UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRADLEY H. FLEMING,

Plaintiff,

v.

KELLOGG COMPANY, et al.,

Defendants.
_____/

Case No. 1:22-cv-593

HON. JANE M. BECKERING

OPINION AND ORDER

Plaintiff Bradley H. Fleming (Fleming) previously worked as an accountant for Defendant Kellogg Company (Kellogg) and participated in the Kellogg Company Savings and Investment Plan, a defined contribution 401(k) plan ("the Kellogg Plan" or the "Plan"). In June 2022, he filed this putative class action against the fiduciaries of the Plan, alleging that they breached their fiduciary duties under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., by paying excessive recordkeeping fees. Fleming has since twice amended his pleading, and now pending before the Court is Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint (ECF No. 82). For the following reasons, the Court grants the motion.

I. BACKGROUND

A. Factual Allegations

Kellogg is a global food manufacturing company where Fleming worked as an accountant for thirteen years until August 2019 (3d Amend. Compl. [ECF No. 81] ¶¶ 39–41, 47).[1] Kellogg

[1] Fleming uses "Kellogg" to refer to Defendants and all parent, subsidiary, related, predecessor, and successor entities (including Kellanova) to which his allegations pertain (3d Amend. Compl.

offers its employees several benefits, including the opportunity to participate in the Kellogg Plan (*id.* ¶ 20). In 2020, the Plan had 12,244 participants and held $1,906,222,216 in assets (*id.* ¶ 51). The Plan allows employees to set aside a portion of their pre-tax earnings, obtain employer matching contributions, and invest the total of the employee and employer contributions (*id.* ¶ 20). The value of these investments is allocated to individual employees' accounts for bookkeeping purposes, but the Plan's assets are held collectively in a trust (*id.* ¶¶ 20, 50–51).

Kellogg's ERISA Administrative Committee is the named Plan fiduciary and is responsible for operating and administering the Kellogg Plan, which includes interpreting the Kellogg Plan's terms, determining eligibility, establishing procedures, allocating contributions, forfeitures, and investment income, and communicating with participants, among other duties (*id.* ¶ 49; Kellogg Plan Document [ECF No. 12-1[2]] § 12.3). Kellogg's ERISA Finance Committee is the fiduciary for the Kellogg Plan's Trust, which it administers (Kellogg Plan Document § 12.4). The Finance Committee is also responsible for, among other things, establishing investment guidelines, curating the menu of investment options in the Kellogg Plan, and monitoring the investments offered (*id.*). Fleming collectively refers to the ERISA Finance and ERISA Administrative Committees as the "Plan Committees."

¶ 47). Defendants likewise use either "Kellogg" or "Defendants" for collective reference in briefing (ECF No. 83 at PageID.1725, n.1). The Court follows suit in this Opinion and Order.

[2] The Plan documents, which were previously submitted in connection with Defendants' first motion to dismiss, are properly considered by the Court inasmuch as they are "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007). *See also Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016) (courts may consider "exhibits attached to the complaint, public records, items appearing in the record of the case, and exhibits attached to defendant's motion to dismiss, so long as they are referred to in the complaint and are central to the claims contained therein, without converting the motion to one for summary judgment").

Kellogg also relies on outside service providers to assist in running the Plan, including Transamerica Retirement Solutions ("Transamerica"), which served as the Plan's recordkeeper beginning in 2015 until Fidelity Workplace Services LLC ("Fidelity") assumed that role in December 2020 (3d Amend. Compl. ¶ 22). *See also* Transition of Mercer DC Services to Transamerica ("Transamerica Agreement"), ECF No. 12-4.[3] The per-participant recordkeeping fees were $66 from 2016 to April 2019, then $46 from April 2019 until Transamerica stopped providing services (3d Amend. Compl. ¶¶ 63–65). After Fidelity succeeded Transamerica, the fees were reduced to $36, and then, beginning in 2022, $26 per year (*id.* ¶ 66).

