IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JERRY PINNELL, et al., **Plaintiffs,** **v.** **TEVA PHARMACEUTICALS USA, INC., et al.,** **Defendants.**	**Civil Action No. 2:19-cv-05738-MAK** **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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I. INTRODUCTION

Plaintiffs, three former employees of Teva Pharmaceuticals USA, Inc. ("Teva"), claim that Defendants breached their fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA") by "imprudently" managing the Teva Pharmaceuticals Retirement Savings Plan (the "Plan"). In their Amended Complaint (the "Complaint"), Plaintiffs assert claims against Teva, Teva's Board of Directors, and the Teva Pharmaceuticals USA, Inc. Investment Committee (the "Committee"). Plaintiffs do not challenge the *performance* of any Plan investment. Rather, their claims focus solely on the *fees* paid by the Plan's participants, alleging Defendants violated ERISA's duties of prudence and loyalty by failing to select the least expensive investment options and permitting participants to pay excessive recordkeeping fees.

The Court should dismiss the Complaint because Plaintiffs' theory of liability is antithetical to the discretion afforded to ERISA plan fiduciaries in designing a 401(k) plan investment menu and contrary to Third Circuit precedent. *See Renfro v. Unisys Corp.*, 671 F.3d 314, 322-28 (3d Cir. 2011) (where participants can choose from a diverse mix of investments charging a reasonable range of fees, the fact that fiduciaries did not select the cheapest investment does not plausibly suggest a breach of fiduciary duties). According to Plaintiffs, the only "prudent" way to structure a 401(k) plan lineup is to (1) impose rigid rules restricting a plan fiduciary's ability to offer participants meaningful choices; (2) require fiduciaries to prioritize cost reduction over all other considerations; and (3) effectively mandate, in every instance, the same narrow investment menu. The Court should reject this improper contention.

ERISA establishes the outer bounds of prudent conduct, as judged by the reasonableness of a fiduciary's decision-making process under "the circumstances then prevailing." 29 U.S.C. § 1104(a)(1)(B). Within those bounds, ERISA affords fiduciaries substantial discretion to structure a plan that best suits its participants and the intent of the plan sponsor. *See Sweda v.*

Univ. of Pa., 923 F.3d 320, 333 (3d Cir. 2019) ("ERISA fiduciaries . . . are afforded discretion because '[t]here are no universally accepted and enduring theories of financial markets or prescriptions for investment that can provide clear and specific guidance,' therefore '[v]aried approaches to the prudent investment' of assets are permissible." (citation omitted)), *petition for cert. filed*, Dec. 16, 2019 (No. 19-784). Accordingly, Plaintiffs cannot state a claim merely by showing that Defendants did not select the least-expensive investment options in every instance. Rather, they must plausibly allege facts permitting the Court to infer that Defendants' fiduciary *process* was fatally flawed. The Complaint contains no such allegations.

Giving effect to the above principles and recognizing that a 401(k) plan "is designed to offer participants meaningful choices," in *Renfro* the Third Circuit held that the plausibility of claims challenging the reasonableness of a 401(k) plan's fees must be evaluated in light of "the range of investment options" offered to participants. 671 F.3d at 327. Applying that analytical framework, the Third Circuit rejected claims (virtually identical to those here) alleging that plan fiduciaries breached their ERISA duties by allowing participants to pay excessive investment and recordkeeping fees. Because the *Renfro* plan allowed participants to choose from a diverse mix of investments charging a reasonable range of fees, the fact that cheaper investments were available did not plausibly suggest that defendants breached their fiduciary duties. *Id.* at 327-28.

The same reasoning applies in this case. During the proposed class period, the Plan offered a diverse array of approximately 27 investments that charged *even lower* fees—between 0.04% and 1.10%—than the plan in *Renfro*. These facts alone doom Plaintiffs' claims.

Plaintiffs' scattershot critiques of the Plan fail to suggest even one plausible legal claim. Plaintiffs advance four primary theories to support their excessive-investment-management-fee claim, all of which are simply different iterations of the contention that the Plan could have offered less-expensive investments. **First,** Plaintiffs allege that no later than 2013 (the beginning

of the proposed class period), Defendants could have switched from mutual funds to "less expensive" collective investment trusts ("CITs") or separately managed accounts ("SMAs").[1] **Second,** Plaintiffs challenge the decision to include both actively and passively-managed funds, alleging that actively-managed funds are more expensive and "rarely" outperform passively-managed ones.[2] Both claims fail for largely the same reasons—ERISA does not mandate the use of any particular investment, and does not impose any duty to utilize the least expensive investment. **Third,** Plaintiffs complain that the Plan utilized "retail" share class funds, rather than lower cost "institutional" share classes of the same funds.[3] However, *Renfro* rejected a similar challenge to the use of retail share classes, 671 F.3d at 319, and, as one court explained, "merely alleging that a plan offered retail rather than institutional share classes is insufficient to carry a claim for fiduciary breach." *White v. Chevron Corp.*, No. 16-CV-0793-PJH, 2017 WL 2352137, at *14 (N.D. Cal. May 31, 2017) ("*White II*"), *aff'd*, 752 F. App'x 453 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2646 (2019). In any event, for virtually the entire class period, most of

[1] "A mutual fund is a pool of assets, consisting primarily of [a] portfolio [of] securities, and belonging to the individual investors holding shares in the fund." *Renfro*, 671 F.3d at 318 (citations omitted). A CIT "is a pooled investment product maintained by a bank or trust company and used exclusively for qualified retirement plans." *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 692 n.6 (W.D. Mo. 2019). SMAs offer a portfolio of assets owned by the individual investor and managed by a professional investment firm. *See* https://www.smartasset.com/investing/separately-managed-account (Ex. R).

