APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-2569

LAURA L. DIVANE, ET AL.,
Plaintiffs-Appellants,
v.

NORTHWESTERN UNIVERSITY, ET AL.,
Defendants-Appellees.

[Argued May 23, 2019
Decided March 25, 2020]

Before Bauer, Manion, and Brennan, Circuit Judges.

Brennan, Circuit Judge.

Laura Divane and other plaintiffs,[1] beneficiaries of employee investment plans, sued Northwestern University for allegedly breaching its fiduciary duties under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq*. The district court found no breach. Neither do we, so we affirm.

I

There are two ERISA defined-contribution plans at issue in this case: the Northwestern University Retirement Plan and the Northwestern University Voluntary Savings Plan. Under the Retirement Plan, participating Northwestern University employees can

[1] April Hughes, Susan Bona, Katherine Lancaster, and Jasmine Walker.

contribute a portion of their salary to their account and Northwestern makes a matching contribution. Employees participating in the Voluntary Savings Plan also contribute a portion of their salary, but Northwestern does not make a matching contribution. Both plans allow participants to choose the investments into which the money in their account is invested and to choose among the investment options assembled by the plans' fiduciaries. Each plaintiff participates in one or both plans.

Northwestern is the administrator and designated fiduciary of both plans. It assigned some of its fiduciary administrative duties to university officials[2] and established a Retirement Investment Committee comprised of individual university officers[3] who exercised discretionary authority in managing the plans' assets. All are named defendants in this suit, and we collectively refer to them as "Northwestern" or "defendants."

Displeased with the administration of the plans, plaintiffs sued Northwestern for allegedly breaching its fiduciary duties under ERISA. Plaintiffs' amended complaint[4] is massive: 287 paragraphs over 141 pages.

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[2] These officials include the university's executive vice president, Nimalam Chinniah, and former executive vice president, Eugene Sunshine.

[3] The Committee members are Ronald Braeutigam, Kathleen Hagerty, Craig Johnson, Candy Lee, William McLean, Ingrid Stafford, and Pamela Beemer.

[4] Plaintiffs filed their initial complaint on August 17, 2016, alleging two counts for breach of the defendants' duties of loyalty and prudence due to unreasonable administrative and management fees and performance losses, and one count for failure to monitor designated fiduciaries. Plaintiffs filed an amended complaint on December 15, 2016, adding three additional counts for prohibited transactions based on the same alleged

Most of plaintiffs' allegations, though, are not specific to certain defendants or to the plans here. For example, plaintiffs object to a wide range or mix of investment options, noting that approach can overwhelm an unsophisticated investor. They believe too many choices leaves the average investor with the "virtually impossible burden" of deciding where to place their money.

Before October 2016, the plans offered investments through the Teachers Insurance and Annuity Association of America and College Retirement Equities Fund (TIAA-CREF) as well as Fidelity Management Trust Company. The Retirement Plan offered 242 investment options, and the Voluntary Savings Plan offered 187 options. Among the available options were mutual funds and insurance company annuities.[5]

In the four months leading up to October, these options were narrowed into four tiered categories from which participants could select their preferred investments:

- *Tier 1*: Target-date mutual funds that automatically rebalance their portfolios to become more conservative as the funds reach their target dates;
- *Tier 2*: Five index funds with a pre-selected set of stocks that eliminate trading and selection costs;

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breach conduct [*sic*]. In both complaints, plaintiffs requested a jury trial.

[5] These options represent a variety of investment offerings ranging from conservative to more aggressive. The annuity options offered here included fixed annuities, which provide participants with the assurance that they will have a stable income in retirement, and variable annuities, which carry some additional risk for the investor but allow for the possibility of a greater return.

- *Tier 3*: 26 actively managed funds in which a manager or management team selects stocks;
- *Tier 4*: A full-service, self-directed brokerage window through which the participant invests his or her plan assets.

By October, Northwestern had streamlined its investment offerings to about 40 options to enable "simpler decision-making by participants, reduce administrative expenses, increase participant returns, and provide access to lower cost shares when available." Appellant Br. at 9. Plaintiffs argue Northwestern's conduct in adjusting its offerings should be treated as proof that its pre-2016 offerings were imprudent.

One of the TIAA-CREF investments that remained available to plan participants post-2016 was the TIAA-CREF Traditional Annuity, a fixed annuity contract that returns a guaranteed, contractually specified minimum interest rate. The Traditional Annuity has "severe restrictions and penalties for withdrawal," including a 2.5% surrender charge if a participant withdraws the investment in a lump sum sooner than 120 days after the termination of her employment. TIAA policy dictates that if the Traditional Annuity is offered as part of an investment plan, that plan must also offer the TIAA-CREF Stock Account fund and use TIAA as the recordkeeper for all TIAA offerings. Plaintiffs complain that the Stock Account charges excessive fees and has not historically performed well.

Among the fees included in a fund's expense ratio are costs for recordkeeping. Defined contribution plans require recordkeepers to track the amount of each participant's account and how the account is allocated among investment options. Recordkeepers also maintain websites for participants and sometimes provide investment advice or education materials. One way that plans (including those in this case) pay for recordkeeping is to have the fund that collects the expense ratio share part of the expense ratio with the recordkeeper.

Plaintiffs alleged Northwestern should have paid recordkeeping costs by assessing a flat annual fee based on the number of participants in each plan. Specifically, plaintiffs alleged that some of the plan funds charged retail-rate expense ratios to cover recordkeeping rather than institutional-rate expense ratios. According to plaintiffs, a reasonable rate for recordkeeping fees would have been $35 per participant per year. The amended complaint reflects that plan participants paid an average of $54 to $87 per year for the Voluntary Savings Plan and an average of $153 to $213 per year for the Retirement Plan.[6] Plaintiffs argued these expenses are even higher for plans that use multiple recordkeepers, as was the case here.

Six days before discovery was scheduled to close, plaintiffs sought leave to file a second amended complaint alleging four new counts for breach of fiduciary duty. Aside from the four new counts, the second amended complaint mirrored the causes of action and claims in the amended complaint. The four new counts alleged that Northwestern: (1) offered retail class funds as investment options instead of using their bargaining power to offer institutional class shares at lower prices; (2) violated Northwestern's Investment Policy Statement by failing to monitor

[6] Plaintiffs allege that in 2015, the Voluntary Savings Plan held $530 million and had 12,293 participants while the Retirement Plan held $2.34 billion and had 21,622 participants.

investment performance and recordkeeping costs; and (3) allowed TIAA to access and use participant information to market its services to participants (two separate counts). These additional counts were based on information available to plaintiffs before discovery.

Plaintiffs sought monetary and injunctive relief and requested a jury trial and leave to file their proposed second amended complaint. Defendants moved to dismiss the amended complaint on every count, to deny leave to file the second amended complaint, and to strike plaintiffs' request for a jury trial.

II

The district court granted defendants' motion to strike the jury demand, finding that the monetary relief sought by plaintiffs did not constitute damages but rather a form of equitable restitution that did not entitle plaintiffs to a jury trial. The court also denied plaintiffs' request for leave to file a second amended complaint and granted defendants' motion to dismiss the amended complaint on all counts.

In dismissing the amended complaint, the district court rejected plaintiffs' theory that Northwestern breached its fiduciary duty by offering the Stock Account and allowing TIAA to serve as the recordkeeper for TIAA funds. First, as the court observed, "no plan participant was required to invest in the CREF Stock fund or any other TIAA-CREF product," so "any plan participant could avoid what plaintiffs consider to be the problems with these products . . . simply by choosing other options." *Divane v. Northwestern Univ.*, 2018 WL 2388118, at *6 (N.D. Ill. May 25, 2018). Moreover, "[t]he plans . . . had valid reasons to use TIAA-CREF as record keeper for its products." *Id.* According to plaintiffs' own allegations:

"TIAA-CREF *required* the plans to use it as record keeper for its products and to offer [the] CREF Stock Account if the plans were going to offer the TIAA-CREF Traditional Annuity," a popular investing option. *Id.* The court concluded that "[i]t was prudent to keep the [TIAA-CREF] Stock Account as an option (which no one was required to choose) and to keep TIAA-CREF as record keeper for its own funds (which no one was required to choose) when the alternative was to subject some participants to [the] 2.5% surrender charge" imposed by the Traditional Annuity. *Id.*

Next, the district court rejected plaintiffs' claim that Northwestern breached its fiduciary duties by permitting excessive fees. Applying *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009), the court held "there is nothing wrong, for ERISA purposes, with the fact that the plan participants paid the record-keeper expenses via . . . expense ratios." *Id.* at *8 (citing *Hecker*, 556 F.3d at 585 (holding the use of revenue-sharing for plan expenses did not amount to an ERISA violation)). Nor was Northwestern required to try to "find a record-keeper willing to take $35/participant/year," the rate that plaintiffs alleged was reasonable. *Divane*, 2018 WL 2388118 at *8. If plan participants sought to keep expense ratios low, they had many investment options to do so.

In applying *Loomis v. Exelon Corp.*, 658 F.3d 667 (7th Cir. 2011), the district court also rejected plaintiffs' claim that Northwestern breached its fiduciary duty because "the range of investment options was too broad." *Id.* at *8-9 (citing *Loomis*, 658 F.3d at 673-74 (holding that plans did not violate ERISA by offering additional funds participants did not want to choose)). The court explained that the "[p]laintiffs might have a different case if they alleged that the fiduciaries failed to make [the low-cost index funds preferred by plaintiffs] available to them." *Id.* at *8. But plaintiffs' allegations describe the freedom they had under the plans to invest in the fund options they wanted. *Id.* at *8-9 (plaintiffs "allege[d] that those types of low-cost index funds *were and are* available to them," showing that "the plans offered them the very types of funds they want[ed]."). The court concluded "these allegations [cannot] add up to a breach of fiduciary duty." *Id.* at *8.

The court further dismissed plaintiffs' claims that "the things [plaintiffs] allege to be breaches of fiduciary duty . . . also constitute transactions prohibited by ERISA." *Id.* at *9. These claims rest on the "[p]laintiffs' theory [that Northwestern] engaged in a prohibited transaction every time the plans paid fees to TIAA-CREF or Fidelity" for the same recordkeeping conduct alleged in the fiduciary duty claims. *Id.* The court found "plaintiffs' attempt to hang their prohibited transaction theory on § 1106(a)(1)(D)" ineffective.[7] *Id.* Once collected as an expense ratio by a TIAA-CREF fund or a Fidelity fund, the amount of the recordkeeping fees "became the property of the respective mutual fund," and "[t]hus, the transfer of some of it for recordkeeping costs was not a transfer of plan assets." *Id.* (citing *Hecker*, 556 F.3d at 584 (rejecting argument that revenue sharing constituted a transfer of plan assets "[o]nce the fees are collected from the mutual fund's assets and transferred to [the recordkeeper], they become [the recordkeeper's] assets—again, not assets of the Plans")). The court

[7] 29 U.S.C. § 1106(a)(1)(D) prohibits the plan fiduciary from engaging in a transaction that he knows or should know would constitute a direct or indirect "transfer to, or use by or for the benefit of a party in interest, of any assets of the plan."

concluded "that plaintiffs have plead the ingredients of [an affirmative] defense" by providing evidence "that the fees paid were reasonable, as a matter of law." *Id.* at *10 (quoting *United States Gypsum v. Indiana Gas Co.*, 350 F.3d 623, 626 (7th Cir. 2003) (only appropriate time to dismiss a claim based on an affirmative defense is when plaintiff "plead[s] [himself] out of court by alleging (and thus admitting) the ingredients of a defense.")).[8]

In denying plaintiffs' motion for leave to file a second-amended complaint, the district court found the proposed new counts were untimely, futile, and abandoned. "[A]fter more than a year of discovery," *id.* at *11, and within just six days of the close of discovery, plaintiffs sought to add four new counts. The court separately analyzed each. On proposed Count VII, alleging Northwestern should have offered investment options at below-retail prices, the court found "that many of the facts underlying this count were alleged in plaintiffs' amended complaint, such that plaintiffs could and should have added this count sooner." *Id.* The court also found the count futile for failing to state a claim and abandoned because plaintiffs did not respond to defendants' arguments.