Fleming alleges that, over a four-year period—June 28, 2016 through January 7, 2021—the Plan's fiduciaries caused the Plan to pay recordkeeping and administrative ("RKA") fees to Transamerica that were "over a 192% premium per-participant on average for Bundled RKA fees … , compared to what a reasonable fee should have been for materially similar RKA services" (*id.* ¶¶ 17–19, 22, 25, 39). According to Fleming, "[h]ad the Plan Committees replaced Transamerica on the first day of the Class Period, and had they used the Plan's massive size and correspondent bargaining power to negotiate for fee rebates, the Plan Committees would have saved Plaintiff and the proposed Class millions of dollars in Bundled RKA fees" (*id.* ¶¶ 27, 34).

Additionally, Fleming alleges that "Transamerica is a party in interest and by causing the Plan[s] to use Transamerica as the Plan's recordkeeper from year to year, Defendants caused the Plan[s] to engage in transactions that Defendants knew or should have known constituted a a [sic]

[3] The Court may also properly take notice of the service agreement, which is a document central to, and expressly incorporated into, the Third Amended Complaint by reference. *See* 3d Amend. Compl. ¶ 59.

direct or indirect furnishing of services between the Plans and TIAA-CREF and Fidelity [sic][4] prohibited by 29 U.S.C. § 1106(a)(1)(C), and a transfer of the Plans' assets to, or use by or for the benefit of Transamerica prohibited by 29 U.S.C. § 1106(a)(1)(D)" (*id.* ¶ 29).[5]

Last, Fleming alleges that Kellogg and Steven A. Cahillane (an officer of Kellogg) breached their fiduciary duties by failing to monitor those members on the Plan Committees responsible for paying reasonable Bundled RKA fees (*id.* ¶ 30).

B. Procedural Posture

On June 28, 2022, Fleming initiated this action with the filing of a Complaint (ECF No. 1). Defendants moved to dismiss the Complaint (ECF No. 10), but Fleming filed an Amended Complaint on October 10, 2022 (ECF No. 15). Consequently, the Court dismissed Kellogg's motion as moot (Order, ECF No. 16). Defendants subsequently moved to dismiss the Amended Complaint and compel arbitration pursuant to the arbitration clause in the Plan document.

On May 1, 2023, this Court granted the motion and dismissed Fleming's claims, concluding that enforcing the Plan's arbitration provision would not prevent Fleming from effectively vindicating the statutory remedies he sought (Op. & Order, ECF No. 42). This Court determined that "the Kellogg arbitration provision constitutes sufficient manifestation of the Kellogg Plan's consent to arbitrate, and the provision properly applies to representative suits brought on behalf of the Kellogg Plan" (*id.* at PageID.1172–1173). On May 12, 2023, Fleming moved to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e) (ECF No. 43). The Court denied the motion, agreeing with Defendants that Fleming did not point to any

[4] As Defendants point out (ECF No. 83 at PageID.1727, n.3), Fleming's references to "services between the Plans [sic] and TIAA-CREF and Fidelity" appear to be mistakenly carried over from a different case.

[5] As noted *infra*, Fleming no longer pursues his claim under 29 U.S.C. § 1106(a)(1)(D).

intervening change in the law, raise any new evidence, or identify any error of law that would permit post-Judgment relief under Rule 59(e) (ECF No. 50 at PageID.1218). Fleming timely appealed.

On October 21, 2024, the Sixth Circuit reversed this Court's decision (ECF No. 54). Relying on its decision in *Parker v. Tenneco Inc.*, 114 F.4th 786 (6th Cir. 2024), the Sixth Circuit decided that Kellogg's arbitration clause precludes representative actions and is therefore invalid and unenforceable. A mandate was issued on November 12, 2024 (ECF No. 55), returning jurisdiction to this Court.

On November 20, 2024, this Court issued an Order requiring Kellogg to file an Answer to Fleming's Amended Complaint (Order, ECF No. 56). However, Fleming requested the opportunity to "update his allegations to align with recent developments in Sixth Circuit ERISA fiduciary law" (ECF No. 59 at PageID.1259). Discerning no undue delay or bad faith in Fleming's request and no lack of notice or undue prejudice to Defendants, this Court granted the request (Order, ECF No. 64). On December 24, 2024, Plaintiff filed his Second Amended Complaint (ECF No. 65).

