated funds were not
9 comparable alternatives to the SVF.

10 Dorman has pleaded sufficient facts to give rise to an
11 inference of a breach of fiduciary duty. Dorman argues that a
12 deficient process can be inferred based on EBAC meeting minutes
13 produced in discovery. Specifically, Dorman's SAC alleges that
14 EBAC meeting minutes show it had delegated its role in selecting
15 a Schwab SVF replacement to an independent consultant, Mercer,
16 because EBAC had a conflict, and Mercer was to prepare a
17 recommendation as to how EBAC should proceed in replacing the
18 terminated SVF. However, because no such report was produced in
19 discovery, SAC ¶¶ 80-82, despite the production of other EBAC
20 minutes and Mercer reports, and because Defendants maintain that
21 all non-privileged and responsive EBAC documents have been
22 produced, id., ¶ 82-83, Dorman argues the Court should infer that
23 no such report exists or that EBAC ignored the recommendation
24 from Mercer, id. Defendants maintain that this Mercer report was
25 not produced because it was outside the scope of claims Dorman
26 could bring in arbitration in that he never invested in the
27 Schwab SVF or Schwab Money Market Fund. The Court does not find
28 this persuasive because Defendants, as they themselves claimed,

1 have produced “thousands of pages” of discovery, including other
2 EBAC meeting minutes and Mercer reports containing financial
3 information about Schwab’s SVF and Money Market Fund. See
4 Declaration of Tulio D. Chirinos (Chirinos Decl.), Ex. 14 at 15,
5 Ex. 15 at 24, Ex. 16 at 21, Ex. 17 at 23, 27. The Court finds
6 that, viewing the allegations in the light most favorable to
7 Dorman, the absence of such a Mercer report or EBAC meeting
8 minutes showing Mercer’s recommendation gives rise to an
9 inference that EBAC either never received or disregarded Mercer’s
10 recommendation. This sufficiently alleges that Fiduciary
11 Defendants breached their fiduciary duties because EBAC failed to
12 follow its own process to prudently and loyally investigate
13 options before selecting alternatives for Schwab’s SVF. Order at
14 7 (noting that Dorman needed to allege facts to show how “the
15 process by which [Fiduciary Defendants] managed the Plan was
16 flawed”).

17 However, Dorman’s other allegations as to a deficient
18 process fail. To the extent Dorman argues again that replacing
19 Schwab’s SVF with another stable value fund, as opposed to the
20 Schwab Money Market Fund, would have been the prudent action, see
21 SAC ¶ 97, Table 3 (showing a majority of thirty-eight plans
22 replaced the Schwab SVF with another stable value fund), this
23 fails as it did the first time because “Defendants are not
24 required to provide a stable value fund.” Id. at 9 (citing White
25 v. Chevron Corp., 16-cv-0793-PJH, 2017 WL 2352137, at *11 (N.D.
26 Cal. May 31, 2017) (White II)).

27 Dorman also argues that EBAC’s process was deficient because
28 it ignored years of data showing the SMRT Funds were

1 underperforming.² However, SMRT Funds were not part of the SVF
2 replacement funds. Moreover, assuming this was to show EBAC's
3 deficient selection process separate from the SVF replacements,
4 this still fails. The only factual allegations to support this
5 conclusion was the purported underperformance of the SMRT Funds
6 themselves. Dorman cannot use the funds' purported
7 underperformance as factual support of a deficient process when
8 the funds' underperformance, as discussed later, is insufficient
9 to infer imprudence and must be supported by facts alleging a
10 deficient process. Dorman cannot use each conclusory statement
11 to bolster the other.

12 Dorman lastly argues that EBAC's process was deficient
13 because transferring the SVF to the unaffiliated replacements did
14 not guarantee against a loss and the unaffiliated funds were not
15 a comparable replacement as capital preservation options.
16 However, Dorman has pleaded no facts to support this conclusory
17 allegation.

18 While Dorman's other allegations as to EBAC's deficient
19 process fail, because the lack of any Mercer report or EBAC
20 minutes stating the independent consultant Mercer's
21 recommendation does give rise to an inference of imprudence and
22 disloyalty in EBAC's process, the Court DENIES Defendants' motion
23 to dismiss count I to the extent it relies on this theory.

24
25 ² The analysis of allegedly underperforming SMRT Funds is
26 separate from the analysis of the alleged underperformance of the
27 affiliated capital preservation options, Schwab Money Market Fund
28 and Schwab Savings Account. As discussed below, Dorman's
allegations as to the capital preservation options, viewed with
allegations of EBAC's deficient process as to selecting the SVF
replacements, sufficiently raises an inference of imprudence and
disloyalty.