With respect to proposed Count VIII, alleging that the Retirement Investment Committee violated its investment policy statement, the court found the claim to be both futile and untimely because plaintiffs had knowledge of the relevant allegations for at least eight months and "[w]aiting until the final few days of a discovery period that had lasted more than a year was undue." *Id.* at *13-14. Regarding

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[8] The court also considered plaintiffs' failure-to-monitor claim and dismissed it as abandoned. *Id.* at *11.

proposed Counts IX and X, alleging Northwestern improperly allowed TIAA to access and use participant data, the court held that both claims were futile because it was "in no way imprudent" to allow TIAA access to participants' information as necessary "to serve as a record keeper." *Id.* at *12. The court noted plaintiffs' failure to "cite[] a single case in which a court has held that releasing confidential information or allowing someone to use confidential information constitutes a breach of fiduciary duty under ERISA" or "that such information is a plan asset" in a prohibited transaction. *Id.*

Finally, in granting defendants' motion to strike the jury demand, the district court acknowledged ERISA's historical roots in trust law, which provides equitable, but not legal, remedies. *Divane v. Northwestern Univ.*, 2018 WL 1942649 at *1 (N.D. Ill. April 25, 2018) (citing *Tibble v. Edison Int'l*, 575 U.S. 523, 135 S.Ct. 1823, 1828, 191 L.Ed.2d 795 (2015) (noting that ERISA fiduciary law is derived from trust law)). In considering ERISA's "statutory antecedents," this court has concluded that plaintiffs have no right to a jury trial in ERISA cases. *See Patton v. MFS/Sun Life Fin. Distrib., Inc.*, 480 F.3d 478, 484 (7th Cir. 2007); *McDougall v. Pioneer Ranch Ltd. P'ship*, 494 F.3d 571, 576 (7th Cir. 2007); *Mathews v. Sears Pension Plan*, 144 F.3d 461, 468 (7th Cir. 1998). Recognizing this court's precedent, the district court denied plaintiffs' request for a jury trial. *See Divane*, 2018 WL 1942649 at *3.

III

On appeal we review whether the district court erred by dismissing plaintiffs' amended complaint for failing to state a claim for relief under ERISA, denying plaintiffs' request to file a second-amended complaint, and rejecting plaintiffs' demand for a jury trial. For the reasons below, we find no error.

A

This court reviews dismissals under Federal Rule of Civil Procedure 12(b)(6) de novo and may affirm the district court's decision on any ground for dismissal contained in the record. *Larson v. United Healthcare Ins. Co.*, 723 F.3d 905, 910 (7th Cir. 2013); *Ewell v. Toney*, 853 F.3d 911, 919 (7th Cir. 2017). "We construe the complaint in the light most favorable to plaintiff, accept all well-pleaded facts as true, and draw reasonable inferences in plaintiff's favor." *Taha v. Int'l Bhd. of Teamsters, Local 781*, 947 F.3d 464, 469 (7th Cir. 2020). But we "need not accept as true statements of law or unsupported conclusory factual allegations," *Yeftich v. Navistar, Inc.*, 722 F.3d 911, 915 (7th Cir. 2013); *Ashcroft v. Iqbal*, 556 U.S. 662, 680-81, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), or "ignore any facts alleged in the complaint that undermine the plaintiff's claim." *Tricontinental Indus. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 833 (7th Cir. 2007).

A district court may dismiss a claim pursuant to Rule 12(b)(6) if plaintiff fails to "state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). A complaint must "give the defendant fair notice of what . . . the claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Although a plaintiff need not provide detailed factual allegations, mere conclusions and a "formulaic recitation of the elements of a cause of action" will not suffice. *Id.*; *see also Iqbal*, 556 U.S. at 678-79, 129 S.Ct. 1937 (the notice-pleading rule "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). Instead, to survive a motion to dismiss, a claim must be plausible. *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937 (finding the court must be able to infer from the allegations "more than the mere possibility of misconduct"); *see also Twombly*, 550 U.S. at 570, 127 S.Ct. 1955 (allegations must "nudg[e] [plaintiff's] claims across the line from conceivable to plausible"). When claiming an ERISA violation, the plaintiff must plausibly allege action that was objectively unreasonable. *See Amgen Inc. v. Harris*, ––– U.S. –––, 136 S. Ct. 758, 760, 193 L.Ed.2d 696 (2016) ("[A] prudent fiduciary in the same position could not have concluded that the alternative action would do more harm than good.") (cleaned up); *see also Renfro v. Unisys Corp.*, 671 F.3d 314, 322 (3d Cir. 2011) (no "hypothetical prudent fiduciary" would have made the same objective choice).

Plaintiffs have alleged Northwestern breached its fiduciary duty as a prudent investor, and they now seek relief under ERISA, 29 U.S.C. §§ 1132(a)(2) and 1109(a). As the plans' fiduciary, Northwestern is required to "discharge [its] duties with respect to the plan[s] solely in the interest of the participants and beneficiaries" in a manner that "defray[s] reasonable expenses of administering the plan[s]" and "with the care, skill, prudence, and diligence . . . that a prudent man" would use. 29 U.S.C. § 1104(a). In their amended complaint, plaintiffs specifically alleged that Northwestern failed to act as a prudent fiduciary when it included the Stock Account as a plan investment offering and allowed TIAA-CREF to serve as a recordkeeper for its funds (Count I); created a multi-entity recordkeeping arrangement (Count III); and provided investment options that were too numerous, too expensive, and underperforming (Count

V). In Counts II, IV, and VI, plaintiffs claimed the above conduct also constituted prohibited transactions under ERISA. *Id.* § 1106.

1

Plaintiffs alleged Northwestern breached its fiduciary duty by "allowing TIAA-CREF to mandate the inclusion of the CREF Stock Account" in the plans and by allowing TIAA to serve as recordkeeper for its funds. Plaintiffs' own allegations, though, contradict this claim. As plaintiffs note in their amended complaint, many plan participants invested money in the Traditional Annuity, which was an attractive offering because it promised a contractually specified minimum interest rate. Plaintiffs do not allege it was imprudent for the plans to offer the Traditional Annuity. Instead, plaintiffs object to the plans offering additional TIAA products (including the Stock Account) and to TIAA serving as the recordkeeper for those products. This ignores the benefit of using TIAA as a recordkeeper—under that arrangement, the plans were able to offer participants continued access to the popular Traditional Annuity.

Assuming plaintiffs' allegations are true, they fail to show an ERISA violation. Under the plans, no participant was required to invest in the Stock Account or any other TIAA product. Any participant could avoid what plaintiffs consider to be the problems with those products (excessive recordkeeping fees and underperformance) simply by choosing from hundreds of other options within a multi-tiered offering system. Participants were not bound to the terms of any TIAA funds simply because they were included in the plans. The allegations instead depict valid reasons for the plans to use TIAA as a recordkeeper and to keep the Stock Account as an *option* for participants. According to plaintiffs' own allegations, TIAA required the plans to use it as a record-keeper for its products and to offer participants the Stock Account if the plans offered the Traditional Annuity. Given the favorable terms and attractive offerings of the Traditional Annuity, which are outlined in plaintiffs' amended complaint, it was prudent for Northwestern to accept conditions that would ensure the Traditional Annuity remained available to participants. This is especially true considering participants with existing Traditional Annuity funds would be subject to a surrender charge of 2.5% if that offering was removed.

Rather than compare Northwestern's actions to those of a "hypothetical prudent fiduciary," *Renfro*, 671 F.3d at 322, plaintiffs criticize what may be a rational decision for a business to make (and, indeed, several do) when implementing an employee benefits program. But "[n]othing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kinds of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996). That plaintiffs prefer low-cost index funds to the Stock Account does not make its inclusion in the plans a fiduciary breach.

In *Loomis*, this court acknowledged the difficulty with trying to enforce benefit program preferences through ERISA. We noted:

> Plaintiff's theory is paternalistic. . . . [T]hey want the judiciary . . . to make [non-preferred] investments impossible. . . . [The plan sponsor here] offered participants a menu that includes high-expense, high-risk, and potentially high-return funds, together with low-expense, low-risk, modest-

> return bond funds. It has left choice to the people who have the most interest in the outcome, and it cannot be faulted for doing this.

Loomis, 658 F.3d at 673-74 (affirming dismissal of claims, noting "the absence from ERISA of any rule that forbids plan sponsors to allow participants to make their own choices"). The same logic applies here and leads us to again conclude that it would be beyond the court's role to seize ERISA for the purpose of guaranteeing individual litigants their own preferred investment options.

2

Plaintiffs also alleged Northwestern breached its fiduciary duties by establishing a multi-entity recordkeeping arrangement that allowed recordkeeping fees to be paid through revenue sharing. On appeal, plaintiffs propose alternative recordkeeping arrangements they would have preferred. For example, plaintiffs argue Northwestern should have implemented a negotiated total fee based on a flat recordkeeping fee, which could have been "allocated to participants." App. Br. at 40. But plaintiffs fail to support their claim that a flat-fee structure is required by ERISA, *see Hecker*, 556 F.3d at 585 (asset-based fees "violate[] no statute or regulation"), or would even benefit plan participants. Indeed, such a structure may have the opposite effect of increasing administrative costs by failing to match the pro-rata fee that individual participants could achieve at a lower cost through exercising their investment options in a revenue-sharing structure.[9] Either way,

[9] *See* Amicus Br. for the U.S. Chamber of Commerce in Supp. of Appellees at 9, ECF No. 42 (describing "revenue sharing" as "a common practice in which service providers of mutual funds share a percentage of the fees they receive with the

this court has recognized that although total recordkeeping fees must be known to participants, they need not be individually allocated or based on any specific fee structure. *See Hecker*, 556 F.3d at 586 (finding so long as participants knew "the total fees for the funds, . . . [t]his was enough").

In their amended complaint, plaintiffs alleged that Northwestern should have solicited competitive bids for a fixed per-capita fee ($35 per year per participant) by a single recordkeeper instead of using two separate recordkeepers, TIAA and Fidelity. According to plaintiffs, multiple recordkeeping arrangements impose higher costs on plan participants. Northwestern, though, explained it was prudent to have this arrangement so it could continue offering the Traditional Annuity among its offerings. If Northwestern removed TIAA and hired a third-party recordkeeper, participants would have lost access to the Traditional Annuity and any funds invested in the annuity would have been subject to the 2.5% surrender charge. We disagree with plaintiffs' theory that Northwestern was required to seek a sole recordkeeper to satisfy its fiduciary duties, finding Northwestern's decision to maintain two recordkeepers prudent.

