

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

Civil Action No. 23-cv-01496-LTB-SBP

IRIS F. MACIAS;
LORINE GUMONE; and
BILLIE MILHAM, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SISTERS OF CHARITY OF LEAVENWORTH HEALTH SYSTEM;
THE BOARD OF DIRECTORS OF THE SISTERS OF CHARITY OF
LEAVENWORTH HEALTH SYSTEM;
THE DEFINED CONTRIBUTION INVESTMENT COMMITTEE OF THE
SISTERS OF CHARITY OF LEAVENWORTH HEALTH SYSTEM; and
JOHN DOES 1-30,

Defendants.

ORDER

This case is before me on Defendants' Motion to Dismiss With Prejudice Plaintiffs' Second Amended Complaint ("SAC") [ECF No. 60], which was filed in response to my Order dismissing Plaintiffs' First Amended Complaint ("FAC") without prejudice [ECF No. 55] (the "January 6, 2025 Order"). After consideration of the Motion and all related case filings, I deny Defendants' Motion for the reasons set forth below.

I. Background

A. General Allegations

Plaintiffs' SAC [ECF No. 59] alleges that Defendants breached their fiduciary duties under ERISA, 29 U.S.C. § 1001, *et seq.*, through the offering of certain JPMorgan SmartRetirement target date funds ("JPM TDFs") in the menu of investment options for participants in (1) the Sisters of Charity of Leavenworth Health System ("SCL Health") 401(k) Retirement Savings Plan; (2) the SCL Health Defined Contribution Plan; and (3) the SCL Health Retirement Savings Plan (collectively "the Plans"). For purposes of the Motion, the SAC's relevant and well-pleaded facts are accepted as true.

Throughout the Class Period beginning June 13, 2017, JPM TDFs were included in the menu of investment offerings available to participants in the Plans. SAC at ¶¶ 35 & 70. The offered JPM TDFs were either in the I, R5, or R6 share classes, the JPMorgan SmartRetirement Passive blend series, and/or the JPMorgan SmartRetirement series offered in its Collective Investment Trust ("CIT") version. *Id.* at 70.

Target date funds like the JPM TDFs are designed to provide a single diversified investment vehicle for participants and are offered as a suite of funds, with each fund based on the participant's anticipated retirement date. *Id.* at ¶ 71. The portfolios of target date funds include multiple types of assets, including equity (stock) and fixed income (bond) securities, and are automatically rebalanced based

on the fund's "glide path" to become more conservative as the participant gets closer to retirement. *Id.* at ¶¶ 74-76. The target date refers to the participant's expected retirement year, i.e., target date 2030 funds are designed for individuals who intend to retire in 2030. *Id.* at ¶¶ 77.

Target date funds are divided into two broad categories based on the fund's glide path. *Id.* at ¶ 78. A "To" target date fund allocates its underlying assets to the most conservative investments at the year of expected retirement while a "Through" target date fund reaches its most conservative asset allocation past the expected retirement date by focusing on the life expectancy of the participant. *Id.* The JPM TDFs included in the Plans are all "Through" target date funds. *Id.* at ¶ 79.

Target date funds may also be "actively" or "passively" managed. *Id.* at ¶ 80. With an actively managed fund, the portfolio manager attempts to select stocks or bonds to generate investment returns that exceed the relevant benchmark index return. *Id.* With a passively managed fund, the portfolio manager attempts to mimic the performance of a relevant benchmark index. *Id.*

The JPM TDFs are the only target date funds offered to participants in the Plans and are the default selection for plan participants who do not select a specific investment option offered by the Plans. *Id.* at ¶¶ 81 & 109.

B. Allegations that the Comparator Funds and the Morningstar Comparator Index are Meaningful Benchmarks

The SAC, like the FAC, asserts that the Plans' JPM TDFs can be compared to target date funds offered by American Funds, T. Rowe Price, and Mutual of America (the "Comparator Funds") as benchmarks. *Id.* at ¶¶ 90-91. Plaintiffs assert that this

comparison is appropriate because each of the Comparator Funds “pursue[s] the same investment objectives as the [JPM TDFs], invest[s] primarily in equity (stock) and fixed income (bond) securities as do the [JPM TDFs], invest[s] in both U.S. and foreign securities as do the [JPM TDFs], utilize[s] a “through” glide path as do the [JPM TDFs], [is] managed by well-known investment advisers, and [is] available to all large retirement plans including the Plans.” *Id.* at ¶ 90.

