APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 18-2707-cv

DR. ALAN SACERDOTE, DR. HERBERT SAMUELS, MARK CRISPIN MILLER, MARIE E. MONACO, DR. SHULAMITH LALA STRAUSSNER, DR. JAMES B. BROWN, individually and as representatives of a class of participants and beneficiaries on behalf of the NYU SCHOOL OF MEDICINE RETIREMENT PLAN FOR MEMBERS OF THE FACULTY, PROFESSIONAL RESEARCH STAFF AND ADMINISTRATION AND THE NEW YORK UNIVERSITY RETIREMENT PLAN FOR MEMBERS OF THE FACULTY, PROFESSIONAL RESEARCH STAFF AND ADMINISTRATION,
Plaintiffs-Appellants,

v.

NEW YORK UNIVERSITY,
Defendant-Appellee.

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,
Intervenor.[*]

AUGUST TERM, 2020
ARGUED: OCTOBER 14, 2020
DECIDED: AUGUST 16, 2021
CERTIFIED COPY ISSUED ON 08/16/2021

Appeal from the United States District Court for the Southern District of New York.

[*] The Clerk of Court is respectfully directed to amend the caption as set forth above.

Before: NEWMAN[**], WALKER, and MENASHI, *Circuit Judges*.

The plaintiff-appellant class participates in retirement plans administered by New York University (NYU) and the NYU School of Medicine. Plaintiffs brought this suit against NYU in its capacity as the fiduciary of plaintiffs' retirement plans, alleging a number of breaches of NYU's fiduciary duties under the Employment Retirement Income Savings Act (ERISA). Following a bench trial in the United States District Court for the Southern District of New York (Katherine B. Forrest, *J.*) and post-trial motions (Analisa Torres, *J.*), they appeal from the entry of judgment in defendant-appellee NYU's favor and the denial of post-trial motions. On appeal, plaintiffs challenge: (1) the dismissal of their claim that NYU breached its duty of prudence by offering particular share classes of mutual funds in the retirement plans, (2) the denial of leave to amend their complaint to name additional defendants, (3) the striking of their demand for a jury trial, (4) the use of written declarations rather than live examination for direct testimony in the bench trial, (5) some of the district court's findings in NYU's favor after the bench trial, and (6) the denial of their motion for a new trial, which argued that the judge presiding over the trial (Forrest, *J.*) should have been disqualified. We find merit in the first two of these challenges, but none in the remainder. Accordingly, we **AFFIRM** in part, **VACATE** in part, and **REMAND** for further proceedings consistent with this opinion.

[**] Circuit Judge Ralph K. Winter, originally a member of this panel, died on December 8, 2020. Circuit Judge Jon O. Newman has replaced Judge Winter on the panel for this appeal. *See* 2d Cir. IOP E(b).

Judge Menashi dissents in part in a separate opinion.

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JOHN M. WALKER, JR., *Circuit Judge*:

The plaintiff-appellant class participates in retirement plans administered by New York University (NYU) and the NYU School of Medicine. Plaintiffs brought this suit against NYU in its capacity as the fiduciary of plaintiffs' retirement plans, alleging a number of breaches of NYU's fiduciary duties under the Employment Retirement Income Savings Act (ERISA). Following a bench trial in the United States District Court for the Southern District of New York (Katherine B. Forrest, *J.*) and post-trial motions (Analisa Torres, *J.*), they appeal from the entry of judgment in defendant-appellee NYU's favor and the denial of post-trial motions. On appeal, plaintiffs challenge: (1) the dismissal of their claim that NYU breached its duty of prudence by offering particular share classes of mutual funds in the retirement plans, (2) the denial of leave to amend their complaint to name additional defendants, (3) the striking of their demand for a jury trial, (4) the use of written declarations rather than live examination for direct testimony in the bench trial, (5) some of the district court's findings in NYU's favor after the bench trial, and (6) the denial of their motion for a new trial, which argued that the judge presiding over the trial (Forrest, *J.*) should have been disqualified. We find merit in the first two of these challenges, but none in the remainder. Accordingly, we **AFFIRM** in part, **VACATE** in part, and **REMAND** for further proceedings consistent with this opinion.

BACKGROUND

The plaintiffs represent a class of NYU and NYU School of Medicine employees who are suing the University for breach of fiduciary duty in its administration of their retirement plans under ERISA. Plaintiffs participate in either the NYU Retirement Plan for Members of the Faculty, Professional Research Staff, and Administration (the Faculty Plan) or the NYU School of Medicine Retirement Plan for Members of the Faculty, Professional Research Staff, and Administration (the Medical Plan). The Faculty Plan covers most of NYU's faculty, research staff, and administrative staff, while the Medical Plan serves employees of the School of Medicine.

The NYU Retirement Plan Committee (the Committee) is the nine-member fiduciary entity responsible for administering both plans, having been designated as the Plan Administrator by NYU's Board of Trustees. The Committee is made up of senior University and Medical Center administrators, including NYU's Chief Investment Officer, the Senior Vice Presidents of Finance of NYU and the Medical Center, the Medical Center's Controller, the Vice Presidents of Human Resources of NYU and the Medical Center, the Directors of Benefits of NYU and the Medical Center, and NYU's Provost (or its designee).

Both the Faculty Plan and Medical Plan (the Plans) are defined contribution plans, as set forth in 29 U.S.C. § 1002(34), and are tax-qualified under 26 U.S.C. § 403(b). Defined contribution plans are retirement plans in which the employee contributes directly to her individual account, and the benefits that will ultimately accrue to the employee are a function of the amount she contributes to investments in the plan and the market

performance of those investments, minus the expenses of plan administration.[1] Plans that operate under § 403(b)'s beneficial tax scheme are retirement plans administered by certain qualifying non-profits, including universities, that offer mutual fund and annuity investment options to participants.[2]

Participants in NYU's Plans had a range of investment options offered by either TIAA-CREF or the Vanguard Group, the two retirement investment firms under contract with NYU. The Faculty Plan offered 103 investment options (25 from TIAA-CREF; 78 from Vanguard) to plan participants during the class period. The Medical Plan offered 84 options (11 from TIAA-CREF; 73 from Vanguard). Both Plans offered investment options that included fixed annuity contracts (meaning the investment returns at a contractually specified minimum interest rate), variable annuities (returns at a variable interest rate), and mutual funds. Participants could also choose from both actively and passively managed index funds, with actively managed funds charging higher fees for that service.

TIAA-CREF and Vanguard are referred to in the industry as the Plans' "recordkeepers." They provide investment and administrative services, for which they charge investment fees and recordkeeping fees, respectively. For mutual funds, the investment fees are charged as a percentage of each fund's assets (the "expense ratio"). The fees can differ depending on the share class of the fund: a "retail" share (the share class

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[1] 29 U.S.C. § 1002(34). Defined contributions plans stand in contrast to defined benefit plans, in which the benefits ultimately accruing to the employee are fixed rather than dependent on market performance.

[2] 26 U.S.C. § 403(b).

that is marketed to individuals with small amounts to invest) typically has a higher expense ratio than an "institutional" share (the share class that is available to institutional investors, including large retirement plans, with large amounts to invest) of the same fund. These fees are measured in "basis points," with each basis point equaling 0.01% of the fund's assets. The administrative (recordkeeping) fees are charged either (1) as a flat fee, in which case each fund participant pays a set amount, or (2) by revenue sharing. Under the revenue-sharing model, a fund pays the recordkeeper a set portion of the fund's expense ratio.

In 2016, plaintiffs brought this suit under 29 U.S.C. § 1132(a)(2),[3] alleging that NYU breached its fiduciary duties of loyalty and prudence and engaged in prohibited transactions, which caused the Plans to incur excessive costs and unreasonable performance losses. The breach allegedly occurred because the defendants: permitted TIAA-CREF to mandate inclusion of specific proprietary accounts, requiring use of TIAA-CREF as the recordkeeper, in the Plans (Counts I and II); incurred unreasonable recordkeeping fees (Counts III and IV); incurred unreasonable investment fees, unnecessary marketing and distribution fees and mortality and expense risk fees, and thus caused unreasonable performance losses (Counts V and VI); and failed to monitor the investments (Count VII).

On August 25, 2017, the district court granted in part and denied in part NYU's motion to dismiss, dis-

[3] Section 1132(a)(2) empowers plan participants and beneficiaries, among others, to sue plan fiduciaries for relief under 29 U.S.C. § 1109. Section 1109(a) makes fiduciaries who breach their fiduciary duties personally liable for resulting losses to the plan and the return of profits that flowed to the fiduciaries, and subject to equitable relief.

missing Counts I, II, IV, VI, and VII in their entirety and Counts III and V in part.[4] The district court's order dismissed all claims alleging that NYU breached its duty of loyalty under § 404(a)(1)(A); that NYU engaged in prohibited transactions under § 406(a)(1)(A), (C), and (D); and that NYU failed to monitor the investments.[5] The order also dismissed some of the plaintiffs' claims alleging a breach of the duty of prudence under § 404(a)(1)(B). First, the court dismissed the imprudence claim under Count I, which alleged that NYU mandated inclusion of specific accounts and required the use of TIAA-CREF as recordkeeper.[6] Second, the court dismissed in part the imprudence claims under Count V to the extent they arose from allegations that NYU offered more expensive retail class shares rather than the lower-cost institutional class shares of the same mutual funds (the share-class claim), or incurred unnecessary and unreasonable layers of fees.[7]

The only claims that survived dismissal were the imprudence claims in Count III and one of the imprudence claims in Count V. Specifically, Count III survived dismissal on the grounds of imprudence regarding incurring excessive recordkeeping costs (the recordkeeping claim); employing a revenue-sharing method to pay recordkeepers (the revenue-sharing claim); and failing to consolidate to a single recordkeeper for each Plan (the recordkeeper consolidation

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[4] *Sacerdote v. NYU*, No. 16-cv-6284 (KBF), 2017 WL 3701482 (S.D.N.Y. Aug. 25, 2017).

[5] *Id.* at *15.

[6] *Id.* at *8.

[7] *Id.* at *11.

claim).[8] Count V survived on the ground of imprudence in continuing to include the underperforming CREF Stock Account and TIAA Real Estate Account as investment options (the investment-retention claim).[9] Thus, those portions of Counts III and V were permitted to proceed to trial.

On September 8, 2017, plaintiffs moved both (1) for reconsideration of the district court's dismissal of the share-class and failure to monitor claims and (2) for leave to amend the complaint to add seventeen individuals who were Committee members during the class period as named defendants and to replead the dismissed claims. On October 17, the district court denied the motion for leave to amend and deferred consideration of the request to replead the dismissed claims until resolution of the pending motion for reconsideration. The district court denied the motion for reconsideration two days later, relying on different reasoning from that supporting the dismissal of the share-class claim.[10]

As the parties were preparing for trial, NYU successfully moved to strike plaintiffs' jury demand. The district court also established trial management rules that specified that all direct testimony would be taken by written declarations (the court's standing practice for bench trials) and that each side would have 25 hours of trial time to present its case.

The district court held a bench trial on the surviving claims from April 16-26, 2018. On July 31, 2018, the

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[8] *Id.* at *8–9.

[9] *Id.* at *10.

[10] *Sacerdote v. NYU*, No. 16-cv-6284 (KBF), 2017 WL 4736740, at *1–4 (S.D.N.Y. Oct. 19, 2017).

district court issued its written decision finding in favor of NYU on all remaining claims.[11]

On August 14, 2018, plaintiffs filed a motion for amended or additional trial findings under Federal Rule of Civil Procedure 52(b) and to alter or amend the judgment under Rule 59(e), seeking findings that individual Committee members had failed to adequately perform their fiduciary duties and removal of those individual Committee members as fiduciaries, despite the overall judgment for NYU. Plaintiffs also appealed to this court on September 11, 2018, but we held the appeal in abeyance pending the district court's resolution of the post-trial motions.

Meanwhile, by mid-July 2018, it had become public knowledge that Judge Forrest would be leaving the bench. She resigned from the bench effective September 11, 2018, and returned to her prior firm, Cravath, Swaine & Moore LLP, the following day. On October 1, 2018, plaintiffs moved for a new trial pursuant to Rule 60(b) on the ground that Judge Forrest should have been disqualified from the case based on a connection to NYU through a colleague at Cravath. On July 1, 2019, Judge Torres, to whom the case had eventually been reassigned, denied plaintiffs' various post-trial motions.[12]

DISCUSSION

On appeal, plaintiffs argue that: (1) the district court erred in dismissing the share-class claim; (2) the district court erred in denying the motion to amend the

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[11] *Sacerdote v. NYU*, 328 F. Supp. 3d 273, 317 (S.D.N.Y. 2018).

[12] *Sacerdote v. NYU*, No. 16-cv-6284 (AT), 2019 WL 2763922, at *7 (S.D.N.Y. July 1, 2019).

complaint to add individual Committee members as defendants, an error that later prejudiced two of their post-trial motions;[13] (3) they were entitled to a jury trial under the Seventh Amendment; (4) the use of written declarations for all direct testimony violated the Federal Rules of Civil Procedure and denied them a fair trial; (5) the district court's trial findings in NYU's favor on the recordkeeper-consolidation claim and the investment retention claim were clearly erroneous; and (6) Judge Forrest should have been disqualified from presiding over this case.

We agree with respect to the first two challenges, and accordingly vacate the dismissal of the share-class claim, vacate the denial of leave to amend, and vacate the denial of the prejudiced posttrial motions. We otherwise affirm.

I. Dismissal of the share-class claim was error

Although the district court granted NYU's motion to dismiss a number of claims for failure to state a claim under Rule 12(b)(6), the only such claim relevant on appeal is plaintiffs' allegation in Count V that the Plans' fiduciary breached its duty of prudence by offering retail-class shares of certain mutual funds rather than lower-cost institutional-class shares of the same funds (i.e., the share-class claim).

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[13] Plaintiffs appeal the denial of their post-trial Rule 52(b) and 59(e) motions separately from their appeal of the denial of leave to amend. For the reasons explained in Part II, *infra*, we decline to review the denial of plaintiffs' post-trial motions because we find antecedent error in the district court's denial of leave to amend, which prejudiced the review of those motions.

Plaintiffs allege that "the only difference between the various share classes is fees,"[14] and that large investors like the Plans "can obtain [institutional] share classes with far lower costs than retail mutual fund shares."[15] They allege that "[e]ven if a jumbo plan does not meet the minimum investment thresholds for an institutional share class, fund companies will routinely waive those minimums for billion dollar plans if merely requested."[16] Supported by a lengthy and detailed chart, plaintiffs make specific allegations regarding the basis point differences in costs between retail and institutional shares of each of dozens of mutual funds offered in the Faculty and/or Medical Plans. They allege that fiduciaries can readily obtain this data on cost-differentials from the prospectus for each fund.

In granting the motion to dismiss, the district court found that "prudent fiduciaries may very well choose to offer retail class shares over institutional class shares … because retail class shares necessarily offer higher liquidity than institutional investment vehicles."[17] It also found that plaintiffs' allegations of imprudence in this respect were insufficient because "the fees offered for the sixty-three identified retail funds included in NYU's Options ranged from 4-77 basis points—a lower range than that permitted by the Third, Seventh, and Ninth Circuits."[18]

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[14] *Sacerdote v. NYU*, No. 16-cv-6284, ECF No. 39, ¶ 139 (S.D.N.Y. Nov. 9, 2016) (amended complaint).

[15] *Id.* ¶ 141.

[16] *Id.* ¶ 142.

[17] *Sacerdote*, 2017 WL 3701482 at *11.

[18] *Id.* (citing *Tibble v. Edison Int'l*, 729 F.3d 1110, 1135 (9th Cir. 2013), *vacated*, 575 U.S. 523 (2015); *Renfro v. Unisys Corp.*,

In responding to plaintiffs' motion for reconsideration of the share-class claim, the district court changed its reasoning for dismissing the claim.[19] It affirmed the dismissal on the basis that "the 'prudence of *each* investment is not assessed in isolation but, rather, *as the investment relates to the portfolio as a whole*,'"[20] and therefore "it must consider the mix rather than the prudence of any individual option when assessing a prudence claim."[21] It found the allegations to be deficient, noting that "plaintiffs do not allege that, taken as a whole, the mixes of options in the Plans were imprudent *because* of the inclusion of these retail class shares."[22] To withstand dismissal, the district court stated that "[t]he retail class shares would have to be so prevalent that an entire Plan was tainted."[23] It found that, in this case, plaintiffs' allegations that the Plans offered retail rather than institutional shares in 63 funds—out of 103 offered by the Faculty Plan and 84 offered by the Medical Plan—were insufficient to meet that standard as a matter of law.[24]

On appeal, plaintiffs argue that their allegations are sufficient to generate a plausible inference of impru-

671 F.3d 314, 319 (3d Cir. 2011); *Loomis v. Exelon Corp.*, 658 F.3d 667, 669 (7th Cir. 2011); *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009)).

[19] *Sacerdote*, 2017 WL 4736740 at *1–3.

[20] *Id.* at *1 (emphasis in original) (quoting *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 717 (2d Cir. 2013) (hereinafter "*PBGC*")).

[21] *Id.* at *3.

[22] *Id.* (emphasis in original).

[23] *Id.*

[24] *Id.*

dence, and that the district court misconstrued our precedent in finding otherwise.[25] NYU disagrees on the merits, but it argues principally that, even if dismissal was error, the claim should not be reinstated because the district court's later trial findings rendered the dismissal harmless.[26]

For the reasons we now explain, we find that the share-class claim was adequately pled and that we cannot conclude, on the present record, that its dismissal was harmless.

A. *Standard of review*

We review the grant of a motion to dismiss a claim under Rule 12(b)(6) de novo.[27] We apply the well-established pleading standard articulated in *Bell Atlantic Corp. v. Twombly*[28] and *Ashcroft v. Iqbal*[29]: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[30] In assessing the complaint, we must construe it liberally, accepting all factual allegations therein as true and drawing all reasonable inferences in the plaintiffs' favor.[31] However, we disregard conclusory allegations, such as

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[25] Pls.-Appellants' Br. at 30.

[26] Def.-Appellee's Br. at 43.

[27] *Palin v. N.Y. Times Co.*, 940 F.3d 804, 809 (2d Cir. 2019).

[28] 550 U.S. 544 (2007).

[29] 556 U.S. 662 (2009).

[30] *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570).

[31] *Palin*, 940 F.3d at 809.

"formulaic recitation[s] of the elements of a cause of action."[32]

We have cautioned that "the nature of … allegations under ERISA calls for particular care in applying this … inquiry in order to ensure that the … [c]omplaint alleges *nonconclusory* factual content raising a *plausible* inference of misconduct and does not rely on the vantage point of hindsight."[33] On the other hand, we are cognizant that "ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences."[34] So, as is true in many contexts, a claim under ERISA may withstand a motion to dismiss based on sufficient circumstantial factual allegations to support the claim, even if it lacks direct allegations of misconduct.[35]

B. *The share-class claim for breach of the fiduciary duty of prudence was adequately pled*

ERISA imposes a "prudent man standard of care" on retirement plan fiduciaries in order "to protect bene-

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[32] *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678.

[33] *PBGC*, 712 F.3d at 718 (emphases in original) (internal quotation marks and citation omitted).

[34] *Id.* (internal quotation marks and citation omitted).

[35] *See id.* (discussing that when an ERISA complaint "contains no factual allegations referring *directly* to [the defendant's] knowledge, methods, or investigations at the relevant times," the claim "may still survive a motion to dismiss if the court, based on circumstantial factual allegations, may reasonably infer" that the defendant acted unlawfully (emphasis in original) (internal quotation marks and citation omitted)).

ficiaries of employee benefits plans."[36] As relevant to the share-class claim, fiduciaries must "discharge [their] duties … with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[37]

The prudence of a fiduciary "is measured according to the objective prudent person standard developed in the common law of trusts."[38] ERISA instructs us to assess a fiduciary's prudence "under the circumstances then prevailing," so we must "judge a fiduciary's actions based upon information available to the fiduciary at the time of each investment decision and not from the vantage point of hindsight."[39] "[T]his standard focuses on a fiduciary's conduct in arriving at an investment decision, not on its results, and asks whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment."[40]

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[36] *Id.* at 715 (internal quotation marks and citation omitted); *see also* 29 U.S.C. § 1104(a)(1).

[37] 29 U.S.C. § 1104(a)(1)(B).

[38] *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984) (internal quotation marks and citation omitted); *see also Tibble*, 575 U.S. at 528 ("We have often noted that an ERISA fiduciary's duty is 'derived from the common law of trusts.'" (quoting *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985))).

[39] *PBGC*, 712 F.3d at 716 (internal quotation marks and citation omitted).

[40] *Id.* (internal quotation marks, citation, and alterations omitted).

A claim for breach of the duty of prudence will "survive a motion to dismiss if the court, based on circumstantial factual allegations, may reasonably infer from what is alleged that the process was flawed" or "that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident."[41] That is the situation here.

The complaint sets forth cost differentials of specified basis points for the dozens of mutual funds as to each of which, they claim, NYU should have offered lower-cost institutional shares instead of higher-cost retail shares. Plaintiffs allege that this information was included in fund prospectuses and would have been available to inquiring fiduciaries when the fiduciaries decided to offer the funds in the Plans. In sum, plaintiffs have alleged "that a superior alternative investment was readily apparent such that an adequate investigation"—simply reviewing the prospectus of the fund under consideration—"would have uncovered that alternative."[42] On review of a motion to dismiss, we must draw reasonable inferences from the complaint in plaintiffs' favor.[43] Upon doing so, with respect to the share-class allegations, we believe that plaintiffs have

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[41] *Id.* at 718 (internal quotation marks and citations omitted).

[42] *Id.* at 719 (describing allegations that would be sufficient to raise a plausible inference of imprudence and withstand a motion to dismiss); *see also Sweda v. Univ. of Pa.*, 923 F.3d 320, 331 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2565 (2020) (reversing dismissal of claim alleging "that despite the availability of low-cost institutional class shares, [the fiduciary] selected and retained identically managed but higher cost retail class shares," where the complaint included "a table comparing options in the Plan with the readily available cheaper alternatives").

[43] *Palin*, 940 F.3d at 809.

sufficiently alleged that NYU acted imprudently in offering the number of retail-class shares identified in the complaint.

Although the district court abandoned its initial rationale for dismissing this claim, we note two problems in its order. First, the notion that "prudent fiduciaries may very well choose to offer retail class shares over institutional class shares" because retail shares offer greater liquidity provides no basis to dismiss pleadings that otherwise generate plausible inferences of the claimed misconduct. Such an argument "goes to the merits and is misplaced at this early stage."[44] While the plausibility standard requires that facts be pled "permit[ting] the court to infer more than the mere possibility of misconduct,"[45] we do not require an ERISA plaintiff "to rule out every possible lawful explanation for the conduct he challenges."[46] To do so "would invert the principle that the complaint is construed most favorably to the nonmoving party" on a motion to dismiss.[47]

Second, we caution against overreliance on cost ranges from other ERISA cases as benchmarks. While

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[44] *Sweda*, 923 F.3d at 333.

[45] *PBGC*, 712 F.3d at 718 (internal quotation marks and citation omitted).

[46] *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009).

[47] *Id.* (internal quotation marks and citation omitted); *see also Sweda*, 923 F.3d at 326 (rejecting application of *Twombly*'s heightened antitrust pleading standard to ERISA complaints and noting that, on a motion to dismiss, a district court may not "require[] [an ERISA plaintiff] to rule out lawful explanations for [the defendant's] conduct").

such comparisons may sometimes be instructive, their utility is limited because the assessment of any particular complaint is a "context-specific task."[48] We cannot rule out the possibility that a fiduciary has acted imprudently by including a particular fund even if, for example, the fees that fund charged are lower than a fee found not imprudent in another case.

The district court's order denying the motion for reconsideration similarly offers no compelling ground for affirmance. In it, the court faulted plaintiffs for not alleging (1) that "the mixes of options in the Plans were imprudent," or (2) that the Plans were tainted in their entirety because the retail shares were included. Neither ground for dismissal is persuasive.

As for the "mix" of funds, we agree with the general principle that "the prudence of each investment is not assessed in isolation but, rather, as the investment relates to the portfolio as a whole."[49] But this principle alone cannot support the district court's dismissal of the share-class claim in this case. As we have suggested previously, allegations concerning the mix of investments are more centrally relevant to claims of imprudence based on the riskiness of funds or the risk-profile of a portfolio as a whole.[50] Here, with respect to

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[48] *PBGC*, 712 F.3d at 718.

[49] *Id.* at 717; *see also Sweda*, 923 F.3d at 331 ("employ[ing] a holistic approach" to evaluate ERISA complaint); *Braden*, 588 F.3d at 598 (noting that ERISA's "remedial scheme … counsel[s] careful and holistic evaluation of an ERISA complaint's factual allegations before concluding that they do not support a plausible inference that the plaintiff is entitled to relief").

[50] *See, e.g.*, *PBGC*, 712 F.3d at 721 (discussing adequacy of allegations that fiduciary "exposed the [p]lan to excessive risk due

the share-class claim, the alleged imprudent choice has nothing to do with the funds' risk profiles; the choice was simply between higher or lower-cost shares of the same fund. In some cases where the 'mix' analysis is appropriate, there is uncertainty as to what investment option would have been included if the questioned investment option had not been included. Here, however, there was a binary choice between the retail shares and the institutional shares; had the funds not included the former, they would have included the latter, to some extent. Even if this were not the case, the principle that a portfolio should be assessed holistically does not preclude critical assessment of individual funds.[51] Fiduciaries cannot shield themselves from liability—much less discovery—simply because the alleged imprudence inheres in fewer than all of the fund options. If the prudence of a particular investment offering will become clear only in the context of the portfolio as a whole, that argument cannot resolve a motion on the pleadings; it goes to the merits.

As to whether the Plans were tainted in their entirety, we do not suggest that a holistic assessment of the Plans is irrelevant to the share-class claim—we simply think that plaintiffs have pled enough on that claim to withstand dismissal at the pleading stage. They allege that 63 of the funds included in the 103-

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to an egregious over-concentration in high-risk mortgage securities").

[51] *See Sweda*, 923 F.3d at 330 ("We did not hold … that a meaningful mix and range of investment options insulates plan fiduciaries from liability for breach of fiduciary duty. Such a standard would allow a fiduciary to avoid liability by stocking a plan with hundreds of options, even if the majority were overpriced or underperforming.").

fund and 84-fund Plans charged excessive (retail share) fees, each of which plaintiffs set forth with specificity. The district court appears to have faulted plaintiffs for failing to calculate what 63/104 or 63/84 would be as a percentage of each plan, and then to allege that those percentages were high enough to taint each plan as a whole. But plaintiffs' non-conclusory allegations plainly pointed the way to these obvious inferences in plaintiffs' favor.

Drawing all reasonable inferences in their favor, plaintiffs have plausibly alleged that offering these retail shares rather than institutional shares was imprudent. This claim should have been, and now must be, litigated on the merits.

C. *The share-class claim's dismissal was not harmless*

NYU urges us to decline to reinstate the share-class claim on the basis that any error in dismissing it was harmless because of two findings the district court made at trial. The first finding was that plaintiffs failed to prove a breach of fiduciary duty in using revenue sharing to fund recordkeeping costs. The second finding was that plaintiffs failed to prove loss resulting from either of the revenue-sharing or recordkeeping claims. NYU's reliance on these findings is premised on its argument that selecting higher-cost retail shares was necessary to pay recordkeeping fees through revenue sharing. For the reasons that follow, however, we are not persuaded that these findings compel the conclusion that dismissal of the share-class claim on the pleadings was harmless.

i. The district court's revenue-sharing finding

We first address NYU's argument that because the use of revenue sharing was found not imprudent at trial, and because the difference in costs between retail and institutional shares supplies the funds for the revenue-sharing arrangement to pay the recordkeepers, the dismissal of the share-class claim on the pleadings was harmless. We think NYU's argument takes the district court's trial findings too far.

The revenue-sharing claim presented at trial was not concerned with the specific expense ratios of each fund that generated revenue for the recordkeepers. Rather, the district court was asked to focus on two other issues: (1) whether it was imprudent not to cap the per-participant cost of revenue sharing, and (2) whether it was imprudent to use revenue sharing at all instead of employing a flat fee billed to each participant.[52] The court's rejection of this claim relied only on evidence pertaining to these general questions in relation to the Plans as a whole.[53]

We cannot be sure what would have happened at trial (or on summary judgment) had the share-class claim survived dismissal. Importantly, the district court's rejection of the revenue-sharing claim was specific to plaintiffs' claim that the cost should have been capped per-participant; the district court did not explicitly find that the revenue-sharing costs themselves were prudent. When pressed at argument to direct us to such a finding in the district court opinion, NYU's

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[52] *Sacerdote*, 328 F. Supp. 3d at 305.

[53] *Id.* at 305–06.

counsel could point only to the district court's brief rejection of plaintiffs' separate recordkeeping claim. But in rejecting the recordkeeping claim, the district court simply rejected the plaintiffs' expert opinion on what would have been a reasonable per-participant amount to charge for recordkeeping services.[54]

We decline to foreclose the reinstatement of a wrongly dismissed claim on the basis of a record that was developed with respect to a different question and that is underdeveloped in the context of the harmlessness argument that defendants now press. For example, there is a set of Committee meeting minutes in the record, upon which the dissent heavily relies, that appears relevant to the relationship between retail-share costs and revenue sharing.[55] But the document is unaccompanied by any testimony, is lacking in specificity, and does not compel the dissent's conclusion that the erroneous dismissal of the share-class claim was necessarily harmless. The fact that one document purports to memorialize a discussion about whether or not to offer retail shares does not establish the prudence of that discussion or its results as a matter of law.

The dissent states that "if revenue sharing is prudent, so too is offering retail shares."[56] We have no quarrel with the general concept of using retail shares to fund revenue sharing. But, there was no trial finding that the use here of all 63 retail shares to achieve that goal was not imprudent. Simply concluding that revenue sharing is appropriate does not speak to how the

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[54] *Id.* at 306.

[55] *See* App'x at 959–62 (NYU Retirement Committee Meeting Minutes, Jan. 10, 2011); *see also* Dissent at 7–8.

[56] Dissent at 4.

revenue sharing is implemented in a particular case. We do not know, for example, whether revenue sharing could prudently be achieved with fewer retail shares.

The dissent also insists that this "numerical claim" is nonetheless foreclosed by the findings at trial because NYU arrived at this number through "a deliberative process for adopting the revenue-sharing model."[57] We cannot agree. While the absence of a deliberative process may be enough to demonstrate imprudence, the presence of a deliberative process does not, contrary to the dissent's suggestion, suffice in every case to demonstrate prudence. Deliberative processes can vary in quality or can be followed in bad faith. In assessing whether a fiduciary fulfilled her duty of prudence, we ask "whether a fiduciary employed the *appropriate* methods to investigate and determine the merits of a particular investment," not merely whether there were any methods whatsoever.[58]

Of course, because this claim has not been litigated on the merits, we offer no opinion on the precise deliberations at issue here. Discovery should take place—and it may turn out to be minimal—before the claim is dispensed with. At the same time, any incentive to future parties to seek discovery as to dismissed claims will be avoided.

ii. The district court's no-loss findings

NYU's second argument in favor of harmlessness is that the district court's findings that plaintiffs failed to prove loss on two of the tried claims—the revenue-

[57] *Id.* at 1.

[58] *PBGC*, 712 F.3d at 716 (emphasis added).

sharing and recordkeeping claims—foreclose a showing of loss on the share-class claim. We are unpersuaded.

First, regarding the revenue-sharing claim, the district court's no-loss finding was at most implied; the court made no explicit findings about why plaintiffs had failed to prove loss on that claim. In contrast to the district court's detailed discussion of the evidence supporting the finding that NYU had not breached its fiduciary duty by using revenue sharing, the district court's only statement regarding plaintiffs' failure to show loss relevant to the revenue sharing claim is a blanket statement in a footnote rejecting their efforts to show loss generally.[59] That the district court did not discuss loss in the specific context of the revenue-sharing claim is understandable—it separately concluded there was no breach of fiduciary duty. However, that absence of reasoning leaves us with no way to assess whether the share-class claim is foreclosed in the way NYU argues.

Second, as to the recordkeeping claim, the district court's discussion of its no-loss finding was unpersuasive. The full extent of the district court's findings on this front was a brief rejection of plaintiffs' proposed alternative range for recordkeeping fees.[60] This finding that plaintiffs had not come up with a credible alternative is distant from saying that the fees charged affirmatively resulted in no loss, and a further distance still from saying that each of the retail-class shares selected was necessary to pay the recordkeeping costs and none of them resulted in lost opportunity costs.

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[59] *See Sacerdote*, 328 F. Supp. 3d at 285 n.25 (explaining that because plaintiffs had not proven loss, the district court would not determine whether to shift the burden to NYU to disprove damages).

[60] *Id.* at 306.

Moreover, we are hard-pressed to rely on the discussion of loss that the district court did undertake because the discussion was somewhat unclear in several respects. It conflated loss with damages, appeared to answer a question the court claimed to leave undecided, and effectively misallocated the burden of proof on damages.

The first thing that perplexes us is the district court's conflation of "loss" with "damages." The court stated expressly that, because it found that plaintiffs had not shown loss, it had no occasion to confront the subsequent question of damages.[61] However, the court then proceeded to describe the evidence exclusively in terms of damages, crediting NYU's "*damages* rebuttal expert"[62] and concluding that plaintiffs "ha[d] not met their burden of proof as to *damages* for excessive recordkeeping fees."[63] To be clear, these terms are not interchangeable. Loss is measured in this context by "a comparison of what the [p]lan actually earned on the … investment with what the [p]lan would have earned had the funds been available for other [p]lan purposes. If the latter amount is greater than the former, the loss is the difference between the two."[64] The question of how much money should be awarded to the plaintiffs in damages is distinct from, and subsequent to, whether they have shown a loss. The district court's conflation of the two concepts saps our confidence in its analysis on this subject.

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[61] *See id.* at 285 n.25.

[62] *Id.* at 306 n.76 (emphasis added).

[63] *Id.* at 307 (emphasis added).

[64] *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985).

We are further puzzled because, in stating that it had no need to address damages, the district court explicitly declined to resolve which party would bear the burden of proof during a damages analysis[65]—but nevertheless it went on to resolve that exact question, and did so incorrectly. It stated that "plaintiffs fail to demonstrate by a preponderance of the evidence that their proposed fee ranges were the only plausible or prudent ones," and so "[p]laintiffs thus have not met their burden of proof as to damages for excessive recordkeeping fees."[66] These statements indicate that the district court believed the plaintiffs would, in addition to proving loss, bear the burden of proving the *amount* of damages. That allocation of the burden was erroneous.

Although plaintiffs bear the burden of proving a loss,[67] the burden under ERISA shifts to the defendants to disprove any portion of potential damages by showing that the loss was not caused by the breach of fiduciary duty.[68] This approach is aligned with the Supreme Court's instruction to "look to the law of trusts"

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[65] *Sacerdote*, 328 F. Supp. 3d at 285 n.25.