To the extent plaintiffs alleged Northwestern should have selected TIAA as its sole recordkeeper, that assertion also fails to state a claim for relief. Plaintiffs' amended complaint contains no allegation that plan participants would have been better off with TIAA as the sole recordkeeper. The complaint does not include Fidelity's recordkeeping costs, and it

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administrative-service provider of a particular plan . . . which can help defray participants' recordkeeping and other administrative costs").

fails to allege that those costs are the reason for higher fees. Regardless, ERISA does not require a sole recordkeeper or mandate any specific recordkeeping arrangement at all. *See Renfro*, 671 F.3d at 319 (upholding as prudent plans that used multiple recordkeepers). Plaintiffs' suggestion (both in their amended complaint and now on appeal) to the contrary is undercut by this court's decisions in *Loomis* and *Hecker*.

In *Loomis*, this court rejected the argument plaintiffs now advance that a flat-fee recordkeeping rate is always prudent. *See Loomis*, 658 F.3d at 672-73 ("A flat-fee structure might be beneficial for participants with the largest balances," but for participants with smaller balances, it "could work out to more, per dollar under management."). Again, plaintiffs' allegations seem to rely on their disapproval of TIAA's role as recordkeeper rather than any imprudent conduct by Northwestern. But, according to plaintiffs' own allegations, Northwestern had "valid reasons" for the recordkeeping arrangements they chose, undermining plaintiffs' imprudent fiduciary claims.

Likewise, in *Hecker*, a revenue sharing arrangement that paid plan expenses did not constitute an ERISA violation. *Hecker*, 556 F.3d at 585. This court explained:

> Fidelity Trust . . . recovered its costs from the [plan] participants in the same way as it did from outside participants—that is, Fidelity Research would assess asset-based fees against the various mutual funds, and then transfer some of the money it collected to Fidelity Trust.
>
> The [plaintiffs'] case depends on the proposition that there is something wrong, for ERISA

> purposes, in that arrangement. The district court found, to the contrary, that such an arrangement . . . violates no statute or regulation. We agree with the district court. . . . [T]he participants were free to direct their dollars to lower-cost funds if that was what they wished to do.

Hecker, 556 F.3d at 585 (affirming dismissal of claims). There is, then, nothing wrong—for ERISA purposes—with plan participants paying recordkeeper costs through expense ratios. Northwestern was not required to search for a recordkeeper willing to take $35 per year per participant as plaintiffs would have liked. *See id.* at 586 ("[N]othing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)."). Plaintiffs have identified no alternative recordkeeper that would have accepted such a low fee or any fee lower than what was paid to Fidelity and TIAA. And plaintiffs have failed to explain how a hypothetical lower-cost recordkeeper would perform at the level necessary to serve the best interests of the plans' participants.[10] We find no ERISA violation with Northwestern's recordkeeping arrangement.

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[10] At any rate, plan participants had options to keep the expense ratios (and, therefore, recordkeeping expenses) low. The amount of fees paid were within the participants' control because they could choose which funds to invest the money in their account. *See Divane*, 2018 WL 2388118 at *10. Participants could invest in various low-cost index funds with expense ratios ranging between .05% and .1%: Fidelity 500 Index (Inst) (FXSIX) at an expense ratio of .05%; TIAA-CREF S&P 500 Index at .06%; Fidelity Spartan 500 Index at .1%; Fidelity 500 Index at .1%; Fidelity International Index at .1%; Fidelity Total Market Index at .1%; Vanguard Small Cap Index at .1%. *Id.* at *8. Am. Compl. ¶¶ 161, 176. Based on plaintiffs' allegations

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Plaintiffs further alleged Northwestern breached its fiduciary duties by providing investment options that were too numerous, too expensive, or underperforming. As alleged, some of these options were retail funds with retails fees, some had "unnecessary" layers of fees, and some could have been cheaper but Northwestern failed to negotiate better fees. Am. Compl. ¶¶ 264-66. Plaintiffs also spill much ink in their amended complaint describing their clear preference for low-cost index funds. We understand their preference and acknowledge the industry may be trending in favor of these types of offerings. Am. Compl. ¶¶ 188-205. Plaintiffs failed to allege, though, that Northwestern did not make their preferred offerings available to them. In fact, Northwestern did. Plaintiffs simply object that numerous additional funds were offered as well. But the types of funds plaintiffs wanted (low-cost index funds) "*were and are* available to them," *Divane*, 2018 WL 2388118 at *8, eliminating any claim that plan participants were forced to stomach an unappetizing menu.

Regarding retail fees, plaintiffs invoke the Eighth Circuit's decision in *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009), as applied by this court in *Allen v. GreatBanc Trust Co.*, 835 F.3d 670 (7th Cir. 2016), to suggest a blanket prohibition on retail share classes. But *Allen* cited *Braden* only to support

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regarding the number of plan participants and the individual fees paid, average expense ratios for the plans ranged between .125% to .2% (for the Voluntary Savings Plan) and between .14% and .197% (for the Retirement Plan), with average record-keeping costs lower than these ranges. *See id.* at *10. App. Br. at p. 33. The available investment options, then, reflect expense ratios that are low, *id.* at *8, and fees that "are reasonable as a matter of law." *Id.* at *10.

its analysis of the pleading burden for prohibited transaction claims under ERISA, *see Allen*, 835 F.3d at 676, 678, not to question the prudence of offering retail share class funds. Moreover, *Braden* is distinguishable on its facts. There, the court found imprudence because the investment plan included a "relatively limited menu of funds"—ten—which "were chosen to benefit the trustee at the expense of the participants." *Braden*, 588 F.3d at 596; *see Loomis*, 658 F.3d at 671 (distinguishing *Braden* on that basis). The plans here offered hundreds of options—over 400 combined—making a claim of imprudence less plausible. *See Braden*, 588 F.3d at 596 n.6.

Similarly, plaintiffs rely on the Third Circuit's holding in *Sweda v. Univ. of Pa.*, 923 F.3d 320 (3d Cir. 2019), to find "a meaningful mix and range of investment options [does not] insulate[] plan fiduciaries from liability for breach of fiduciary duty." 923 F.3d at 330. But despite plaintiffs' contention to the contrary, the court did not disregard the mix of offered investment options. Rather, the court in *Sweda* declined to find a "bright-line rule that providing a range of investment options satisfies a fiduciary's duty" because "[p]ractices change over time, and bright-line rules would hinder courts' evaluation of fiduciaries' performance against contemporary industry practices." *Id.* (internal quotations omitted). The court determined it need not look only at the available range of offerings but would consider that range in the context of the fiduciary's overall performance. The court reiterated that "ERISA fiduciaries have a duty to act prudently according to current practices," and that any "breach claim must be examined against the backdrop of the mix and range of available investment options." *Id.* The

Third Circuit's approach is sound and not inconsistent with our own.

We concluded in *Hecker* and *Loomis* that plans may generally offer a wide range of investment options and fees without breaching any fiduciary duty. *Loomis*, 658 F.3d at 673-74; *Hecker*, 556 F.3d at 586 (no breach of fiduciary duty where 401(k) plan participants could choose to invest in 26 investment options and more than 2,500 mutual funds through a brokerage window). Concerning the plans' alleged underperformance, this court has determined "the ultimate outcome of an investment is not proof of imprudence." *DeBruyne v. Equitable Life Assurance Soc'y of the United States*, 920 F.2d 457, 465 (7th Cir. 1990); *see also Jenkins v. Yager*, 444 F.3d 916, 926 (7th Cir. 2006) ("Investment losses are not proof that [a fiduciary] violated his duty of care."). We see both principles at play in this case. Not only did Northwestern provide the plans with a wide range of investment options, it also provided prudent explanations for the challenged fiduciary decisions involving alleged losses or underperformance. Plaintiffs pleaded the same prudent reasons in their amended complaint. We echo the district court in concluding that such allegations do not add up to a breach of fiduciary duty.

4

In their amended complaint, plaintiffs also attempted to repackage their imprudent fiduciary claims as prohibited transactions claims. They relied largely on the same facts and allegations and provided no independent argument showing those facts or allegations reveal impermissible transactions. Plaintiffs merely assert that each allegedly unreasonable fee collected from plan participants for recordkeeping costs constituted a prohibited transaction under ERISA, 29 U.S.C. § 1106(a)(1)(D).

Under § 1106(a)(1)(D), a fiduciary is prohibited from engaging in a transaction he knows or should know "constitutes a direct or indirect transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." Here, plaintiffs failed to plausibly allege the basic elements of their claim; namely, that any defendant benefited from the collected fees, that the fees were assets of the plans, or that any defendant knew or should have known that collecting routine fees may violate ERISA. In fact, this court has held that after a fee is collected by a recordkeeper, the amount of those fees becomes the property of the fund such that the transfer of some of it for recordkeeping costs is not a transfer of plan assets. *See Hecker*, 556 F.3d at 584 ("Once the fees are collected from the mutual fund's assets and transferred to [the recordkeeper], they become [the recordkeeper's] assets—again, not assets of the Plans")). Ignoring their pleading burden, plaintiffs concluded that dismissal of their claims on this ground should be reversed for the same reasons they argued the above claims should be reversed. For the same reasons we discussed above on the fiduciary duty claims, plaintiffs have failed to state a prohibited transaction claim.

* * *

Construing the facts and allegations in plaintiffs' favor, the amended complaint fails to plausibly allege a breach of fiduciary duty under ERISA. Taken as a whole, the amended complaint appears to reflect plaintiffs' own opinions on ERISA and the investment strategy they believe is appropriate for people without specialized knowledge in stocks or mutual funds. Ultimately, defendants "cannot be faulted for" leaving "choice to the people who have the most interest in the outcome." *Loomis*, 658 F.3d at 673-74.

B

We consider now the district court's denial of plaintiffs' request to file a second amended complaint. This court reviews a denial of a motion for leave to amend a complaint for abuse of discretion. *Hukic v. Aurora Loan Servs.*, 588 F.3d 420, 432 (7th Cir. 2009). "[D]istrict courts have broad discretion to deny leave to amend where there is undue delay, . . . undue prejudice to the defendants, or where the amendment would be futile." *Arreola v. Godinez*, 546 F.3d 788, 796 (7th Cir. 2008). "A new claim is futile if it would not withstand a motion to dismiss." *Vargas-Harrison v. Racine Unified Sch. Dist.*, 272 F.3d 964, 974 (7th Cir. 2001).

In their proposed second amended complaint, plaintiffs sought to add four new claims, three regarding breach of fiduciary duty generally and one regarding prohibited transactions. The district court denied plaintiffs' request for leave to file the second amended complaint for two reasons: plaintiffs unduly delayed bringing the claims, and the four proposed counts failed to state claims for relief and did not state new or additional claims. We agree.

Plaintiffs did not even attempt in their brief to explain the undue delay. Instead, plaintiffs note they were "separat[ing] out" the claims that had previously been included in the amended complaint as Count V. And, as further evidenced by plaintiffs' desire to separate out their underlying claims, none of the four new claims advance arguments that were unavailable to plaintiffs at the time they asked the court for leave to file their second amended complaint. Although plaintiffs dress up the claims with different language in the second amended complaint, they rely on the same allegations and facts, revealing these claims as essentially the same claims separated into different counts. Because they are essentially the same claims, they too suffer from a lack of proper pleading.

C

Finally, we consider the district court's decision to reject plaintiffs' jury demand. This court reviews de novo the determination that no right to a jury trial exists. *Int'l Fin. Servs. Corp. v. Chromas Techs. Canada, Inc.*, 356 F.3d 731, 735 (7th Cir. 2004).