[2] An actively-managed fund's "investment advisers try to find and buy underpriced securities while selling ones that the advisers think are overvalued," seeking to outperform a particular benchmark. *Loomis v. Exelon Corp.*, 658 F.3d 670 (7th Cir. 2011). The time and resources associated with this work necessarily render actively-managed funds more expensive than passively-managed funds, which "do not make any independent investment choices but simply track a designated portfolio such as the Standard & Poor's 500 Index." *Id.* at 669-70.

[3] Mutual funds may offer different share "classes," including "retail" share classes, where investors pay the same expenses as the public, and "institutional" share classes, which are typically for larger, institutional investors and charge lower expenses. *Loomis,* 658 F.3d at 670. Retail share classes typically pay more in revenue sharing. *See White II*, 2017 WL 2352137, at *14 (noting fiduciary used retail share class funds to "pa[y] the Plan's recordkeeping expenses").

the Plan's investments *were* in the lowest-cost available share class (based on asset minimums and other requirements). **Fourth** and finally, Plaintiffs attempt to bolster their claims by identifying "prudent" alternative funds that were "similar to" but cost less than the Plan's funds. However, their comparisons are rife with mistakes and involve apples-to-oranges comparisons that say nothing about the prudence of Defendants' fiduciary process, rendering the comparisons meaningless. *See Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018) ("*Meiners II*") ("To show that a 'prudent fiduciary in like circumstances' would have selected a different fund based on the cost or performance of the selected fund, a plaintiff must provide a sound basis for comparison—a meaningful benchmark.").

Plaintiffs' allegation that the Plan's participants paid unreasonable recordkeeping fees is even more flawed. Plaintiffs speculate that a reasonable recordkeeping fee is approximately $50 per participant. They offer no factual support for this figure, but in any event, between July 2014 and 2019 the Plan's recordkeeping agreement *capped* fees at $50 per participant (and $62 for the first six months of the proposed class period). In other words, the Plan participants paid the "reasonable" recordkeeping fee that Plaintiffs posit.

For these reasons and as explained below, the Court should dismiss the Complaint.

II. BACKGROUND

A. The Plan.

The Plan is a type of retirement plan known as a defined contribution plan. (Compl. ¶ 2; 29 U.S.C. § 1002(34).) In a defined contribution plan, participants choose the investments and investment allocation for their individual accounts from a menu of investments selected by the plan fiduciary, consistent with their retirement timelines and risk tolerances. *See Renfro*, 671 F.3d at 318. Rather than receive a guaranteed payment following retirement, a participant's benefit at retirement is dependent on the contributions the participant or employer make to the

participant's individual account and subsequent investment performance.[4] *Id.* At Teva, participants can contribute between 1% and 75% of their compensation toward their Plan account (subject to various restrictions), and Teva provides a generous matching contribution of up to 6% of the participants' contributions. (*See* Ex. A (excerpts of Summary Plan Description) at numbered page 7.) The Committee serves as the "Plan Administrator." (Compl. ¶ 27.) As permitted by the Plan, (*see* Ex. B (excerpts of Plan Document) § 15.5), the Committee retained an independent investment consultant, Aon Hewitt Investment Consulting, Inc., to assist in selecting and monitoring the Plan's investments.[5]

B. The Plan's Investment Menu.

At all times during the putative class period, the Plan included approximately 27 investment options from well-known investment managers such as Fidelity, T. Rowe Price, and Vanguard. (*See* Exs. C-I (Plan's participant fee disclosures from 2013-2019).) These investment options changed from time to time during the class period. (*See id.*) Participants could choose from 10 target-date funds and 16 to 17 other investments, composed primarily of mutual funds.[6]

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[4] The facts are from the Complaint and other materials properly before the Court. The Court may consider documents "attached to or submitted with the complaint and any matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, and items appearing in the record of the case." *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006) (citations omitted). Courts routinely consider plan documents, trust/recordkeeping agreements, summary plan descriptions, statutorily required disclosures, IRS Forms 5500, and fund prospectuses. *E.g.*, *Hecker v. Deere & Co.*, 556 F.3d 575, 582-83 (7th Cir. 2009) (plan and prospectuses); *Patterson v. Morgan Stanley*, No. 16-CV-6568 (RJS), 2019 WL 4934834, at *11 (S.D.N.Y. Oct. 7, 2019) (fee disclosure); *White II*, 2017 WL 2352137, at *18 (same); *In re Lehman Bros. Sec. & ERISA Litig.*, No. 09 MD 2017, 2012 WL 6000575, at *1 n.2 (S.D.N.Y. Dec. 3, 2012) (plan and recordkeeping agreement); *White v. Chevron Corp.*, No. 16-cv-0793, 2016 WL 4502808, at *3-15 (N.D. Cal. Aug. 29, 2016) ("*White I*") (Forms 5500); *Davis v. Wash. Univ.*, No. 4:17-CV-1641, 2018 WL 4684244, at *2 (E.D. Mo. Sept. 28, 2018) ("[P]rospectuses, fact sheets, and the like.").