[66] *Id.* at 307.

[67] 29 U.S.C. § 1109(a); *see also Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 104 (2d Cir. 1998).

[68] *N.Y. State Teamsters Council Health & Hosp. Fund v. Estate of DePerno*, 18 F.3d 179, 183 (2d Cir. 1994); *see also Donovan*, 754 F.2d at 1056 ("[T]he court should presume that the funds would have been used in the most profitable" prudent fashion, and "[t]he burden of proving that the funds would have earned less than that amount is on the fiduciaries found to be in breach of their duty."). *But see Silverman*, 138 F.3d at 105 (Jacobs, *J.*, and Meskill, *J.*, *concurring*) ("Causation of damages is therefore an element of the claim, and the plaintiff bears the burden of proving it.").

for guidance in ERISA cases.[69] Trust law acknowledges the need in certain instances to shift the burden to the trustee, who commonly possesses superior access to information.[70] Even in the context of the share-class claim, where plaintiffs have alleged the known cost-differentials between retail and institutional shares, "it makes little sense to have the plaintiff hazard a guess as to what the fiduciary would have done had it not breached its duty in selecting investment vehicles, only to be told [to] guess again."[71] In considering the potential opportunity cost to the plaintiff of the investment, "[i]t makes much more sense for the fiduciary to say what it claims it would have done and for the plaintiff to then respond to that."[72]

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[69] *Tibble*, 575 U.S. at 529; *see also LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 253 n.4 (2008) ("[T]he common law of trusts … informs our interpretation of ERISA's fiduciary duties … .").

[70] Restatement (Third) of Trusts, § 100 cmt. f ("When a plaintiff brings suit against a trustee for breach of trust, the plaintiff generally bears the burden of proof. This general rule, however, is moderated in order to take account of the trustee's … superior (often, unique) access to information about the trust and its activities … .").

[71] *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 38 (1st Cir. 2018), *cert. denied*, 140 S. Ct. 911 (2020) (internal quotation marks omitted); *see also id.* at 39 (joining the Fourth, Fifth, and Eighth circuits in "hold[ing] that once an ERISA plaintiff has shown a breach of fiduciary duty and loss to the plan, the burden shifts to the fiduciary to prove that such loss was not caused by its breach, that is, to prove that the resulting investment decision was objectively prudent") (citing *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 363 (4th Cir. 2014); *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995); *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992)).

[72] *Id.* at 38.

By requiring the plaintiffs here to prove that the alternative fee ranges proposed by their expert were "the *only* plausible or prudent ones,"[73] the district court failed to shift the burden onto the defendant. Had plaintiffs been able to prove that the charged fees were imprudent, and had the plaintiffs shown a prudent alternative, the burden would have shifted to the defendant to disprove that the entire amount of loss should be awarded as damages. Put differently, if a plaintiff proved that it was imprudent to pay $100 for something but that it would have been prudent to pay $10, it is not the plaintiff's burden to prove that it would also have been imprudent to pay every price between $11 and $99. It is on the defendant to prove that there is some price higher than $10 that it would have been prudent to pay.[74]

Against this backdrop, we decline to foreclose the share-class claim on the basis of the district court's loss findings. Accordingly, we vacate dismissal of that claim in Count V and order its reinstatement for further proceedings.

II. Leave to amend was denied under the wrong legal standard, and denial was not harmless

Plaintiffs argue that the district court erred when it denied their motion to amend the complaint to add the Committee members as named defendants. We agree, because the district court denied the motion to

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[73] *Sacerdote*, 328 F. Supp. 3d at 307 (emphasis added).

[74] *Cf. LaScala v. Scrufari*, 479 F.3d 213, 221 & n.4 (2d Cir. 2007) (noting, in a case where a fiduciary breached his fiduciary duty by giving his son salary raises without trustee approval, that it would be his burden to disprove damages from the salary raises by demonstrating that his son's services were reasonably necessary and the value of those services equaled the sums paid).

amend with reference to the wrong legal standard. We therefore vacate the denial of leave to amend and remand for consideration under the correct legal standard. Plaintiffs further argue that this first error led to another, when the district court refused to order the removal of two of the members as fiduciaries. We agree that the outcome of the motion to amend may have affected the outcome of plaintiffs' post-trial motions for removal of specific Committee members, and therefore we also vacate the relevant rulings on those post-trial motions.

The district court, on December 5, 2016, entered a scheduling order in which the dates seem to have been proposed by the parties that provided, in relevant part: "Amended pleadings may not be filed, and no party may be joined, without leave of Court more than 10 days after the filing of this Order or the filing of a responsive pleading, whichever occurs first."[75] Nine months later, on September 8, 2017, shortly after resolution of the motion to dismiss and nearly three months before fact discovery closed, plaintiffs sought leave of court to amend the complaint to add the individual Committee members as named defendants.

The district court denied the motion with citations to Federal Rule of Civil Procedure 16(b) and the scheduling order. Specifically, it found that "[t]he time for amending the complaint as of right has passed" and so "without [plaintiffs] demonstrating good cause, the Court may dismiss this untimely motion. Plaintiffs have not demonstrated good cause for their failure to

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[75] *Sacerdote v. NYU*, No. 16-cv-6284 (KBF), ECF No. 43 (S.D.N.Y. Dec. 5, 2016) (scheduling order).

include the defendants whom they now propose to add."[76]

We review denial of leave to amend for abuse of discretion,[77] and will find it when the district court's "decision rests on an error of law (such as the application of the wrong legal principle)."[78] The district court here applied the wrong Federal Rule of Civil Procedure to the motion to amend, so we must vacate the ruling.

The ability of a plaintiff to amend the complaint is governed by Rules 15 and 16 of the Federal Rules of Civil Procedure which, when read together, set forth three standards for amending pleadings that depend on when the amendment is sought. At the outset of the litigation, a plaintiff may freely amend her pleadings pursuant to Rule 15(a)(1) as of right without court permission.[79] After that period ends—either upon expiration of a specified period in a scheduling order or upon expiration of the default period set forth in Rule 15(a)(1)(A)—the plaintiff must move the court for leave to amend, but the court should grant such leave "freely … when justice so requires" pursuant to Rule 15(a)(2). This is a "liberal" and "permissive" standard, and the only "grounds on which denial of leave to amend has long been held proper" are upon a showing of "undue

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[76] *Sacerdote v. NYU*, No. 16-cv-6284 (KBF), ECF No. 100 (S.D.N.Y. Oct. 17, 2017) (order denying motion to amend) (citations omitted).

[77] *Shimon v. Equifax Info. Servs. LLC*, 994 F.3d 88, 91 (2d Cir. 2021).

[78] *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001).

[79] Fed. R. Civ. P. 15(a)(1).

delay, bad faith, dilatory motive, [or] futility."[80] The period of "liberal" amendment ends if the district court issues a scheduling order setting a date after which no amendment will permitted. It is still possible for the plaintiff to amend the complaint after such a deadline, but the plaintiff may do so only up a showing of the "good cause" that is required to modify a scheduling order under Rule 16(b)(4).[81]

The language of the scheduling order in this case set the deadline (ten days) for amending *without* leave of court. It set no expiration date after which all amendments were prohibited, which would have triggered the stricter Rule 16(b)(4) "good cause" standard thereafter. Thus, if plaintiffs wanted to amend after the stated deadline, they only needed the court's leave—under Rule 15(a)(2)—which they sought by filing their motion for leave to amend. By considering plaintiffs' motion to amend under Rule 16, the district court here committed legal error and thus abused its discretion.

The dissent, to find grounds for affirmance on this point, looks beyond the plain language of the order and speculates that what the district court *really* intended when it set the deadline to amend "*without* leave of Court" was to also set a deadline after which even amendments *with* leave of Court would not be permitted.[82] But litigants are entitled to rely on the meaning

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[80] *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190 (2d Cir. 2015) (internal quotation marks and citation omitted).

[81] *Parker v. Columbia Pictures*, 204 F.3d 326, 340 (2d Cir. 2000).

[82] Dissent at 10–11.

suggested by the plain language of a court order, as these plaintiffs did here.

The dissent also suggests that the scheduling order at issue was a "pro forma" order, and that our analysis should therefore be affected by the possibility that similar orders were entered in other cases.[83] Based purely on the formatting of the document, we do not necessarily disagree that it originated as a form: there appear to have been blank spaces in which the parties filled in their proposed dates for the various scheduling deadlines.[84] But we are unpersuaded to change our legal analysis as a result.

First of all, we have found nothing defective in the order itself, only in the district court's ensuing ruling on the motion for leave to amend, which applied the wrong legal standard. Other district courts that have issued an identical scheduling order, and evaluated a motion for leave to amend under that order pursuant to Rule 15(a)(2), would have no cause for concern. District courts wishing to evaluate motions for leave to amend under Rule 16 after a particular date need only write their scheduling orders consistent with that intent, and state that no amendment will be permitted after that date in order to trigger the Rule 16 standard. And secondly, even if the dissent's speculation that other district courts may have committed similar interpretive missteps is true, that provides no reason for us to review this decision more deferentially. The efficacy of our appellate review should not be affected by the pos-

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[83] *Id.* at 12.

[84] We note, however, that there is no evidence in the record about other scheduling orders entered in cases before this district court that would inform this speculation.

sible existence of other similarly worded scheduling orders in other cases.

We cannot find this error harmless because the resulting denial of leave to amend may have later affected plaintiffs' post-trial motions. In the district court's trial findings, it had harshly criticized as incompetent the performance of two Committee members—Margaret Meagher and Nancy Sanchez—who were among the fiduciaries that plaintiffs had sought (through their motion to amend) to name as defendants.[85] Thereafter, in

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[85] Meagher was the Committee co-chair who served as the Senior Director of Benefits for NYU and later the Senior Director of Benefits for the Medical Center. The district court described her testimony as "concerning" and found "that Meagher does not have the depth of knowledge appropriate to oversee a plan the size of the NYU Faculty and Medical Plans." Meagher's testimony "made it clear that she viewed her role as primarily concerned with scheduling, paper movement, and logistics," and "she displayed a surprising lack of in-depth knowledge concerning the financial aspects of managing a multi-billion dollar pension portfolio and a lack of true appreciation for the significance of her role as a fiduciary." The court further noted that Meagher "appeared to believe it was sufficient for her to have relied rather blindly on [a retained investment advisor firm]'s expertise." *See Sacerdote*, 328 F. Supp. 3d at 291 & nn. 35–37.

Sanchez was Meagher's supervisor and the Senior Vice President and Vice Dean for Human Resources and Organizational Development and Learning at the Medical Center. The district court found that Sanchez "was similarly unfamiliar with basic concepts relating to the Plans" and "d[id] not view herself as having adequate time to serve effectively on the Committee." In one notable portion of testimony, when she was asked to identify the plan administrator, Sanchez responded, "I don't review the plan documents. That's what I have staff for." Sanchez said that she relied upon Meagher to review the materials for her but, of course, Sanchez has her own full vote on the Committee. *See id.* at 291 & n.37.

their proper role of policing the Plans' fiduciaries, plaintiffs pressed for Meagher and Sanchez's removal.[86]

Plaintiffs' effort was thwarted, in major part, because Meagher and Sanchez had not been named as defendants. Judge Torres denied plaintiffs' post-trial motions on the ground that Judge Forrest had previously considered and rejected ordering their removal from the Committee.[87] However, we see no such ruling by Judge Forrest, even implicitly, in the trial findings. The only question put to the district court was the Committee's performance as a whole because the Committee, in NYU's shoes, was the only defendant.[88] In answering that question, the district court found that although "the level of involvement and seriousness with which several Committee members treated their fiduciary duty [was] troubling, [the court] does not find that this rose to a level of failure to fulfill fiduciary obligations. Between [the investment advisor firm's] advice and the guidance of the more well-equipped Committee members … , the Court is persuaded that the

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[86] Such equitable relief is available under 29 U.S.C. § 1109(a), which provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries" by ERISA "shall be subject to . . . equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." *See also Katsaros*, 744 F.2d at 281 ("Since the trustees here acted imprudently … , it was not an abuse of discretion for the court to remove the trustees pursuant to its equitable power.").

[87] *Sacerdote*, 2019 WL 2763922 at *3.

[88] *See, e.g.*, *Sacerdote*, 328 F. Supp. 3d at 279 (describing the issue at trial as plaintiffs' "claim that NYU, through its Retirement Plan Committee … failed to fulfill certain of its fiduciary obligations under ERISA).

Committee performed its role adequately."[89] In our view, this passage means only that, while certain constituent members of the Committee were incompetent, their colleagues' diligence saved the Committee itself from failing to fulfill its fiduciary obligations.

Accordingly, although the decision of whether to order removal of ERISA fiduciaries would be a matter committed to the discretion of the trial court,[90] here, there is no such exercise of discretion to which we must defer. Had Meagher and Sanchez been named in the complaint as defendants, the district court would have had to enter judgments specific to each of them after trial, finding whether each had breached her fiduciary duty as an individual member of the Committee. Given the district court's harsh assessment of Meagher and Sanchez's performance as fiduciaries, it is hardly inevitable that the district court would have found in their favor and declined to remove them as fiduciaries had it been required to enter those judgments.

We therefore vacate the denial of leave to amend and remand for consideration under the correct legal standard. We also vacate the denial of plaintiffs' Rule 52(b) and 59(e) post-trial motions; those motions sought findings specific to Meagher and Sanchez, and so, depending on how the motion to amend is disposed of on remand, those motions may require further consideration as well.

III. Plaintiffs waived their jury demand

Plaintiffs argue that they had a Seventh Amendment right to a trial by jury, and therefore that the dis-

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[89] *Id.* at 293.

[90] *Katsaros*, 744 F.2d at 281.

trict court erred in striking their jury demand. We disagree. The record of proceedings before the district court makes clear that plaintiffs waived their jury demand.[91] Accordingly, we need not address the substance of their Seventh Amendment argument.

On December 4, 2017, NYU moved to strike plaintiffs' jury demand. Under the Southern District of New York's local rules, plaintiffs' opposition to NYU's motion was due within fourteen days.[92] On December 19, one day after the deadline for plaintiffs to file a response had expired, the district court granted NYU's motion to strike. Plaintiffs now argue that we should excuse their failure to respond to NYU's motion as "inadvertent[]."[93] But they offer no justification for their admitted inadvertence—let alone a sympathetic one—and no explanation for their failure to subsequently raise this issue before the district court.

Plaintiffs did not, upon being alerted by the district court's December 19 order, move for reconsideration of the order denying a jury trial.[94] Nor did they object at

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[91] *See Royal Am. Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1018 (2d Cir. 1989) ("[T]he right to jury trial may be waived by conduct of the parties.").

[92] *See* S.D.N.Y. Local Rule 6.1(b)(2), *available at* https://www.nysd.uscourts.gov/sites/default/files/local_rules/rules-2018-10-29.pdf.

[93] Pls.-Appellants' Br. at 46.

[94] Although "[t]he standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked," *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995), plaintiffs could have filed such a motion to litigate their claimed constitutional right in good faith. Indeed, we have recognized that motions for reconsideration are appropriate vehicles to

the pretrial conference, at which the parties and court turned their attention to the forthcoming bench trial. And finally, the plaintiffs thereafter "participat[ed] in a bench trial without objection[, which alone] constitutes waiver of the jury trial right."[95] Under these circumstances, "[i]t would be patently unfair and, in effect, an ambush of the trial judge on appeal if appellant were allowed to lodge an early demand for a jury, participate in a bench trial without objection, and then assign as error the failure to honor the jury demand."[96]

IV. The district court's use of written direct testimony was not an abuse of discretion

The district court followed its bench-trial practice of taking direct testimony by written submissions, followed by live cross-examination and live redirect. Plaintiffs argue that this practice violated the Federal Rules of Civil Procedure and denied plaintiffs a fair trial. These arguments lack merit.

Plaintiffs claim to have lodged this objection with the district court, but the letter they point to as evidence of that objection contains no such argument.[97] In that letter, they argued only that they needed more trial time for oral cross-examination of witnesses *in light of* the court's practice of taking direct testimony by written declaration. Having acknowledged the

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"correct a clear error or prevent manifest injustice." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d Cir. 2013) (internal quotation marks and citation omitted).

[95] *Royal Am. Managers*, 885 F.2d at 1018.

[96] *Id.* (internal quotation marks, citation, and alterations omitted).

[97] Pls.-Appellants' Reply Br. at 24.

practice without objection, they effectively consented to it.

It is a "well-established general rule that a court of appeals will not consider an issue raised for the first time on appeal."[98] In any event, we have approved of the practice of taking direct testimony by written submissions in bench trials.[99] While in certain cases this practice might exceed a district court's discretion, there is nothing in this record indicating that the district court abused its discretion to manage trials efficiently.[100]

V. The district court did not err in ruling for NYU on the tried claims

Plaintiffs appeal the district court's entry of judgment for NYU after trial, and specifically make arguments that the trial court erred with respect to: (A) the recordkeeper-consolidation claim, and (B) the investment-retention claim.[101] We reject these arguments.

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[98] *Otal Invs. Ltd. v. M/V CLARY*, 673 F.3d 108, 120 (2d Cir. 2012) (per curiam).

[99] *See Ball v. Interoceanica Corp.*, 71 F.3d 73, 77 (2d Cir. 1995) (per curiam) ("[W]e approve the procedure allowing the parties to produce direct evidence from their witnesses in writing while permitting subsequent oral cross-examination—particularly when the parties agree to that procedure in advance.").

[100] *See United States v. Yakobowicz*, 427 F.3d 144, 150 (2d Cir. 2005) (reviewing "trial management issue … for abuse of discretion"); *Manley v. AmBase Corp.*, 337 F.3d 237, 249 (2d Cir. 2003) ("District courts have considerable discretion in the management of trials … .").

[101] Because we find no error in the district court's determinations after trial that NYU did not breach its fiduciary duties, we have

"We review the district court's findings of fact after a bench trial for clear error and its conclusions of law de novo."[102] The clear error standard permits us to set aside a district court's factual findings only if we are "left with the definite and firm conviction that a mistake has been committed."[103] The district court's determination as to whether NYU breached its fiduciary duty rests on an "application of those facts to draw conclusions of law, including a finding of liability, [and so] is subject to *de novo* review."[104] Because we discern no clear error in the district court's factual findings, we have little difficulty agreeing that NYU did not breach its fiduciary duties in the ways argued by plaintiffs at trial.

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no occasion to consider plaintiffs' argument about the district court's loss analysis in the context of their appeal from the trial findings.

[102] *L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cnty., Inc.*, 710 F.3d 57, 65 (2d Cir. 2013); *see also* Fed. R. Civ. P. 52(a)(6) (providing that, in an action tried without a jury, "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility").

[103] *United States v. U.S. Gypsum*, 333 U.S. 364, 396 (1948).

[104] *F.D.I.C. v. Providence Coll.*, 115 F.3d 136, 140 (2d Cir. 1997) (internal quotation marks and citation omitted); *see also L.I. Head Start*, 710 F.3d at 69–71 (noting that the district court's factual finding was not clearly erroneous and then finding, as a matter of de novo review on appeal, "that the Administrators breached their fiduciary duties with respect to the … [c]laim"); *cf. LoPresti v. Terwilliger*, 126 F.3d 34, 39 (2d Cir. 1997) (holding that a legal conclusion that a particular individual qualifies as a fiduciary under ERISA is subject to de novo review). To the extent language in *Katsaros* suggests that the applicable standard of review on this question might be clear error, *see* 744 F.2d at 279, it plainly has not survived our subsequent precedent.

Turning first to the recordkeeper-consolidation claim: plaintiffs argued that it was imprudent for NYU to use multiple recordkeepers for the Plans rather than consolidating to one recordkeeper. The Medical Plan contracted with TIAA-CREF, Vanguard, and Prudential as recordkeepers until 2013, when it consolidated with TIAA-CREF, while the Faculty Plan contracted with both TIAA-CREF and Vanguard throughout the class period.[105]

The district court found that, while plaintiffs were correct that "[c]onsolidation may lead to lower recordkeeping fees[,] … [t]he evidence at trial support[ed] defendant's contention that technical and other requirements prevented immediate consolidation."[106] Specifically, the district court credited testimony from several Committee members to the effect that a lengthy and resource-intensive change of the computer systems used for payroll, finance, student records, and human resources at the Washington Square campus (where Faculty Plan members work) precluded the Committee from consolidating recordkeepers during that time.[107] The court credited NYU's belief that "any recordkeeper switch could not be completed without risk of significant errors or additional changes prior to completion of this global update of NYU's systems and technology."[108] The switchover of the University's IT systems created this hurdle because "[a] change in recordkeepers would entail significant coordination with and changes to the new systems being implemented," due

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[105] *Sacerdote*, 328 F. Supp. 3d at 293–94.

[106] *Id.* at 294.

[107] *Id.* at 295–98.

[108] *Id.* at 298.

to the fact that the recordkeepers' systems must interface with NYU's systems in order to allow participants to access their account information.[109]

Plaintiffs argue on appeal, as they did before the district court, that the IT justification for not consolidating recordkeepers sooner is not credible because the contemporaneous Committee meeting minutes lack references to these technical difficulties.[110] But "clear error review mandates that we defer to the district court's factual findings, particularly those involving credibility determinations."[111] In light of the district court's extensive discussion of witness testimony that persuaded it to credit the IT justification, we find no clear error in the factual findings forming basis of the court's rejection of the recordkeeper-consolidation claim.

Having accepted the district court's factual findings, we agree that NYU did not breach its fiduciary duty of prudence by failing to consolidate recordkeepers any faster than it did. In light of the technical challenges NYU was facing, including the risk that participants would suffer disrupted account access, we cannot conclude that a hypothetical prudent fiduciary would have acted any differently.

Turning next to the investment-retention claim: plaintiffs argue that NYU breached its duty of prudence by retaining two particular funds—the CREF

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[109] *Id.* & n.50.

[110] Pls.-Appellants' Br. at 71; *Sacerdote*, 328 F. Supp. 3d at 296 n.47.

[111] *Phx. Glob. Ventures, LLC v. Phx. Hotel Assocs., Ltd.*, 422 F.3d 72, 76 (2d Cir. 2005) (per curiam).

Stock Account and the TIAA Real Estate Account—in the Plans beyond when it should have because NYU was using inadequate benchmarks to decide which funds to retain.

The district court found after detailed analysis, however, that the benchmarks used by the Committee to evaluate these two funds were appropriate in light of these funds' unique and complex characteristics and that the retention of these funds was valuable in diversifying the plans.[112] The district court found that the fact the Committee changed the benchmarks employed to monitor the TIAA Real Estate Account during the relevant period demonstrated careful attention to the fund's performance.[113] Similarly, the district court found that the Committee "focused on the difficulties with benchmarking that the CREF Stock Account presented," held "specialized discussions" about it, and was "actively engaged" with monitoring this fund's benchmarks.[114] With respect to its evaluation of the funds' performance, the district court found that these funds were performing as well as could be expected from contemporaneous assessments.[115] The district court specifically discredited plaintiffs' expert testimony regarding these funds' performance.[116] We see no clear error in these factual findings.

Based on the foregoing findings, we also agree that NYU did not breach its duty of prudence by failing to

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[112] *Sacerdote*, 328 F. Supp. 3d at 310–16.

[113] *Id.* at 311.

[114] *Id.* at 314 (internal quotation marks omitted).

[115] *Id.* at 311, 314–15.

[116] *Id.* at 311 & n.110, 314–16.

remove the CREF Stock Account and TIAA Real Estate Account from the Plans. The facts found at trial demonstrated that the Committee paid special attention to these funds and retained them on the strength of their performance against legitimate benchmarks. We agree with the district court that a hypothetical prudent fiduciary would have made similar choices if presented with these circumstances.

VI. Judge Forrest's attenuated connection to NYU did not require disqualification

Plaintiffs argue, as they did before Judge Torres, that Judge Forrest was disqualified from presiding over this case due to her connection to one of NYU's board members, and that Judge Torres erred by denying plaintiffs' motion for a new trial on that ground following Judge Forrest's resignation from the bench. We review the district court's denial of a motion for new trial for abuse of discretion.[117]

Federal law provides that: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[118] And we have said: "[P]hrased differently, would an objective, disinterested observer fully informed of the underlying facts, entertain significant doubt that justice would be done ab-

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[117] *Gomez v. City of New York*, 805 F.3d 419, 423 (2d Cir. 2015) (per curiam). We note that, had plaintiffs moved before Judge Forrest for her recusal, rather than moving before Judge Torres for a new trial after Judge Forrest's resignation, we would similarly be reviewing Judge Forrest's decision to preside for abuse of discretion. *S.E.C. v. Razmilovic*, 738 F.3d 14, 30 (2d Cir. 2013), *as amended* (Nov. 26, 2013).

[118] 28 U.S.C. § 455(a).

sent recusal?"[119] Here, we think not. Judge Forrest's connection to NYU is the sort of "remote, contingent, or speculative" relationship that "is not the kind of interest which reasonably brings into question a judge's impartiality."[120]

Plaintiffs argue that Judge Forrest was disqualified because of her employment, both before taking the bench and after leaving the bench, at Cravath, Swaine & Moore LLP. They assert that because Judge Forrest left the bench for Cravath six weeks after issuing her trial findings, and because Cravath's chairman Evan Chesler, who was a mentor to Judge Forrest before she took the bench and would be a close colleague after she left, serves on the NYU Board of Trustees, she had a "prospective financial relationship" with NYU that called her impartiality into question.[121] Upon a close look, this argument does not hold water.

Chesler was one of NYU's sixty-one voting Board members, and he was one of more than eighty partners at Cravath. Chesler had no personal financial interest in this case, and his conduct is not at issue. Significantly, he did not sit on the NYU Board's Retirement Committee. Nonetheless, plaintiffs claim that because Chesler had a "personal strong charitable interest in raising money for NYU's endowment," there is an appearance of bias on Judge Forrest's part.[122] Their theory is that Judge Forrest would want to enter judgment

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[119] *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992).

[120] *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988).

[121] Pls.-Appellants' Br. at 49.

[122] *Id.* at 53.

in NYU's favor in order to protect "donor confidence in NYU's treatment of employees and retirees" and therefore benefit Chesler's personal charitable interest.[123] Plaintiffs also theorize that, as a personal matter, Judge Forrest "would be reluctant to strain [her] relationship" with Chesler "by condemning an institution to which Mr. Chesler has major ties and holds deep affection."[124]

We believe that plaintiffs' theories of impropriety are too farfetched to reasonably call Judge Forrest's impartiality into question. Her prospective financial relationship was with Cravath, not Chesler individually. Cravath was never involved in this case, and Chesler's involvement is limited to his membership on a large Board of Trustees in his personal capacity.

Although we agree with plaintiffs that the appearance of judicial impartiality is of the utmost importance, parties who dislike court rulings cannot later rely upon first-time assertions of tenuous, preexisting alleged conflicts of interest to avoid those rulings. Plaintiffs had similar arguments before Judge Forrest ruled against them, but never made those arguments. Even though plaintiffs did not know that Judge Forrest would leave the bench for Cravath until she did so, the knowledge that she had come to the bench from Cravath and had previously been close to Chesler at the firm was readily ascertainable at all stages of the litigation. Chesler's attendance at Judge Forrest's Senate confirmation hearing was a matter of public record—a fact plaintiffs themselves rely upon in arguing for her

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[123] *Id.*

[124] *Id.*

disqualification on appeal.[125] And yet, they made no attempt to move for Judge Forrest's disqualification "at the earliest possible moment,"[126] as they are required to do.

Under these circumstances, we discern no reasonable questions about the appearance of Judge Forrest's impartiality. Judge Torres's denial of plaintiffs' motion for a new trial was not an abuse of discretion.

* * *

In sum, we hold that plaintiffs adequately pled a breach of the fiduciary duty of prudence in Count V's share-class claim, and we cannot find the district court's dismissal of this claim harmless on the present record. We therefore vacate its dismissal and reinstate the claim for further proceedings. We also find that the district court erred in denying plaintiffs' motion to amend to name individual Committee members as defendants. We therefore vacate denial of leave to amend and vacate denial of the ensuing Rule 52(b) and 59(e) motions for post-trial findings concerning two of those individuals. We reject the remainder of plaintiffs' arguments on appeal, affirming the trial of their claims without a jury, the use of written direct testimony at that trial, the entry of judgment for NYU on the tried

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[125] Pls.-Appellants' Br. at 55 (citing *Confirmation Hearing on Federal Appointments Before the S. Comm. on the Judiciary*, 112th Cong. 127 (2011) (statement of Katherine B. Forrest, Nominee to the U.S. District Court for the Southern District of New York)).

[126] *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987); *see also id.* at 334 ("[T]wo concerns prompt this rule. First, judicial resources should not be wasted; and, second, a movant may not hold back and wait, hedging its bets against the eventual outcome.").

claims, and the denial of their Rule 60 motion for a new trial based upon Judge Forrest's alleged disqualification. We remand for further proceedings consistent with this opinion.

CONCLUSION

For the foregoing reasons, we **AFFIRM** in part, **VACATE** in part, and **REMAND** for further proceedings consistent with this opinion.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit
[signature and electronic seal]

18-2707
Sacerdote v. NYU

MENASHI, *Circuit Judge*, dissenting in part:

I join the opinion of the court insofar as it affirms the judgment of the district court, and I dissent insofar as the court vacates and remands that judgment. I would not remand for further proceedings on the share-class claim, and I do not believe the district court abused its discretion in denying leave to amend the complaint.

I

The court appears to entertain two versions of the share-class claim: a categorical version (that NYU acted imprudently by including *any* retail shares) and a numerical version (that NYU acted imprudently by including *too many* retail shares). Neither version of the claim can prevail based on the trial record. The categorical claim is foreclosed by the district court's decision that the revenue-sharing model was prudent—a judgment that the plaintiffs do not even appeal. Because retail shares enable revenue sharing, if revenue sharing is not imprudent, then neither is the inclusion of retail shares. The numerical claim is foreclosed by the uncontested determination that NYU followed a deliberative process for adopting the revenue-sharing model that includes the retail shares. ERISA requires prudence, meaning that an employer must follow a deliberative process in making its decisions, even if the decisions are imperfect. Here, NYU followed a deliberative process for deciding which retail shares to offer; therefore, NYU acted prudently even if the plaintiffs or the court could imagine a better ultimate decision. For these reasons, both versions of the share-class claim are

foreclosed by the district court's judgment after trial, and therefore the district court's purportedly erroneous dismissal of the share-class claim was harmless.

A

Like all retirement plans, NYU's retirement plans require the service of recordkeepers. Recordkeepers calculate and track account balances and investment performance and prepare and deliver enrollment materials, notices, and other materials to plan participants. For these services, recordkeepers must be paid. There are two ways to pay recordkeepers: based on the number of participants in the plan (a flat per-participant fee) or based on the assets under management (an asset-based fee).

NYU chose the latter. NYU paid the recordkeeping fees through a method called "revenue sharing," in which NYU would offer retail shares—rather than institutional shares—of investment products as investment options for the plan participants. Many of the investment options NYU offered are available in two classes of shares: retail shares and institutional shares. The only difference between the two classes of shares is the cost; the underlying asset is the same. Retail shares have higher expense ratios.[1] Institutional shares have lower expense ratios. Just as sellers in other industries offer wholesale prices to large purchasers, investment managers offer lower-priced "institutional" shares to large clients. As one of the largest defined-contribution plans in the country, NYU could obtain institutional shares for its plan participants.

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[1] An expense ratio is the amount that an investment company charges investors to manage an investment portfolio.

Yet for sixty-three funds, NYU offered participants the higher-priced retail shares rather than the lower-priced but otherwise identical institutional shares. The court suggests that, based on the pleadings, the "reasonable inference[]" is that the inclusion of retail shares was due to NYU's neglect and therefore its imprudence. *Ante* at 17. The court says that an "adequate investigation," consisting of "simply reviewing the prospectus of the fund under consideration," would have "uncovered" the "superior alternative investment" of institutional shares—and that the plaintiffs have plausibly alleged that NYU failed to conduct that adequate investigation. *Id.*

But the trial record reveals that NYU in fact investigated its alternatives and made a considered decision to offer retail shares rather than institutional shares. NYU did so for a perfectly reasonable reason: the excess cost of the retail shares paid for the recordkeeping fees under NYU's revenue-sharing model. Under revenue sharing, administrative fees are not charged separately—as a flat per-participant fee would be—but are covered by the higher expense ratios of the retail-share offerings. Plan participants who buy the retail shares pay more, and the investment manager then transfers a portion of the excess expense ratios to the recordkeeper. The revenue-sharing model and the retail-share offerings cannot be viewed in isolation because the latter enables the former: revenue sharing works by offering higher-priced retail shares.[2]

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[2] The plaintiffs recognized this interdependency in their argument before the district court. Though the plaintiffs argue on appeal that retail shares might be imprudent *even if* revenue-sharing is prudent and permissible, the plaintiffs' complaint alleged that offering retail shares was imprudent precisely because it *enabled* revenue-sharing. *See, e.g.*, App'x 109-10 (Complaint

Consequently, if revenue sharing is prudent, so too is offering retail shares. The district court concluded that the revenue-sharing plan was prudent. It found that revenue-sharing arrangements were "common" and that NYU had "du[ly] considered] … the appropriate pros and cons" in rejecting the plaintiffs' favored alternative—"a flat per-participant model"—because the flat fee would not be "fair" to participants with "relatively small account balance[s]" and because "flat dollar fees cannot be assessed against the TIAA and CREF annuity account balances in the Plans." *Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273, 305-06 (S.D.N.Y. 2018). The plaintiffs do not challenge this ruling on appeal. Therefore, because the inclusion of retail shares is the mechanism by which revenue sharing operates, the district court's determination that the revenue-sharing model was prudent forecloses the categorical version of the share-class claim: if revenue sharing is prudent, the inclusion of retail shares must also be prudent.

B

The court rejects this justification for including retail shares—that "the difference in costs between retail and institutional shares supplies the funds for the revenue-sharing arrangement to pay the recordkeepers"—by suggesting that NYU violated ERISA's standard of prudence because it could have bargained for a better deal on "the specific expense ratios of each fund that generated revenue for the recordkeepers." *Ante* at 22. The court thus shifts its argument from the categorical version of the share-class claim, according to which

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¶ 223) ("[T]he use of these funds was tainted by the recordkeepers' financial interest in including these funds in the Plans, which Defendant failed to consider.").

NYU failed to investigate the possibility of institutional shares,[3] and defends the numerical version instead. According to the numerical version of the share-class claim, even if the inclusion of *some* number of retail shares would not be imprudent, sixty-three retail shares was too many.

The numerical claim is also foreclosed by the district court's findings at trial. NYU did not act imprudently by including sixty-three retail shares in its retirement plan because NYU arrived at that number through a deliberative process—the deliberative process through which it adopted the revenue-sharing model. A deliberative process is what ERISA requires.