Although we need not reach the district court's decision here because we affirm dismissal, it is worth noting the court's general position on this point. The Supreme Court has held there is no right to a jury trial on this type of claim. *See CIGNA Corp. v. Amara*, 563 U.S. 421, 439, 131 S.Ct. 1866, 179 L.Ed.2d 843 (2011) ("[A] suit by a beneficiary against a plan fiduciary (whom ERISA typically treats as a trustee) . . . is the kind of lawsuit that, before the merger of law and equity, [plaintiffs] could have brought only in a court of equity, not a court of law."). This court has held the same: "The general rule in ERISA cases is that there is no right to a jury trial because ERISA's antecedents are equitable, not legal." *McDougall*, 494 F.3d at 576 (quoting *Mathews*, 144 F.3d at 468); *see also Patton*, 480 F.3d at 484 (recognizing the "general rule in ERISA cases, where the plaintiff has no right to a jury trial"). Because this case involves a suit against a fiduciary for breach of trust, the traditional equitable remedy is surcharge (the requirement to make the beneficiary whole for any losses caused by the breach), not a legal remedy. *See CIGNA*, 563 U.S. at 440-43, 131 S.Ct. 1866. We follow binding precedent and conclude no right to a jury trial exists in this ERISA case.

IV

For the reasons above, we AFFIRM the district court's dismissal of plaintiffs' amended complaint on all counts and AFFIRM the decision to deny plaintiffs' request for leave to further amend the complaint and for a jury trial.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 16 C 8157

LAURA L. DIVANE, ET AL.,
Plaintiffs,

v.

NORTHWESTERN UNIVERSITY, ET AL.,
Defendants.

[Filed May 25, 2018]

MEMORANDUM OPINION AND ORDER

JORGE L. ALONSO, United States District Judge

Plaintiffs Laura L. Divane ("Divane"), April Hughes ("Hughes"), Susan Bona ("Bona"), Katherine Lancaster ("Lancaster") and Jasmine Walker ("Walker") filed suit seeking relief under the Employee Retirement Income Security Act ("ERISA"). In plaintiffs' amended complaint [38], plaintiffs assert six counts for breach of fiduciary duty (Counts I-VI) and one count for failure to monitor fiduciaries (Count VII). Defendants have filed a motion to dismiss the amended complaint [58]. In addition, plaintiffs seek leave to file a second-amended complaint [129], which includes the same six counts for breach of fiduciary duty and the claim for failure to monitor fiduciaries (Count XI of the proposed second amended complaint). Plaintiffs would like to add four counts for breach of fiduciary duty and to drop one plaintiff (Bona). Plaintiffs have also moved to file the proposed second amended complaint under seal.

For the reasons set forth below, the Court grants defendants' motion to dismiss [58]. The Court denies the motion for leave to file under seal [133]. The Court denies plaintiffs' motion for leave to amend [129]. All other pending motions are denied as moot.

I. BACKGROUND

Two ERISA defined-contribution plans are at issue in this case. The first plan is the Northwestern University Retirement Plan (the "Retirement Plan"), in which all plaintiffs participate. Under the Retirement Plan, participating employees can contribute a portion of their compensation to their account within the Plan, and Northwestern makes a matching contribution. (Am. Complt. ¶ 112). The second plan is the Northwestern University Voluntary Savings Plan (the "Voluntary Plan"), in which three plaintiffs (Hughes, Lancaster and Walker) participate. Under the Voluntary Plan, participating employees can contribute a portion of their compensation to their account within the Plan, but Northwestern does not make a matching contribution. (Am. Complt. ¶ 112).

Both the Retirement Plan and the Voluntary Plan are 403(b) plans that allow contributions to grow tax-free until withdrawn (preferably in retirement). Originally, 403(b) plans allowed investment only in insurance company annuity contracts, but now 403(b) plans can offer investments in mutual funds. (Am. Complt. ¶ 76). Both plans allow each participant to choose the investments into which the money in his or her account is invested. (Am. Complt. ¶ 18, 42). Participants can choose among the options assembled by the plans' fiduciaries. (Am Complt. ¶ 42).

Defendant Northwestern University ("Northwestern") is the plan administrator for both plans. (Am. Complt. ¶ 25). Plaintiffs allege that Northwestern is a fiduciary by virtue of its discretionary control of the plans. (Am. Complt. ¶ 26). Plaintiffs allege that Northwestern delegated its fiduciary responsibility to its Executive Vice President, a position which has been held by defendant Nimalam Chinniah ("Chinniah") since September 8, 2014 and was held by defendant Eugene Sunshine ("Sunshine") before that. (Am. Complt.¶¶ 28-29). Plaintiffs allege that, as of February 28, 2012, Northwestern established the Northwestern University Retirement Investment Committee (the "Investment Committee") and granted it discretionary authority to manage the assets of the plans. The Investment Committee is made up of defendants Ronald R. Braeutigam, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean and Ingrid S. Stafford. (Am. Complt. ¶¶ 31-33).

Plaintiffs' amended complaint is massive: 287 paragraphs over 141 pages. Plaintiffs' proposed second amended complaint (which is nearly identical, except it adds allegations for four new counts and a few additional allegations as to the original counts) is 376 paragraphs over 165 pages. Most of plaintiffs' allegations, though, are not specific to the defendants and the plans in this case. Instead, most of plaintiffs' allegations constitute a description of plaintiffs' opinions both on ERISA law and on a proper long-term investment strategy for average people who lack the time to select either individual stocks or actively-managed mutual funds.

In their complaint, plaintiffs object to, among other things, the mix of investment options available in the plans. Plaintiffs believe they had too many options, leaving them with the "virtually impossible burden" of deciding where to invest their money. (Am. Complt. 167). In the amended complaint, plaintiffs describe two line-ups of investment options they could choose from under the plans: the options available for some (unspecified) period of time before October 2016 and the options available during and after October 2016.

Investment options before October 2016

Before 2016, the plans offered investments through TIAA-CREF (Teachers Insurance and Annuity Association of America and College Retirement Equities Fund) and Fidelity Management Trust Company ("Fidelity"). The Retirement Plan offered 240 investment options (39 through TIAA-CREF and 203 through Fidelity) while the Voluntary Plan offered 180 (39 through TIAA-CREF and 148 through Fidelity). (Am. Complt. ¶¶ 112-113). Among the investment options were mutual funds and insurance company annuities (both fixed and variable). (Am. Complt. ¶ 110).

One of the TIAA-CREF investments offered under the plans is the TIAA-CREF Traditional Annuity, a fixed annuity contract that returns a guaranteed, contractually-specified minimum interest rate. (Am. Complt. ¶ 117). The TIAA-CREF Traditional Annuity has "severe restrictions and penalties for withdrawal," including a 2.5% surrender charge if a participant withdraws the investment in a lump sum sooner than 120 days after the termination of his/her employment. (Am. Complt. ¶¶ 117, 132).

TIAA-CREF's policy was (and apparently still is) to require any plan offering its TIAA-CREF Traditional Annuity: (1) to offer its CREF Stock Account; and (2) to use TIAA as recordkeeper for *its* products. (Am. Complt. ¶ 130). Plaintiffs are not fond of the CREF Stock Account. (Of course, under the plans, they could choose their investments and did not have to choose the CREF Stock Account merely because it was offered.) Plaintiffs allege that the CREF Stock Account fund charged excessive fees. (Am. Complt. ¶ 135). (More on plaintiffs' complaints about the CREF Stock Account later.)

Investment options available by October 2016

In 2016, defendants changed the line-up of investment options. (Am. Complt. ¶¶ 123-128). Beginning in July 2016, participants could invest in one of three tiers of options: Tier 1 consists of target-date mutual funds (i.e., funds that automatically rebalance their portfolios to become more conservative as the funds reach their target dates); Tier 2 consists of five index funds; and Tier 3 consists of 26 actively-managed funds. (Am. Complt. ¶¶ 124-126, 128). Beginning in September 2016, the plans also offered Tier 4, which allows a participant to invest his or her plan assets via a full-service brokerage window. (Am. Complt. ¶¶ 127-128). The participants had to be out of the old options (the ones that did not carry over, anyway) by October 21, 2016.[1] (Am. Complt. ¶ 128).

Fees

Among the investment options in the plans both before and after October 2016 were mutual funds, each of which covers its expenses (including profit) by charging fees in the form of an expense ratio. (Am. Complt. ¶¶ 54, 120, 121). The expense ratio is the percentage of fund assets the fund keeps each year. All other things being equal, a lower expense ratio is better. An illustration: if a fund has a 4% return in a year but charges a 2% expense ratio, then half the return is eaten in expenses, and the investor keeps

[1] Plaintiffs do not allege that the structure or timing of the transition violated fiduciary duties.

half of the return. If the same fund has a 1% expense ratio and the same return, then a quarter of the return is eaten in expenses, and the investor keeps 75% of the return. If the fund, instead, has an expense ratio of .1%, then only 2.5% of the return is eaten by expenses, and the investor keeps 97.5% of the return. Over time with compound returns, all else being equal, the difference in expense ratios makes a huge difference in an investor's savings at retirement. Of course, all things are not equal between funds. In practice, the funds with the lowest expense ratios are the ones with the least to do in terms of selecting stocks: index funds. Index funds hold a pre-selected (usually by someone else, like the S&P 500) set of stocks, which minimizes not only trading costs but also eliminates the need to pay someone to select the stocks. Actively-managed funds have to pay someone to select the stocks, and the cost of paying the investment managers drives up expenses (though not necessarily returns: it is hard, it turns out, to beat the market). Index funds tend to be less liquid, because they tend to have features that discourage turnover. *See Loomis v. Exelon Corp.*, 658 F.3d 667, 670 (7th Cir. 2011) ("an index fund typically disallows new investments for a month or more following any withdrawal").

Among the expenses included in a fund's expense ratio are costs for recordkeeping. Defined contribution plans need to have a record keeper to track the amount of each participant's account and how the account is allocated among investment options. (Am. Complt. ¶ 48). Record keepers also maintain websites for plan participants and sometimes provide investment advice or education materials. (Am. Complt. ¶ 48). The fund that collects the expense ratio is not necessarily the entity that handles the recordkeeping. One way for plans to pay for recordkeeping is to have the fund that collects the expense ratio share part of the expense ratio with the record keeper. (Am. Complt. ¶¶ 60-61). That is how fees are (and were) paid in these plans. (Am. Complt. ¶¶ 144-146).

Plaintiffs allege that, alternatively, plans can pay directly for recordkeeping by paying a "flat annual fee based on the number of participants" in the plan. (Am. Complt. ¶ 61). Plaintiffs allege that a reasonable fee for recordkeeping is $35/participant/year. (Am. Complt. ¶ 148). Plaintiffs allege that participants in the Northwestern plans paid more. Plaintiffs allege that, between 2010 and 2015, participants in the Voluntary Plan paid an average of between $54 and $87 per participant per year (Am. Complt. ¶ 150) and that participants in the Retirement Plan paid an average of between $153 and $213 per participant per year (Am. Complt. ¶ 149). Plaintiffs' allege that in 2015 the Voluntary Plan held $530 million in net assets and had 12,293 participants. (Am. Complt. ¶ 16). Plaintiffs' allege that in 2015 the Retirement Plan held $2.34 billion in net assets and had 21,622 participants. (Am. Complt. ¶ 12). Plaintiffs seem to recognize that a per capita charge (instead of an expense ratio) tends to discourage and punish small investors, because plaintiffs allege that a per capita fee can, once calculated, be divided by the plans among the participants based on the amount each participant has invested. (Am. Complt. ¶ 64).

Plaintiffs allege that the record keeping expense for plans generally can be higher if plans use multiple record keepers. (Am. Complt. ¶ 142). As to the plans in this case, plaintiffs allege that the Retirement Plan has two record keepers (TIAA-CREF and Fidelity) and that the Voluntary Plan has had one record keeper (TIAA-CREF) since 2012. (Am. Complt.