[5] (*See* Ex. J (Plan's Form 5500 for 2018) at Schedule C, 3-1 (identifying investment advisor).)

[6] Target-date funds are "managed towards a particular target (retirement) date, or the approximate date when the investor expects to start withdrawing money from the fund," and "are

(Exs. C-I.) The investments include an array of passively- and actively-managed funds covering the three primary asset classes—stocks, bonds, and capital preservation investments—as well as hybrid funds investing in multiple asset classes. (*See id.*) Within these asset classes, the Plan's investment options covered a variety of investment styles, from domestic-large-capitalization to emerging-markets stock funds, and inflation-protection to high-yield bond funds. (*See id.*) In 2017 and 2018, the Plan added CITs as investments. (*See* Ex H at B5-B8 (identifying Fidelity Contrafund and Low-Priced Stock as "commingled pool" investments).) On June 28, 2019—the end date of the putative class period—the Plan largely transitioned to CITs. (Compl. ¶ 86.)

C. The Plan's Expenses and Fees.

There are expenses associated with administering every retirement plan, including expenses for managing a plan's investments, known as investment management fees, and expenses for recordkeeping the plan. A fund expresses its investment management fee as an "expense ratio," which represents the percentage of assets deducted each year by the investment manager.[7] During the class period, the expense ratios for the Plan's funds ranged from 0.04% for passively-managed index funds like the Vanguard Institutional Index Fund and Vanguard Total Bond Market Index Fund, to a high of 1.10% for the actively-managed Lazard Emerging Markets Equity Portfolio. (Exs. C-I.)

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generally offered as a suite of funds with target dates staggered 5 to 10 years apart, allowing the participant to choose the target date that aligns with his or her estimated retirement date." *Nelsen v. Principal Glob. Inv'rs Tr. Co.*, 362 F. Supp. 3d 627, 631 (S.D. Iowa 2019).

[7] *See* Morningstar Investing Glossary, *Expense Ratio*, http://www.morningstar.com/InvGlossary/expense_ratio.aspx (Ex. S). For example, a participant who invests $1,000 in a fund with an expense ratio of 0.10% would pay an annual fee of $1 ($1,000 * .001). The annual statutory disclosure to Plan participants discloses the annual gross expense ratio as a percentage of assets and per $1,000. (*See* Exs. C-I.)

Recordkeeping a defined contribution retirement plan generally requires maintaining up-to-date participant records; processing daily transactions (e.g., participants' changes to their investment choices); generating participant account statements; executing fund transfers and exchanges; issuing communications to participants; maintaining the plan's website and call center; and fulfilling tax-reporting requirements. (*See* Compl. ¶ 115.) Fidelity Management Trust Company ("Fidelity") is the Plan's trustee and recordkeeper, and Plan participants pay recordkeeping fees to Fidelity from the Plan investments' expense ratios (instead of as a separate charge) through a process called "revenue sharing." (*See* Ex. K (excerpts of recordkeeping agreement describing Plan's fee structure).) In this model, the managers of a plan's investment options share a portion of the overall fund expense ratio with the recordkeeper. For example, if a mutual fund's total expense ratio is 0.40%, that mutual fund's investment manager pays a portion of that 0.40% to the plan's recordkeeper for these services. Revenue sharing is a common industry practice to pay for plan recordkeeping. *See, e.g.*, *Hecker*, 556 F.3d at 585.

Pursuant to the Plan trust and recordkeeping agreement, Fidelity received capped annual recordkeeping fees of $62 per participant between 2012 and June 2014 and $50 per participant during the rest of the proposed class period. (*See* Ex. K (excerpts of recordkeeping agreement addressing fee caps).) Under the agreement, Fidelity rebated to the Plan any revenue exceeding the capped rate. (*See id.*)

III. ARGUMENT

A. Legal Standard and Applicable Law.

A motion to dismiss is an "important mechanism for weeding out meritless claims" in the ERISA context. *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014). This is because "the prospect of discovery" in an ERISA class action is "ominous" and "elevates the possibility that a plaintiff with a largely groundless claim will simply take up the time of a

number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013) (internal quotations and citations omitted). ERISA's "prudent person" standard focuses on a fiduciary's *process* in arriving at an investment decision—not on the after-the-fact results of the decision, be it investment performance or fees. Thus, Plaintiffs must allege facts permitting the Court "to infer from what is alleged that the process was flawed." *Renfro*, 671 F.3d at 327. The failure to do so mandates dismissal.