1 B. Schwab's Affiliated Funds and Options

2 In the SAC, Dorman adds new allegations relating to Schwab-
3 affiliated funds in support of his breach of fiduciary duty claim
4 (count I). He alleges that the selection and retention of the
5 Schwab International Index Fund, Schwab Small-Cap Index Fund and
6 SMRT Funds, along with the Schwab Money Market Fund and Schwab
7 Savings Account, were breaches of fiduciary duties by the
8 Fiduciary Defendants because these funds generated excessive
9 management fees while underperforming.

10 1. Excessive Management Fees of the Schwab
11 International Index Fund, Schwab Small-Cap Index
12 Fund and SMRT Funds

13 The Court rejected Dorman's argument that Schwab's
14 affiliated funds charged excessive fees on the last motion to
15 dismiss, finding that "Schwab funds appear to have charged only
16 slightly higher fees and underperformed by only a modest amount"
17 and citing Schwab's S&P 500 Index Fund fees as an example. Order
18 at 6. The Court further held that these modest differences are
19 insufficient because a fiduciary may consider other relevant
20 factors and not just fees when selecting certain funds. Id. at
21 7. Dorman alleges no new facts as to excessive management fees
22 for the Schwab International Index Fund, Schwab Small-Cap Index
23 Fund and SMRT Funds, but argues that this is sufficient to
24 survive Defendants' motion to dismiss because the fees charged by
25 the SMRT Funds were three times higher than comparable Vanguard
26 funds, because he omitted Schwab's S&P 500 Index Fund from his
27 SAC and because it is Defendants' burden to identify the other
28 relevant factors that were available when considering selection
of these funds. First, Dorman's excessive management fees theory

1 fails because he has alleged no new facts to address the
2 deficiencies identified by the Court and merely recharacterizes
3 them. For example, he has not alleged certain fees that would be
4 outside the range of "modest differences." See Order at 6-7
5 (noting acceptable expense ratios can range from .03% to 2% or
6 .07% to 1%). Here, the expense ratio range is purported to be
7 .07% to .93%. Chirinos Decl., Ex. 3 at 2-7; Ex. 12 at 2-7.

8 Further, Dorman misconstrues the Court's Order. The Court
9 cited Schwab's S&P 500 Index Fund fees as an example of a fund
10 charging slightly higher fees. The Court's reasoning that
11 slightly higher fees of the S&P 500 Index Fund alone were
12 insufficient to state a cognizable breach of fiduciary duty claim
13 extends to all management fees alleged to be excessive by Dorman
14 here. Merely deleting the S&P 500 Index Fund allegations does
15 not cure the deficiency. Moreover, the burden is not on
16 Defendants to identify other relevant factors; rather, the
17 Court's Order stated that modest differences in fees do not give
18 rise to a breach of fiduciary duty as to the excessive fees
19 allegations because fiduciaries may take other factors into
20 consideration. Plaintiffs must generally plead facts showing
21 more than just high fees to show that defendants were imprudent
22 in selecting certain funds.

23 2. EBAC's Decision to Include Underperforming Schwab
24 International Index Fund, Schwab Small-Cap Index
Fund and SMRT Funds

25 The Court rejected Dorman's theory in count I that Fiduciary
26 Defendants breached their fiduciary duties based on the
27 affiliated funds' underperformance, finding, "Standing alone,
28 offering and retaining funds that have underperformed modestly

1 and have somewhat higher fees is not enough to show malfeasance."
2 Order at 6; see also White II, 2017 WL 2352137, at * 20
3 (rejecting plaintiff's allegation that defendants' failure to
4 remove a fund due to its "consistent underperformance" was
5 insufficient because "poor performance, standing alone, is not
6 sufficient to create a reasonable inference that plan fiduciaries
7 failed to conduct an adequate investigation ERISA
8 requires a plaintiff to plead some other indicia of imprudence").
9 Dorman offers new allegations, which he argues cure the
10 deficiencies identified by the Court because these allegations
11 now show "material" and "persistent" underperformance. These new
12 allegations do not remedy the previous deficiencies. First,
13 Dorman has provided no new allegations of "other indicia of
14 imprudence." At most, construed in the light most favorable to
15 Dorman, his new allegation that Defendants failed to pursue a
16 "meaningful investigation, or ignored recommendations of advisors
17 or consultants," SAC ¶ 55, would be "other indicia" of
18 malfeasance as to the SMRT Funds,³ but is conclusory and
19 unsupported by any factual allegations. Thus, Dorman has not
20 provided factual allegations of "other indicia" and his new
21 allegations pertain only to underperforming funds, which alone,
22 as the Court has said, are insufficient to survive a motion to
23 dismiss and fail for that reason.

