IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MELISSA STANLEY, individually and as representative of a class of participants and beneficiaries on behalf of the George Washington University Retirement Plan for Faculty and Staff and the George Washington University Supplemental Retirement Plan, *Plaintiff*, v. THE GEORGE WASHINGTON UNIVERSITY, THE GEORGE WASHINGTON UNIVERSITY BOARD OF TRUSTEES, and THE GEORGE WASHINGTON UNIVERSITY PLAN ADMINISTRATION COMMITTEE, *Defendants*.	Civil Action No. 1:18-cv-00878 Hon. John D. Bates

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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INTRODUCTION

This is an action for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"). Fiduciaries form a critical part of ERISA's regime. Consistent with ERISA's balance between the need to "ensure that employees would receive the benefits they had earned" (*Conkright v. Frommert*, 559 U.S. 506, 516 (2010)) and the risk of creating "a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefits plans in the first place" (*Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)), Congress required the appointment of fiduciaries to oversee employer-sponsored retirement plans but crafted a standard of fiduciary conduct that was designed to be manageable—fiduciaries must act as would reasonable individuals "in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). ERISA thus imposes a relative standard of care that obligates fiduciaries to heed the practices of their peers.

Plaintiff Melissa Stanley's complaint envisions a far different statute—a statute in which fiduciaries can be forced into costly discovery whenever they make a decision that is subject to second-guessing. Stanley makes no allegations at all about the fiduciary decisionmaking processes that she is challenging. Rather, she alleges that Plan fiduciaries could have lowered the Plans' administrative expenses and contends that two of the Plans' 90+ investment options were underperformers and that a third option was subject to undesirable liquidity terms.

Plaintiffs' allegations are the sort of claims that can be articulated against any retirement plan in America. It could be possible to find a lower-cost vendor to perform a task—so long as fiduciaries are willing to cut corners on the nature and quality of services provided. And it will always be possible, with the benefit of hindsight, to find an investment option that performed better than at least one investment option fiduciaries chose. But neither of these theories supports an inference that fiduciaries did not perform their responsibilities in a prudent manner in the best

interests of plan participants. And it certainly does not create an inference that fiduciaries somehow violated federal law.

To make matters worse, when Stanley separated from her employment at the George Washington University ("GW" or the "University"), she released her legal claims against GW and its affiliates in exchange for a severance payment. Under recent Circuit precedent, Stanley's release deprives her of standing and requires that her complaint be dismissed.

It is notable that this case is part of a recent wave of ERISA class action litigation against institutions of higher education.[1] In one such case in which the motion to dismiss was ultimately granted, Northwestern University was forced to bear $4 million in fees and expenses (because discovery had not been stayed). *Divane v. Northwestern Univ.*, 2018 WL 2388118 (N.D. Ill. May 25, 2018) (dismissing complaint with prejudice); Decl. of Casey T. Grabenstein in Opp. to Pltf's Mot. for Leave to File a Second Am. Compl. at 5, *Divane v. Northwestern Univ.*, No. 1:16-cv-08157 (N.D. Ill. filed May 7, 2018), ECF No. 154 (discussing burdens of discovery). This case should be dismissed before needlessly subjecting a not-for-profit institution of higher education to unwarranted litigation costs for a meritless claim brought by a plaintiff who has no right to sue.

[1] *See Sweda v. Univ. of Pa.*, 2017 WL 4179752 (E.D. Pa. Sept. 21, 2017), *appeal docketed*, No. 17-3244 (3d Cir. Oct. 13, 2017); *Divane v. Northwestern Univ.*, 2018 WL 2388118 (N.D. Ill. May 25, 2018); *Short v. Brown Univ.*, No. 17-cv-318 (D.R.I. filed July 6, 2017); *Cates v. Trs. of Columbia Univ. in the City of N.Y.*, No. 16-cv-6524 (S.D.N.Y. filed Aug. 28, 2016); *Cunningham v. Cornell Univ.*, No. 16-cv-6525 (S.D.N.Y. filed Aug. 17, 2016); *Clark v. Duke Univ.*, No. 16-cv-1044 (M.D.N.C. filed Aug. 10, 2016); *Henderson v. Emory Univ.*, No. 16-cv-2920 (N.D. Ga. filed Aug. 11, 2016); *Kelly v. Johns Hopkins Univ.*, No. 16-cv-2835 (D. Md. filed Aug. 11, 2016); *Sacerdote v. N.Y. Univ.*, No. 16-cv-6284 (S.D.N.Y. filed Aug. 9, 2016); *Nicolas v. Trs. of Princeton Univ.*, No. 17-cv-3695 (D.N.J. filed May 23, 2017); *Daugherty v. Univ. of Chi.*, No. 17-cv-3736 (N.D. Ill. filed May 18, 2017); *Munro v. Univ. of S. Cal.*, No. 16-cv-6191 (S.D. Cal. filed Aug. 17, 2016); *Cassell v. Vanderbilt Univ.*, No. 16-cv-2086 (M.D. Tenn. filed Aug. 10, 2016); *Davis v. Wash. Univ. in St. Louis*, No. 17-cv-1641 (E.D. Mo. filed June 8, 2017); *Vellali v. Yale Univ.*, No. 16-cv-1345 (D. Conn. filed Aug. 9, 2016); *Wilcox v. Georgetown Univ.*, No. 18-cv-422 (D.D.C. filed Feb. 23, 2018).

BACKGROUND[2]

A. Tax-Deferred Annuity Plans

The Internal Revenue Code provides favored tax treatment to a variety of different types of retirement plans. These plans are commonly known by the code section that provides authorization. There are 401(a) plans, 401(k) plans, 403(b) plans, and 457 plans. Of these categories, 401(k) plans are perhaps the most familiar, but 403(b) plans are the foundation of the collegiate retirement system. Section 403(b) of the Internal Revenue Code, entitled "Taxation of employee annuities," provides a set of rules for certain plans sponsored by nonprofit employers. Section 403(b) reflects the heritage of the collegiate retirement system. The unique attributes of that system provide relevant background, particularly given Stanley's false suggestion that there is a cohesive market for "defined contribution plans"—a category that includes both nonprofit 403(b) plans and corporate 401(k) plans.

Annuities have formed the backbone of the collegiate retirement system for more than a century. In 1905, Andrew Carnegie endowed a $10 million gift to fund pensions at thirty universities.[3] The following year, Congress chartered the Carnegie Foundation for the Advancement of Teaching to provide a system of retiring pensions for university professors.[4] By 1918, however,

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[2] At this stage of the proceedings, a court may consider "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the court] may take judicial notice." *See, e.g.*, *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). If the complaint "necessarily relies" on particular documents, they are considered to be incorporated in the complaint "even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss." *Hinton v. Corr. Corp. of Am.*, 624 F. Supp. 2d 45, 46 (D.D.C. 2009). Consistent with these standards, courts routinely rely upon formal plan documents and disclosures required by statute when resolving motions to dismiss in ERISA cases. *Winfield v. Citibank, N.A.*, 842 F. Supp. 2d 560, 568 n.3 (S.D.N.Y. 2012) (plan and summary plan description "plainly are integral" to ERISA cases); *Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Group, Inc.*, 99 F. Supp. 3d 1110, 1126 (C.D. Cal. 2015) (DOL Form 5500 subject to judicial notice); *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773–74 (2d Cir. 1991) (prospectuses subject to judicial notice).

[3] WILLIAM C. GREENOUGH, COLLEGE RETIREMENT AND INSURANCE PLANS 9 (1948).

[4] Act to Incorporate the Carnegie Foundation for the Advancement of Teaching, ch. 636, 34 Stat. 59 (Mar. 10, 1906).

the aspirations of the Carnegie Foundation had outgrown its means. So the Carnegie Foundation founded the Teachers Insurance and Annuity Association, which is now known as TIAA.[5] TIAA developed annuity contracts with "fundamental provisions specially designed for college retirement plans," with an eye toward "advanc[ing] the cause of education as a whole."[6]

The launch of the collegiate retirement system of annuities predates by decades enactment of I.R.C. § 403(b), which was enacted in 1958 to provide favorable treatment to so-called "tax-sheltered annuities."[7] In 1974, Congress permitted 403(b) plans to begin offering investments other than annuities, thus allowing 403(b) plans to include both annuities and custodial accounts containing mutual funds.[8] Nevertheless, even today, annuities remain the hallmark of 403(b) plans.[9] The U.S. Government Accountability Office has endorsed this emphasis on lifetime income; a 2016 GAO report recommended that the Secretary of Labor "help encourage plan sponsors to offer lifetime income options" as part of their retirement plans.[10]

Unlike 403(b) plans, corporate 401(k) plans were designed to supplement pensions. When ERISA was enacted in 1974, section 401(k) had not yet been enacted. At that time, "the defined benefit plan was the norm of American pension practice." *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255 (2008) (alteration and internal quotation marks omitted). In 1978,

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[5] *See* TIAA, *Our History*, https://www.tiaa.org/public/why-tiaa/who-we-are.

[6] GREENOUGH, *supra* n. 3, at 14, 17.

[7] Technical Amendments Act of 1958, Pub. L. No. 85-866, § 23, 72 Stat. 1606, 1620-21 (codified at 26 U.S.C. § 403(b)).

[8] ERISA, Pub. L. No. 93-406, § 1022(e), 88 Stat. 829, 1072 (1974) (codified as amended at 26 U.S.C. § 403(b)(7)).

[9] The American Association of University Professors and the Association of American Colleges (now known as the Association of American Colleges and Universities) jointly endorse a Statement of Principles on Academic Retirement and Insurance Plans. *See* Statement of Principles on Academic Retirement and Insurance Plans, https://www.aaup.org/file/retirement-and-insurance-plans.pdf. The Statement encourages member-institutions to "provide for a plan of retirement annuities" that will generate, for a typical individual retiring at a normal age, "two-thirds of the yearly disposable salary (after taxes and other mandatory deductions) during the last few years of full-time employment." *Id.* at 2.

[10] GAO, 401(k) Plans: DOL Could Take Steps to Improve Retirement Income Options for Plan Participants 55, GAO-16-433 (2016), https://www.gao.gov/assets/680/678924.pdf.