B. Plaintiffs Do Not Plausibly Allege That the Plan's Investments Charged Excessive Investment Management Fees.

Plaintiffs' primary theory of liability is that a fiduciary must select only the cheapest investment options, and that the failure to do so is a breach of ERISA's fiduciary duties. Stated differently, Plaintiffs seek to eliminate participant choice (and fiduciary discretion) in favor of a judicially mandated investment menu offering only the least expensive passively-managed funds or CITs. But participant choice is the "centerpiece of what ERISA envisions for defined-contribution plans" like the Plan. *Tibble v. Edison Int'l*, 729 F.3d 1110, 1135 (9th Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1823 (2015). Moreover, "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund." *Renfro v. Unisys Corp.*, No. 07-2098, 2010 WL 1688540, at *6 (E.D. Pa. Apr. 26, 2010) (quoting *Hecker*, 556 F.3d at 586), *aff'd*, 671 F.3d 314 (3d Cir. 2011).[8] Thus, Plaintiffs' allegation "that some other funds might have had even lower ratios" than the funds in the Plan is "beside the point." *Id.*

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[8] Plaintiffs' theory would also stifle free-market competition by limiting retirement plans to a handful of investments from a limited number of investment managers, or alternatively require every manager to offer the exact same lineup of low-cost passively-managed funds. *See Patterson v. Cap. Grp. Cos.*, No. Cv 17-4399, 2018 WL 748104, at *5 (C.D. Cal. Jan. 23, 2018) ("Unquestionably, fiduciaries need not choose the cheapest fees available to the exclusion of other considerations—or all funds seeking investments from trusts and pension plans would have

1. Plaintiffs' Claims Fail Under Controlling Third Circuit Precedent.

Renfro disposes of Plaintiffs' claim that the Plan's investments were too expensive. The *Renfro* plaintiffs alleged that the defendants breached their fiduciary duties by offering retail share class mutual funds that charged excessive investment management fees compared to alternative funds. 671 F.3d at 319, 326-27. The plan's investments charged fees that ranged from 0.10% to 1.21%. *Id.* at 327-28. The *Renfro* plaintiffs did not allege "any sort of concealed kickback scheme relating to fee payments" or make other allegations of mismanagement; rather, the "allegations concerning fees [were] directed exclusively to the fee structure." *Id.* at 327.

The Third Circuit affirmed dismissal of *Renfro* because the allegations did not support a reasonable inference that the defendants utilized a flawed fiduciary process. *Id.* The Third Circuit emphasized that courts must evaluate the plausibility of fiduciary breach claims alleging excessive fees "against the backdrop of the reasonableness of the mix and range of investment options" offered. *Id.* at 326. Considering the mix of investments offered in *Renfro*, with fees that ranged from 0.10% to 1.21%, the court held that the plaintiffs' various challenges to the plan's investments and fee structure could "not plausibly support" a fiduciary breach claim. *Id.* at 327-28. In other words, when a plan offers "a reasonable range of investment options with a variety of risk profiles and fee rates," and there are no plausible allegations of improper self-interest or abdication of fiduciary oversight, the claims fail as a matter of law. *Id.*

The allegations found deficient in *Renfro* are materially indistinguishable from those in the Complaint. Throughout the class period, Plan participants could choose from roughly 27 different investments with varying profiles and expense ratios that ranged from 0.04% to 1.10% (*see* Exs. C-I), lower than the expense ratios found reasonable as a matter of law in *Renfro*. For

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to charge the same fees regardless of the type of fund, management approach or services, performance, etc. in order to attract institutional clients.").

example, Plan participants who preferred passively-managed, low-cost index funds could select from five different Vanguard funds with expense ratios between 0.04% and 0.08%. (*See* Ex. D at numbered pages 8-9, 12-13.) On the other hand, participants who preferred actively-managed funds could select from a number of funds with different investment styles, risk factors, and fees, such as the Cohen & Steers Institutional Realty Shares Fund, which invested in real estate securities and had an expense ratio of 0.76%, or the Fidelity Contrafund, which invested in growth and value stocks and had an expense ratio of 0.61%. (*See* Exs. T-U (summary fund prospectuses).) At the same time, Plan participants also could select from a suite of T. Rowe Price target-date funds with fees that ranged from 0.59% to 0.76% (*see* Ex D at numbered pages 8-11), which Kiplinger's (a well-known publication in the retirement-plan industry) recently described as having "performed spectacularly" and being among the top 10% in their peer group (Ex. L). In other words, Teva offered Plan participants a broad array of investments at various fee levels and "left [the] choice to the people who have the most interest in the outcome, and it cannot be faulted for doing this." *Loomis*, 658 F.3d at 673-74.

Decisions by other Circuits considering similar claims bolster this conclusion. In *Hecker*, the Seventh Circuit dismissed similar claims where the plan offered 26 core investments charging fees between 0.07% and "just over" 1.00%. 556 F.3d at 586. As in *Renfro*, it made no difference that the plan offered only retail share class mutual funds or that its recordkeeper was paid through revenue sharing from those funds. *Id.* at 578-79; *accord Loomis*, 658 F.3d at 669-70 (affirming dismissal of excessive fee claims where plan offered 32 mutual funds with expense ratios between 0.03% and 0.96%). The Ninth Circuit followed suit in *Tibble*, where the plan offered 51 investments with expense ratios between 0.03% and 2.00%. 729 F.3d at 1135.