¶ 143). Plaintiffs allege that TIAA-CREF and Fidelity are paid for record-keeping via expense ratios. (Am. Complt. ¶¶ 144-146). Specifically, plaintiffs allege that the Fidelity funds in the plans charge retail rate expense ratios in order to cover record-keeping, rather than institutional-rate expense ratios. (Am. Complt. ¶¶ 146).

The charging of higher retail expense ratios instead of institutional-rate expense ratios is also a major theme in plaintiffs' complaint. Plaintiffs worry that the entities which provide services to the plans have a profit motive. (Am. Complt. ¶ 46, 50). Plaintiffs believe that large plans have sufficient bargaining power to obtain lower expense ratios on funds. (Am. Complt. ¶ 45, 164). Plaintiffs include in their complaint a ten-page list of the funds available to plan participants, as well as the retail expense ratios the plan participants are charged. (Am. Complt. ¶ 161). The list also includes the expense ratios charged by the same mutual funds to institutional investors. (Am. Complt. ¶ 161). Five funds (Fidelity Spartan 500 Index, Fidelity 500 Index, Fidelity International Index, Fidelity Total Market Index and Vanguard Small Cap Index) available to participants of the plans charged expense ratios of .1%, even though institutional investors could get those funds for an expense ratio of .07%. (Am. Complt. ¶ 161). Other spreads were different. (Am. Complt. ¶ 161). Plan participants could invest in the Fidelity Emerging Europe, Middle East, Africa Fund at an expense ratio of 1.25%, while institutional investors paid 1.19% for that fund. (Am. Complt. ¶ 161). The expense ratios of all funds available to plan participants ranged from .05% (Fidelity 500 Index (Inst) (FXSIX)) to 1.89% (Calvert New Vision Small Cap (A) (CNVAX)). (Am. Complt. ¶ 161).

In April 2016, defendants informed plan participants that they had "negotiated a credit of fees" from both Fidelity and TIAA-CREF. (Am. Complt. ¶ 216).

Fees are one reason, as noted above, plaintiffs object to the inclusion of the CREF Stock Account as an investment option in the plans. While plan participants could invest in the TIAA-CREF Equity Index for an expense ratio of .05% or the TIAA-CREF S&P 500 Index for an expense ratio of .06%, the CREF Stock Account charged an expense ratio of .46%. (Am. Complt. ¶ 176). The CREF Stock Account paid TIAA-CREF about half of the expense ratio for record keeping. (Am. Complt. ¶ 188). Plaintiffs also dislike the fund, because it has not performed well. Plaintiffs devote a lot of ink in their amended complaint to the concept that actively-managed funds do not have a strong track record of beating the market. With respect to the CREF Stock Account in particular, plaintiffs allege that it has underperformed in one-, three-, and five-year periods relative to the Russell 3000, the Vanguard Total Stock Market Index Fund, the Vanguard Institutional Index, the Vanguard PRIMECap-Adm and the Vanguard Capital Opp.-Adm. (Am. Complt. ¶¶ 200, 202).

Based on these allegations, plaintiffs assert three counts (Counts I, III and V) for standard breach of fiduciary duty. For each of those counts, plaintiffs assert a mirror-image count (Counts II, IV and VI) for breach of fiduciary duty based on a prohibited transaction. In Count VII, plaintiffs assert that defendants Northwestern, Chinniah and Sunshine failed to monitor the other fiduciaries. Defendants move to dismiss every count.

II. STANDARD ON A MOTION TO DISMISS

The Court may dismiss a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure if the plaintiffs fail "to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). Under the notice-pleading requirements of the Federal Rules of Civil Procedure, a complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A complaint need not provide detailed factual allegations, but mere conclusions and a "formulaic recitation of the elements of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555. To survive a motion to dismiss, a claim must be plausible. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Allegations that are as consistent with lawful conduct as they are with unlawful conduct are not sufficient; rather, plaintiffs must include allegations that "nudg[e] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

In considering a motion to dismiss, the Court accepts as true the factual allegations in the complaint and draws permissible inferences in favor of the plaintiffs. *Boucher v. Finance Syst. of Green Bay, Inc.*, 880 F.3d 362, 365 (7th Cir. 2018). Conclusory allegations "are not entitled to be assumed true," nor are legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 680 & 681 (2009) (noting that a "legal conclusion" was "not entitled to the assumption of truth[;]" and rejecting, as conclusory, allegations that "'petitioners 'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement"). The notice-pleading rule "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-679.

III. DISCUSSION

A. Defendants' motion to dismiss

"Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kinds of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Congress's goals in passing ERISA were to "ensure employees would receive the benefits they had earned" (*Conkright v. Frommert*, 559 U.S. 506, 516 (2010)) and to "induc[e] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards" (*Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002)). The Supreme Court has explained that Congress wanted to avoid creating "a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefits plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

Plaintiffs seek relief under 29 U.S.C. §§ 1132(a)(2) and 1109(a). ERISA § 502(a)(2) provides a private right of action "by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." 29 U.S.C. § 1132(a)(2). ERISA § 409(a), in turn, provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to

such plan any profits of such fiduciary which have been made through the use of assets of the plan by the fiduciary . . .

29 U.S.C. § 1109(a). A fiduciary is required to:

discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) 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;

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III.

29 U.S.C. § 1104(a)(1). That section goes on to say:

(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

* * *

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by

> reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

29 U.S.C. § 1104(c)(1).

1. Count I

In Count I, plaintiffs allege that defendants breached their fiduciary duty by "allowing TIAA-CREF to mandate the inclusion of the CREF Stock Account and Money Market Account" in the plans and by allowing TIAA-CREF to require the plans to use TIAA-CREF as record keeper for its proprietary funds. (Am. Complt. ¶ 235). The upshot of using TIAA-CREF as record keeper was that a portion of the expense ratios paid by participants when they invested in TIAA-CREF products was paid to TIAA-CREF for recordkeeping. (Am. Complt. ¶¶ 60-61, 147). Plaintiffs, as noted above, did not want the CREF Stock Account included as an investment option, because the fund: (a) underperformed; and (b) charged an expense ratio (.46%, with half going to TIAA-CREF for recordkeeping) that plaintiffs allege to be excessive compared to other funds (such as the TIAA-CREF S&P 500 Index with an expense ratio of .06%) available to plan participants. (Am. Complt. ¶¶ 135, 176, 188, 200, 202).

The Court fails to see how these allegations amount to a breach of fiduciary duty. To begin with, no plan participant was required to invest in the CREF Stock fund or any other TIAA-CREF product. (Am. Complt. ¶ 42). Thus, any plan participant could avoid what plaintiffs consider to be the problems with those products (excessive record-keeping fees and underperformance) simply by choosing other options. The plans, though, had valid reasons to use TIAA-CREF as record keeper for its products and to keep the CREF Stock Account as an *option* for plan participants. The valid reason, according to plaintiffs' own allegations, is that TIAA-CREF *required* the plans to use it as record keeper for its products and to offer CREF Stock Account if the plans were going to offer the TIAA-CREF Traditional Annuity. (Am. Complt. ¶ 117).

The plans had good reasons, which are outlined in plaintiffs' amended complaint, to offer the TIAA-CREF Traditional Annuity. According to plaintiffs' allegations, the TIAA-CREF Traditional Annuity is a fixed annuity contract that offers a contractually-specified minimum rate of return. (Am. Complt. ¶ 117). That is an attractive offering, particularly given that 403(b) plans were originally *required* to offer *only* annuities. (Am. Complt. ¶ 76). The TIAA-CREF Traditional Annuity, though, had what even plaintiffs describe as "severe restrictions and penalties for withdrawal," including a 2.5% surrender charge. (Am. Complt. ¶¶ 117, 132). "A fiduciary must behave like a prudent investor under similar circumstances." *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009). It was prudent to keep the TIAA-CREF Stock Account as an option (which no one was required to choose) and to keep TIAA-CREF as record keeper for its own funds (which no one was required to choose) when the alternative was to subject some participants to a 2.5% surrender charge.

The Court also notes that the mere fact that plaintiffs believe index funds are a better long-term investment than the CREF Stock Account does not a fiduciary breach make. Low-cost index funds were available to plan participants (Am. Complt. ¶¶ 161, 176), and one can understand why they might prefer those funds to the CREF Stock Account. Anyone who has paid attention to stock-market or investment-strategy news over the last decade would be hard-pressed to disagree with the notion that the average investor will do better investing in low-cost index funds rather than in attempting either to select individual stocks or to select actively-managed mutual funds. What is good for the average investor, though, is not necessarily what is good for any particular individual. Warren Buffett, who has (famously) planned for his wife's money to be invested in low-cost index funds after his death, has (also famously) become one of the world's most-successful investors by choosing individual stocks that are undervalued in the grand tradition of Benjamin Graham's *The Intelligent Investor*. A professor of economics or finance might prefer investment options different from what a professor of music might choose. Ultimately, plaintiff's theory is paternalistic, but ERISA is not. As the Seventh Circuit said in *Loomis v. Exelon Corp.*:

> Plaintiff's theory is paternalistic. They appear to believe that participants should prefer captive funds, even with loss of liquidity, and should not be allowed to invest in the funds from Fidelity Group that Exelon's Plan now offers. . . . [T]hey want the judiciary to make these investments impossible. . . . [A]ll that matters is the absence from ERISA of any rule that forbids plan sponsors to allow participants to make their own choices. . . . Exelon offered participants a

> menu that includes high-expense, high-risk, and potentially high-return funds, together with low-expense, low-risk, modest-return bond funds. It has left choice to the people who have the most interest in the outcome, and it cannot be faulted for doing this.

Loomis v. Exelon Corp., 658 F.3d 667, 673-674 (7th Cir. 2011) (affirming dismissal of claims).

Count I is dismissed for failure to state a claim.

2. Count III

In Count III, plaintiffs allege defendants breached their fiduciary duties by allowing the plans to pay record-keeping expenses through revenue sharing and by failing to prevent those fees from being excessive. (Am. Complt. 248-249).

As plaintiffs allege in their complaint, one way to pay for recordkeeping is to have each mutual fund share a portion of its expense ratio (a process called revenue sharing) with the record keeper. (Am. Complt. ¶¶ 60-61). That is how it was done in the case of these plans (Am. Complt. ¶¶ 145-146), and plaintiffs believe the fees were excessive. Plaintiffs allege that defendants should have used their bargaining power to solicit bids for record-keeping services that would be charged on a per capita basis (plaintiffs think $35/participant/year is reasonable) or at least limit the plans to a single record keeper. (Am. Complt. ¶¶ 249, 251). Plaintiffs allege that, between 2010 and 2015, participants in the Voluntary Plan paid an average of between $54 and $87 per participant per year (Am. Complt. ¶ 150) and that participants in the Retirement Plan paid an average of between $153 and $213 per participant per year (Am. Complt. ¶ 149). Given plaintiffs' allegation that in 2015 the Voluntary Plan held $530 million in net assets and had 12,293 participants, plaintiffs' allegations suggest an average expense ratio of .125% to .2%. (Am. Complt. ¶ 16). Given plaintiffs' allegations that in 2015 the Retirement Plan held $2.34 billion in net assets and had 21,622 participants, plaintiffs' allegations suggest an average expense ratio between .14% and .197%. (Am. Complt. ¶ 12). Plaintiffs seem to recognize that a per capita charge (instead of an expense ratio) tends to discourage and punish small investors, because plaintiffs allege that a per capita fee can, once calculated, be divided by the plans among the participants based on the amount each participant has invested. (Am. Complt. ¶ 64).