Congress enacted I.R.C. § 401(k) to govern profit-sharing and stock option plans. Such plans were envisioned as supplements to pensions, so early 401(k) plans were not built around annuities. Although the market for for-profit retirement plans has changed dramatically in the past forty years—such that "defined benefit plans are now largely limited to the public sector, very large employers, and multi-employer plans of large national unions such as the Teamsters"[11]—401(k) plans have largely retained their original structures.

Existing retirement plan data reflect the differences between 403(b) and 401(k) plans: Whereas 68% of 403(b) retirement plans (which includes plans sponsored by educational institutions and by other nonprofits) offer annuities among the plan investment options, only 6% of 401(k) plans do.[12]

B. GW's Plans

The University sponsors a variety of retirement and welfare benefit plans for the benefit of its employees. Two such plans are at issue here: the George Washington University Retirement Plan for Faculty and Staff ("Base Plan") and the George Washington University Supplemental Retirement Plan ("Supplemental Plan") (collectively, the "Plans"). These Plans reflect GW's commitment to help its faculty and staff to prepare for retirement.

Participants in the Plans have individual accounts. Most GW employees are eligible to participate in the Supplemental Plan (a 403(b) plan), which is funded entirely by elective contributions by Plan participants. Compl. ¶ 22. Eligible University employees with two years of service are also entitled to participate in the Base Plan (a 401(a) plan). In the Base Plan, GW makes an automatic contribution of 4% of an employee's salary irrespective of whether the employee

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[11] David Pratt, *To (b) or Not to (b): Is That the Question? Twenty-First Century Schizoid Plans Under Section 403(b) of the Internal Revenue Code*, 73 Alb. L. Rev. 139, 144 (2009).

[12] *Compare* Plan Sponsor Council of Am., 2017 403(b) Plan Survey tbl.58 (2017), *available at* Doc. 134-5, *Sacerdote v. N.Y. Univ.*, No. 1:16-cv-06284-KBF (S.D.N.Y. filed Jan. 10, 2018), *with* Deloitte, Defined Contribution Benchmarking Study 20 (2017), https:// www2.deloitte.com/content/dam/Deloitte/us/Documents/human-capital/us-hc-defined-contributions-benchmarking-survey-report.pdf.

elects to make any contributions to the Supplemental Plan. GW also makes generous matching contributions, such that a participant who elects to contribute at least 4% of her salary to the Supplemental Plan will have an additional "match" amount of 6% of her salary, for a total GW contribution equal to 10% of her salary contributed to the Base Plan by GW on her behalf. *Id.* ¶ 19.[13]

For each Plan, the participant directs how the money is to be invested from a broad menu of investment options that includes fixed and variable annuities offered by TIAA and mutual funds offered by TIAA, Vanguard, and Fidelity. Compl. ¶¶ 39-40.[14] The Plans' investment options charge certain fees to plan participants, which are disclosed pursuant to law through prospectuses and periodic statements. One component of those fees compensates the investment manager for overseeing the assets. Another component of those fees compensates the recordkeepers for administering the Plans. TIAA maintains the records for the annuities and mutual funds it offers to the Plans. Fidelity maintains the records for its own mutual fund offerings and for Vanguard's.

There are multiple ways for a recordkeeper to be paid. "'In the past, defined contribution (DC) plan sponsors and service providers typically treated revenue generated from the plan's assets as the primary method of payment for recordkeeping service fees.'" Compl. ¶ 52 (quoting

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[13] The Supplemental Plan is organized under I.R.C. § 403(b). The Base Plan is technically organized under I.R.C. § 401(a), which authorizes "money purchase pension plan[s]" that are funded entirely by employer contributions. I.R.C. § 401(a)(27)(B); *see* Choosing a Retirement Plan: Money Purchase Plan, https://www.irs.gov/retirement-plans/choosing-a-retirement-plan-money-purchase-plan. The only material difference between a 401(a) plan and a 403(b) plan is that 403(b) plans permit employee contributions.

[14] During earlier periods, participants could also invest in investment funds provided by AXA, but those funds stopped accepting additional contributions in 2009. Compl. ¶ 72. Given that AXA was removed as an investment option long before the class period began, any claims involving frozen AXA assets are clearly time-barred. *See* 29 U.S.C. § 1113(1) (barring ERISA suits commenced more than "six years after . . . the date of the last action which constituted a part of the breach or violation").

Vanguard, *Shining a Light on ERISA Budget Accounts* 1).[15] Today, plan fiduciaries negotiate the price of administrative services. Containment of recordkeeping costs can be achieved in one of three ways: (1) "'adopting lower-priced share classes (with a corresponding reduction in credits or revenue sharing for recordkeeping)'"; (2) "'transitioning from asset-based fees to flat, per-participant fees'"; or (3) establishing an "ERISA budget account," which is "an unallocated account held within the plan that is funded by some or all of the asset-based fee revenue received by a service provider." *Id.*; Vanguard, *Shining a Light, supra* n.15.[16]

The Plans employ the first and third approaches. As explained in the Department of Labor disclosure upon which Stanley's complaint is premised (*see* Compl. ¶ 76), the Plans offer institutional shares of TIAA's mutual funds, the low-fee "Admiral" share class of Vanguard funds, and the K share class of Fidelity funds, which is generally available only to employer-sponsored retirement plans for which Fidelity provides recordkeeping services.[17] Moreover, TIAA rebates to the Plans any collections for administrative fees that exceed the Plans' negotiated fees:

> [W]here the Plan maintains a balance in and makes active contributions to any of the investment vehicles kept on TIAA-CREF's platform, TIAA-CREF funds a Revenue Credit Account in the Plan based upon revenues generated by the Plan. The amount so determined to be in excess of TIAA-CREF's revenue requirement is deposited into the Revenue Credit Account of the Plan. The Revenue Credit Accounts may only be used either to pay direct, reasonable and necessary expenses of the Plan with authorization or to provide benefits for Plan participants and beneficiaries in the form of revenue credits. Only those participants whose accounts generated rev-

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[15] Vanguard, *Shining a Light on ERISA Budget Accounts* (Aug. 2014), https://institutional.vanguard.com/iam/pdf/ERISA_Budgets_Final.pdf.

[16] Only the first two possibilities are quoted in the complaint. The third possibility comes from the same page of the Vanguard document upon which the complaint relies.

[17] *See* Annual Return (Form 5500), The George Washington University Retirement Plan for Faculty and Staff, Supplemental Schedule H, Line 4i (2016) (Ex. 2); *see* Fidelity Institutional Asset Management, https://institutional.fidelity.com/app/funds-and-products/list/FIIS_PP_SP34_DPL19_AVG/fidelity-funds-class-k.html?navId=327 (listing funds and explaining that "Class K and K6 Shares are available only in eligible employer-sponsored retirement plans").

> enue credits during the plan year shall receive an allocation of revenue credits at year end.

Annual Return (Form 5500), The George Washington University Retirement Plan for Faculty and Staff, Notes to Financial Statements, Note 2, at 7 (2016) (Ex. 2).

The Plans include, among a wide variety of investment options, the following three investment options:

The **TIAA Traditional Annuity** is a fixed annuity. An annuity is effectively an insurance policy. "Under a classic fixed annuity, the purchaser pays a sum certain and, in exchange, the issuer makes periodic payments throughout, but not beyond, the life of the purchaser." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 262 (1995). When a participant elects to invest in the Traditional Annuity, TIAA enters into a direct contractual relationship with the Plan participant. The terms of the Traditional Annuity are different for the Base Plan and the Supplemental Plan. A participant who invests Supplemental Plan contributions in the Traditional Annuity may withdraw the funds at any time with no penalty; a participant who invests funds from the Base Plan in the Traditional Annuity may not withdraw those assets until the termination of employment; upon termination, a participant who elects not to annuitize the funds must pay a 2.5% surrender charge to receive a lump-sum payout of the funds. Because of the difference in the liquidity terms, contributions to the Base Plan yield greater interest than contributions to the Supplemental Plan—typically 0.50-0.75% per year. Participants' Traditional Annuity contracts with TIAA also give them an individual, contractual right to invest in two of TIAA's variable annuity products—the CREF Stock Account and the CREF Money Market Account—meaning that GW cannot discontinue contributions to the variable annuities by removing them from the Plans without also discontinuing contributions to the Traditional Annuity contracts.

The **CREF Stock Account** is a variable-annuity investment fund. According to its prospectus, the Stock Account seeks to achieve "[a] favorable long-term rate of return through capital appreciation and investment income by investing primarily in a broadly diversified portfolio of common stocks."[18] The CREF Stock Account is globally diversified and "seeks to maintain the weightings of its holdings as approximately 65–75% domestic equities and 25–35% foreign equities."[19] Because of this blended strategy, the prospectus explains, no single benchmark gauges the CREF Stock Account's performance:

> The benchmark for the Stock Account is a composite index composed of two unmanaged indices: the Russell 3000® Index and the MSCI All Country World ex USA Investable Market Index ("MSCI ACWI ex USA IMI"). The weights in the composite index change to reflect the relative sizes of the domestic and foreign segments of the Account and to maintain its consistency with the Account's investment strategies.[20]

Because the applicable federal regulations do not permit the use of a composite benchmark (*see* 29 C.F.R. § 2550.404a-5(d)(1)(iii); Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 75 Fed. Reg. 64,910, 64,916-17 (Oct. 20, 2010)), certain participant disclosures reference only the domestic, Russell 3000 component of the benchmark. As of year-end 2017, the independent analyst Morningstar rates the CREF Stock Account as a 5-star investment option.[21]

The **TIAA Real Estate Account** is a variable annuity account that "seeks favorable long-term returns primarily through rental income and appreciation of real estate and real estate-related investments."[22] The TIAA Real Estate Account invests primarily in commercial real

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[18] TIAA, *College Retirement Equities Fund Prospectus* 27 (May 1, 2017), https://www.tiaa.org/public/pdf/cref_prospectus.pdf.

[19] *Id.* at 28.

[20] *Id.*

[21] TIAA, *CREF Stock Account, Class R3* (Dec. 31, 2017), https://www.tiaa.org/public/pdf/ffs/194408126.pdf.