On January 21, 2025, Defendants filed a motion to dismiss the Second Amended Complaint, and the motion was fully briefed on March 4, 2025 (ECF Nos. 71–75). However, in May 2025, citing additional caselaw significant to the ERISA pleading standard, Fleming moved to again amend his complaint, and Defendants did not oppose the motion. This Court granted the motion and dismissed the then pending motion to dismiss as moot (Order, ECF No. 80).

On May 29, 2025, with leave having been granted, Fleming filed a Third Amended Complaint against Kellogg, Cahillane, and the two Plan Committees (ECF No. 81). Fleming alleges the following three claims:

I. **Breach of Duty of Prudence of ERISA, as Amended** (Plaintiff, on behalf of himself and Class, Against Plan Committees Defendants—Bundled RKA Fees)

II. **Prohibited transactions**—29 U.S.C. §1106(a)(1) (Plaintiff, on behalf of himself and Class, Against Plan Committee Defendants—Bundled RKA Fees)

III. **Failure to Adequately Monitor Other Fiduciaries under ERISA, as Amended** (Plaintiff, on behalf of himself and Class, Against Defendants Kellogg and Cahillane—RKA Fees)

Defendants subsequently moved to dismiss the Third Amended Complaint, and the motion is fully briefed (ECF Nos. 82–86). Although his present claims reference the "Plan Committee Defendants," Fleming indicates in briefing that he will "drop the ERISA Finance Committee from this action as a defendant" (ECF No. 84 at PageID.1748, n.2). Having considered the parties' submissions, the Court concludes that oral argument is unnecessary to resolve the issues presented. *See* W.D. Mich. LCivR 7.2(d).

II. ANALYSIS

A. Motion Standard

Under Federal Rule of Civil Procedure Rule 8(a), a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). Rule 12(b)(6) authorizes the court to dismiss a claim for relief in any pleading if it "fail[s] to state a claim upon which relief can be granted[.]" FED. R. CIV. P. 12(b)(6). In general, to survive a motion to dismiss, a complaint must present "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although the plausibility standard is not equivalent to a "'probability requirement,'

… it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." *Id.* at 679 (quoting FED. R. CIV. P. 8(a)(2)).

In deciding a motion to dismiss for failure to state a claim, the court must construe a complaint in the light most favorable to the non-movant and accept all well-pleaded factual allegations in the complaint as true. *Thompson v. Bank of Am., N.A.*, 773 F.3d 741, 750 (6th Cir. 2014). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

When considering a motion to dismiss for failure to state a claim, the Court generally does not consider matters outside the pleadings unless the Court treats the motion as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016); *see also* FED. R. CIV. P. 12(d) ("If, on a motion under Rule 12(b)(6) …, matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."). On the other hand, the Court may consider "exhibits attached to the complaint, public records, items appearing in the record of the case, and exhibits attached to defendant's motion to dismiss, so long as they are referred to in the complaint and are central to the claims contained therein, without converting the motion to one for summary judgment." *Gavitt, supra.*

B. Discussion

ERISA protects participants in employee benefit plans, including retirement plans, by establishing standards of conduct for plan fiduciaries. *Forman v. TriHealth, Inc.*, 40 F.4th 443,

447 (6th Cir. 2022). Specifically, plan administrators must discharge their duties "with 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." 29 U.S.C. § 1104(a)(1)(B). "Derived from the law of trusts, the duty of prudence requires plan administrators to select initial investment options with care, to monitor plan investments, and to remove imprudent ones." *Forman*, 40 F.4th at 448 (citing *Tibble v. Edison Int'l*, 575 U.S. 523, 528–29 (2015)). Upon a breach of a fiduciary duty, ERISA provides a private right of action. *See* 29 U.S.C. §§ 1109(a), 1132(a)(2). Fleming's action at bar presents three claims, and Kellogg seeks dismissal of all three claims.