Count III runs smack into *Hecker* and *Loomis*, where the Seventh Circuit affirmed dismissal of similar claims. In *Hecker*, the Seventh Circuit said it did not violate ERISA to use revenue-sharing for plan expenses. *Hecker*, 556 F.3d at 585. There, the Seventh Circuit explained:

> Fidelity Trust . . . recovered its costs from the [plan] participants in the same way as it did from outside participants—that is, Fidelity Research would assess asset-based fees against the various mutual funds, and then transfer some of the money it collected to Fidelity Trust.
>
> The [plaintiffs'] case depends on the proposition that there is something wrong, for ERISA purposes, in that arrangement. The district court found, to the contrary, that such an arrangement . . . violates no statute or regulation. We agree with the district court. . . . [T]he participants were free to direct their dollars to lower-cost funds if that was what they wished to do.

Hecker, 556 F.3d at 585 (affirming dismissal of claims).

Thus, there is nothing wrong, for ERISA purposes, with the fact that the plan participants paid the record-keeper expenses via the expense ratios they paid. Nor were defendants required to try to find a record-keeper willing to take $35/participant/year. *Cf. Hecker*, 556 F.3d at 586 ("nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems."). Furthermore, it is not clear that the plan could have arranged for lower prices. As the Seventh Circuit explained in *Loomis*:

> Now it isn't clear to us why mutual funds would offer lower prices just because participants in this Plan have pension wealth that in the aggregate exceeds $1 billion. [The Plan Administrator] can't commit that sum, or any portion of it, to any one fund without abandoning the arrangement under which the participants themselves choose where their money will be invested. The expenses of retail funds derive in large measure from the need to deal with investors one at a time: to receive and mail small checks, to print and mail individual prospectuses and account statements, frequently to exchange modest sums from one fund to another, and so on. Expenses per dollar under management necessarily are higher if the average account is $100,000 than if it is $100,000,000. Hertz gets a fleet discount from General Motors when it orders 10,000 cars at a time, but Hertz does not secure fleet discounts for members of its #1 Club to buy their own GM cars; retail transactions occur at retail prices. So too with retail transactions in mutual funds.

> Likewise it isn't clear to us why participants would view a capitation fee as a gain. A flat-fee structure might be beneficial for participants with the largest balances, but, for younger employees and others with small investment balances, a capitation fee could work out to more, per dollar under management, than a fee between .03% and .96% of the account balance.

Loomis v. Exelon Corp., 658 F.3d 667, 672-673 (7th Cir. 2011).

In any case, the participants had options to keep the expense ratios (and, thus, record-keeping expenses) low. Plaintiffs' allege that participants could invest in the following funds at the following expense ratios: Fidelity 500 Index (Inst) (FXSIX) at an expense ratio of .05%; TIAA-CREF S&P 500 Index at an expense ratio of .06%; Fidelity Spartan 500 Index at .1%, Fidelity 500 Index at .1%, Fidelity International Index at .1%, Fidelity Total Market Index at .1% and Vanguard Small Cap Index at .1%. (Am. Complt. ¶¶ 161, 176). These are, as a matter of law, low.

The facts, as plaintiffs have alleged them, do not constitute a breach of fiduciary duty. Count III is dismissed.

3. Count V

In Count V, plaintiffs assert a similar claim for breach of fiduciary duty. This time, plaintiffs assert that the range of investment options was too broad. Plaintiffs also allege that the fees charged by some funds were too high, either because they were retail funds with retail fees, because they had layers of fees that plaintiffs believe were "unnecessary" or because defendants failed to negotiate better fees. (Am. Complt. ¶¶ 264-266).

Once again, the Court cannot conclude that these allegations add up to a breach of fiduciary duty. Plaintiffs spend much of their lengthy amended complaint describing their clear preference for low-cost index funds, and the Court does not dispute that their preference is becoming conventional wisdom. Plaintiffs might have a different case if they alleged that the fiduciaries failed to make such funds available to them. Plaintiffs, though, allege that those types of low-cost index funds *were and are* available to them. Plaintiffs allege that participants could invest in the following funds at the following expense ratios, which are, as a matter of law, low: Fidelity 500 Index (Inst) (FXSIX) at an expenses ratio of .05%; TIAA-CREF S&P 500 Index at an expense ratio of .06%; Fidelity Spartan 500 Index at .1%, Fidelity 500 Index at .1%, Fidelity International Index at .1%, Fidelity Total Market Index at .1% and Vanguard Small Cap Index at .1%. (Am. Complt. ¶¶ 161, 176). It does not matter that some of those expenses were retail expenses (*Loomis*, 658 F.3d at 672), and it does not matter that the plans offered additional funds that they did not want to choose (*Loomis*, 658 F.3d at 673-674). The types of funds plaintiffs wanted were and are available to them.

Plaintiffs have alleged that the plans offered them the very types of funds they want. That is not a breach of fiduciary duty, and Count V is dismissed for failure to state a claim.

4. Counts II, IV and VI

In Counts II, IV and VI, Plaintiffs assert that the things they allege to be breaches of fiduciary duty in Counts I, III and V also constitute transactions prohibited by ERISA.

Congress, in passing ERISA, prohibited certain transactions "deemed 'likely to injure the pension plan.'" *Harris Trust & Sav. Bank v. Saloman Smith Barney, Inc.*, 530 U.S. 238, 242 (2000) (quoting *Commissioner v. Keystone Consol. Ind., Inc.*, 508 U.S. 152, 160 (1993)). Specifically, ERISA § 406 states:

> Except as provided in section 1108 of this title:
>
> (1) 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—
>
> * * *
>
> (C) furnishing of goods, services, or facilities between the plan and a party in interest;
>
> (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan;

29 U.S.C. § 1106(a). Section 1108, in turn, exempts from the list of prohibited transactions "[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C. § 1108(b)(2). ERISA defines a "party in interest" as, among other things, "a person providing services to such plan[.]" 29 U.S.C. § 1002(14)(B).

Here, plaintiffs allege that defendants engaged in prohibited transactions: (1) by allowing TIAA-CREF to require the plans to include the CREF Stock Account and to use TIAA-CREF as record keeper (Count II); (2) by not negotiating for a per capita record-keeping fee and by using two record keepers instead of one (Count IV); and (3) by paying fees to TIAA-CREF and Fidelity when plan participants invested in funds offered by those entities (Count VI). Plaintiffs' theory is that defendants engaged in a prohibited transaction every time the plans paid fees to TIAA-CREF or Fidelity. (Am. Complt. ¶ 243, 257, 276).

Defendants move to dismiss. With respect to plaintiffs' attempt to hang their prohibited transaction theory on § 1106(a)(1)(D)—which prohibits "transfer to, or use by or for the benefit of a party in interest, of any assets of the plan"—the Court agrees with defendants' argument that plaintiffs have not alleged a transfer of plan assets. Plaintiffs allege that the record-keeping fees were paid to TIAA-CREF and Fidelity by the mutual funds via the expense ratios collected by mutual funds. (Am. Complt. ¶¶ 145-146). Once the Fidelity fund or the TIAA-CREF fund collected the expense ratio, that amount became the property of the respective mutual fund. Thus, the transfer of some of it for record-keeping costs was not a transfer of plan assets. *See Hecker*, 556 F.3d at 584 (rejecting argument that revenue sharing constituted a transfer of plan assets, noting "[o]nce the fees are collected from the mutual fund's assets and transferred to one of the Fidelity entities, they become Fidelity's assets—again, not assets of the Plans.").

Plaintiffs' next theory is that the transactions (every time the plans paid TIAA-CREF and Fidelity) were prohibited by § 1106(a)(1)(C), which prohibits fiduciaries from engaging in transactions that constitute the "furnishing of goods, services, or facilities between the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(C). Because ERISA defines a "party in interest" as "a person providing services to such plan," section 1106(a)(1)(C) prohibits the "furnishing of . . . services . . . between the plan and [a person providing services to such plan]." The language is obviously circular. *See Sacerdote v. New York Univ.*, Case No. 16-cv-6284, 2017 WL 3701482 at 13 (S.D.N.Y. Aug. 25, 2017) ("[I]t is circular to suggest that an entity which becomes a party in interest by providing services to the Plans has engaged in a prohibited transaction simply because the Plans have paid for those services.").

A number of courts have recognized the circularity of the statute and have rejected attempts to state a claim for a prohibited transaction under that theory unless a plaintiff also alleges something more, such as self-dealing or that the payments were secret. *Cunningham v. Cornell Univ.*, Case No. 16-cv-6525, 2017 WL 4358769 at *10 (S.D.N.Y. Sept. 29, 2017); *Sweda v. University of Penn.*, Case No. 16-4329, 2017 WL 4179752 at *11 (E.D. Penn. Sept. 21, 2017); *Sacerdote*, 2017 WL 3701482 at *13-14; *see also Patrico v. Voya Fin., Inc.*, Case No. 16-cv-7070, 2018 WL 1319028 at *6-7 (S.D.N.Y. Mar. 13, 2018).

This Court appreciates the circularity and agrees that it would be nonsensical to let a party state a claim for a prohibited transaction in violation of ERISA merely by alleging a plan paid a person for a service. That would be just the sort of litigation, the Court imagines, that Congress worried would discourage employers from offering ERISA plans. Still, the statute is not as circular as it appears, because the first words of 29 U.S.C. § 1106(a) are "[e]xcept as provided in section 1108 of this title," and 29 U.S.C. § 1108(b) says, the "prohibitions . . . in section 1106 . . . shall not apply" to "[c]ontracting . . . for . . . services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C. § 1108(b). The solution, then, to eliminating nonsensical claims is to require a party asserting such a claim to allege that the exception does not apply.

This Court, however, is not at liberty to require a party to plead the exception, because the Seventh Circuit has already held that the exceptions in ERISA § 408, 29 U.S.C. § 1108, are affirmative defenses. *Allen v. GreatBanc Trust Co.*, 835 F.3d 670, 675 (7th Cir. 2016). A plaintiff is not required to plead around an affirmative defense. *Chicago Bldg Design, PC v. Mongolian House, Inc.*, 770 F.3d 610, 613 (7th Cir. 2014); *United States Gypsum v. Indiana Gas Co.*, 350 F.3d 623, 626 (7th Cir. 2003). The only time it is appropriate to dismiss a claim based on an affirmative defense is when the plaintiff "plead[s] himself out of court by alleging (and thus admitting) the ingredients of a defense." *United States Gypsum*, 350 F.3d at 626; *see also Mongolian House*, 770 F.3d at 614.

The Court concludes that plaintiffs have plead the ingredients of the defense, i.e., that the fees paid were reasonable, as a matter of law. The Court first notes that the amount of fees paid were within the control of participants, because they could choose in which funds to invest the money in their account. Funds were available with expense ratios as low as .05%. (Am. Complt. ¶¶ 161, 176). Plaintiffs have also alleged the actual amounts paid. Plaintiffs allege that, between 2010 and 2015, participants in the Voluntary Plan paid an average of between $54 and $87 per participant per year (Am. Complt. ¶ 150) and that participants in the Retirement Plan paid an average of between $153 and $213 per participant per year (Am. Complt. ¶ 149). Given plaintiffs' allegation that in 2015 the Voluntary Plan held $530 million in net assets and had 12,293 participants, plaintiffs' allegations suggest an average expense ratio of .125% to .2%. (Am. Complt. ¶ 16). Given plaintiffs' allegations that in 2015 the Retirement Plan held $2.34 billion in net assets and had 21,622 participants, plaintiffs' allegations suggest an average expense ratio between .14% and .197%. (Am. Complt. ¶ 12). These amounts are reasonable as a matter of law.