[22] TIAA, *TIAA Real Estate Account Prospectus* 3 (May 1, 2017), https://www.tiaa.org/public/pdf/

estate, an asset class not widely available to retail investors in a variable annuity or mutual fund.[23] The TIAA Real Estate Account is not a real-estate investment trust; as the prospectus explains, "REIT investments are securities and generally publicly traded," such that "they may be exposed to market risk and potentially significant price volatility due to changing conditions in the financial markets and, in particular, changes in overall interest rates, regardless of the value of the underlying real estate such REIT may own." Because the TIAA Real Estate Account invests primarily in real property, its returns are driven by the appraised "fair value" of the real estate properties in its portfolio, and the income generated by those properties.[24]

C. Plaintiff Melissa Stanley

Stanley is a resident of Florida. She left the University in January 2016. In conjunction with her departure, Stanley entered into a Confidential Separation Agreement and General Release ("Agreement").[25]

Under the terms of the Agreement, GW made a payment to Stanley and Stanley agreed to a broad release of all claims against GW or related parties.[26] The release covers

> any and all claims, demands, damages, debts, costs, suits, actions or causes of action, liabilities, charges or grievances of any nature whatsoever, whether past or present, whether known or unknown, vested or contingent, and regardless of the legal theory or factual basis involved (collectively, "Claims"), which Ms. Stanley has or may have or which may hereafter accrue or which may be asserted by another on her behalf, arising prior to her execution of the Agreement. This release includes, without limitation . . . *Claims for violation of any federal, state, and/or local statute* . . . . It is explicitly understood that this is a GENERAL RELEASE, and is intended to release claims to the fullest extent permitted by law. Excluded from this General Release is an action by Ms. Stanley to enforce the terms of this Agreement, claims for vested benefits under employee benefit plans, claims

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realestate_prosp.pdf.

[23] *Id.* at 37.

[24] *Id.* at 28, 55.

[25] The Confidential Separation Agreement is attached as Exhibit 1. Because of its confidential nature, the University has filed a motion to maintain the Agreement under seal. Particularly sensitive information—such as the amount of consideration exchanged—is not disclosed in this public filing.

[26] The release covers GW as well as "all other of its former, current and future trustees, officers, employees, attorneys, and agents, predecessors, successors, assigns, divisions, departments, subsidiaries, and affiliates, whether in their representative or individual capacities."

> that arise after Ms. Stanley signs this Agreement, any right Ms. Stanley has to file a charge with a government agency . . . and any other claim which cannot be released by private agreement as a matter of law.

Agreement, Ex. 1, ¶ 10 General Release (emphasis added).[27]

Notwithstanding the Agreement, on April 13, 2018, Stanley filed this action against GW, GW's Board of Trustees, and the GW Plan Administration Committee. ECF No. 1. She seeks relief under four overlapping theories:

First, Stanley contends that GW[28] caused Plan participants to pay more for Plan administration than was warranted.

Second, Stanley challenges certain of the investment options provided to Plan participants. As a general matter, she alleges that there were too many options on the investment menu. She then challenges three of the approximately 90 investment offerings for specific reasons. She alleges that GW should have eliminated the CREF Stock Account from the Plans because of its historical underperformance relative to the Russell 3000 index and to passively managed mutual funds that track the Russell 3000 index. Compl. ¶¶ 123-38. She next alleges that GW should have removed the TIAA Real Estate Account in favor of the Vanguard REIT Index (Institutional) mutual fund, which she says had lower fees and better performance. Compl. ¶¶ 139-52. Finally, she contends that offering the TIAA Traditional Annuity was unreasonable because the appli-

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[27] The Agreement can be considered now without converting this motion to dismiss into a motion for summary judgment. On a motion to dismiss, courts may consider a settlement agreement outside the pleadings when the "[p]laintiff acknowledges [its] existence . . . [and] does not dispute its validity." *Rogers v. Johnson-Norman*, 466 F. Supp. 2d 162, 170 n.5 (D.D.C. 2006); *see also Jenisio v. Ozark Airlines, Inc. Ret. Plan*, 187 F.3d 970, 972 n.3 (8th Cir. 1999) (holding that a court may consider documents outside the pleadings on a motion to dismiss when "the plaintiffs' claims are based solely on the interpretation of the documents and the parties do not dispute the actual contents of the documents"). Likewise, evidence bearing on the Court's jurisdiction—disputed or not—is admissible on a motion to dismiss for lack of jurisdiction. *Ellis v. Holy Comforter Saint Cyprian Cmty. Action Group*, 153 F. Supp. 3d 338, 340 (D.D.C. 2016).

[28] Stanley mostly does not distinguish among the Defendants. Therefore, except where specified, all of the defenses discussed herein pertain to each of the Defendants. For ease of reference, Defendants will be referred to as GW.

cable contracts impose a 2.5% surrender charge under some circumstances. Compl. ¶¶ 153-62.

Third, she alleges that it was improper for GW to select recordkeeping service providers that required GW to offer particular investment options.

Fourth, Stanley claims that it was inappropriate for GW to utilize multiple vendors to provide recordkeeping services to the Plan when, she says, one recordkeeper would have sufficed.

ARGUMENT

There are a multitude of reasons why Stanley's complaint must be dismissed.[29] To start with the jurisdictional problems, Stanley lacks standing to seek redress from this Court because she released all relevant claims against GW. Even if she were not categorically foreclosed from asserting all claims, she lacks standing to assert challenges to the TIAA Real Estate Account and to the TIAA Traditional Annuity, because she has no personal stake in those claims.

Moreover, Stanley's theories of fiduciary breach are hopelessly defective. Applying the familiar standards of *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), a complaint can survive a motion to dismiss only if it alleges "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged, rather than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678. Stanley's claims would, if true, establish only that there were *different* decisions that the Plans' fiduciaries could have made—not that the fiduciaries' performance was out of line when assessed against prevailing practices among 403(b) plans sponsored by institutions of higher education.

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[29] The Court must assume the truth of the allegations contained in the complaint for purposes of deciding the Motion to Dismiss, except insofar as those allegations are disproven by judicially noticeable documents. To be clear, however, GW strongly disputes many of the factual assertions contained in the complaint. But those disputes are irrelevant: for the reasons stated herein, Stanley fails to state a claim.

Finally, even if the complaint stated a claim against somebody, it states no claim against the GW Board of Trustees, which should be dismissed as a party.

I. This Court Lacks Jurisdiction.

As a threshold matter, Stanley's complaint must be dismissed for failure to satisfy the minimum requirements of Article III.

"Article III of the Constitution limits [federal courts'] jurisdiction to 'Cases' and 'Controversies.'" *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 699 (D.C. Cir. 2017) (quoting U.S. Const. art. III, § 2, cl. 1). "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). That doctrine "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong" and "ensure[s] that federal courts do not exceed their authority as it has been traditionally understood." *Id.*

"[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As the D.C. Circuit has explained:

> To satisfy the case-and-controversy requirement, a [plaintiff] must allege (i) that it suffered an injury in fact; (ii) that a causal connection exists between the injury and challenged conduct; and (iii) that it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision.

Millennium Pipeline, 860 F.3d at 699 (citing *Lujan*, 504 U.S. at 560-61); *see also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180 (2000). Stanley must demonstrate standing for "'each claim'" and "'for each form of relief that is sought.'" *Davis v. FEC*, 554 U.S. 724, 734 (2008) (quoting *DaimlerChrysler v. Cuno*, 547 U.S. 332, 352 (2006)). In a class action, the *named* plaintiff must demonstrate that she has constitutional standing (*O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)), measured at the time the complaint was filed (*Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)). "The party invoking feder-

al jurisdiction bears the burden of establishing these elements … with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561.

In an ERISA breach-of-fiduciary-duty action, plaintiffs "cannot claim that either an alleged breach of fiduciary duty to comply with ERISA, or a deprivation of [an] entitlement to that fiduciary duty, in and of themselves constitutes an injury-in-fact sufficient for constitutional standing." *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009). In a case involving a plan with a defined *benefit*, plan participants share a "common interest … in the financial integrity of the plan" (*Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985)) that can be injured by a fiduciary breach that "creates or enhances the risk of default by the entire plan" (*LaRue*, 552 U.S. at 255). In a defined *contribution* plan, by contrast, the interests of plan participants are not always aligned. Where, as here, participants "choose how their retirement assets will be invested" (*Loomis v. Exelon Corp.*, 658 F.3d 667, 669 (7th Cir. 2011)), a fiduciary misstep might have no impact on a participant's individual interests, as, in the most extreme case, when a plan participant alleges a fiduciary breach respecting an investment fund he did not elect. Thus, in an ERISA action for breach of fiduciary duty, plaintiffs must "establish individual standing" in order to maintain a lawsuit. *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 608 (6th Cir. 2007).

A. Stanley lacks standing because she released her claims against GW.

Stanley lacks standing to bring this suit because she released the claims in the complaint as part of the Agreement. Prior to filing this motion, counsel for the University apprised counsel for Stanley of the release and of its legal effect, but Stanley decided nevertheless to press these claims.

Recent Circuit precedent governs. In *Russell v. Harman Int'l Industries, Inc.*, 945 F. Supp. 2d 68 (D.D.C. 2013), *aff'd*, 773 F.3d 253 (D.C. Cir. 2014), a former employee filed a puta-

tive ERISA class action for breach of fiduciary duty despite having entered into a release of claims. The employer moved to dismiss, invoking the release. The district court (Roberts, J.) converted the motion to dismiss into a motion for summary judgment and granted it. The court found that "[a] release of one's ERISA claims is valid if it is knowing and voluntary." 945 F. Supp. 2d at 74. Applying the rule that the knowing-and-voluntary standard is satisfied "if the contract states what the employee is waiving and what the employee is receiving in return for that waiver," the court found that the release was valid as a matter of law and that it covered the claims in the plaintiff's complaint. *Id.* at 75-77. Because the plaintiff had relinquished any personal stake in the controversy, the court found that the plaintiff lacked Article III standing to bring a claim on behalf of all participants in the plan, because he would not benefit from any relief that might be awarded. *Id.* at 79-80. The D.C. Circuit unanimously affirmed. Responding to the plaintiff's argument that he should have been afforded discovery to determine the significance of the severance agreement, the court determined that the release was determinative unless the plaintiff could establish that his assent to the agreement was not knowing and voluntary—a standard that could be applied on the face of the release alone that did not necessitate any discovery. 773 F.3d at 256-57.