1. Fiduciary Breach (Count I)

In his Third Amended Complaint, Fleming alleges that "[d]uring the Class Period, Plan Committees Defendants breached their fiduciary duty of prudence to Plan participants, including to Plaintiff, by failing to: ensure that the Plan's Bundled RKA fees were objectively reasonable, defray reasonable expenses of administering the Plan, and act with the care, skill, diligence, and prudence required by ERISA" (3d Amend. Compl. ¶ 120).

Defendants argue that despite having the benefit of the Sixth Circuit's further guidance regarding the applicable pleading standards, Fleming continues to ask this Court to allow him to proceed to discovery based on the same conclusory and faulty allegations in Count I that have failed throughout the Circuit to state a plausible fiduciary breach claim (ECF No. 83 at PageID.1738). Specifically, Defendants argue that Fleming's allegations fail because (1) Fleming is not excused from pleading "actual inappropriate fiduciary actions" and in fact had access to the fee disclosure materials; (2) Fleming pleads no facts showing that his claim falls outside of the standards set forth in Sixth Circuit precedent; (3) Fleming pleads only conclusory, generalized

contentions; (4) Fleming's attempted fee comparisons with his purported comparator plans likewise fail under Sixth Circuit precedent; (5) Fleming fails to establish that his three comparator plans are actually comparable to the Kellogg Plan; (6) Fleming fails to demonstrate how the services the Kellogg Plan received and those received by other plans are "substantially similar"; and (7) Fleming improperly attempts to state a claim by alleging that Kellogg should have solicited bids from other recordkeepers (*id.* at PageID.1731–1738).

In response, Fleming argues that the allegations in Count I satisfy the relevant pleading standards where he delineated the specific Bundled RKA services received by the Kellogg Plan for which the Plan paid "$50 per participant per year on average" versus the comparator plans, which paid "$25 per participant per year on average" for Bundled RKA (ECF No. 84 at PageID.1748–1754, referencing 3d Amend. Compl. ¶¶ 58, 66–67, 71, 89–90).

Defendants' argument for dismissal of Count I has merit.

The Supreme Court has emphasized that "[b]ecause the content of the duty of prudence turns on 'the circumstances . . . prevailing' at the time the fiduciary acts," an appropriate inquiry by a court will "necessarily be context specific." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014) (quoting 29 U.S.C. § 1104(a)(1)(B)). The rationale is that "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes v. Northwestern Univ.*, 595 U.S. 170, 177 (2022). *See also* RESTATEMENT (SECOND) OF TRUSTS § 174 cmt. b (1959) (indicating that when judging a trustee's prudence, courts look to "the circumstances as they reasonably appear to him at the time when he does the act and not at some subsequent time when his conduct is called in question").

Hence, in *Forman*, where the employees alleged that the fiduciaries breached their duties of prudence and loyalty under ERISA through the plan's choice of investment funds offered to participants, the Sixth Circuit opined that "[t]he focus is on each administrator's real-time decision-making process, not on whether any one investment performed well in hindsight." 40 F.4th at 448. *See also CommonSpirit*, 37 F.4th at 1166 ("Merely pointing to another investment that has performed better in a five-year snapshot of the lifespan of a fund that is supposed to grow for fifty years does not suffice to plausibly plead an imprudent decision—largely a process-based inquiry—that breaches a fiduciary duty").

The recent decisions of the Sixth Circuit reflect that the Supreme Court's emphasis on requiring context-specific pleading applies to claims about recordkeeping fees as well. First, in *Smith v. CommonSpirit Health*, 37 F.4th 1160 (6th Cir. 2022), the Sixth Circuit held that that "[t]o allege a breach of fiduciary duty claim based on imprudent recordkeeping fees, a plaintiff must plead facts that would allow a plausible inference that the recordkeeping fees were excessive relative to the services rendered." *Id.* at 1169. Specifically, the plaintiff must provide the "kind of context that could move [a recordkeeping] claim from possibility to plausibility." *Id.* In affirming the district court's decision to dismiss Smith's cause of action, the Sixth Circuit found that Smith failed to "'allege that the fees were excessive relative to the services rendered'" and omitted "'facts concerning other factors relevant to determining whether a fee is excessive under the circumstances.'" *Id.* (quoting *Young v. Gen. Motors Inv. Mgmt. Corp.*, 325 F. App'x 31, 33 (2d Cir. 2009) (per curiam) (quotation omitted)). The Sixth Circuit emphasized the Supreme Court's instruction that dividing "the plausible sheep from the meritless goats" is "accomplished through careful, context-sensitive scrutiny of a complaint's allegations." *Id.* at 1164 (quoting *Dudenhoeffer*, 573 U.S. at 425)).