The SAC also again asserts that it is appropriate to compare the JPM TDFs to the Comparator Funds because Morningstar, “the most well respected and accepted financial industry fund database,” includes each of them in its Lifetime Moderate Index (also referred to as the “Morningstar Comparator Index”) “because the underlying holdings of each fund match the risk return profile for this category” and that “all four funds concentrate their holdings in the large blend risk/return category.” *Id.* at ¶¶ 85 & 92.

A Morningstar category “is assigned by placing funds ... into peer groups based on their underlying holdings. The underlying securities in each portfolio are the primary factor in [Morningstar’s] analysis Funds are placed in a category based on their portfolio statistics and compositions over the past three years. Analysis of performance and other indicative factors are also considered.” *Id.* at ¶ 86. Morningstar states that it created its category classifications “to help investors make meaningful comparisons between mutual funds.” *Id.* at ¶ 87.

The SAC alleges that the Comparator Funds and the JPM TDFs all have active management because the Comparator Funds are actively managed while the

JPM TDFs have a blend of active and passive management. *Id.* at ¶ 93. Plaintiffs further allege that all target date funds are actively managed “in a true sense” because the glide path must be managed by an investment manager, but the management style matters little in any event because “[the] underlying asset allocations are similar (e.g., equity v. fixed income) and ... [they] have the same investment objective[,]” i.e., to achieve the objectives of growth, income, and conservation of capital based on the proximity of the target date. *Id.* at ¶¶ 94 & 95.

Finally, the SAC alleges that the Plans’ investment policy statement (“IPS”) supports the use of the Comparator Funds and the Morningstar Comparator Index as meaningful benchmarks for comparison. *Id.* at ¶¶ 98-105. Specifically, the IPS [ECF No. 59-4] provides as follows:

The screening process for the initial selection of any mutual fund or other investment vehicle will include, but not be limited to, consideration of ...

- Performance relative to peers within the appropriate peer group categories;
- Performance relative to market benchmarks for annualized periods, calendar years, and quarters within calendar years. Rolling periods of performance may also be considered, along with performance in both positive and negative market environments; ...
- Years of history – while longer periods are preferred (five of ten years), some asset classes may necessitate using a shorter (e.g., three-year) performance history;

...

At the time of selection of any alternative, [SCL Health’s Defined Contribution Investment Committee (the “Committee”)], with assistance of outside investment advisors as desired ..., will establish

appropriate benchmarks and peer groups for such alternatives, which will also be reflected on Exhibit A and may be modified by the Committee from time to time as appropriate.

...

Although the investment alternatives are chosen with long-term expected return and risk profiles in mind, performance will be reviewed at least annually in an effort to identify any adverse performance trends or other issues and the Committee will take such actions as it deems appropriate. Funds will be reviewed against market benchmarks and peer groups as reflected on the attached Exhibit A, as well as the following criteria:

- Performance relative to peer group - the investment manager should be measured against an appropriate peer universe, using a consistent period of measurement (e.g. the most recent five-year period);
- Performance relative to market benchmark - the investment manager should be compared to the market benchmark using a consistent period of measurement (e.g. the most recent five-year period); ...

...

The Committee recognizes that there are no hard and fast rules for investment alternative termination. Performance against the alternative's index or peer group is just one factor in determining whether the alternative should continue to be offered under the Plans.

Id. at ¶¶ 98-101, 104 & 105 & IPS at 3-5. Exhibit A to the IPS provides that the JPM TDFs in the Plans are “benchmarked to the appropriate Morningstar Lifetime Mod benchmark that matches the year in the fund. Additionally, the peer universe used to benchmark performance is the Morningstar Target-Date Universe that aligns with each fund in the series.” SAC ¶ 102 & IPS at 8.

C. Allegations Regarding the Performance of the JPM TDFs Relative to the Comparator Funds and the Morningstar Comparator Index and IPS Requirements

To demonstrate underperformance of the JPM TDFs relative to the Comparator Funds and the Morningstar Comparator Index, the SAC relies on largely the same comparisons and data as the FAC. That is, the SAC first compares the three- and five-year average returns for the JPM TDFs offered by the Plans for the target year 2040 with the corresponding Comparator Funds and the Morningstar Comparator Index as of 12/31/2014, 12/31/2015, 12/31/2016, 12/31/2017, and 12/31/2018. *Id.* at ¶¶ 112-115. The data from Plaintiffs' charts can be summarized as follows:

- (1) the three-year average returns for the 2040 JPM TDFs were below those of the Comparator Funds by 0.02% - 1.86%;
- (2) the five-year average returns for the 2040 JPM TDFs were below these of the Comparator Funds by 0.26 - 1.27%, but in 2014 the 2040 JPM TDF had a five-year average return that was 0.01% higher than the Comparator Fund offered by American Funds;
- (3) the three-year average returns for the 2040 JPM TDFs were above those of the Morningstar Comparator Index by 1.69% in 2014 and 1.62% in 2015, and below it by 0.03% in 2016, 0.24% in 2017, and 0.68% in 2018; and
- (4) the five-year average returns for the 2040 JPM TDFs were above those of the Morningstar Comparator Index by 0.22% - 0.94%.

Id. See also ECF No. 59-2, App. B to SAC (comparing three- and five-year average returns for JPM TDFs offered by the Plans for the target years 2020-2060 to Comparator Funds and the Morningstar Comparator Index).

Then, for the years 2019 - 2022, the SAC compares the one-year returns for the 2040 JPM TDFs offered by the Plans to the Comparator Funds and the

Morningstar Comparator Index. SAC at ¶ 117. The corresponding chart shows that one-year returns for the 2040 JPM TDFs were below those of the Comparator Funds and the Comparator Index by 0.16% - 5.89% in 2019 - 2021 and exceeded them by 0.58% - 1.93% in 2022, with a few exceptions. *Id.* Plaintiffs assert that 2022 was “an outlier year” and that “early returns for 2023 suggest that ... the funds will continue to struggle as compared to their peers.” *Id.* at ¶ 118.

The SAC plots an investment of \$10,000 in the 2040 R5 JPM TDF and the Comparator Funds and the Morningstar Comparator Index from 2014 through 2022 and asserts that the 2040 R5 JPM TDF “generally performed below the [Morningstar Comparator Index] and well below the Comparator Funds.” *Id.* at ¶¶ 119-120 & 122. *See also* ECF No. 59-2, App. C to SAC (graphs purporting to show that “[s]imilar results are seen for the remaining target date years”).

The SAC notes the following Morningstar rankings for the 2040 R5 JPM TDF in the Lifetime Moderate Index: (1) 80th percentile in 2016, meaning it performed worse than 176 of the 221 funds in the same category; (2) 95th percentile in 2018, meaning it performed worse than 227 of the 239 funds in the same category; (3) not above the 47th percentile between 2020 and 2022; and (4) 51st percentile in 2021. SAC at ¶ 121. *See also* ECF No. 24-1, Ex. 2 (percentile rankings for 2040 R5 JPM TDF (SMTIX)). Plaintiffs allege that the fact that the 2040 R5 JPM TDF fund ranked higher in some years is only evidence of its lack of stability. SAC at ¶ 122. Plaintiffs further allege that similar results can be seen for each target year of the JPM TDFs. *Id.* at ¶ 121.

The SAC alleges that the Plans' IPS "required" the JPM TDFs to be replaced "based on its performance as early as the start of the Class Period, if not sooner." *Id.* at ¶ 123. Plaintiffs quote the IPS for providing that "... performance will be reviewed at least annually in an effort to identify any performance trends or other issues..." and allege that the IPS further provides that (1) funds in the Plans must be evaluated primarily on their three- and five- year returns compared to their respective benchmark(s) and the rankings of each fund in the three- and five- year peer universe; and (2) that any underperforming funds should be removed and replaced with better performing alternatives *Id.* Plaintiffs allege that the IPS required a comparison of the JPM TDFs "[p]erformance relative to peer group,' i.e., [they] 'should be measured against an appropriate peer universe, using a consistent period of measurement'" and that "[d]oing so would have demonstrated the imprudence of the [JPM TDFs] and the prudence of other funds such as the Comparator Funds." *Id.* at ¶124.

The SAC adds allegations that small differences in returns between the JPM TDFs and other funds resulted in significant loss to the Plans. *Id.* at ¶¶ 126-127. By way of example, Plaintiffs chart the portfolio value from realizing the same annual return of 4% on an investment of \$100,000 over 20 years but with annual fees of 0.25%, 0.50%, and 1.0%. *Id.* Plaintiffs allege that the JPM TDFs performance compared to the average performance of the Comparator Funds during the Class Period resulted in lost retirement earnings of \$60 million for the Plans and their participants. *Id.* at ¶ 127.