The court implies that an employer might be imprudent under ERISA if it makes a considered decision but fails to get the best deal possible. *See ante* at 25-26 (describing the standard for the share-class claim as requiring a showing that "each of the retail-class shares selected was necessary to pay the recordkeeping costs and none of them resulted in lost opportunity costs"). But ERISA's standard of prudence requires the fiduciary to follow an appropriate *process* leading to its decision, not to make a perfect decision. *See Pension Ben. Guar. Corp. (PBGC) v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 718 (2d Cir. 2013) (noting that a claim for breach of fiduciary duty under ERISA depends on showing that "the process was flawed" such that the fiduciaries failed to conduct "an adequate investigation" and that it is not "necessarily sufficient to

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[3] *See ante* at 17 (arguing that the "plaintiffs have alleged 'that a superior alternative investment was readily apparent such that an adequate investigation'—simply reviewing the prospectus of the fund under consideration—'would have uncovered that alternative'").

show that better investment opportunities were available at the time of the relevant decisions"). The court itself even recognizes that ERISA's "standard focuses on a fiduciary's conduct in arriving at an investment decision, not on its results, and asks whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." *Ante* at 16-17 (quoting PBGC, 712 F.3d at 716). ERISA does not require an employer to obtain the best possible result as long as the employer acts prudently by following a deliberative process.

A fiduciary acts imprudently when it fails to follow a deliberative process or fails to conduct an adequate investigation *at all*.[4] A district court case, *Tibble v. Edison Int'l*, No. 07-CV-5359, 2010 WL 2757153 (C.D. Cal. July 8, 2010), is instructive. In *Tibble*, the district court concluded that the employer was imprudent in the selection of retail shares because the employer did not consider the relative benefits of institutional shares *at all*. In other words, the fiduciary acted imprudently

[4] The plaintiffs recognized this standard when they filed their suit. Their new argument on appeal—that offering sixty-three retail shares is imprudent even though some lesser number might not be—is not reflected in their complaint. In the complaint, Count V alleged that offering *any* retail shares was imprudent because no prudent fiduciary would have included retail shares after following a proper process: "The failure to select far lower-cost share classes for the Plans' mutual fund options that are identical in all respects ... except for cost, demonstrates that Defendant *failed to consider* the size and purchasing power of the Plans when selecting share classes and *failed to engage in a prudent process* for the selection, monitoring, and retention of those mutual funds." App'x 71 (Complaint ¶ 147) (emphasis added). In this way, the complaint applied the correct standard by alleging a wholesale failure to investigate the option of institutional shares. But the plaintiffs could not prove those allegations at trial.

because it undertook *no* process to investigate its options:

> The Investments Staff simply recommended adding the retail share classes of these three funds without any consideration of whether the institutional share classes offered greater benefits to the Plan participants. Thus, the Plan fiduciaries responsible for selecting the mutual funds (the Investment Committees) were not informed about the institutional share classes and did not conduct a thorough investigation.

Id. at *25. Moreover, "[i]n the one instance in which the Plan fiduciaries actually reviewed the different share classes of one of these three funds, the fiduciaries realized that it would be prudent to invest in the institutional share class rather than the retail share class," indicating that the presence of retail shares was not the result of a deliberative process. *Id.* at *26.

By contrast, the trial evidence in this case shows that NYU followed a deliberative process through which it made a considered decision to offer the sixty-three retail shares to finance its recordkeeping fees through revenue-sharing. As an initial matter, the presence of institutional shares in the plan offerings in this case shows that, unlike the employer in *Tibble*, NYU was not ignorant of the existence of institutional shares—and it is not plausible that NYU failed to "simply review[] the prospectus" to "uncover[] that alternative." *Ante* at 17. To the contrary, NYU made a considered decision to maintain a revenue-sharing model that required the sixty-three retail-share offerings. Among other things, the minutes of the Retirement Committee's meeting of January 10, 2011, illus-

trate the deliberative process by which the offerings were determined:

> The Committee next discussed the availability of lower cost share classes as communicated to NYU by Vanguard, and the possibility of implementing a lower share class in the NYU program. CLC [Cammack LaRhette Consulting, an outside investment adviser] noted that although the share class reduction seems to be an offer of a fee reduction, it actually offers plan sponsors the opportunity to decide how to structure the fees of the plan. That is, Vanguard would allow the plan to utilize the lower share classes as long as Vanguard continues to receive the required revenue necessary to administer the program. A plan sponsor could choose to use a lower cost share class for the program, but, because Vanguard would still require a certain amount of revenue for its services to NYU, Vanguard would require that any revenue lost from the lower cost share class be made up by either a per participant fee or direct payments from NYU.
>
> The Committee sought additional clarification as to whether NYU could utilize the lower share classes in its program. CLC confirmed that NYU could choose to utilize the lower share class. However, because the lower share class funds do not return any recordkeeping revenue to Vanguard, they would need to make up this revenue, either by issuing a per participant fee or by the plan sponsor paying to offset the cost. The existing share class in the NYU program provides 13 [basis points] of recordkeeping revenue to Vanguard; this would need

> to be made up by NYU or plan participants if the switch is made to the lower cost share class.
>
> The Committee agreed that since a change in share classes would not result in an actual fee reduction for plan participants, it did not make sense to change share classes at this time.

App'x 959-62 (NYU Retirement Committee Meeting Minutes, Jan. 10, 2011). When the employer weighs the relevant variables and arrives at a considered decision—as NYU did here—the employer has not violated its fiduciary duty of prudence even if, in hindsight, the decision could have been better. *See Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984) (noting that the decision must be evaluated "from the perspective of the 'time of the [challenged] decision' rather than from the 'vantage point of hindsight'"). Because NYU made a considered decision by following a deliberative process, the plaintiffs cannot prevail on remand.[5]

In short, the plaintiffs have already received a trial on whether NYU acted prudently when it implemented the revenue-sharing model by offering sixty-three retail shares to plan participants. That trial showed that NYU followed a deliberative process that demonstrates prudence. Therefore, even if the district court erred in dismissing the share-class claim, that error

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[5] The court writes that "the presence of a deliberative process does not … suffice in every case to demonstrate prudence" because the process might have been "followed in bad faith" or "vary in quality." *Ante* at 24. Yet there has been a trial about the process NYU followed to adopt the revenue-sharing model, and "the trial record here reflects due consideration of the appropriate pros and cons," showing that "the Committee's choice to employ [revenue-sharing] was [not] imprudent." *Sacerdote*, 328 F. Supp. 3d at 306. The trial record reflects a *deliberative* process, not one "followed in bad faith" or of poor "quality." *Ante* at 24.

was harmless because the trial effectively disposed of the claim. For that reason, I would not remand. *See, e.g.*, *Wilson v. Hanrahan*, 804 F. App'x 58, 61 (2d Cir. 2020) (affirming dismissal of a claim because, even if the dismissal were an error, "that error was harmless" because the subsequent verdict meant that the claim "would necessarily have failed").[6]

II

The court also vacates the district court's denial of leave to amend the complaint because the district court relied on Rule 16(b)'s "good cause" standard instead of Rule 15(a)'s liberal standard. *Ante* at 29-34. That is incorrect. The district court referenced the correct standard when it denied leave to amend.

The court acknowledges that "[t]he period of 'liberal' amendment ends if the district court issues a scheduling order setting a date after which no amendment will permitted." *Id.* at 32. The district court issued a pro forma scheduling order setting a date after which it would not entertain amendments without leave:

> Amended pleadings may not be filed, and no party may be joined, without leave of Court

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[6] In addition, while the district court's findings might not strictly foreclose a showing of loss on remand, the district court's findings make such a showing highly unlikely. The district court concluded that the plaintiffs failed to establish that NYU paid "excessive recordkeeping fees." *Sacerdote*, 328 F. Supp. 3d at 306-07 & n.76. Perhaps, on remand, the plaintiffs will offer testimony showing that NYU's fees are higher than other institutions using revenue-sharing. But the plaintiffs could have introduced such evidence at trial to support their challenge to the revenue-sharing model. They did not—and do not now—indicate that they have such evidence. Thus, the plaintiffs have effectively obtained a trial on the issue of excessive fees, and there is no good reason to re-run the trial looking for the same evidence.

> more than 10 days after the filing of this Order or the filing of a responsive pleading, whichever occurs first.

Special App'x 147. The obvious implication of this order is that the district court would not liberally grant leave to amend after the date it set.

Today's opinion, however, refuses to acknowledge this obvious implication. Instead of adhering to the ordinary meaning of the order, the court insists that the district court set no deadline to seek leave to amend *with* leave of court after the ten-day period.[7] According to the court, therefore, the district court intended to cut off amendment as of right but for some reason still intended to liberally and freely grant leave to amend.

We should not read district court orders so tendentiously. *Cf. Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting) ("[J]udicial opinions are not statutes, and we don't dissect them word-by-word as if they were."). The meaning of the scheduling order is plain. It indicates that in the normal course, no pleadings may be amended; however, where there is good cause, pleadings may be amended if the court grants leave. We have said that the "lenient standard of Rule 15(a)" does not apply when a party seeks to amend after the deadline set in a scheduling order; under those circumstances, a party must show "good

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[7] *Ante* at 32 ("The language of the scheduling order in this case set the deadline (ten days) for amending *without* leave of court. It set no expiration date after which all amendments were prohibited, which would have triggered the stricter Rule 16(b)(4) 'good cause' standard thereafter."); *see also* Reply Br. 12 ("The qualifier '*without* leave of Court' necessarily means that amendments '*with* leave of Court' were not subject to the same deadline.").

cause" under Rule 16(b). *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000). The language of the scheduling order effectively communicates that the district court intended to invoke that restriction.[8] "[W]ithout leave of the court" does not indicate that anything goes *with* leave of the court. Special App'x 147.

This reasonable understanding of the scheduling order accords with the structure of Rules 15(a) and

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[8] The court misconstrues this dissent as "look[ing] beyond the plain language of the order." *Ante* at 32. To the contrary, I think the meaning of the scheduling order is straightforward and I follow its plain language. The court, by contrast, reads the order in a highly technical fashion divorced from ordinary meaning. The ordinary meaning of a text includes not only its semantic content—that is, "the meaning of the words and phrases as combined by the rules of syntax and grammar"—but also its "pragmatic enrichment," or "the contribution that context makes to meaning." Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 488 (2013). Thus, the "full communicative content" results from both the semantic and the pragmatic meaning. *Id*. As a pragmatic matter, sometimes "what is said implicitly includes something else that is closely related. For example, if I say 'Jack and Jill are married,' this frequently communicates some additional information, which could have been stated explicitly as follows: 'Jack and Jill are married [to each other].'" Lawrence B. Solum, *Contractual Communication*, 133 HARV. L. REV. F. 23, 28 (2019) (describing "impliciture"). Here, the district court's order—dictating that amended pleadings may not be filed without leave after ten days—communicates that the district court does not intend to liberally grant leave to amend after that deadline. The court improperly seizes on the order's literal semantic meaning to the exclusion of its pragmatic meaning. *But see* Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RES. L. REV. 855, 859 (2020) ("[T]extualism isn't a mechanical exercise, but rather one involving a sophisticated understanding of language as it's actually used in context.").

16(b). Rule 15(a) does not mention scheduling orders. Scheduling orders are issued pursuant to Rule 16(b), which sets out the requirements for issuing scheduling orders. For this reason, Rule 15(a) applies in the absence of a scheduling order, but when a scheduling order is issued, Rule 16(b) applies. We have explained that "the Rule 16(b) 'good cause' standard, rather than the more liberal standard of Rule 15(a), governs a motion to amend filed after the deadline a district court has set for amending the pleadings" because, "if we considered only Rule 15(a) without regard to Rule 16(b), we would render scheduling orders meaningless and effectively would read Rule 16(b) and its good cause requirement out of the Federal Rules of Civil Procedure." *Parker*, 204 F.3d at 340 (alteration omitted). Here, the district court issued a Rule 16(b) scheduling order, and this court finds "nothing defective in the order itself." *Ante* at 33. Yet the court holds that even though the district court properly issued a scheduling order pursuant to Rule 16(b), it nevertheless abused its discretion by following the "good cause" standard of Rule 16(b) rather than the liberal standard of Rule 15(a). In doing so, the court renders the scheduling order meaningless; in its view, the district court was obliged to freely permit amendment despite its issuance of a Rule 16(b) scheduling order. I would instead adhere to the rule that "a district court does not abuse its discretion in denying leave to amend the pleadings after the deadline set in the scheduling order where the moving party has failed to establish good cause." *Parker*, 204 F.3d at 340.

The court's decision today could have unexpected consequences. The scheduling order in question was one of Judge Forrest's pro forma scheduling orders. She appears to have used it regularly, and perhaps oth-

er judges have used the same or similar language. Are all those orders now defective? In light of today's opinion, district judges must beware. Instead of reading the scheduling order in the stilted fashion on which the court insists, I would read it reasonably and affirm the judgment. *Cf. Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2242 (2021) (Alito, J., dissenting) ("If we expect the lower courts to respect our decisions, we should not twist their opinions to make our job easier.").

* * *

The share-class claim is foreclosed by the district court's judgment after trial. The categorical version of the claim necessarily fails because if revenue sharing is not imprudent, neither is the inclusion of retail shares. The numerical version of the claim necessarily fails because the deliberative process by which NYU adopted its revenue-sharing model satisfies ERISA's duty of prudence. I therefore would not remand the case because the dismissal of the share-class claim, even if erroneous, was harmless. The district court also did not abuse its discretion in denying leave to amend. Accordingly, I dissent in part.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit
[signature and electronic seal]

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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16 **CIVIL** 6284 (KBF)

DR. ALAN SACERDOTE, DR. HERBERT SAMUELS, MARK CRISPIN MILLER, PATRICK LAMSON-HALL, MARIE E. MONACO, DR. SHULAMITH LALA STRAUSSNER, AND JAMES B. BROWN, individually and as representatives of a class of participants and beneficiaries on behalf of the NYU School of Medicine Retirement Plan for Members of the Faculty, Professional Research Staff and Administration and the New York University Retirement Plan for Members of the Faculty, Professional Research Staff and Administration,
Plaintiffs,

v.

NEW YORK UNIVERSITY,
Defendant,

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DOC #: ________________
DATE FILED: ___7/31/18]

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED**: That for the reasons stated in the Court's Opinion and Order dated July 31, 2018, the Court finds

in favor of defendant NYU on all claims; accordingly, the case is closed.

Dated: New York, New York
July 31, 2018

RUBY J. KRAJICK

____
Clerk of Court

BY:

/s/ Kmango
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

16-cv-6284 (KBF)

DR. ALAN SACERDOTE, DR. HERBERT SAMUELS, MARK CRISPIN MILLER, PATRICK LAMSON-HALL, MARIE E. MONACO, DR. SHULAMITH LALA STRAUSSNER, AND JAMES B. BROWN, individually and as representatives of a class of participants and beneficiaries on behalf of the NYU School of Medicine Retirement Plan for Members of the Faculty, Professional Research Staff and Administration and the New York University Retirement Plan for Members of the Faculty, Professional Research Staff and Administration,

Plaintiffs,

v.

NEW YORK UNIVERSITY,

Defendant,

[STAMP: USDC SDNY
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ELECTRONICALLY FILED
DOC #: ________________
DATE FILED: July 31, 2018]

OPINION & ORDER

KATHERINE B. FORREST, District Judge:

Each week, to ensure a more secure future, employees throughout the United States contribute por-

tions of their paychecks to retirement savings accounts. An employer sponsoring a retirement plan becomes a fiduciary under the Employee Retirement Income Savings Act ("ERISA") and is required to act vis-à-vis a plan with the care, skill, and diligence that a prudent person would use in a similar situation. *See Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015). Employees rely on such fiduciaries to perform their duties with appropriate dedication and attention. The fiduciary duty imposed by ERISA reflects congressional recognition of the importance of workers' retirement savings.

Plaintiffs here are employees of New York University ("NYU") who claim that NYU, through its Retirement Plan Committee (the "Committee"), failed to fulfill certain of its fiduciary obligations under ERISA. According to plaintiffs, NYU's imprudence resulted in losses totaling more than $358 million. They are one of at least eleven groups of plaintiffs—all represented by the same counsel—asserting ERISA claims against their university-employers.[1] This is the first of those cases to proceed to trial.

Plaintiffs assert that the Committee breached its duty of prudence with regards to two NYU retirement plans: the New York University Retirement Plan for Members of the Faculty, Professional Research Staff and Administration (the "Faculty Plan") and the New

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[1] *See, e.g., Munro v. Univ. of S. Calif.*, 16-cv-6191 (C.D. Cal.); *Vellali v. Yale Univ.*, 16-cv-1345 (D. Conn.); *Henderson v. Emory Univ.*, 16-cv-2920 (N.D. Ga.); *Divane v. Northwestern Univ.*, 16-cv-8157 (N.D. Ill.); *Kelly v. Johns Hopkins Univ.*, 16-cv-2835 (D. Md.); *Tracey v. Mass. Inst. Tech.*, 16-cv-11620 (D. Mass.); *Clark v. Duke Univ.*, 16-cv-1044 (M.D.N.C.); *Cates v. Columbia Univ.*, 16-cv-6524 (S.D.N.Y.); *Sweda v. Univ. of Pa.*, 16-cv-4329 (E.D. Pa.); *Cunningham v. Cornell Univ.*, 16-cv-6525 (S.D.N.Y.); *Cassell v. Vanderbilt Univ.*, 16-cv-2086 (M.D. Tenn.).

York University School of Medicine Retirement Plan for Members of the Faculty, Professional Research Staff and Administration (the "Medical Plan") (together, the "Plans"). The same Committee oversees both Plans. Plaintiffs' first claim is that the Committee imprudently managed the selection and monitoring of recordkeeping vendors resulting in excessively high fees. According to plaintiffs, the Committee could have reduced such fees by "consolidating" its use of two recordkeepers into one, and also by negotiating a lower overall rate. Plaintiffs include in this claim arguments that the Committee: (1) failed to prudently manage a request-for-proposal ("RFP") process relating to recordkeeping vendors; (2) failed to allow respondents to propose pricing for all Plan assets (versus only non-annuity assets); and (3) had pre-determined that TIAA (already a recordkeeper for annuity assets) was the favored vendor.

Plaintiffs' second claim is that the Committee acted imprudently by failing to remove the TIAA Real Estate Account and the CREF Stock Account as investment options (thereby continuing to allow plaintiffs to invest in such funds). Plaintiffs assert that the Committee used confusing and inappropriate financial benchmarks to review their performance and that these funds objectively underperformed, resulting in significant losses.

After careful review of the record, the Court finds by a preponderance of the evidence that while there were deficiencies in the Committee's processes—including that several members displayed a concerning lack of knowledge relevant to the Committee's mandate—plaintiffs have not proven that the Committee acted imprudently or that the Plans suffered losses as a result.

Accordingly, the Court finds in favor of NYU on all claims.

I. PROCEDURAL HISTORY

This action was far more expansive at the time of initial filing. The first complaint, filed on August 9, 2016, contained seven counts.[2] In a decision dated August 25, 2017, the Court dismissed several claims in the Amended Complaint, (ECF No. 39), leaving only the two which proceeded to trial. *Sacerdote v. New York Univ.*, No. 16-cv-6284, 2017 WL 3701482 (S.D.N.Y. Aug. 25, 2017).

> On February 13, 2018, the Court certified a class consisting of:
>
> All participants and beneficiaries of the NYU School of Medicine Retirement Plan for Members of the Faculty, Professional Research

[2] Initially, plaintiffs alleged that NYU breached its fiduciary duties of loyalty and prudence (Claims I, III, and V) by failing to use "the Plans' bargaining power to reduce expenses and [to exercise] independent judgment to determine what investments to include in the Plans." (ECF No. 39, Am. Compl. ¶ 4.) Plaintiffs also claimed that NYU allowed the Plans' "conflicted third party service providers—TIAA-CREF and Vanguard—to dictate the Plans' investment lineup, to link its recordkeeping services to the placement of investment products in the Plans, and to collect unlimited asset-based compensation from their own proprietary products." (*Id.*) Claims II, IV, and VI alleged that NYU engaged in prohibited transactions because plaintiffs, through their investments, allegedly "paid a portion of the Plans' excessive administrative and recordkeeping fees, [costs] which would not have been incurred had defendants discharged their fiduciary duties to the Plan." (*Id.* ¶ 8(c).) In addition, Claim VII asserted that, to the extent NYU delegated any of its fiduciary responsibilities to another fiduciary, NYU breached its duty to monitor. (*Id.* ¶¶ 236-39.)

> Staff and Administration and the New York University Retirement Plan for Members of the Faculty, Professional Research Staff and Administration from August 9, 2010, through the date of judgment, excluding the Defendant and any participant who is a fiduciary to the Plans.

Sacerdote v. New York Univ., No. 16-cv-6284, 2018 WL 840364, at *7 (S.D.N.Y. Feb. 13, 2018). The "Class Period" is therefore August 9, 2010 to the present.

The Court held an eight-day bench trial in April 2016; post-trial submissions were filed on May 13, 2018 and closing arguments were held on May 16, 2018. Twenty witnesses testified at trial (seventeen by trial declaration,[3] with live cross and redirect, and three by deposition designation), including: named plaintiffs (Marie Monaco,[4] Alan Sacerdote,[5] Mark Crispin Miller,[6]

[3] The Court's procedure for bench trials provides for direct examination by trial declaration, with live cross-examination and redirect.

[4] Monaco is a participant in the Medical Plan. (PX1683 ("Monaco Decl.").) She has been invested in the TIAA Real Estate Account and the CREF Stock Account since 1980. (Tr. at 1041:14-1042:2; *see also* Monaco Decl. ¶ 3.) She has never sought to reduce her investments in these funds. (Tr. at 1041:17-1042:23.) As of December 31, 2017, 82.12% of her portfolio was invested in the CREF Stock Account, 0.48% was invested in the TIAA Real Estate Account, and the remainder was divided among other TIAA funds. (DX874.) She is also invested in two TIAA annuities. (*See* PX729, PX731.) Monaco testified that her Medical Plan account has not lost money. (Tr. at 1044:8-10.) She further conceded that she did not typically read the quarterly statements TIAA provides. (Tr. at 1046:8-13.)

[5] Sacerdote is a participant in the Medical Plan. (PX1685 ("Sacerdote Decl.").) He is not invested in the TIAA Real Estate Account or the CREF Stock Account. (Tr. at 1036:18-23.)

and Shulamith Straussner[7]); six former and current members of NYU's Retirement Committee (Margaret Meagher,[8] Nancy Sanchez,[9] Patricia Halley,[10] Tina

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[6] Miller is a participant in the Faculty Plan. (PX1682 ("Miller Decl.").) He is not invested in any TIAA accounts through the Plans. (Tr. at 1031:5-13.) However, he is invested in the CREF Stock Account through retirement plans at universities where he was previously employed—Johns Hopkins University and the University of Pennsylvania. (*Id.* at 1032:13-1032:17.) He has not altered his investments in any of those plans since this lawsuit commenced. (*Id.* at 1033:4-6.)

[7] Straussner is a participant in the Faculty Plan. (PX1684 ("Straussner Decl.").) She has been invested in the TIAA Real Estate Account and the CREF Stock Account since at least 2009. (Straussner Decl. ¶ 3.) Between July 1, 2009 and June 30, 2017, the value of her CREF Stock Account grew by 265%; the value of her TIAA Real Estate account grew by 538%; and her overall savings grew by 252%. (*See* DX344, DX377.) As of June 30, 2017, her savings in the TIAA Real Estate Account and the CREF Stock Account amounted to 43.05% of her total portfolio. (*See* DX344, DX377.) Straussner has not sought to reduce her investment in either account. (Tr. at 1027:4-1028:1.) Straussner is also invested in a retirement annuity account, described in more detail below. (*See* PX739.)

[8] Meagher has been the co-chair of the Committee since its inception. (DX883 ("Meagher Decl.").) She testified regarding the Committee's due diligence activities and her role. The Court found her testimony concerning—she did not demonstrate the depth of knowledge one would expect from a fiduciary.

[9] Sanchez, Meagher's supervisor, is another Committee member. (DX885 ("Sanchez Decl.").) Her testimony was also troubling. Not only did she fail to demonstrate a satisfactory understanding of key documents and her role as a fiduciary, but she also relied on Meagher to review certain key documents, (Tr. at 385:3-9) and noted that she did not consider herself a fiduciary (but rather believed the Committee was the fiduciary), (*id.* at 386:20-387:9).

[10] Halley is NYU's Assistant Vice President of Global Benefits and another member of the Committee; she testified about the

Surh,[11] Martin Dorph,[12] and Linda Woodruff[13]); two NYU staff members (Mark Petti[14] and Susanna Hollnsteiner[15]); one TIAA representative (Douglas Chittenden[16]); one Vanguard representative (George

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Committee's processes and discussions. (DX887 ("Halley Decl.").) As part of this, she testified that the Committee's meeting minutes are intended to be summaries and not to capture every detail and conversation.

[11] For the period of 2010-2014, Surh was NYU's Chief Investment Officer ("CIO") and a Committee member. (DX884 ("Surh Decl.").) Of the Committee members who testified, she was the most knowledgeable about the investment options in the Plans. The Court found Surh to be a highly credible witness and gives significant weight to her testimony. Surh asked a number of probing questions during Committee meetings and demonstrated that the Committee exerted decisionmaking authority independent from its financial advisor, Cammack LaRhette Consulting ("Cammack").

[12] Dorph, now NYU's Executive Vice President and a Committee member until 2017, also provided somewhat concerning testimony. For instance, on the first day of his testimony, he did not even know whether he was currently a member of the Committee (and, accordingly, whether he was a fiduciary to thousands of employees). (Tr. at 1311:3-6; *see also* DX888 ("Dorph Decl.").) However, his testimony regarding NYU's information technology ("IT") transitions and their impact on recordkeeping consolidation was informative, detailed, consistent, and very credible.

[13] Woodruff was a Committee member from 2010-2012. (ECF No. 283-1.)

[14] Petti was a Manager of Retirement Plans at NYU; he attended Committee meetings but was not a member of the Committee. (DX886 ("Petti Decl.").)

[15] Hollnsteiner was also a Manager of Retirement Plans at NYU; she similarly attended Committee meetings but was not a member of the Committee. (ECF No. 283-1.)

[16] Chittenden is the Executive Vice President and head of the Institutional Retirement business of Institutional Financial Ser-

Heming[17]); and one Cammack LaRhette Consulting ("Cammack") representative (Jan Rezler[18]). Plaintiffs also called two expert witnesses: Michael Geist[19] and

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vices ("IFS") at TIAA. (DX892 ("Chittenden Decl.").) He was a highly credible witness and was very knowledgeable regarding NYU's Plans as well as TIAA's offerings and capabilities.

[17] Heming is a principal at Vanguard. (ECF No. 283-1.) He displayed significant knowledge regarding Vanguard's offerings and capabilities.

[18] Rezler has advised the Committee since Cammack's retention in 2009. (DX893 ("Rezler Decl.").) He displayed deep knowledge and understanding of the NYU Plans as well as the offerings and capabilities of vendors such as TIAA and Vanguard.

[19] Plaintiffs retained Geist to provide analysis and opinions related to the Committee's actions/inactions regarding recordkeeping fees. (PX1681 ("Geist Decl.").) Geist spent over ten years in the Retirement Plan Services ("RPS") division of T. Rowe Price, during which time he "was responsible for delivering, creating, and/or governing over 20,000 pricing proposals for over 10,000 retirement plans." (*Id.* ¶ 3.)

As discussed below, Geist lacked the particular expertise necessary to provide useful opinions to the Court. He has virtually no experience with: (1) the type of plans at issue here (403(b) plans); (2) participants heavily invested in TIAA annuities; or (3) transitioning large plans from multiple to single recordkeepers. (*See, e.g.*, Tr. at 702:15-703:2 (noting that a "small percentage of the plans that [he] worked with at T. Rowe Price" were 403(b) plans); *id.* at 775:23-25, 784:19-785:4 (noting that had no experience with transitioning a 403(b) plan from dual record keeper to a single recordkeeper, and while he had some experience in transitioning billion dollar plans from multi-record keeper to single recordkeeper, he could not recall the name of one).) T. Rowe Price did not recordkeep annuities while Geist worked there, (*id.* at 704:10:15; *id.* at 774:19-22), and Geist has no specific knowledge of "what it costs to record-keep a fixed annuity," (*id.* at 706:23-707:1; *id.* at 712:24-713:6). The Court does not believe that he is a true "expert" on the pricing of the specific products at issue here and he did not demonstrate to the Court that he possesses the requisite

Gerald Buetow.[20] NYU called three expert witnesses: Marcia Wagner,[21] Daniel Fischel,[22] and Dr. Lassaad Adel Turki.[23] The Court also received over six hundred documents into evidence.

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qualifications to present reliable opinions on whether NYU's participants paid reasonable recordkeeping fees.

[20] Plaintiffs retained Buetow to provide expert testimony regarding the investment performance of the TIAA Real Estate Account and the CREF Stock Account, as well as damages. (PX1690 ("Buetow Decl.").) As discussed below, Buetow's testimony relied heavily on his view that the Committee used inappropriate benchmarks against which to measure investment fund performance. The Court was not persuaded by this testimony.

[21] Defendant retained Wagner to provide expert testimony regarding NYU's processes relating to recordkeeping fees and to rebut Geist's testimony on the same topic. (DX889B ("Wagner Decl.").) The Court found her experience with 403(b) plans impressive and her testimony consistent, reasonable, logical, and ultimately highly credible.

[22] Defendant retained Fischel to analyze the investment performance of the CREF Stock Account and TIAA Real Estate Accounts and to rebut Buetow's testimony on the same topic. (DX891A ("Fischel Decl.").) The Court found him knowledgeable, reasonable, and consistent; overall, he was highly credible and the Court gives great weight to his testimony.

[23] Defendant retained Turki as a damages rebuttal expert. (DX890A ("Turki Decl.").) He has a wealth of experience in this area, and the Court relied on his opinions.

II. LEGAL PRINCIPLES[24]

To prove a breach of the duty of prudence, plaintiffs bears the burden of showing: (1) that NYU failed to engage in a prudent process (here, with specific regard to how it monitored recordkeeping fees and certain investment options); and (2) that, on an objective basis, such breaches led to Plan losses. Plaintiffs have failed to carry their burden.

A. *ERISA Generally*

Under ERISA, the duties owed by fiduciaries to plan participants "are those of trustees of an express trust—the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982). ERISA § 404(a)(1) (codified at 29 U.S.C. § 1104(a)(1)) imposes twin duties of prudence and loyalty on fiduciaries of retirement plans. The duty of loyalty—not principally at issue in this case—is codified in ERISA § 404(a)(1)(A). It requires fiduciaries to act "solely in the interest of the participants and beneficiaries," and "for the exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan." ERISA § 404(a)(1)(A). "The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty. … It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries." *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000) (internal quotation omitted).

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[24] The remainder of this Opinion constitutes the Court's conclusions of law and findings of fact. The Court makes its findings of fact by a preponderance of the credible evidence. While this Opinion contains some citations to evidence, they should be considered examples only. The Court has not attempted to recite all supportive citations in the record.

The duty of prudence requires a fiduciary to act "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." ERISA § 404(a)(1)(B). The "prudent person" standard asks whether "the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984) (quoting *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984); *see also Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc. (PBGC)*, 712 F.3d 705, 716 (2d Cir. 2013) (noting that the standard "focus[es] on a fiduciary's conduct in arriving at an investment decision, not on its results, and ask[s] whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment" (quoting *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996)) (alterations in *PBGC*)). "In short, ERISA's 'fiduciary duty of care ... requires prudence, not prescience.'" *PBGC*, 712 F.3d at 716 (quoting *DeBruyne v. Equitable Life Assurance Soc'y of the U.S.*, 920 F.2d 457, 465 (7th Cir. 1990)). Fiduciaries' prudence is measured against an objective standard, and their own "lack of familiarity with investments is no excuse" for failing to act with the care, skill, prudence and diligence required under the circumstances then prevailing. *Katsaros*, 744 F.2d at 279. Participants may bring civil actions for failures in fiduciary performance. 29 U.S.C. § 1132(a)(2). An action under § 1132(a)(2) is "brought in a representative capacity on behalf of the plan." *L.I.*

Head Start Child Dev. Servs. v. Econ. Opportunity Council of Suffolk, Inc., 710 F.3d 57, 65 (2d Cir. 2013) (quoting *Coan v. Kaufman*, 457 F.3d 250, 257 (2d Cir. 2006)).

B. *Principles Related to an Imprudent Process Claim*

A fiduciary breaches its duty of prudence when it fails to "employ[] the appropriate methods" in making investment decisions. *See Katsaros*, 744 F.2d at 279 (quoting *Mazzola*, 716 F.2d at 1232).

> Pursuant to ERISA implementing regulations, promulgated by the Secretary of Labor, a fiduciary's compliance with the prudent-man standard requires that the fiduciary give "appropriate consideration" to whether an investment "is reasonably designed, as part of the portfolio ... to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment."

PBGC, 712 F.3d at 716 (quoting 29 C.F.R. § 2550.404a-1(b)(2)(i)). Fiduciaries should consider the prudence of each investment as it relates to the portfolio as a whole, rather than in isolation. *Id.*, 712 F.3d at 717. Accordingly, courts must look to "not only to [a fiduciary's] investigation procedures, but also to the methods used to carry out those procedures as well as the thoroughness of their analysis of the data collected in that investigation." *Chao v. Tr. Fund Advisors*, No. Civ. A. 02-559, 2004 WL 444029, at *3 (D.D.C. Jan. 20, 2004); *see also Henry v. Champlain Enters., Inc.*, 445 F.3d 610, 620 (2d Cir. 2006) (holding that a failure to produce notes documenting an investigation did not, on its own, indicate that the defendant failed to employ an "appropri-

ate method"); *United States v. Mason Tenders Dist. Council of Greater N.Y.*, 909 F. Supp. 882, 890 (S.D.N.Y. 1995) (holding that a fiduciary failed to discharge its obligation to investigate various purchases of property).

C. *Principles Relevant to Monitoring and Removing Investments*

Fiduciaries have a "continuing duty to monitor investments and remove imprudent ones[.]" *Tibble*, 135 S. Ct. at 1829. This means that a fiduciary "cannot assume" that investments that were prudent at one time "will remain so indefinitely." *Id.* at 1828 (quoting A. Hess, G. Bogert & G. Bogert, Law of Trusts and Trustees ("Bogert 3d") § 684, pp. 145-146 (3d ed. 2009)). Rather, the fiduciary "must 'systematic[ally] conside[r] all the investments of the trust at regular intervals' to ensure that they are appropriate." *Id.*, 135 S. Ct. at 1828 (quoting Bogert 3d § 684) (alterations in *Tibble*). In short, a fiduciary "'who simply ignores changed circumstances that have increased the risk of loss to the trust's beneficiaries is imprudent.'" *PBGC*, 712 F.3d at 717 (quoting *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 734 (7th Cir. 2006)).

