IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-02872-CMA-NYW

BONNIE BIRSE and
GERAD DETWILER, on behalf of all similarly situated participants and beneficiaries of the CenturyLink Dollars & Sense 401(k) Plan,

Plaintiffs,

v.

CENTURYLINK, INC. and
CENTURYLINK INVESTMENT MANAGEMENT COMPANY,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Nina Y. Wang

This matter comes before the court on Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint ("Motion to Dismiss") [#58, filed May 16, 2018][1] filed by Defendant CenturyLink, Inc. and CenturyLink Investment Management Company ("CenturyLink" and "CIM" respectively; "Defendants" collectively) pursuant to 28 U.S.C. § 636(b), the Order Referring Case dated December 6, 2017 [#4], and the Memorandum dated May 17, 2018 [#59]. Plaintiffs ("Ms. Birse" and "Mr. Detwiler" respectively; "Plaintiffs" collectively) filed their Response to Defendants' Motion to Dismiss on May 30, 2018 [#60], and Defendants filed a Reply on June 13, 2018 [#61]. The matter is now ripe for disposition. For the reasons set forth in this Recommendation, the undersigned respectfully recommends that the Motion to Dismiss be **GRANTED**.

[1] This court uses the convention [#__] to refer to the docket entry number assigned by the court's Electronic Court Filing ("ECF") system. In this case, [#58] refers to Defendant's Motion to Dismiss.

BACKGROUND

The following facts are drawn from the operative Second Amended Complaint. [#53]. CenturyLink is a major, publicly-traded telecommunications company. [*Id.* at ¶ 18]. In 2011, it acquired CIM, an investment management company. [*Id.* at ¶ 19]. CenturyLink uses CIM to manage the retirement plans provided to its employees. [*Id.* at ¶¶ 22–24]. In November 2011, CenturyLink named CIM the Plan Investment Fiduciary for its two defined-contribution 401(k) retirement plans, the CenturyLink Dollars & Sense 401(k) Plan ("Dollars & Sense Plan" or "Plan") and the CenturyLink Union 401(k) Plan ("Union Plan"). [*Id.* at ¶ 22]. Shortly thereafter, CenturyLink and CIM formed a Master Trust to hold the combined assets of the Dollars & Sense Plan and the Union Plan. [*Id.*].

CIM manages the Master Trust and provides twenty-two investment options for CenturyLink employees invested through the Dollars & Sense Plan. [*Id.* at ¶ 23]. One of those funds is the "Large Cap Fund" ("the Fund"), an actively managed fund benchmarked against the Russell 1000 Stock Index, a common index of large-capitalization ("large cap") stocks. [*Id.* at ¶ 24]. An actively managed fund, the Fund has annual management fees of 0.41% of net assets which is notably higher than an index fund. [*Id.* at ¶ 25]. The Fund allocated its assets between four investment firms, one actively managed mutual fund, and one large cap index fund. [*Id.* at ¶ 28]. According to the Fund, it chose this particular allocation strategy to diversify its holdings across different management styles in an effort to reduce the risk inherent in relying on a smaller number of investment options and hopefully outperform the benchmark over the long-term. [*Id.* at ¶ 29].

Since the Fund's inception on April 1, 2012, it has underperformed its benchmark by an average of 2.11%. [*Id.* at ¶ 34]. A hypothetical investor who invested $10,000 in the Fund at its

inception and who made no further investments or withdrawals is now approximately $1,680 poorer than one who invested directly in the Fund's benchmark, the Russell 1000. [*Id.* at ¶ 35]. One of the Fund's investments, the T. Rowe Price Institutional Growth Fund, outperformed the index by 2.93% over this same period. [*Id.* at ¶ 36]. Necessarily, the other investments significantly underperformed.

In addition to the Fund, the Master Trust also includes twelve "target date funds." [*Id.* at ¶ 38]. These are funds whose investment strategy is tailored to a specific retirement date, e.g., "the 2045 Target Date Fund." All twelve target date funds allotted some of their assets to the Fund, with the lowest allocating nine percent and the highest sixteen percent. [*Id.*]. Plaintiffs do not identify if these target date funds underperformed their respective benchmarks, but do allege that the funds underperformed relative to their hypothetical performance if the Fund had consistently met its benchmark. This underperformance ranges from 0.19% to 0.48%. [*Id.*].

Plaintiffs are employees of CenturyLink and investors in several of the funds contained in the Master Trust, specifically, the Dollar & Sense Plan. [*Id.* at ¶¶ 16, 17]. Ms. Birse invested in the CenturyLink 2015 Target Date Fund which invested 15% into the Large Cap Fund sometime in 2012 [*id.* at ¶¶ 16, 38],[2] and Mr. Detwiler separately invested directly in the Large Cap Fund in 2015 [*id.* at ¶ 17]. Ms. Birse filed the initial Complaint in November 2017 [#1], and was later joined by Mr. Detwiler in the filing of the Second Amended Complaint in May 2018 [#53]. The Second Amended Complaint remains the operative pleading in this case, and raise three separate claims.

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[2] Plaintiffs do not identify the order in which these investments occurred, i.e., whether Ms. Birse invested in the 2015 Fund before the 2015 Fund invested in the Fund. Such facts could be material to the statute of limitations analysis, but without any facts the court is unable to determine the significance of the investment timing at this stage.

First, Plaintiffs bring a claim against CIM, alleging that CIM breached its fiduciary duty in the design and selection of the Large Cap Fund and breached its duty in failing to monitor the Fund given its sustained underperformance since its inception in 2012 ("First Claim for Relief"). [*Id.* at ¶¶ 52–57]. Second, Plaintiffs bring a claim against CenturyLink, alleging that CenturyLink is both a named and a functional fiduciary of the Dollars & Sense Plan. Plaintiffs allege that CenturyLink failed to monitor CIM in the latter's imprudent selection and monitoring of the Large Cap Fund, and thus incurred liability ("Second Claim for Relief"). [*Id.* at ¶¶ 58–63]. Third, Plaintiffs bring a claim against CenturyLink as a co-fiduciary for their alleged failure to remedy CIM's breach of fiduciary duty in monitoring the Fund ("Third Claim for Relief"). [*Id.* at ¶¶ 64–67]. All of Plaintiffs' claims are premised upon the primary claim that CIM breached its fiduciary duty in the selection and monitoring of the Large Cap Fund. If the first claim is not established, or if it fails to state a claim, the other claims necessarily fail. In response, Defendants address these claims and raise additional arguments with respect to the application of a statutory safe harbor provision and the standing of Plaintiffs.