Next, in *Forman*, where the employees not only challenged the plan's choice of investment funds but also attempted to present an "overall attack on the plan's expense ratio," the employees claimed that the "average plan expenses were almost twice as high as other comparator plans they identified." 40 F.4th at 449. The Sixth Circuit rejected the claim based on its "pleading failures," pointing out that the employees "never alleged that these fees were high in relation to the services that the plan provided." *Id.* (citing *CommonSpirit*, 37 F.4th 1169, and *Young*, 325 F. App'x at 33). The Sixth Circuit cautioned that it was improper for a court to allow "such bare allegations to proceed, devoid of all context for the services provided." *Id.* (affirming the district court's dismissal).

And this year, in *England v. DENSO International America Inc.*, 136 F.4th 632 (6th Cir. 2025), the Sixth Circuit again rejected a claim where the plaintiff failed to provide sufficient context to show that the allegedly unreasonable fees were "excessive under the circumstances" in that the plan participants had "provide[d] no details about the specific types or quality of services that the comparator plans received relative to those the DENSO plan received." *Id.* at 637 (citation omitted). According to the Sixth Circuit, "generic allegations about similar services across the industry and about mega plans' ability to 'negotiate favorable rates' 'based on economies of scale,'. . . say[] nothing about the disparity in services to sufficiently move the needle from implausible to plausible." *Id.* (citation omitted). The Court reasoned that "there is a distinction between generally alleging that bundled recordkeeping and administrative services provided to mega plans all offer essentially the same thing and alleging that the services offered to and utilized by the Plan here did not justify the cost difference in fees." *Id.*

The case law in this Circuit resoundingly demonstrates that to plead a plausible excessive fee claim, an employee must supply sufficient factual context about plan fees and services. The

Court turns then to a careful, context-sensitive scrutiny of Fleming's allegations in this case. Fleming identifies three comparators—Team Health 401(k) Plan, RELX Inc. US Salary Investment Plan, and the Nissan Employee 401(k) Plan—that he claims received "substantially similar" Bundled RKA services as the Kellogg Plan (3d Amend. Compl. ¶ 67) in "around the same time period" (*id.* ¶ 71).

Are the Plans Comparable? Fleming alleges that in 2020, the Kellogg Plan had 12,244 participants and $1,906,222,216 in assets (*id.* ¶ 51). While Fleming provides a number of participants and an amount of assets for each comparator, *see id.* ¶ 71, neither piece of data is tethered to a specific calendar year.

Were Comparable Services Offered? According to Fleming, "all plan recordkeepers" provide the same bundled services and ad hoc services (3d Amend. Compl. ¶¶ 57–59). Fleming generically delineates certain services that the services Transamerica provided to the Kellogg Plan therefore presumably "included" (*id.* ¶¶ 58–59). Fleming does not cite to the relevant service agreement, let alone specifically delineate the recordkeeping and related services delineated therein, citing instead to the agreements that transferred service contracts to, and away from, Transamerica. *See id.* ¶¶ 58–59.

Were the Services Offered During Comparable Years? Last, Fleming does not specify the years the comparators received the purportedly "substantially similar Bundled RKA services," alleging only that it was "around the same time period the Kellogg Plan was paying Transamerica $66 per participant per year" (*id.* ¶ 71).