Plaintiffs undoubtedly will argue that *Sweda* saves their claims from dismissal, but there are stark differences between the factual allegations here and in *Sweda*. In *Sweda*, the Third

Circuit reversed dismissal of claims alleging the defendants breached their fiduciary duties by, *inter alia*, offering funds that charged excessive investment management fees. 923 F.3d at 331. But unlike the allegations here, the *Sweda* plaintiffs did not merely allege that the fiduciaries could have selected cheaper funds. They also alleged that 60% of the plan's 78 investments underperformed appropriate benchmarks, that the plan's fiduciaries "retain[ed] high-cost investment options with historically poor performance compared to available alternatives," retained "multiple options in the same asset class and investment style," selected investments with "layers of unnecessary fees," and selected duplicative funds that confused participants and reduced the plan's "leverage." *Id.* The plaintiffs in *Sweda* also provided several demonstrative examples of "similarly situated fiduciaries who acted prudently" and who had allegedly obtained lower fees in comparable situations. *Id.* at 330-31. They further alleged that the fiduciaries failed to negotiate a cap on recordkeeping fees and failed to consolidate from a two-recordkeeper system to a single-recordkeeper system, thereby increasing the plan's fees. *Id.* Those allegations, taken together, distinguished the claims from those in *Renfro* and plausibly suggested that the defendants engaged in a flawed fiduciary process. *Id.* at 332.

By comparison, the Complaint here says *nothing* about the performance of any particular Plan investment, whether compared to a fund's benchmark or some "prudent" alternative. Nor do Plaintiffs allege that the Plan's investments had unnecessary fee "layers" or that any particular fund strategy duplicated another. And although Plaintiffs allege the Plan's participants paid "excessive" recordkeeping fees, as discussed in further detail below, those fees were capped at $50 per participant—the "reasonable" fee Plaintiffs tout in their Complaint. Thus, unlike the allegations the *Sweda* court found sufficient to state a claim, Plaintiffs here assert only that Teva could have selected purportedly "similar" investments with lower fees. That is the same theory of liability rejected by *Renfro*, and the Court should apply that ruling here.

2. ERISA Does Not Require That Defendants Offer CITs or SMAs.

The allegation that Defendants breached their fiduciary duties because they did not consider switching from mutual funds to CITs or SMAs at the outset of the class period (Compl. ¶¶ 86-88) fails to state a plausible claim. There is "nothing in [ERISA] that requires plan fiduciaries to include any particular mix of investment vehicles in their plan." *Hecker*, 556 F.3d at 586. Thus, the claim that Defendants breached their fiduciary duties because they "could have" switched to CITs or SMAs at an earlier date fails as a matter of law. *Ferguson v. Ruane Cunnif & Goldfarb, Inc.*, 2019 WL 4466714, at *10 (S.D.N.Y. Sept. 18, 2019) (dismissing claim defendants breached fiduciary duties by failing to offer CITs instead of mutual funds); *Larson v. Allina Health Sys.*, 350 F. Supp. 3d 780, 795-96 (D. Minn. 2018) (same); *White I*, 2016 WL 4502808, at *12 (it is "inappropriate to compare distinct investment vehicles solely by cost, since their essential features differ so significantly," and dismissing claim defendants breached their fiduciary duty by offering mutual funds instead of less expensive CITs).

Moreover, in 2017 and 2018 the Plan added two CITs, the Fidelity Contrafund and the Fidelity Low Priced Stock Fund. (*See* Ex. J at numbered page 9 ("The Fidelity Contrafund Commingled Pool Fund and Fidelity Low-Priced Stock Commingled Pool Fund are common collective trust funds.").) Most recently, in mid-2019 the Plan transitioned nearly all of its investment options into CITs. (Compl. ¶ 86.) Thus, the allegation that Teva "failed to consider collective trusts . . . as alternatives to the mutual funds in the Plan" (*id.* ¶ 7) is patently wrong. Rather, these facts support the conclusion that Teva utilized a prudent fiduciary process. *See, e.g.*, *White I*, 2016 WL 4502808, at *17 (changing investments during the class period "create[d] a plausible inference that the Plan fiduciaries were attentively monitoring the fund").[9]

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[9] Plaintiffs' assertion that the Plan's 2019 switch to CITs is an "admission against interest" (Am. Compl. ¶ 86) gets the analysis completely backwards. *See Laboy v. Bd. of Trs. of Bldg. Serv. 32*

3. ERISA Does Not Require That Defendants Offer Passively-Managed Investment Options.

Plaintiffs' allegation that Defendants breached their fiduciary duties by utilizing actively-managed funds instead of passively-managed ones fares no better. "ERISA does not mandate passive management (with lower fees) over active management." *Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273, 313 n.114 (S.D.N.Y. 2018) (citing *Hecker*, 556 F.3d at 586), *appeal docketed*, No. 18-2707 (2d Cir. Sept. 12, 2018). Courts thus routinely dismiss fiduciary breach claims premised on the offering of actively-managed funds. *Patterson*, 2019 WL 4934834, at *12 (dismissing fiduciary breach claim challenging use of actively-managed funds); *accord Bekker v. Neuberger Berman Grp. LLC*, 2018 WL 4636841, at *7 (S.D.N.Y. Sept. 27, 2018); *Rosen v. Prudential Ret. Ins. & Annuity Co.*, No. 3:15-CV-1839, 2016 WL 7494320, at *14 (D. Conn. Dec. 30, 2016) ("[A]llegations regarding the higher costs associated with actively-managed mutual funds as opposed to 'passive' funds or 'index' funds" fail to state an ERISA claim), *aff'd*, 718 F. App'x 3 (2d Cir. 2017).