In order to prevail in their claims here, plaintiffs bear the burden of establishing that the Plans suffered a loss due to the breach. *Silverman v. Mutual Ben. Life Ins. Co.*, 138 F.3d 98, 104 (2d Cir. 1998). Specifically, under ERISA:

> Any person who is a fiduciary ... who breaches any of the responsibilities, obligations, or duties ... 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.

29 U.S.C. § 1109(a) (emphasis added); *see also PBGC*, 712 F.3d at 730 (noting that a claim for breach of fiduciary duty under ERISA requires an alleged loss to the plan at issue); *Mira v. Nuclear Measurements Corp.*, 107 F.3d 466, 473 (7th Cir. 1997) ("In light of our holding that the plaintiffs suffered no economic loss, we hold that this case falls within the 'no harm, no foul' rule. It is a longstanding principle in civil law that there can be no monetary recovery unless the plaintiff has suffered harm."); *Silverman*, 138 F.3d at 105 ("Causation of damages ... is an element of the claim, and the plaintiff bears the burden of proving it.").

Therefore, even if plaintiffs had established that NYU did not follow a prudent process in monitoring administrative fees and investments (which, as discussed below, they have failed to do), in order to be entitled to recover damages, the Plan(s) must have also suffered a causally related loss.[25] ERISA §

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[25] Plaintiffs argue that once a plaintiff has proven a breach of a fiduciary duty and loss to the plan, the burden of explanation or justification shifts to defendant. *See N.Y. State Teamsters Council Health & Hosp. Fund v. Estate of DePerno*, 18 F.3d 179, 182 (2d Cir. 1994). In other words, according to plaintiffs, defendant then bears the burden of disproving causation (i.e., that its decisions were objectively prudent, in that any prudent fiduciary would have made the decisions it made). Defendant counters that the Second Circuit has rejected such burden-shifting, citing *Silverman*, 138 F.3d at 105. The Court need not resolve this question, as plaintiffs acknowledge that they bear the initial burden of proving both (1) that a breach occurred and (2) the Plans suffered a loss as a result. As discussed below, plaintiffs have not proven either.

404(a)(1)(B); *see also Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 919 (8th Cir. 1994) ("Even if a [fiduciary] failed to conduct an investigation before making a decision, he is insulated from liability if a hypothetical prudent fiduciary would have made the same decision anyway.").

D. *Principles Particularly Relevant to Excessive Fee Claims*

A fiduciary also has the responsibility of ensuring that fees paid to recordkeepers are not excessive relative to services rendered. *Young v. Gen. Motors Inv. Mgmt. Corp.*, 325 Fed. App'x 31 (2d Cir. 2009). In *Young*, the Second Circuit held that a prudence claim based on excessive fees must be supported by facts that take the particular circumstances into account. *Id.*, 325 Fed. App'x at 33 (citing *Gartenberg v. Merrill Lynch Asset Mgmt.*, 694 F.2d 923, 928 (2d Cir. 1982) and *Krinsk v. Fund Asset Mgmt.*, Inc., 875 F.2d 404, 409 (2d Cir. 1989)). These facts may go to fiduciaries' "independence and conscientiousness," *Krinsk*, 875 F.2d at 409, and they may tend to show whether a fiduciary failed to adequately tether fees to services rendered or employed an imprudent process. ERISA does not dictate "any particular course of action" with regards to fees, but it does require a "fiduciary ... to exercise care prudently and with diligence under the circumstances then prevailing." *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006) (internal quotation omitted). For example, competitive bidding is not *per se* required under ERISA, but it can be an example of an action taken to ensure fees are appropriate. *See White v. Chevron Corp.*, 16-cv-0793, 2016 WL 4502808, at *14 (N.D. Cal. Aug. 16, 2016); *see also George v. Kraft Foods Glob., Inc.*, 641 F.3d 786, 800 (7th Cir. 2011) (holding "a trier of fact could reasonably conclude that defendants did

not satisfy their duty to ensure that [the recordkeeper's] fees were reasonable" where plan fiduciaries failed to, *inter alia*, solicit competitive bidding for more than fifteen years). As with other ERISA claims, plaintiffs must show that demonstrated imprudence in fact "resulted in monetary loss." *George*, 641 F.3d at 797.

E. *Reliance Between and Among Fiduciaries*

As discussed below, in April 2009, the Committee retained Cammack to act as an investment advisor to the Committee; Cammack thus became a co-fiduciary.[26] During the trial, certain witnesses testified that they—in effect—assumed that on financial issues (which constituted a significant portion of the Committee's mandate), they could defer virtually entirely to Cammack for expertise and information and rely on its recommendations. This is incorrect.

The hiring or appointment of a co-fiduciary does not relieve the original fiduciary of its independent duties; no fiduciary may passively rely on information provided by a co-fiduciary. *Bierwirth*, 680 F.2d at 272. A fiduciary who delegates fiduciary responsibilities nonetheless retains a duty to exercise prudence "in continuing the allocation or designation." 29 U.S.C. § 1105(c)(A)(iii). In this regard, good old-fashioned "kicking the tires" of the appointed fiduciary's work is required: "ERISA's duty to investigate requires fiduciaries to review the data a consultant gathers, to assess its significance and to supplement it where necessary." *In re Unisys*, 74 F.3d at 435. "In order to rely on an expert's advice, a 'fiduciary must (1) investigate the expert's qualifications, (2) provide the expert with com-

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[26] The parties agree that Cammack is a co-fiduciary. (*See* ECF Nos. 301 at 1, 302 at 4.)

plete and accurate information, and (3) make certain that reliance on the expert's advice is reasonably justified under the circumstances.'" *Bussian v. RJR Nabisco, Inc.*, 223 F. 3d 286, 301 (5th Cir. 2000) (quoting *Howard v. Shay*, 100 F.3d 1484 at 1489 (9th Cir. 1996)); *see also Hugler v. First Bankers Tr. Servs., Inc.*, No. 12-cv-8649, 2017 WL 1194692, at *11 (S.D.N.Y. Mar. 30, 2017) (outlining the same three requirements).[27]

Put otherwise, Cammack's appointment does not now and never has entitled the Committee or its members to unthinkingly defer to Cammack's expertise—even when Cammack was hired because it possessed expertise Committee members did not. To fulfill their duties, the Committee members must meaningfully probe Cammack's advice and make informed but independent decisions. *See In re Unisys*, 74 F.3d at 434-35; *Bussian*, 223 F.3d 286. Certainly, a fiduciary is within its rights—and likely well-advised—to seek advice from experts. *Hightshue v. AIG Life Ins. Co.*, 135 F.3d 1144, 1148 (7th Cir. 1998 ("Seeking independent expert advice is evidence of a thorough investigation ... ."). However, this comes with the proviso that the fiduciary "investigate[s] the expert's qualifications ... and determine[s] that reliance on the expert's advice is reasonably justified under the circumstances." *Id.*, 135 F.3d at 1148. While the fiduciary need not "duplicate the expert's analysis," it must "review that analysis to determine the extent to which any emerging recommendation can be relied upon." *Bussian*, 223 F.3d at 301. This can take various forms, such as "an honest, objective effort to read the valuation, understand it, and

[27] The parties agree that NYU has not delegated its fiduciary responsibilities pursuant to 29 U.S.C. § 1105. (ECF No. 301 at 3, ECF No. 302 at 4.)

question the methods and assumptions that do not make sense." *Howard v. Shay*, 100 F.3d 1484, 1490 (9th Cir. 1996).

III. THE PLANS

NYU established both the Faculty and Medical Plans in 1952. (PX940; DX386.) NYU is the designated "Sponsor" of both. (Tr. at 369:10.) They are defined-contribution, participant-directed 403(b) plans available to employees.

A. *The Faculty Plan*

In 2010, the Faculty Plan had 12,868 participants and $1.79 billion in assets; by the end of 2016, the number of participants had grown to 18,551 and assets had increased to $2.62 billion. (DX46 at 2, 18; DX3 at 2, 19.) Each participant has the independent ability to decide how his/her money should be invested. (PX940 at 14.) The Plan provides for 103 investment options. During the Class Period, the Faculty Plan offered investment options comprised of funds managed by TIAA (twenty-five options) and Vanguard (seventy-eight options). (*See, e.g.*, PX497; PX718; DX87.) These options included fixed and variable annuities, as well as mutual funds. (*Id.*) The Faculty Plan offers participants both actively- and passively-managed index funds. (Active management typically carries higher fees.)

B. *The Medical Plan*

The Medical Plan is available to employees of the NYU School of Medicine. (Meagher Decl. ¶ 8; DX386 at 11.) In 2010, the Medical Plan had 9,153 participants and $1.29 billion in assets; by the end of 2016, it had actually shrunk in size to 8,560 participants but its assets increased to $2.02 billion. (DX27 at 2, 18; DX4 at 2, 19.) Like the Faculty Plan, each participant may choose

among investment options. (DX386 at 18.) And like the Faculty Plan, the Medical Plan offers diverse investment options (of which there are eighty) including funds managed by TIAA (nine options) and Vanguard (seventy-one options); among the options are fixed and variable annuities as well as actively- and passively-managed index funds. (PX688; DX149.)

C. *An Overview of Recordkeeping Services*

Retirement accounts require management. As part of this, information regarding account balance and investment performance must be calculated and provided to participants. Necessary services also include preparing enrollment kits and delivering information such as fund notices, prospectuses, and financial statements; additional and optional services might also include providing investment and savings advice. (Halley Decl. ¶ 30; DX526 at 11-13; DX532 at 13-16.) "Recordkeeper" is the shorthand term for a vendor who provides recordkeeping services, and payment for such services are designated as "recordkeeping" or "administrative" fees.

During the Class Period, the Plans' recordkeeping services were provided by TIAA[28] and Vanguard; Pru-

[28] As of December 1, 2009, $2.41 billion of the Plans' combined $3.01 billion in assets were in TIAA funds and annuities. (PX128 at 4-5.) As of September 30, 2017, $2.8 billion of the Faculty Plan's $4.1 billion assets were in TIAA funds and annuities, and all (100%) of the Medical Plans $3.6 billion in assets were in TIAA funds and annuities. (PX959 at 30-31.) TIAA's services included investment and savings advice to participants at no additional cost by TIAA. (Chittenden Decl. ¶¶ 85-109; Halley Decl. ¶ 31.) TIAA's website provided content, videos, and tools on topics such as saving for retirement, building a legacy, and living well in retirement. (Chittenden Decl. ¶ 102.) TIAA also provided financial education webinars on several topics, such as the basics of investing, asset

dential also serviced only the Medical Plan until that Plan's consolidation to a single recordkeeper in 2013 (at which time it was eliminated). (*See*, *e.g.*, Rezler Decl. ¶¶ 20-31.) In 2013, TIAA became the sole service provider to the Medical Plan. (Meagher Decl. ¶ 45; Petti Decl. ¶ 30; *see also* DX532; DX533.) Until May 2018, both Vanguard and TIAA provided services to the Faculty Plan: Vanguard provided recordkeeping services for the Vanguard investment options, and TIAA provided recordkeeping services for the TIAA investment options. In May 2018, the Faculty Plan eliminated Vanguard as a recordkeeper and consolidated to TIAA as the single vendor. (Rezler Decl. ¶ 56; DX520 at 5.)

Like a number of large 403(b) plans, the NYU Plans pay recordkeeping fees by way of "revenue sharing." In a revenue sharing arrangement, a portion of investment earnings are used to pay the fund's expenses. Participants do not "write checks" for such fees; rather, fees are deducted automatically. (Halley Decl. ¶ 24; Rezler Decl. ¶¶ 23-24; Wagner Decl. at 27-28.) *See also Tussey v. ABB, Inc.*, 746 F.3d 327, 331 (8th Cir. 2014) ("Revenue sharing is "a common method of compensation whereby the mutual funds on a defined contribution plan pay a portion of investor fees to a third party.").

D. *The Role of Annuities in the Plans*

403(b) plans may be set up to pay out a stream of income at retirement. In order to fund this future in-

allocation, staying on track in a volatile market, and receiving retirement income. (*Id.*) Likewise, Vanguard's recordkeeping fees included services such as participant calls, participant education, and quarterly summary participant statements. (Halley Decl. ¶ 32; Heming Dep. Designation 44:4-47:12.)

come stream, participants may elect to contribute to an annuity. Most Plan participants have elected to do so, and the amount of assets invested in annuities constitutes a sizable majority (three quarters) of the Plans' assets under management. Annuities are established through contracts (referred to as "annuity contracts") between participants and the investment entity (for instance, TIAA). Annuity contracts may be between individuals and the investment entity or on a group basis; they may also provide for "fixed" or "variable" payouts.

Here, the individual annuities are contracts issued in a Plan participant's name; the annuities guarantee periodic payments at retirement, determined on the basis of premium payments and credited interest or investment earnings during a participant's working years. (Chittenden ¶¶ Decl. 23-25; Wagner Decl. at 6.) Unlike mutual funds, a fixed annuity is considered to be an insurance product. An institution offering annuities (such as TIAA) has to maintain reserves to fund its future obligations.

E. *Background on the Committee*[29]

In the fall of 2007, NYU determined that a Retirement Plan Committee (the "Committee") should be formed to provide "consistency and clarity in plan governance." (Meagher Decl. ¶ 10; Dorph Decl. ¶ 4; PX462.) The Committee was established effective June

[29] From the time of its creation until the end of 2017, the Committee met approximately once per quarter; meetings often lasted about two hours. (*See, e.g.*, PX45 at 7; PX1209 at 1.) The Committee met forty-three times, twenty-five of which occurred in the six years preceding the filing of the Complaint on August 9, 2016.

1, 2008. (Meagher Decl. ¶ 12; Dorph Decl. ¶ 5; PX533 at 2-5.)[30]

The Committee has nine members who hold employment positions with NYU: the NYU Chief Investment Officer, the NYU Senior Vice President of Finance, the NYULMC Senior Vice President of Finance, the NYU Langone Medical Center ("NYULMC") Controller, the NYU Vice President of Human Resources, the NYULMC Senior Vice President of Human Resources, the NYU Director of Benefits, the NYULMC Director of Benefits, and the NYU Provost or his/her designee.[31] (PX533 at 3.) In addition, the NYU Director of Benefits and NYULMC Senior Vice President of Human Resources were designated as co-chairs, and the Committee was allowed to appoint a secretary. (*Id.*)

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[30] Prior to 2009, employers with 403(b) plans were protected by Department of Labor ("DOL") regulation (the "Safe Harbor"), under which 403(b) plans were treated as exempt from ERISA if employers limited their administrative involvement. (Wagner Decl. at 7.). However, the 2009 IRS regulations required tax-exempt employers to assume a deeper involvement in 403(b) plan administration. (*Id.*) 403(b) plans no longer qualify for the DOL Safe Harbor. (*Id.*)

[31] Some of the positions identified in the Committee's original charter changed over time. (Sanchez Decl. ¶ 7, n.1.) Currently the Charter designates the following members: (1) NYU Associate Vice President, Global Compensation and Benefits; (2) NYU Chief Financial Officer; (3) NYU Chief Investment Officer; (4) NYU Provost; (5) NYU Senior Vice President of Human Resources; (6) NYULMC Senior Director of Benefits; (7) NYULMC Senior Vice President of Finance; (8) NYULMC Senior Vice President of Human Resources; and (9) NYULMC Vice President for Finance. (PX518; Sanchez Decl. ¶ 7, n.1.)

In February 2009, the Committee decided to engage Cammack as an investment advisor to help with management and monitoring of the financial aspects of plan management, including evaluating, selecting, and managing the Plans' recordkeepers as well as advising them on the selection and monitoring of plan investments. (DX554 at 1-2; *see also* Meagher Decl. ¶¶ 16-17, Rezler Decl. ¶¶ 6-7, 9.)[32]

F. *Quarterly Meetings*

During the Class Period, Cammack provided the Committee with quarterly updates on various financial aspects of the Plans. (*See*, *e.g.*, PX34, PX36, PX43, PX44, PX530, PX1073, PX1093, PX1107, PX1294, PX1314, PX1390, PX1676.) Its reports were typically distributed to all Committee members one week before a meeting. The evidence at trial supported receipt and review of these reports by Committee members. (Halley Decl. ¶ 10; Meagher Decl. ¶ 20; Rezler Decl. ¶ 12; *see also* DX456-DX521 (the "Reports").) At the meetings, and prior to making final decisions, Committee members asked questions about the information Cammack provided and its recommendations. (Tr. at 372:21-373:17, 424:8-19, 425:1-18, 1152:20-1153:20.) The evidence supports the Committee having made decisions based on adequate investigation and independent decisionmaking.

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[32] The record is not clear as to when Cammack initially began advising the Committee. The minutes for the Committee's February 4, 2009 meeting indicate that an RFP for an outside investment advisor had been issued and that Cammack had been selected, but the minutes for the October 8, 2008 meeting—four months earlier—indicate that the Committee was already discussing Cammack's role. (PX476 at 1.)

Cammack's quarterly reports (referred to as "due diligence reports"), reviewed, *inter alia*, the performance of investment options. Its analyses included recommendations as to when the performance of a fund is sufficiently concerning that it has become a candidate for placement on a list established for additional scrutiny and monitoring (the "Watch List"). (Rezler Decl. ¶ 10.) Cammack's analyses included comparisons of funds' performance against peer groups as well as benchmark indices; the analyses also set forth each fund's risk-adjusted return, fees in comparison to peer funds, portfolio manager tenure, and Morningstar[33] ratings. (Rezler Decl. ¶¶ 11, 15.) The reports additionally included: reminders as to members' fiduciary duties, including their duty to ensure the "plan is competitive, meets the needs of participants and complies with ever-changing regulatory requirements"; asset allocation, including the amount allocated to TIAA traditional accounts, the TIAA Real Estate Account, and the CREF Stock Account; expenses; a financial market overview; an overview of investment options; industry trends; and regulatory updates. (*See*, *e.g.*, the Reports (DX456-DX521).)

During the Class Period, the Committee's quarterly meetings tracked many of the topics in the Cammack reports included discussions on topics that included review of investment options and performance, recordkeeping and other fees, overviews of fiduciary responsibility, (*see*, *e.g.*, PX478; PX1303); streamlining the fund lineup, (*see*, *e.g.*, PX480); converting to lower-cost share classes, (*see*, *e.g.*, PX368; PX1331); amendments to the Committee charter, (*see*, *e.g.*, PX380); and re-

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[33] Morningstar is commonly used for independent investment research and analysis.

views of the differences between certain annuity contracts and more recently available annuity offerings, (*see*, *e.g.*, PX662; PX959).

In 2011, and annually thereafter, the Committee approved an Investment Policy Statement ("IPS") that it used in connection with decisionmaking with respect to fund options. (Tr. at 1005:8-17; Meagher Decl. ¶ 69.) The IPS sets forth criteria for evaluating funds, how often funds are to be reviewed, and Cammack's responsibilities. (Rezler Decl. ¶ 14; Surh Decl. ¶ 15-16; Meagher Decl. ¶ 69; Halley Decl. ¶ 16.)[34]

G. *Trial Testimony Regarding Committee Meetings and Processes*

Five current and former Committee members testified at trial: Margaret Meagher, Nancy Sanchez, Patricia Halley, Tina Surh, and Martin Dorph. Mark Petti, who attended many meetings but was not a voting member, also testified. In addition, Linda Woodruff (a Committee member) and Susanna Hollnsteiner (not a Committee member) testified by deposition designation. (ECF No. 283-1.)

Since the Committee's inception, Meagher has been one of its two co-chairs.[35] The second co-chairs were, at

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[34] At trial, plaintiffs argued that the Committee failed to approve or use an IPS, and that such failure evidences an imprudent process. This assertion is incorrect. While the IPS was not formally signed, the evidence at trial supports that it was in fact adopted and used throughout the Class Period.

[35] Meagher has been employed by NYU since 1989 and has been the Senior Director of Benefits for NYU Langone since December 2009; prior to that position, she was the Senior Director of Benefits at NYU Washington Square. (Meagher Decl. ¶ 1.) Her job responsibilities include the "day to day operation" of the Medical Plan. (*Id.* ¶ 2.)

various times, Linda Woodruff, Patricia Halley, and others. Meagher's testimony was concerning.[36] She made it clear that she viewed her role as primarily concerned with scheduling, paper movement, and logistics; she displayed a surprising lack of in-depth knowledge concerning the financial aspects of managing a multi-billion-dollar pension portfolio and a lack of true appreciation for the significance of her role as a fiduciary. In a number of instances, she appeared to believe it was sufficient for her to have relied rather blindly on Cammack's expertise. As a matter of law, blind reliance is inappropriate. *See In re Unisys*, 74 F.3d 420; *Bussian*, 223 F.3d 286. For instance, she testified that it was entirely appropriate for her, as well as the other Committee members, to rely upon Cammack to determine the reasonableness of fees and that she did not do anything to test the reliability of their information. (Tr. at 126:13-128:8.) She bluntly testified that "[i]t's not my job to determine whether the fees are appropriate" for the Plans. (*Id.* at 126:3-9.)

Meagher's supervisor, Sanchez,[37] also a Committee member, was similarly unfamiliar with basic concepts relating to the Plans, such as who fulfilled the role of administrator for the Faculty Plan. (*Id.* at 368:8-374:11.) When asked about her inability to remember

[36] The Court finds that Meagher does not have the depth of knowledge appropriate to oversee a plan the size of the NYU Faculty and Medical Plans. For example, she was unable to state which Plan was bigger, even though the Faculty Plan has (and always has had) thousands more members, and she was uncertain of whether there was a difference in fees between the Plans.

[37] Sanchez is the Senior Vice President and Vice Dean, Human Resources and Organizational Development and Learning of NYU Langone Health (i.e., the "chief human resource executive for the NYU Langone Health System"). (Sanchez Decl. ¶¶ 1-2.)

Plan details, Sanchez responded that she has a "big job" (referring to her human resources role, not her Committee membership) and that her role on the Committee is one of many responsibilities she has. (*Id.* at 386:5-387:24.) This suggested that Sanchez does not view herself as having adequate time to serve effectively on the Committee.

Sanchez further testified that she did not "know enough about variable annuities to be able to comment on whether they should be in these plans," and she could not recall whether there were "specific underperformance metrics or thresholds that have to be triggered for a fund to be put on the watch list."[38] (*Id.* at 368:8-374:7.) When asked who the plan administrator was, she responded, "I don't review the plan documents. That's what I have staff for." (*Id.* at 383:1-6.) Specifically, she noted that Meagher is the "one that reviews the plan documents for [her]." (*Id.* at 384:19-385:1.) However, as noted, Meagher—Sanchez's direct report—also failed to demonstrate a firm grasp on these documents. (Meagher and Sanchez, of course, each have a vote in Committee decisions.)

This under-preparedness was not limited to just these two Committee members. Linda Woodruff, who was Meagher's co-chair during 2010-2012, testified that did not know whether NYU was a large plan relative to others in the United States, (Woodruff Dep. Tr. at 81:11-19[39]), and she could not recall the TIAA Real Es-

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[38] Sanchez's statements during her deposition were admissible at trial as opposing party statements under Federal Rule of Evidence 801(d)(2) were used for the purpose of impeachment.

[39] The Court relies on certain designated deposition testimony, portions of which were objected to by one or more parties. The Court overrules those objections.

tate Account at all, (*id*. at 274:2-16)—even though it was discussed at multiple meetings at which she was in attendance and was on the Watch List during her tenure, (*see*, *e.g.*, PX375, DX569). Martin Dorph, a Committee member until July 2017, testified that he did not even know whether he was, at the time of trial (in April 2018), still a member of the Committee—and thus whether he bore a fiduciary responsibility to thousands of NYU participants. (Tr. 1304:3-9, 1311:3-6, 1312:8-15, 1338:11-1339:21.)[40] After the Court questioned how he could be unaware of his membership status, he endeavored to learn; the next day at trial he reported that he was in fact no longer a Committee member. (Tr. at 1338:11-1339:21.)[41]

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[40] Dorph, who is now Executive Vice President at NYU, previously served as NYU's Senior Vice President for Finance and Budget; through this position, he held a seat on the Committee. (Dorph Decl. ¶ 1; PX191.) However, between September 2007 and November 2013, he attended only sixteen of twenty-six meetings. (Tr. at 1341:8-24.) He missed meetings for a full year and a half, from May 18, 2009 to September 23, 2010. (*Id*. at 1304:10-18.) After this prolonged absence, he attended meetings only intermittently, (Id. at 1308:17-25), and he never attended a meeting after November 25, 2013; instead, he designated a representative pursuant to the Charter, (Dorph Decl. at ¶ 7). He testified that he "had a very busy schedule" and that he "didn't review all of the materials," but did so only on occasion. (Tr. at 1305:19-1306:2.)

[41] Additionally, the Court heard from two witnesses who attended many meetings but were not voting members of the Committee. Mark Petti is NYU's Associate Director of Retirement Plans and Global Benefits. (Petti Decl. ¶ 1.) He is not a voting member of the Committee, though he has attended meetings since May 17, 2012 and oversees various aspects of the Faculty Plan's administration. He advised the Committee on, *inter alia*, administration matters and compliance; he also serves as one point of contact for vendors. (*Id*. ¶ 7.) He appeared knowledgeable on the areas for which he is responsible.

Several Committee members stated that they did not independently seek to verify the quality of Cammack's advice; rather, they simply relied on it. (*See*, *e.g.*, Tr. at 1014:2-10; Woodruff Dep. Tr. at 90:10-91:12, 180:6-13.)

In contrast, Tina Surh, who served as NYU's Chief Investment Officer ("CIO")[42] and a Committee member from 2010-2014, "questioned [Cammack's] recommendations all the time." (Tr. at 365:16-25; Surh Decl. ¶¶ 3-4.) Surh appeared to be very knowledgeable in the area of investing generally. She attended a majority of Committee meetings held between 2010-2014. Surh testified that she remembers "speaking up a lot beyond what's contained in the minutes ... many more times than two times over the course of [her] tenure ... ." (Tr. at 1133:12-22.) As the CIO, Surh saw her role as providing "specialized knowledge relating to investing" to the Committee. (*Id.* at 1155:11-1156:3.) She testified that she "questioned [Cammack] and discussed ... the basis for their views" on the Plans' investment options.

Susanna Hollnsteiner—who testified by deposition designation only—began working at NYU in April 1989; she retired on March 1, 2017. (Hollnsteiner Dep. Tr. at 7:3-23.) She began as a Manager for Retirement Plans and Health and Welfare Benefits, and in 2001, she became Manager for NYU's Retirement Plans only. (*Id.* at 8:17-9:18.) In this capacity, she reported to Meagher. (*Id.* at 21:6-10.) At that time, she also gave up her supervisory duties. (*Id.* at 9:15-18.) She testified that she was "there more as a subject-matter expert" for the benefit specialists, but that specialists no longer reported to her. (*Id.* at 10:20-12:20.) She was not a member of the Committee, but she attended many meetings during her tenure.

[42] Over the Class Period, several people served as NYU's CIO: Maurice Maertens, Tina Surh, Martin Kelly, and Kathleen Jacobs. (Tr. at 367:7-377:16.) Surh was the only one of these individuals to testify at trial.

(*Id.* at 1154:17-23.) Outside Committee meetings, Surh read plan material prospectuses and met with portfolio managers at TIAA as well as TIAA's CEO, Roger Ferguson, who would update her on TIAA's progress and increasing efficiency. (*Id.* at 1153:7-22.) She also met with Cammack team members to discuss general market trends and investment options as well as specifics around NYU's IPS. (*Id.* at 1154:1-16.)

While the Court finds the level of involvement and seriousness with which several Committee members treated their fiduciary duty troubling, it does not find that this rose to a level of failure to fulfill fiduciary obligations. Between Cammack's advice and the guidance of the more well-equipped Committee members (such as Surh), the Court is persuaded that the Committee performed its role adequately.[43] As discussed below, the evidence does not support a failure or loss with regard to recordkeeping fees, or with regard to the two Plans investment options at issue here.

IV. RECORDKEEPING FEES

Plaintiffs' first claim is that NYU breached its duty of prudence with regard to recordkeeping fees. According to plaintiffs, the breach arose from the following actions or inactions:

(1) A failure to conduct a competitive RFP process that could have driven fees down;

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[43] As discussed below, plaintiffs also fail to demonstrate loss to the Plans as these result of an alleged breaches of fiduciary duty. While loss is not required to show that a breach of the duty of prudence occurred, the lack of loss does suggest that there was not some obvious danger to the Plans that the Committee failed to recognize, and therefore no recovery is appropriate.

(2) A failure to engage in a timely and reasoned decisionmaking process to consolidate the two recordkeepers each Plan had into a single recordkeeper for each Plan; and

(3) Use of uncapped revenue-sharing to pay recordkeeping fees led to improperly high payments.

According to plaintiffs these actions or inactions resulted in an overpayment by (or loss to) the Plans in the amount of $25,818,880 for the Faculty Plan and $17,074,702 for the Medical Plan. As discussed below, the Court finds that plaintiffs have failed to prove that the Committee acted imprudently with regard to recordkeeping fees. The evidence supports that during the Class Period, the Committee prudently managed its recordkeepers: it ran prudent RFP processes, was able to obtain lower fees for the Faculty Plan when consolidation was impractical (as discussed further below), and it consolidated recordkeepers for the Medical Plan (and, in 2018, the Faculty Plan). In addition, plaintiffs have not proven that the allegedly imprudent actions/inactions resulted in losses.

A. *Recordkeeper Consolidation*

As of 2009, each Plan had multiple recordkeepers: the Faculty Plan had TIAA and Vanguard, and the Medical Plan had those two vendors along with Prudential. (*See* Tr. at 312:11-25, 1223:22-24.) Early on, the Committee began discussing whether to consolidate recordkeepers, so that each Plan would have only one. Consolidation may lead to lower recordkeeping fees. However, recordkeepers may offer a variety of collateral services to participants which also have value. Thus, any examination of fees needs to account for total value—that is, both recordkeeping and collateral ser-

vices. Finally, when reviewing a recordkeeping vendor's RFP response, a fiduciary needs to examine both fees, the services offered, and total value. The Committee performed this holistic review appropriately.

Over a period of several years, the Committee issued several RFPs regarding recordkeeping services. Plaintiffs have argued that the RFP process was generally and specifically infirm and inadequate. The Court finds otherwise. In connection with the RFPs the Committee issued, a persistent criticism was that the RFPs only sought bids for a portion of the asset base. According to plaintiffs, this prevented potential vendors from seeing and contemplating the full opportunity, thereby driving further price concessions. However, as discussed below, defendant argues that consolidation of recordkeepers was simply not possible for assets held in TIAA annuities, which constituted three quarters of the Plans' assets.[44]

The evidence at trial supports defendant's contention that technical and other requirements prevented immediate consolidation of the Faculty Plan. Under the circumstances, the Committee ran an appropriate RFP process both in terms of number and with regard to the asset base up for bid.

Embedded in plaintiffs' overall "failure to consolidate to a single recordkeeper" argument are the assumptions that (1) a single vendor is always in the best interests of plan participants, and (2) consolidation necessarily results in lower overall fees. The record is not

[44] At trial, the parties referred to the TIAA annuity portion of assets as amounting to "two-thirds" of the Plans' total assets. In fact, $675 million out of $3.1 billion amounts to just less than one quarter of total assets.

supportive. In this case alone, administrative fees for the Faculty Plan (which had two recordkeepers throughout the Class Period) were actually lower than for the Medical Plan (which had one recordkeeper as of 2013). (Wagner Decl. at 29-30.) In any case, even assuming that a single recordkeeper might have resulted in lower fees, the Court is not persuaded that the Committee was imprudent for failing to consolidate the Plans sooner.[45]

A principal point plaintiffs made at trial was that on a number of occasions spanning several years, Cammack advised the Committee that consolidating recordkeepers would result in savings. (*See*, *e.g.*, PX972 at 8; PX480 at 1; PX463 at 2-3; PX976 at 1; PX235 at 4; PX504 at 4; PX368 at 3; PX9 at 7; PX971.) For example, in its report dated June 14, 2010, Cammack listed certain advantages of consolidation to a single vendor arrangement. (PX1248 at 10-13.) These included, *inter alia*: increased purchasing power resulting in lower cost investments; ease in the administrative burden; simplification of compliance costs; enhanced control of NYU over assets; and more efficient fiduciary monitoring. (*Id.* at 11.) On July 14, 2010, Cammack provided a report focused solely on vendor consolidation, which added details on TIAA-CREF pricing according to the 2009 RFP. (DX462 at 10.) A similar report was provided on September 23, 2010,

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[45] It is also notable that the majority of TIAA's largest two hundred clients use multiple recordkeepers. (Chittenden Decl. ¶ 45.) Of the clients that have consolidated to a sole recordkeeper, the overwhelming majority chose to consolidate with TIAA as their sole recordkeeper. (*Id.*) Two of Cammack's three relevant clients in 2011 employed a multiple-recordkeeper arrangement at that time; as of 2016, six of thirteen relevant clients employed a multiple record-keeper arrangement. (Rezler Decl. ¶ 58.)

(PX598), and in November 2010, (DX465). In December 2010, Cammack's report noted:

- It is extremely difficult, if not impossible, to effectively manage the existing multi-vendor arrangement while meeting the compliance requirements of the regulations cited previously.
- Multi-vendor arrangements are not cost-efficient, as vendors are forced to compete for assets contributed to the plan, and therefore cannot offer lower cost fund options or lower administrative expenses (higher fees cause participants to realize lower investment returns).
- The arrangement requires plan participants to follow an unnecessarily complicated process if they want to move account balances from one investment with one vendor to another vendor.
- Many functions, such as loan processing and new participant enrollments, cannot be fully automated online as no single vendor has all required information.
- Participant communications for newly eligible participants and educational campaigns for all active participants are extremely difficult to coordinate across multi-vendor programs.

(PX232 at 4.) The same report stated that the "disadvantages to consolidating the program to a single vendor are few," but included: a disruption to participants using Vanguard or Prudential, a possibility that employees would view it as a "take away," and considerable work for the NYU benefits team. (*Id.* at 7.) A similar report was issued the following month. (PX246.)

There is no evidence that in making its recommendations in favor of consolidation, Cammack considered: (1) certain technical issues pertinent to consolidation of the Faculty Plan; or (2) that over three quarters of the Faculty Plan's assets were in TIAA annuities that only TIAA had any experience recordkeeping (that is, literally no other vendor had ever recordkept TIAA annuities). Thus, the Court does not view the existence of the Cammack recommendations, and any failure to follow those recommendations, as strong evidence of imprudence. Indeed, it demonstrates Committee decisionmaking independent of Cammack.