24
25 ³ Dorman does not provide any new allegations of
26 underperformance by the other challenged affiliated funds, Schwab
27 International Index Fund or Schwab Small-Cap Index Fund. His
28 only new allegations of underperformance relate to the SMRT Funds
and Money Market Fund. Thus, Dorman's allegations of
underperformance as to the former funds independently fail
because he has failed to offer new allegations to cure the
deficiencies identified by the Court.

1 Separately, the allegations here do not, as Dorman argues,
2 indicate the SMRT Funds “persistent[ly]” or “materially”
3 underperformed. Dorman now alleges that some of Schwab’s SMRT
4 Funds underperformed, measured on a five-year basis using the
5 Schwab Managed Retirement Trust Index (Index) and the Mercer
6 Mutual Fund Lifecycle Universe Median (Universe Median) as
7 benchmarks. As compared to these benchmarks, Dorman’s SAC shows
8 that Schwab’s family of ten SMRT Funds both underperformed and
9 outperformed or matched at various times, ranging from zero out
10 of ten funds underperforming in one year up to six out of ten
11 funds underperforming in another year. See SAC ¶¶ 62-66. This
12 contradicts Dorman’s own allegations that SMRT Funds
13 “persistent[ly]” underperformed. For example, in 2013, all ten
14 SMRT Funds outperformed or matched the Index benchmark in the
15 previous five years, and eight out of the ten funds outperformed
16 or matched the Universe Median in the previous five years. See
17 Chirinos Decl., Ex. 17 at 22; compare with Terraza v. Safeway,
18 Inc., 241 F. Supp. 3d 1057, 1071 (N.D. Cal. 2017) (finding
19 plaintiff’s allegations, inter alia, that “during the pertinent
20 period, almost all of the investment options . . . underperformed
21 compared to their benchmark” was sufficient to create a plausible
22 inference that defendants’ decision-making process was flawed).
23 Moreover, Dorman alleges persistent underperformance, citing
24 Mercer reports showing consistent quarters of underperformance of
25 SMRT Funds, including periods as long as thirteen, seventeen or
26 twenty-one quarters. However, converted into years, this
27 translates into three to five years, which are still considered
28 relatively short periods of underperformance. See Jenkins v.

1 Yager, 444 F.3d 916, 925-26 (7th Cir. 2006) (finding defendant
 2 did not breach his fiduciary duties retaining funds that
 3 underperformed for three years because “investment
 4 strategy . . . to find long-term, conservative, reliable
 5 investments that would do well during market fluctuations” for
 6 long-term investment was not unreasonable or imprudent); Order at
 7 7.

8 3. Excessive Management Fees and Underperformance of
 9 the Schwab Money Market Fund and Schwab Savings
 Account

10 As to the Schwab Money Market Fund’s and Schwab Savings
 11 Account’s management fees and underperformance allegations,
 12 because Dorman has sufficiently alleged facts supporting a claim
 13 of breach of fiduciary duty under the theory of a deficient
 14 process selecting the SVF replacements (i.e., the Money Market
 15 Fund and Schwab Savings Account), the allegations of excessive
 16 management fees and underperformance as to the Fund and Account
 17 also survive as Dorman has alleged “some other indicia of
 18 imprudence.” See e.g., White II, 2017 WL 2352137, at *20.

19 For the foregoing reasons, apart from the Schwab Money
 20 Market Fund and Schwab Savings Account, none of Dorman’s new
 21 allegations as to his affiliated funds theory sufficiently
 22 alleges facts to infer a breach of Fiduciary Defendants’
 23 fiduciary duties (count I).

24 C. Earnings from Unallocated Cash

25 Dorman argues that Fiduciary Defendants were imprudent and
 26 disloyal because they gave CSBank an interest-free loan using
 27 extraneous unallocated cash from the Plan in violation of 29
 28 C.F.R. § 2550.408b-2(e). Dorman has alleged these new facts to

1 flesh out his prohibited transaction claim and appears to argue
2 that this also sufficiently alleges Defendants breached their
3 fiduciary duties because these allegations show a prohibited
4 transaction.⁴ Regulation § 2550.408b-2 is an explicit exemption
5 from the prohibitions in § 406(a) (i.e., prohibited transactions)
6 promulgated pursuant to § 408(b)(2) under ERISA. 29 C.F.R. §
7 2550.408b-2(a). The regulation states, "Section 408(b)(2) of the
8 Act does not contain an exemption from other provisions of the
9 Act, such as § 404 [i.e., the statutes pertaining to the
10 fiduciary duties of prudence and loyalty] . . . which may impose
11 requirements or restrictions relating to the transactions which
12 are exempt under section 408(b)(2)." Id., subd. (a)(3) (emphasis
13 added). Thus, while a transaction may be exempt under §
14 408(b)(2), it could nevertheless still be subject to the
15 fiduciary duties of prudence and loyalty. However, aside from
16 conclusory allegations that Defendants failed to make meaningful
17 investigations, see SAC ¶¶ 104-05, Dorman has not identified any
18 facts nor regulations under § 404 showing how Defendants here
19 violated their duties of prudence or loyalty as to the
20 unallocated earnings. Instead, Dorman argues because the loan is
21 allegedly a prohibited transaction, it should also be a per se
22 violation of Defendants' fiduciary duties of prudence and
23 loyalty. This is insufficient to state a claim of a breach of
24 fiduciary duty.