D. Allegations that the S&P Target Date Index is a Meaningful Benchmark and Comparing Its Performance to that of the JPM TDFs

Plaintiffs' SAC adds new allegations that the S&P Target Date Index ("S&P Comparator Index") is a "prominent and widely-accepted target date benchmark for 'through' target date funds, like the [JPM TDFs] and the Comparator Funds" and that JPMorgan itself benchmarked the JPM TDFs against the S&P Comparator Index. *Id.* at ¶¶ 129-130 & n. 23.

The SAC alleges that the JPM TDFs "consistently underperformed the [S&P Comparator Index] in both returns and rank." *Id.* at ¶ 130. Plaintiffs provide charts comparing the year-to-date, one-, three-, five-, and ten-year returns for JPM TDFs for the target years 2015 through 2060 and a "Retirement" version with the corresponding S&P Comparator Index as of September 30, 2022. *Id.* The data from these charts for the three-, five-, and ten-year returns can be summarized as follows:

- (1) the three-year returns for the JPM TDFs were below those of the S&P Comparator Index by 0.29% - 3.14%;
- (2) the five-year returns for the JPM TDFs were below those of the S&P Comparator Index by 0.23% - 2.1%; and
- (3) the ten-year return for the JPM TDFs were below those of the S&P Comparator Index by 0.18% - 0.7%, except that the ten-year returns for the JPM "Retirement" TDF were above those of the S&P Comparator Index by 0.17% and 0.38%.

Plaintiffs' charts also show that the three-, five-, and ten-year returns of the JPM TDFs generally ranked in the bottom deciles of funds in the corresponding S&P

category, except that the ten-year average return for the JPM “Retirement” TDF ranked near the top decile. *Id.*

E. Allegations of “Other Indicia” of Imprudent Conduct in the Offering of the JPM TDFs

Plaintiffs’ SAC adds new allegations that the JPM TDFs consistently took more risk than the S&P Comparator Index while achieving a lesser return. *Id.* at ¶¶ 132-135.

Plaintiffs include charts in the SAC showing the five- and ten-year “risk/return comparison” for the Passive Blend (CIT) and Blend JPM TDFs for the target years of 2030, 2040, and 2050 as of the third quarter of 2022. *Id.* at ¶¶ 132-133. The five-year comparison appears to show variations in risk, charted as “volatility (standard deviation),” of less than 0.5%, and variations in returns of less than 1.0%. *Id.* at ¶ 132. The ten-year comparison appears to show variations in risk of up to 0.3%, and variations in returns of up to 0.5%. *Id.* at ¶ 133.

F. Plaintiff’s Claims

Plaintiffs’ SAC asserts two claims: (1) a claim against the Committee and its members for breaches of the fiduciary duty of prudence “in multiple respects ... such as failing to select prudent investment options or failing to replace investment options when they became imprudent,” *id.* at 139 (First Claim for Relief); and (2) a claim against SCL Health, its Board of Directors, and the Board members for failure to adequately monitor other fiduciaries (Second Claim for Relief).

II. Standard of Review

In reviewing Defendants' Motion, I have limited my consideration to the allegations in the SAC, the IPS, demonstrative exhibits referred to in the SAC, and documents of which I have already taken judicial notice. *See* ECF Nos. 24 & 56. Defendants' Motion is therefore governed by the Rule 12(b)(6) standard for dismissal. *See Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010) (motion to dismiss under Rule 12(b)(6) need not be converted to one for summary judgment if court limits its consideration to documents the complaint incorporates by reference; documents referred to in the complaint that are central to the plaintiff's claim and the parties do not dispute their authenticity; and matters of which a court may take judicial notice).

Under Rule 12(b)(6), "[d]ismissal is appropriate only if the complaint, viewed in the light most favorable to plaintiff, lacks enough facts to state a claim to relief that is plausible on its face." *United States ex rel. Conner v. Salina Regional Health Center, Inc.*, 543 F.3d 1211, 1217 (10th Cir. 2008) (quotations and citations omitted). A claim is plausible on its face "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) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

To survive a motion to dismiss, a plaintiff must provide more than “labels and conclusions” or “a formulaic recitation of the elements of a cause of action.” *Bell Atlantic Corp.*, 550 U.S. at 555. *See also Iqbal*, 556 U.S. at 678 (a complaint will not suffice if it tenders “naked assertions devoid of further factual enhancement”). The Court accepts all well-pleaded factual allegations as true and views them in the light most favorable to the plaintiff. *Cuervo v. Sorenson*, 112 F.4th 1307, 1312 (10th Cir. 2024). The Court need not accept conclusory allegations as true. *Southern Disposal, Inc. v. Tex. Waste Mgmt.*, 161 F.3d 1259, 1262 (10th Cir. 1998). “A conclusory allegation is one in which an inference is asserted without stating underlying facts or including any factual enhancement.” *Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136, 1145 (10th Cir. 2023) (internal quotation marks and citation omitted).