Plaintiffs' claims—Counts II, IV and VI—that defendants engaged in prohibited transactions are dismissed.

5. Plaintiffs' claim for failure to monitor

In Count VII, plaintiffs assert that defendants Northwestern, Chinniah and Sunshine failed to monitor the other fiduciaries. Defendants move to dismiss this count, but plaintiffs did not respond. Accordingly, the Court deems the claim abandoned and any arguments against dismissing the claim forfeited. *See Alioto v. Town of Lisbon*, 651 F.3d 715, 721 (7th Cir. 2011) ("We apply [the waiver/forfeiture rule] where a party fails to develop arguments related to a discrete issue, and we also apply that rule where a litigant effectively abandons the litigation by not responding to alleged deficiencies in a motion to dismiss."); *County of McHenry v. Insurance Co. of the West*, 438 F.3d 813, 818 (7th Cir. 2006) ("'[W]hen presented with a motion to dismiss, the non-moving party must proffer some legal basis to support his cause of action.'") (quoting *Stransky v. Cummins Engine Co.*, 51 F.3d 1329, 1335 (7th Cir. 1995)).

Count VII is dismissed.

B. Plaintiffs' motion for leave to amend

Plaintiffs filed a motion for leave to amend their complaint after more than a year of discovery, which was set to close a few days later. Plaintiffs seek to add four counts. Defendants argue that the Court should deny plaintiffs' motion to amend, because amendment would be futile and because plaintiffs could have amended sooner. Plaintiffs argue (confusingly) that they intend to add "just two limited claims" based "on previously unknown facts that were discovered during depositions of Defendants' representatives that began on March 22, 2018." (Plfs' Reply at 1/Docket [159] at 1).

The Court first notes that when plaintiffs filed their motion for leave to amend, they also filed a motion for leave to file their proposed second amended complaint under seal. The parties have not given the Court adequate reason to seal the filing. Litigation in federal courts is presumptively public, and people who "call on the courts . . . must accept the openness that goes with subsidized dispute resolution." *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000). "[O]nly trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence . . . is entitled to be kept secret." *Baxter Int'l v. Abbott Labs.*, 297 F.3d 544, 546 (7th Cir. 2002). Here, in the absence of a showing that one of those exceptions applies, the litigation is public, and the motion is denied.

1. Proposed Count VII

In proposed Count VII of the proposed second amended complaint, plaintiffs allege that defendants included retail-class funds as investment options when they could and should have used their bargaining power to include identical versions of the same funds at below-retail prices. (Prop. 2d. Am. Complt. ¶¶ 340-341, 342).

The Court will not allow plaintiffs to add this count. The Court agrees with defendants that many of the facts underlying this count were alleged in plaintiffs' amended complaint, such that plaintiffs could and should have added this count sooner, if not as part of its amended complaint. In addition, proposed Count VII would be futile, because it fails to state a claim for the same reasons outlined in sections III.A.2. and III.A.3. above. Finally, plaintiffs did not respond to defendants' argument as to this claim, so it is deemed abandoned.

The Court denies plaintiffs leave to add Count VII.

2. Proposed Counts IX and X

In proposed Counts IX and X, plaintiffs seek to hold defendants liable for allowing TIAA-CREF to market products to them. Plaintiffs allege that the plans allowed TIAA, as record keeper, to obtain access to "participants' contact information, their choices of investments, the asset size of their accounts, their employment status, age, and proximity to retirement[.]" (Prop. 2nd Am. Complt. ¶ 357). Plaintiffs allege that the information about participants constitutes a plan asset and that defendants breached their fiduciary duties: (1) by not preventing TIAA from using that information to market products to plaintiffs (Count IX); and by engaging in a prohibited transaction (Count X). (Prop. 2nd Am. Complt. ¶¶ 357-358; 365-366).

The Court agrees with defendants that it would be futile to allow plaintiffs to add these claims, which have a number of problems. To begin with, it is in no way imprudent for defendants to allow TIAA, who is alleged to be a record keeper, to have access to each participant's contact information, their choice of investments, their employment status, their age and their proximity to retirement. TIAA needed that information in order to serve as record keeper. Next, defendants argue that disclosure of information does not implicate ERISA fiduciary functions, and that argument has some support. *See Davis v. Screen Actors Guild, Inc.*, Case No. 08-00913, 2008 WL 11336377 at *9 (C.D. Cal. April 17, 2008) (holding that plaintiff's claim "that the plans betrayed their trust by disclosing personal information" was not preempted by ERISA because the claim was "distinct from any available under ERISA"). Plaintiff has not responded to this argument or cited a single case in which a court has held that releasing confidential information or allowing someone to use confidential information constitutes a breach of fiduciary duty under ERISA. This Court will not be the first, particularly in light of Congress's hope that litigation would not discourage employers from offering plans and in light of the principle that breach of fiduciary duty remedies inure to the plans.

Plaintiffs fare no better on their theory that defendants engaged in prohibited transactions when they allowed TIAA to use plan participants' confidential information. The Court agrees with defendants that the information was not a plan asset. Plaintiffs argue that it is enough that they *allege* the confidential information to be a plan asset, but such an allegation is merely a legal conclusion. *Iqbal*, 556 U.S. at 680 & 681; *In re Fidelity ERISA Float Lit'n*, 829 F.3d 55, 59 (1st Cir. 2016) ("we need not credit the complaint's statement that float is a 'plan asset,' for that label represents a legal conclusion"). Plaintiffs cite no case in which a court has held that such information is a plan asset for purposes of ERISA. This Court does not intend to be the first. In considering what constitutes a plan asset, courts consider "ordinary notions of property rights under non-ERISA law." *Fidelity*, 829 F.3d at 60. The Court has no doubt that a compilation of the information TIAA has on participants has some value (to TIAA, at least), but the Court cannot conclude that it is a plan asset under ordinary notions of property rights. The information the plans gave TIAA on each participant who joined one of the plans is not, for example, property the plan could sell or lease in order to fund retirement benefits. It does not appear that courts have recognized a property right in such information. *Cf. Rejimas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 695 (7th Cir. 2015) ("This assumes that federal law recognizes such a property right [as 'loss of their private information']. Plaintiffs refer us to no authority that would support such a finding. We thus refrain from supporting standing on such an abstract injury, particularly since the complaint does not allege that the plaintiffs could sell their personal information for value."); *see also Sexton v. Runyon*, Case No. 03-cv-291, 2005 WL 2030865 at *8 (N.D. Ind. Aug. 23, 2005) ("Though the law has considered various privacy interests in personal information, . . . the law does not frame these protections as property rights.").

The Court will not allow plaintiffs to add Counts IX and X.

3. Proposed Count VIII

Finally, in proposed Count VIII of the proposed second amended complaint, plaintiffs allege that defendants violated 29 U.S.C. § 1104(a)(1)(D), which requires an ERISA fiduciary to "discharge his duties" in "accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III." 29 U.S.C.

§ 1104(a)(1)(D). Specifically, plaintiffs allege that in June 2015, defendants adopted an Investment Policy Statement ("IPS") and then proceeded not to follow it.[2]

The Investment Policy Statement says, among other things:

> Service providers should be monitored on a regular basis or more frequently if applicable. Administrative and/or recordkeeping service providers may be benchmarked against, but not limited to, industry averages and/or other providers quotes. . . . The monitoring of the plan provider(s) is to ensure that total plan costs and services are competitive and reasonable.
>
> * * *
>
> [A]ll investments under consideration should generally meet the following standards for selection:
>
> 1. Investment performance should be competitive with an appropriate style-specific benchmark and the median return for an appropriate, style-specific peer group . . .
> 2. Specific risk and risk-adjusted return measures should be reviewed by the Committee and be within a reasonable range relative

[2] Defendants do not argue that the Investment Policy Statement is not a plan document or instrument for purposes of 29 U.S.C. § 1104(a)(1)(D), so the Court assumes without deciding that it could be. *See Tussey v. ABB, Inc.*, 746 F.3d 327, 334 n.5 (8th Cir. 2014) ("While we are concerned that construing all investor policy statements as binding plan documents will discourage their use, and we question whether a policy statement like the one in this case—informally implemented to provide a framework for administering the Plan itself—constitutes a binding Plan document, we need not resolve those issues here.").

> to appropriate, style-specific benchmark and peer group;
>
> * * *
>
> Investments where no objective performance metric is possible due to specialty focus or passively managed funds, short time history or other unique circumstances should be reviewed using a qualitative framework.

(Investment Policy Statement at 2-4/Docket [130-9] at 2-4). Plaintiffs allege that defendants violated these provisions by retaining the CREF Stock Account and TIAA Real Estate Accounts, by failing to monitor the performance and prudence of investments in the plans and by failing to monitor costs, including record-keeping costs. (Prop. 2nd Am. Complt. ¶ 350-351).

Defendants first argue that this claim is futile. Defendants take issue with plaintiffs allegation that defendants violated the IPS by including the CREF Stock Account and TIAA Real Estate Account without comparing them to a benchmark. Defendants point out that plaintiffs specifically allege that the CREF Stock Account and TIAA Real Estate Account have no benchmarks such that defendants could not have compared it to a benchmark. (Prop. 2nd Am. Complt. ¶ 256). Defendants also point out that the IPS states that when evaluating funds that have no benchmark, the funds should be "reviewed using a qualitative framework" and that plaintiffs have not alleged they violated that procedure. The Court agrees that this portion of the claim does not set out a violation of the IPS.

That is not, however, all plaintiffs allege in Count VIII. They also allege that defendants violated the IPS by failing to monitor the performance and prudence of investments in the plans and by failing to monitor costs, including record-keeping costs. (Prop. 2nd Am. Complt. ¶ 350-351). Plaintiffs argue that they could not have made these claims sooner, because they first learned of them during depositions in March 2018. This is not compelling. Defendants have shown (via declaration) that they produced the Investment Policy Statement in August 2017. Allegations that defendants failed to monitor the prudence of investments and failed to monitor record-keeping costs were major themes in plaintiffs' amended complaint. Thus, plaintiffs could and should have added these claims much sooner. Waiting until the final few days of a discovery period that had lasted more than a year was undue. Leave to add this claim now is denied.

Finally, the Court notes that it reviewed the new allegations as to Counts I through VI and considered whether the new allegations changed the Court's analysis with respect to those claims. It has concluded that they do not.[3]

Accordingly, plaintiffs' motion for leave to amend is denied.

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[3] The Court notes that for some allegations, plaintiffs cited deposition transcripts, which they attached. Where the cited testimony conflicted with the allegation, the Court credited the attachment. *See Chicago Dist. Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463, 466 (7th Cir. 2007) (citing *Perkins v. Silverstein*, 939 F.2d 463, 469 n.4 (7th Cir. 1991) (in determining the sufficiency of the complaint the court may rely on exhibits to the complaint whenever the allegations of the complaint are materially inconsistent with those exhibits)).

IV. CONCLUSION

For the reasons set forth above, the Court grants defendants' motion to dismiss [58] and denies plaintiffs' motion for leave to amend [129]. Plaintiffs' motion for leave to file under seal [133] is denied. All other pending motions are denied as moot. Any pending dates are stricken. Plaintiffs' case is dismissed with prejudice. Civil case terminated.

SO ORDERED. **ENTERED:** May 25, 2018

/s/ Jorge L. Alonso

JORGE L. ALONSO
United States District Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 11, 2020

Before

WILLIAM J. BAUER, *Circuit Judge*
DANIEL A. MANION, *Circuit Judge*
MICHAEL B. BRENNAN, *Circuit Judge*

No. 18-2569

LAURA L. DIVANE *et al.*,
Plaintiffs-Appellants,
v.