Furthermore, the Plan offered participants several low-cost, passively-managed investments. For example, the Vanguard Institutional Index Fund—a passively-managed fund that tracks the return of the S&P 500 Index with an expense ratio of just 0.04%—was offered to Plan participants during the entire class period. (Ex. C at numbered pages 8-9.) The inclusion of several low-cost investments "undermines Plaintiffs' assertions that [Defendants] breached their fiduciary duties by charging excessive fees." *Rosen*, 2016 WL 7494320, at *15; *see also Divane v. Nw. Univ.*, No. 16 C 8157, 2018 WL 2388118, at *5-6 (N.D. Ill. May 25, 2018) (dismissing

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BJ SRSP, No. 11 Civ. 5127, 2012 WL 3191961, at *3 (S.D.N.Y. Aug. 7, 2012), *aff'd*, 513 F. App'x 78 (2d Cir. 2013) ("It would turn the law on its head were we to embrace a concept where a plaintiff could use allegations of prudent measures to prove a defendant's imprudence: a trustee might hesitate to replace a fund in its plan out of fears that such action could later be used to sustain a claim for breach of fiduciary duty.").

excessive investment fee claim and noting that "any plan participant could avoid what plaintiffs consider to be the problems with those products . . . simply by choosing other options"), *appeal docketed*, No. 18-2569 (7th Cir. July 18, 2018).

4. ERISA Does Not Require the Use of the Lowest-Cost Share Class.

Plaintiffs allege that Defendants breached their fiduciary duties by failing to utilize the lowest-cost share class for "many" of the Plan's mutual funds. (Compl. ¶ 7.) Such assertions fail to state a plausible claim and are demonstrably incorrect.

a. The existence of less expensive share classes for some funds does not plausibly suggest Defendants breached their fiduciary duties.

It is wrong to assume "that the mere inclusion of a fund with an expense ratio that is higher than that of the lowest share class violates the duty of prudence." *White I*, 2016 WL 4502808, at *11; *see also Renfro*, 671 F.3d at 319 (affirming dismissal of claims like Plaintiffs' that "focus on the inclusion of so-called retail mutual funds"); *Loomis*, 658 F.3d at 671-72; *Sacerdote v. N.Y. Univ*., No. 16-CV-6284 (KBF), 2017 WL 3701482, at *11 (S.D.N.Y. Aug. 25, 2017) (dismissing claim challenging the inclusion of higher-cost share classes because "inclusion of retail options does not, on its own, suggest imprudence"). Yet that is all Plaintiffs offer here, averring that Defendants breached their fiduciary duties by offering a handful of funds that were not in the lowest-cost share class, but were not in any other way "imprudent." *White II* rejected an indistinguishable claim that fiduciaries breached their duties by selecting mutual funds with excessive fees "compared to lower-cost share classes of identical mutual fund options" because "merely alleging that a plan offered retail rather than institutional share classes is insufficient to carry a claim for fiduciary breach." 2017 WL 2352137, at *3, *14. The court found the complaint deficient as a matter of law because it "simply provide[d] comparisons between funds that were in the Plan lineup and funds that plaintiffs claim were less expensive," which was not

enough to state a claim for relief. *Id.* at *14. The same reasoning applies here—Plaintiffs do not plausibly allege Defendants implemented a flawed fiduciary process simply because a few funds were not in the lowest-cost share class.

b. The Plan offered the lowest-cost share classes for most funds.

Even if Plaintiffs' allegations were not legally deficient, they are factually incorrect. For virtually the entire class period, most of the Plan's investments have been in the lowest-cost available share class (based on asset minimums and other requirements). Plaintiffs proffer a table allegedly demonstrating the existence of lower-cost share classes for some funds in 2019, (Compl. ¶ 99), but that table is misleading or in several instances flatly wrong.

For instance, Plaintiffs wrongly assert that the Plan offered the Investor share class of the Vanguard Total Bond Market Index Fund, when in fact the Plan offered the Institutional (i.e., lowest-cost) share class of that investment. (*See, e.g.*, Ex. C at numbered pages 12-13; Ex. G at pages B11-B12.) Plaintiffs' allegation regarding the Vanguard Institutional Index Fund is even less indicative of a flawed fiduciary process. Plaintiffs do not contend Defendants failed to offer the lowest cost share class of that fund, but instead compare it to a less expensive version of a completely different fund, the Fidelity 500 Index Fund. (Compl. ¶ 99.) Plaintiffs ignore that the Plan *already* offered the "Institutional" share class of the Vanguard fund, with an expense ratio of just 0.04%—one of the least expensive funds on the market. (*See id.*) The fact that Plaintiffs identified a single fund, offered by a different company, for a single year, with an expense ratio lower than 0.04% does not plausibly suggest a fiduciary breach.[10] *Meiners II*, 898 F.3d at 823-

[10] The Plan offered the Investor class shares of the T. Rowe Price target date funds. These funds offer three share classes (Investor class, Advisor class, and R class) of which the Investor class shares offer the lowest fees. (https://www.troweprice.com/financial-intermediary/us/en/investments/mutual-funds/us-products/retirement-2030-fund.html#primary-how-to-invest (Ex. V).) Thus, throughout the class period, the Plan always was in the lowest-cost share class of those funds. Plaintiffs allege the Plan should have invested in the I class shares of the T. Rowe Price

24 ("[T]he existence of a cheaper fund does not mean that a particular fund is too expensive *in the market generally* or that it is otherwise an imprudent choice."). This is the exact type of flawed comparison rejected by *Hecke*r and other courts. 556 F.3d at 586 ("[N]othing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund.").

