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' Third Amended Complaint ("Second Motion to Dismiss") [#97, filed April 3, 2019] filed by Defendants CenturyLink, Inc. ("CenturyLink") and CenturyLink Investment Management Company ("CIM"; collectively, "Defendants") pursuant to 28 U.S.C. § 636(b), the Order Referring Case dated December 6, 2017, [#4], and the Memorandum dated April 4, 2019, [#98]. Plaintiffs Bonnie Birse ("Plaintiff Birse" or "Ms. Birse") and Gerad Detwiler ("Plaintiff Detwiler" or "Mr. Detwiler") (collectively, "Plaintiffs") filed their Response to the Motion to Dismiss on April 26, [#104], and Defendants filed a Reply on May 10, 2019, [#110]. The court entertained oral argument by the Parties on August 14, 2019, [#125, #128], and the matter is now ripe for resolution. For the reasons set forth in this Recommendation, it is

respectfully **RECOMMENDED** that the Motion to Dismiss be **GRANTED IN PART** and **DENIED IN PART**.

BACKGROUND

This court has discussed the procedural background to this case in its prior Recommendation, [#78], and therefore focuses on subsequent amendments made in Plaintiff's Third Amended Complaint, [#94], for the present Recommendation, accepting as true all well-pled allegations.

Defendant CenturyLink is a large, publicly traded telecommunications company incorporated in Louisiana. [#94 at ¶ 24]. In 2011, it appointed CenturyLink Investment Management Company as its Plan Investment Fiduciary for its Dollars & Sense 401(k) Plan. [*Id.* at ¶¶ 1, 35, 36]. CIM is a Colorado Corporation first organized in 2000 and acquired by CenturyLink in 2011 that is managed as a wholly-owned subsidiary. [*Id.* at ¶ 25]. From its inception to 2016, CIM was registered with the Securities and Exchange Commission under the Investment Advisors Act of 1940. [*Id.*]. In its role as Plan Investment Fiduciary, CIM offered CenturyLink employees an array of investment options it designed and managed (as opposed to directly offering third-party funds). [*Id.* at ¶¶ 2, 37]. These investment options included eleven "core investment options" and twelve target date funds—funds whose investment strategies are tailored to a specific retirement date. [*Id.* at ¶¶ 3, 86]. These investment offerings reflected CenturyLink's "greater appetite for active management" in line with CIM's own preferences. [*Id.* at ¶ 37].

One of the new investment options offered by CIM was the Active Large Cap U.S. Stock Fund ("the Fund"). [*Id.* at ¶ 4]. The Fund was designed to "exceed the return of a broad market index of the largest 1,000 companies using an actively managed multi-manager approach" and was benchmarked against the Russell 1000 Stock Index ("the benchmark" or "the Russell 1000"), a common measure of large capitalization ("large cap") stocks. [*Id.* at ¶¶ 5, 43]. The Fund was designed to "take risk commensurate with the benchmark for each active core fund option. Long-term outperformance of the passive benchmarks (on a rolling three-year basis) w[ould] be the primary measure of success for the strategy from a quantitative standpoint." [*Id.* at ¶ 39]. The twelve target date funds were each invested in the Fund. [*Id.* at ¶ 12].

CIM designed the Fund to diversify its assets across multiple active managers, each allotted a percent of the Fund's total assets, in order to "provide participants with full beta exposure to asset classes,[1] maintain sufficient liquidity to allow for efficient rebalancing, and provide excess returns above the passive benchmark [the Russell 1000]." [*Id.* at ¶ 41]. CIM defined the Fund's strategy as: "(a) Style-based; (b) fundamental active management; (c) slight mid Cap bias; and (d) slight value bias." [*Id.* at ¶ 42]. CIM decided to diversify the Fund's assets across multiple managers even though its research showed that the large cap domestic equity market was a particularly difficult market to outperform. [*Id.* at ¶¶ 44–45]. Nearly 90% of managers underperform their benchmarks in this space. [*Id.* at ¶ 44]. Nonetheless, CIM designed the Fund with multiple managers "to include a set of institutional-grade managers whose strategies,

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[1] "Beta" is "[a] statistical measure of a security's risk, based on how widely a particular security's return swings as compared to the overall return in the market for that security." *Beta*, Black's Law Dictionary (11th ed. 2019).

styles, and return drivers are uncorrelated enough to generate excess returns over the long term at a reasonable level of risk while still providing a measure of increased wealth protection in varying market environments and economic conditions." [*Id.* at ¶ 46]. CIM selected managers for the Fund with these aims in mind, but restricted itself to considering the managers who were already used in the CenturyLink Defined Benefit Plan. [*Id.* at ¶ 51]. CIM selected seven managers—(1) Fiduciary Management; (2) Cornerstone; (3) Waddell & Reed [sic] (4) T. Rowe Price; (5) Artisan; (6) Systematic; and (7) State Street Global Advisors Index Fund", [*id.* at ¶ 53], "after a period of re-underwriting, when the Team refreshed its due diligence through calls, meetings, site visits, and quantitative analysis[,]" [*id.* at ¶ 51].

The Fund underperformed its benchmark nearly every quarter over the life of the Fund. *See* [*id.* at ¶ 60]. As of September 30, 2017, shortly before this case was filed and the Fund terminated, the Fund underperformed by an average of (1.73%) with quarterly performance ranging from 1.32% to (1.75%). [*Id.*].[2] For the twenty-two quarters of its existence, the Fund underperformed its benchmark for all but four. [*Id.*]. Nearly three years into the life of the Fund, on February 6, 2015, CIM conducted a review and found that several of the managers had significantly underperformed in 2014: Cornerstone (5.2%); Waddell & Reed (2.9%); Artisan (7.0%); and Systematic (3.7%). [*Id.* at ¶ 63]. Notwithstanding this poor performance, on the three-year anniversary of the Fund, on March 31, 2015, CIM, in the face of sustained underperformance, took no substantive

[2] Elsewhere in the Third Amended Complaint, Plaintiff avers that "the Large Cap Fund underperformed its benchmark by (2.11%) since 2012." [#94 at ¶ 81]. But as clarified at oral argument, this is the figure terminating on March 31, 2017 (prior to an evaluation by CIM in April 2017); the figure for the entire life of the Fund is 1.73%. [*Id.* at ¶¶ 60, 78].

action, only reformulating the time horizon for long-term performance from three years to five years. [*Id.* at ¶¶ 66–69].