Recordkeeper consolidation at an institution such as NYU is a complex and time-consuming process. (Meagher Decl. ¶ 42; Dorph Decl. ¶ 18; Petti Decl. ¶¶ 25-28.) It requires significant planning and a long, detailed process involving coordination of vendors and the plan sponsor, as well as a detailed rollout plan.[46] (Meagher Decl. ¶ 42; Dorph Decl. ¶ 18; Petti Decl. ¶¶ 25-28.) This is in addition to any technical systems reconfiguration that has to be made and tested for new or changing file interfaces. (Meagher Decl. ¶ 42; Dorph Decl. ¶ 18; Petti Decl. ¶¶ 25-28.) A move to consolidate retirement plan vendors requires a substantial amount of organizational resources in technology, time, person-

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[46] The rollout plan would include drafting detailed notices and communications to participants, negotiation of legal agreements, disruption of plan operations as a result of the need to temporarily freeze contributions, distributions, loans, changes in investment elections, a blackout period with applicable notices to participants, fund mapping (to the extent that is possible), reconfiguration of existing support systems, default investment processes and multi-stage communication to plan participants, all with appropriate review and auditing of implementation.

nel, and money. (Meagher Decl. ¶ 42; Dorph Decl. ¶ 18; Petti Decl. ¶¶ 25-28.)

The evidence at trial persuasively demonstrated that, unlike the Medical Plan, the Faculty Plan was subject to administrative and technological issues that made a switch to a single recordkeeper practically quite difficult. In and around 2008-2010, NYU Washington Square (the employees of which utilize the Faculty Plan) was in the midst of a number of human resources and technological system switchovers; NYU Langone (the employees of which utilize the Medical Plan) was not. Credible testimony at trial supported IT concerns as a significant factor the Committee considered in determining whether or not to go to a single record keeper.[47] As Petti testified:

> in order to implement a single-record keeper process, there needed to be a facility that was actually implemented and so the underlying resources, the underlying technology, the underlying support by the university in order to be able to do that. And so in order to successfully implement a single-record keeper process, the university has to provide the resources and make them available in order to make it a successful implementation.

(Tr. at 442:6-13.)

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[47] Plaintiffs assert that the lack of reference to technical issues in the Committee minutes means it was not a material issue. The Court disagrees. Rather, the Court credits the CFO's (Dorph's) testimony in which he described his knowledge of the issue and a technical presentation made to individuals who sat on the Committee. (*See generally* Tr. at 1358-1361.)

In 2008, Washington Square (for the Faculty Plan) was beginning the complex process of updating multiple computer systems and programs at the University, including updating and modernizing all of NYU's systems for payroll, finance, student records, and human resources. (Dorph Decl. ¶ 15; Tr. at 535:16-21.) A series of major system implementation projects followed. (Dorph Decl. ¶ 15.) The new human resources ("HR") operating system "went live in May 2014," but implementation was not complete until 2015. (Tr. at 1364:2-8.) The result—which took several years—was one system for all of the university's HR needs. (*Id.* at 535:16-21.) It is clear that the technological issues at Washington Square were a very real concern on which NYU spent significant time and money.[48] (These problems did not exist at Langone (i.e., for the Medical Plan), which had already converted to a new HR system. (*Id.* at 1365:8-17.))

The primary trial witness on the technical issues impeding recordkeeper consolidation was Dorph, NYU's then-CFO. Dorph's testimony on this issue was detailed, thorough, consistent, and credible. He testified that as of his arrival at NYU in 2007, NYU's fi-

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[48] Plaintiffs argue that technical issues are an *ex post* justification for the failure to consolidate; plaintiffs point to the absence of such concern reflected in the Committee's meeting minutes. (Tr. at 154:7-155:17.) Woodruff, for example, served as a fiduciary for two years but was unable to recall during her deposition why the Faculty Plan did not consolidate. (Woodruff Dep. Tr. at 332:5-336:4.) However, the Court credits the evidence that the meeting minutes were not meant to reflect all discussions and considerations by the Committee. (Halley Decl. ¶ 9; Surh Decl. ¶ 8.) The Court thus finds, by a preponderance of the evidence, that technology concerns were a real issue for the Committee and a major and sufficient reason that the Faculty Plan's consolidation was delayed.

nance system, human resources system, and student information systems were "considered to be legacy systems, meaning systems of previous generations of software." (*Id.* at 1358:3-5.) He was "quickly confronted with the question of ... if and how, and how best to implement changes to the systems." (*Id.* at 1358:6-10.) His team thus conducted a "readiness assessment" and hired an IT consulting firm to plan out the system changes. Dorph testified:

> What they basically told us in 2008 or whenever their report was issued is that we weren't ready. There were a lot of steps we needed yet to take to be ready to implement changes to our systems. And it's really important to understand when we talk about changes to our system, we are not talking about unplugging one plug and putting in another plug. If you think about the HR system, there's records of literally tens of thousands of people in the system, there are hundreds of users of the system, there's processes that flow through not only the HR process itself but then connect to things like the finance system, to our budget systems and so forth.
>
> So when we talk about readiness, it's not a question of just replacing one app with another app the way you do on your phone, it's a question of do we have people in place who actually can take us through the process of figuring out what functionality we need, what software vendors can meet the functionality, what changes we need to make to the software to provide the functionality that we need to have to maintain our services to our employees. We asked that question with regard to all of the

> systems, including our HR system, and we were told we didn't have the people and sophistication in place. We proceeded almost immediately to do that. One of the recommendations was to create something called a program services office who could help us navigate—think about it as a three-part triangle. There are the IT folks who plug things in and make them run, there are the business process owners, the people like the HR department or the accounting department and so forth who actually in some respects own the systems, and then the users who are out there in the university using the systems every day in schools or who might be finance officers in the schools and so forth.

(*Id.* at 1358:16-1359:22.) Thus, the NYU team sat down with stakeholders to determine which systems would be updated and in what order. It brought in a consultant to analyze "the finance system, the HR system, the student information system. We also talked about the need for a data warehouse so we could get up-to-date reports out of all of these systems." (Tr. at 1360:8-11.) Dorph further testified:

> Just to make sure you understand the magnitude of what we're talking about, the three systems at the end of the day that we replaced we probably spent between [$]80 and $100 million replacing these systems, I assure you software was only a small component of that. The need for all of this process, design, figuring out which software could actually do the best job, bringing on the consultants to help us figure out how to connect systems to each other—just by way of example, when we actually put in the HR system ... a couple of years ago, we had to

> create what we call interfaces to other systems. The HR system required 136 interfaces to other systems. I remember that number because we quoted it often because we were often explaining to people the complexity of our IT environment. So the software is a small piece of the overall system requirements.
>
> But at the core of this is the need to make sure that the functionality continues and is not interrupted. To go back to HR system, what was then the [Human Resources Information System] and the payroll systems, as I said, were legacy systems. They were old. They were repeatedly patched. They were systems that were connecting to all these other systems. And when you ... don't change that and then you start putting more functionality on top of it, you take the risk that things will go wrong.

(*Id.* at 1360:20-1361:18.) A change in recordkeepers would entail significant coordination with and changes to the new systems being implemented; NYU believed any recordkeeper switch could not be completed without risk of significant errors or additional changes prior to completion of this global update of NYU's systems and technology. (Dorph Decl. ¶ 15; Meagher Decl. ¶¶ 22, 38.)

In sum, the Court finds that these technical issues meant that consolidation of the Faculty Plan prior to completion of the systems update was likely to result in substantial participant disruption. Thus, until the other system updates were completed, it would not have been prudent for the Committee to consolidate recordkeep-

ers for the Faculty Plan.[49] Certainly a decision not to consolidate at this time was not imprudent.[50]

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[49] NYU also appropriately considered that certain participants viewed Vanguard as a valuable vendor and viewed the Vanguard website as having value. Elimination of Vanguard (if that was the result of consolidation) thus constituted a loss of a valuable tool to some participants. (Tr. at 158:7-160:14.)

[50] As of trial, the Faculty Plan was converting to a single recordkeeper, a process which had taken 12-18 months. It has required:

> all sorts of tests of the software and the connections and the data flowing back and forth, we've had to change the way the actual calculations of these contributions are made and have had to test that numerous times, and we've had to spend a lot of time dealing with the employee communication issue, which, as we discussed earlier, ... started, among other times, with the faculty around their benefits committees, but now is in the actual process of describing the changes themselves, how they can get access to ... their retirement funds. When we are on the new sole recordkeeper system, to be honest, it's— the complications, although they exist on both sides, it's the Vanguard funds that people would be particularly upset about, because here was someone that used to have a Vanguard account, and even though Vanguard will still hold the funds, they will need to access information about those funds by going through a TIAA-CREF portal. We've already had people who have received communications and had suspicions that that meant we were trying to force them into TIAA-CREF. So it's those kind of communications, to say nothing of the legally required ERISA communications, to say nothing of blackout periods and so forth that have to happen.
>
> So bottom line, an incredibly extended period of time involving dozens upon dozens of people and consultants and software folks and so forth.

(Tr. at 1366:9-1367:10.)

1. *RFP Frequency*

Plaintiffs assert that more frequent RFP processes for both Plans would have exerted competitive pressure on recordkeeping vendors, resulting in either a reduction of fees by an existing vendor or a better deal altogether.[51] According to plaintiffs, the Committee was imprudent in issuing infrequent RFPs. The Court finds otherwise. The record at trial persuasively demonstrated that NYU had particular needs, a particular technological environment, and infrastructure that made the frequency of its RFP process during the Class Period adequate. In addition, plaintiffs ignore that over the course of several years, NYU's recordkeeping fees consistently *decreased* as NYU obtained repeated rate reductions.

The Committee issued its first RFP in September 2009; this eventually resulted in the Medical Plan's consolidation of recordkeepers in March 2013. It did not result in consolidation for the Faculty Plan. The Committee did not issue another RFP for the Faculty Plan until 2016.[52]

Vendors submitted detailed responses to the 2009 RFP. TIAA, which was already a recordkeeper, itself submitted a substantial and detailed response. It provided extensive answers to all questions and provided an expense projection. (Chittenden Decl. ¶ 21; Rezler Decl. ¶ 21; DX21.)[53] Vanguard and Fidelity likewise

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[51] Cammack recommended conducting an RFP every three to five years "to ensure continued competitive pricing." (PX477.)

[52] That RFP resulted in the Faculty Plan's consolidation with TIAA, which became effective in May 2018. (Tr. at 1189:5-9.)

[53] TIAA also created a Microsoft Excel spreadsheet detailing an investment array for the plan that included information regard-

provided detailed information in their response to the RFP, including extensive information detailing fees, fund performance, and fund expenses.[54] (Rezler Decl. ¶ 22; PX65; DX395.) Aside from price alone, the Committee was "sensitive to the variation in service capability that existed among different vendors." (Tr. at 1136:24-1137:2.)[55]

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ing performance history versus benchmarks and standard deviation versus benchmarks as well as all fees, including investment management fees, revenue sharing, and the total expense ratio. (Rezler Decl. ¶ 21; DX21 (and following non-Bates labeled printout of corresponding Excel document)).

[54] The 2009 RFP resulted in a range of price proposals: the lowest fee proposed was from Great West at 13 basis points; TIAA and Diversified both bid 15 basis points; Vanguard bid 17 basis points; and Fidelity bid 18 basis points. (Rezler Decl. ¶ 26; Chittenden Decl. ¶ 72; PX133; PX134 at 21.) Prudential, Affiliated Computer Services ("ACS"), and Hewitt each declined to submit a proposal. (PX134 at 8.) Fidelity also offered a flat dollar per participant fee of $80-85 per year, but this excluded certain services such as employee education and counseling, which would be offered only on a "fee for service" basis. (*Id.* at 21 n.2, 24.) The bidders' proposed rates were based on an assumption that not "all plans and all assets would be able to be mapped" to the respondent. (Tr. at 319:22-320:17, 1245:3-17; Rezler Decl. ¶ 16; PX134 at 21.) Rather, each expected to receive about $675 million in assets, with the remainder staying with TIAA. (Each bidder's specific assumption was slightly different, though those differences are immaterial to the Court's conclusion here.)

[55] For example, Fidelity's flat fee bid did not "necessarily include services—so for example, on-site education, mailings." (Tr. at 1247:5-15.) Thus, while certain vendors had lower rates than others, the Committee wanted to ensure that participants would receive a high level of service. TIAA's services to NYU are included in the bundled recordkeeping price and is referred to as a "high-touch" service model that includes, *inter alia*, an interactive online tool, a call center (which had 120 representatives trained on NYU's Faculty Plan during its transition to NYU as sole record-

At meetings in April and September of 2010 and January and March of 2011, the Committee worked to finalize its decision. It reviewed the advantages of consolidation with a single recordkeeper, highlighted the reduction of fees that would result from consolidating with TIAA, and discussed streamlining the fund lineup. (*See*, *e.g.*, PX480, PX463, PX460.) They also noted that Langone (for the Medical Plan) and the University (for the Faculty Plan) would need approval from senior management before making a move (or "map") to a single recordkeeper, (PX463 at 3), and discussed moving assets between vendors or types of products (a process generally referred to as "mapping") as well as their understanding that "NYU has the capability to move the assets at Vanguard to TIAA" but that "the existing contract [i.e., the annuity contracts] with TIAA does not allow NYU to move [TIAA] assets to another vendor."[56] (PX460 at 2.) (This "mapping" issue is discussed further below.)

On April 1, 2011, the Committee formally approved consolidation to TIAA as a single recordkeeper for the Medical Plan. (PX481 at 1.) In 2013, the "Committee determined that due to the complexities of a consolidation and the perceived expectations of faculty and staff for the NYU retirement program, a move to vendor consolidation [would] not be undertaken [for the Faculty Plan] at [that] time." (DX576 at 3.)

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keeper), and a minimum of 150 days per year of on-site education (e.g., one-on-one counseling and/or group meetings on campus)—some of which is outside normal business hours at no extra cost. (Chittenden Decl. ¶¶ 85-88, 95-98.) The Committee appropriately weighed and considered the entire array of services and overall value presented by each RFP respondent.

[56] The Court discusses this understanding in more detail below.

In 2016, the Committee issued a second RFP for the Faculty Plan.[57] (DX42.) Four responses were received and Cammack crafted a detailed presentation comparing them. (DX404 at 2, 8-32.) In response to this second RFP, TIAA offered further reduced rates. (PX1366 at 1.) A key issue on which the Committee focused was disruption to the Faculty Plan's participants. (Petti Decl. ¶¶ 32, 36; Dorph Decl. ¶¶ 16-18.) It also considered its understanding that, because a significant amount of the Faculty Plan's assets were held in annuity contracts, there were questions as to whether any vendor other than TIAA could or had the appropriate expertise to recordkeep them. In this regard, the Committee either was unwilling or believed it could not move participants' investments in TIAA traditional annuities, the CREF Stock Account, or the TIAA Real Estate Account to other investments. (Halley Decl. ¶ 39.) In addition, the Committee also knew that no other vendor had ever recordkept TIAA annuities on their own platforms. Thus, as a practical matter, the Committee viewed TIAA as an entrenched recordkeeper for its own annuity products—and that the concept of "consolidation" would need to account for TIAA's continued role. (Halley Decl. ¶ 40.) On February 23, 2017, the Committee voted unanimously to move to TIAA as the sole recordkeeper. (DX592 at 1.)[58] This deci-

[57] Consolidation of the Faculty Plan to a single recordkeeper was raised on February 26, 2015, but discussion was postponed to another meeting. (PX479 at 2.)

[58] Plaintiffs also argue that both RFPs improperly favored TIAA, as evidenced by, *inter alia*, alleged secret meetings or communication with TIAA by a Committee co-chair, Meagher. (Tr. at 188:22-189:14, 190:24-191:23, 193:3-10, 194:9-196:25; PX831; PX845.) The evidence does not support this. The Court has considered the evidence plaintiffs have proffered in this regard. While

sionmaking process was considered, careful, and prudent under the particular circumstances here.

2. *Fee Negotiations*

While plaintiffs assert that the Committee did not negotiate fee reductions zealously enough, the record reflects a number of serious—and successful—efforts by the Committee to reduce recordkeeping fees. As of 2018, both Plans' fees for the TIAA assets decreased substantially—from 19.9 basis points in 2008 to 3.0 basis points for the Faculty Plan and to 4.0 basis points for the Medical Plan in 2018. (Chittenden Decl. ¶¶ 70-84; Rezler Decl. ¶¶ 27, 33-34; Halley Decl. ¶ 25; PX477 at 1; DX529 at 1; DX592 at 1.) Vanguard's fees for the Faculty Plan also decreased, from 10.0 to 6.0 basis points. (DX144 at 2.)

In addition, while the number of Plan participants and total Plan assets increased during this same period, the amount of fees decreased.[59] Indeed, at several

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it might have been more advisable for Meagher not to have communicated with TIAA at this time as she did, ultimately the communications played no role in the decisionmaking process. Meagher was only one vote and there is no indication that she could have or did sway the Committee's decisionmaking on recordkeeping fees based on her views of TIAA or influence potentially exerted by TIAA. TIAA was selected after a fair review process. (*See, e.g.*, PX128.)

[59] Between 2012 and 2016, for example, assets in the Faculty Plan increased from $1.98 billion to $2.62 billion, and the number of Faculty Plan participants increased from 14,368 to 18,551. (DX48 at 2, 18; DX3 at 2, 19). However, in 2012, the total administrative fees for the Faculty Plan were $2.88 million, (PX700 at 2), but in 2016, total fell to $2.10 million in 2016. (PX718 at 2.)

Likewise, the Medical Plan's assets grew from $1.43 billion to $2.02 billion (even though the number of Plan participants fell from 11,876 to 8,560) between 2012 and 2016. (DX28 at 2, 18; DX4 at 2,

junctures, the Committee secured retroactivity for the lower rates it secured, and participants received revenue credits.

3. *The Portion of Plan Assets Available for Bid*

More than three quarters of the Plans' assets are held in legacy TIAA annuities, or about $2.4 billion of the $3.1 billion in Plan assets (as of 2009). In connection with the 2009 RFP, the Committee requested bids for recordkeeping on only the non-annuity assets, which amounted to $675 million (or less than one quarter of total assets). Plaintiffs argue that limiting the RFP to non-annuity assets was imprudent because it prevented competitive bidding on the fees for over three quarters of Plan assets, thereby (according to plaintiffs) preventing potential cost reductions. They contend that any recordkeeper could have recordkept the TIAA annuities or, in the alternative, the legacy TIAA assets could have been "mapped" (i.e., moved) to similar funds held by a different vendor. The Court disagrees.

Under the circumstances here, limiting the RFP to the non-annuity assets was reasonable. A primary reason not to include the annuity assets in the RFP was that they were maintained and funded by TIAA, and other entities lacked the experience and ability to recordkeep such assets. As discussed below, the preponderance of the evidence supports defendant's position that TIAA annuities have never been recordkept by a different vendor (anywhere, at any time), and that they have only once (and under very different circumstances) been mapped to non-TIAA funds.

19.) However, the Plan's total administrative fees fell from $1.90 million in 2012 to $1.49 million in 2016. (PX672 at 4; PX688 at 4.)

i. *Background on TIAA Annuity Products*

TIAA annuities are insurance policies governed by contracts between TIAA and individual participants; a plan sponsor is not a party to the contracts. The annuity contract states that it is a "contract between you, as its owner (Annuitant), and TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA (TIAA). No other person or institution is a party to this contract."[60] (*See*, *e.g.*, PX731 at 5.)

TIAA offers four types of TIAA traditional annuity contracts. The oldest, now known as the Retirement Annuity ("RA"), limits withdrawals and transfers to ten annual installments; while other annuities have more liquidity, the RAs have lower total crediting rates. (Chittenden Decl. ¶¶ 23-24.) As April 2018, the RAs were still TIAA's largest contract type in terms of contributions, and there is no indication that RA plans will be discontinued in the future. (Tr. at 587:1-16, 590:2-14.) TIAA also offers a Supplemental Retirement Annuity ("SRA"); this contract is similar to the traditional RA, but allows for lump-sum withdrawals without restrictions or charges. (Chittenden Decl. ¶¶ 27-29.) Both RA and SRA contracts are individually-owned contracts between an NYU participant and TIAA. (*Id.* ¶¶ 23, 27; Tr. at 596:16-18.)

The third traditional TIAA annuity type is referred to as the Group Retirement Annuity ("GRA"). (Chittenden Decl. ¶ 31.) Participants receive individually-controlled certificates, enforceable directly against TIAA. (*Id.*) Like the SRA, the GRA allows lump-sum withdrawals and transfers, though there are limita-

[60] While the annuity contracts changed over time, they always included some form of this language.

tions. (*Id.* ¶ 28.) Unlike the RA and SRA, within 120 days of termination of employment, a participant in the GRA may take a lump-sum withdrawal, subject to a 2.5% surrender charge. (*Id.* ¶ 32.) The same is true for yet another annuity type, the Group Supplemental Retirement Annuity ("GSRA"). (*Id.* ¶¶ 34-35.) When sponsors (such as NYU) offer these TIAA annuity contracts, TIAA requires that the sponsor also offers the CREF Stock Account and CREF Money Market Account. According to TIAA's Chittenden, TIAA views these offerings as ensuring that participants will have a minimum ability to diversify their retirement accounts. (Other fund offerings determined by the sponsor may provide additional diversification opportunities.) TIAA does not require that participants in TIAA traditional annuities invest in these options. (*Id.* ¶ 38.)

In 2005-2006, TIAA introduced two additional forms of annuity contracts—respectively, the Retirement Choice ("RC") and Retirement Choice Plus ("RCP") contracts. (*Id.* ¶¶ 39, 40; Tr. at 586:15-18.) Unlike TIAA traditional annuity accounts, these are group contracts institutionally controlled by the sponsor. (Chittenden Decl. ¶ 41.) For purposes of this case, the key difference between the TIAA traditional annuities and these "group choice" annuities concerns the ability to move (or "map") the assets to another vendor or vehicle. With ninety days' notice, a plan sponsor can elect to map assets over the course of sixty months without a surrender charge. (*Id.*)[61]

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[61] The NYU Plans do not and have never offered RC or RCP contracts. (Tr. at 470:17-471:12, 520:6-521:4.)

ii. *Recordkeeping TIAA Annuities by Non-TIAA Vendors*

Plaintiffs first contend that the Committee should have anticipated an RFP outcome in which some entity—that had never before recordkept TIAA annuities—could have bid to recordkeep all assets (including the TIAA annuities) and won. However, the evidence conclusively demonstrated that the "only firm that recordkeeps TIAA annuities ... is TIAA." (Tr. at 595:24-25.) At the very least, no other vendor has any experience recordkeeping TIAA annuities.

The most impressive witness at trial was a TIAA employee, Douglas Chittenden.[62] He acknowledged "the complexity associated with the TIAA product, the vintages [referring to the dates of annuity offerings] that are available to you as you save your money over time, the different mortality basis that you are able to purchase annuity benefits under as you're saving, [and] all the range of payout options that are available ... ." (Tr. at 596:1-5.)[63] Similarly, Vanguard's George Hem-

[62] Chittenden, an Executive Vice President at TIAA who oversees the institutional servicing and relationship division, is extremely knowledgeable in the area of 403(b) and other retirement plans, as well as on the pricing, substance, and mechanics of TIAA's products and recordkeeping. (*See* Tr. at 559:13-19; Chittenden Decl. ¶ 1.) His testimony was well-grounded, based on articulated facts, consistent, and forthright.

[63] Plaintiffs themselves offered consistent testimony. Plaintiffs' own expert, Michael Geist, conceded that while in his experience at T. Rowe price several of its seven university plans included TIAA annuities, those plans required multiple recordkeepers. (Tr. at 705:2-706:7.) In other words, if T. Rowe Price was going to recordkeep for a plan that offered annuities, the plan remained with (at least) two recordkeepers (so that someone else—likely TIAA—could recordkeep the annuities). (*Id.* at 781:7-10.) When T. Rowe Price bid on a higher-education institution's plan that had

ing[64] testified at his deposition that "Vanguard is not able to record keep the TIAA annuities."[65] (Heming Dep. Tr. at 174:22-175:3.) Thus, he explained, NYU would have had "to maintain a recordkeeping relationship with TIAA if they want to keep [existing] annuities active." (*Id.* at 175:20-23.)

Simply put, on the record before the Court, no other vendor has ever recordkept TIAA annuities; even if it were legally possible to have another vendor do so, the Committee was not imprudent in preventing Plan participants from being a vendor's "guinea pigs" for whom it tries recordkeeping TIAA products for the first time. Accordingly, the Court is not persuaded that the Committee acted imprudently in limiting the asset base up for bid in the RFPs to non-TIAA annuity assets.

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existing annuities, T. Rowe Price would not bid to recordkeep for the annuities. Instead it would "propose a different investment lineup," (i.e., that "whoever is in annuities move their money from annuities to something else"). (*Id.* at 723: 9-24.) If people wanted to keep annuities, T. Rowe Price "would not be able to provide what they were asking for, with respect to those investments." (*Id.* at 724:1-10.) While they would be able to "do something," it "wouldn't necessarily have been automated. So it would have probably required more manual work if you hadn't build the infrastructure to do something like that. ... It just wouldn't be as efficient." (*Id.* at 704:16-705:1.)

[64] While not intimately familiar with NYU's Plans, Heming appeared to be very knowledgeable on Vanguard's services and abilities generally. He has been a principal at Vanguard for twenty years. (Heming Dep. Tr. at 8:5-10.)

[65] He elaborated that, based on his understanding, "TIAA doesn't permit the annuities to be record kept on any other ... platforms but theirs. They haven't opened up their architecture." (Heming Dep. Tr. at 175:7-11.)

iii. *Mapping Assets to Different Funds*

Plaintiffs next claim that, even if a non-TIAA vendor would not be able to recordkeep the *TIAA* legacy assets, the Committee should still have put all Plan assets up for bid because legacy assets could have been moved or mapped to different funds; these different funds could, then, be recordkept by a non-TIAA vendor. The Court finds otherwise. The evidence demonstrates that TIAA annuity assets have not previously been "mapped" into similar funds with a different recordkeeper.[66]

Defendant's retirement plan expert, Marcia Wagner,[67] testified that she had never seen a situation

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[66] As discussed, defendant asserts that the annuity contract, to which NYU is not a party, prevents it from moving a participant's assets without his or her consent. Plaintiffs counter that even if that is true, ERISA's duty of prudence and/or the Plan document supersede the annuity contract, such that defendant was still obligated to map the assets to different funds. The Court need not resolve this question; as a matter of fact, it was not imprudent to put only the non-legacy assets up for bid in the RFP on the assumption that TIAA would continue to recordkeep the legacy annuities, as no other vendor had ever done so.

[67] Wagner was highly credible; the Court finds her qualified as an expert on retirement plan processes. She provided opinions on the processes NYU followed after 2009 with respect to (i) selecting and monitoring plan administrative service providers and reviewing their fees as well as (ii) offering and monitoring the TIAA Real Estate Account and CREF Stock Account under the Plans. In particular, she provided helpful information to the Court on industry standard processes during the relevant time frame. Wagner has extensive experience designing and consulting with respect to 403(b) plans, including the types of 403(b) plans involved in this case. *(Id.* ¶ 2.)

Wagner is the principal of The Wagner Law Group, which she founded more than twenty-one years ago. (Wagner Decl. ¶ 1.) Her firm employs more than thirty lawyers, who collectively focus

where a plan sponsor moved assets out of TIAA annuities without a participant's consent. (Tr. at 1418:3-8.) TIAA's Chittenden agreed, and testified that TIAA Traditional annuities could not be mapped out.[68] (Tr. at

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exclusively on ERISA employee benefits and executive compensation. (Tr. at 1401:14-22.) She has extensive experience designing and consulting on 403(b) plans. (Wagner Decl. ¶¶ 1-2.) She has worked with dozens of 403(b) plan sponsors on their request for proposal ("RFP") processes. (*Id.* at 1402:1-7.) Wagner's experience includes (i) advice on the structure and establishment of plan investment and administrative committees, (ii) counseling such bodies on the design of investment menus and recommending the processes to be used for selecting investment options to be included thereon, as well as monitoring their performance and expenses, (iii) preparing investment policy statements that allocate fiduciary responsibilities and provide guidance on the criteria and processes involved in investment selection and monitoring, (iv) guiding plan committees on due diligence processes for issuing requests for proposals relating to a plan's engagement of recordkeepers and other service providers and the information to be considered, decision-making process and documentation recommended before making a final selection, (v) advising plan committees on the criteria for evaluating the performance and fees of service providers, and (vi) attending meetings of fiduciary committees to provide advice regarding issues arising in the performance of their duties. (*Id.*) She has advised fiduciary committees, including committees responsible for large plans, on the process and criteria to be used in the selection of recordkeepers. (Wagner Decl. ¶ 2.)

[68] There was a single occasion on which TIAA mapped assets in certain money market accounts without permission or voluntary participation by investors; this was due to "an opportunity because of the very low interest rates to do things with the money market account when needed, if applicable." (Tr. at 677:19-678:9.) He explained:

> But there was a period of time when interest rates were so low and ... the view was that people who held assets in the retirement plan in a money market account was not a good thing, because they were earning basically nothing on it, that on a one-time basis we went to the plan sponsor, said, look, if

587:1-3.) The "vast majority of [NYU] participants are invested in funds which NYU cannot transfer." (*Id*. at 1235:22-24 (Rezler testimony).) Even Geist, plaintiffs' expert, could not recall a time when a "plan sponsor forced participants to move their money from an RA contract to an RC contract." (*Id*. at 885:10-13.)[69] Geist recalled only one situation in which he was able to convince an institution to move assets out of fixed annuities into other products; that institution was a high school with a plan of only about $5 million in assets. (733:24-737:17.)[70]

> you want to do something proactively with these people's assets so that they, you know, don't hold the money there for a long period of time when the prospects are so bleak, we can work with you to do that.

(Tr. at 678:14-21.) Those circumstances were not present here and thus, the Court does not find it unusual that the Committee did not attempt a similar resolution.

[69] Plaintiffs also claim that RA contracts are themselves imprudent, and that only RC contracts should have been offered. However, plaintiffs concede that RC contracts have advantages and disadvantages, and they also elicited testimony that the RC return or income guarantee—between 1-3%—is lower than the RA guarantee.

As Chittenden explained, TIAA does not view RC contracts as simply a better version of RA contracts. When asked by the Court if the introduction of RC plans indicated the "death of the RA plans," he responded that "certainly some plans adopted RC," but that the RA contracts "had a 3 percent guarantee, [which] looked appealing" to participants. (Tr. at 587-17:588-2.) He also noted that TIAA Traditional annuities are still being used by universities all over the country and that it is likely still TIAA's largest contract type in terms of contributions. *(Id.* at 587:-14.)

[70] Specifically, the institution stopped new contributions into the TIAA annuities, but the assets already in fixed annuities still could not be mapped to new accounts by the plan sponsor, (Tr. at

Accordingly, the Court finds that the RFP's treatment of the legacy assets was not imprudent for failing to allow for "mapping" to non-TIAA funds.[71]

B. *The Committee's Fee Negotiations Outside the RFPs*

Plaintiffs argue that the use of revenue sharing that was not capped at a particular dollar amount was an imprudent way to collect fees. According to plaintiffs, this arrangement allowed the overall collection of fees to exceed that which was reasonable when calculated on a per-participant basis. Instead, according to plaintiffs, if allowed at all, revenue sharing should have been capped at some amount that would translate into a

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735:10-23); the plan would need to keep two recordkeepers unless it consolidated with TIAA, who managed the annuities, (*id.* at 735:24-736:2.)

[71] Plaintiffs also asserted that even if the assets in individual annuities were not mappable, NYU should have "frozen" the existing accounts and encouraged participants to move assets to other investments. They claim that this would have given the Committee leverage in negotiations to secure a lower fee arrangement. However, the evidence in the record on this topic—of which there is not much—does not support this assertion. Geist testified that he could not think of any plan where T. Rowe Price "successfully convinced the plan sponsor to freeze their annuity product and move to a T. Rowe Price investment lineup." (Tr. at 736:16-20.) Additionally, Cammack's Rezler testified that even if the funds had been frozen, this would not have allowed them to be removed from the relevant TIAA fund. (*Id.* at 1237:14-16.) The evidence in the record does not support the assertion that freezing TIAA annuities would have been likely to lead to lower fees for the Plans. Additionally, given the plaintiffs' ongoing and rigorous negotiations regarding fees (discussed in greater detail elsewhere), the Court is not persuaded that the Committee acted imprudently by not freezing—or threatening to freeze—any TIAA funds.

specific per-participant fee of (for instance) not more than $35 annually. The Court finds otherwise.

In addition and along the same lines, plaintiffs argue that NYU acted imprudently by failing to move away from revenue sharing altogether and instead negotiate a flat per-participant recordkeeping fee (e.g., $35 per participant per year instead of 10 basis points per year). The Court is also not persuaded, on the record here, that a flat rate would have been a more prudent way to collect fees than through revenue-sharing.

Plaintiffs proffered Geist's testimony in support of these positions. For the reasons already discussed, the Court did not find Geist a reliable expert in this area and does not rely on his testimony. But in all events, even his testimony was not supportive of plaintiff's positions. While he testified that, as of the mid-2000s, plans were moving away from revenue sharing, (Tr. at 843:21-845:9), he also testified that, as recently as 2010, 40-60% of big plans still used revenue-sharing models, (*id*. at 850:15-853:16). Moreover, when he left T. Rowe Price in 2016, 25% or more of large plans may still have been using revenue-sharing models. (*Id*.)

In contrast to Geist, defendant's expert, Wagner, provided reasoned, factually-based testimony supportive of defendant's position. She testified that it is "extremely common" for 403(b) plans to price administrative services by basis points of assets under management. (*Id*. at 1402:23-1403:5.) She further testified that it is "highly *un*common" for pricing in 403(b) plans to be on a flat per-participant basis. (*Id*. at 1403:9-17 (emphasis added).) Furthermore, Cammack's Rezler testified credibly that with regard to Fidelity's per-participant quote, the total fees actually worked out to twice as much as a 15 basis point arrangement would

have cost in the first year.[72] (Tr. at 1257:12-24.) He thus testified that in 2009-10, when vendors began offering per participant flat dollar annual fees, their quotes were often "in excess of the amount generated under the basis point model."[73] (*Id.* at 1257:6-16.)[74]

In all events, the trial record here reflects due consideration of the appropriate pros and cons and rejection of using a flat per-participant model. (Halley Decl. ¶ 37.) For instance, the Committee considered a number of issues related to paying for services on a flat per-participant basis, including whether they thought the arrangement would be fair, given that a participant with a large account balance might pay the same as a participant with a relatively small account balance. (*Id.*) The Committee also inquired as to whether TIAA

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[72] Recordkeepers build growth into a basis point pricing model (i.e., build in assumptions about how quickly assets will grow); they cannot do this for per-participant fees and as a result, per-participant arrangements can sometimes end up being more expensive. (Tr. at 1258:2-10.)