STANDARDS OF REVIEW

I. Rule 12(b)(1)

Though not raised by Defendants, Rule 12(b)(1), rather than Rule 12(b)(6), of the Federal Rules of Civil Procedure applies to a standing challenge. Federal courts are courts of limited jurisdiction. Under Article III of the United States Constitution, federal courts only have jurisdiction to hear certain "cases" and "controversies." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). As such, courts "are duty bound to examine facts and law in every lawsuit before them to ensure that they possess subject matter jurisdiction." *The Wilderness Soc. v. Kane Cty.* 632 F.3d 1162, 1179 n.3 (10th Cir. 2011) (Gorsuch, J., concurring). Indeed, courts

have an independent obligation to determine whether subject matter jurisdiction exists, even in the absence of a challenge from any party. *1mage Software, Inc. v. Reynolds & Reynolds, Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006) (citing *Arbaugh v. Y & H Corp*., 546 U.S. 500 (2006)).

A plaintiff must establish Article III standing to bring each of his claims separately. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007). The standing inquiry has two components: constitutional and prudential. To establish constitutional standing, a plaintiff must demonstrate "(1) an 'injury in fact,' (2) sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List*, 134 S. Ct. at 2341 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). A plaintiff must also satisfy the requirements of prudential standing. To establish prudential standing, a plaintiff must (1) assert his own rights, rather than those belonging to third parties; (2) demonstrate that his claim is not simply a "generalized grievance;" and (3) show that plaintiff's grievance falls within the zone of interests protected or regulated by statutes or constitutional guarantee invoked in the suit. *See Bd. of Cty. Comm'rs of Sweetwater Cty. v. Geringer,* 297 F.3d 1108, 1112 (10th Cir. 2002) (citations omitted). The elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Lujan*, 504 U.S. at 561.

In addition, in order to bring a class action, the named plaintiff must have individual standing, and may not rely upon potential class members' injuries to establish their standing. *See Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 40 n.20, (1976) (citing *Warth v. Seldin,* 422 U.S. 490, 502 (1975) (stating that named plaintiffs who seek to represent a class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent")); *Thomas v.*

Metro. Life Ins. Co., 631 F.3d 1153, 1159 (10th Cir. 2011) ("Prior to class certification, the named Plaintiffs' failure to maintain a live case or controversy is fatal to the case as a whole—that unnamed plaintiffs might have a case or controversy is irrelevant."). If the named plaintiff does not have standing, then this court lacks subject matter over the action as a whole. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

II. Rule 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure states that a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To state a claim, a complaint must contain factual allegations that, when taken as true, establish a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plausibility is distinct from, and more demanding than, mere conceivability. *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012). An unadorned, conclusory recitation of the elements of the cause of action does also not meet this standard. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

When reviewing a motion to dismiss under Rule 12(b)(6), a court ordinarily accepts as true all well-pleaded factual allegations and views those allegations in the light most favorable to the plaintiff. *Sec. & Exch. Comm'n v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014). But not all facts must be assumed as true for purposes of a Rule 12(b)(6) motion. Legal conclusions, whether presented as such or masquerading as factual allegations, are not afforded such deference. *Dahn v. Amedei*, 867 F.3d 1178, 1185 (10th Cir. 2017). And while a court may usually only consider documents aside from the complaint and any attachments by converting the 12(b)(6) Motion to a Motion for Summary Judgment, Fed. R. Civ. P. 12(d), there are narrow exceptions. A court may take judicial notice of a fact contrary to a plaintiff's assertion even in the context of a Rule 12(b)(6)

motion if taking judicial notice is otherwise appropriate under FRE 201. *See Hodgson v. Farmington City*, 675 F. App'x 838, 840–41 (10th Cir. 2017); *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006). Courts may also consider documents which are referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity. *Wasatch Equality v. Alta Ski Lifts Co.*, 820 F.3d 381, 386 (10th Cir. 2016); *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir 2010). "[W]here a complaint references extrinsic documents which contradict other general allegations in the complaint, a court is not obliged to accept the contradicted allegations as true." *Malone v. City of Wynnewood*, No. Civ-17-0527-HE, 2017 WL 3671170, at *2 (W.D. Okla. 2017) (citing *Gorsuch, Ltd., B.C. v. Wells Fargo Nat. Bank Ass'n*, 771 F.3d 1230, 1238 (10th Cir. 2014)).

ANALYSIS

In their Motion to Dismiss, Defendants argue that dismissal is appropriate on three different grounds. First, Defendants contend that Plaintiffs have failed to sufficiently plead facts to state any claim for breach of fiduciary duty by CIM, and accordingly, all three claims fail. [#58 at 5–12]. Second, Defendants argue that Plaintiffs fail to state a claim for co-fiduciary liability or for breach of the duty to monitor against CenturyLink. [*Id.* at 12–14]. Third, Defendants argue that any claim by Plaintiff Birse is time-barred under the statute of limitations. [*Id.* at 14–15]. The court considers each of Defendants' arguments in turn.

I. Standing

Though Defendants do not lead with their argument regarding Plaintiffs' standing, this court begins with standing because it implicates the court's subject matter jurisdiction. Specifically, Defendants argue that Mr. Detwiler lacks standing because he did not allocate any of his plan account funds to the target date funds, and therefore he lacks standing to assert a claim

premised on plan investment in those funds. [#58 at 11]. Similarly, Defendants assert that Ms. Birse lacks standing to assert a claim based on her direct allocation to the Fund because she invested in a target date fund and not directly in the Fund itself. [*Id.*]. Plaintiffs respond that the Defendants have conflated standing issue with whether or not the Plaintiffs are appropriate class representatives. [#60 at 10–11]. Defendants disagree, insisting that Plaintiffs cannot assert a claim for a harm they have not suffered. [#61 at 8].

As discussed above, to satisfy Article III's case or controversy requirement, Plaintiffs must establish: (1) an injury in fact; (2) a sufficient causal connection between the injury and the conduct complained of; and (3) a likelihood of redressability by a favorable decision. Despite arguing that there are additional ERISA standing requirements in this case, Defendants have not pointed the court to any, nor has this court's own research revealed, any that would be relevant to this present argument. It does not appear that Defendants argue that Plaintiffs lack constitutional standing to bring a certain cause of action as a whole. Instead, Defendants' argument appears to be one of prudential standing, i.e., that Ms. Birse and Mr. Detwiler are required to assert her or his own rights, rather than those belonging to third parties, and may not rely upon other class members to confer standing.

Focusing upon the elements of standing, this court concludes that Plaintiffs have adequately pleaded standing and Defendants' arguments are more properly directed at class certification and damages. Plaintiffs assert claims against CenturyLink and CIM based on alleged harm they suffered from the Fund's design and imprudent retention. [#53 at ¶¶ 52–67]. Both of the named Plaintiffs were exposed to the Fund's defects and CIM and CenturyLink's alleged breach of fiduciary duty, but in different ways. Mr. Detwiler directly invested in the Fund while Ms. Birse had second-hand exposure through the target date funds. Contrary to Defendants'

assertion that the named Plaintiffs are asserting a claim to relief for harms they did not suffer, Plaintiffs have sufficiently pleaded individualized harm. Defendants' arguments pertain not to causes of action, but to different theories of liability, and damages—issues more appropriately considered in the context of class certification. Accordingly, this court declines to recommend dismissal on the basis of standing.