Shortly thereafter, in May 2015, CIM revaluated its managers using a five-year, rather than a three-year, basis. [*Id.* at ¶¶ 69, 70]. This review indicated that two managers, Cornerstone and Systematic, had three-star ratings (out of five) from Morningstar. [*Id.* at ¶ 70]. Fiduciary Management, Waddell and Reed, and Artisan had four-star ratings. [*Id.*]. Cornerstone's Annual Value Added ("AVA") was negative (11.8%) for one year, negative (4.2%) for three years and negative (2.8%) for five years. Systematic's AVA was negative (6%) for one year, negative (4.1%) for three years, and negative (2.8%) for five years. [*Id.*]. By this point, the Fund had underperformed its benchmark for nine consecutive quarters with growth stocks outperforming mid-cap and value stocks for the preceding two years in the broader market, yet the "three primary Large Cap Fund managers pursued value strategies, and mid cap[] [stocks] comprised approximately 20% of the Large Cap Fund, more than 5 times the mid cap composition of the Russell 1000 index." [*Id.* at ¶ 72]. By the end of 2015, three of the Fund managers had significantly underperformed their benchmarks in 2014: Fiduciary (2.7%); Cornerstone (14.7%); and Systematic (6.5%). [*Id.* at ¶ 71]. Despite these results, CIM took no action. [*Id.* at ¶ 74].

In May 2016, CIM again reviewed its investment strategy, concluding that "the Large Cap Fund underperformed by (2.6%) while the average manager has detracted (1.8%)." [*Id.* at ¶ 75]. CIM concluded that (1) active management had been the largest detractor for the Fund with Cornerstone and Systematic significantly underperforming, (2) the value index trailed the growth index for the past three years, and (3) the mid-cap index

had also trailed the growth index over the past three years. [*Id.*]. With this information, CIM shifted 8% of Cornerstone-managed assets to the other managers and terminated Artisan, which managed 4% of the Fund. [*Id.* at ¶ 77].

In April 2017, after more underperformance, CIM again evaluated its strategy but declined to make material adjustments. [*Id.* at ¶ 78]. On September 30, 2017, CIM merged the Fund with the Active Small Cap US Stock Fund, ending with a lifetime underperformance of (2.11%) from its benchmark. [*Id.* at ¶¶ 80, 81]. The target date funds, partially invested in the Fund to varying degrees, suffered approximately (0.19%) to (0.48%) underperformance relative to the benchmark. [*Id.* at ¶ 88].

Plaintiffs commenced this action on November 30, 2017. [#1]. On February 23, 2018, the Parties filed a Stipulation Regarding Filing Amended Complaint and Response, [#25], leading to an Amended Complaint that was ultimately filed on March 2, 2018, [#29]. Defendants moved to dismiss the Amended Complaint on March 23, 2018 ("First Motion to Dismiss"), and to stay discovery pending the adjudication of the First Motion to Dismiss. [#36; #37]. Then, on April 23, 2018, while the First Motion to Dismiss remained pending, Plaintiffs sought leave, [#47], and the Parties ultimately stipulated to, [#51], the filing of a Second Amended Complaint subject to a forthcoming motion to dismiss and renewed motion to stay the action. The Second Amended Complaint, [#53], was filed on May 2, 2018, and Defendants thereafter moved to dismiss the Second Amended Complaint, [#58]. On November 19, 2018, this court issued a Recommendation that Plaintiff's Second Amended Complaint be dismissed with prejudice. [#78]. The presiding judge, the Honorable Christine M. Arguello, subsequently dismissed the Second Amended

Complaint, but did so without prejudice and simultaneously accepted Plaintiffs' Third Amended Complaint for filing. [#93; #94].

As confirmed at oral argument, the Third Amended Complaint contains three counts: (1) breach of fiduciary duty against CIM for the deficient design of the Fund, including but not limited to opting for a self-designed fund and the failure to sufficiently monitor and replace or modify the Fund despite "dramatic underperformance" ("Count I"); (2) breach of fiduciary duty against CenturyLink for failure to properly monitor CIM as the Plan Investment Fiduciary in its design and implementation of the Fund ("Count II) [#94, #128 at 3:9-4:4];[3] and (3) co-fiduciary liability against CenturyLink under the Employee Retirement Income Security Act ("ERISA") ("Count III"). [#94]. Defendants moved to dismiss the Third Amended Complaint shortly thereafter, [#97], and the instant Second Motion to Dismiss was referred to the undersigned, [#98]. Plaintiffs filed a Response, [#104], and Defendants a Reply, [#110], the court held oral argument on August 14, 2019, [#125; #128], and the matter is now ripe for Recommendation.

LEGAL STANDARD

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

[3] When citing to a transcript, this court uses the convention of the document number assigned by the court's Electronic Court Filing ("ECF") system, but the page and line number assigned by the original transcript for purposes of consistency.

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 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 consider only 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 Rule 201 of the Federal Rules of Evidence. *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 or documents that 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

I. Facts Properly Before the Court

Before turning to the substance of the instant Second Motion to Dismiss, the court briefly addresses three extrinsic documents offered by Defendants for the court's consideration. Specifically, the court considers: (1) the Dollars & Sense Amended Plan ("the Amended Plan"), [#97-2]; (2) the Dollars & Sense Plan Form 5500 for the period ending December 31, 2016 ("the Form 5500"), [#97-3]; and (3) the Memorandum from Aaron T. Houlihan dated March 30, 2012 ("the Houlihan Memo"), [#110-2]. This court finds an adequate basis to consider each of the foregoing documents in this Recommendation.