[73] Cammack's Rezler testified that this scenario was demonstrated by Fidelity's 2009 RFP bid. (*Id.* at 1257:16-24.) During the 2009 RFP, Fidelity submitted two proposed fee arrangements, an 18 basis points asset-based fee and an $85 per participant fee. (PX134; Tr. at 1257:16-20). However, when Fidelity "supplied an analysis of how that would work out ... that analysis showed that in year one [Fidelity] would earn close to twice as much in revenue under the per participant methodology as opposed to the basis point methodology." (Tr. at 1257:16-24).

[74] Plaintiffs also argue that as the Plans' asset base grew, the cost to participants should have fallen, as the cost of recordkeeping is the same regardless of the number of participants or their account sizes. Thus, as the Plans' assets grew, so did the revenue share that was paid to the recordkeepers as fees. However, this fact alone does not render the model imprudent. The totality of circumstances must be considered, as they were here.

could charge for recordkeeping services on a flat per-participant fee basis. (*Id.*) TIAA explained, however, that flat dollar fees cannot be assessed against the TIAA and CREF annuity account balances in the Plans. (*Id.* at ¶¶ 37, 48.)

Accordingly, the Court is not persuaded that a revenue-sharing model itself or the Committee's choice to employ that model here was imprudent.[75]

C. *Objective Prudence of Plan Fees*

Plaintiffs assert that a reasonable recordkeeping fee would have been between $23-31 per year for the Faculty Plan and between $27-35 per year for the Medical Plan (as opposed to what plaintiffs calculated the revenue share to have amounted to: $140-270 paid for the Faculty Plan and the $152-274 paid for the Medical Plan). (Geist Decl. ¶¶ 185.) However, plaintiff's expert on this topic, Geist, failed to provide adequate data to back his numbers up.[76]

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[75] Additionally, the required revenue rates for the Plans had no "cap"—that is to say, there was no ceiling on the amount that any participant might pay. Plaintiffs assert that as assets under management increase, a revenue-sharing arrangement without a cap on fees leads to an ever-increasing dollar amount in fees paid to the recordkeeper. The preponderance of the evidence demonstrates otherwise. The concept of "capped" versus "uncapped" fees matters only in a theoretical sense; as assets under management increase, so may efficiencies, and a fiduciary can thus negotiate to reduce the basis point charge. (Tr. at 1148:19-1149:3.) Arrangements where fees are based on basis points but "capped out at a certain dollar maximum" are, at the very least, highly unusual. (*Id.* at 1248:6-25.)

[76] Additionally, Turki conducted a calculation to demonstrate the flaws in Geist's numbers by making three adjustments. (Turki Decl. at 7-8.) The Court found him highly credible. Turki he has

Accordingly, plaintiffs fail to demonstrate by a preponderance of the evidence that their proposed fee ranges were the only plausible or prudent ones—or, indeed, that any comparable Plan has ever charged within that range. Plaintiffs thus have not met their burden of proof as to damages for excessive recordkeeping fees. Indeed, on a per participant basis in every year following the consolidation of the Medical Plan with a sole recordkeeper in 2012, administrative fees for the Faculty Plan were actually lower than for the Medical Plan. (Wagner Decl. at 30-31, 79.)

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extensive experience as a damages rebuttal expert in ERISA matters.

Turki's first adjustment took into account that TIAA has disclosed to the Plans that approximately 40% of the total Plan services expense dollar amount is allocable to "recordkeeping services" as defined by DOL regulations. (*Id.*) Turki's second adjustment is based on the TIAA traditional annuity requiring separate recordkeeping, and as such, those recordkeeping fees should be subtracted from the total recordkeeping fees and considered separately. (*Id.*) Turki's third adjustment assumes "that any excessive annual fees should be allocated to Plan participants' accounts and reinvested in the Plan." (*Id.*) The Court agrees with each of these adjustments. Adjusting for these three factors, Turki shows that recordkeeping fees paid by the Medical Plan for assets other than the TIAA traditional annuity were *less* than Mr. Geist's admittedly "hypothetical" recordkeeping fees of $27-$35 per participant/per year." (*Id.*)

Turki correctly concludes that the "Geist damages for the alleged excessive recordkeeping fees are not predicated on a proper economic analysis, and when corrected for some obvious flaws do not establish that the [Faculty Plan] or the [Medical Plan] paid excessive recordkeeping fees over the period where the data are available." (*Id.* at 8.)

I. MONITORING FUND OPTIONS

Plaintiffs' second claim of imprudence relates to monitoring the performance of specific investment options. Plaintiffs assert that the Committee did not analyze fund performance on a regular basis and did not timely remove two funds in particular that allegedly underperformed. Plaintiffs also argue that the Committee acted imprudently by allowing the Plans to include too many investment options.[77] The evidence does not support these claims.

The evidence demonstrates that the Committee closely monitored the performance of the investment alternatives offered in the Plans. (Tr. at 338:7-339:19, 1152:20-1153:20; Petti Decl. ¶¶ 17-18; Surh Decl. ¶¶ 11-12; Halley Decl. ¶¶ 13-14.) Prior to each meeting, the Committee received and reviewed a detailed report from Cammack that analyzed the investment options. In evaluating specific funds, Cammack reviewed, inter alia, the fund's performance against its peers', investment objectives and risk, and expenses. (*See*, *e.g.*, DX456 at 50; PX34 at 45.) One of the factors used by Cammack and the Committee to analyze the funds was a widely-used measure of performance called "alpha," which is defined as the difference between the actual return and expected return. (Tr. at 1263:24-1264:9; Rezler Decl. ¶ 15.)

The Committee's minutes reflect discussion of the investment performance at numerous meetings, including those held on:

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[77] The Court previously dismissed this argument as a standalone claim, *Sacerdote* 2017 WL 3701482, though it allowed in some evidence to the extent it went specifically to the Committee's process.

- June 14, 2010[78];
- March 21, 2011[79];
- April 1, 2011[80];
- June 9, 2011[81];
- August 15, 2011[82];
- November 14, 2011[83];
- May 17, 2012[84];
- September 4, 2012[85];
- November 16, 2012[86];
- February 22, 2013[87];
- June 14, 2013[88];
- November 25, 2013[89];

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[78] DX562 at 3.

[79] PX460 at 3-4.

[80] PX481 at 3.

[81] PX375.

[82] DX569 at 2-3.

[83] PX472.

[84] PX482 at 2-3.

[85] PX382 at 2-3.

[86] PX380 at 1-2.

[87] PX467 at 2-3.

[88] PX368 at 3.

[89] PX458 at 2-3.

- February 26, 2014[90];
- May 22, 2014[91];
- August 19, 2014[92];
- December 11, 2014[93];
- February 26, 2015[94];
- June 9, 2015[95];
- September 15, 2015[96];
- December 16, 2015[97];
- March 2, 2016[98];
- June 1, 2016[99];
- September 8, 2016[100];
- December 12, 2016[101];

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[90] PX1240 at 2-3.

[91] PX461 at 2.

[92] PX49 at 1-2.

[93] PX469 at 2-3.

[94] PX479 at 1-2.

[95] PX1303 at 2.

[96] PX484 at 2-3.

[97] PX474 at 2.

[98] PX1331 at 2.

[99] PX471 at 2.

[100] PX520 at 2-3.

[101] PX519 at 2-3.

- February 23, 2017[102];
- May 24, 2017;[103]
- September 7, 2017;[104] and
- December 11, 2017.[105]

Cammack's reports contain detailed information regarding the Plans and the Plans' investments, including summaries of the Plans' total assets, summaries of the Plans' asset allocations (e.g., bond, money market, fixed income, large cap, small cap, etc.), capital markets reviews and analyses, quarterly economic reports (including discussion of equities, bonds, real estate markets, consumer sentiment, energy prices, and expert predictions), and detailed analyses of the Plans' investment alternatives (including managers, ratings, expense ratios, performance against benchmarks on a quarterly, year-to-date, 1-year, 3-year, 5-year and 10-year basis.) (Rezler Decl. ¶¶ 9-13, 15; Halley Decl. ¶ 15; Petti Decl. ¶ 23.)

These same reports also included analyses of manager tenure, category ranking, risk, risk adjusted return, net expense ratio, style drift, turnover ratio, and Morningstar rating. (Rezler Decl. ¶¶ 11, 15.) The reports were prepared using various software tools. (Tr. at 1263:15-23.) The software programs "filter[] in information from thousands of funds that are available and that are being used ... by the plans that [Cammack's] clients offer." (*Id.* at 1263:20-23.)

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[102] PX1366 at 2-3.

[103] PX662 at 2-3.

[104] PX959 at 2-3

[105] PX962 at 2-3.

Cammack's Rezler[106] testified that the Committee asked questions of Cammack regarding its advice, (*id.* at 1283:18-25), and that, on at least one occasion, the Committee questioned the viability of a metric Cammack used to analyze the investment options, (*id.* at 1284:1-12). The meeting minutes show that the Committee "voted to accept all fund recommendations presented by Cammack." (*See*, *e.g.*, DX589; PX519; DX517.) It rarely deviated, although on at least one occasion (March 2, 2016) it placed a fund on a watch list rather than replacing it, as Cammack had suggested. (DX587.) This acceptance of Cammack's recommendations does not mean the Committee improperly deferred to Cammack; it could just as easily mean (and the Court views it as such) that Cammack's recommendations also happened to be appropriate.

On a quarterly basis, and using the IPS for guidance (which set forth the types of metrics used to evaluate and monitor investments), the Committee also compiled and reviewed the Watch List to monitor certain funds. (Rezler Decl. ¶¶ 13-14; Surh Decl. ¶ 17; PX481 at 3.) Funds were put on the Watch List for a number of reasons, such as a fund manager change, a sub-adviser change, or underperformance. (Tr. at 1276:3-10; Halley Decl. ¶ 13; Surh Decl. ¶ 18.) The

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[106] Cammack's Rezler was a careful and credible witness who is well-versed in reviewing a fund's invetsments. He is a VP for Client Consulting and oversees Cammack's seven client consulting teams in New York City. (Rezler Decl. ¶¶ 1, 5.) Since joining Cammack in 2005, he has focused primarily on 403(b) plans and helps fiduciaries: (1) evaluate, select, and manage their plans' recordkeepers; (2) monitor the amount of revenue sharing and recordkeeping fees; and (3) select and monitor plan investments. (*Id.*) He has worked in the ERISA-regulated retirement plan services industry for over twenty years. (*Id.*)

Committee analyzed the funds on the Watch List at almost every Committee meeting and discussed the addition or removal of funds to or from the Watch List where applicable. (Rezler Decl. ¶ 13; Halley Decl. ¶ 13.) Funds on the Watch List were not automatically removed from the investment lineup; rather, they were initially analyzed and discussed by the Committee at length. (Rezler Decl. ¶ 13; Surh Decl. ¶ 18; Halley Decl. ¶ 13.)

VI. CLAIM REGARDING TWO SPECIFIC FUNDS

In Claim V, plaintiffs assert that NYU failed to prudently monitor the Plans' investment Options by continuing to offer two funds with what plaintiffs assert were high fees and poor performance—namely, the CREF Stock Account and the TIAA Real Estate Account. (Am. Compl. ¶ 217-229.) In particular, plaintiffs argue that the Committee used improper benchmarks to evaluate the performance of the TIAA Real Estate Account and the CREF Stock Account. They further argue that this improper benchmarking both reveals a process failure and masks objective poor performance. The Court finds otherwise.

A. *The TIAA Real Estate Account*

The TIAA Real Estate Account is a tax-deferred variable annuity contract offered by TIAA. (Chittenden Decl. ¶ 58; *see*, *e.g.*, DX689; DX679.) It is an unusual fund because it invests in actual real estate properties. (*Id.* ¶ 60.) "[A]t least 75% of the Account's net assets have ... direct ownership interests in real estate" and typically less than 10% of the account's net assets have been comprised of interests in liquid real estate securities, such as real estate investment trusts ("REITs") and commercial mortgage-backed securities ("CMBSs"). (*Id.*; Fischel Decl. at 9-10.)

This fund provides investors with an opportunity to participate in investments typically only available to institutional investors; it is therefore a valuable diversifying element of a retirement portfolio. (Chittenden Decl. ¶ 61; Tr. at 646:6-14, 671:19-672:2.) As of September 30, 2017, it held $24.8 billion in net assets. (Fischel Decl. at 9.) Its annual return in 2010 was 13.3%, (DX648 at 19); in 2014, it was 12.22%, (DX668 at 1); and in 2016, it was 5.20%, (DX676 at 1).[107]

Ten to twenty percent of this fund's holdings are in cash or other short-term securities and short-term higher quality liquid investments that are easily converted to cash. (Tr. at 642:25-643:3; Fischel Decl. at 10.) This provides a level of liquidity that would be otherwise difficult to achieve in a real estate portfolio, (Tr. at 645:12-22), and ensures that the Account can meet participant redemption requests, purchase or improve properties, or cover other expense needs, (Fischel Decl. at 10).

Plaintiffs contend that the fund's cash holdings create a "drag" on overall return. However, whether cash increases or lowers returns (i.e., whether it is a "drag" or a boost) depends on the health of the real estate market:

> When real estate values are increasing, then cash lowers returns, because the zero return on cash is averaged against deposited returns on real estate, and in that situation, the cash low-

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[107] TIAA also guarantees liquidity for the TIAA Real Estate Account via a "liquidity guarantee" under which the TIAA General Account will purchase accumulation units issued by the TIAA Real Estate Account if there are issues with liquidity. (Fischel Decl. at 10.)

> ers risk and also lowers returns. But in down markets, when real ... estate values are falling, then the zero return on cash improves performance because the zero return is averaged against negative numbers as opposed to positive numbers. And therefore, you can't say that lowering risk either improves performance or hurts performance without specifying what period of time you're looking at ... .

(Tr. at 1525:14-25.) Fischel[108] testified credibly that "there's no doubt that REITs are riskier" than the TIAA Real Estate Account because REITs lack cash, which means they may have to operate using leverage or debt as part of their capital structure. (*Id.* at 1524:1-1524:5.)

Surh, NYU's CIO who was a Committee member from 2010-2014, testified that the TIAA Real Estate Account is a "really unique and useful instrument," as a strategic asset and stabilizer, because it is not highly correlated to the equities markets. (*Id.* at 1152:1-11.) The fund offers diversification that can lead to a better overall return for a participant. (*Id.* at 644:23-645:3, 646:6-14.) Chittenden testified that the fund is a:

> great diversifier to individuals for their retirement savings. To be able to say that you, as part of your retirement savings, as a man on the street, the average NYU participant, you can have a return that's based off of commer-

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[108] Fischel has significant expertise in various relevant areas and the Court found him to highly credible and relies heavily on his testimony. Fischel was retained by NYU to analyze plaintiffs' claims concerning the performance of the CREF Stock Account and the TIAA Real Estate Account from an economics perspective. (*Id.* ¶ 5.)

> cial, directly held commercial real estate which is typically only available to large institutional investors is a special thing ... .

(Tr. at 639:12-18.)

1. *Benchmarks Utilized for the TIAA Real Estate Account*

During the Class Period, TIAA provided a number of benchmarks that the Committee and participants could use to assert the performance of the TIAA Real Estate Account. The Committee took additional steps to evaluate the performance of the TIAA Real Estate Account and to determine whether the fund should continue to be included in the Plans. For example, the Committee requested that TIAA explain the strategy of the fund and the appropriateness of its chosen benchmark. (Tr. at 257:8-14, 305:1-14.) The Committee also had detailed discussions of the fund's strategy, liquidity requirements, and benchmarks. (Halley Decl. ¶ 20.)

While the benchmarks for the TIAA Real Estate Account did change during the Class Period,[109] the

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[109] For example, at the February 21, 2012 meeting, TIAA informed the Committee that they were working to develop a benchmark for the fund due to the challenges in benchmarking. (Surh Decl. ¶¶ 21, 24; Rezler Decl. ¶ 66; PX40 at 2).) Since 2012, TIAA has compared the Account's performance with the performance of "two widely used indices" that TIAA "believes ... are most appropriate to compare to the performance of the Account": the NCREIF Fund Index—Open End Diversified Core Equity ("NFI-ODCE") and the NCREIF Property Index ("NPI"). (DX709 at 7.) NFI-ODCE is an equal-weighted index of the investment returns from a collection of open-end commingled funds which focus on a core real estate investment strategy, and TIAA uses the "Net of Fees" returns that are calculated by the NCREIF in its analyses. (*Id.*)

mere fact that the Committee, Cammack, and TIAA itself changed benchmarks during the relevant time period does not indicate that the Committee acted imprudently, or that the fund was imprudently included as an option. Indeed, one of the factors that makes it a useful product—the diversification it offers vis-à-vis its unique holdings—also makes it difficult to benchmark. There simply are not similar funds in the market. The fact that the benchmarks shifted over time indicates that the Committee *was* performing its review function appropriately—it carefully considered the benchmarks being used, whether they were appropriate, and whether a more apt benchmark existed, and it altered the benchmarks when a more useful one was proffered. These shifts in benchmarks are not evidence of imprudence.

1. *Objective Prudence of the TIAA Real Estate Account*

Ultimately, benchmarks are useful to objectively evaluate fund performance. The Court credits and relies on Fischel's thoughtful analysis regarding the objective performance of this fund. Fischel's analysis makes clear that retention of the TIAA Real Estate Account was not imprudent. In contrast to Fischel's analysis, plaintiffs' expert, Buetow,[110] failed to adjust for cash and compared the fund to a REIT.

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[110] Buetow was retained by plaintiffs to opine on the fiduciary process and investment decisions made by NYU and its officers and trustees. (*Id.* at 1.) The Court discounts Buetow's testimony; as described above, his analysis of fund performance did not account for a number of important factors and the Court is not persuaded that he compared the funds in question to appropriate benchmarks.

The TIAA Real Estate Account's adjusted performance "has closely tracked the performance of its benchmark during the one-, five-, and ten-year periods ending on December 31 of each year from 2009 to 2016, and the one-, five-, and ten-year periods ending September 30, 2017." (Fischel Decl. at 18, 24.) The Account "performed at least as well as would have been expected given its risk, notwithstanding the costs of providing liquidity and other services." (*Id.* at 19, 45.) The "alpha analyses" for the TIAA Real Estate Account (which measure the difference between the actual return and expected return (Tr. at 1264:2-9; Rezler Decl. ¶ 15)), which the Court finds are reliable, also demonstrated that the fund performed at least as well as expected, given its risk and notwithstanding the costs of providing liquidity and other services. (Fischel Decl. at 20.)[111]

Plaintiffs compare the TIAA Real Estate Account to the Vanguard REIT Index over the one-, five-, and ten-year periods ending December 31, 2009, and the one-, five-, and ten-year periods ending December 31, 2014. But as described above, the evidence shows that a REIT is not a proper comparison for the TIAA Real

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[111] Specifically, the one-factor alpha analysis for the TIAA Real Estate Account resulted in an estimated alpha that is positive and not statistically significant in the ten-year period ended December 31, 2009, positive and statistically significant (at the 10% level) in the ten year period ending December 31, 2014, and positive and statistically significant (at the 1% level) in the period from August 2010 to September 2017. A three-factor analysis resulted in estimated alphas that were positive but not statistically significant in the ten-year period ended December 31, 2009 and the ten-year period ended December 31, 2014, and negative but not statistically significant in the period from August 2010 to September 2017. (Fischel Decl. at 19-20.)

Estate Account, which invested directly in commercial properties, had a low correlation to stocks and, therefore, operated differently from a REIT index. (Tr. at 218:6-220:9, 236:19-237:5, 1583:5-1587:23; *see also* Turki Decl. at 15.) But in any case, on a month-to-month basis, the TIAA Real Estate Account still outperformed the REIT Index more often than not. (DX456 at 60.)

In concluding that the TIAA Real Estate Account should have been removed as an investment option by December 31, 2009, Buetow also compared the Account's performance to the NCREIF Fund Index—Open Fund Diversified Core Equity ("NCREIF Index"). (Buetow Decl. at 57; Tr. at 1707:1-1709:23.) However, this is not the benchmark that was used by TIAA as of December 31, 2009. (Fischel Decl. at 10, 18). Additionally, Buetow did not adjust the returns to account for cash as TIAA did. (Tr. at 1710:12-15.)[112]

It is notable that TIAA Real Estate account is also widely accepted as an appropriate and desirable investment by other market participants. Of TIAA's 200 largest institutional clients with at least one 403(b) plan, all but one client held assets in the TIAA Real Es-

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[112] Buetow does not use reliable economic methods to analyze damages related to the TIAA Real Estate Account or appropriate benchmarks against which to measure damages; he also fails to take into account that the annuities would not be mapped. Accordingly, the Court does not rely on Buetow's damages calculations. *See Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 255 (2d Cir. 2005) (affirming district court's decision to exclude expert opinion and noting that "[f]ollowing Joiner, we held that 'when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony" (quoting *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 266 (2d Cir. 2002))).

tate Account for the period 2010 through 2014. (Chittenden Decl. ¶ 63.) In 2015 and 2016, all but two of TIAA's largest institutional clients held assets in the TIAA Real Estate Account. (*Id.*) And, of those 200 clients, over 84% had plans that received contributions into the TIAA Real Estate Account for the period 2010 through 2016. (*Id.* ¶ 64.)[113]

Accordingly, plaintiffs have not demonstrated that the TIAA Real Estate Account underperformed so significantly that the Committee was imprudent for failing to remove it as an option. *See Taylor v. United Techs. Corp.*, No. 03:06-cv-1494, 2009 WL 535779, at *9-10 (D. Conn. Mar. 3, 2009) (finding that defendant acted prudently in maintaining cash in a Stock Fund, while noting that plaintiffs provided no evidence to the contrary and finding that defendant did not breach a fiduciary duty by offering actively managed funds, and noting that "ERISA does not require a fiduciary to take 'any particular course' so long as the fiduciary's decision meets the prudent person standard"); *PBGC*, 712 F.3d at 721 (holding that defendant's actions were objectively prudent because none of plaintiff's "warning signs" demonstrated defendant "knew, or should have known, that the securities in the Portfolio were imprudent investments"); *cf. Bd. of Trs. of Local 295/Local 851-IBT Emp. Pension Fund v. Callan Assocs., Inc.*, No. 97 Civ. 1741(HB), 1998 WL 289697, at *3-4 (S.D.N.Y. June 4, 1998) (finding defendant acted with objective prudence in liquidating the funds' portfolio to cash).

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[113] Chittenden explained that this historical data is that which he uses in connection with his duties and responsibilities at TIAA in the last couple of years. (Tr. at 567:16-21, 652:13-653:15.)

B. *The CREF Stock Account*

The College Retirement Equities Fund ("CREF") was the first variable annuity; the CREF Stock Account was CREF's first offering. (Chittenden Decl. ¶ 47.) It first began receiving investments in 1952 and, as of September 30, 2017, had net assets of $123.08 billion. (Fischel Decl. at 8.) It is a tax-deferred variable annuity that was offered by 93% of TIAA's largest 200 clients in 2010 and 2016. (*Id.* ¶¶ 47, 54; DX763; DX760).) The CREF Stock Account is a broadly diversified investment, investing across all major equity market segments, including large-, mid, and small-cap stocks, both domestically and within foreign developed and emerging markets. (Chittenden Decl. ¶ 48.) It had an annual rate of return of 32% in 2009, followed by 15.72% in 2010. (Fischel Decl. at 38.)

As of December 31, 2017, the CREF Stock Account had approximately $127 billion in assets under management. (Chittenden Decl. ¶ 52.) The Account's "Investment Objective" is to provide "[a] favorable long-term rate of return through capital appreciation and investment income by investing primarily in a broadly diversified portfolio of common stocks." (DX760 at 27; Chittenden Decl. ¶ 48.) Three different investment strategies are used to manage the account —active management, a quantitative approach, and an indexing comparison. (Chittenden Decl. ¶ 48; DX760 at 27).)[114]

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[114] Plaintiffs' assertion in Claim V is that NYU breached ERISA's duty of prudence by offering the actively-managed CREF Stock Account instead of a passive index account is also without merit. ERISA does not mandate passive management (with lower fees) over active management. *See Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) ("We see nothing in [ERISA] that requires plan fiduciaries to include any particular mix of investment vehicles in their plan."). The U.S. Department of Labor

Under normal circumstances, the CREF Stock Account seeks to maintain approximately 65-75% domestic equities and 25-35% foreign equities. Its mix of domestic and international securities is unique. (Chittenden Decl. ¶ 48; DX760 at 28 ("Under normal circumstances,

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recognizes that plans typically offer "actively managed" funds. U.S. Dep't of Labor, Emp. Benefits Sec. Admin., A Look at 401(k) Plan Fees, at 7 (Aug. 2013).

The law of trusts, upon which the ERISA duty of prudence is based, recognizes that actively managed funds may be prudent. Restatement 3d of Trusts, § 90 cmts. e(1) and f at 304, 307 (observing that "active management strategies" are permissible and "[t]here are no universally accepted and enduring theories of financial markets or prescriptions for investment that can provide clear and specific guidance to trustees and courts, varied approaches to the prudent investment of trust funds are therefore permitted by the law"). Courts have specifically rejected the theory that a plaintiff can establish a breach of the duty of prudence by comparing a passively-managed Vanguard index fund to an actively-managed fund. *See, e.g.*, *Brotherston v. Putnam Invs., LLC*, No. 15-13825-WGY, 2017 WL 1196648, at *7 (D. Mass. Mar. 30, 2017) (rejecting damage model that compared active and passive funds as "apples and oranges").

The Plans here offered participants both actively and passively managed index funds, including the passively managed Vanguard funds Plaintiffs use as comparisons to the CREF Stock Account. Thus, NYU "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, 673-74 (7th Cir. 2011). The Plans disclosed to participants the CREF Stock Account's investment managers, performance, investment strategy, fees, and that it was an actively managed fund. (DX053 (2012 Investment Options Comparative Chart for School of Medicine Faculty Plan).) "Given the numerous investment options, varied in type and fee, [defendants] ... can be held responsible for those choices." *Hecker*, 556 F.3d at 590.

Accordingly, the Court does not find that the inclusion of actively managed funds was imprudent.

the Account seeks to maintain the weightings of its holdings as approximately 65-75% domestic equities and 25-35% foreign equities."). Participants who invest in the CREF Stock Account have the option to transfer their investment to a TIAA traditional annuity in the future. (Chittenden Decl. ¶ 55.)

1. *Benchmarks Utilized for the CREF Stock Account*

Like the TIAA Real Estate Account, a number of benchmarks were used to assess the performance of the CREF Stock Account during the Class Period. Because of its unique domestic-foreign securities mix, it is challenging to find an appropriate benchmark. (Rezler Decl. ¶¶ 72-74; PX380 at CLC003902.) The Committee reviewed the CREF Stock Account on a quarterly basis and in the context of the Plans' total investment lineup. (Rezler Decl. ¶ 72; Surh Decl. ¶ 20; Halley Decl. ¶ ¶ 13, 20; Petti Decl. ¶ 18). The Committee focused on the difficulties with benchmarking that the CREF Stock Account presented due to its composition. (Rezler Decl. ¶ 72-74.) It determined that, as a result of these benchmarking difficulties, the CREF Stock Account was one that warranted "specialized discussions." (PX481 at 2).)[115] Such discussions occurred.

As with the TIAA Real Estate Account, the mere fact that benchmarks changed for the CREF Stock Account does not make its inclusion as a Plan option imprudent. The Committee was actively engaged with

[115] For example, the Committee specifically noted in April 2011 that the CREF Stock Account was benchmarked against "large cap domestic equities only," when that was not how the fund invested. (Rezler Decl. ¶ 72.)

the Fund and its benchmarks, asking for clarification at several points throughout the Class Period.

2. *Objective Prudence of the CREF Stock Account*

Plaintiffs have also failed to prove that the Committee's inclusion of this fund was objectively imprudent. In support of objective underperformance, plaintiffs compare the fund to the Russell 3000 Index, two passively managed index funds (VITPX and VIIIX), and three purportedly comparable actively managed funds (VDEQX, VPMAX, and VHCAX). However, plaintiffs' comparisons are misleading. They present data for the one-, five- and ten-year periods ending December 31, 2014 and, with respect to the purportedly comparable actively-managed funds, the one-, five- and ten-year periods ending December 31, 2009. However, a more accurate comparison shows the CREF Stock Account did not underperform.

Looking at the one-, five-, and ten-year periods ending December 31, 2009, plaintiffs compare the CREF Stock Account with the performance of the purportedly comparable actively managed funds during these periods, but do not compare its performance with the Russell 3000 Index or the two passive index funds. (Fischel Decl. at 12.) When that comparison is made, the CREF Stock Account outperforms during that period. (*Id.* at 12, 36.) For example, the one-year total return for 2009 for the CREF Stock Account was 32.15%; for the VITPX, VIIIX, and Russell 3000, it was 28.92%, 26.66%, and 28.29%, respectively. (*Id.* at 36.) The five-year average annual return as of December 31, 2009 was 1.64%; for the VITPX, VIIIX, and Russell 3000, it was 0.65%, -0.02%, and 0.75%, respectively. (*Id.*)

With regard to monthly performance, the CREF Stock Account did not consistently underperform any of the alternatives identified by Plaintiffs during either ten-year period ending December 31, 2009 or the ten-year period ending December 31, 2014. (*Id.* at 12.) With respect to each alternative and time period, the CREF Stock Account performed better in a substantial fraction of the months during both of these ten-year periods. (*Id.* at 12, 37.) For example, on a monthly basis for the ten-year period ending December 31, 2009, the CREF Stock Account performed better than the Russell 3000 Index 53% of the time and better than the VIIIX Fund 57% of the time. However, on a monthly basis in the ten-year period ending December 31, 2014, the CREF Stock Account performed better than the Russell 3000, VIIIX, VITPX, VDEQX, VPMAX, and VHCAX between 41-48% of the time. In other words, those funds saw higher returns slightly more than half of the time period. (*Id.* at 37.)

The CREF Stock Account closely tracked the performance of its benchmark index during the one-, five-, and ten-year periods ending on December 31 of each year from 2009 to 2016, and the one-, five-, and ten-year periods ending June 30, 2017.[116] (*See id.* at 13, 38.) In that time period, the fund rarely deviated from the composite benchmark index by more than one percent.

[116] As discussed above, as of 2009, the CREF Stock Account's publicly stated (and available) composite benchmark was the Russell 3000 Index, the MSCI Barra EAFE® + Canada Index, the MSCI Emerging Markets Index and the MSCI EAFE + Canada Small Cap Index. In mid-2011, the account's publicly stated (and available) composite benchmark in its prospectus was changed to a composite index of two unmanaged indices: (1) Russell 3000® Index (70%); and (2) the MSCI All Country World ex-US Investable Market Index (30%).

(*See id.* at 38.) In addition, alpha estimates[117] of the CREF Stock Account demonstrate that the fund performed as well as would have been expected, given its risk profile, notwithstanding the costs of providing liquidity and other services.[118] (*Id.* at 16-17, 41.)

Plaintiffs' comparisons between the CREF Stock Account's performance and that of passively and actively managed index funds (VITPX, VIIIX, VDEQX, VPMAX, and VHCAX) are inapposite, because those funds do not account for the foreign stock market's performance or the performance of the relevant segments of the U.S. and foreign markets.[119] (*Id.* at 13.)

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[117] As discussed above, alpha is a measure of the difference between the actual return of a portfolio and the expected return of that portfolio (which depends upon the underlying risk of the portfolio) during a specific period of interest. (Fischel Decl. at 16.)

[118] Specifically, one-factor models using only US market factors result in alpha estimates that are not significantly different from zero (both positive and negative depending on which index is used) in the ten-year period ended December 31, 2009 and alpha estimates that are negative and statistically significant in both the ten-year period ended December 31, 2014 and the period from August 2010 to September 2017. Two-factor models that use both a US market index and an international market index result in alpha estimates that are not significantly different from zero in all estimation periods.

[119] Specifically, the Vanguard Institutional Total Stock Market Index Fund (i.e., VITPX) "employs an indexing investment approach designed to track the performance of the CRSP US Total Market Index, which represents approximately 100% of the investable U.S. stock market and includes large-, mid-, small-, and microcap stocks regularly traded on the New York Stock Exchange and Nasdaq." The Vanguard Institutional Total Stock Market Index Fund (i.e., VITPX) "employs an indexing investment approach designed to track the performance of the CRSP US Total Market Index, which represents approximately 100% of the investable U.S. stock market and includes large-, mid-, small-, and

Additionally, it is not clear the Russell 3000 Index is the appropriate benchmark by which to measure the CREF Stock Account's objective performance. In December 2017, TIAA changed its benchmark from the Russell 3000 Index to the Morningstar Aggressive Target Risk Index. (Tr. at 629:23-630:3; PX929.) At that time, the fund's one-year returns were 23.43%, compared with 21.95% for the Morningstar Aggressive Target Risk Index and 23.13% for the CREF Composite Benchmark. (PX929.) Its 10-year return were 6.44%, compared with 6.50% or the Morningstar Aggressive Target Risk Index and 6.71% for the CREF Composite Benchmark. (*Id.*)

Plaintiffs' expert, Buetow, claimed to have looked at the CREF Stock Account against its publicly stated actual benchmark as of December 31, 2009, concluding that the CREF Stock Account had a period of "longstanding underperformance over 3, 5, and 10 years as December 31, 2009." (Buetow Decl. at 35). But Buetow incorrectly used the benchmark for the CREF Stock Account that was not in place until mid-2011 to

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microcap stocks regularly traded on the New York Stock Exchange and Nasdaq." The Vanguard Diversified Equity Fund (i.e., VDEQX) "invests in a diversified group of other Vanguard equity mutual funds, rather than in individual securities," and "[t]he underlying funds' holdings mainly consist of large-, mid-, and small capitalization equity securities of domestic companies." The Vanguard PRIMECAP Fund (i.e., VPMAX) "invests in stocks considered to have above-average earnings growth potential that is not reflected in their current market prices" (i.e., growth stocks) and its "portfolio consists predominantly of large- and mid-capitalization stocks." The Vanguard Capital Opportunity Fund (i.e., VHCAX) "invests mainly in U.S. stocks, with an emphasis on companies that are considered to have prospects for rapid earnings growth" and "emphasize[s] mid-cap stocks." (Fischel Decl. at 13-14.)

cover a period prior to mid-2011. (*Compare* Fischel Decl. at 8-9, 13-14, *with* Buetow Decl. at 35; *see also* Tr. at 1476:2-13, 1575:18-1576:17, 1667:23-1668:14; Turki Decl. ¶ 20.) In fact, the benchmark Buetow used was his own creation. (Tr. at 1667:16-1668:14, 1670:16-20, 1675:20-1676:15).