III. Analysis

A. Plaintiffs’ Claim for Breach of the Duty of Prudence

“An ERISA fiduciary must discharge his responsibility with ‘with the care, skill, prudence, and diligence’ that a prudent person ‘acting in a like capacity and familiar with such matters’ would use.” *Tibble v. Edison Int’l*, 575 U.S. 523, 529 (2015) (quoting 29 U.S.C. §1104(a)(1)). The test governing claims for breach of the duty of prudence “is one of conduct, and not a test of the result of performance of the investment.” *Kurtz v. Vail Corp.*, 511 F. Supp. 3d 1185, 1197 (D. Colo. 2021) (citations omitted). In the absence of factual allegations about a fiduciary’s process, a claim for breach of the duty of prudence may survive a motion to dismiss “if the

court can reasonably infer from circumstantial factual allegations that the process was flawed.” *Id.*

1. Allegations About Defendants’ Processes

Defendants assert that Plaintiffs’ SAC, like the FAC, does not allege facts about Defendants’ processes but instead attempts to plead an inference that these processes were imprudent based solely on the alleged underperformance of the JPM TDFs. Plaintiffs counter that the SAC contains new process-based allegations regarding Defendants’ selection and retention of the JPM TDFs as an investment option under the Plans. The first issue for my consideration then is whether the SAC makes direct allegations about Defendants’ processes such that Plaintiffs now need not rely solely on allegations of underperformance to plausibly plead imprudent conduct by Defendants. *See Kistler v. Stanley Black & Decker, Inc.*, 2024 WL 3292543, at **11-12 (D. Conn. July 3, 2024) (“Because the [challenged] TDFs’ underperformance is not substantial enough to prop up the plaintiffs’ imprudence claim alone, the plaintiffs’ process allegations are critical to whether they have nudged their underperformance claim to plausibility.”); *Jones v. DISH Network Corp.*, 2023 WL 7458377, at *7 (D. Colo. Nov. 6, 2023), *R. & R. adopted*, 2023 WL 8170913 (D. Colo. Nov. 24, 2023) (“*Jones II*”) (denying dismissal of amended complaint’s duty of prudence claim where allegations of minor underperformance previously found by the court to be too insubstantial were now “part and parcel” of newly added direct allegations about defendants’ monitoring process).

Plaintiffs first cite the IPS's review criteria for investment alternatives offered under the Plans and assert that “[h]ad Defendants followed the IPS[,] they would have discovered that replacing the JPM TDFS was required because the JPM TDFs failed to satisfy prescribed benchmarks under the prescribed 3- and 5- year focus.” Response, ECF No. 61, at 6. *See also* SAC at ¶¶ 123 -124. Plaintiffs thus argue that Defendants’ processes were flawed because they failed to follow the IPS.

Imprudent conduct may be shown through failure to follow an IPS. *Jones II*, 2023 WL 7458377, at *8 (failure to follow IPS constituted failure to prudently review plan’s investment decisions). In *Jones II*, the plaintiffs’ operative complaint included allegations based on minutes from meetings of the retirement plan’s committee which did not reflect any review or discussion of the criteria set forth in the plan’s IPS. *Id.* at *6. While Plaintiffs’ SAC contains no comparable allegations based on the Committee’s meetings, this does not preclude a finding that Plaintiffs have plausibly pled that Defendants’ processes were flawed in that they failed to follow their own policies as set forth in the IPS. *See Garcia v. Alticor, Inc.*, 2021 WL 5537520, at *7 (W.D. Mich. Aug 9, 2021) (recognizing that ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail without discovery and that therefore courts read their complaints “slightly more leniently”).

Tellingly, the SAC asserts that Defendants denied Plaintiffs’ request for minutes from the Committee’s meetings, SAC at ¶ 66, and Defendants do not argue that Plaintiffs have failed to plausibly plead imprudent processes based on their

failure to present evidence that is solely in Defendants' control. Instead, Defendants argue that Plaintiffs' assertion that the IPS *required* them to remove the JPM TDFs based solely on underperformance relative to market benchmarks for three- and five- year periods was already considered and rejected in my January 6, 2025 Order. This argument ignores additional allegations in Plaintiffs' SAC and Response supporting their assertion that Defendants failed to follow the IPS.