25
26 ⁴ Since Dorman has added new allegations to support his
27 prohibited transaction claim, a claim which the Court had
28 previously allowed to proceed, and Defendants do not oppose these
amendments to the extent they support the prohibited transaction
claim, the Court will allow the amendments as to count II.

1 D. Viewing All Allegations in Their Totality

2 Aside from Dorman's allegedly deficient process inferred
3 from the lack of any Mercer report or meeting minutes and the
4 excessive fees and underperformance of the SVF replacements, all
5 of the other theories fail for the reasons identified above;
6 thus, viewing these all together also does not sufficiently state
7 a breach of fiduciary duty claim.

8 However, the Court finds that Dorman has sufficiently
9 alleged facts giving rise to an inference of imprudence and
10 disloyalty as to his theory of Defendants' deficient process in
11 selecting the Schwab SVF replacements based on the lack of a
12 report or meeting minutes, along with the allegations of
13 excessive fees and underperformance of these SVF replacements.
14 Thus, to the extent Dorman's breach of fiduciary duty claim
15 relies on these theories, the Court DENIES Defendants' motion to
16 dismiss count I. However, because Dorman has failed to cure the
17 deficiencies as to his other theories despite an opportunity to
18 do so, the Court GRANTS Defendants' motion to dismiss count I as
19 to the other theories without leave to amend.

20 III. Dorman's Derivative Claims (Counts III & IV)

21 Dorman also alleges that the Board of Director Defendants
22 failed to monitor the Fiduciary Defendants (count III). "The
23 Ninth Circuit has recognized that where members of an employer's
24 board of directors have responsibility for the appointment and
25 removal of ERISA trustees, those directors are themselves subject
26 to ERISA fiduciary duties, albeit only with respect to trustee
27 selection and retention." Solis v. Webb, 931 F. Supp. 2d 936,
28 952-53 (N.D. Cal. 2012) (internal citations omitted). Here,

1 Dorman has sufficiently alleged a duty to monitor claim, alleging
2 that Board of Director Defendants had authority to appoint
3 individuals to EBAC, failed to investigate and monitor whether
4 Fiduciary Defendants (which includes EBAC members) were
5 fulfilling their fiduciary roles and failed to act to correct any
6 imprudent and disloyal actions. See SAC ¶¶ 150-51; see also
7 Fernandez v. Franklin Resources, Inc., 17-cv-6409, 2018 WL
8 1697089, at *7 (N.D. Cal. Apr. 6, 2018). The basis for this
9 claim would be failing to act to correct EBAC's allegedly
10 deficient process in selecting the SVF replacement.

11 Further, Dorman's breach of co-fiduciary duty claim (count
12 IV) against the Fiduciary Defendants also survives because Dorman
13 has sufficiently alleged that Fiduciary Defendants had knowledge
14 of the alleged imprudent or disloyal acts that this Court found
15 sufficiently state a claim for Dorman's breach of fiduciary duty
16 claim (count I). See Woods v. Southern Co., 396 F. Supp. 2d
17 1351, 1379 (N.D. Ga. 2005) (finding allegation that co-
18 fiduciaries had "knowledge" of purported wrongdoing sufficiently
19 stated a claim and citing cases stating the same).

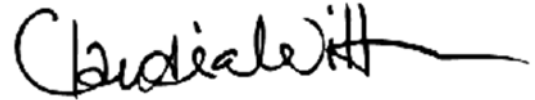
20 CONCLUSION

21 For the foregoing reasons, Defendants' motion to dismiss in
22 part Dorman's SAC is GRANTED in part without leave to amend and
23 DENIED in part. Defendants' motion is denied to the extent that
24 counts I, III & IV are based on the theories of a deficient
25 process in selecting a replacement for the SVF and of excessive
26 fees and underperformance of such SVF replacements. The motion
27 is otherwise granted without leave to amend. A further case
28 management conference is set for March 12, 2019 at 2:30 p.m., a

1 joint case management statement is due a week before on March 5,
2 2019.

3 IT IS SO ORDERED.

4
5 Dated: February 8, 2019



CLAUDIA WILKEN
United States District Judge