In addition to Buetow's use of an incorrect benchmark, Fischel pointed out that if "you add the fees for services, the three-year number would turn positive and the five and the ten ... would be correspondingly reduced as well." (Tr. at 1577:2-6). It was misleading for Buetow to cite to a "TIAA-CREF Annual Review" apparently provided by an accountant to the State Universities Retirement System ("SURS") (DX901) because that exhibit supports Fischel's conclusion regarding the market acceptance of the CREF Stock Account. (Tr. at 1578:7-17.) Further, DX901 shows that the CREF Stock returned 32.04 percent in 2009, "outperforming the composite benchmark of 29.65 percent by 239 basis points." (Tr. at 1578:7-1579:22). Accordingly, a prudent fiduciary looking at DX901 would draw the opposite conclusion from Buetow. (Tr. at 1578:7-1579:22).

Moreover, based on its analysis of the performance of the CREF Stock Account, the SURS investment committee concluded that as of April 2, 2010, "[t]he CREF Stock Account is a stand-alone equity allocation that offers a well-diversified portfolio of domestic and foreign equity holdings of all sectors, styles and market caps, using a combination of active management, enhanced indexing and pure indexing. It has closely tracked the benchmark over longer time periods. We recommend retention of this option." (Tr. at 1579:2-1582:11; DX901 at 20.)

Accordingly, plaintiffs have not demonstrated that the CREF Stock Account was objectively imprudent or that participants suffered losses due to its inclusion in the Plan.[120]

[120] Plaintiffs have also argued that in failing to identify the correct benchmark for the TIAA Real Estate Account and the CREF Stock Account, the Committee acted imprudently. But the benchmarking was adequate. Plan participants received a wealth of information about the funds, including materials pointing them to alternative benchmarks for each. For example, TIAA quarterly performance analyses are available on TIAA's website as well as the SEC's website. The reports provide two indices to assess the TIAA Real Estate Account's performance, including the REA Composite Index for comparison. This Index is comprised of (1) the total return for all real estate properties owned or managed in commingled open-end funds, as derived from the database of the National Council of Real Estate Investment Fiduciaries ("NCREIF"), an independent party (hereinafter, "NCREIF Open-end"), (2) the FTSE Group (FTSE) NAREIT Equity REIT Index or, for periods prior to the second quarter of 2009, the Dow Jones Wilshire Real Estate Securities Index, and (3) the iMoneyNet All-Taxable Average for short-term, cash-like investments. (DX724; *see also* DX900.) Additionally, the Plan summary is given to every participant, (Tr. at 1543:3-7), and it directs participants to the TIAA and Vanguard websites to see the various funds' prospectuses, (DX384).

In 2012, TIAA began to provide NYU with information to provide 404a5 disclosures to participants, and TIAA assists in their delivery to participants. (Chittenden Decl. ¶ 108.) As required by the Department of Labor Regulations, in the 404a5 disclosures TIAA shows the performance of the CREF Stock Account versus a broad-based securities market index, the Russell 3000 Index, as opposed to using the account's composite benchmark stated in its prospectus because the Department of Labor Regulations do not permit the use of composite benchmarks or customized benchmarks in the 404a5 disclosures and only permits the use of one benchmark for each investment option. (Tr. at 1010:12-16, 1011:20-1012:5.) However, the Russell 3000 Index is not necessarily sufficient, on its own, to help participants understand whether the CREF Stock Fund is performing well vis-à-vis

VII. CONCLUSION

For the reasons stated above, the Court finds in favor of defendant NYU on all claims. The Clerk of Court is directed to enter judgment for NYU, close all open motions in 16-cv-6284, and terminate the case.

SO ORDERED.

Dated: New York, New York
July 31, 2018

/s/ *Katherine B. Forrest*
KATHERINE B. FORREST
United States District Judge

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comparable stock funds because it is comprised entirely of domestic holdings (and the CREF Stock Fund has 30% international holdings). (*Id.* at 1440:21-1441:3.)

The 404a5 disclosures also direct the participant to the prospectus for more detailed information. (*Id.* at 1541:19-1542:12.) Moreover, the Plans' Summary Plan Descriptions inform participants to read all descriptions and disclosure materials relative to investment options under the Plan before making investment decisions. (*Id.* at 1542:6-12, 1543:3-20.) The CREF Stock Account closely tracked the performance of the CREF Stock Composite Benchmark during the one-, five-, and ten-year periods ending on December 31 of each year from 2009 to 2016, and the one-, five-, and ten-year periods ending June 30, 2017. (Fischel Decl. at 20-21, 38.)

Accordingly, any argument that participants received inadequate information is without merit.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

16-cv-6284 (KBF)

DR. ALAN SACERDOTE, et al.,
Plaintiffs,

v.

NEW YORK UNIVERSITY,
Defendant,

[STAMP: USDC SDNY
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DATE FILED: October 19, 2017]

OPINION & ORDER

KATHERINE B. FORREST, District Judge:

Pending before the Court is plaintiff's motion for reconsideration. (ECF No. 81.) Plaintiffs seek reconsideration of the Court's dismissal of (1) their prudence claim in Count V regarding mutual fund share classes, and (2) their failure to monitor claim in Count VII. For the reasons discussed below, that motion is DENIED.

I. LEGAL STANDARD

The standard for granting reconsideration is strict. A motion for reconsideration under Local Rule 6.3 "will generally be denied unless the moving party can point

to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *See Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). "Controlling authority means decisions of the Second Circuit Court of Appeals or the U.S. Supreme Court … ." *Ivan Visin Shipping, Ltd. v. Onego Shipping & Chartering B.V.*, 543 F. Supp. 2d 338, 339 (S.D.N.Y. 2008) (citation omitted). The Court should not revisit a prior order without "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (quotation omitted). A motion for reconsideration should be denied if the moving party "merely offers substantially the same arguments he offered on the original motion … ." *United States v. Kerik*, 615 F. Supp. 2d 256, 276 n.27 (S.D.N.Y. 2009) (quotation omitted). Plaintiffs' first claim is that this Court committed manifest legal error in dismissing an allegation supporting Count V of the Amended Complaint; their second is that they have discovered new evidence supporting Count VII.

II. RETAIL CLASS SHARES VERSUS INSTITUTIONAL CLASS SHARES

The first question before the Court is whether it manifestly erred when it determined that, as a matter of law and as elaborated by the facts alleged in the Amended Complaint, the inclusion of retail class shares in a plan despite the alleged availability of identical institutional class does not, on its own, support a cognizable prudence claim. Plaintiff asserts that the Court erred in its interpretation of the caselaw on which it relied in deciding this question.

A. *Legal Principals*

As an initial matter, the Court notes that the Second Circuit has not addressed this precise question and that no case on which plaintiffs, defendants, or this Court relied is binding precedent.[1] However, in assessing the prudence of a particular investment mix, the Second Circuit has held that the "prudence of *each* investment is not assessed in isolation but, rather, *as the investment relates to the portfolio as a whole*." *Pension Ben. Guar. Corp. v. Morgan Stanley Investment Mgmt. Inc.*, 712 F.3d 705, 717 (2d Cir. 2013) (emphasis added). To comply with ERISA and the duty of prudence, the fiduciary must "give 'appropriate consideration' to whether an investment 'is reasonably designed, as part of the portfolio ... to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment.'" *Id.* (quoting 29 C.F.R. § 2550.404a-1(b)(2)(i)); *see also Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) ("We see nothing in [ERISA] that requires plan fiduciaries to include any particular mix of investment vehicles in their plan."). Thus, to support a claim that defendant breached its duty of prudence in the Second Circuit, plaintiff must demonstrate that the mix of investments was unreasonable, not just that the inclusion of any specific investment was imprudent.[2]

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[1] Additionally, the Court notes that its reliance on *Tibble v. Edison Int'l (Tibble I)*, 729 F.3d 1110 (9th Cir. 2013), rev'd 135 S. Ct. 1823 (2015), was misplaced, though *Tibble I* was not necessary to support its holding.

[2] Certainly, trustees have "a continuing duty to monitor trust investments and remove imprudent ones." *Tibble v. Edison Int'l (Tibble II)*, 135 S. Ct. 1823, 1828 (2015). This standard does not,

Plaintiffs maintain that this Court misread the caselaw on whether offering retail class shares over institutional class shares is prudent. However, none of the cases cited are directly on point; each decision necessarily focuses on the facts a plaintiff alleges, the sufficiency of which differs from complaint to complaint. Various appellate decisions that have addressed this or similar questions indicate a trend supportive of this Court's decision. Where plaintiffs allege that a defendant breached its fiduciary duty by including retail class shares but do not sufficiently allege an alteration of the total mix, the allegation does not survive a motion to dismiss. *See, e.g.*, *Renfro v. Unisys Corp.*, 671 F.3d 314, 319 (3d Cir. 2011) (dismissing an allegation when plaintiffs alleged only that the defendant "could have selected investments having lower fees than mutual funds and/or used the size of its plan as leverage to bargain for lower fee rates on mutual funds," but did not identify specific funds); *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) (dismissing a claim that the defendant breached its fiduciary duty by including retail mutual funds because "the undisputed facts [left] no room for doubt that the [plans] offered a sufficient mix of investments for their participants" and no trier of fact could find that the defendant failed to satisfy its alleged duty to "furnish an acceptable array of investment vehicles").

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however, speak to which investments are imprudent, nor does it require trustees to always choose options based on fee structure alone. In fact, the standard may in some cases encourage trustees to pick an option with higher fees, based on the other aspects of the fund in question or the other options available in the plan.

It is, of course, possible that a single investment option could be so manifestly imprudent as to support a prudence claim simply by virtue of its inclusion. Here, though, the claim is essentially that including a particular share class is *ipso facto* imprudent. That claim is not sufficiently supported.

In contrast, cases that maintain such claims, such as *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009), do not lack allegations supporting a total mix argument. In *Braden*, the Eighth Circuit denied a motion to dismiss a prudence claim based on an allegation that the defendant could have switched to specific institutional class shares with identical features and lower costs. *See* 588 F.3d at 590. In that case, the decision focused on the mix as well, but there, the plan offered only thirteen products (not 103 or 84 as here): ten mutual funds, one common/collective trust, common stock in the defendant corporation, and a stable value fund. *Id.* at 589. In addition, plaintiffs there alleged that *all* of the included mutual funds were only available as retail class shares. *Id.* at 595. Here, defendant's Faculty Plan offers 103 options, and the Medical Plan offers 84 options—far more than the defendant in *Braden*—and there is no allegation that every mutual fund option offered only retail class shares. (*See* Am. Compl. ¶ 223; *see also* Faculty Plan Form 5500, ECF No. 47-5, at 13-15; Medical Plan Form 5500, ECF No. 47-6, at 16-17.)

In *Renfro*, the Third Circuit illuminated the distinction between *Hecker* and *Braden*, noting that both courts used a similar methodology in analyzing the investment mix by "look[ing] first to the characteristics of the mix and range of options and then evaluat[ing] the plausibility of claims challenging fund selection against the backdrop of the reasonableness of the mix and range of investment option." *Renfro*, 671 F.3d at 326. That methodology led to divergent results because of the varied sufficiency of the plaintiffs' allegations.

Plaintiffs' motion also relies heavily on their reading of *Loomis v. Exelon Corp.*, 658 F.3d 667 (7th Cir. 2011), which dismissed a claim for breach of fiduciary duty based on an allegation that defendant offered re-

tail funds rather than "arrang[ing] for access to 'wholesale' or 'institutional' investment vehicles ... to which the general public does not have access." *Id.* at 671. Put simply, reliance on Loomis is not necessary for this Court's holding.[3] That said, the Court still finds persuasive the Seventh Circuit's reasoning that the plaintiffs in *Loomis* were not arguing that their fees were higher, as low-fee plans were available to plaintiffs through the plan, or that the defendant "left participants adrift and apt to blunder into the high-expense funds when they would be better off with the low-expense funds." *Loomis*, 658 F.3d at 671. Like plaintiffs here, the plaintiffs in *Loomis* had access to a mix of options, some of which were retail class shares and some of which were not.

Finally, the Court is aware of Judge Castel's opinion addressing similar claims to those brought by plaintiffs here, in which he disagreed with this Court, noting that *Loomis* "considered challenges to the overall range of investment options offered by the plans rather than the prudence of including any particular investment options." *Cunningham v. Cornell Univ.*, No. 16-cv-6525, 2017 WL 4358769, at *7 (S.D.N.Y. Sept. 29, 2017). Re-

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[3] Upon further reflection, the record on which the *Loomis* court relied included additional allegations that were not made here. An amicus brief illuminated the difference between the expense ratios of institutional share class and those of retail funds, which undermined the plaintiffs' claim that institutional shares are always more prudent. The record also included not just the point about lower liquidity with which plaintiffs here take issue, but also arguments about the expenses tied to funds with more small investors versus fewer large investors. The Seventh Circuit's holding thus relied on the factual record before it—the decision did not necessarily indicate that as a matter of law, fiduciaries may offer retail class shares instead of institutional class shares consistent with their duty of prudence.

spectfully, this Court's reading of Second Circuit precedent indicates that it must consider the mix rather than the prudence of any individual option when assessing a prudence claim.

B. *Discussion*

Against this backdrop, the Court has re-reviewed its decision of August 25, 2017. (ECF No. 79.) Having carefully considered the issue, the Court continues in its view that plaintiffs' Amended Complaint does not allege sufficient facts to support a plausible claim that the inclusion of retail class shares (versus specific institutional class shares) breached the duty of prudence. The allegations in the Amended Complaint fall short of showing the inclusion of such shares rendered the mix of options imprudent.

According to the Amended Complaint, defendant offers two retirement plans: the New York University Retirement Plan for Members of the Faculty, Professional Research Staff, and Administration (the "Faculty Plan") and the New York University School of Medicine Retirement Plan for Members of the Faculty, Professional Research Staff, and Administration (the "Medical Plan") (collectively, the "Plans").[4] (Am. Compl. ¶ 1.) The Faculty Plan consists of 103 investment options and the Medical Plan offers 84 investment options. (*Id.* ¶ 18.) As relevant here, plaintiffs claim the Plans offered only retail class shares in certain of the investment options, though cheaper institutional class shares might have been available to defendant because of its size. Plaintiffs allege:

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[4] On a motion to dismiss, the Court assumes the truth of the factual allegations in the Amended Complaint.

> The fees available to multi-billion dollar retirement plans are orders of magnitude lower than the much higher retail fees available to small investors. … Retail share classes are marketed to individuals with small amounts to invest. Institutional share classes are offered to investors with large amounts to invest, such as large retirement plans. The different share classes of a given mutual fund have the identical manager, are managed identically, and invest in the same portfolio of securities. The only difference is that the retail shares charge significantly higher fees, resulting in retail class investors receiving lower returns. The share classes are otherwise identical in all respects.[5]

(*Id.* ¶¶ 40, 50.) The Court accepts this as an allegation that defendant included higher-cost classes of shares when it could have included lower-cost, "identical" classes. (*Id.* ¶ 50.) The only other difference alleged is the minimum required investment, which defines whether the class is retail or institutional. Plaintiffs also list a number of funds that had retail class shares included in the Plans but not institutional class shares.[6] (*Id.* ¶ 144-45.) But plaintiffs do not allege that, taken as a whole,

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[5] For the purpose of this motion, the Court accepts as true that the share classes are identical, but the Court is not currently aware of any situation in which this is truly the case. Plaintiffs admit, for example, that the share classes require different minimum investment amounts; this on its own might suggest that they are not, in fact, identical, as the size—and the corresponding number of investors—may influence other aspects of the classes such their management and returns.

[6] The precise proportion that retail class share funds comprise of the available options is unclear, as the plaintiffs' list includes options that are currently and were previously offered. (*Id.* ¶¶ 144-45.)

the mixes of options in the Plans were imprudent *because* of the inclusion of these retail class shares. In light of the large number of investment choices in the Plans—including institutional class shares in certain funds—plaintiffs' allegation that lower-cost, allegedly "identical" funds were available is not enough to support a claim that defendants breached their duty of prudence. The retail class shares would have to be so prevalent that an entire Plan was tainted. To hold otherwise would result in an unreasonable level of micromanagement of investment mixes by courts and unduly restrict fiduciaries.

For the foregoing reasons, the Court will not reinstate this claim.

III. FAILURE TO MONITOR

Additionally, the Court will not reinstate Count VII. Plaintiffs claim that through discovery, they have uncovered evidence of defendant's failure to monitor. However, the facts plaintiffs reference are not "new" as required by *Virgin Atl. Airways*. 956 F.2d at 1255. Plaintiffs knew about the Retirement Plan Committee and its membership since at least November 28, 2016—well in advance of its briefing on defendant's motion to dismiss, which was filed on January 9, 2017, and the oral argument on the motion on February 16, 2017. (ECF Nos. 47, 55.) The evidence now referenced is not "new" by any stretch of the imagination. In fact, in support of this motion, plaintiffs cite their own memorandum in opposition to the motion to dismiss, which the Court considered in deciding that motion. And even if the evidence were new, plaintiffs have not met their burden of demonstrating that it "might reasonably be expected to alter the conclusion reached by the

court." *Sulton*, 2010 WL 1375188, at *1 (quotation omitted). As such, this claim will not be reinstated.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES the motion for reconsideration. The Clerk of Court is directed to close the motion at ECF No. 81.

SO ORDERED.

Dated: New York, New York
October 19, 2017

/s/ Katherine B. Forrest
KATHERINE B. FORREST
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

16-cv-6284 (KBF)

DR. ALAN SACERDOTE, *et al.*,
Plaintiffs,
v.

NEW YORK UNIVERSITY,
Defendant,

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DATE FILED: August 25, 2017]

OPINION & ORDER

KATHERINE B. FORREST, District Judge:

Plaintiffs, individually and as the representatives of a class, have alleged that defendant New York University ("NYU") has violated sections 404 and 406 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1104 and 1106 (2012). The instant action against NYU is one of a number of cases filed in district courts across the country by the same counsel alleging that university pension plans, known as "403(b) plans," typically with significant assets, have not been managed prudently or for the exclusive purpose of providing benefits to participants and their

beneficiaries, in violation of ERISA. Here, plaintiffs allege a wide array of acts or omissions by NYU that they assert amount to serious ERISA violations with regard to two 403(b) plans.

ERISA requires, inter alia, that NYU comply with its fiduciary obligation to administer the Plans solely in the interest of Plan participants and to act prudently. As discussed below, while plaintiffs have adequately plead certain claims, the Court finds that a number of the bases upon which they rely as support for other claims could not—even if proven—result in a favorable judgment. For the reasons set forth below, NYU's motion to dismiss is GRANTED in part and DENIED in part.

I. BACKGROUND

NYU sponsors two defined contribution retirement plans (together, the "Plans"), which are qualified under 26 U.S.C. § 403(b)(1)(A). (ECF No. 39, Plaintiffs' Amended Complaint ("Am. Compl.") ¶¶ 26, 70.) Both the New York University Retirement Plan for Members of the Faculty, Professional Research Staff, and Administration ("Faculty Plan") and the NYU School of Medicine Retirement Plan for Members of the Faculty, Professional Research Staff and Administration ("Medical Plan") are defined contribution, individual account, employee pension benefit plans. (*Id.* ¶¶ 9, 13.) The Faculty Plan covers substantially all members of NYU's faculty, professional research staff, and administration, other than employees of the School of Medicine, who are covered by the Medical Plan. (*Id.* ¶¶ 11, 15.)

Under the terms of both Plans, participants may contribute a discretionary amount of their annual compensation to the Plans, and NYU makes a matching

contribution. (*Id.* ¶ 17.) The Plans' fiduciaries choose the investment Options for the Plans, but it is the participants themselves who direct their contributions into a particular investment option ("Option"). (*Id.* ¶ 18.) There is no allegation that any Plan participant was required to invest in any particular investment Option. Rather, plaintiffs allege that Defendant included expensive or imprudent options among the array of choices, allowed the service providers to mandate inclusion of their own investment products and recordkeeping services, failed to remove poorly performing funds, and engaged in prohibited transactions.

As of December 31, 2014, the Faculty Plan offered 103 total investment Options—25 TIAA-CREF investment Options and 78 Vanguard Options. (*Id.* ¶ 107.) As of that same date, the Medical Plan offered 11 TIAA-CREF investment Options and 73 Vanguard Options, for a total of 84 Options. (*Id.* ¶ 108.) Both Plans offered the TIAA Traditional Annuity, which is a fixed annuity contract that returns a contractually specified minimum interest rate. (*Id.* ¶ 112.) TIAA-CREF requires plans that offer the TIAA Traditional Annuity to also offer the CREF Stock and Money Market accounts and to use TIAA as a recordkeeper for its proprietary products. (*Id.* ¶ 110.) The other TIAA-CREF investment Options in the Plans include variable annuities, an insurance separate account (the TIAA Real Estate Account), and mutual funds. (*Id.* ¶¶ 114-19.) The remaining investment Options in the Plans are Vanguard mutual funds, which charge investment management, distribution, marketing, and other fees. (*Id.* ¶ 119.)

The Amended Complaint alleges that the named plaintiffs were invested in a number—but by no means all—of the investment Options, including: the CREF Bond Market, CREF Global Equities, CREF Growth,

CREF Stock, TIAA Real Estate, Vanguard Energy, Vanguard Explorer, Vanguard GNMA, Vanguard Health Care, Vanguard High-Yield Corporate, Vanguard Inflation-Protected Securities, Vanguard Institutional Index, Vanguard Long-Term Treasury, Vanguard Morgan Growth, Vanguard Prime Money Market, Vanguard Small Cap Value Index, Vanguard Target Retirement 2015, Vanguard Target Retirement 2050, Vanguard Total Bond Market Index, Vanguard Total International Stock Index, and Vanguard Windsor II accounts. (*Id.* ¶ 8(c).)

Both TIAA-CREF and Vanguard are recordkeepers for the Faculty Plan, and NYU did not consolidate the Medical Plan to a single recordkeeper (TIAA-CREF) until late 2012. (*Id.* ¶ 126.) Plaintiffs point to three other Plans, as well as industry reports, to support their assertions that many other Plans have implemented systems with single recordkeepers. (*Id.* ¶¶ 87-103.)

In terms of assets, the Faculty Plan is among the largest 0.04% and the Medical Plan is among the largest 0.06% of defined contribution plans in the United States. (*Id.* ¶¶ 12, 16.) According to plaintiffs, plans of such size are referred to as "jumbo plans," and their large size affords them "enormous bargaining power" to command low investment management and recordkeeping fees for their participants. (*Id.*)

Plaintiffs allege that NYU breached its fiduciary duties of loyalty and prudence by failing to use "the Plans' bargaining power to reduce expenses and failing to exercise independent judgment to determine what investments to include in the Plans." (*Id.* ¶ 4.) Plaintiffs further allege that defendant allowed the Plans' "conflicted third party service providers—TIAA-

CREF and Vanguard—to dictate the Plans' investment lineup, to link its recordkeeping services to the placement of investment products in the Plans, and to collect unlimited asset-based compensation from their own proprietary products." (*Id.)* In addition, to the extent defendant delegated any of its fiduciary responsibilities to another fiduciary, plaintiffs allege that defendant breached its duty to monitor. (*Id.* ¶¶ 236-39.)

Plaintiffs further allege that NYU engaged in prohibited transactions because plaintiffs, through their investments, "paid a portion of the Plans' excessive administrative and recordkeeping fees, [costs] which would not have been incurred had defendants discharged their fiduciary duties to the Plan." (*Id.* ¶ 8.) They also list the particular funds in which each named plaintiff was invested, noting that each paid a portion of these "excessive" fees through revenue sharing payments. (*Id.)* They further allege that by "allowing the Plans to be locked into an unreasonable arrangement that required the Plans to include the CREF Stock Account and to use TIAA as the recordkeeper for its proprietary products," *(id.* ¶ 203), allowing the service providers to collect "unreasonable fees," *(id.* at ¶ 215), and including Options that cost more than identical alternatives, *(id.* at ¶ 232), the defendants engaged in exchanges of property prohibited under § 406.

II. STANDARD OF REVIEW

A. *Motion to Dismiss*

When resolving a motion to dismiss, a court must construe the complaint liberally, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001), *as amended* (Apr. 20, 2001). A complaint survives a mo-

tion to dismiss under Rule 12(b)(6) if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Where, as here, a complaint alleges that a defendant failed to act prudently within the meaning of ERISA § 404(a), a failure to plead factual allegations "referring *directly* to [defendant's] knowledge, methods, or investigations at the relevant times" is not, by itself, "fatal to a claim alleging a breach of fiduciary duty" if the process was flawed. *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.* (*PBGC*), 712 F.3d 705, 718 (2d Cir. 2013) (emphasis in original). ERISA affords such leeway because plaintiffs "generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." *Id.* (quoting *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009)).

At the motion to dismiss stage, "application of th[e] 'plausibility' standard to particular cases is 'context-specific', and requires assessing 'the allegations of the complaint as a whole.'" *Id.* at 19 (2d Cir. 2013) (first quote quoting *Iqbal*, 556 U.S. at 679) (second quote quoting *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 47 (2011)). A complaint must therefore "be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible."

Braden, 588 F.3d at 594.[1] Here, plaintiffs' complaint contains seven counts, each of which include several categories of allegations regarding purported breaches and violations. (*See* Am. Compl. ¶¶ 195-240.) Defendant argues that the individual allegations supporting each count fail to state a claim. But to the extent one or more allegations plausibly enable the Court to infer that plaintiffs have stated a claim under a particular count, the Court need not assess whether the remaining allegations in such a count could independently support that claim.

B. *Fiduciary Duties and Prohibited Transactions*

Under ERISA, the duties owed by fiduciaries to plan participants and beneficiaries "are those of trustees of an express trust—the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 271, 272 n.8 (2d Cir. 1982). ERISA § 404(a)(1) imposes twin duties of prudence and loyalty on fiduciaries of retirement plans. The duty of loyalty, codified in ERISA § 404(a)(1)(A), requires fiduciaries to act "solely in the interest of the participants and beneficiaries," and "for the exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan." ERISA § 404(a)(1)(A). The Supreme Court has "often noted that an ERISA fiduciary's duty is 'derived from the common law of trusts.'" *Tibble v. Edison Int'l*, 135 S.

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[1] During oral argument on defendant's motion to dismiss, the Court asked the parties to explain whether and when various allegations that are in and of themselves insufficient to state a claim for imprudence or disloyalty should be viewed in the aggregate, such that they can be said to demonstrate, as a whole, that the complaint plausibly states a claim or claims. (*See* ECF No. 59.) The Court has considered the parties' arguments on this point in deciding the present motion.

Ct. 1823, 1828 (2015) (quoting *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985)). The Restatement (Third) of Trusts, which the Supreme Court has turned to "[i]n determining the contours of an ERISA fiduciary's duty," *id.*, explains that that "duty of loyalty" bars trustees from "engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests." Restatement (Third) of Trusts § 78 (2007); *see also Pegram v. Herdrich*, 530 U.S. 211, 224 (2000) ("Perhaps the most fundamental duty of a trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons.").

The duty of prudence, codified in ERISA § 404(a)(1)(B), requires a pension plan fiduciary to act "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." ERISA § 404(a)(1)(B). The "prudent person" standard asks whether "the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984) (quoting *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). Fiduciaries' prudence is measured against an objective standard, and their own "lack of familiarity with investments is no excuse" for failing to act with the care, skill, prudence and diligence required under the circumstances then prevailing. *Id.*

ERISA § 406(a)(1) "supplements the fiduciary's general duty of loyalty to the plan's beneficiaries ... by categorically barring certain transactions deemed 'likely to injure the pension plan.'" *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241 (2000) (quoting *Comm'r Internal Revenue v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993)). As is relevant here, ERISA provides:

> 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; ...
> >
> > (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 … .

ERISA § 406(a)(1). To state a claim under ERISA § 406(a)(1)(A), (C), or (D), plaintiffs must allege that the defendant is a fiduciary; the defendant caused the plan to engage in one of the prohibited transactions set forth in § 406(a)(1); the transaction was "between the plan and a 'party in interest'" (for § 406(a)(1)(A) and (C)) or involved plan assets (for § 406(a)(1)(D)); and the defendant knew or should have known that the transaction was prohibited. *See id.*

The prohibitions set forth in § 406(a)(1) are subject to a number of statutory exemptions, which are codified in ERISA § 408, and which are affirmative defenses that a defendant bears the burden of proving by a preponderance of the evidence if their applicability is in dispute. *Leber v. Citigroup, Inc.*, No. 07 CIV. 9329

(SHS), 2010 WL 935442, at *11 (S.D.N.Y. Mar. 16, 2010); *see also Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1215 (2d Cir. 1987). Thus, "on a Rule 12(b)(6) motion, it must be clear from the face of the Complaint or judicially noticed court filings that the Plan's use of proprietary funds falls within an available exemption." *Moreno v. Deutsche Bank Americas Holding Corp.*, No. 15 CIV. 9936 (LGS), 2016 WL 5957307, at *6 (S.D.N.Y. Oct. 13, 2016) (citing *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008)).

III. COUNTS I, III, AND V—CLAIMS UNDER ERISA § 404(A)(1)(A)

In Counts I, III, and V, Plaintiffs allege breaches of the duties of both loyalty and prudence. These are separate claims—but pled in a single count. Loyalty claims arise under § 404(a)(1)(A) and prudence claims arise under § 404(a)(1)(B). The Court addresses alleged breaches of the duty of loyalty in this section and prudence in the following section.

Plaintiffs' loyalty claims are based on allegations that NYU:

(1) "favor[ed] the financial interests of TIAA-CREF in receiving a steady stream of revenues from bundled services over the interest of participants" (Count I) (ECF No. 39 ¶ 198);

(2) "allow[ed] TIAA-CREF and Vanguard to put their proprietary investments in the Plans without scrutinizing those providers' financial interest in using funds that provided them a steady stream of revenue sharing payments" (Count III) *(id.* ¶ 209); and

(3) failed to consider the conflicts associated with offering the recordkeepers' own proprietary investments in the Plans (Count V) *(id.* ¶ 223).

Defendant argues that plaintiffs have failed to plead sufficient facts to support the loyalty-based claims. (ECF No. 45 at 6.) The Court agrees. To state a *loyalty-based* claim under ERISA § 404(a)(1)(A), a plaintiff must do more than simply recast purported breaches of the duty of prudence as disloyal acts. *See, e.g., White v. Chevron Corp.*, No. 16-CV-0793-PJH, 2017 WL 2352137, at *7 (N.D. Cal. May 31, 2017) (holding plaintiff failed to state claim under ERISA § 404(a)(1)(A) where "most of the allegations ... do not relate to the duty of loyalty, as distinguished from the duty of prudence"). Turning to the Restatement (Third) of Trusts as guidance, the Court finds that, to state a claim under ERISA § 404(a)(1)(A), a plaintiff must allege facts that permit a plausible inference that the defendant "engag[ed] in transactions involving self-dealing or otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests." Restatement (Third) of Trusts § 78 (2007); *see also Gearren v. McGraw-Hill Companies, Inc.*, 690 F. Supp. 2d 254, 261 (S.D.N.Y. 2010), *aff'd sub nom. Gearren v. The McGraw-Hill Companies, Inc.*, 660 F.3d 605 (2d Cir. 2011) ("To state a claim for breach of fiduciary duty under ERISA, Plaintiffs must adequately allege that (1) Defendants were fiduciaries of the plan who, (2) while acting within their capacities as plan fiduciaries, (3) engaged in conduct constituting a breach of an ERISA fiduciary duty.").

Put differently, a plaintiff does not adequately plead a claim simply by making a conclusory assertion that a defendant failed to act "for the exclusive purpose of" providing benefits to participants and defraying

reasonable administration expenses; instead, to implicate the concept of "loyalty," a plaintiff must allege plausible facts supporting an inference that the defendant acted *for the purpose* of providing benefits to itself or someone else. *Compare White*, 2017 WL 2352137, at *6 (stating that original complaint failed to plead facts "sufficient to raise a plausible inference that defendants had engaged in self-dealing or had taken any of the actions alleged for the purpose of benefitting themselves or a third-party entity ... or that they had acted under any actual or perceived conflict of interest in administering the Plan"), *with In re Am. Int'l Grp., Inc. ERISA Litig. II*, No. 08 CIV. 5722 LTS KNF, 2011 WL 1226459 (S.D.N.Y. Mar. 31, 2011) (denying motion to dismiss breach of loyalty claim where plaintiffs alleged that certain fiduciary defendants knowingly allowed company to make employer-contribution matching obligations with overvalued stock, which benefitted company over plan participants), *and Terraza v. Safeway Inc.*, No. 16-CV-03994-JST, 2017 WL 952896, at *7 (N.D. Cal. Mar. 13, 2017) (denying motion to dismiss breach of loyalty claim where plaintiffs alleged that plan administrators permitted trustee to confirm value of its own trusts and to "engag[e] in unlawful product-steering practices to influence its customers to invest in its own proprietary funds").

Implicit in the above-referenced caselaw is that an act which has the effect of furthering the interests of a third party is fundamentally different from an act taken with that as a goal. The former may well not be a violation of the duty of loyalty, but the latter may well be. Here, no factual allegations support purposeful action by NYU to benefit another (let alone itself). If the Court were to allow mere allegations that defendant's conduct "advanced the financial interests" of a third

party to state a claim under ERISA § 404(a)(1)(A), then the duties of loyalty and prudence would collapse into a single claim.

Reviewed according to these principles, plaintiffs' allegations in Counts I, III, and V fail to plead a breach of a duty of loyalty. In Count I, plaintiffs' allegations are principally based on NYU purportedly allowing TIAA-CREF and Vanguard to include their proprietary investments in the Plans without considering potential conflicts, which favored TIAA-CREF's and Vanguard's own interests through the provision of allegedly bundled services.[2] As pled, these allegations do not include facts suggesting that defendant entered into the transaction for the purpose of (rather than merely having the effect of) benefitting TIAA-CREF. (*See* Am. Compl. ¶¶ 195-99.) Similarly, in Count III, the allegation that defendant *allowed* TIAA-CREF (or itself) and Vanguard to include proprietary investments in the Plans "without scrutinizing those providers' financial interests in using funds that provided them a steady stream of revenue sharing payments," (Am. Compl. ¶ 209), is a claim that NYU followed an imprudent process—not that it acted disloyally. Finally, in Count V, plaintiffs allege that "[a]ll of the Plans' options were the recordkeepers' own proprietary investments." (Am. Compl. ¶ 223.) But that allegation does not support an inference that defendant failed to act solely in the interest of participants.

In support of its breach of the duty of loyalty claim, plaintiffs point to the Eighth Circuit's decision *Braden*.

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[2] The Court also notes an allegation that defendant "favored" another's financial interests cannot carry the weight of Count I because the word "favor" does not provide factual context on its own.