Fleming alleges that he has supplied "a reasonable basis for determining whether an inference of imprudence is warranted based on the Bundled RKA fees being paid by any specific plan" (*id.* ¶ 68). According to Fleming, "[a]ny alleged minor differences in service levels or quality

cannot explain the disparity of $21 per participant (or a 192% premium) from 2016 to 2024 … compared to the Bundled RKA fees paid by other comparable plans with similar amounts of participants and assets under management" (*id.* ¶ 88). However, the allegations fail to sufficiently inform the Court whether the Plans are comparable; the type, level, or quality of services offered; or even the years during which such services were offered. Under the strictures of current caselaw, the Court therefore concludes that Fleming has failed to supply sufficient factual context from which the Court can reasonably infer that Kellogg acted imprudently in violation of ERISA, i.e., the kind of factual context that could move the needle from mere possibility to plausibility.

In support of a contrary conclusion, Fleming contends that any remaining questions this Court has about plan comparisons concern factual disputes that are not appropriate for resolution under Rule 12(b)(6) (ECF No. 84 at PageID.1756). However, as indicated, a careful examination of the allegations in the Third Amended Complaint does not support "[e]qually reasonable inferences" in two directions. *Forman*, 40 F.4th at 450. The Court is not improperly crediting one set of reasonable inferences over another but expressly finding that Fleming has not supplied the requisite factual context to plausibly state a claim that Defendants breached their duty of prudence. *See CommonSpirit*, 37 F.4th at 1166 ("Comparing apples and oranges is not a way to show that one is better or worse than the other.") (citation omitted). As the Sixth Circuit aptly observed, "context often is destiny." *Forman*, 40 F.4th at 448. For these reasons, Defendants' motion to dismiss Count I is properly granted.

2. <u>Prohibited Transaction</u> (Count II)

29 U.S.C. § 1106 governs "Prohibited Transactions." Fleming's five-paragraph claim in Count II alleges, in pertinent part, that "Transamerica is a party in interest" and that Defendant Plan Committee violated both 29 U.S.C. § 1106(a)(1)(C) ("furnishing of goods, services, or

facilities between the plan and a party in interest"), and *id.* § 1106(a)(1)(D) ("transfer to, or use by or for the benefit of a party in interest, of any assets of the plan") (3d Amend. Compl. ¶¶ 128–29).

Defendants argue that Fleming fails to state a plausible prohibited-transaction claim in Count II (ECF No. 83 at PageID.1738). According to Defendants, Fleming simply declares in conclusory fashion that Transamerica is a "party in interest" and fails to identify the specific "transaction" that purportedly violates § 1106(a) (*id.* at PageID.1739–1740). Additionally, Defendants argue that Fleming fails to address the "obvious alternative explanation" for the conduct he alleges, to wit: that Transamerica's agreement with the Kellogg Plan is not a "transaction" that falls within ERISA's prohibitions (*id.* at PageID.1740–1742).

In response, Fleming first indicates that he no longer seeks to allege a prohibited-transaction claim under 29 U.S.C. § 1106(a)(1)(D) for a transfer of the Kellogg Plan's assets (ECF No. 84 at PageID.1761, n.15). As to his remaining claim under subsection (C), he argues that he has alleged the necessary facts for each of the three elements of a prohibited-transaction claim under 29 U.S.C. § 1106(a)(1)(C), and, having set out the necessary three elements, has plausibly established that the RKA transactions between the Kellogg Plan Committee and Transamerica are "presumptively unlawful" (*id.* at PageID.1758–1761).

Defendants' argument for dismissal of Count II has merit.

The general fiduciary duties imposed by 29 U.S.C. § 1104 are supplemented by a detailed list of transactions that are expressly prohibited by 29 U.S.C. § 1106 and are considered per se violations because they entail a high potential for abuse. *Harris Trust and Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 241–42 (2000). Congress enacted § 406 "to bar categorically a transaction that [is] likely to injure the pension plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996) (citation omitted). In pertinent part, § 1106(a)(1)(C) states that "[a] fiduciary with respect

to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect … furnishing of goods, services, or facilities between the plan and party in interest." 29 U.S.C. 1106(a)(1)(C). Thus, § 1106(a)(1)(C) contains the following three elements: (1) "caus[ing a] plan to engage in a transaction" (2) that the fiduciary "knows or should know ... constitutes a direct or indirect ... furnishing of goods, services, or facilities" (3) "between the plan and a party in interest." *Cunningham v. Cornell University*, 604 U.S. 693, 700 (2025).[6] ERISA defines a "party in interest" to include entities "providing services to [the] plan." 29 U.S.C. § 1002(14).

