UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Southern Division)

BRUCE KONYA, SIMON SHIFF, STEPHEN SCHWARZ, and DIANA VASQUEZ, individually and as representatives of a class of participants and beneficiaries on behalf of the LOCKHEED MARTIN CORPORATION SALARIED EMPLOYEE RETIREMENT PROGRAM and the LOCKHEED MARTIN AEROSPACE HOURLY PENSION PLAN,	Civil Action No. 8:24-cv-00750
Plaintiffs,	Hon. Peter J. Messitte
v.	
LOCKHEED MARTIN CORPORATION,	
Defendant.	

DEFENDANT'S MOTION TO DISMISS

Defendant Lockheed Martin Corporation hereby moves to dismiss this action for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) or for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). The grounds for this motion are set forth in the accompanying memorandum of law.

Dated: May 3, 2024

By: /s/ Reginald R. Goeke

Reginald R. Goeke (No. 13527)
E. Brantley Webb (*pro hac vice*)
Eric A. White (*pro hac vice*)
Michelle N. Webster (*pro hac vice*)
Jennifer L. Weinberg (*pro hac vice*)
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
rgoeke@mayerbrown.com
bwebb@mayerbrown.com
eawhite@mayerbrown.com
mwebster@mayerbrown.com
jlweinberg@mayerbrown.com

Nancy G. Ross (*pro hac vice*)
MAYER BROWN LLP
71 S. Wacker Dr.
Chicago, Illinois 60606
(312) 701-8788
nross@mayerbrown.com

Counsel for Defendant Lockheed Martin Corporation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Southern Division)

BRUCE KONYA, SIMON SHIFF, STEPHEN SCHWARZ, and DIANA VASQUEZ, individually and as representatives of a class of participants and beneficiaries on behalf of the LOCKHEED MARTIN CORPORATION SALARIED EMPLOYEE RETIREMENT PROGRAM and the LOCKHEED MARTIN AEROSPACE HOURLY PENSION PLAN,	Civil Action No. 8:24-cv-00750
Plaintiffs,	Hon. Peter J. Messitte
v.	
LOCKHEED MARTIN CORPORATION,	
Defendant.	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Nancy G. Ross (*pro hac vice*)
MAYER BROWN LLP
71 S. Wacker Dr.
Chicago, Illinois 60606
(312) 701-8788
nross@mayerbrown.com

Reginald R. Goeke (No. 13527)
E. Brantley Webb (*pro hac vice*)
Eric A. White (*pro hac vice*)
Michelle N. Webster (*pro hac vice*)
Jennifer L. Weinberg (*pro hac vice*)
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
rgoeke@mayerbrown.com
bwebb@mayerbrown.com
eawhite@mayerbrown.com
mwebster@mayerbrown.com
jlweinberg@mayerbrown.com

Counsel for Defendant Lockheed Martin Corporation

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(cont'd)

Page(s)

TABLE OF AUTHORITIES
(cont'd)

Page(s)

TABLE OF AUTHORITIES
(cont'd)

Page(s)

TABLE OF AUTHORITIES
(cont'd)

Page(s)

TABLE OF AUTHORITIES
(cont'd)

Page(s)

INTRODUCTION

Plaintiffs seek a novel ruling from this Court that a decades-old, common corporate practice violates federal law, even though they have not suffered any injury because of it. Their complaint reads like an op-ed with little to no support arguing against the very idea of pension risk transfers ("PRTs")—a mechanism by which fiduciaries of defined-benefit plans transfer fund assets and liabilities to insurance companies, effectively converting pensions into private annuities. As far back as the 1990s, the federal government has approved of that practice as a permissible way to ensure that retirees can continue to receive their full benefits in the face of uncertain and unpredictable market conditions.

Plaintiffs are former employees of Lockheed Martin Corporation ("Lockheed Martin") and former participants in two Lockheed Martin defined-benefit pension plans. Those plans are governed by the Employee Retirement Income Security Act ("ERISA"). Pursuant to ERISA, the plans were administered by fiduciaries who owed duties to plan participants to act as would prudent, 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.

In this action, Plaintiffs challenge the PRTs for their former plans. Their theory is that, by engaging in PRTs, Lockheed Martin violated a host of ERISA provisions—breaching fiduciary duties, engaging in prohibited transactions, and failing to monitor. But there is nothing illegal or nefarious about engaging in a PRT—which, by law, is not a fiduciary decision—or to do so with one of the leading insurance companies in that industry, Athene Annuity and Life Company and Athene Annuity & Life Assurance Company of New York (collectively, "Athene"). And Plaintiffs continue to receive all the benefits to which they are entitled.