II. CIM's Breach of Fiduciary Duty

The central allegation underlying all claims in the Second Amended Complaint is that the CIM breached its fiduciary duty in the design of the Fund and by failing to monitor and replace the Fund when it consistently underperformed its benchmark every year since its inception in 2012.[3] [#53 at ¶¶ 52–57]. Plaintiffs further contend that CenturyLink owed a duty, and failed, to properly monitor CIM [*id.* at ¶¶ 58–63], and that it is also liable for CIM's breach of fiduciary duty as a co-fiduciary. [*Id.* at ¶¶ 64–67].

The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, provides that an investment manager is a fiduciary and must execute their duties in managing the fund in compliance with the "prudence rule," that is: "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). ERISA fiduciaries are under a statutory duty to diversify the investments of managed funds unless "clearly prudent" to not do so. *Id.* at § 1104(a)(1)(C); *In*

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[3] The role of the Fund's management fees in Plaintiffs' theory is unclear. A review of the Second Amended Complaint reveals that the fees are scarcely mentioned, and Plaintiffs do not expressly allege there is nexus between the fees and the alleged breach of fiduciary duty. [#53 at ¶¶ 25, 52–57]. Nevertheless, given that fees are linked to the design of the fund and for the sake of completeness for the purposes of this Recommendation, the court will consider Plaintiffs' allegations with respect to management fees as part of their claims that CIM breached its fiduciary duty in the initial design of the Fund or by failing to properly monitor and replace the Large Cap Fund due to its alleged underperformance.

re Unisys Sav. Plan Litig., 74 F.3d 420, 434 (3d Cir. 1996). There are two types of ERISA fiduciaries: named fiduciaries and functional fiduciaries. 29 U.S.C. § 1102(a) (named); *id.* at § 1002(21)(A) (functional); *Lebahn v. Nat. Farmers Union Unif. Pen. Plan*, 828 F.3d 1180, 1184 (10th Cir. 2016). As the term implies, a named fiduciary is identified in the plan documents as a fiduciary of the fund. 29 U.S.C. § 1102(a). There is no dispute that CIM is a named fiduciary of the Plan.

Because the consideration of whether a fiduciary has satisfied its duty of prudence is an objective one, this court frames its inquiry into the exercise of a fiduciary's duties as a process inquiry, not an outcome inquiry. *Schapker v. Waddell & Reed Fin., Inc.*, No. 17-CV-2365-JAR-JPO, 2018 WL 1033277, at *7 (D. Kan. 2018) (*citing Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009)). In evaluating a fiduciary's compliance with the prudence rule, the "primary question is whether the fiduciaries, 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." *Calif. Ironworkers Field Pension Tr. v. Loomis Sayles & Co.*, 259 F.3d 1036, 1043 (9th Cir. 2001) (quotations and citations omitted); *see also Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 7 (1st Cir. 2009) ("The test of prudence—the Prudent Man Rule—is one of conduct, and not a test of the result of performance of the investment." (cleaned up)); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996) ("[C]ourts measure section 1104(a)(1)(B)'s 'prudence' requirement according to an objective standard, focusing on a fiduciary's conduct in arriving at an investment decision, not on its results[.]"). In short, the rule contemplates careful consideration of current circumstances, not clairvoyance. *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) ("ERISA's fiduciary duty of care requires prudence, not prescience.").

Although ERISA provides a comprehensive statutory scheme, the specific duties of an ERISA fiduciary are derived from the common law of trusts, and courts examining an ERISA fiduciary's duties often look to the law of trusts, including the Uniform Prudent Investor Act ("UPIA"). *Tibble v. Edison Intl.*, 135 S. Ct. 1823, 1827–28 (2015). Modern trust law applies the "Modern Portfolio Theory" in evaluating a trustee's or fiduciary's investment choices and overall strategy. UPIA § 2(b) (Unif. Law Comm'n 1995) ("A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust."); Restatement (Third) of Trusts § 90(a) (2007) ("This standard requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust."). This formulation applies to ERISA fiduciaries through both court decisions and explicit guidance from the Department of Labor. *See DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 423 (4th Cir. 2007) ("[The] modern portfolio theory has been adopted in the investment community and, for the purposes of ERISA, by the Department of Labor."); *Laborers Nat. Pension Fund v. N. Tr. Quantitative Advisors, Inc.*, 173 F.3d 313, 317 (5th Cir. 1999) ("In general, the regulations provide that the fiduciary shall be required to act as a prudent investment manager under the modern portfolio theory . . . ."); 29 C.F.R. § 2550–404a–1(b) (Department of Labor regulation).

A plaintiff asserting a claim that a fiduciary has violated its duties under § 1104(a)(1)(B) must therefore allege facts establishing a plausible case that the fiduciary's investment decision(s), in the conditions prevailing at the time and without the benefit of hindsight, are such that a reasonably prudent fiduciary would not have made that decision as part of a prudent, whole-

portfolio investment strategy that properly balances risk and reward, short-term and long-term performance. *Accord St. Vincent*, 712 F.3d at 723 (granting a 12(b)(6) motion because the Amended Complaint did not allege that defendant knew that the investment was imprudent at the time it was made, instead only alleging that the investments were improper with the benefit of hindsight); *see also id.* ("Rather than alleging any factual matter about how a prudent investor would have viewed the Portfolio's securities at the relevant times, and in the relevant circumstances, the Amended Complaint simply ignores the issue.") Even if a claim is narrowly focused on one investment, the proper inquiry considers the entire portfolio.

Upon review of the Second Amended Complaint, this court concludes that it fails to sufficiently allege facts, taken as true, that would permit a factfinder to conclude that CIM breached its fiduciary duty under the applicable standards.

A. Initial Design of the Fund

As discussed above, the court's inquiry is one of process, but Plaintiffs make minimal factual allegations regarding any alleged flaws in CIM's process in designing the Fund. The Second Amended Complaint makes no factual allegations why, at the time the Fund was designed, no prudent fiduciary would have diversified the Fund across five different managers, except generic assertions regarding the use of multiple fund managers. *See generally* [#53]. This court is disinclined to accept Plaintiffs' generic assertions that "using multiple managers to reduce the 'risk' of having a single manager . . . significantly reduced the likelihood that the Large Cap Fund would outperform its benchmark"; and "the more managers a fund has, the worse its performance will be." [#53 at ¶¶ 30, 31] as true based on their unsupported and conclusory nature. *Khalik v. United Air Lines*, 671 F.3d 1188, 1193 (10th Cir. 2012) (observing that conclusory allegations are not entitled to the assumption of truth).

But even accepting these assertions as true, the relevant standard acknowledges that fund managers are balancing multiple factors in their investment strategies, and there are no factual allegations to establish that CIM failed to reasonably balance risk and reward, short-term and long-term performance when diversifying the Fund across five different managers. Indeed, Plaintiffs seem to acknowledge that using multiple fund managers reduces the risk of having a single manager (or at least CIM believed so) [*id.* at ¶ 31], and Plaintiffs do not allege facts that allow a factfinder to conclude that either CIM knew that such an assumption was inaccurate or that the reduction of that risk was unreasonable in light of the alternative goal of "seeking to outperform the benchmark." Plaintiffs also do not aver facts about how the use of multiple fund managers affected the stability of the Fund, minimized risk, or affected the long-term versus short-term performance of the Fund.