The Amended Plan, [#97-2]. The court has previously considered whether the Amended Plan is referenced in and central to the Complaint such that it may be considered and concluded that it was. [#78 at 22]. The court sees no reason to depart from its earlier finding that was and is not objected to by Plaintiffs. *See* [#88; #104].

The Form 5500, [#97-3]. Form 5500 of the Internal Revenue Service is "an annual disclosure document, which most large employers that offer employee benefits plans are required to submit as part of ERISA's overall reporting and disclosure framework." *Medellin v. CommunityCare HMO, Inc.*, 787 F. Supp. 2d 1259, 1262 n.2 (N.D. Okla. 2011). The court may properly take judicial notice of this document under Rule 201 of the Federal Rules of Evidence. *Troudt v. Oracle Corp.*, No. 1-16-CV-00175-REB-CBS, 2017 WL 663060, at *4 (D. Colo. Feb. 16, 2017) (taking judicial notice of a Form 5500); *Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp., Inc.*, 99 F. Supp. 3d 1110, 1126 (C.D. Cal. 2015) (same). Having taken judicial notice of the document, the court is

limited to considering the document to prove its contents, not the truth of the matter asserted. *Tal*, 453 F.3d at 1264 n.24; *Troudt*, 2017 WL 663060, at *4.

The Houlihan Memo, [#110-2]. The court now turns to the Houlihan Memo, the only document offered in the Reply and not in the Motion to Dismiss. Though they did not have the opportunity to dispute the authenticity of this document in their Response, Plaintiffs have not sought to strike the exhibit through a filing or at oral argument. In comparing paragraph 37 of the Third Amended Complaint to the Houlihan Memo, it does appear Plaintiffs have incorporated statements from the Houlihan Memo into the operative pleading. *Compare* [#94 at ¶ 37] *with* [#110-2 at 3]. Accordingly, this court may consider the Houlihan Memo without converting the Second Motion to Dismiss into one for summary judgment. *Gee*, 627 F.3d at 1186 (10th Cir. 2010) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007)).

II. Count I: Breach of Fiduciary Duty Against CIM Based on Design of the Fund.

In their first Count as it relates to the design of the Fund, Plaintiffs allege two different theories of liability. First, Plaintiffs allege that the Fund was poorly designed when it was distributed across multiple active managers. Next, Plaintiffs argue that CIM improperly limited its search for active managers.

A. Legal Standard

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 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.

Although ERISA provides a comprehensive statutory scheme, the specific duties of an ERISA fiduciary are derived from the common law of trusts, and so, as before, this court looks to the law of trusts, including the Uniform Prudent Investor Act ("UPIA"), when necessary to determine the contours of the fiduciary's duty. *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."). As noted in this court's prior Recommendation, this formulation applies to ERISA fiduciaries through both court

decisions and guidance from the Department of Labor. *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 423 (4th Cir. 2007).

The consideration of whether a fiduciary has satisfied its duty of prudence is an objective one, and 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. Feb. 22, 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." (formatting altered)); *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."). Courts universally emphasize the need to view the fiduciary's decisions in the specific context in which they are made and not with the benefit of hindsight. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014); *Barchock*

v. CVS Health Corp., 886 F.3d 43, 53 (1st Cir. 2018); *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006) ("Because the fiduciary's obligation is to exercise care prudently and with diligence under the circumstances then prevailing, his actions are not to be judged from the vantage point of hindsight[.]" (citations and quotations omitted)).

B. Analysis

Defendants seek dismissal of this claim on the basis that the accepted facts do not establish that a reasonably prudent fiduciary would not have made the decision to structure the Fund across multiple active managers. [#97 at 7–8]. Just as with the Second Amended Complaint, Defendants argue that Plaintiffs' claim that CIM imprudently designed the fund fails for the same reason—the design of the fund across multiple different managers had a valid investment purpose and does not necessarily, or under the facts as pleaded, reveal a deficient process. [*Id.* at 8–9]. Indeed, Defendants argue that discovery has harmed Plaintiffs who, by including a thorough discussion of the considerations which informed the structuring of the Fund, have pleaded themselves out of a claim by showing CIM's diligence. [*Id.* at 9].

Plaintiffs counter that the facts alleged in the Third Amended Complaint demonstrate that the design of the Fund was necessarily deficient because CIM's own research should have led it to conclude that structuring the Fund across multiple different managers would virtually guarantee underperformance against the benchmark. [#104 at 7–8]. Moreover, CIM's own search for fund managers reflects this deficient process—far from showing how careful CIM was, it reflects an abbreviated search of only the managers with whom CIM was already familiar. [*Id.* at 8]. In short, the Fund's design across multiple managers plus its limited search for managers reflects a process that CIM knew, at the

outset, was doomed to underperform. [*Id.* at 9]. Defendants counter that this amounts to a hindsight-based attack, criticizing the Fund for underperforming despite the careful and well-documented analysis that went into its design. [#110 at 2–4].

Plaintiffs make two basic claims regarding the design of the Fund. First, it was imprudent because having too many managers made it virtually certain that it would not achieve its primary goal of outperforming its benchmark. Second, the limited search for investment managers reflects an inefficient and imprudent process.

The court begins by noting that the fact that a fiduciary has undergone a robust investigation of an investment does not in and of itself relieve the fiduciary of liability if the circumstances reflect a breach of duty despite the rigorous investigation—and the reverse is true as well. *Brotherston v. Putnam Inv., LLC*, 907 F.3d 17, 33 (1st Cir. 2018); *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007); *Ellis v. Fid. Mgmt. Tr. Co.*, 257 F. Supp. 3d 117, 129 (D. Mass. 2017). A fiduciary is under a duty to exercise reasonable prudence in selecting investments, and this objective reasonableness standard is applied to the subjective needs of the fund—the "conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B); *Jenkins v. Yager*, 444 F.3d 916, 925 (7th Cir. 2006); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996) ("In addition, the prudence requirement is flexible, such that the adequacy of a fiduciary's independent investigation and ultimate investment selection is evaluated in light of the character and aims of the particular type of plan he serves." (quotations omitted)). The Third Amended Complaint avers that at the time it designed the Fund, CIM knew that distributing the assets across multiple different managers made it very unlikely that the Fund would outperform its benchmark. [#94 at ¶¶ 44, 45]. Plaintiffs contend that CIM even performed

a "back test" where it determined that there was a 0.98 correlation between a seven-manager fund and the Russell 1000 Index, "which implies that when blended together, the performance of multiple uncorrelated large cap managers over a 10-year period will be very similar to the performance of the index." [*Id.* at ¶ 47]. Nevertheless, Plaintiffs aver that CIM ignored its own research, and chose an arrangement that made it "highly unlikely" that the Fund would "achieve its objective of outperforming the Russell 1000 Index benchmark, especially once fees are factored in. CIM was creating a high-cost index fund in a Plan with a limited number of investment options and that already contained a passively managed domestic equities index fund, the US Stock Index Fund." [*Id.* at ¶¶ 45, 48].