Plaintiffs' claims fail out of the gate on jurisdictional grounds. For one thing, they cannot point to any concrete, imminent injury that they have suffered as a result of the PRTs. *See* § I.A.-B., *infra*. They do not allege that they have received anything less than their full benefits from Athene. And their claim that there is a risk that Athene might someday default on its obligations rests on pure speculation, with an attenuated series of hypothetical events standing between Plaintiffs today and any potential lost benefits in the future. Moreover, it is well settled that the mere allegation of a "risk that . . . pension benefits will at some point in the future be adversely affected as a result of the present alleged ERISA violations is too speculative to give rise to Article III standing." *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013); *accord Thole v. U.S. Bank. N.A.*, 590 U.S. 538, 546 (2020). Further adding to the problems with Plaintiffs' complaint, their claimed statutory sources for subject-matter jurisdiction here, and by extension for the sweeping injunctive relief they seek, are two ERISA provisions that on their face do not authorize suits by former ERISA plan participants. *See* § I.D, *infra*.

Even if jurisdiction existed here, Plaintiffs do not plausibly allege ERISA claims for breach of fiduciary duty, prohibited transactions, or failure to monitor. *See* II.A.-C., *infra*. Their complaint is replete with conclusory assertions about supposed duties and devoid of factual allegations to support the claims. For example, Plaintiffs include no allegations backing up their conclusion that Lockheed Martin was the relevant fiduciary for any breach. And even though ERISA is a process statute, the complaint does not set forth any allegations regarding the process with respect to the PRTs, let alone deficiencies in that process attributable to Lockheed Martin. Nor, for that matter, have Plaintiffs alleged that Lockheed Martin's peers have done things any differently, as they must to state a plausible claim of imprudence under ERISA. 29 U.S.C. § 1104(a)(1)(B). The premise for their complaint rests on a simplistic and flawed theory that any company that engages in a PRT violates ERISA if it does not select the single largest, most expensive insurance provider that Plaintiffs prefer. Plaintiffs have failed to state a claim, and their complaint accordingly should be dismissed.

BACKGROUND

A. ERISA

This case concerns ERISA, the federal statute governing employee benefit plans. Congress enacted ERISA in 1974 to establish minimum standards for voluntarily established retirement, health, and welfare plans provided by private sector companies to protect beneficiaries and their corresponding retirement assets. 29 U.S.C. § 1001. ERISA covers various retirement programs, including defined-contribution and defined-benefit (*i.e.*, pension) plans. *See id.* § 1002; *see also Pender v. Bank of Am. Corp.*, 788 F.3d 354, 360 (4th Cir. 2015).

ERISA regulates the administration of these retirement programs and imposes on plan fiduciaries the duties of prudence and loyalty. *E.g.*, *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 355-56 (4th Cir. 2014). In general, the duty of prudence contemplates that a fiduciary should act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use." 29 U.S.C. § 1104(a)(1)(B). And the duty of loyalty contemplates that a fiduciary should "discharge his duties . . . solely in the interest of the participants." *Id.* § 1104(a)(1)(A).

These duties of prudence and loyalty only attach to those who exercise discretionary, fiduciary functions. *E.g.*, *Pegram v. Herdich*, 530 U.S. 211, 223-24 (2000). Under ERISA, employers often serve as "plan sponsors" that establish or maintain at least one employee benefit plan. 29 U.S.C. § 1002(16)(B). But plan sponsorship is neither necessary nor sufficient in and of itself to establish fiduciary status under ERISA. Instead, someone acts as a fiduciary under ERISA only "to the extent" he or she engages in certain conduct, such as exercising "discretionary authority or discretionary control respecting management of [the] plan," the "disposition of its assets," or "the administration of [the] plan." *Id.* § 1002(21)(A).

It is well established that a plan sponsor does not become a fiduciary or engage in discretionary functions under ERISA when it performs "settlor" functions, such as establishing a plan, designing its benefits, or terminating a plan. *E.g.*, *Beck v. PACE Int'l Union*, 551 U.S. 96, 101-02 (2007); *Hughes Aircraft Co., v. Jacobson*, 525 U.S., 432, 444 (1999); *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465 (4th Cir. 1996).