Nor are there sufficient facts to conclude that the Fund was not a prudent option in the context of the other available investment options for the Plan. In fact, the Second Amended Complaint does not make a single allegation regarding how a prudent fiduciary would have analyzed the available investments, and entirely ignores how the Fund and its design fit into that analysis. Just as in *St. Vincent*, "[r]ather than alleging any factual matter about how a prudent investor would have viewed the Portfolio's securities at the relevant times, and in the relevant circumstances, the Amended Complaint simply ignores the issue." *St. Vincent*, 712 F.3d at 723.

B. Substantial Fees

To the extent that Plaintiffs allege that the design of the Fund is defective due, in part or whole, to its management fees, this court finds that their allegations with respect to the fees neither alters this court's analysis with respect to the design, as articulated above, or are sufficient to serve as an alternative basis for a finding of breach of fiduciary duty. Selecting a fund with "substantial

fees" is not per se a breach of fiduciary duty; a modern portfolio may have any number of risky or high-cost investments if such investments are hedged and reasonable in context. *DiFelice*, 497 F.3d at 423. And there is no ERISA requirement that a fiduciary "scour the market to find and offer the cheapest possible fund." *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009). Rather, fees are simply one factor among many pertinent considerations in making an investment decision. *St. Vincent*, 712 F.3d at 723; *Renfro v. Unisys Corp.*, 671 F.3d 314, 327 (3d Cir. 2011) ("[T]he range of investment options and the characteristics of those included options—including the risk profiles, investment strategies, and associated fees—are highly relevant and readily ascertainable facts against which the plausibility of claims challenging the overall composition of a plan's mix and range of investment options should be measured."). As one of many relevant considerations, Plaintiffs simply fail to adequately allege how the Large Cap Fund's "substantial fees" rendered the design flawed.

Cost challenges to an ERISA fiduciary's investment choice frequently arise from allegations that an ERISA plan invested in retail-class shares as opposed to institutional shares which typically have lower fees, or otherwise fails to make the cheaper selection between largely or entirely identical investment vehicles. *See, e.g.*; *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 & n.5 (8th Cir. 2009); *Sacerdote v. New York University*, No. 16-cv-6284 (KBF), 2017 WL 3701482, at *11 (S.D.N.Y. 2017); *Henderson v. Emory University*, 252 F. Supp. 3d 1344, 1249 (N.D. Ga. 2017); *White v. Chevron Corp.*, No. 16-cv-0793-PJH, 2016 WL 4502808, at *10 (N.D. Calif. 2016); *Kruger v. Novant Health, Inc.*, 131 F. Supp. 3d 470, 467–77 (M.D.N.C. 2015). In such an inquiry, the investments must be nearly or entirely identical as comparison of unrelated investments is not a properly framed inquiry given the fact-specific and contextual nature of investment decision-making. *See White*, 2016 WL 4502808, at *10. These cases illustrate the

process-focused nature of the inquiry; courts find a plausible basis for a breach of fiduciary duty when the fiduciary could have selected an identical option with lower fees. *See e.g., Braden*, 588 F.3d at 596 (holding that the district court erred in dismissing a Complaint on a 12(b)(6) motion when Plaintiff plausibly alleged that the defendant invested in the retail class shares while institutional class shares were available). But Plaintiffs make no such allegations in the Second Amended Complaint. Though Plaintiffs allege that "[t]he Large Cap Fund charged Class members investment management fees of .41% of net assets annually. In comparison, the CenturyLink U.S. Stock Index Fund charged management fees of only .07% of net assets annually," [#53 at ¶ 25], Plaintiffs do not allege that "actively managed funds" are identical to "index funds," such that the comparison of the respective management fees plausibly leads to an inference of a deficiency in the selection process. *See generally* [#53]. Nor do Plaintiffs allege that an identical fund to the Large Cap Fund was available and had lower fees. [*Id.*].

A challenge to a fee structure based solely on the absolute amount of the fees charged presents an even higher bar for plaintiffs. Courts have held that to establish a valid excessive fee claim, the fund must "charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining." *Young v. General Motors Invest. Mgmt. Corp.*, 325 F. App'x 31 (2d Cir. 2009) (quoting *Gartenberg v. Merrill Lynch Asset Mgmt.*, 694 F.2d 923, 928 (2d Cir. 1982)). In other words, the investment choice must be *per se* a breach of fiduciary duty due to its high fees; the investment must be so expensive and so flatly improper that a reasonably prudent investor could not have selected such an option—even if hedged with safer or lower-cost investments elsewhere in the portfolio.

But Plaintiffs offer no factual allegations that would support such a claim. Plaintiffs do not assert factual allegations regarding the expense ratios implicated by the Large Cap Fund or its "substantial fees," or how the "substantial fees" bear no reasonable relationship to the services rendered. There are also no factual allegations regarding the services included with the "substantial fees," and how they compare with lower cost options. Accordingly, this court and a factfinder is left simply with a conclusory allegation that the Large Cap Fund fees were "substantial," but even taken as true, that allegation is insufficient standing alone to state a cognizable claim for breach of fiduciary duty.[4]

C. Failure to Monitor and Replace

Finally, this court considers whether CIM breach its fiduciary duty after the initial design of the Fund, as fiduciary duties continue beyond the initial section process. Fiduciaries are under a continuing duty to conduct a regular review of their investment decisions and remove those investments which, although perhaps initially prudent, have become improper to retain. *Tibble*, 135 S. Ct. at 1828. As the Supreme Court did in *Tibble*, *id.* at 1828–29, this court turns to trust law to substantively examine the scope of this duty.

The comment to UPIA § 2 reiterates this duty, providing that "managing embraces monitoring, that is, the trustee's continuing responsibility for oversight of the suitability of

[4] In the Seventh Circuit, mere selection of an expensive investment option does not support a claim for breach of fiduciary duty. "As *Loomis* [and] *Hecker* . . . make clear, however, the mere fact that mutual funds have higher expense ratios than separately managed accounts does not mean Defendants breached their fiduciary duties in offering these funds." *Spano v. The Boeing Co.*, 125 F. Supp. 3d 848, 867 (S.D. Ill. 2014). The Third and Eighth Circuits have come to similar conclusions, looking first to the characteristics of the mix and range of investment options and then evaluating 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; *Braden*, 588 F.3d at 596. In fact, Plaintiffs have not identified any decisions which have found a breach of fiduciary duty based solely on the selection of an expensive fund, and the court's own research has not found any either.

investments already made. (internal quotations omitted). Restatement (Third) of Trusts § 77 cmt. b similarly provides that "[t]he duty of care requires the trustee to exercise reasonable effort and diligence . . . in monitoring the trust situation[.]" In making such a claim, plaintiffs must allege either that the fiduciary engaged in a deficient review process or that no review occurred at all, and that if the review had occurred or not been deficient, no reasonably prudent fiduciary would have retained the investment. The application of this duty to monitor depends on whether the plaintiff alleges particular changed circumstances merited review and were ignored, or whether plaintiff's claim is premised on an allegation that, while nothing has materially changed with respect to the investment, it has become stale or proven to be imprudent.