Russell applies with full force here. As in *Russell*, the Agreement highlights what GW provided to Stanley (the payment described in Section 5), and what Stanley provided to GW in exchange (as relevant, the "GENERAL RELEASE" in Section 10). As in *Russell*, the Agreement provided Stanley with a period of time (here, 21 days, per Section 14) to consider whether to accept the bargain and advised her (again, in Section 14) "to consult with an attorney of her choice" before signing the agreement. Moreover, as in *Russell*, the Agreement states (in Section 14) that Stanley understood the rights she was releasing, that "her waiver [was] knowing and

voluntary," and that she "voluntarily and freely" accepted the agreement. Therefore, as in *Russell*:

> [b]ecause the Agreement states clearly the consideration [Stanley] received for entering into the Agreement, highlights the rights that [Stanley] released, uses clear and precise language to describe the scope of that release, provides that [Stanley] had time to consider the Agreement, and counsels [her] to consult an attorney, the waiver was knowing and voluntary.

945 F. Supp. 2d at 76.

The claims that Stanley articulates in the complaint are covered by the Agreement's General Release. The defendants—the University, the University's Trustees, and the University's Plan Administration Committee—all qualify as "Released Parties" under the agreement. Stanley's statutory claims for breach of fiduciary duty, which arise under Section 409(a) of ERISA, 29 U.S.C. § 1109(a) (Compl. ¶¶ 214, 225, 236, 244), are plainly covered by the release of "Claims for violation of any federal, state, and/or local statute, code, regulation, or ordinance." And these claims do not trigger the Agreement's exclusion for "claims for vested benefits under employee benefit plans," because Stanley is not pursuing vested benefits. *Cf. Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1989) (explaining that claims "to recover benefits due under [a] plan" arise under 29 U.S.C. § 1132(a)(1)(B), not 29 U.S.C. § 1109(a). Finally, Stanley's claims arose prior to the January 2016 execution of the Agreement; indeed, her complaint seeks a class period that begins on April 13, 2012.

For the foregoing reasons, the Agreement is dispositive of Stanley's individual and class claims, and the complaint should be dismissed in full.[30]

[30] Although the district court in *Russell* converted the defendant's motion to dismiss into a motion for summary judgment, that approach is not necessary. As we have noted, the settlement agreement can be considered at the pleading stage.

B. Stanley lacks standing to challenge the TIAA Real Estate Account because she did not elect that investment option.

Even if Stanley had not entered into the Agreement, she would still be ineligible to press claims pertaining to the TIAA Real Estate Account (Compl. ¶¶ 139-52) for the simple reason that she does not allege that she ever elected that investment option (*see id.* ¶ 29 (alleging that Stanley invested in the CREF Stock Account and the TIAA Traditional Annuity)).

Where, as here, participants "direct[] their own investment choices from a menu of options selected by [plan] fiduciaries," a fiduciary misstep might have no impact on a participant's individual interests (*Taveras v. UBS AG*, 612 F. App'x 27, 29 (2d Cir. 2015)), as when a plan participant alleges a fiduciary breach respecting an investment fund he did not elect. Thus, in an ERISA action for breach of fiduciary duty, "[f]ailure to allege individualized harm goes directly to constitutional standing and is fatal to [a] Complaint." *Id.*; *accord Marshall v. Northrop Grumman Corp.*, 2017 WL 2930839, at *8 (C.D. Cal. Jan. 30, 2017) (dismissing for lack of standing a claim challenging an investment fund, where the plaintiffs did not allege that they had invested in that particular fund). Indeed, "federal appellate courts have unanimously rejected" the assertion that an ERISA breach-of-fiduciary-duty plaintiff "need not prove an individualized injury insofar as he seeks monetary equitable remedies in a 'derivative' or 'representative' capacity on behalf of the Plan." *Perelman v. Perelman*, 793 F.3d 368, 375-76 (3d Cir. 2015); *accord David v. Alphin*, 704 F.3d 327, 334-36 (4th Cir. 2013); *McCullough v. AEGON USA, Inc.*, 585 F.3d 1082, 1086 (8th Cir. 2009); *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009); *Loren*, 505 F.3d at 608; *Harley v. Minn. Min. & Mfg. Co.*, 284 F.3d 901, 908 (8th Cir. 2002).

As a result, Stanley cannot challenge the TIAA Real Estate Account, a fund in which she did not invest.

C. Stanley lacks standing to challenge the TIAA Traditional Annuity's surrender charge because she has not been injured by any surrender charge.

Stanley likewise cannot assert a challenge to the TIAA Traditional Annuity because she has not alleged any respect in which judicial action could redress her individualized injury. Her challenge to the Traditional Annuity is that GW allegedly "failed to thoroughly evaluate the surrender charges imposed on Plan participants wishing to take a lump sum distribution or, worse, knowingly saddled participants with severe restrictions on their ability to withdraw from the TIAA Traditional Annuity, even at retirement, without the imposition of a penalty." Compl. ¶ 222.

The problem is that Stanley alleges no injury from the liquidity terms of her TIAA Traditional Annuity. As TIAA explains in quarterly disclosures sent to Plan participants:

> TIAA Traditional is designed primarily to help meet your long-term retirement income needs; it is not a short-term savings vehicle. Therefore, some contracts require that benefits are paid in installments over time and/or may impose surrender charges on certain withdrawals. TIAA has rewarded participants who save in contracts where benefits are paid in installments over time instead of in an immediate lump-sum by crediting higher interest rates, typically 0.50% to 0.75% higher. Higher rates will lead to higher account balances and more retirement income for you.[31]

In other words, a participant who maintains her annuity as an annuity *benefits* from the liquidity restrictions, because they facilitate higher yields. The injuries hypothesized by Stanley's complaint—a 2.5% surrender charge or the inability to convert the annuity into a lump-sum payment—could apply only to an individual who sought to convert her annuity into something else. Stanley makes no allegations that she wanted to exit her annuity, so just as with her challenge to the TIAA Real Estate Account, Stanley could not obtain redress even if her claim challenging the TIAA Traditional Annuity had merit.

[31] Quarterly Investment Update, The George Washington University Supplemental Retirement Plan 9 (Mar. 31, 2018), https://benefits.gwu.edu/sites/g/files/zaxdzs1316/f/TIAA_Plan_Performance_3.31.18.pdf.

II. Stanley Has Failed To State A Claim Related To Recordkeeping Fees.

Stanley's claims fare no better under Rule 12(b)(6). Stanley alleges in Count I and IV that the University breached its fiduciary duty by overpaying for recordkeeping services. This Count encompasses two related allegations: (1) that the Plans should not have permitted multiple recordkeepers to maintain separate records for their own accounts; and (2) that the overall costs of recordkeeping were excessive. But those allegations do not plausibly raise an inference of fiduciary misconduct. *Sweda v. Univ. of Pa.*, 2017 WL 4179752, at *7-8 (E.D. Pa. Sept. 21, 2017); *Divane*, 2018 WL 2388118, at *7-8. On the contrary, Stanley's allegations show that Defendants' practices were in line with common practices within the relevant industry—403(b) plans sponsored by institutions of higher education.

That reality is fatal to Stanley's claims, all of which pertain to ERISA's duty of prudence. "Prudence under ERISA is measured according to the objective prudent person standard developed in the common law of trusts." *Fink v. Nat'l Sav. & Tr. Co.*, 772 F.2d 951, 955 (D.C. Cir. 1985). The duty looks to what "a prudent man acting in a *like capacity* and familiar with such matters would [do] in the conduct of an *enterprise of a like character and with like aims*." 29 U.S.C. § 1104(a)(1)(B) (emphases added).

Ordinarily, therefore, a claim for breach of fiduciary duty must allege shortcomings in the fiduciary's *processes* that led the fiduciary to deviate from industry customs. A complaint that *lacks* "allegations relating directly to the methods employed by the ERISA fiduciary" may survive a motion to dismiss only "if the court, based on circumstantial factual allegations, may reasonably 'infer from what is alleged that the process was flawed.'" *PBGC ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Co.*, 712 F.3d 705, 718 (2d Cir. 2013) (quoting *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009)). "ERISA does not impose a 'duty to take any particular course of action if another approach seems preferable.'" *Har-*

ris v. Koenig, 815 F. Supp. 2d 26, 32 (D.D.C. 2011) (quoting *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006)). Rather, a fiduciary need only act reasonably "*under the circumstances then prevailing*." *Id.* at 31 (quoting 29 U.S.C. § 1104(a)(1)). "A court's task," then, is "to inquire 'whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment.'" *Fink*, 772 F.2d at 955 (quoting *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983)). As discussed below, Stanley has not made any such allegations.

A. Defendants' use of multiple recordkeepers fails to support an inference of a flawed decision-making process.

Rather than pleading a plausible case of flawed fiduciary process, Stanley alleges, categorically and conclusorily, that "[p]rudent fiduciaries of similarly sized defined contribution plans use a single recordkeeper rather than hiring multiple recordkeepers." Compl. ¶ 57. But such categorical allegations do not state a claim.

Stanley compares GW's Plans generically to "defined contribution plans"—a term that encompasses corporate 401(k) plans that look nothing like, and serve purposes different from, GW's plans. But Stanley's allegations must support a plausible inference that GW's fiduciary processes were out of step with those of "prudent [fiduciaries] acting in a like capacity . . . in the conduct of an enterprise of a like character and with like aims." 29 U.S.C § 1104(a)(1)(B)—*i.e.*, *with those of its peer institutions.* As demonstrated by the authorities invoked by Stanley in her complaint, GW's approach to recordkeeping was fully consistent with the norms of higher-education plans. Those authorities establish that multiple recordkeeping platforms are, in the university context, "[t]he most prevalent model by far."[32]

[32] Standard Retirement Servs., Inc., *Fixing Your 403(b) Plan: Adopting a Best Practices Approach*, at 2 (Nov. 2009), http://web.archive.org/web/20081221040932/http:/www.standard.com/pensions/publications/fixing_your_403b.pdf; *see* Compl. ¶ 60.