5. The Fee-Related Comparisons in Plaintiffs' Complaint Are Inaccurate and Misleading and Lend No Support to Their Claims.

As the foregoing discussion makes clear, "[t]he fact that it is possible that some other funds might have had even lower ratios is beside the point." *Hecker*, 556 F.3d at 586. Yet that is exactly the premise of Plaintiffs' claims, and they attempt to support their allegations with several tables comparing the fees of the Plan's investment to "comparable" less expensive funds. These comparisons are inapt, riddled with errors, and do nothing to save the Complaint.

The Complaint contains a chart comparing the expense ratios of the Plan's funds in 2019 to "comparable passively-managed and actively-managed funds in the same investment style." (Compl. ¶ 111.) However, Plaintiffs use the wrong share class for several of the Plan's funds, significantly overstating those funds' fees. For instance, Plaintiffs allege the Plan offered the Investor share class of the Vanguard Inflation-Protected Securities Fund with an expense ratio of 0.20%, (*id.* ¶ 41), when in fact the Plan offered the Institutional share class with an expense ratio of 0.07% (*see, e.g.*, Ex. G at pages B11-B12.) Similarly, the Plan offered the Institutional share class of the Vanguard Developed Markets Index Fund with an expense ratio of 0.06% (not 0.16%) (*id.* at B7-B8), only 0.01% more than Plaintiffs' "prudent" alternative (*see* Compl. ¶ 40). As far as Defendants can discern, two of Plaintiffs' comparator funds, the JPMorgan SmartRetirement Blend 2005 and 2010 Funds, never even existed.

Retirement I target date funds, but that is a different fund with a different fee structure (*see* https://www.troweprice.com/financial-intermediary/us/en/investments/mutual-funds/us-products/retirement-i-2030.html#primary-how-to-invest (Ex. W)), as opposed to a different share class.

Moreover, several of the Plan's funds have different investment strategies than Plaintiffs' comparator funds. This inapt comparison is critical because Plaintiffs must allege that the cheaper comparator funds "are reliable comparators, offer similar services, or are of similar size," but they do nothing of the sort. *Meiners v. Wells Fargo & Co.*, No. CV 16-3981, 2017 WL 2303968, at *3 (D. Minn. May 25, 2017) ("*Meiners I*"), *aff'd*, 898 F.3d 820 (8th Cir. 2018). For example, Plaintiffs compare the Fidelity Low Priced Stock Fund and the PGIM Jennison Small Company Fund to the Vanguard Capital Value Fund. (Compl. ¶ 40.) The Fidelity Low Priced Stock Fund and the PGIM Jennison Small Company Fund invest in small and/or mid cap stocks, while the Vanguard Capital Value Fund invests in companies of all sizes (*see* Exs. M-O (summary prospectuses)); funds that invest in large cap stocks tend to be less expensive than funds specializing in small and/or mid cap stocks (*see* Ex. P (excerpt of 2019 ICI Factbook)).[11] Plaintiffs also compare the fees of the Vanguard Wellington Fund and J.P. Morgan High Yield Fund, both actively-managed funds, to the fees of passively-managed funds. (Compl. ¶ 41.) Comparing funds with inapposite investment strategies "permits plaintiffs to dodge the requirement for a meaningful benchmark by merely finding a less expensive alternative fund or two with some similarity." *Meiners II*, 898 F.3d at 823.

Plaintiffs also allege the Plan should have used less expensive target-date funds and identify three comparators—the JPMorgan SmartRetirement Blend, the Fidelity Freedom Index funds, and the Vanguard Target Retirement Fund. (Compl. ¶¶ 111-13.) The attached table

[11] The Complaint contains a separate chart comparing the performance of some of the Plan's actively-managed funds to passively-managed funds selected by Plaintiffs. (Compl. ¶ 113.) Plaintiffs do not explain how they selected those comparator funds and provide no evidence to support the claim that they are reasonable comparators, rendering this chart meaningless. *See Meiners II*, 898 F.3d at 823-24. Despite these limitations, Plaintiffs' own chart shows that the five-year return of seven of the Plan's ten actively-managed funds exceeds the five-year return of Plaintiffs' "comparable" passively-managed fund. (Compl. ¶ 113.) This is entirely at odds with Plaintiffs' allegation that actively-managed funds "rarely" outperform passively-managed ones.

composed of publicly available information shows the historical performance for each of Plaintiffs' alternative target-date funds and the target-date funds in the Plan as of December 31, 2018. (Ex. Q.[12]) The five-year performance (which includes the impact of fees) as of December 31, 2018, covers nearly all of the class period. (*Id.*) As the table shows, the Plan's target-date funds outperform Plaintiffs' preferred target-date funds over the five years ending December 31, 2018, and outperform all of Plaintiffs' alternative target-date funds across all target dates except 2035 (where it has the second-best return by three basis points). (*Id.*) In other words, accounting for fees and performance, the Plan's participants would have been *worse off* had Teva offered Plaintiffs' proposed target date funds, meaning Plaintiffs' claims are of the "meritless" variety that should be "weed[ed] out" for failure to state a claim. *Dudenhoeffer*, 134 S. Ct. at 2471.