Multiple Active Managers. Putting aside the allegations regarding the Fund's ultimate lack of performance (that could only be ascertained in hindsight), the Third Amended Complaint is left with allegations, even taken as true, that are insufficient to establish that a reasonably prudent fiduciary would not have made the decision to structure the Fund across multiple active managers within the context of the entire portfolio and the overall investment strategy. First, Defendants have a statutory duty under ERISA to diversify investments. 29 U.S.C. § 1104(a)(1)(C). According to the Third Amended Complaint, CIM claimed to have designed the Fund "to include a set of institutional-grade managers whose strategies, styles, and return drivers are uncorrelated enough to generate excess returns over the long term at a reasonable level of risk while still providing a measure of increased wealth protection in varying market environments and economic conditions." [#94 at ¶ 46]. In other words, CIM claimed to have designed the Fund to hedge against various market factors. And Plaintiffs allege that the back test

showed CIM that "the performance of multiple uncorrelated large cap managers over a 10-year period will be very similar to the performance of the index." [#94 at ¶ 47 (emphasis added)].

As Defendants point out, the allegations in the Third Amended Complaint suggest that CIM engaged in a robust investigation in designing the Fund. Plaintiffs do not claim that Defendants knew from the outset that structuring the Fund with seven managers could not exceed the benchmark. *Cf. In re Meridian Funds Grp. Sec. & Employee Ret. Income Sec. Act (ERISA) Litig.,* 917 F. Supp. 2d 231, 240 (S.D.N.Y. 2013) (observing that plaintiff stated a claim when alleging that defendants should have recognized that the advertised returns were mathematically impossible, as other investors did). Nor are there factual allegations that demonstrate that CIM's determination that the level of risk was unacceptable, particularly given the back test that demonstrated that the performance would be "very similar" to the performance of the index. Other courts have observed in the context of a motion to dismiss that "a plan is not *per se* imprudent merely because it incorporates risky investments." *See Jacobs v. Verizon Commc'ns, Inc., No. 16 CIV. 1082 (PGG),* 2017 WL 8809714, at *6 (S.D.N.Y. Sept. 28, 2017). Indeed, 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. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 717 (2d Cir. 2013) (emphasis added). The closest Plaintiffs come is their contention that

> [t]he near-perfect correlation with the benchmark index made it highly unlikely the Large Cap Fund would ever be able to achieve its objective of outperforming the Russell 1000 Index benchmark, especially once fees are factored in. CIM was creating a high-cost index fund in a Plan with a limited number of investment options and that already contained a passively managed domestic equities index fund, the US Stock Index Fund.

[#94 at ¶ 48].

But there are no factual allegations to support the inference that CIM knew, or should have recognized, that the US Stock Index Fund somehow obviated the reasonableness of including the Fund in the Plan. This is particularly striking given the fact that discovery has been ongoing, such that the information asymmetry that is often attendant at the motion to dismiss phase is not the circumstance here. This court concludes that Plaintiffs have failed to state a claim under its theory that CIM imprudently structured the Fund with seven active managers. The court now turns to Plaintiffs' allegations that CIM's truncated search for managers constitutes a breach of fiduciary duty.

CIM's Search for Managers. Plaintiffs argue that CIM sought to lessen its oversight burden rather than find the best possible managers for the Fund and therefore imprudently limited its search for managers to those with whom it was already familiar. [#94 at ¶¶ 51–57; #104 at 8]. Defendants counter that CIM's selection of "experienced fund managers" reflects "appropriate consideration." [#110 at 3]. This court respectfully also finds that these allegations in the Third Amended Complaint fail to state a claim.

As an initial matter, this court notes that the applicable standard is not "the best available managers for the Large Cap Fund." [#104 at 8]. Rather, as discussed above, this court is focused on the process CIM engaged in to select the fund managers, and whether CIM's decision to select from known fund managers was objectively imprudent. Plaintiffs' argument that CIM limited this search to "ease its own oversight burden" is both conclusory and does not itself indicate any defective process. Plaintiffs also have not pled facts that, taken as true, establish or support a plausible inference that CIM's

purported objective to reduce the oversight costs associated with the Plan was improper. The court further notes that the Third Amended Complaint avers not that this decision was made without analysis, but rather only after "a period of re-underwriting, when the Team refreshed its due diligence through calls, meetings, site visits, and quantitative analysis." [#94 at ¶ 51]. There are also no factual allegations that support the contention that CIM's existing managers were known to be inadequate or managers with such a poor track record that a reasonably prudent fiduciary should have necessarily broadened the search. Indeed, at least regarding T. Rowe Price, Plaintiffs later note that the actively managed T. Rowe Price Institutional Growth Fund, which was 15% of the Fund, outperformed the Russell 1000 Index each year from April 1, 2012 through March 31, 2017. [*Id.* at ¶ 82]. This court finds that the Third Amended Complaint fails to state a claim for breach of fiduciary duty based on CIM's limitation on its search for active managers.

For these reasons, the court respectfully **RECOMMENDS** granting the Motion to Dismiss as to Count I, insofar as it concerns the design of the Fund.

III. Count I: Breach of Fiduciary Duty Against CIM for Failure to Monitor.

A. Legal Standard

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 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.