Stanley's effort to compare GW's 403(b) plans to corporate 401(k) plans—non-annuity plans that differ fundamentally from university 403(b) plans—cannot move the needle on Stanley's burden to allege that GW's conduct reflects an imprudent or unjustifiable deviation from the conduct of its peers. And Stanley's effort to draw inferences from other collegiate retirement plans only proves that there are pros and cons to different recordkeeping approaches. For example, she points out that Loyola Marymount University and Pepperdine University consolidated their plans' recordkeeping with Diversified Investment Advisors (now known as Transamerica). Compl. ¶¶ 164-73. But she also acknowledges that, in so doing, Loyola Marymount and Pepperdine lost the ability to offer annuities to plan participants. *Id.* ¶ 167.[33] Purdue acknowledged that "*[n]o higher education institution of Purdue's size and level of assets ha[d] implemented a single service provider/open architecture structure*,"[34] and likewise discontinued annuities when it implemented its recordkeeping change.[35] Only Caltech was able to keep its annuities while consolidating recordkeepers; but, in choosing TIAA, it had to give up its Fidelity mutual funds—preventing participants from electing the deeply respected investment options from one of the world's best-known and most popular mutual fund providers. Compl. ¶¶ 176-77.

Stanley's embrace of recordkeeper consolidation shows only that it is possible to take any side of a debate. In the real world, however, decisions require tradeoffs. If GW can be forced to engage in a lengthy, expensive, and needless defense of its approach to plan recordkeeping just

[33] Consistent with Stanley's allegations, the current disclosures for the Loyola Marymount and Pepperdine plans indicate that no annuities are available. Loyola Marymount University Fund Performance and Fees, https://fp.trsretire.com/PublicFP/fpClient.jsp?c=TT069304&a=00001&l=TDA&p=lmu; Pepperdine University Fund Performance and Fees, https://fp.trsretire.com/PublicFP/fpClient.jsp?c=TT069312&a=00001&l=TDA&p=pepperdine. As a striking demonstration of the effects of that transition, whereas TIAA's fixed annuity guarantees an annual return of 3%, Loyola Marymount now offers a guaranteed return fund generating 1.25% in annual returns.

[34] James S. Almond, Purdue Univ., *403(b) Plan Redesign–Making a Good Retirement Plan Better* at 9, http://www.cacubo.org/wp-content/uploads/2016/02/10_403b_Plan_Redesign_Making_a_Good_Retirement_Plan_Better.docx (quoted without attribution at Compl. ¶ 175).

[35] Purdue University Plan Details, https://nb.fidelity.com/public/nb/purdue/planoptions/plandetails?planId=84810.

because an alternative approach exists, then no retirement plan can protect itself from litigation. Far from demonstrating that GW was out of step with its peers, Stanley's examples show that GW was well within industry norms—and that the recordkeeping change that Stanley tries to isolate would actually have required cascading changes to other aspects of the Plans about which Stanley has nothing bad to say. So the thrust of Stanley's allegations is that GW could have constructed an entirely different retirement plan, with different investment options, using a single recordkeeper.

But the fact that GW could have made *many* different decisions hardly supports the inference that GW's recordkeeping decision violated federal law. As the *Sweda* court recognized in dismissing similar claims, "there are rational bundling reasons to allow separate recordkeepers." 2017 WL 4179752, at *8. In the recordkeeping market, as in other markets, certain investment firms bundle services together—for example, by pairing an investment offering with recordkeeping services. "[I]t is rational to comply with [a provider's] requirement that they serve as recordkeeper if that is required to gain access to the desired [provider's] portfolio." *Id.*

Stanley's abstract preference for a single-recordkeeper platform does not entitle her to bring a legally deficient complaint and subject the University to the costs of discovery.

B. Stanley's allegations that overall recordkeeping fees were too high are inadequate to state a claim.

Stanley's challenge to overall recordkeeping fees fails for similar reasons. Her assertion is that GW could have made different decisions that would have reduced recordkeeping expenses. *See, e.g.*, Compl. ¶¶ 4, 6, 51, 79. While perhaps true, such allegations do not plausibly show a fiduciary breach.

The gap in Stanley's attempted syllogism arises from the truism that valuable services cost money. GW could have abandoned annuities, which are more expensive to administer, but

in doing so would have caused participants to lose important and meaningful benefits from TIAA, a company with deep and enduring ties to faculty and staff alike at hundreds of colleges and universities across the country. Likewise, GW could have chosen vendors that offer subpar investments coupled with below-market recordkeeping fees intended to attract business. Or GW could have designed its Plans taking a "no-frills" approach whereby participants received only the minimum disclosures required by law instead of access to advisors who provide valuable one-on-one retirement planning services.

But Stanley does not allege that these cheaper Plans could have offered the same products and services that GW made available. Her allegations thus amount to nothing more than a claim that a different product could have been obtained for a different price. As many courts have emphasized, the responsibility of ERISA's fiduciaries is not to minimize a plan's costs; it is to balance fairly the costs of administration with the provision of reasonable services. *See, e.g.*, *Sweda*, 2017 WL 4179752, at *8 ("Even if there *were* cheaper options available for recordkeeping fees, ERISA mandates that fiduciaries consider options besides cost."). Thus, Stanley's cost allegations do not plausibly demonstrate that GW was imprudent in the administration of the Plans. Indeed, if identifying an opportunity to cut costs were enough to plead a breach of the duty of prudence, then any retirement plan in America could be subjected to such a needless lawsuit.

To be sure, the false equivalence between annuity-based plans and plans without annuities has prompted some courts to permit discovery. One of those cases, which has proceeded all the way to trial, provides a cautionary tale. After the parties had spent millions of dollars, the fundamental issue we now present became unavoidable, when the plaintiffs' recordkeeping expert was forced by the presiding judge to admit that his asserted cost savings were based on plans that offered no annuities:

> THE COURT: All right. So then let's go back to my history of time. In the history of time, are you aware of any instance where a single record keeper, other than the place where a fixed annuity started, offered and provided a per-participant fee for managing the entirety of the investment relationship that included another entity's fixed annuity? Are we aware of, in the history of time, has that ever happened?
>
> THE WITNESS: I'm not aware of that.
>
> THE COURT: So then this fee never happened. This fee, you developed a hypothetical fee that could happen, where there's no basis of that $31 ever happening in the history of time.

Sacerdote v. N.Y. Univ., No. 1:16-cv-6284 (S.D.N.Y. Apr. 19, 2018), Trial Tr. 906 (Ex. 3).

The *Sacerdote* court will therefore need to decide, after a two-week bench trial, whether university retirement plans with annuities are supposed to cost the same amount as corporate retirement plans without annuities. But it is not necessary to conduct a trial to answer that question. Nothing in the complaint plausibly alleges any disconnect between the services that the Plans provided and the fees paid for those services. In fact, the complaint does not allege anything about the services the Plans received. Having failed even to identify the services that were provided, Stanley plainly cannot "allege that the fees were excessive *relative 'to the services rendered*,'" (*Young v. Gen. Motors Inv. Mgmt. Corp.*, 325 F. App'x 31, 33 (2d Cir. 2009) (Sotomayor, J.) (quoting *Gartenberg v. Merrill Lynch Asset Mgmt.*, 694 F.2d 923, 928 (2d Cir. 1982)) (emphasis added), let alone that it was imprudent for defendants to agree to pay those fees for those services. Thus, Stanley's self-serving conclusion that recordkeeping fees were too high is not sufficient to state a claim for breach of fiduciary duty.[36]

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[36] On a related note, Stanley alleges that "prudent fiduciaries of defined contribution plans negotiate recordkeeping fees based on a fixed dollar amount per participant rather than as a percentage of plan assets." Compl. ¶ 49. The assumption underlying that allegation is that per-participant fees would be lower than percentage-of-asset fees. Whether or not that assumption has merit, Stanley has not alleged that per-participant recordkeeping fees were even *available* in the marketplace for 403(b) plans offering annuities.

III. Stanley Has Failed To State A Claim Relating To The Plans' Investment Options.

In Counts II and III, Stanley alleges that GW breached its fiduciary duties (1) by offering mutual funds that were too expensive; (2) by offering too many investment options; (3) by selecting vendors that bundle their investment selections with recordkeeping services; and (4) by offering the CREF Stock Account and the TIAA Real Estate Account, which she alleges to have underperformed; and the TIAA Traditional Annuity, which she alleges to have contained undesirable terms. None of those allegations states a plausible claim of fiduciary breach.

A. Stanley does not adequately allege that the University failed to monitor investment fees.

Stanley first seeks to impose liability on GW for allegedly failing to include the lowest-fee options within the mutual-fund menu. But ERISA requires only that the processes followed by Defendants in making decisions about what to offer satisfy standards of prudence. *Fink*, 772 F.2d at 955. To state a claim against Defendants, Stanley would need to allege that Defendants had inadequate processes in place to satisfy their fiduciary duties. Stanley is inexcusably silent with respect to those processes, and she nowhere alleges that those processes were inadequate.

Moreover, even if it were appropriate to focus only on outcomes, the mix of investments offered belies Stanley's allegations of imprudence. Fiduciaries satisfy their duties under ERISA by "offer[ing] participants meaningful choices about how to invest their retirement savings," a standard that accounts for "the range of investment options and the characteristics of those included options—including the risk profiles, investment strategies, and associated fees." *Renfro v. Unisys Corp.*, 671 F.3d 314, 327 (3d Cir. 2011). The standard is thus whether a fiduciary has given "'appropriate consideration' to whether an investment 'is reasonably designed, as part of the portfolio … to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment.'" *St. Vincent*, 712 F.3d

at 716 (quoting 29 C.F.R. § 2550.404a–1(b)(2)(i)).