Under this standard, plaintiffs must show that a proper exercise of procedural prudence—meeting and considering the fund's then-extant investments—would have averted the harm which "necessarily require[s] a plausible allegation explaining how no reasonable fiduciary could conclude that removing such investments would not be likely to do more harm than good to the plan and its participants." *In re SunEdison, Inc. ERISA Litig.*, No. 16-MC-2744 (PKC), 2018 WL 3733946, at *8 (S.D.N.Y. 2018). Phrased differently, to plausibly establish a claim for breach of the duty to monitor based on procedural prudence, plaintiff must allege facts plausibly establishing that, upon proper review, no reasonable fiduciary would maintain the investment. Plaintiff must allege facts to support the conclusion that defendants would have acted differently had they engaged in proper monitoring—and that an alternative course of action could have prevented the plan's losses. *Kopp v. Klein*, 894 F.3d 214, 221 (5th Cir. 2018).[5] It is not sufficient to simply allege that an investment did poorly, and therefore a plaintiff was harmed.

[5] There does appear to be law outside the Tenth Circuit which holds that the failure to monitor, without more, may in and of itself give rise to liability. *See, e.g.*, *Brannen v. First Citizens Bankshares Inc.*, 6:15-cv-30, 2016 WL 4499458, at *5 (S.D. Ga. 2016) ("[T]he failure to monitor or investigate the continued prudence of an investment may breach the duty of prudence even if

In *Kopp*, the United States Court of Appeals for the Fifth Circuit affirmed dismissal of a procedural prudence claim when the plaintiff failed to make those kind of factual allegations, notwithstanding the fact that the investment cratered to below $1 a share. *Id.* at 217, 221. The United States District Court for the Southern District of New York reached a similar conclusion in considering investments in Lehman Brothers, which collapsed in 2008. *In re Lehman Bros. Sec. and ERISA Litig.*, 113 F. Supp. 3d 745, 757–58 (S.D.N.Y. 2015) ("[P]laintiffs allege no facts to suggest that the review they claim should have been done would have averted the injury that ultimately occurred when Lehman later collapsed."). In short, to establish a claim for failure to monitor, Plaintiffs must plead facts plausibly establishing that: (1) a review of plan investments should have been conducted, but either was not conducted at all or was faulty in some way; (2) but for the absence/deficiency of the former, the plan would have removed the investments; (3) no reasonably prudent fiduciary would have held onto the investment, taking into account the whole-of-portfolio theory discussed above; and (4) an alternative course of action could have prevented the plan's losses.

In applying these standards, this court concludes that Plaintiffs also fail to allege sufficient facts for a factfinder to conclude that CIM failed to properly monitor and replace the Large Cap Fund when it underperformed its benchmark by an average of 2.11% since 2012. While Plaintiffs allege that "[h]ad CIM replaced the Large Cap Fund with the T. Rowe Price Institutional Growth Fund, Plaintiff and other class members would have realized 5% higher returns on their investment," [#53 at ¶ 37], such an assertion, standing alone, improperly focuses on the outcome

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adequate monitoring would have resulted in the same action (or inaction)." (quotations omitted)). However, because Plaintiffs do not allege any infirmity in the monitoring process apart from the outcome—the retention of the Fund—this court does not consider such arguments in this Recommendation.

rather than the process. *Kopp*, 894 F.3d at 221 ("[The] duty-of-prudence claim cannot rest solely on the Defendants' procedural failings."). Plaintiffs fail to allege facts that indicate when a review of plan investments should have been conducted and/or that any review was deficient and what information and investment options were available to CIM at that time. For instance, there are no allegations that a particular event precipitated the need for CIM to review its Plan investments; that CIM had a choice to replace the Large Cap Fund with any other fund year-to-year; what funds were available for replacing the Large Cap Fund, including but not limited to the T. Rowe Price Institutional Growth Fund; the opportunity costs of replacing the Large Cap Fund; or its decision to remain with the Large Cap Fund was unreasonable weighing the opportunity costs of a switch, the comparative risk of the funds, the comparative short-term and long-term returns of the funds, and the balance of the overall portfolio, given information available to it at the time CIM would have been making year-to-year investment determinations. There are no allegations that CIM considered improper factors in making its year-to-year investment decisions. As Plaintiffs state, 89% of managers underperform their benchmarks [#53 at ¶ 31], and this court cannot accept that the mere fact of relative underperformance is sufficient to state a claim. Additionally and independently, the court notes that the Fund's underperformance is paired with strong absolute performance, [*id.* at ¶ 34] (averaging over 11% return per year since inception), and that relative underperformance has been *decreasing* by Plaintiffs' own admission. [*Id.*] (underperformance from benchmark has been reduced by well over half in past year).

Having considered both claims underlying the alleged breach of fiduciary duty in the design of the Fund and found neither sufficient independently, the court also considers whether the aggregate of the two theories constitute a breach of fiduciary duty, i.e., did CIM breach its fiduciary duty because it designed an inadequate Fund, and then failed to replace it when it became

clear that it was underperforming. Upon review of the Second Amended Complaint as a whole, this court concludes that even aggregated, the factual allegations as pled do not nudge the claim for breach of fiduciary duty over the line to survive dismissal. For the reasons set forth above, this court respectfully RECOMMENDS that the Motion to Dismiss be GRANTED with respect to the First Claim of Relief.

III. Failure to Monitor by and Co-Fiduciary Liability of CenturyLink

In the Second Claim for Relief against CenturyLink, Plaintiffs allege that CenturyLink failed in its duty to monitor by virtue of CenturyLink's supervisory role over CIM. [#53 at ¶¶ 52–63.] Specifically, Plaintiffs allege that the Defendants should have been aware that the Fund's sustained underperformance should have led to its replacement. [*Id.*]. In their Third Claim for Relief, Plaintiffs assert that CenturyLink is also liable for the breach of fiduciary duty due to its status as co-fiduciary. [*Id.* at ¶¶ 64–67].

CenturyLink argues that Plaintiffs have failed to state a claim for breach of the duty to monitor or for co-fiduciary liability. CenturyLink contends that: (1) Plaintiffs failed to adequately plead that CenturyLink is a fiduciary; (2) failed to plead that CenturyLink should have known of CIM's breach and could have but failed to stop it, and; (3) failed to plead that CenturyLink acted in a fiduciary capacity to appoint CIM. [*Id.* at 7].