Significantly, the SAC now specifically cites Exhibit A to the IPS, which states that the JPM TDFs offered under the Plans are "benchmarked to the appropriate Morningstar Lifetime Mod benchmark that matches the year in the fund" and that "the peer universe used to benchmark performance is the Morningstar Target-Date Universe that aligns with each fund in the series." SAC ¶ 102 & IPS at 8. The IPS requires a yearly comparison of the JPM TDFs' performance relative to these benchmarks. SAC at ¶¶ 98-101 & 105 & IPS at 3 -5. The SAC alleges that this comparison was not made and "[d]oing so would have demonstrated the imprudence of the [JPM TDFs] and the prudence of other funds such as the Comparator Funds." SAC at ¶ 124.

Thus, while Plaintiffs continue to overstate what the IPS provides regarding the removal of funds based on their underperformance relative to identified benchmarks, they have nonetheless identified a specific requirement thereunder that they allege Defendants failed to satisfy. Plaintiffs have therefore plausibly pled that Defendants' processes were flawed in that they failed to follow the IPS.

Plaintiffs' Response further alleges that Defendants' processes were flawed because "had [they] prudently evaluated the funds in the Plans, they would have discovered that even by the fund manager's own benchmark, the S&P [Comparator] Index, the JPM TDFs were subpar." Response at 7. This argument is not definitively reflected in the SAC's allegations. *See* SAC at ¶¶ 128-133 (discussing the S&P Comparator Index as a benchmark and comparing returns, ranking, and "risk/return") & 135 (generally alleging that the Committee was repeatedly faced with "objective evidence" that the JPM TDS were an imprudent investment option "yet ... sat on its hands and failed to take any action...").

Defendants do not address Plaintiffs' process-based argument that it was imprudent for Defendants not to compare the JPM TDFs to the S&P Comparator Index despite JPMorgan itself making such comparison in publicly available information but argue that the S&P Comparator Index is not a meaningful benchmark for the JPM TDFs and that the performance differentials are not significant in any event. These arguments will be addressed in the context of Plaintiffs' performance-based allegations. For present purposes, Plaintiffs have plausibly pled, at a minimum, flawed processes by Defendants in failing to comply with the requirements of the IPS. This failure alone, however, cannot establish that Defendants breached their duty of prudence, and I must also consider Plaintiffs' performance-based allegations. *See Kopp v. Klein*, 894 F.3d 221 (5th Cir. 2018) ("...even if the Defendants' actions were procedurally imprudent, a fiduciary is liable only for 'losses to the plan resulting from' that breach.").

2. Allegations About the Performance of the JPM TDFs

a. Meaningful Benchmarks

Plaintiffs must satisfy the Tenth Circuit’s “meaningful benchmark” standard to demonstrate underperformance of the JPM TDFs relative to other investment options. Under this standard, a meaningful comparison “will be supported by facts alleging, for example, the alternative investment options have similar investment strategies, similar investment objectives, or similar risk profiles to the plan’s funds.” *Matney*, 80 F.4th at 1148. *See also id.* at 1149 (“... the complaint must state facts to show the funds or services being compared are, indeed, comparable. The allegations must permit an apples-to-apples comparison.”).

In my January 6, 2025 Order, I concluded that Plaintiffs’ FAC did not meet the “meaningful benchmark” standard with respect to the Morningstar Comparator Index and the Comparator Funds because it made broad allegations about similarities between these comparators and the JPM TDFs, i.e. a concentration of holdings in the large blend risk/return category, with little factual enhancement and failed to include any allegations about their management styles. *See* January 6, 2025 Order at 12-14.

Defendants first argue that the SAC fails to cure this deficiency in the FAC with respect to the Comparator Funds because it likewise provides no specific details showing that they have similar characteristics to the JPM TDFs and adds only broad allegations that all “pursue the same investment objectives,” “invest primarily in equity and bonds securities,” “invest in both U.S. and foreign

securities,” and are “managed by well-known advisors and are available to large retirement plans.” SAC at ¶ 90. Defendants also argue that Plaintiffs’ new allegation that the Comparator Funds invest exclusively in actively managed funds while the JPM TDFs invest in both actively and passively managed funds, SAC at ¶ 93, highlights a lack of similarity with respect to management styles that Plaintiffs cannot overcome.