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, a plaintiff must allege facts plausibly establishing that, upon proper review, no reasonable fiduciary would maintain the investment. Plaintiffs must allege facts to support the conclusion that CIM 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). It is not sufficient to simply allege that an investment did poorly, and therefore a plaintiff was harmed.

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 kinds of factual

allegations, notwithstanding the fact that the investment's value fell 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. *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.

B. Analysis

Plaintiffs argue that while CIM periodically reviewed its investments, it failed to take adequate remedial action during such review processes despite the consistent underperformance of the Fund relative to its benchmark, thus breaching its fiduciary duty to Plaintiffs. [#94 at ¶¶ 58–80; #104 at 11 ("CIM . . . elected to pursue its homegrown investment strategy despite the clear, contemporaneous evidence that the strategy was failing.")]. Defendants contend that these allegations are insufficient because Plaintiffs do not establish that no reasonably prudent fiduciary would have maintained the Fund's structure even in light of the Fund's lack of performance, given the then-prevailing market conditions and opportunity costs of such a switch. [#97 at 10, 11]. Defendants argue that

the allegations in the Third Amended Complaint are deficient, as Plaintiffs entirely fail to mention the prevailing market conditions, or the Fund's strong absolute performance despite the requirement that a failure to monitor claim must establish causation, i.e., that a reasonably prudent fiduciary would have undertaken a different action under the totality of the circumstances as then existed. [*Id.* at 10 & nn.6, 7]. Finally, Defendants argue that CIM—by Plaintiffs' own admission—did act, including terminating one underperforming manager, and there is no indication that CIM's action or inaction was based on improper or imprudent concerns, only that it was not sufficient in hindsight. [*Id.* at 11].

In considering the Third Amended Complaint, the court is mindful that the Complaint is to be read in the light most favorable to the non-movant, and Plaintiffs do not need to anticipate or substantively rebut Defendants' defenses at this stage. Nor is it proper for the court to attempt to resolve any disputed facts. Against this standard, the court concludes that the Third Amended Complaint states a claim sufficient to survive dismissal at this juncture.

Here, the Parties agree, and the Third Amended Complaint avers, that when confronted with the persistent underperformance of the Fund, CIM did undertake several reviews of its investments and took some action. Defendants claim that Plaintiffs' recitation of the actions CIM took leads to the logical inference that CIM concluded from its periodic reviews that it was "choosing the best course for the Plan's investment portfolio as a whole." [#97 at 11]. Plaintiffs counter that the reviews conducted by CIM were nonetheless inadequate in context and not reflective of a prudent investment process. [#104 at 10–11]. For instance, Plaintiffs allege that by February 6, 2015, four of the seven fund managers significantly underperformed their benchmarks in 2014. [#94

at ¶ 63]. As for the market context, Plaintiffs aver that "growth stocks had outperformed mid cap stocks and value stocks significantly over the past year. Nonetheless, CIM did not review the soundness of (or change) its investments strategy, replace any of the underperforming managers, or replace the Large Cap Fund. [*Id.* at ¶ 64]. Plaintiffs further allege that while CIM originally set a long-term goal of outperforming the passive benchmark, by the three-year anniversary, it did not take any steps to improve the underperforming Fund but rather chose to recalibrate the measure of performance to a five-year, rather than three-year, basis. [*Id.* at ¶¶ 65-69]. Plaintiffs then contend that as the performance of the Fund continued its downward trajectory, CIM ignored information that showed the investment strategy was flawed and failed to heed its own data to make, or even consider, necessary adjustments. Plaintiff aver that by May 2016, CIM concluded that every source that it had designed to add value to the Fund had failed, including two underperforming managers; a value index that had trailed the growth index by 4% per year for the past three years; and the Mid Cap index trailing the growth index by over 1% per year for three years. [*Id.* at ¶ 75]. But the only actions CIM took was to shift assets and terminate Artisan, a fund manager that managed 4% of the Fund assets. [*Id.* at ¶ 77]. And it was another year before CIM evaluated whether the Fund should be changed to diversity its drivers. [*Id.* at ¶ 78]. Finally, on September 30, 2017, CIM terminated the Fund by merging it with another actively managed fund, the Active Small Cap US Stock Fund, to create the Active US Stock Fund. [*Id.*at ¶ 80].

Given these additional factual allegations—coupled with Plaintiffs allegation that, had CIM "replaced the Large Cap Fund with the T. Rowe Price Institutional Fund after the Large Cap Fund consistently underperformed in 2014, 2015, or 2016, Plaintiffs . . . would

have realized up to 5% higher returns on their investments," [*id.* at ¶¶ 82-83]—this court finds that dismissal at this juncture is not appropriate. The adequacy of a fiduciary's investigation is a flexible, context-specific inquiry not usually appropriate for resolution in the context of a Rule 12(b)(6) Motion. *See Renfro v. Unisys Corp.*, 671 F.3d 314, 322 (3d Cir. 2011); *Donovan v. Cunningham*, 716 F.2d 1455, 1467 & n.26 (5th Cir. 1983). Though this court is cognizant that Plaintiffs have not addressed the specific alternative course of action that could have prevented the Plan's losses in each instance where review was not adequately conducted, drawing all inferences in favor of Plaintiffs as I must at this juncture, this court finds that the Third Amended Complaint at least presents a question of the proper interpretation of certain admitted facts, which is not amenable to the motion to dismiss, and may be influenced by expert testimony. *See Bd. of Trustees of S. California IBEW-NECA Defined Contribution Plan v. Bank of New York Mellon Corp.*, No. 09 CIV. 6273 RMB, 2011 WL 6130831, at *3 (S.D.N.Y. Dec. 9, 2011) ("The fiduciary standard imposed by ERISA requires the application of a reasonableness standard. Rarely will such a determination be appropriate on a motion for summary judgment."). Indeed, Defendants' arguments on Reply that Plaintiffs have misapplied Modern Portfolio Theory reinforces this court's conclusion. [#110 at 7-9]. In so finding, this court does not pass on whether Plaintiffs' failure to monitor claim can survive summary judgment or prevail at trial. But it does conclude that taking the factual allegations as true and, interpreting them in the light most favorable to Plaintiffs, this court respectfully **RECOMMENDS** denying the Motion to Dismiss as to Count I insofar as it is based on an alleged failure to monitor.