A. Derivative Claims

The Second and Third Claims for Relief against CenturyLink are derivative to a cognizable breach of fiduciary duty by CIM, and Plaintiffs allege no separate or additional basis for a breach of a duty to monitor by CenturyLink that might alter this court's prior analysis. Plaintiffs have not attempted to make any allegations specific to CenturyLink that might plead a cognizable claim of the duty to monitor CIM or its investments. Plaintiffs do not make any allegations about

CenturyLink's process of monitoring CIM, precluding this court from being able to determine if Plaintiffs' claim is premised on the complete absence of such a process or the defective nature of such a process. Plaintiffs also do not allege whether CenturyLink should have been aware because of a specific event that rendered the Fund imprudent to retain or whether it is merely the slow accumulation of substandard performance that should have—at some undefined point—informed CenturyLink that the Fund was now imprudent to retain. All that is before the court in the Second Amended Complaint is the outcome of the process—the retention and alleged subpar performance of the Fund – which in and of itself, is insufficient to state a claim for a failure to monitor. *See e.g. In re Lehman Bros.*, 113 F. Supp. 3d at 757 (finding a failure to state a claim for failure to monitor despite the collapse of Lehman Brothers); *Kopp*, 894 F.3d at 217, 221 (finding failure to state a claim for failure to monitor despite delisting from the New York Stock Exchange). Thus, based on the court's prior Recommendation with respect to that primary claim, the court respectfully RECOMMENDS that the Second and Third Claims for Relief be DISMISSED. *See e.g.*, *In re YRC Worldwide, Inc. ERISA Litig.*, No. 09-2593-JWL, 2011 WL 1303367, at *2 n.2 (D. Kan. 2011) (collecting cases that duty to monitor and co-fiduciary claims are derivative to breach of fiduciary duty claims).

Nevertheless, for the purposes of completeness, the court assumes that Plaintiffs have sufficiently pled a cognizable breach of fiduciary duty by CIM, and considers but declines to adopt each of Defendants' additional arguments.

B. CenturyLink's Status as Fiduciary

CenturyLink first contends that the Second and Third Claims for Relief fail because Plaintiffs have failed to adequately allege that it is a fiduciary of the Plan or a co-fiduciary with

CIM. The Plaintiffs allege that CenturyLink is a fiduciary because (1) it was named in the Plan documents, and (2) exercises sufficient control such that it is a functional fiduciary. [#53 at ¶ 18].

Named Fiduciary. Normally, the factual assertion that "CenturyLink is a named fiduciary" would be taken as true and sufficient to establish that CenturyLink is a named fiduciary for present purposes. However, Defendants have provided the relevant plan documents in their Motion to Dismiss. Those documents, which are central to Plaintiffs' claims and whose authenticity is not questioned in Plaintiffs' Reply, may properly be considered by the court at this juncture, *Wasatch Equality*, 820 F.3d at 386, and designate CIM as the named fiduciary with one exception that is not relevant. [#58-2 at 80] ("CIM shall be the named fiduciary for all purposes of the management and investment of Plan assets except as provided in subsection (d) below."). Accordingly, this court finds that the Second Amended Complaint's averment that CenturyLink is a named fiduciary need not be taken as true for the purposes of this instant Motion to Dismiss.

Functional Fiduciary. Having rejected the claim that CenturyLink is a named fiduciary, the question becomes whether or not Plaintiffs have alleged sufficient facts to plausibly establish that CenturyLink is a functional fiduciary. A functional fiduciary is a fiduciary-in-fact based on the nature and extent of their interactions with the fund, particularly on the degree of control the functional fiduciary exercises. The statute provides for several alternate methods of establishing this relationship: a person is a functional fiduciary if (1) she exercises "any discretionary authority or discretionary control respecting management of such plan" including regarding the disposition of plan assets; (2) she renders investment advice for a fee or other compensation or has any authority to do so, or (3) she has any discretionary authority or discretionary responsibility in the administration of such plan. § 1002(21)(A). The second test is not relevant here, and thus the analysis focuses on the first and third.

To be a functional fiduciary based on one's discretionary authority over either fund assets or the fund itself, one must provide more than ministerial, administrative, or non-discretionary services to a fund. For example, a fund's attorneys, accountants, and consultants do not in the usual course of their duties become plan fiduciaries. 29 C.F.R. § 2509.75-5 ("[A]ttorneys, accountants, actuaries and consultants performing their usual professional functions will ordinarily not be considered fiduciaries[.]"); *Lebahn*, 828 F.3d at 1185 (same). The Tenth Circuit has defined the duties a functional fiduciary must undertake to fall within this section as "the providing of investment advice, administrative control over a plan, advising on whom to retain as legal or investment advisors to a plan, and, ultimately, how to invest plan assets." *In re Luna*, 406 F.3d 1192, 1201 (10th Cir. 2005); *David P. Coldesina, D.D.S. v. Estate of Simper*, 407 F.3d 1126, 1132 (10th Cir. 2005). And as the Circuit further stated in *Lebahn*, the functional fiduciary must have independent discretion in undertaking these duties. *Lebahn*, 828 F.3d at 1183; *Luna* 406 F.3d at 1202; *accord* § 2509.75-5 (referring to attorneys/accounts/consultants who have no discretionary authority over the management or administration of the plan). The fiduciary must exercise discretionary control over plan administration or the use of plan assets, rather than over portions of the plan's functioning. *See, e.g.*, *Derryberry v. Pharmerica Corp.*, No. Civ 17-207-C, 2017 WL 377945, at *4 (W.D. Okla. 2017) (discretion in administrative functions not sufficient); *It's Greek to Me, Inc. v. Fisher*, Civ. No. 17-4084-KHV, 2018 WL 953111, at *7 (D. Kan. 2018) (control over settlement funds not sufficient to establish fiduciary status because control over "plan assets" must refer to "common transactions in dealing with a pool of assets: selecting investments, exchanging one instrument or asset for another, and so on" (quoting *Luna*, 406 F.3d at 1201)).

Plan administration is distinct from plan sponsorship. In *Beck v. PACE International Union*, the Supreme Court held that "an employer's fiduciary duties under ERISA are implicated

only when it acts in the . . capacity" of a plan administrator as opposed to as a plan sponsor. 551 U.S. 96, 102 (2007). In other words, merely sponsoring a plan or setting up a separate entity to administer the plan is not enough, standing alone, to render an employer a functional fiduciary under this test. Additionally, because a sponsor necessarily has discretionary power in the creation and termination of a fund, even the powers that involve fund creation, amendment, merger, or termination are not considered fiduciary functions despite the fact that, in common parlance, those are duties that relate to plan administration. *Id.*; *see Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries."); *In re J.P. Morgan Chase & Co. ERISA Litig.*, 12 Civ. 04027(GBD), 2016 WL 110521, at *2–3 (S.D.N.Y. 2016) (holding that plaintiffs did not plead sufficient facts to plausibly allege that defendants were functional fiduciaries "because actions taken as a sponsor, such as establishing a plan, are not fiduciary functions that trigger liability under ERISA"). In short, decisions regarding the design of the fund are not usually subject to fiduciary duties, while actions over the specific administration of plan assets are. *Hughes Aircraft*, 525 U.S. at 445.