Applying that standard, several courts in similar university retirement-plan class actions have rejected identical claims that university 403(b) plans should have offered exclusively institutional share classes of mutual funds. As the court in *Sacerdote v. New York University* explained in rejecting a similar claim, the question is not whether "the inclusion of any specific investment was imprudent," but whether "the mix of investments was unreasonable" (2017 WL 4736740, at *11 (S.D.N.Y. Oct. 19, 2017) (opinion denying motion for reconsideration)). Courts have repeatedly approved mixes of investments with expense ratios that include many retail share classes (*Sacerdote v. New York Univ.*, 2017 WL 3701482, at *11 (S.D.N.Y. Aug. 25, 2017) (citing Third, Seventh, and Ninth Circuit precedents)). There are good reasons why a plan's mix of investments would include retail share classes for mutual funds, not least because a plan can use the revenue sharing that such funds generate as the means for paying for plan administration and recordkeeping expenses—as Stanley acknowledges that the Plans did. Compl. ¶ 6. If the Plans did *not* rely on this kind of revenue sharing, their participants would have to pay for administration and recordkeeping services separately. In other words, as several courts have explained, "[s]witching from retail to institutional shares is not a matter of checking a different box. It requires fiduciaries to balance the menu of options given to plan beneficiaries against the fees." *Sweda*, 2017 WL 4179752, at *9; *see also Divane*, 2018 WL 2388118, at *8 ("[T]here is nothing wrong, for ERISA purposes, with the fact that the plan participants paid the recordkeeper expenses via the expense ratios they paid."). Indeed, the prospectus cited by Stanley for the proposition that it would be costless to switch from retail to institutional shares discloses that Vanguard is entitled to collect "additional recordkeeping fees for institutional clients whose ac-

counts are recordkept by Vanguard."[37] This is just another instance of Stanley accentuating one aspect of a multidimensional issue. Again, fiduciaries operate in a world that requires a prudent balancing of many factors, of which price is but one. Stanley cannot state a breach of federal law by myopically focusing on price alone.

Indeed, Stanley's attempt to focus on investment price alone has also been rejected by numerous courts outside the university 403(b) context. These courts have recognized that "where, as here, a plan offers a diversified array of investment options, the fact that some other funds might offer lower expense ratios is not relevant, as ERISA does not require fiduciaries to scour the market to find and offer the cheapest possible funds (which might, of course, be plagued by other problems)." *White v. Chevron Corp.*, 2016 WL 4502808, at *10 (N.D. Cal. Aug. 29, 2016) (citations and internal quotation marks omitted). Applying that standard, the Third Circuit affirmed the dismissal of a claim challenging the inclusion of retail mutual funds because the expense ratios ranged from 0.10% to 1.21%. *Renfro*, 671 F.3d at 319, 327–28. The Seventh Circuit affirmed the dismissal of a similar claim, where the fees ranged from 0.07% to "just over 1%." *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009); *accord Loomis*, 658 F.3d at 671; *cf. Braden*, 588 F.3d at 596 (acknowledging that a fiduciary might "have chosen funds with higher fees for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility").

Here, the Plans offered investment options with fees as low as 0.035%—and more than 40 options at 0.40% or less. *See* Ex. 2 (2017 fee disclosure to participants). This is well within the reasonable range for investment options. *See Divane*, 2018 WL 2388118, at *8 (dismissing claim that expense ratios were too high because plans included several funds with expenses be-

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[37] Vanguard, *Vanguard Institutional Target Retirement Funds Prospectus* 105 (2018), https://www.vanguard.com/pub/Pdf/i1673.pdf; *see* Compl. ¶ 106 (invoking the prospectuses for "Vanguard Target Retirement Funds" as the basis for Plaintiffs' claim).

tween 0.05% and 0.10%, which "are, as a matter of law, low"); *Rosen v. Prudential Ret. Ins. & Annuity Co.*, 2016 WL 7494320, at *15 (D. Conn. Dec. 30, 2016) (granting motion to dismiss excessive fees claim because, "[t]aken as a whole, the total menu of investment options resulted in expense ratios ranging from 0.04% to 1.02%."). Stanley thus has failed to state a claim related to the investment fees charged by the Plans' mutual funds.

B. Courts have repeatedly dismissed allegations, such as Stanley's here, that plans offered too many options.

Like plaintiffs in the other 403(b) cases, Stanley suggests that the GW Plans offered participants too many investment options. She argues that the choices offered "confus[ed] Plan participants" and that, if the Plans had offered participants fewer choices of funds, they could have "qualif[ied] for lower-cost share classes of certain investments." Compl. ¶ 218.

But courts in the other ERISA class actions against universities have held time and again that claims based on the number of investment options offered by the universities' 403(b) plans are not viable. *See, e.g.*, *Cunningham v. Cornell Univ.*, 2017 WL 4358769, at *6 (S.D.N.Y. Sept. 29, 2017); *Kelly v. Johns Hopkins Univ.*, 2017 WL 4310229, at *1 (D. Md. Sept. 28, 2017); *Tracey v. Mass. Inst. of Tech.*, 2017 WL 4453541, at *10 (D. Mass. Aug. 31, 2017), *adopted in relevant part*, 2017 WL 4478239 (D. Mass. Oct. 4, 2017); *Sacerdote*, 2017 WL 3701482, at *11; *Sweda*, 2017 WL 4179752, at *9.

In so doing, those courts have recognized that suggesting that Plan participants would have benefited from *less* choice is anathema to the free choice that is the hallmark of ERISA individual account plans. "Because participant choice is the centerpiece of what ERISA envisions for defined-contribution plans, these sorts of paternalistic arguments have had little traction in the courts." *Tibble v. Edison Int'l*, 729 F.3d 1110, 1134–35 (9th Cir. 2013), *vacated and remanded on other grounds*, 135 S. Ct. 1823 (2015). Indeed, courts have *encouraged* rather than *penal-*

ized increased choice. Choice is important because different investment vehicles have different features and characteristics that will make them attractive to different investors. *See id.* at 1135; *Loomis*, 658 F.3d at 671–72; *Hecker*, 556 F.3d at 586. The same analysis applies here: the number of investment options offered by the Plans does not in any way suggest that Defendants' investment-management process was inadequate.

C. Stanley's bundling claim ignores established law.

Stanley also fails to state a claim based on GW's agreement to so-called "bundled" arrangements for recordkeeping and investment services with the Plans' recordkeepers. She alleges that these bundled arrangements were "inefficient, overpriced, and imprudent" because GW could not remove certain investments from the Plans and could not switch recordkeepers if it wished to do so. Compl. ¶ 89.

Contrary to Stanley's assertions, however, there is nothing imprudent about a plan's contracting with a vendor that bundles investment options together with recordkeeping services for those investments. Bundled arrangements are "common and acceptable investment industry practices that frequently inure to the benefit of ERISA plans." *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014) (internal quotation marks omitted). The question is simply whether the overall decision to enter into the agreement is prudent—and Stanley has not alleged any facts suggesting that the bundled arrangement here was imprudent. While Stanley alleges that the bundled agreement required the Plan to offer the CREF Stock Account as an investment (Compl. ¶ 124), that does not suggest that the agreement was imprudent, for two reasons. First, as we explain *infra*, Stanley does not plausibly allege that the CREF Stock Account was an imprudent investment. And second, the question is not merely whether the CREF Stock Account was imprudent on its own but whether the overall bundle of investments and recordkeeping services was imprudent. Given that the Plans were required to offer CREF Stock in order to offer the TIAA Traditional

Annuity—"an attractive offering, particularly given that 403(b) plans were originally required to offer only annuities"—GW had "valid reasons to use TIAA-CREF as record keeper for its products and to keep the CREF Stock Account as an option for plan participants." *Divane*, 2018 WL 2388118, at *6 (dismissing identical claim).

At bottom, Stanley simply takes issue with certain recordkeepers' decision to offer their investment products and recordkeeping services as a package deal. That is insufficient to support a breach of fiduciary duty claim: Stanley cannot show that it was imprudent for the University to do business with recordkeepers on those terms, as countless other non-profit universities offering 403(b) plans did. *See Sacerdote*, 2017 WL 3701482, at *8 (dismissing bundling claim because "a contract that restricts NYU's ability to seek less expensive service providers, standing alone, does not breach th[e] duty" of prudence"); *Cunningham v. Cornell Univ.*, 2017 WL 4358769, at *5 (S.D.N.Y. Sept. 29, 2017) (dismissing bundling claim because "[e]ven if the agreement with TIAA-CREF limited defendants' ability to remove particular investment options, there is no allegation that defendants were unable to terminate the entire agreement with TIAA-CREF if they believed that to be a prudent action").

D. Stanley's protests concerning investment selection do not state a plausible claim.

Among all the investment options in the Plans, Stanley alleges that two should have been removed from the Plans for underperformance—the CREF Stock Account and the TIAA Real Estate Account (Compl. ¶¶ 123-52)—and that a third, the TIAA Traditional Annuity, should not have been offered because it imposes a 2.5% surrender charge on lump-sum distributions of participants' investments (*id.* ¶¶ 153-62). In addition to lacking standing on most of these claims, Stanley has no legally viable claim.

"[T]he test of ERISA prudence focuses on the defendant's conduct in investigating, eval-

uating and making the challenged investment." *Chao v. Tr. Fund Advisors*, 2004 WL 444029, at *2 (D.D.C. Jan. 20, 2004) (quotation marks and brackets omitted). The test is "not a test of the result of performance of the investment." *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 7 (1st Cir. 2009). "Whether a fiduciary's actions are prudent cannot be measured in hindsight." *Id.*; *accord Fifth Third Bancorp. v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014) ("the content of the duty of prudence turns on 'the circumstances . . . prevailing' at the time the fiduciary acts") (quoting 29 U.S.C. § 1104(a)(1)(B)) (omission in original).

That standard makes good sense. With the benefit of hindsight, it will always be possible to observe that certain investment decisions were rewarded while others were not. Indeed, it will always be possible to identify investment funds that have underperformed their peer-group median—as half of all funds will do in any given period.