There, as here, plaintiffs alleged that the Plan included a limited number and type of funds that were selected despite readily available alternatives, and that the investment options were chosen to benefit the trustee at the expense of the participants. *Id.* at 596. The *Braden* court determined that such allegations, if substantiated, would demonstrate that "the process by which appellees selected and managed the funds in the Plan [had] been tainted by failure of effort, competence, or loyalty." *Id.* Plaintiffs assert that the same result should apply here. But in *Braden*, the Court made clear that its conclusion "rest[ed] on the totality of the specific allegations in th[e] case," *id.* 596 n.7, and the *Braden* plaintiffs—unlike the current plaintiffs—alleged facts indicating that the defendant had failed to disclose material information regarding the funds' performance and fees, including the fact that funds purportedly made revenue sharing payments (of concealed amounts) to the trustee in exchange for inclusion in the plan, *id.* at 598-600. Such purported kickbacks, and the fiduciaries' concealment thereof, plausibly supported concerns regarding "latent conflicts of interest which affect participants' ability to make informed decisions about their benefits." *Id.* at 600. Plaintiffs here have not pled similar facts.

Accordingly, the loyalty claims included in Counts I, III, and V are dismissed.

IV. COUNTS I, III AND V—CLAIMS UNDER ERISA § 404(A)(1)(B)

As stated above, ERISA provides for separate duties of prudence and loyalty. The Court addressed the loyalty-based claims in the preceding section and here addresses the prudence claims arising under § 404 (a)(1)(B).

A. *Count I*

In Count I, plaintiffs allege that defendant breached the duty of prudence set forth in ERISA § 404(a)(1)(B) by acting or failing to act in the following ways:

> (1) Entering into an arrangement that required the Plans to include and retain particular investment Options (specifically, the CREF Stock Account and Money Market Account) regardless of their prudence; and
>
> (2) Retaining TIAA-CREF as a recordkeeper, regardless of its cost-effectiveness and quality of service. (Am. Compl. ¶¶ 196-99.)

Plaintiffs refer to both of these as "lock-in" arrangements (Am. Compl.¶ 202) and assert that they singly or together constitute a breach of ERISA § 404(a)(1)(B) because they prevented defendant from fulfilling its ongoing duty to independently assess the prudence of each investment Option in the Plans and to remove any investments that became, for whatever reason, imprudent. (*Id.* ¶ 198.)

In *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015), the Supreme Court held that "[a] plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." *Id.* at 1829; *see also Henderson v. Emory Univ.*, No. 1:16-CV-2920-CAP, 2017 WL 2558565, at *6 (N.D. Ga. May 10, 2017) (declining to dismiss a nearly identical count in a nearly identical suit filed against Emory University). The facts in *Tibble*, however, are not on all fours with this case. In *Tibble*, the defendant initially offered only six investment options; when the plaintiffs sought more, the defendant added fifty. Brief for the

Respondents at 7, *Tibble*, 135 S. Ct. 1823 (2014) (No 13-550); *see also* Brief for the Petitioners at 5-8, *id.* All told, in *Tibble*, about 11% of the investment Options were being challenged. Here, in contrast, plaintiffs allege that defendant offered more than 100 investment Options in the Faculty Plan and 84 in the Medical Plan at all times material to this litigation—the challenged Options therefore amount to 1.9% of the available Options in the Faculty Plan and 2.4% of those in the Medical Plan.

Moreover, while plaintiffs allege that NYU was contractually required by the service providers to include certain investment Options, there is no allegation that plaintiffs were required to invest in any particular investment Option. In fact, the Amended Complaint alleges that plaintiffs had myriad different investment Options from which they could choose; dozens of investment Options are not alleged to be subject to any "lock-in."

In addition, the Second Circuit requires that, in order to state a claim for breach of the duty of prudence connected to the retention of certain investment Options, plaintiffs must raise a plausible inference that "the investments at issue were so plainly risky at the relevant times that an adequate investigation would have revealed their imprudence, or that a superior alternative investment was readily apparent such that an adequate investigation would have uncovered that alternative"; that is, that "a prudent fiduciary in like circumstances would have acted differently." *PBGC*, 712 F.3d at 719-20. Defendant's contractual agreement to include certain investment Options does not, by itself, demonstrate imprudence— plaintiffs have not demonstrated that this arrangement resulted in the Plans' inclusion of "*plainly risky*" Options. In other words,

plaintiffs have not plausibly alleged that defendant engaged in a transaction that in fact (versus in theory) contractually precluded the Plans' fiduciaries from fulfilling their broad duties of prudence to monitor and review investments under this standard.

As an additional basis for their prudence claim in Count I, plaintiffs allege that defendant entered into a binding contractual arrangement with TIAA-CREF requiring NYU to use its recordkeeping services. However, merely having a contractual arrangement for recordkeeping services does not, as a matter of law, constitute a breach of the duty of prudence—to support a claim on this basis, plaintiff must make a plausible factual allegation that the arrangement is otherwise infirm. Plaintiffs have failed to do so here. Instead, plaintiffs attempt to support their claim by adding a series of assertions that alternative recordkeepers—with whom NYU was allegedly precluded from contracting—could have provided "superior services at a lower cost." (Am. Compl. ¶ 198.) But, as defendant argues, this fact alone does not support *imprudence*. (ECF No. 45 at 27.) If it did, the mere entry into the market of a lower-cost and superior provider would lead to a breach of fiduciary duty. This is not the law. While defendant is certainly bound by the fiduciary duty when selecting service providers, *Leber*, 2010 WL 935442, at *5, a contract that restricts NYU's ability to seek less expensive service providers, standing alone, does not breach this duty.

Count I is therefore dismissed in its entirety, as both the loyalty and prudence claims alleged in it are unsupported.

B. *Count III*

In Count III, plaintiffs allege that defendant breached its duty of prudence with regard to incurring excessive administrative fees relating to recordkeeping. According to plaintiffs, the breach arose from the following actions or inactions:

> (1) NYU failed to solicit competitive bids from other recordkeepers;
>
> (2) It failed to monitor and control recordkeeping fees by not (a) monitoring the amount of revenue sharing received by the Plans' recordkeepers, (b) determining the competitiveness/reasonability of those amounts, or (c) leveraging the Plans' size to reduce fees; and
>
> (3) It failed "to engage in a timely and reasoned decisionmaking process" to determine whether the Plans should use a single recordkeeper.

(Am. Compl. ¶¶ 217-29.)

Defendant argues that plaintiffs have failed to allege why the fees in question were excessive relative to the services rendered. According to defendant, and as set forth in the Second Circuit's decision in *Young v. Gen. Motors Inv. Mgmt. Corp.*, 325 F. App'x 31 (2d Cir. 2009), whether fees are excessive or not is relative to the quality of services provided. In other words, under *Young*, in certain circumstances, paying more for superior services might be more prudent than paying less for inferior ones.

In *Young*, the Second Circuit stated that to support a prudence claim based on excessive fees, a plaintiff must allege facts concerning factors "relevant to determining whether a fee is excessive under the circumstances." *Young*, 325 F. App'x at 33 (citing *Krinsk v.*

Fund Asset Mgmt., Inc., 875 F.2d 404, 409 (2d Cir. 1989)). Facts may go to "the independence and conscientiousness of the [fiduciaries]," *Krinsk*, 875 F.2d at 409, and may tend to show whether a fiduciary failed to adequately tether fees to the services rendered or employed an imprudent process.

Here, however, plaintiffs allege more—they allege several forms of procedural deficiencies with regard to recordkeeping which both individually and combined are sufficient to separate the case from *Young*. For example, they claim that defendant failed to seek bids from other recordkeepers and to ensure that participants were not being overcharged for services. While ERISA does not dictate "any particular course of action," it does require a "fiduciary ... to exercise care prudently and with diligence." *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006) (first quote quoting *Diduck v. Kaszycki & Sons Contractors, Inc.*, 874 F.2d 912, 917 (2d Cir. 1989)). The general requirements may be satisfied at the pleading stage with a variety of allegations, including certain of those here. Thus, the principles set forth in *Young* do not, at this stage, defeat Count III.

Defendant also challenges plaintiff's claim that defendant breached its duty of prudence regarding administrative fees by failing to solicit bids from other recordkeepers, pointing out that competitive bidding is not *per se* required under ERISA. *See White*, 2016 WL 4502808, at *14. That is true. However, there are circumstances where a failure to run a competitive bidding process may be imprudent. *See George v. Kraft Foods Glob., Inc.*, 641 F.3d 786, 800 (7th Cir. 2011) (holding "a trier of fact could reasonably conclude that defendants did not satisfy their duty to ensure that [recordkeeper's] fees were reasonable" where plan fiduciaries failed to solicit competitive bidding for more

than fifteen years). Here, in addition, plaintiffs allege that a competitive bid would have benefitted the Plan or the Plan participants; the series of allegations on the "failure to get bids" claim is sufficient to support Count III. (Am. Compl. ¶ 136.) *See also White*, 2016 WL 4502808 at *14.

In addition, caselaw also supports claims for imprudence based on specific allegations of the level of fees and why such fees were/are unreasonable. Such allegations exist here. Plaintiffs allege that "[e]xperts in the recordkeeping industry" determined that the "market rate" for administrative fees for plans like those at issue in this case was $35 per participant, and that the Plans' recordkeeping fees far exceeded that amount. (Am. Compl. ¶ 132; ECF No. 47 at 13-14.) Thus, the "excessive recordkeeping fees" claim is sufficient to support Count III.

Defendant also attacks plaintiffs' allegations regarding revenue sharing with recordkeepers as a basis for a prudence claim. In this regard, plaintiffs allege that defendant allowed TIAA-CREF to share in revenues obtained from administrative fees associated with certain investment Options. According to plaintiffs, TIAA-CREF did not separately charge for recordkeeping, but rather obtained compensation for its services through the revenue share—they allege that this arrangement was imprudent. While revenue sharing is a "common industry practice," a fiduciary's failure to ensure that "recordkeepers charged appropriate fees and did not receive overpayments for their services" may be a violation of ERISA. *Henderson*, 2017 WL 2558565, at *5. Accordingly, these "revenue-sharing" allegations are sufficient at this stage to support Count III.

In addition, plaintiffs claim that defendant's failure to use a single recordkeeper for each Plan itself demonstrates a lack of prudence. Plaintiffs allege that a number of other plans consolidated into single recordkeeper arrangements to save costs; industry evidence is alleged as part of this. (Am. Compl. ¶¶ 89-103.) While it should be noted that having a single recordkeeper is not required as a matter of law, based on the facts here alleged (for instance, that it consolidated recordkeeping for one plan but not the other), the allegation that a prudent fiduciary would have chosen fewer recordkeepers and thus reduced costs for Plan participants—the "recordkeeping consolidation" allegation—is sufficient at this stage to support Count III. (*Id.* at *6.)

More broadly, when plaintiffs' prudence allegations in Count III are viewed as a whole, they plausibly support an assertion that the Plan fiduciaries failed to diligently investigate and monitor recordkeeping costs. Such a holistic approach was applied in *Tussey v. ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014), in which the Eighth Circuit determined that a host of allegations, viewed together, amounted to a breach of the duty of prudence. *Id.* at 336 (affirming the district court's holding that plan administrators breached their fiduciary duty by "fail[ing] to (1) calculate the amount the Plan was paying Fidelity for recordkeeping through revenue sharing, (2) determine whether Fidelity's pricing was competitive, (3) adequately leverage the Plan's size to reduce fees, and (4) 'make a good faith effort to prevent the subsidization of administration costs of [company's] corporate services' with Plan assets").[3]

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[3] Defendant seeks to distinguish *Tussey* on the ground that there, unlike here, plaintiffs alleged that "the revenue sharing went to pay expenses of the plan sponsor rather than plan expens-

Count III—insofar as it alleges a prudence claim—therefore survives defendant's motion to dismiss.

C. *Count V*

In Count V, plaintiffs allege that defendant failed to prudently select and evaluate Plan investment Options in the following ways:

(1) Continuing to offer two funds with high fees and poor performance—namely, the CREF Stock Account and the TIAA Real Estate Account;

(2) Including in the mix actively managed mutual funds and retail class options with high expenses and poor performance instead of other readily available Options;

(3) Including investment Options that had unnecessary layers of fees; and

(4) Failing to consolidate the Plans' offerings into a "core investment lineup."

(Am. Compl. ¶ 217-229.) Of these allegations, the first two support a claim of prudence while the others do not.

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es." (ECF No. 45 at 9 n.27.) *Tussey* does not require dismissal of this claim at this stage. Allegations regarding misuse of revenue sharing payments go to a breach of the duty of loyalty, which defendant argues (and this Court agrees) is analytically distinct from the breach of the duty of prudence. The *Tussey* court made a number of factual findings that concern the duty of prudence (*e.g.*, the failure to calculate the amount of revenue sharing payments, to determine whether the recordkeepers' pricing was competitive, and to adequately leverage the plan's size to reduce fees), and similar allegations are present here. Plaintiffs have therefore not failed, as a matter of law, to state facts that may amount to a breach of ERISA § 404(a)(1)(B).

Count V may stand as long as any portion of plaintiff's allegations suffice to support the proposition that defendant failed to "employ[] the appropriate methods" in making investment decisions. *See Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984) (quoting *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983)). Plaintiffs have carried their pleading burden on the prudence claim included in Count V. First, plaintiffs plausibly allege that NYU imprudently maintained investments in the CREF Stock Account and TIAA Real Estate Account. Plaintiffs allege that these particular funds underperformed comparable lower-cost alternatives over the preceding one-, five-, and ten-year periods, and that other industry players had recommended removing at least the CREF Stock Account from client plans. (Am. Compl. ¶¶ 178-89.) Plaintiffs' "specific comparisons" to "allegedly similar but more cost effective fund[s]" support a claim of imprudence. *See Braden*, 588 F.3d at 590; *cf. Taylor*, 2009 WL 535779, at *10 (finding plaintiffs' claims regarding allegedly underperforming actively-managed mutual funds to be implausible because "plaintiffs have not addressed the imprudence of selecting any particular actively-managed mutual funds").

Defendant's assertion that plaintiffs "use patently inappropriate benchmarks over jury-rigged performance periods" raises factual questions that are not appropriately addressed at this time. While it is true that a decline in price indicates only that, in hindsight, the investment may have been a poor one (rather than a continuing breach of a fiduciary duty), *PBGC*, 712 F.3d at 721 (dismissing claims of imprudence based on investments in subprime mortgage-backed securities that suffered losses in 2007 and 2008), here there is the additional allegation of a ten-year record of consistent

underperformance. Such an allegation, combined with an allegation of inaction, plausibly supports a claim.

Second, plaintiffs' allegations that NYU breached its fiduciary duties by offering actively managed funds that did not have a "realistic expectation of higher returns" also plausibly support a prudence claim at this stage. Defendant points to *Taylor v. United Techs. Corp.*, No. 3:06-CV-1494-WWE, 2009 WL 535779 (D. Conn. Mar. 3, 2009), *aff'd*, 354 F. App'x 525 (2d Cir. 2009), in which a district court in this circuit rejected similar allegations. However, the *Taylor* Court's reasoning turned in large part on the plaintiffs' failure to address (1) the "imprudence of ... any particular actively-managed funds" and (2) "the fact that two of the selected mutual fund options outperformed market benchmarks." *Id.* at *10. Here, by contrast, plaintiffs do challenge the performance of a specific actively managed fund (the CREF Stock Account, (Am. Compl. ¶ 225)), and they allege that the fund has consistently "underperform[ed] its benchmark and lower-cost actively and passively managed investments that were available to the Plans," (Am. Compl. ¶ 165).

While the above allegations support the prudence claim included in Count V, the plaintiffs' remaining allegations therein would not support a claim. As to plaintiffs' allegations regarding the Plans' inclusion of retail class mutual funds, the Court finds the Third, Seventh, and Ninth Circuit opinions dismissing claims that fiduciaries breached their duties by including retail class mutual funds among their investment Options persuasive. *See Tibble v. Edison Int'l*, 729 F.3d 1110, 1135 (9th Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1823; *Renfro v. Unisys Corp.*, 671 F.3d 314, 319 (3d Cir. 2012); *Loomis v. Exelon Corp.*, 658 F.3d 667, 669-70 (7th Cir. 2011); *Hecker v. Deere & Co.*, 556 F.3d 575, 586

(7th Cir. 2009). In analyzing an allegation against the mix of investment options offered, courts have "looked first to the characteristics of the mix and range of options and then evaluated the plausibility of claims challenging fund selection against the backdrop of the reasonableness of the mix and range of investment options." *Renfro*, 671 F.3d at 326 (citing *Braden*, 588 F.3d at 596; *Hecker*, 556 F.3d at 586). When retail funds are just several of a wide range of options, courts have held that their inclusion was not imprudent. *See Renfro*, 671 F.3d at 326-27; *Hecker*, 556 F.3d at 586. Conversely, when a fiduciary offered ten retail options and only three others, the court concluded that "[t]he far narrower range of investment options available in this case makes more plausible the claim that this Plan was imprudently managed." *Braden*, 556 F.3d at 596 n.6.

Plaintiffs have identified funds for which NYU included a higher-cost share class in the Plans instead of an identified available lower-cost share class of the "exact same mutual fund option." (*See* Am. Compl. ¶¶ 143-48.) But this does not constitute evidence of imprudence. As the court noted in *Loomis*, prudent fiduciaries may very well choose to offer retail class shares over institutional class shares (presumably even where, as here, both versions have identical portfolio managers, underlying investments, and asset allocation (*see* Am. Compl. ¶ 147)), because retail class shares necessarily offer higher liquidity than institutional investment vehicles. 658 F.3d at 672 ("The retail funds that Exelon offers allow daily transfers. Participants can move their money from one vehicle to another whenever they wish, without paying a fee. In retirement, they can withdraw money daily. Institutional trusts and pools do not offer that choice. It is not clear that participants would gain from lower expense ratios at the cost

of lower liquidity.”). The same reasoning precludes plaintiffs’ reliance on such allegations here. Moreover, the fees offered for the sixty-three identified retail funds included in NYU’s Options ranged from 4-77 basis points—a lower range than that permitted by the Third, Seventh, and Ninth Circuits. *See Tibble*, 729 F.3d at 1135; *Renfro*, 671 F.3d at 319; *Loomis*, 658 F.3d at 669; *Hecker*, 556 F.3d at 586. Thus, as the inclusion of retail options does not, on its own, suggest imprudence, the low fees associated with these particular retail options indicates that their inclusion in the range of Options does not demonstrate an unwise choice.

Likewise, the Court finds that plaintiffs’ allegations regarding unnecessary and excessive fee layers are insufficient (as pled) to support a prudence claim. In a series of paragraphs, plaintiffs assert that certain administrative and investment advisory fees are unreasonable in terms of the actual services provided to Plan participants, and that the distribution fees and mortality and expense risk charges provide no benefit to participants. (*See* Am. Compl. ¶¶ 115-21.) However, plaintiffs have not alleged that the inclusion of investment products with these fees led to higher fees overall. Without such an allegation, it is not clear that plaintiffs have plausibly alleged that the overall fee structure was unreasonable. (Even with these categories of fees, they still appear to be within the ranges accepted by various Circuits.)

Finally, the Court agrees with defendant that plaintiffs’ allegations regarding NYU’s purportedly “dizzying array” of investments in the same “investment style” do not support a prudence claim. (*See* ECF No. 45 at 15.) Plaintiffs allege that NYU breached its fiduciary duty by failing to whittle down the investment Options available to class participants, thereby

diluting the Plans' bargaining power and confusing participants. (*See* Am Compl. ¶¶ 107-08, 149-55, 223.) While a "[p]lan fiduciary can[not] insulate itself from liability by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among them," *Hecker*, 569 F.3d at 711, plaintiffs simply have not alleged any facts to suggest that the Plans' beneficiaries were harmed in an actionable way by NYU's failure to consolidate the Plans' investment Options. Plaintiffs allege that each investment style included "duplicative funds," but they do not allege that the Plans offered identical funds or different index funds that tracked the same index or had the same results. (*See* ECF No. 52 at 6.) And plaintiffs allege that an excessively large array of investment Options confuses participants, but they do not allege that any participants were, in fact, confused or overwhelmed. (*Id.*) In effect, then, plaintiffs' theory boils down to a claim that having too many investments limited the Plans' "ability to qualify for lower cost share classes of certain investments." (Am. Compl. ¶ 109.) But while ERISA requires fiduciaries to "monitor and remove imprudent investments," *Tibble*, 135 S. Ct. at 1829, nothing in ERISA requires fiduciaries to limit plan participants' investment Options in order to increase the Plan's ability to offer a particular type of investment (such as funds offering institutional share classes). Indeed, courts have bristled at "paternalistic" theories that suggest ERISA "forbids plan sponsors to allow participants to make their own choices." *Loomis*, 658 F.3d at 673.

For the reasons set forth above, Count V survives—but only as to certain prudence claims.

V. COUNTS II, IV, AND VI—CLAIMS UNDER ERISA § 406(A)(1)

In Counts II, IV, and VI, plaintiffs allege that defendant engaged in prohibited transactions in violation of ERISA § 406(a)(1)(A), (C), and (D). In particular, Count II alleges that defendant's lock-in arrangement with TIAA-CREF regarding the CREF Stock Account and TIAA's recordkeeping services caused the Plans to engage in prohibited sales or exchanges of property, provision of services, and transfers of "plan assets" between the Plan and TIAA-CREF. (Am Compl. ¶¶ 200-04.) According to plaintiffs, these prohibited transactions occurred each time the Plans paid fees to TIAA-CREF in connection with the Plans' investment in the CREF Stock Account and other proprietary options that paid revenue sharing to TIAA. (*Id.* ¶ 203.)

In Count IV, plaintiffs allege that defendant violated ERISA § 406(a)(1)(A), (C), and (D) when it caused the Plans to pay unreasonable administrative fees to TIAA-CREF and Vanguard. (*Id.* ¶¶ 213-16.) Plaintiffs allege that such prohibited transactions occurred each time the Plans paid fees to TIAA-CREF or Vanguard in connection with the Plans' investments in funds that made revenue sharing payments to TIAA or Vanguard. (*Id.* ¶ 215.)

Finally, plaintiffs allege in Count VI that defendant engaged in prohibited transactions by paying unreasonable investment management fees and unnecessary marketing and distribution fees and mortality and risk expense fees to TIAA-CREF and Vanguard. (*Id.* ¶¶ 230-33.) Plaintiffs claim that these prohibited transactions occurred each time that the Plans paid fees to TIAA-CREF and Vanguard in connection with the Plans' investments in TIAA-CREF and Vanguard in-

vestment options. (*Id.* ¶ 232.) For the reasons set forth below, plaintiffs' prohibited transactions claims fail as a matter of law.

As an initial matter, any revenue sharing payments or other fee payments drawn from mutual funds' assets and paid to Vanguard and TIAA-CREF are not "transactions" involving plan assets.[4] Payments drawn from plan assets for administrative purposes do not become "transactions" involving plan assets when they are transferred to the service provider.

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[4] Citing *Haddock v. Nationwide Fin. Servs.*, 419 F. Supp. 2d 156 (D. Conn. 2006), plaintiffs claim that revenue sharing payments delivered to a plan recordkeeper from mutual funds are plan assets. But *Haddock* is not applicable here. In *Haddock*, the court determined that revenue sharing payments from mutual funds can become plan assets when they are received by a fiduciary at the expense of plan participants or beneficiaries. *Id.* at 170. The implication, then, is that revenue sharing payments from mutual funds remain non-plan assets when they are received by non-fiduciaries, and plaintiffs in no way allege that Vanguard or TIAA-CREF were fiduciaries of the NYU Plans. Accordingly, plaintiffs' reliance on *Haddock* is misplaced. *See Hecker*, 556 F.3d at 584 (finding that Haddock was neither "helpful [n]or persuasive [in resolving case where service provider was not alleged to be fiduciary], since the service provider in [*Haddock*] had the authority to delete and substitute mutual funds from the plan without seeking approval from the named fiduciary"). *See also* Dep't of Labor, Advisory Opinion 2013-03A (July 3, 2013) (advising that revenue sharing payments from mutual funds to recordkeepers are not plan assets where, as here, the recordkeeper made "no representations to the plan fiduciaries or to any plan participants or beneficiaries that revenue sharing amounts it receives will be set aside for the benefit of the plan or represent a separate fund for payment of benefits or expenses under the plan"); *Phones Plus, Inc. v. The Hartford Fin. Servs. Grp., Inc.*, No. CIV. 3:06-CV-01835AVC, 2007 WL 3124733, at *4 (D. Conn. Oct. 23, 2007) (finding that Department of Labor advisory opinions are entitled to *Skidmore* deference).

Plaintiffs have similarly failed to state a claim under ERISA § 406(a)(1)(A). Though this provision does not necessarily require the transfer of "plan assets" between the plan and a party in interest, it does require plaintiffs to have plausibly alleged that NYU caused the "sale or exchange, or leasing, of any property between the plan and a party in interest." ERISA § 406(a)(1)(A). "Property," which is not a defined term in ERISA, must be given its "'ordinary meaning' while 'attempt[ing] to ascertain how a reasonable reader would understand the statutory text, considered as a whole.'" *Deutsche Bank Nat. Tr. Co. v. Quicken Loans Inc.*, 810 F.3d 861, 868 (2d Cir. 2015). The term "Property" in § 406(a)(1) can mean anything from "something owned or possessed" to "an attribute common to all members of a class." Merriam-Webster Online, https://www.merriam-webster.com/dictionary/property. Courts tend to find that a transfer of property is a "prohibited transaction" under ERISA when real property or stock are transferred, or when improper payments are made from the pension fund. *See, e.g., Keystone Consol. Indus.*, 508 U.S. at 162 (holding that a transfer of unencumbered real property, as well as encumbered real property, to a pension trust in order to satisfy an obligation is a prohibited transaction); *Henry v. Champlain Enterprises, Inc.*, 445 F.3d 610, 618 (2d Cir. 2006) (noting that the sale of convertible preferred stock is a prohibited transaction under § 406); *N.Y. State Teamsters Council Health & Hosp. Fund v. Estate of DePerno*, 18 F.3d 179, 183 (2d Cir. 1994) (holding that payment out of a health and hospital fund to two maintenance workers who were "parties in interest" was a prohibited transaction under ERISA).

However, as commonly and reasonably understood, the statute is not equating "property" with compensa-

tion payments simply paid by plan investments to plan recordkeepers for workaday recordkeeping transactions. Indeed, payment of a fee for services rendered is a core aspect of a pension plan under ERISA—and most retirement savings plans. Depending on the circumstances, overpayment of fees may be an issue under other provisions of ERISA, but a payment for services rendered cannot be a "prohibited transaction." As much is clear when ERISA § 406(a)(1)(A) is read in conjunction with ERISA § 408(b)(2), which provides that "[c]ontracting or making reasonable arrangements with a party in interest for ... services necessary for the establishment or operation of the plan" is not proscribed under ERISA § 406, so long as "no more than reasonable compensation is paid therefor." ERISA § 408(b)(2).

The Second, Seventh, and Eighth Circuits (at least) have held that the statutory exemptions set forth in ERISA § 408 are affirmative defenses that a defendant bears the burden of proving. *See Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 676 (7th Cir. 2016); *Braden*, 588 F.3d at 601; *Lowen*, 829 F.2d at 1215. Given this precedent, it would be nonsensical to read § 406(a)(1)(A)'s proscription on the transfer of "property" to include the revenue sharing or fee payments from plan investments to recordkeepers, as such an interpretation would mean plan beneficiaries and participants can make out a *prima facie* case for prohibited transactions every time a recordkeeper is compensated for its services—which the plan fiduciary would then have to contest in court by affirmatively pleading and proving, under ERISA § 408, that the fee payments and revenue sharing payments were "no more than reasonable compensation." Surely, Congress and the courts did not intend § 406(a)(1)(A) to be read so broadly, and plain-

tiffs have not pointed the Court to any case suggesting otherwise.[5]

Finally, ERISA § 406(a)(1)(C) does not provide a viable hook for plaintiffs' claim of prohibited transactions. According to plaintiffs, "a plaintiff states a § [406](a)(1)(C) claim based on allegations that recordkeeper/party in interest received 'revenue sharing payments in exchange for services rendered to the Plan.'" (ECF No. 47 at 23 (citing *Braden*, 588 F.3d at 601).) But it 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.

The Court recognizes, of course, that the Eighth Circuit appeared to endorse this theory of liability in *Braden* when it held that plaintiffs had stated claim under ERISA § 406(a)(1)(C) by alleging that a 401(k) plan's sponsor "caused the Plan to enter into an arrangement with [plan trustee/administrator] Merrill Lynch, a party in interest, under which Merrill Lynch received undisclosed amounts of revenue sharing payments in exchange for services rendered to the Plan." 588 F.3d at 601. But in *Braden*, unlike here, the revenue sharing payments were *undisclosed*; in fact, the complaint alleged that the plan fiduciary in *Braden* had agreed to keep the amounts of the revenue sharing payments confidential. *Id.* at 591. Such factual allegations raise the reasonable inference that the plan's fidu-

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[5] In *Braden*, the Eighth Circuit held that the plaintiff had stated a claim under § 406(a)(1)(C) by alleging that a plan administrator had "received undisclosed amounts of revenue sharing payments in exchange for services rendered to the Plan." 588 F.3d at 601. *Braden* did not consider the applicability of § 406(a)(1)(A) to the plaintiff's claims.

ciaries caused the plan to engage in the type of transactions ERISA § 406(a) was intended to avoid— namely, transactions in which "the fiduciary allow[s] himself to be placed in a position where his personal interest might conflict with the interest of the beneficiary." *See Fulton Nat'l Bank v. Tate*, 363 F.2d 562, 571 (5th Cir. 1966); *see also Braden*, 588 F.3d at 602 (noting that "prohibited transactions [under § 1106(a)(1)] involve self-dealing") (alterations in the original).

As discussed above, plaintiffs have offered only conclusory allegations suggesting self-dealing or disloyal conduct. Accordingly, allegations that the Plans violated § 406(a) by paying Vanguard and TIAA-CREF for recordkeeping services— even allegations that the Plans paid too much for those services—do not, without more, state a claim. To hold otherwise would transform § 406—a statutory provision meant to "categorically bar[] certain transactions deemed 'likely to injure the pension plan.'" *Harris Tr. & Sav. Bank*, 530 U.S. at 241—into a statutory provision that proscribes retirement pension plan's most basic operations.

VI. COUNT VII—CLAIM FOR FAILURE TO MONITOR FIDUCIARIES

Plaintiffs allege in Count VII that NYU breached its fiduciary monitoring duties by failing to monitor its delegates, to the extent there were any. (Am. Compl. ¶¶ 23-39.) With regard to this claim, plaintiff claims only that defendant is in exclusive possession of information as to whether NYU delegated its fiduciary duties and responsibilities. (Am. Compl. ¶ 28.) This on its own does not sufficiently support a claim that the defendant failed to monitor the Plans. *See Lerwick v. Kelsey*, 150 F. App'x 62, 65 (2d Cir. 2005) (holding that the district court did not abuse its discretion in denying

a cross-motion for discovery where the "[p]laintiff did not explain with any specificity, inter alia, how he was prevented from obtaining discovery; indeed, his remaining discovery requests appear to be more of a 'fishing expedition' than a good-faith effort to fill in evidentiary gaps"); *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1138 (2d Cir. 1994) ("[A] bare assertion that the evidence supporting a plaintiff's allegation is in the hands of the defendant is insufficient to justify a denial of a motion for summary judgment under Rule 56(f)." (quoting *Sundsvallsbanken v. Fondmetal, Inc.*, 624 F. Supp. 811, 815 (S.D.N.Y. 1985))); *Waldron v. Cities Serv. Co.*, 361 F.2d 671, 673 (2d Cir. 1966), aff'd sub nom. *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968) ("The court quite properly denied the Rule 56(f) motion for further discovery by which plaintiff sought to engage in still another 'fishing expedition' in the hope that he could come up with some tenable cause of action."). If plaintiffs do possess additional facts in support of Count VII, they should inform the Court and may file for reconsideration.

VII. STATUTE OF LIMITATIONS

Defendant argues that any alleged breaches before August 9, 2013 are time-barred by ERISA's three-year statute of limitations. (ECF No. 45 at 24.) Dismissal on statute of limitations grounds is warranted only if "it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law." *Staehr v. Hartford Fin. Servs. Grp.*, 547 F.3d 406, 425 (2d Cir. 2008).

Under ERISA's statute of limitations, a plaintiff must bring suit within the earlier of six years after "the date of the last action which constituted a part of the

breach," or "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." ERISA § 413(2). "[A] plaintiff has 'actual knowledge of the breach or violation' within the meaning of ERISA § 413(2) ... when he has knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated the Act." *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 193 (2d Cir. 2001) (quoting ERISA § 413(2)). "Such material facts 'could include necessary opinions of experts, knowledge of a transaction's harmful consequences, or even actual harm.'" *Id.* (quoting *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1177 (3d Cir. 1992)). "While disclosure of 'a transaction that is not inherently a statutory breach of fiduciary duty ... cannot communicate the existence of the underlying breach,' it follows that where the alleged breach stems from a transaction that a plaintiff claims is 'inherently a statutory breach of fiduciary duty,' knowledge of the transaction 'standing alone' may be sufficient to trigger the obligation to file suit." *Young*, 550 F. Supp. 2d at 419 (S.D.N.Y. 2008), *aff'd*, 325 F. App'x 31 (2d Cir. 2009) (quoting *Caputo*, 267 F.3d at 193). By contrast, where a "plaintiff [is] asserting a process-based claim under § [4]04, § [4]06(a), or both," she "does not have actual knowledge of the procedural breach of fiduciary duties unless and until she has actual knowledge of the procedures used or not used by the fiduciary." *Fish v. GreatBanc Tr. Co.*, 749 F.3d 671, 681 (7th Cir. 2014).

Defendant frames plaintiffs' claims as alleging "inherent" breaches of fiduciary duties. (*See* ECF No. 52 at 9-10.) As a result, defendant argues that plaintiffs gained "actual knowledge" of their claims for excessive fees when they received disclosures in 2012 detailing the Plans' investments, expense ratios, benchmarks,

performance summaries and fees. (ECF No. 45 at 24-25.) In the same vein, defendant contends that plaintiffs had actual knowledge of their claims under § 406(a) when they learned about "the affiliation between [the various parties] and the fact that the funds paid trustee, recordkeeping, and management fees." (ECF No. 45 at 24 (citing *Krueger v. Ameriprise Fin., Inc., No.* 11-CV-02781-SRN/JSM, 2014 WL 1117018, at *14 (D. Minn. Mar. 20, 2014))).

On the circumstances here, the Court cannot dismiss any claims based on the statute of limitations at this time. A fuller record is needed. Whether or not plaintiffs had actual knowledge of defendant's alleged breach before August 13, 2013 is a question for another day.

VIII. CONCLUSION

For the foregoing reasons, defendant's motion to dismiss is GRANTED in part and DENIED in part. Counts I, II, IV, VI, and VII are dismissed in their entirety. The prudence claims in Counts III and V remain to the extent discussed above, as do any claims regarding the statute of limitations.

SO ORDERED.

Dated: New York, New York
August 25, 2017

/s/ Katherine B. Forrest
KATHERINE B. FORREST
United States District Judge