That said, there are certain powers to amend or terminate the plan that do give rise to a fiduciary relationship under § 1002(21)(A). The power to select and retain or terminate a plan fiduciary has been held to establish the required discretion over plan administration to give rise to a fiduciary relationship. *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465 (4th Cir. 1996) ("[P]lan sponsors . . . are generally free under ERISA to amend plans without triggering fiduciary status . . . . However, the power (through plan amendment) to appoint, retain and remove plan fiduciaries constitutes 'discretionary authority' over the management or administration of a plan within the meaning of § 1002(21)(A)."); *see also Ed Miniat, Inc. v. Globe Life Ins. Grp., Inc.*, 805

F.2d 732, 735–36 (7th Cir. 1986) ("[A]n individual and a corporation who had the power to appoint and remove the trust administrators were fiduciaries for that purpose. (citing *Leigh v. Engle*, 727 F.2d 113, 133 (7th Cir. 1984)). While the parties do not identify, and this court has not found, any relevant case law from the Tenth Circuit, Department of Labor regulations have come to a similar conclusion. 29 C.F.R. § 2509.75–8 at D-4 ("[T]he board of directors [of a plan sponsor] may be responsible for the selection and retention of plan fiduciaries. In such a case, members of the board of directors exercise discretionary authority or discretionary control respecting management of such plan and are, therefore, fiduciaries with respect to the plan." (quotation marks omitted)).

In the Second Amended Complaint, Plaintiffs plead that "CenturyLink is a fiduciary of the Plan because [a] the CenturyLink Board of Directors has the sole authority to appoint and remove CIM as Investment Fiduciary, and [b] amend or terminate, in whole or part, the [Dollars & Sense] Plan or the Master Trust." [#53 at ¶ 18.] The Supreme Court uniformly rejects the latter proposition that the power to amend or terminate the plan implicates fiduciary duties. *Hughes Aircraft*, 525 U.S. at 443; *Spink*, 517 U.S. at 890; *Beck*, 551 U.S. at 102. But Plaintiffs have also alleged that CenturyLink has the sole authority to appoint and remove CIM as an Investment Fiduciary, and in light of the case law above, this court finds that Plaintiffs have sufficiently pleaded that CenturyLink is a functional fiduciary at this stage. *Coyne & Delany*, 98 F.3d at 1465; *Miniat*, 805 F.2d at 736; 29 C.F.R. § 2509.75–8 at D-4. Therefore, this court declines to recommend dismissal based on Defendants' arguments that Plaintiff has failed to sufficiently plead that CenturyLink is a fiduciary.[6]

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[6] In reaching this conclusion, the court declines Defendants' invitation to substantively interpret the Dollars & Sense Plan governing document to conclude as a matter of law that CenturyLink is not a co-fiduciary of CIM. [#61 at 7–8]. Although the court took judicial notice of the document in declining to take Plaintiffs' allegation that CenturyLink was a named fiduciary as true, it is not obliged to substantively interpret the document and apply it to the facts at hand in the context of a 12(b)(6) motion. Fed. R. Evid. 201(c)(2).

C. CenturyLink's Knowledge

Lastly, the court rejects Defendants' contention that Plaintiffs "have not pled any facts supporting their claim that CenturyLink 'should have known' continued investment in the Large Cap Fund was imprudent." [#61 at 8.] It is true that Plaintiffs do not specifically allege facts establishing that CenturyLink should have known that the Fund had become an imprudent investment, but given that the court accepts for the current motion that CenturyLink is a functional fiduciary, Plaintiffs are entitled to the inference that a fiduciary—especially one so deemed because of their control over the Plan—is generally aware of plan investments and publicly available performance data.

IV. ERISA Statute of Limitations and Claim Accrual

Defendants also contends that Plaintiff Birse (but not Plaintiff Detwiler) is precluded from proceeding at this stage based on the statute of limitations. [#58 at 14–15]. Under ERISA, the statute of limitations is:

> (1) Six years after
>
> (A) the date of the last action which constituted a part of the breach or violation, or
>
> (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation.

29 U.S.C. § 1113 (2018). The statute of limitations for breach of fiduciary duty for the design of the Fund under ERISA begins running when the plaintiff has actual knowledge of the breach, i.e., when she has actual knowledge the Fund has selected an imprudent investment. But a breach of fiduciary duty for the imprudent retention of an asset is a continuing violation, and "so long as the

alleged breach of the continuing duty occurred within six years of suit, the claim is timely." *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1829 (2015). "Held together by chewing gum and baling wire," the statute of limitations has been described as "enigmatic—almost chimerical." *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 184, 188 (2d Cir. 2001). Here, the application of three-year statute or the six-year statute of limitation turns on whether and when Ms. Birse had "actual knowledge."

The various federal Circuits have different definitions of the "actual knowledge" requirement, but the Tenth Circuit has not established its own or adopted one from another Circuit. *Mid-S. Iron Workers Welfare Plan v. Harmon*, 645 F. App'x 661, 665 (10th Cir. 2016) ("We need not adopt one of these constructions of the statute because the district court's ruling is sound under any of them."); *Ramos v. Banner Health*, 325 F.R.D. 382, 390 (D. Colo. 2018) ("[T]he Court has not located any controlling Tenth Circuit case interpreting or applying the 'actual knowledge' standard." (formatting altered)).

In the Third and Fifth Circuits, "actual knowledge" and the three-year statute of limitation applies only where the Plaintiff knows both the facts establishing a breach of duty and has knowledge of the legal significance of those facts. *Lewis v. Allegheny Ludlum Corp.*, 579 F. App'x 116, 121 (3d Cir. 2014) (citing *Int'l Union of Elec. Workers v. Murata Erie N. Am., Inc.*, 980 F.2d 889, 900 (3d Cir. 1992)); *see also Babcock v. Hartmarx Corp.*, 182 F.3d 336, 339 (5th Cir. 1999) ("[A]ctual knowledge requires that the [plaintiffs] know not only of the events constituting the breach, but 'also that those events supported a claim for breach of fiduciary duty or violation under ERISA.'" (quoting *Murata Erie*, 980 F.2d at 900)). A plaintiff may know all the facts establishing the breach, but if she does not appreciate that those facts also give rise to ERISA liability, then the three-year statute of limitations does not apply.

The Sixth, Seventh, and Ninth Circuits do not require that the plaintiff understand the legal significance of the underlying acts, only the essential facts of the transaction or conduct constituting the violation. *See Fish v. GreatBanc Tr. Co.*, 749 F.3d 671, 679 (7th Cir. 2014) ("Our most concise definition is knowledge of the essential facts of the transaction or conduct constituting the violation, with the caveat that it is not necessary for a potential plaintiff to have knowledge of every last detail of a transaction, or knowledge of its illegality." (quotations and citations omitted)); *Wright v. Heyne*, 349 F.3d 321, 330 (6th Cir. 2003) ("[T]he relevant knowledge required to trigger the statute of limitations . . . is knowledge of the facts or transaction that constituted the alleged violation; it is not necessary that the plaintiff also have actual knowledge that the facts establish a cognizable legal claim under ERISA in order to trigger the running of the statute."); *In re Northrop Grumman Corp. ERISA Litig.*, No. cv 06-06213 MMM (JCx), 2015 WL 10433713, at *18 (C.D. Calif. 2015) ("[T]he statute of limitations is triggered by plaintiffs' knowledge of the transaction that constituted the alleged violation, not by their knowledge of the law." (citing *Blanton v. Anzalone*, 760 F.2d 989, 992 (9th Cir. 1985)).