As the First Circuit recently held, an ERISA plaintiff does not state a claim that survives a motion to dismiss when an investment fund meaningfully pursues the "investment objective that had been disclosed to the plan participants," even if other investment funds ended up achieving better performance. *Barchock v. CVS Health Corp.*, 886 F.3d 43, 49 (1st Cir. 2018). That standard reflects two complementary principles. In addition to the prohibition on reviewing decisions with the benefit of hindsight, Judge Barron's opinion in *Barchock* reflects the Supreme Court's acknowledgment that the nation's securities markets are presumed to be efficient. *See Dudenhoeffer*, 134 S. Ct. at 2471-72; *accord Coburn v. Evercore Tr. Co., N.A.*, 844 F.3d 965, 969 (D.C. Cir. 2016). Thus, differences in performance between two broadly available investment vehicles is the result of differences in the *risk* profiles of the funds—and is not plausible evidence that one fund was imprudent.

Under this standard, claims against funds that have *lost* much of their principal are rou-

tinely dismissed. *E.g.*, *St. Vincent*, 712 F.3d at 721; *Jenkins v. Yager*, 444 F.3d 916, 926 (7th Cir. 2006); *DeBruyne v. Equitable Life Assur. Soc'y of U.S.*, 920 F.2d 457, 465 (7th Cir. 1990) ("We cannot say that Equitable was imprudent merely because the Balanced Fund lost money."). Stanley's challenges to the CREF Stock Account and the TIAA Real Estate Account—both of which have appreciated considerably—likewise fail to state a claim.

a. The CREF Stock Account. Stanley contends that the CREF Stock Account should have been removed as a Plan investment option because it has "for years underperformed and continues to underperform its benchmark and the lower-cost actively and passively managed investments that have been available to the Plans." Compl. ¶ 123. But this claim fails for numerous reasons.

The core of Stanley's claim is that the CREF Stock Account underperformed the Russell 3000, an index that broadly tracks the performance of the U.S. stock market. But Stanley is attempting a classic apples-to-oranges comparison—she fails meaningfully to demonstrate why the CREF Stock Account should have *outperformed* the Russell 3000 index. As explained above, the CREF Stock Account's judicially noticeable prospectus discloses that it "seeks to maintain the weightings of its holdings as approximately 65–75% domestic equities and 25–35% foreign equities."[38] Thus, the CREF Stock Account is globally diversified. Stanley's comparison to the U.S.-based Russell 3000 index plausibly demonstrates only that, during the periods covered by their data, U.S. stocks outperformed their foreign counterparts. But that hardly states a federal claim that Plan participants should have been forbidden from diversifying their retirement accounts with international assets.

Stanley claims that the performance of the CREF Stock Account is appropriately measured against the Russell 3000 because "[i]n participant communications, Defendants and TIAA-

[38] TIAA, *College Retirement Equities Fund Prospectus*, *supra* n.18, at 28.

CREF identified the Russell 3000 index as *the appropriate benchmark* to evaluate the fund's investment results." Compl. ¶ 128 (emphasis added). But that assertion miscomprehends the governing law.

The U.S. Department of Labor has interpreted ERISA's fiduciary duties to encompass an obligation to provide plan participants with "sufficient information regarding the plan, including fees and expenses, and regarding designated investment alternatives, including fees and expenses attendant thereto, to make informed decisions with regard to the management of their individual accounts." 29 C.F.R. § 2550.404a-5(a). In particular, fiduciaries must make annual disclosures that identify the expenses associated with each investment option, the historical returns of the investment option, and

> the name and returns of an appropriate broad-based securities market index over the 1-, 5-, and 10-calendar year periods (or for the life of the alternative, if shorter) . . . and which is not administered by an affiliate of the investment issuer, its investment adviser, or a principal underwriter, unless the index is widely recognized and used.

Id. § 2550.404a-5(d)(1)(iii). In promulgating the requirement to specify a "broad-based securities market index" on the annual disclosures, the Department of Labor *rejected* a proposal to permit the disclosures to use "composite or customized benchmarks," favoring the use of benchmarks that are "recognizable and understandable to the average plan participant" to those that would more accurately reflect the fund's expected performance. 75 Fed. Reg. at 64,916-17. The Department of Labor does not require fiduciaries to disclose each fund's *target* (which is amply described in each fund's prospectus); it requires only the disclosure of a familiar *reference point* to contextualize each fund's performance.

It is trivial to point out the folly of comparing a global fund to a domestic index. Here, suffice it to say that because the Russell 3000 does not meaningfully reflect the investment strat-

egy of a global fund, a comparison between the CREF Stock Account and the Russell 3000 creates no inference that the CREF Stock Account should have been removed from the Plans. *Accord, e.g.*, *Ellis v. Fid. Mgmt. Tr. Co.*, 883 F.3d 1, 4 (1st Cir. 2018) (affirming grant of summary judgment to defendants on fiduciary duty claims involving investment that "fully achieved its objective").

Moreover, and as alleged by Stanley herself (Compl. ¶ 124), the CREF Stock Account could have been removed from the Plans only if *all* TIAA annuities were discontinued. It thus is not enough for Stanley to allege that the CREF Stock Account, in isolation, should not have been included in the Plans; she must allege that it was imprudent to offer TIAA's suite of investments altogether. She has not done so and, as explained above, even her more modest allegation that GW should not have "acquiesced" in TIAA's bundling of products fails.

In any event, the behavior of the market itself confirms that including the CREF Stock Account in the Plans was prudent. More than $100 *billion* is invested in the CREF Stock Account. If, as the Supreme Court held in *Dudenhoeffer*, it is permissible for fiduciaries to rely on the market's assessment of an investment, it was unquestionably prudent for GW to include the Stock Account, an enormously popular investment, in the Plans.[39] *See* Br. of TIAA as *Amicus Curiae* in Support of Appellee at 6, *Sweda v. Univ. of Pa.*, No. 17-3244 (3d Cir. Apr. 12, 2018) (noting that the Stock Account has $122 billion in assets and that "[o]f TIAA's 200 largest clients with at least one 403(b) plan, 198 held assets in CREF Stock as of 2016").

b. ***The TIAA Real Estate Account.*** Stanley lacks standing to bring any claim regarding the TIAA Real Estate Account, given that she did not invest in it—but even if she did, her

[39] Plaintiffs' presumption that Plan fiduciaries had the *authority* to remove Plan investments from the Stock Account is also unfounded. The contracts governing the rights of the named Plaintiffs who invested in the Stock Account prove otherwise—under a number of CREF contracts, an employer plan "may not limit participation in the CREF Stock Account and the CREF Money Market Account." Ex. 4 (CREF Rules of the Fund), at B091 (emphasis added); 26 C.F.R. § 1.408-3; *see* Compl. ¶ 92.

claims regarding the TIAA Real Estate Account would fail for similar reasons as their claim regarding the Stock Account: the difference in performance between the TIAA Real Estate Account and the Vanguard REIT Index mutual fund that Stanley relies on is explained by differences in the fund objectives and, therefore, differences in their risk profiles.

The TIAA Real Estate Account, like the CREF Stock Account, is a variable annuity. The TIAA Real Estate Account "seeks favorable long-term returns primarily through rental income and appreciation of real estate and real estate-related investments."[40] As the complaint itself emphasizes, the TIAA Real Estate Account "invests directly in real property assets that are highly illiquid" (Compl. ¶ 146), which means that its performance depends largely on the returns generated by particular parcels of real property.[41]

The Vanguard REIT Index fund that Stanley prefers is an entirely different investment. It is a mutual fund, rather than a variable annuity, which makes comparisons between it and the TIAA Real Estate Account specious from the start. Moreover, the Vanguard fund invests in an index of stocks in U.S. real estate investment trusts—*i.e.*, companies that own and manage real estate—rather than direct ownership of real property. As a result, the Vanguard fund's returns reflect the performance of real estate companies (and general stock-market trends) and "may not correspond to returns from direct property ownership."[42]

Indeed, as one might expect, the historical performance of these two investment vehicles

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[40] TIAA, *TIAA Real Estate Account Prospectus*, *supra* n.22, at 3.

[41] Stanley complains that the Real Estate Account's direct investment in real property requires it to retain an independent fiduciary to review the transactions and that this is "an expense that should be borne entirely by TIAA as a cost of engaging in the business—not a legitimate expense of the operation of the fund." Compl. ¶ 142. But these complaints do not state a claim, because as explained *supra*, at 1, 20, ERISA looks to the prudence of defendants' decisions in the context of the market that exists—and in that market, TIAA passes its operating costs—including the costs of retaining independent fiduciaries to comply with ERISA—on to investors. Stanley's laments that TIAA does not choose to bear these costs itself have no bearing on whether defendants complied with ERISA.

[42] Vanguard, *Vanguard REIT Index Fund Prospectus* 9 (May 25, 2018), https://www.vanguard.com/pub/Pdf/i3123.pdf.

shows that they reflect different strategies with different investment objectives and different risk profiles, making comparisons between them meaningless. *See, e.g.*, *Meiners v. Wells Fargo & Co.*, 2017 WL 2303968, at *2 (D. Minn. May 25, 2017) ("[A] comparison of the returns for two different funds is insufficient because 'funds ... designed for different purposes ... choose their investments differently, so there is no reason to expect them to make similar returns over any given span of time.'") (quoting *Tussey v. ABB, Inc.*, 850 F.3d 951, 960 (8th Cir. 2017)).

It so happens that, during the class period chosen by Stanley (from April 13, 2012, until April 13, 2018), the TIAA Real Estate Account (shown below by the more stable line, in blue) *outperformed* the Vanguard REIT Index (the more volatile line, in green):[43]

That performance disparity would deprive Stanley of standing to challenge the TIAA Real Estate Account for a third reason (after her General Release and her failure to invest in the TIAA Real Estate Account), because she could not have been injured by the Plans' failure to re-

[43] *Compare* Morningstar, TIAA Real Estate Account (QREARX), http://www.morningstar.com/funds/XNAS/QREARX/quote.html ("Growth of 10K" chart for period beginning 4/13/2012 and ending 4/13/2018); *with* Morningstar, Vanguard Real Estate Index Institutional (VGSNX), http://www.morningstar.com/funds/xnas/vgsnx/quote.html (chart for Vanguard fund over same time period). The Court can rely on these figures because Plaintiffs incorporated documents memorializing the respective performance of the two funds in their complaint. *See* Compl. ¶¶ 143-44. Alternatively, the Court may take judicial notice of the publicized prices of these securities. *See, e.g.*, *Ross v. Walton*, 668 F. Supp. 2d 32, 41 n.7 (D.D.C. 2009) ("Generally, courts may take judicial notice of publicized stock prices without converting a motion to dismiss into summary judgment.").

place the TIAA Real Estate Account with a fund that performed worse. Moreover, it demonstrates quite conclusively the folly of making an apples-to-oranges comparison to suggest that an investment option was ill-considered.