In response, Plaintiffs assert that new allegations in the SAC address the deficiencies identified in the January 6, 2025 Order and plausibly demonstrate that the Comparator Funds are meaningful benchmarks for the JPM TDFs. Regarding asset allocation, Plaintiffs cite Appendix A to the SAC to show that they have provided specific details as to the similar allocation of assets by the Comparator Funds, the Morningstar Comparator Index, and the JPM TDFs. Regarding management style, Plaintiffs argue that Defendants overlook the SAC’s allegations that the Comparator Funds and the JPM TDFs are all actively managed “in a true sense” because the very nature of TDFs requires active management. *See* SAC at ¶ 94. While Defendants dispute the accuracy of this characterization in their Reply, ECF No. 64, at 7, resolution of this issue is not appropriate at this stage based on the parties’ unsupported arguments.

The SAC also cites the IPS to show that the Comparator Funds and the Morningstar Comparator Index are meaningful benchmarks for the JPM TDFs. SAC ¶¶ 97-106. Specifically, Exhibit A to the IPS states that the Plans’ JPM TDFs are “benchmarked to the appropriate Morningstar Lifetime Mod benchmark that

matches the year in the fund. Additionally, the peer universe used to benchmark performance is the Morningstar Target-Date Universe that aligns with each fund in the series.” IPS at 8. The SAC adds the S&P Comparator Index as another benchmark for comparison and similarly asserts that such comparison is appropriate, in part, because JPMorgan itself uses the S&P Comparator Index as a benchmark for the JPM TDFs. SAC at ¶¶ 129 & 130.

Defendants argue that the IPS and JPMorgan’s use of these benchmarks for performance does not mean that they are “meaningful benchmarks” under the pleading standard required by the Tenth Circuit. It strains credulity, however, that the Committee and JPMorgan chose these benchmarks with no consideration of similarities they have with the JPM TDFs. Their use of Plaintiffs’ comparators as benchmarks therefore makes it plausible that they provide a meaningful basis for comparison. *See Jones II*, 2023 WL 7458377, at *10 (allegation that plan committee’s investment advisor selected the same comparator as plaintiffs satisfied plaintiffs’ burden at the pleading stage to provide a sound basis for comparison); *Trauernicht v. Genworth Fin. Inc.*, 2023 WL 5961651, at *13 (E.D. Va. Sept. 13, 2023) (there is “nothing implausible or defective” about complaint that relies on S&P Target Date Index for one of its comparisons when the IPS identified this index as a benchmark to measure performance).

Defendants also argue that the Morningstar Comparator Index and the S&P Comparator Index cannot be meaningful benchmarks because these indexes are not funds that could have been selected instead of the JPM TDFs. Defendants notably

cite no supporting authority for this proposition. Instead, Defendants cite case law rejecting indexes as meaningful benchmarks due to a lack of similarity to the funds being challenged. *See, e.g., Tullgren v. Booz Allen Hamilton*, 2023 WL 2307615, at *7 (E.D. Va. Mar. 1, 2023) (S&P Index was not a meaningful benchmark against which to assess the performance of the challenged funds when plaintiffs conceded that it reflected disparate investment strategies and styles); *Wehner v. Genetech, Inc.*, 2021 WL 2417098, at * 8 (N.D. Cal. June 14, 2021) (general allegations that challenged TDFs and S&P Index “share the same overall purpose and strategy” did not support apples-to-apples comparison absent factual allegations that compared their strategies and styles). These cases also do not reference the identification of the subject indexes as appropriate benchmarks by an operative IPS or investment manager as is the case here. It is this distinction that led the court in *Trauernicht*, to reject *Tullgren’s* criticism of the use of the S&P Index as a point of comparison, 2023 WL 5961651, at *13, and the same reasoning applies here.

Plaintiffs’ Response further suggests that the SAC’s risk/return comparisons between the JPM TDFs and the S&P Comparator Index also supports that this index as a meaningful benchmark for comparison. *See* Response at 16-17. The SAC alleges, however, that these comparisons show that the JPM TDFs took more risk than the S&P Comparator Index while achieving a lesser return. *Id.* at ¶ 132. Nonetheless, viewed in the light most favorable to Plaintiffs, the SAC’s other factual allegations are sufficient to support the use of the Comparator Funds, the

Morningstar Comparator Index, and the S&P Comparator Index as meaningful benchmarks for the JPM TDFs at the pleading stage.

b. Degree of Underperformance

Because I have already concluded that the SAC plausibly alleges flawed processes by Defendants, Plaintiffs no longer need to rely solely on allegations of underperformance to plausibly plead imprudent conduct by Defendants. Specifically, a lesser degree of underperformance may now plausibly support that Defendants breached their duty of prudence. *Kistler*, 2024 WL 3292543, at **11-12; *Jones II*, 2023 WL 7458377, at *7. I now analyze the SAC's allegations of underperformance with this distinction in mind.