NORTHWESTERN UNIVERSITY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 16-cv-8157
Jorge L. Alonso,
Judge.

ORDER

On consideration of the petition for rehearing and for rehearing en banc filed by Plaintiffs-Appellants on April 22, 2020, no judge in active service has requested a vote on the petition for rehearing en banc*, and the judges on the original panel have voted to deny rehearing.

Accordingly, the petition for rehearing is DENIED.

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* Chief Judge Wood, Judge Flaum, Judge Scudder and Judge St. Eve did not participate in the consideration of this petition.

STATUTORY PROVISIONS INVOLVED

1. Section 2(b) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001(b), provides:

§ 1001. Congressional findings and declaration of policy

* * *

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

* * *

2. Sections 3(14)(B) and 3(34) of ERISA, 29 U.S.C. § 1002(14)(B) and § 1002(34), provide:

§ 1002. Definitions

For purposes of this subchapter:

* * *

(14) The term "party in interest" means, as to an employee benefit plan—

* * *

(B) a person providing services to such plan;

* * *

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

* * *

3. Sections 404(a) and 404(c) of ERISA, 29 U.S.C. § 1104(a) and § 1104(c), provide:

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) 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;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

* * *

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of—

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of title 26, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon—

(A) the earlier of—

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which—

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if—

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) Default investment arrangements.—

(A) In general.—For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) Notice requirements.—

(i) In general.—The requirements of this subparagraph are met if each participant or beneficiary—

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) Form of notice.—The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of title 26 shall apply with respect to the notices described in this subparagraph.

* * *

4. Section 406(a) of ERISA, 29 U.S.C. § 1106(a), provides:

§ 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) 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—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

* * *

5. Section 408(b) of ERISA, 29 U.S.C. § 1108(b), provides:

§ 1108. Exemptions from prohibited transactions

(b) Enumeration of transactions exempted from section 1106 prohibitions

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees (within the meaning of section 414(q) of title 26) in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured. A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of title 26.

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 1107(d)(6) of this title), if—

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 1107(d)(5) of this title).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 1344 of this title (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of subchapter III.

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multi-employer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 1411 of this title.

(12) The sale by a plan to a party in interest on or after December 18, 1987, of any stock, if—

(A) the requirements of paragraphs (1) and (2) of subsection (e) are met with respect to such stock,

(B) on the later of the date on which the stock was acquired by the plan, or January 1, 1975, such stock constituted a qualifying employer security (as defined in section 1107(d)(5) of this title as then in effect), and

(C) such stock does not constitute a qualifying employer security (as defined in section 1107(d)(5) of this title as in effect at the time of the sale).

(13) Any transfer made before January 1, 2026, of excess pension assets from a defined benefit plan to a retiree health account in a qualified transfer permitted under section 420 of title 26 (as in effect on July 31, 2015).

(14) Any transaction in connection with the provision of investment advice described in section

1002(21)(A)(ii) of this title to a participant or beneficiary of an individual account plan that permits such participant or beneficiary to direct the investment of assets in their individual account, if—

(A) the transaction is—

(i) the provision of the investment advice to the participant or beneficiary of the plan with respect to a security or other property available as an investment under the plan,

(ii) the acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice, or

(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with an acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice; and

(B) the requirements of subsection (g) are met.

(15)(A) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a party in interest (other than a fiduciary described in section 1002(21)(A) of this title) with respect to a plan if—

(i) the transaction involves a block trade,

(ii) at the time of the transaction, the interest of the plan (together with the interests of any other plans maintained by the same plan sponsor), does not exceed 10 percent of the aggregate size of the block trade,

(iii) the terms of the transaction, including the price, are at least as favorable to the plan as an arm's length transaction, and

(iv) the compensation associated with the purchase and sale is not greater than the compensation associated with an arm's length transaction with an unrelated party.

(B) For purposes of this paragraph, the term "block trade" means any trade of at least 10,000 shares or with a market value of at least $200,000 which will be allocated across two or more unrelated client accounts of a fiduciary.

(16) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a party in interest if—

(A) the transaction is executed through an electronic communication network, alternative trading system, or similar execution system or trading venue subject to regulation and oversight by—

(i) the applicable Federal regulating entity, or

(ii) such foreign regulatory entity as the Secretary may determine by regulation,

(B) either—

(i) the transaction is effected pursuant to rules designed to match purchases and sales at the best price available through the execution system in accordance with applicable rules of the Securities and Exchange Commission or other relevant governmental authority, or

(ii) neither the execution system nor the parties to the transaction take into account the identity of the parties in the execution of trades,

(C) the price and compensation associated with the purchase and sale are not greater than the price and compensation associated with an arm's length transaction with an unrelated party,

(D) if the party in interest has an ownership interest in the system or venue described in subparagraph (A), the system or venue has been authorized by the plan sponsor or other independent fiduciary for transactions described in this paragraph, and

(E) not less than 30 days prior to the initial transaction described in this paragraph executed through any system or venue described in subparagraph (A), a plan fiduciary is provided written or electronic notice of the execution of such transaction through such system or venue.

(17)(A) Transactions described in subparagraphs (A), (B), and (D) of section 1106(a)(1) of this title between a plan and a person that is a party in interest other than a fiduciary (or an affiliate) who has or exercises any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of section 1002(21)(A)(ii) of this title) with respect to those assets, solely by reason of providing services to the plan or solely by reason of a relationship to such a service provider described in subparagraph (F), (G), (H), or (I) of section 1002(14) of this title, or both, but only if in connection with such transaction the plan receives no less, nor pays no more, than adequate consideration.

(B) For purposes of this paragraph, the term "adequate consideration" means—

(i) in the case of a security for which there is a generally recognized market—

(I) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934 [15 U.S.C. 78f], taking into account factors such as the size of the transaction and marketability of the security, or

(II) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of the party in interest, taking into account factors such as the size of the transaction and marketability of the security, and

(ii) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by a fiduciary or fiduciaries in accordance with regulations prescribed by the Secretary.

(18) Foreign exchange transactions.—Any foreign exchange transactions, between a bank or broker-dealer (or any affiliate of either), and a plan (as defined in section 1002(3) of this title) with respect to which such bank or broker-dealer (or affiliate) is a trustee, custodian, fiduciary, or other party in interest, if—

(A) the transaction is in connection with the purchase, holding, or sale of securities or other investment assets (other than a foreign exchange transaction unrelated to any other investment in securities or other investment assets),

(B) at the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arm's length foreign exchange transactions between unrelated parties, or the terms afforded by the bank or broker-dealer (or any affiliate of either) in comparable arm's-length foreign exchange transactions involving unrelated parties,

(C) the exchange rate used by such bank or broker-dealer (or affiliate) for a particular foreign exchange transaction does not deviate by more than 3 percent from the interbank bid and asked rates for transactions of comparable size and maturity at the time of the transaction as displayed on an independent service that reports rates of exchange in the foreign currency market for such currency, and

(D) the bank or broker-dealer (or any affiliate of either) does not have investment discretion, or provide investment advice, with respect to the transaction.

(19) Cross trading.—Any transaction described in sections 1106(a)(1)(A) and 1106(b)(2) of this title involving the purchase and sale of a security between a plan and any other account managed by the same investment manager, if—

(A) the transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available,

(B) the transaction is effected at the independent current market price of the security (within the meaning of section 270.17a-7(b) of title 17, Code of Federal Regulations),

(C) no brokerage commission, fee (except for customary transfer fees, the fact of which is disclosed pursuant to subparagraph (D)), or other remuneration is paid in connection with the transaction,

(D) a fiduciary (other than the investment manager engaging in the cross-trades or any affiliate) for each plan participating in the transaction authorizes in advance of any cross-trades (in a document that is separate from any other written agreement of the parties) the investment manager to engage in cross trades at the investment manager's discretion, after such fiduciary has received disclosure regarding the conditions under which cross trades may take place (but only if such disclosure is separate from any other agreement or disclosure involving the asset management relationship), including the written policies and procedures of the investment manager described in subparagraph (H),

(E) each plan participating in the transaction has assets of at least $100,000,000, except that if the assets of a plan are invested in a master trust containing the assets of plans maintained by employers in the same controlled group (as defined in section 1107(d)(7) of this title), the master trust has assets of at least $100,000,000,

(F) the investment manager provides to the plan fiduciary who authorized cross trading under subparagraph (D) a quarterly report detailing all cross trades executed by the investment manager in which the plan participated during such quarter, including the following information, as applicable: (i) the identity of each security bought or sold; (ii) the number of shares or units traded; (iii) the parties involved in the cross-trade; and (iv) trade price and the method used to establish the trade price,

(G) the investment manager does not base its fee schedule on the plan's consent to cross trading, and no other service (other than the investment opportunities and cost savings available through a cross trade) is conditioned on the plan's consent to cross trading,

(H) the investment manager has adopted, and cross-trades are effected in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program, and that include a description of the manager's pricing policies and procedures, and the manager's policies and procedures for allocating cross trades in an objective manner among accounts participating in the cross-trading program, and

(I) the investment manager has designated an individual responsible for periodically reviewing such purchases and sales to ensure compliance with the written policies and procedures described in subparagraph (H), and following such review, the individual shall issue an annual written report no later than 90 days following the period to which it relates signed under penalty of perjury to the plan fiduciary who authorized cross trading under subparagraph (D) describing the steps performed during the course of the review, the level of compliance, and any specific instances of non-compliance.

The written report under subparagraph (I) shall also notify the plan fiduciary of the plan's right to terminate participation in the investment manager's cross-trading program at any time.

(20)(A) Except as provided in subparagraphs (B) and (C), a transaction described in section 1106(a) of this title in connection with the acquisition, holding, or disposition of any security or commodity, if the transaction is corrected before the end of the correction period.

(B) Subparagraph (A) does not apply to any transaction between a plan and a plan sponsor or its affiliates that involves the acquisition or sale of an employer security (as defined in section 1107(d)(1) of this title) or the acquisition, sale, or lease of employer real property (as defined in section 1107(d)(2) of this title).

(C) In the case of any fiduciary or other party in interest (or any other person knowingly participating in such transaction), subparagraph (A) does not apply to any transaction if, at the time the transaction occurs, such fiduciary or party in interest (or other person) knew (or reasonably should have known) that the transaction would (without regard to this paragraph) constitute a violation of section 1106(a) of this title.

(D) For purposes of this paragraph, the term "correction period" means, in connection with a fiduciary or party in interest (or other person knowingly participating in the transaction), the 14-day period beginning on the date on which such fiduciary or party in interest (or other person) discovers, or reasonably should have discovered, that the transaction would (without regard to this paragraph) constitute a violation of section 1106(a) of this title.

(E) For purposes of this paragraph—

(i) The term "security" has the meaning given such term by section 475(c)(2) of title 26 (without regard to subparagraph (F)(iii) and the last sentence thereof).

(ii) The term "commodity" has the meaning given such term by section 475(e)(2) of title 26 (without regard to subparagraph (D)(iii) thereof).

(iii) The term "correct" means, with respect to a transaction—

(I) to undo the transaction to the extent possible and in any case to make good to the plan or affected account any losses resulting from the transaction, and

(II) to restore to the plan or affected account any profits made through the use of assets of the plan.

6. Section 409(a) of ERISA, 29 U.S.C. § 1109(a), provides:

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

* * *

7. Section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), provides:

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

* * *

> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

* * *