In sum, Stanley's allegations do no more than establish that there are mutual funds with strategies that differ from the $22.4 billion TIAA Real Estate Account. They establish no plausible basis for believing that the TIAA Real Estate Account is inferior, or that Defendants lacked appropriate processes for reviewing the TIAA Real Estate Account (a topic about which the complaint says nothing at all).[44]

c. The TIAA Traditional Annuity. Stanley's challenge to the TIAA Traditional Annuity does not pertain to its performance, but to the limitations on converting the TIAA Traditional Annuity into a lump-sum distribution. Stanley focuses almost exclusively on the 2.5% surrender charge that TIAA assesses on lump-sum distributions of participants' investments in certain annuity contracts. Compl. ¶ 162. According to Stanley, this charge "bears no relationship to any reasonable risk or expense to which the fund was subject" and was unlawful under Department of Labor regulations. She is incorrect.

This claim fails for a series of reasons. For starters, it is time-barred. A claim for breach of fiduciary duty under ERISA must be filed no later than (1) three years after a plaintiff acquires actual knowledge of her claim; or (2) six years after the breach, whichever is earlier. 29 U.S.C. § 1113. The annuity contracts upon which Stanley's claim is based were issued on January 1,

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[44] Stanley alleges, in passing, that the TIAA Real Estate Account charges a "liquidity guarantee" fee and "distribution fees" that the Vanguard REIT Index Fund does not. Compl. ¶¶ 147, 149. But this allegation is meaningless. As several courts have observed, plaintiffs cannot state a claim by challenging the components of fees associated with investments but must instead plausibly allege that "the overall fee was unreasonable." *See, e.g.*, *Cunningham*, 2017 WL 4358769, at *6; *Sacerdote*, 2017 WL 3701482, at *11. Stanley has not plausibly made that allegation.

1989, and February 1, 1997.[45] If Stanley found the terms of those contracts to be objectionable, she would have needed to press those claims more than a decade ago.

Second, Stanley's contracts are not the types of contracts that impose surrender charges. Her Group Supplemental Retirement Annuity contract authorizes lump-sum distributions at any time prior to the first annuity payment and provides that the surrender charge to be assessed against lump-sum distributions is 0%.[46] Her Retirement Annuity contract "does not provide for cash surrender or loans."[47] So the premise of her claim is wrong.

Third, even if Stanley's contract was one of the contracts that offered a 2.5% surrender charge, neither that surrender charge (nor any other limitation on liquidity) implicates the Department of Labor regulation upon which Stanley's claim is based. Under 29 C.F.R. § 2550.408b-2, when an ERISA plan enters into a contract with a party-in-interest "for office space or any service" that is "necessary for the establishment or operation of the plan," the contract will not be deemed "reasonable" unless it "permit[s] termination by the plan without penalty to the plan on reasonably short notice under the circumstances to prevent the plan from becoming locked into an arrangement that has become disadvantageous." 29 C.F.R. § 2550.408b-2(c)(3).

That regulation has no application here. The regulation governs the terms on which contracts between *plans* and service providers must be terminable in order to satisfy ERISA's prohibited transaction rules. But Stanley does not allege that the *plan* must pay any penalties for ceasing to offer the TIAA Traditional Annuity; her theory is that the regulation somehow also applies to decisions by individual plan participants. But that argument borders on the frivolous, given the plain language of the regulation.

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[45] *See* Ex. 5 (Stanley Retirement Annuity Certificate) at 3; Ex. 6 (Stanley Group Supplemental Retirement Annuity Certificate) at B005. The Court may consider these documents, as they are relied on in the complaint. *See Hinton*, 624 F. Supp. 2d at 46.

[46] Ex. 6, at B049.

[47] Ex. 5, ¶ 28.

In any event, Stanley's claim that limitations on liquidity are "*per se* unreasonable" (Compl. ¶ 157) is clearly wrong. When an individual invests money in a fixed annuity, the firm providing the annuity expects to have the use of the money invested for a specified period of time (determined according to actuarial assumptions). If an investor requests to convert the annuity contract into a lump sum distribution upon retirement, rather than electing to receive it in the periodic installments that the annuity contemplates, the insurance company loses liquidity, along with the time value of the money that the individual had paid as a premium. Under those circumstances, it is neither surprising nor inequitable that an insurer, to the extent it is willing to alter the original arrangement, imposes a fee as compensation for its losses—as evidenced by the fact that insurers, which are heavily regulated, are permitted to offer annuities on such terms.

This is yet another example of a tradeoff. An insurer that has greater predictability about how long it can invest its assets will be able to generate greater yields than an insurer that must return investments at yields. Participants are counseled that the "TIAA Traditional [Annuity] is designed primarily to help meet your long-term retirement income needs; it is not a short-term savings vehicle" and that liquidity terms affect an annuity's yield—to the tune of 0.50% to 0.75% every single year.[48] Stanley does not allege that GW's decision to offer multiple annuities—including some that yielded "enhanced returns" for investors in exchange for reduced liquidity—was imprudent, or that alternative annuity investments were available to the Plans that would have offered similar financial performance without limitations on liquidity. Stanley's attack on GW for offering participants a fixed annuity, long the underpinning of university 403(b) plans, does not allege a plausible claim.

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[48] Quarterly Investment Update, *supra* n.31.

IV. The GW Board of Trustees Should Be Dismissed.

The GW Board of Trustees must be dismissed for a distinct reason—it cannot be liable for breach of fiduciary duty because Stanley has not plausibly alleged that it is a fiduciary to the Plans.

"In every case charging breach of ERISA fiduciary duty, . . . the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). Under ERISA, an individual or entity is a fiduciary "when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration." *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996).

To survive a motion to dismiss, "conclusory allegations that a person was acting as a fiduciary are not sufficient." *Strumsky v. Washington Post Co.*, 922 F. Supp. 2d 96, 104 (D.D.C. 2013). Rather, the complaint must plausibly allege that the defendant exercised "authority or control over the management or administration of the Plan or its assets." *Anthony v. Int'l Ass'n of Machinists & Aerospace Workers Dist. Lodge 1*, 296 F. Supp. 3d 92, 96 (D.D.C. 2017).

Here, the operative plan documents identify the Plan Administration Committee as the "named fiduciary responsible for administration of the Plan[s]" and indicate that the committee is "established and maintained by the University." Base Plan Document § 1.32 (Ex. 7); Supplemental Plan Document § 1.26 (Ex. 8). The Board of Trustees is mentioned nowhere in the written plans.

In the complaint, Stanley alleges that GW and its Board of Trustees delegated to the Plan Administration Committee and others "the authority to oversee the investment options

provided under the Plans or otherwise administer the Plans, or to delegate these functions." Compl. ¶ 31. As a result of that supposed delegation, Stanley supposes that GW, the Board of Trustees, and the Plan Administration Committee were collectively "responsible for selecting and overseeing the investment options provided under the Plans and otherwise administering the Plans." *Id.* ¶ 34.

Those allegations are an insufficient basis for keeping the Board of Trustees in the case. This Court need not accept Stanley's allegation that GW and the Board of Trustees jointly delegated authority to the Plan Administration Committee, given that the Plan document establishes that the University alone establishes and maintains the Committee. Base Plan Document § 1.32; *cf. Winfield*, 842 F. Supp. 2d at 568 n.3 (permitting consideration of plan's terms at motion-to-dismiss stage). And even if the Court were required to accept that false allegation, it would establish only that the Board of Trustees played a role in delegating responsibilities to the Plan Administration Committee. But if the Board of Trustees exercised discretionary authority to appoint the Plan Administration Committee as a fiduciary, that would mean that it was a fiduciary *only to the extent of that appointment* and could be liable for breach of fiduciary duty only if it had failed prudently to appoint the Committee. The Department of Labor has explained as much in its interpretation of ERISA:

> Q: In the case of a plan established and maintained by an employer, are members of the board of directors of the employer fiduciaries with respect to the plan?
>
> A: Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries only to the extent that they have responsibility for the functions described in section 3(21)(A) of the Act. For example, the board of directors 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. *However, their responsibility, and, consequently, their liability, is lim-*

> *ited to the selection and retention of fiduciaries* (apart from co-fiduciary liability arising under circumstances described in section 405(a) of the Act).

29 C.F.R. § 2509.75-8, at D–4 (emphasis added); *accord* 29 U.S.C. § 1002(21)(A) ("[A] person is a fiduciary with respect to a plan *to the extent . . . he exercises* any discretionary authority or discretionary control respecting management of such plan") (emphasis added); *see also Pipefitters Local 636 Ins. Fund v. Blue Cross & Blue Shield of Mich.*, 722 F.3d 861, 866 (6th Cir. 2013) ("Though ERISA fiduciary status is broadly triggered with any control over plan assets, the inquiry in each case is granular, asking whether an entity is a fiduciary with respect to the particular activity in question.") (brackets and internal quotation marks omitted); *Plumb v. Fluid Pump Serv., Inc.*, 124 F.3d 849, 854 (7th Cir. 1997) ("In assessing whether a person can be held liable for breach of fiduciary duty, a court must ask whether that person is a fiduciary with respect to the particular activity at issue.") (brackets and internal quotation marks omitted); *Marshall*, 2017 WL 2930839, at *12 (dismissing claims against fiduciary responsible only for appointing committee members, where the complaint did not allege breaches relating to appointment process). The complaint contains no allegations that the Board of Trustees was deficient, in any respect, in appointing or monitoring the Committee; accordingly, even in the fictitious world in which it played a role in the appointment, it would not be an appropriate defendant in this action.

CONCLUSION

For the foregoing reasons, the complaint should be dismissed.

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Respectfully submitted,

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