The Second and D.C. Circuits have adopted a hybrid test, interpreting the actual knowledge requirement to refer to the "knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated the Act." *Caputo*, 267 F.3d at 193; *Fink v. Nat. Sav. & Tr. Co.*, 772 F.2d 951, 957 (D.C. Cir. 1985). So long as a potential plaintiff is aware of conduct that constitutes a breach, she is deemed to have actual knowledge even if she is subjectively unaware of the ultimate legal significance of the actions. But under this test, the Plaintiff must have some level of understanding that the facts of which he is aware establish the defendant's legal culpability. *Frommert v. Conkright*, 433 F.3d 254, 272 (2d Cir. 2006) (holding that plaintiff's general awareness that something was wrong was not, without more, sufficient to

establish actual knowledge because "it is not enough that [plaintiffs] had notice that something was awry; [plaintiffs] must have had specific knowledge of the actual breach of duty upon which they sued." (quotations and citations omitted)). The level of knowledge regarding the legal significance depends on the nature of the violation and whether the facts known to the plaintiffs are such that their legal significance is apparent. *See Perlman v. Fidelity Brokerage Svcs. LLC*, 932 F. Supp. 2d 397, 412 (E.D.N.Y. 2013). *But see Fink*, 772 F.2d at 957 (appearing to apply constructive knowledge would apply upon disclosure of a transaction that is inherently a breach).

Under any standard, this court concludes that dismissal of Ms. Birse's claims on the basis of the statute of limitations is not appropriate at this juncture. The Fund was established on April 1, 2012. [#53 at ¶ 34]. Plaintiffs filed this action on November 30, 2017, five years and nearly eight months afterwards. [#1.] But Plaintiffs have not alleged facts from which this court can definitively discern the timing of Ms. Birse's actual knowledge. Because a statute of limitations bar is an affirmative defense, it may only be resolved on a Rule 12(b)(6) motion to dismiss when the dates given in the complaint make clear that the right sued upon has been extinguished, not when there appears to be a dispute of fact as to when the statute begins to run. *Thornton v. DaVita Healthcare Partners, Inc.*, No. 13-CV-00573-RBJ-KMT, 2016 WL 7324094, at *9 (D. Colo. 2016). Otherwise, this defense is typically more suited for the summary judgment stage when factual matters can be developed through discovery. *E.g.*, *Caputo*, 267 F.3d at 187; *Murata Erie*, 980 F.2d at 894; *Fish*, 749 F.3d at 674; *Wright*, 349 F.3d at 322; *Babcock*, 182 F.3d at 337; *Browning*, 313 F. App'x at 657.

Accordingly, this court finds that it is more appropriate to defer any statute of limitations issue to the summary judgment phase of this action, should it proceed beyond the current Recommendation.

V. Additional Arguments

A. ERISA Safe Harbor

Defendants cursorily argue in the Motion to Dismiss that they are entitled to dismissal based on ERISA's safe harbor provision, 29 U.S.C. § 1104(c). [#58 at 10 n.7.] Without further elaboration, Defendants assert that it "is apparent from the face of the [second amended] complaint that the Plan satisfies ERISA's safe harbor." [*Id.*] Defendants do not meaningfully develop this argument in their Reply either, merely stating that Plaintiffs have not "meaningfully rebut[ted]" their argument. [#61 at 8 n.6.]

To avail oneself of the ERISA safe harbor, a defendant must make a showing as to all of its elements. There are dozens of requirements to establish entitlement to the safe harbor in this type of case. Depending on how one counts, there are either "twenty-five or so," *Hecker*, 556 F.3d at 588, or over forty by this court's rough estimation. 29 C.F.R. §§ 2550.404c-1, 2550.404a-5. Complex, fact-intensive arguments may be summarily addressed when they are summarily asserted. ERISA's safe harbor does not implicate the court's subject-matter jurisdiction, and the court is under no obligation to consider an argument that Defendants do not 'make' in any meaningful sense of the term. The court respectfully declines to create and weigh arguments that are not fully developed, particularly given the fact that Defendants have been ably represented by counsel since the inception of this action. *See United States v. Davis*, 622 Fed.Appx. 758, 759 (10th Cir. 2015) ("[I]t is not this court's duty, after all, to make arguments for a litigant that he has not made for himself"); *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 800 n.10 (10th Cir. 2001) (observing that the court has no obligation to make arguments or perform research on behalf of litigants).

B. Dismissal With Prejudice

Defendants seek dismissal of Plaintiffs' Second Amended Complaint with prejudice. [#58 at 5, 15]. Plaintiffs do not address Defendants' request for dismissal with prejudice, but simply argue that dismissal is not warranted. [#60]. A dismissal with prejudice of a complaint that fails to state a claim under Rule 12(b)(6) is appropriate only when "granting leave to amend would be futile." *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006). Futility has been found when a party has been previously granted leave to amend, but was unable to cure the deficiencies, and where a party has made no showing how it could cure the defects present in its current complaint. *TV Commc'ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1028 (10th Cir. 1992). Plaintiffs do not seek leave to amend as an alternative to dismissal. This court further notes that Plaintiffs have had multiple opportunities to amend, both of which were in response to defects that were deemed by Plaintiffs to be "curable." [#25, #50]. Discovery has been ongoing give this court's denial of a stay [#62], and Plaintiffs have not sought leave to supplement their Response to the Motion to Dismiss based on discovery. Accordingly, this court respectfully recommends that dismissal of the Second Amended Complaint be with prejudice.

CONCLUSION

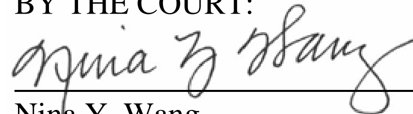
For the reasons set forth herein, this court respectfully **RECOMMENDS** that:

(1) Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint [#58] be **GRANTED**; and

(2) The Second Amended Complaint be **DISMISSED with prejudice**.[7]

DATED: November 19, 2018

BY THE COURT:



Nina Y. Wang
United States Magistrate Judge

[7] Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the District Court on notice of the basis for the objection will not preserve the objection for de novo review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar de novo review by the District Judge of the Magistrate Judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (District Court's decision to review a Magistrate Judge's recommendation de novo despite the lack of an objection does not preclude application of the "firm waiver rule"*); Int'l Surplus Lines Ins. Co. v. Wyo. Coal Ref. Sys., Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the Magistrate Judge's order, cross-claimant had waived its right to appeal those portions of the ruling); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (by their failure to file objections, plaintiffs waived their right to appeal the Magistrate Judge's ruling). *But see Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).