B. Pension Risk Transfers

This case involves one such settlor function—a "buyout" pension risk transfer, or PRT. In a "buyout" PRT, a plan transfers assets and liabilities to an annuity provider, who then assumes responsibility for issuing future benefit payments to covered beneficiaries. Compl. ¶ 28. PRTs can transfer some or all of the benefits owed to pension plan participants. *Id.* Once completed, a PRT extinguishes a pension plan's obligation with respect to the subset of former beneficiaries subject to the PRT, and seamlessly re-establishes it under the annuity provider. *Id.* Conducting a PRT falls into the category of settlor functions exempt from ERISA fiduciary obligations. *E.g.*, *Hughes*, 525 U.S. at 444 (describing "decision[s] regarding the form or structure" of a plan as settlor functions); *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 538 (5th Cir. 2016) ("[T]he transfer of pension liabilities from an ongoing plan through an annuity transaction amendment is a settlor function, permitted under ERISA, or, alternatively . . . such transactions are not subject to fiduciary duty requirements.").

For well over three decades, PRTs have been fully integrated into the retirement benefits marketplace. As Plaintiffs recognize, PRTs are not a new phenomenon, and they are often used. Between 2012 and 2022, there were nearly 4,500 PRTs involving over $268 billion in premiums.[1] The increase in PRT popularity and demand (Compl. ¶¶ 27, 29) is attributable to many factors, one of which is the widespread underfunding of traditional pension programs.[2]

Moreover, the federal government has approved of the practice for years.[3] In 1995, the Department of Labor ("DOL") issued Interpretive Bulletin 95-1 ("IB 95-1") regarding the use of PRTs. 29 C.F.R. § 2509.95-1. It provides six factors to guide fiduciaries in the process of selecting an annuity provider for a PRT. *See id.* The bulletin is not, however, itself part of ERISA, nor is following its guidance an ERISA fiduciary obligation. *See, e.g.*, *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 298 (5th Cir. 2000); *Riley v. Murdock*, 83 F.3d 415 (table), 1996 WL 209613, at *1 (4th Cir. Apr. 30, 1996) (per curiam).

PRTs do not result in loss of retirement benefits; rather, the benefit provider changes.[4] A PRT involves a transfer of plan assets to the insurance provider. These assets are typically held in accounts separate from the insurance company's general operating account, and both accounts protect the transferred assets should the insurance provider become insolvent.[5] Most annuity providers also have reinsurance coverage, which operates as "insurance for insurance companies," and helps further manage risk to insure against losses.[6] Moreover, insurance providers are subject to rigorous regulatory requirements to participate in the PRT marketplace. They must also be well capitalized, highly rated, and pass multiple layers of review.[7]

One difference between annuities from an insurance company and ERISA plans is the entity that serves as a final backstop protecting benefits. Insurance annuities are protected by

---

[1] *2023 U.S. Pension Risk Transfer Market Insights*, Aon, https://www.aon.com/insights/reports/2023/us-pension-risk-transfer-market-insights#ft_form.

[2] *Unfunded Pension Liabilities: The Growing Cost of Retirement*, The Council of State Gov'ts, https://www.csg.org/2023/05/03/unfunded-pension-liabilities-the-growing-cost-of-retirement/.

[3] As far back as 1975, regulations provided that "[a]n individual is not a participant covered under an employee pension plan or a beneficiary receiving benefits under an employee pension plan if . . . [t]he entire benefit rights of the individual . . . [a]re fully guaranteed by an insurance company." 29 C.F.R. § 2510.3-3(d)(2)(ii) (Aug. 15, 1975).

[4] *Pension Risk Transfer*, Nat'l Ass'n of Ins. Comm'rs, https://content.naic.org/cipr-topics/pension-risk-transfer.

[5] *Id.*

[6] *See Reinsurance*, Nat'l Ass'n of Ins. Comm'rs, https://content.naic.org/cipr-topics/reinsurance.