IV. Count II: Failure to Monitor Against CenturyLink

Count II is brought against CenturyLink, alleging that CenturyLink is liable for its failure to monitor CIM given the sustained underperformance of the Fund and the periodic reviews, where CIM took little to no action in response to the Fund's lackluster performance. [#94 at ¶¶ 109–114]. Specifically, Plaintiffs allege that CenturyLink, as a sponsor of the Plan, was a fiduciary of the Plan and has incurred liability for CIM's defective design and supervision of the Fund. [*Id.*]. Plaintiffs further allege that CenturyLink is a fiduciary because it is the Plan sponsor and because it "was responsible for the appointment, supervision, and removal of CIM as the Plan Investment Fiduciary." [*Id.* at ¶ 111]. Defendants contend the allegations as to CenturyLink's actions are "unchanged" from the Second Amended Complaint; that Plaintiffs' allegations are inadequate to establish that CenturyLink exercised the requisite degree of discretionary control over CIM (noting that CenturyLink and its board are mentioned only twice in the Complaint); and there are no new allegations to support a separate or additional basis for a breach of duty to monitor by CenturyLink. [#97 at 11, 13]. Plaintiffs counter that the authority to appoint and remove CIM is sufficient and, in any event, CenturyLink directed CIM to include more actively managed funds in the Plan. [#104 at 14–15]. At oral argument, Defendants' counsel argued that "CenturyLink does not directly appoint or monitor or have any fiduciary responsibility with regard to investment decisions. Its only role is to amend or terminate the plan, not a fiduciary function." [#128 at 19:9–12].

As before, this claim against CenturyLink is largely derivative of a cognizable claim against CIM. [#78 at 20; #104 at 14]. Thus, to determine whether Plaintiffs can maintain a cause of action for failure to monitor against CenturyLink, the court must first consider

Defendants' arguments related to whether CenturyLink is a functional fiduciary of the Plan.

A. CenturyLink's Status As a Functional Fiduciary

As before, the court takes judicial notice of the fact that CenturyLink is not a named fiduciary of the Plan pursuant to the Amended and Restated Dollars & Sense Plan. [#97-2 at 80]. However, one may still be a functional fiduciary even if not named in the governing document if (1) she exercises "any discretionary authority or discretionary control respecting management of such plan" including regarding the disposition of plan assets; or (2) she has any discretionary authority or discretionary responsibility in the administration of such plan. § 1002(21)(A). Plan sponsorship is distinct from plan administration and the fact that CenturyLink initially sponsored the Plan is not sufficient to qualify it as a fiduciary. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996).

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. 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). The functional 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)).

B. Analysis

1. CenturyLink as Fiduciary

The court now considers whether the Third Amended Complaint sufficiently pleads that CenturyLink constitutes a functional fiduciary, either because it exercised discretionary administrative control over the Plan by virtue of directing CIM to include more actively managed funds, or because CenturyLink had authority to appoint and remove Plan fiduciaries. [#104 at 15]. Paragraph 37 of the Third Amended Complaint provides, in full:

> CIM and CenturyLink elected to offer new Plan investment options to replace the existing options, which consisted largely of passive, low-tracking error investment options. The new options reflected "the CenturyLink senior management['s] . . . greater appetite for active management, which is in-line with the investment style and preferences of [CIM.]"

[#94 at ¶ 37].

Plaintiffs also aver that CenturyLink is a functional fiduciary because "the CenturyLink Board of Directors has the sole authority to appoint and remove CIM as Investment Fiduciary, and amend or terminate, in whole or part, the Plan." [*Id.* at ¶ 24]. Plaintiffs argue that this power over CIM renders CenturyLink a fiduciary, relying on *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465 (4th Cir. 1996), and *Ed Miniat, Inc.*

v. Globe Life Ins. Grp., Inc., 805 F.2d 732, 735-36 (7th Cir. 1986), for the proposition that "the power 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)." [#104 at 14–15 (formatting altered)]. The power to appoint and remove an ERISA fiduciary gives rise to a duty to monitor and results in the appointing and removing party being a de facto fiduciary with respect to such appointment, monitoring and removal. [#78 at 24–25 (citing *Ed Miniat*, 805 F.2d at 735-36, and *Coyne & Delany*, 98 F.3d at 1465)]; *Carr v. Int'l Game Tech.*, 770 F. Supp. 2d 1080, 1090 (D. Nev. 2011). Defendants argue the authority vested in CenturyLink is limited under Article IX of the Amended Plan. [#97 at 12; #97-2]. Having determined that the Amended Plan is properly before it, the court now turns to Article IX in considering these two issues, affording Plaintiff all reasonable inferences and avoiding weighing the evidence or resolving disputed questions of fact.

Article IX governs the allocation of responsibilities and names a fiduciary for the Plan. [#97-2 at 79–82]. Section 9.3 of the Amended Plan governs the powers delegated to "the Company," i.e., CenturyLink, "as Plan sponsor and not as a fiduciary." [*Id.* at 11, 79]. Specifically, CenturyLink is charged with "[a]mendment or termination of the Plan . . . appointment of any third party service providers and vendors to the Plan other than fiduciaries[,]" and "[a]ppointment and removal of the members of the Committee and the Plan Design Committee." [*Id.* at 79]. The "Committee" refers to "the administrative committee described in Section 9.4" of Article IX. [*Id.* at 11]. Under Section 9.4, the Committee is a named fiduciary of the Plan whose members "hold office at the pleasure of [CenturyLink]." [*Id.* at 80]. Similarly, the Plan Design Committee is appointed by

CenturyLink and is charged with "mak[ing] determinations with respect to Plan design matters, including authorization to amend the Plan pursuant to Section 11.4." [*Id.* at 20, 80]. The Amended Plan disclaims any fiduciary status for the Plan Design Committee. [*Id.* at 80].