Defendants first argue that the SAC's inclusion of five- and ten- year "risk/return comparisons" between two of the JPM TDFs and the S&P Comparator Index fail to bolster the FAC's allegations of underperformance. Plaintiffs dispute Defendants' characterization of these comparisons as "risk-adjusted returns" and assert that they instead reflect Defendants' repeated failure "to discover that the JPM TDFs' risk profile was unjustifiably abnormally high." Response at 17. Regardless, as Defendants point out, the difference in the degree of "risk," or "volatility (standard deviation)," between the chosen JPM TDFs and the S&P Comparator Index appears to be, at most, 0.3% in the 10-year chart and no more than 0.5% on the 5-year chart. As such, these comparisons do not meaningfully enhance Plaintiff's allegations of imprudent conduct by Defendants. Plaintiffs also fail to demonstrate that the SAC's added reference to the "exponential losses" that

result from small differences in returns over a twenty-year period provides further evidence of imprudent conduct by Defendants. *See* SAC at 30 n.17 (asserting that three- and five-year return averages are industry-accepted and IPS-mandated measurements of performance).

Defendants next argue that the SAC relies on the performance data comparing the JPM TDFs to the Comparator Funds and the Morningstar Comparator Index that I found insufficient in the FAC. Specifically, like the FAC, the SAC shows that the highest rate of underperformance by the JPM TDFs in relation to the Comparator Funds and the Morningstar Comparator Index in three- and five-year average returns from 2014-2018 was 1.86% in a single instance with considerably lower rates of underperformance overall and that the JPM TDFs outperformed the Comparator Index in most instances. *See* SAC at ¶¶ 112, 114 & 115.

As already noted, however, this performance data must now be viewed in combination with Plaintiffs' process-based allegations that Defendants failed to follow the IPS's requirements with respect to these benchmarks. Notably, the IPS does not specify a threshold of underperformance to be considered in the review of investment options included in the Plans. It is also notable that the court in *Jones II* found underperformance of 1 to 3.5% sufficient to support a duty of prudence claim when viewed in combination with new allegations about defendants' monitoring process. I cited the previous order in that case, *Jones v. DISH Network, Corp.*, 2023 WL 2644081, at *7 (D. Colo. Mar. 27, 2023), in support of my conclusion

that the FAC's performance data regarding the Comparator Funds and the Morningstar Comparator Index was insufficient to support this claim. January 6, 2025 Order at 16. Here too, while the SAC's allegations showing the degree by which the JPM TDFs underperformed the Comparator Funds and the Morningstar Comparator Index are insufficient alone, the SAC's additional allegations about Defendants' flawed processes sufficiently bolster these allegations to plausibly show imprudent conduct.

The performance data comparing the JPM TDFs to the Comparator Funds and the Morningstar Comparator Index must also be reviewed in combination with the SAC's added performance data comparing the JPM TDFs to the S&P Comparator Index. This data reflects more consistent underperformance in the range of 0.18% to 3.14% and more consistent low rankings by the JPM TDFs than the data comparing the JPM TDFs to the Morningstar Comparator Index and the Comparator Funds. *Id.* at ¶ 130. When viewed in combination with its other process and performance-based allegations, the SAC's comparisons of the JPM TDFs to the S&P Comparator Index plausibly supports Plaintiffs' claim for breach of the duty of prudence.

In sum then, after consideration of the totality of the SAC's process-and performance-based allegations under the dismissal standard of review, I conclude that Plaintiffs have now plausibly pled that Defendants breached the duty of prudence through the selection and retention of the JPM TDFs as investment options for participants in the Plans.

B. Claim for Failure to Monitor Other Fiduciaries

Defendants' only argument in support of the dismissal of this claim is that it is derivative of Plaintiffs' claim for breach of the duty of prudence. Thus, because the latter claim survives the Motion, so too does this claim.

IV. Conclusion

For the reasons set forth above, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss With Prejudice Plaintiffs' Second Amended Complaint [ECF No. 60] is DENIED.

Dated: July 24, 2025 in Denver, Colorado.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, JUDGE