Fleming alleges (1) the existence of various covered "transactions" between the Plan Committee and Transamerica, including multiple RKA service transactions from at least 2016 until 2020 (3d Amend. Compl. ¶¶ 17–18); (2) the Plan Committee's knowledge that its relationship with Transamerica involved "direct furnishing of RKA services" to the Plan during that time period (*id.* ¶ 59); and (3) that Transamerica, as a service provider to the Plan, is a party in interest (*id.* ¶ 16).

The Supreme Court has stressed that the central inquiry is whether the party was acting as an ERISA fiduciary (that is, was performing a fiduciary function) "when taking the action subject

[6] The question before the Supreme Court in *Cunningham* was "whether, to state a claim under § 1106, a plaintiff must plead that § 1108(b)(2)(A) does not apply to an alleged transaction between a plan and a party in interest." 604 U.S. at 695–96. The Supreme Court unanimously held that the answer was "no," reasoning that § 1108 sets out affirmative defenses and that it is the defendant-fiduciary's burden to plead and prove that a § 1108 exemption applies to an otherwise prohibited transaction under § 1106. *Id.* Hence, the Court's reference therein to a plaintiff's allegations having to demonstrate "no more" and "no less" than the three elements of § 1106 was intended to cabin a plaintiff's showing to § 1106, i.e., to the exclusion of the twenty-one exemptions in § 1108. Fleming's emphatic use of the "no more, no less" phrase, *see* ECF No. 84 at PageID.1759–1760, is misplaced in this case. The Supreme Court did not address which entities fall within the "party in interest" definition or which "transactions" fall within § 1106, and its use of the phrase "no more, no less" did not connote any erosion of the plausibility pleading standard.

to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). In *Harris Trust*, the Supreme Court recognized that "Congress defined 'party in interest' to encompass those entities that a fiduciary might be inclined to favor at the expense of the plan's beneficiaries." 530 U.S. at 242; *see also Lockheed*, 517 U.S. at 893 (explaining that § 1106(a) prohibits "commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length").

Consistent with this reasoning, a majority of circuits have held that the collection of a contractually predetermined fixed fee does not constitute a fiduciary act under ERISA. *See Danza v. Fidelity Mgmt. Tr. Co.*, 533 F. App'x 120, 125–26 (3d Cir. 2013) (affirming the district court's dismissal of the plaintiff's prohibited-transaction claim, reasoning that entering into a services agreement could not provide the basis for a prohibited-transaction claim because "Fidelity … was not a party in interest at the time the Trust Agreement was signed" and "[a] service provider cannot be held liable for merely accepting previously bargained-for fixed compensation that was not prohibited at the time of the bargain"); *D.L. Markham DDS, MSD, Inc. 401(K) Plan v. Variable Annuity Life Ins. Co.*, 88 F.4th 602, 609–10 (5th Cir. 2023) (affirming the district court's dismissal of the plaintiff's prohibited-transaction claim because "entities that are not already providing services to a particular plan at the time of contracting with that plan . . . are not 'parties in interest' under ERISA"); *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 655 (9th Cir. 2019) (affirming the district court's dismissal of the plaintiff's prohibited-transaction claim because "the service provider cannot be held liable for merely accepting previously bargained-for fixed compensation") (internal quotation marks and citation omitted)); *Ramos v. Banner Health*, 1 F.4th 769 (10th Cir. 2021) (affirming the district court's dismissal of the prohibited-transaction claim, reasoning that the plaintiff's theory "leads to an absurd result: the initial agreement with a service

provider would simultaneously transform that provider into a party in interest and make that same transaction prohibited under § 1106"). *Cf. McLemore v. Regions Bank*, 682 F.3d 414, 424 (6th Cir. 2012) (holding, within the context of a different ERISA provision, that there is no breach of a fiduciary duty when a service provider simply withdraws "routine contractual fees" from ERISA plan accounts).