Under Section 9.8(a), the Committee is charged with certain ministerial duties, including "to determine the eligibility, status and rights of all persons under the Plan and in general to decide any dispute" and "direct[ing] the Trustee concerning all non investment related distributions from the Trust Fund, in accordance with the provisions of the Plan and the Trust Agreement[.]" [*Id.*]. CIM's duties are delineated in 9.8(b) and include "appointing and removing trustees, investment managers and other service providers providing investment advice or investment education[.]" [*Id.*]. In short, the Committee, whose members serve at-will pursuant to CenturyLink's appointment power under Section 9.3(a)(iii), is charged with ministerial duties regarding plan administration and CIM's duties under 9.8(b) are clearly fiduciary duties relating to plan investment and the management of plan assets.

This division noticeably conflicts with the allegations in the Amended Complaint that CenturyLink was directly involved in the Dollars & Sense Plan's selection of assets acting in concert with CIM. [#94 at ¶ 37]. The Complaint also alleges that CenturyLink has the power to appoint and remove CIM. [*Id.* at ¶¶ 9, 24]. The Amended Plan document does not support this, but the court is also cognizant that functional fiduciaries are fiduciaries in practice, and the language of a Plan document does not necessarily control at this juncture. This court previously found that Plaintiffs' allegations were sufficient to establish that CenturyLink was a functional fiduciary. [#78 at 25]. This court relied on the

fact that Plaintiffs pleaded that CenturyLink had the authority to appoint and remove CIM as plan fiduciary. [*Id.*]. The court declined to recommend dismissal of CenturyLink, given that the especially fact-sensitive inquiry into functional fiduciary status was more appropriate for the summary judgment stage or trial. [*Id.* at n.6].

In this respect, this court finds no reason to depart from its prior recommendation. While the court cannot deny that the Amended Plan appears to remove any fiduciary status or responsibility from CenturyLink, the resolution of the disputed facts regarding the actual exercise of power undertaken by CenturyLink are more appropriately resolved at the summary judgment or trial stage, as previously indicated by the presiding judge, the Honorable Christine M. Arguello. *Ramos v. Banner Health*, No. 15-CV-2556-WJM-MJW, 2017 WL 4337598, at *5 (D. Colo. Sept. 29, 2017) (discussing deferring such questions at the 12(b)(6) stage and citing cases). The court also notes that Defendants offer the *Amended* Plan, effective January 1, 2017, and thus the Amended Plan is not necessarily contrary to the allegations regarding CenturyLink's fiduciary status prior to that date. [#97-2 at 2]. Therefore, this court declines to recommend dismissal on the basis that the Third Amended Complaint fails to sufficiently plead that CenturyLink is a functional fiduciary.

2. Duty to Monitor

Assuming CenturyLink constitutes a functional fiduciary, this court now turns to considering whether Plaintiffs have stated a plausible claim that CenturyLink breached its duty to monitor CIM. Plaintiffs allege that CenturyLink owes its fiduciary status to its appointment and removal power over CIM, which serves as the direct fiduciary to the Dollars & Sense Plan under Article IX. *See* [#94 at ¶ 111]. Thus, Plaintiffs argue that

CenturyLink owed a duty to monitor its appointee's execution of its fiduciary duties. [#104 at 14–15]. Defendants argue that the Third Amended Complaint is bereft of factual claims establishing a deficiency in the monitoring process and that, as before, all that Plaintiffs allege is the outcome of the process. [#97 at 13–14].

In reviewing the Third Amended Complaint, the court finds that Count II against CenturyLink suffers from a lack of factual support. While Plaintiffs have now offered a more detailed record of when CIM monitored the Fund's performance, and its alleged lack of appropriate action, there are no such factual averments supporting CenturyLink's monitoring of CIM. In Response to Defendants' argument on this point in the Motion to Dismiss, [#104 at 15], Plaintiffs point to Paragraph 113 of the Third Amended Complaint, which offers only the conclusory statement that CenturyLink failed to monitor CIM, *see* [#94 at ¶ 113]. There are no times, dates, locations, or any such specific identification of any review process, nor do Plaintiffs point to any schedule by which CenturyLink was required to monitor CIM but failed to do so.

This is particularly salient because Plaintiffs' sole allegation is not that there was no review process—it is that CenturyLink failed to "*properly* monitor CIM." [#94 at ¶ 113 (emphasis added)]. As it stands, the court is left with little but the outcome of the process and the hope that the court will infer a claim exists from that fact. Particularly given the fact that Plaintiffs are on their Third Amended Complaint, and they have had discovery available to them, this single allegation is still not sufficient. [#78 at 21 ("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.")]. Accordingly, this court respectfully **RECOMMENDS** that Defendants' Motion to Dismiss be **GRANTED** as to Count II.

V. Count III: Co-Fiduciary Liability Against CenturyLink

The court now turns to consider whether Plaintiffs have adequately pleaded a claim against CenturyLink for co-fiduciary liability arising from CIM's alleged breach. Plaintiffs claim that Count III against CenturyLink is derivative of its primary claims against CIM, and as go those claims, so goes this claim against CenturyLink. [#104 at 14]. Defendants counter that "plaintiffs' derivative claims require them to plead the elements of an underlying breach, but doing so is not sufficient, on its own, to make out derivative claims against CenturyLink. Rather, plaintiffs must also plead additional, independent elements of those claims—and they have not." [#110 at 9 n.8]. Importantly, Defendants argue that Plaintiffs must meet an additional element to establish liability—establishing CenturyLink's actual knowledge under 29 U.S.C. § 1105(a). [#97 at 12]. Plaintiffs do not address this contention.

Under ERISA, a co-fiduciary may be liable for a breach committed by another. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993); *Pioneer Centres Holding Co. Employee Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, No. 12-CV-02547-RM-MEH, 2015 WL 2018973, at *3 (D. Colo. May 1, 2015). In full, § 1105(a) provides:

> (a) Circumstances giving rise to liability
> In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

> (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1105(a).