C. Plaintiffs Do Not Plausibly Allege That Plan Participants Paid Unreasonable Recordkeeping Fees.

Plaintiffs offer virtually no details to support their allegation that the Plan's participants paid recordkeeping fees between $160.63 and $208.32 per person annually. (Compl. ¶ 125.) They assert, in conclusory fashion, that Defendants "failed to monitor and control recordkeeping compensation," and that this alleged failure amounts to an "independent breach[] of the duties of loyalty and prudence." (*Id.* ¶ 127.) These allegations are grossly inaccurate.

It is unclear how Plaintiffs calculated the alleged "per participant fees," but those figures have no connection to reality. Under the agreement between Fidelity and Teva, participants paid $62 annually between 2012 and June 2014, and $50 annually the rest of the putative class period. (*See* Ex. K at Schedule B to the second and fourth amendments.) Plaintiffs cannot plausibly allege Plan participants paid "excessive" recordkeeping fees when the governing agreement

[12] Appended to the summary table are excerpts from publicly available documents that demonstrate the historical performance of these investment options.

capped those fees *in the very range* Plaintiffs contend would be reasonable. (*See* Compl. ¶ 123.)[13]

The low annual recordkeeping fees Defendants obtained for Plan participants were no accident. Instead, the Plan's agreement with Fidelity mandated an annual "contractual rate" for recordkeeping services—in other words, a "cap" on the revenue that Fidelity could receive each year. (*See* Ex. K.) Structuring the Plan's recordkeeping fees to mandate a per-participant cap is exactly what many plaintiffs in similar "excessive fee" cases allege the plan fiduciaries *should* have done. *See, e.g.*, *Davis*, 2018 WL 4684244, at *2 (noting that "Plaintiffs assert that there should have been 'some sort of cap' to the recordkeeper fees"); *cf. Sweda*, 923 F.3d at 330 (plaintiff alleged defendant "could have negotiated for a cap on fees" but allegedly failed to do so). The fact that Defendants negotiated a per-participant cap, that fees declined during the class period, and that fees were in the "reasonable" range espoused by Plaintiffs all indicate Defendants followed a prudent process for monitoring fees (and that the fees were objectively prudent). Because the Plan's participants paid a fraction of what Plaintiffs allege they paid in recordkeeping fees, and because a $50 per participant recordkeeping fee is indisputably reasonable based on Plaintiffs' own Complaint, the Court should dismiss this claim.

D. Plaintiffs Cannot State a Claim for Breach of the Duty of Loyalty.

ERISA's duty of loyalty requires that fiduciaries act solely in the interest of plan participants and beneficiaries. *See, e.g.*, *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 423 (3d Cir. 2013). To state a claim for fiduciary disloyalty, Plaintiffs must allege facts

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[13] Plaintiffs base their estimate on a plan with 10,0000 to 15,000 participants. (Compl. ¶ 123.) Plaintiffs reference court filings (not decisions) in three other 401(k) plan fee cases where plaintiffs in those cases advocated for lower per-participant recordkeeping fees (*id.* ¶ 124), but Plaintiffs do not attempt to compare the size of the Plan to the size of those other plans, and they do not allege any facts to suggest that those plans were comparable in other respects.

sufficient to show that Teva took actions contrary to the interests of Plan participants and beneficiaries. The Complaint contains no allegations from which the Court could infer that Defendants committed any disloyal act, and the Court should dismiss this claim.

Courts routinely dismiss disloyalty claims that merely piggyback on other fiduciary breach theories. *See, e.g.*, *Sacerdote*, 2017 WL 3701482, at *5 ("To state a loyalty-based claim under ERISA § 404(a)(1)(A), a plaintiff must do more than simply recast purported breaches of the duty of prudence as disloyal acts."); *Romero v. Nokia, Inc.*, No. C 12-6260 PJH, 2013 WL 5692324, at *5 (N.D. Cal. Oct. 15, 2013) (dismissing disloyalty claims where plaintiff failed to "present any separate allegations regarding any loyalty breach"). Here, Plaintiffs' failure to plead any facts in support of their disloyalty claims mandates dismissal. *See, e.g.*, *White I*, 2016 WL 4502808, at *4 (ERISA plaintiffs cannot merely "attach[] a 'disloyalty' label to the complaint" without proffering specific allegations regarding the allegedly disloyal actions).

E. Plaintiffs Cannot State a Failure-to-Monitor Claim.

Plaintiffs' failure-to-monitor claim is derivative of their fiduciary breach claims and cannot survive dismissal of those claims. *See Johnson v. Radian Grp., Inc.*, No. CIV.A. 08-2007, 2009 WL 2137241, at *24 (E.D. Pa. July 16, 2009) (dismissing fiduciary breach claims and "derivative" failure-to-monitor claims, because such claims "necessarily depend upon the existence of breaches of fiduciary duties"). The Court should dismiss Plaintiffs' failure-to-monitor claim with prejudice.

IV. CONCLUSION

The Court should grant Defendants' motion to dismiss Plaintiffs' Complaint, dismiss Plaintiffs' claims with prejudice, and enter judgment in Defendants' favor.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Brian T. Ortelere, hereby certify that on this 3rd day of March 2020, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notice of electronic filing to counsel of record for this case and which is available for viewing and downloading from the ECF system of the U.S. District Court for the Eastern District of Pennsylvania.

/s/ Brian T. Ortelere
Brian T. Ortelere