Again, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Fleming's conclusory allegations in Count II do not demonstrate how Transamerica fits within the "party in interest" definition at the time of the challenged transaction. Therefore, consistent with prevailing caselaw, this Court likewise concludes that Fleming's allegations do not state a plausible prohibited-transaction claim. Count II is properly dismissed.

3. Failure to Monitor (Count III)

Last, Fleming's six-paragraph claim in Count III alleges, in pertinent part, that Defendants Kellogg and Cahillane, who had the authority to "appoint and remove members" on the Plan Committees, breached their "duty to monitor those individuals responsible for Plan Bundled RKA fees on the Plan Committees to ensure that they were adequately performing their fiduciary obligations, and to take prompt and effective action to protect the Plan in the event that these individuals were not fulfilling those duties" (3d Amend. Compl. ¶¶ 134–35).

Defendants argue that Fleming fails to state a plausible failure-to-monitor claim in Count III against Kellogg and Cahillane where (1) the underlying claims fail, and (2) the derivative claim is unsupported by Fleming's factual allegations (ECF No. 83 at PageID.1743–1744).

In response, Fleming does not disagree that a duty-to-monitor claim derives from a successful claim of a breach of fiduciary duty (ECF No. 84 at PageID.1761–1762).

Defendants' argument for dismissal of Count III has merit.

The predicate for Count III is Fleming's underlying allegations for fiduciary breach and prohibited transactions. In failing to plausibly allege his claims in Counts I and II, Fleming concomitantly fails to plausibly allege a derivative failure-to-monitor claim. *See, e.g., Smith v. CommonSpirit Health*, No. 20-cv-95, 2021 WL 4097052, at *13 (E.D. Ky. Sept. 8, 2021) ("[A] monitoring claim must be dismissed where, as here, the underlying breach by the appointed fiduciary is not sufficiently pled."), aff'd, 37 F.4th 1160 (6th Cir. 2022). Count III is properly dismissed.

4. <u>Dismissal with Prejudice</u>

"Ordinarily, if a district court grants a defendant's 12(b)(6) motion, the court will dismiss the claim without prejudice to give parties an opportunity to fix their pleading defects." *CNH Am. LLC v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW)*, 645 F.3d 785, 795 (6th Cir. 2011). However, "it is not the district court's role to initiate amendments." *Just. v. Petersen*, No. 21-5848, 2022 WL 2188451, at *4 (6th Cir. June 17, 2022) (quoting *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 438 (6th Cir. 2008)).

Fleming does not request an opportunity to file a fourth amended complaint in this case. Defendants argue that any further attempts to revise his pleading would be similarly futile, and they request that dismissal of his claims be with prejudice (ECF No. 83 at PageID.1726, 1729, 1744). The Court agrees. *See*, *e.g.*, *Golf Vill. N., LLC v. City of Powell, Ohio*, 14 F.4th 611, 624 (6th Cir. 2021) (holding that a district court does not abuse its discretion in dismissing an amended complaint with prejudice where a plaintiff never moves for leave to file a second amended

complaint); *Crosby v. Twitter, Inc.*, 921 F.3d 617, 627–28 (6th Cir. 2019) (same). *See also Stewart v. IHT Ins. Agency Grp., LLC*, 990 F.3d 455, 457 n.* (6th Cir. 2021) ("Dismissal with prejudice and without leave to amend is [ ] appropriate when it is clear ... that the complaint could not be saved by an amendment.").

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint (ECF No. 82) is GRANTED.

Because this Opinion and Order resolves all pending claims, the Court will also enter a Judgment to close this case. *See* FED. R. CIV. P. 58.

Dated: December 8, 2025

/s/ Jane M. Beckering
JANE M. BECKERING
United States District Judge