Plaintiffs' theory is two-fold: CenturyLink failed to monitor CIM's imprudent design of the Fund and failed to monitor CIM's own review of the Fund. [#94 at ¶¶ 109–114]. Plaintiffs make clear in the Response that this claim is premised entirely on the absence of action despite their knowledge of the breach—i.e., § 1105(a)(3). [#104 at 15 ("Plaintiffs allege CenturyLink did not monitor CIM's design of the Fund, the investments CIM chose to offer the Plan, or whether CIM had processes in place to track investments."); #94 at ¶ 112–13 (emphasizing the passive nature of CenturyLink's failure)].

Under ERISA, a fiduciary is under an affirmative obligation to remedy the breach of another if he has knowledge of the breach, otherwise the second fiduciary may become liable for a breach that he has not participated in. *LaScala v. Scrufari*, 479 F.3d 213, 220 (2d Cir. 2007); *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 331 (2d Cir. 2005) (Pooler, J., concurring) ("[A] fiduciary under ERISA turns a blind eye to improprieties at her great peril. . . . [A]n ERISA fiduciary may not avoid liability for mismanagement by simply doing nothing." (citation and quotation omitted)). Under § 1105(a)(3), a plaintiff must show that (i) the fiduciary had knowledge of the breach, (ii) the fiduciary failed to make reasonable efforts to remedy the breach, and (iii) a loss resulted from that failure. *Silverman v. Mut. Ben. Life Ins. Co.*, 138 F.3d 98, 104 (2d Cir. 1998); *Acosta v. Vinoskey*, 310 F. Supp. 3d 662, 684 (W.D. Va. 2018) (requiring actual knowledge for the first prong). This standard

requires actual knowledge and a corporation's employee's knowledge may be imputed to it. *In re Dynegy, Inc. Erisa Litig.*, 309 F. Supp. 2d 861, 905–06 (S.D. Tex. 2004)

The Third Amended Complaint contains numerous allegations regarding the CIM's oversight. Specifically, Plaintiffs allege design decisions or reviews were undertaken by CIM, at a minimum, (1) on or about April 1, 2012, [#94 at ¶ 38]; (2) in May 2015, [*id.* at ¶ 70]; (3) in May 2016, [*id.* at ¶ 75]; and (4) in April 2017, [*id.* at ¶ 78]. As discussed above, this court finds that dismissal of Count I as to CIM's alleged failure to monitor is not appropriate at this juncture. Therefore, the court focuses on whether Plaintiffs have sufficiently pled knowledge on the part of CenturyLink.

In the Third Amended Complaint, Plaintiffs offer only a summary allegation that CenturyLink "knew" of these issues without elaboration or explanation whether this knowledge is actual or imputed, only the former of which meets the statutory requirements. [#94 at ¶ 117]. In fact, the wording of this claim appears to suggest the latter—alleging that "as the Plan Sponsor" CenturyLink had knowledge of the underlying breach. [*Id.*]. Defendants note this issue in the Motion to Dismiss and Plaintiffs make no counter in Response. [#97 at 14; *see generally* #104].

This claim presents the court with an issue similar to that in *In re Sprint Corp. ERISA Litigation*, 388 F. Supp. 2d 1207 (D. Kan. 2004). In that case, as here, the Complaint presents "no factual allegations at all, but instead simply parrot[s] the language of the co-fiduciary liability statute." *Id.* at 1230. Actual knowledge of a breach is a necessary condition to imposing co-fiduciary liability under § 1105(a)(3), *Renfro v. Unisys Corp.*, 671 F.3d 314, 324 (3d Cir. 2011), and even after discovery and now four iterations of an operative pleading, Plaintiff's allegation of CenturyLink's knowledge is unsupported

by any factual averments. Additionally, Plaintiffs offer no factual allegations that CenturyLink knew that this conduct constituted a breach—CenturyLink must know that the conduct occurred *and* that the conduct constitutes a breach of its co-fiduciary's duties. *See id.* at 324–25. Plaintiffs offer no averments to establish that CenturyLink knew of the events related above, much less that it should have been aware that those (in)actions constituted a breach of CIM's duty. *See id.* at 325 ("Similarly, plaintiffs do not allege Fidelity knew Unisys's selection of investment options constituted a breach of fiduciary duty. Accordingly, plaintiffs fail to state a claim against Fidelity under § 1105(a)."). The court is left to conclude that Plaintiffs' claim for failure to monitor based on CenturyLink's status as a functional fiduciary fails for want of well-pleaded allegations establishing (1) actual knowledge of the underlying facts constituting breach, and (2) that CenturyLink should have concluded that those facts constituted a breach.

VI. Dismissal With Prejudice and Leave to Amend

Finally, Defendants seek dismissal of Plaintiffs' Second Amended Complaint with prejudice. [#97 at 15]. Plaintiffs do not address Defendants' request for dismissal with prejudice, but simply argue that dismissal is not warranted and request leave to file an Amended Complaint. [#104 at 15]. Given the court's recommendation that Plaintiffs be permitted to pursue Count I as to failure to monitor, this court reserves the issue of dismissal with prejudice and leave to amend for Judge Arguello as the presiding judge.

CONCLUSION

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

(1) Defendants CenturyLink Inc. and CenturyLink Investment Management Company Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint [#97] be **GRANTED IN PART** and **DENIED IN PART** as follows:[4]

(A) **GRANTED** as to Count I against CIM based on the design of the Large Cap Fund;

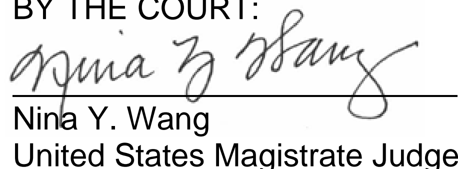
(B) **DENIED** as to Count I against CIM based on a failure to monitor;

(C) **GRANTED** as to Count II against CenturyLink; and,

(D) **GRANTED** as to Count III against CenturyLink.

DATED: October 23, 2019

BY THE COURT:



Nina Y. Wang
United States Magistrate Judge

[4] 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).