[7] *E.g.*, *Insurance*, Fitch Ratings, https://www.fitchratings.com/criteria/insurance.

state guaranty associations ("SGAs"). SGAs employ multilayered, structural protections to ensure the adequate funding of benefits in the event of a default, with funds raised from insurer assessments on collected premiums and the assertion of subrogation rights in any insolvency proceeding.[8] In over thirty years, no retiree has lost any benefits with SGAs acting as sureties.[9] By contrast, the backstop for ERISA plans is the federally chartered Pension Benefit Guaranty Corporation ("PBGC"). The PBGC is not backed by the full faith and credit of the federal government.[10] A recent study of 500 corporate pensions taken over by the PBGC showed that 16% of retirees saw a cut in benefits, with an average loss of $222,000 per beneficiary.[11]

C. Lockheed Martin's Plans

The partial buyout PRTs at issue here involve two Lockheed Martin pension plans, the Lockheed Martin Corporation Salaried Employee Retirement Program and the Lockheed Martin Aerospace Hourly Pension Plan. *See* Compl. ¶¶ 1, 9, 10.

D. Athene

Athene is a retirement services company that, as Plaintiffs put it, "is one of the leading players in the PRT market." Compl. ¶ 47. It has completed over $50 billion in PRT transactions covering over half a million former pension plan participants. *Id.* Athene "maintains surpluses to ensure [its] long-term solvency." *Id.* at ¶ 52. As of July 2023, Athene had "nearly two million

---

[8] *How Coverage Is Funded*, Nat'l Org. of Life and Health Ins. Guaranty Ass'ns, https://www.nolhga.com/policyholderinfo/main.cfm/location/insolvencyprocess#funding.

[9] *Statement of the 2023 Advisory Council on Employee Welfare and Pension Benefit Plans to the U.S. Department of Labor Regarding Interpretive Bulletin 95-1* (Aug. 29, 2023) at No. 11 ("Statement of the 2023 Advisory Council"), https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/statement-regarding-interpretive-bulletin-95-1.

[10] *See* Stimulus Oversight and Government Spending, Committee on Oversight and Government Reform, 112 Cong. (2011) (Testimony of Vincent K. Snowbarger) https://www.pbgc.gov/news/testimony/page/tm062011.

[11] *PBGC's Single-Employer Guarantee Outcomes: May 2019*, PBGC, https://www.pbgc.gov/sites/default/files/2016-single-employer-guaranty-study.pdf.

policyholders" for its insurance products.[12] And it has received an "A+" credit rating from S&P and Fitch, an "A1" rating from Moody's, and an "A" from AM Best.[13]

With respect to the particular annuities at issue here, Athene provides layers of protection for a participant in a group annuity contract that are as or more robust than those in a defined-benefit pension plan.[14] These protective layers include assets backing reserves that fully fund liabilities for these annuities, further mandated regulatory capital to draw upon if need be, and reinsurance protection.[15] By contrast, corporate pensions may not have fully funded plan assets, are not subject to capital requirements, and need not have any reinsurance.[16] The assets backing Plaintiffs' annuities are also "ring-fenced" at Athene, meaning that they are insulated from any of Athene's general liabilities.[17]

E. Plaintiffs' Complaint

Plaintiffs Bruce Konya, Simon Shiff, Stephen Schwarz, and Diana Vasquez filed this action against Lockheed Martin on March 13, 2024. Plaintiffs seek relief under three theories:

First, Plaintiffs allege that Lockheed Martin breached its fiduciary duty with respect to the plans by engaging in PRTs with Athene. Compl. ¶¶ 68-74. They do not allege any details of the process. Instead, they point to IB 95-1 and claim, "[o]n information and belief," that Lockheed Martin "selected Athene not because doing so was in the interest of participants, their beneficiaries, and the security of their retirement benefits, but to save the company money and enhance corporate profits." *Id.* at ¶ 72. Plaintiffs also do not claim that they have lost any benefits. Instead, they aver generally that their harm "includes an increased and significant risk

---

[12] Ltr. from Sean Brennan to Christine Donahue, ERISA Advisory Council at 2 (July 10, 2023), https://retirementincomejournal.com/wp-content/uploads/2023/07/Athene-Part-1-Sean-Brennan.pdf.

[13] *Id.*

[14] *The Plan Sponsor's Guide to Pension Risk Transfer*, Pensions & Investment, https://www.pionline.com/pension-risk-transfer-guide.

[15] *Id.*; Ltr. from Sean Brennan to Christine Donahue, *supra* n.12 at 1, 2, 8.

[16] *See The Plan Sponsor's Guide to Pension Risk Transfer*, Pensions & Investment, https://www.pionline.com/pension-risk-transfer-guide.

[17] *See id.*

that they will not receive the benefit payments to which they are entitled and a decrease in value of their pension benefits due to the uncompensated risk." *Id.* at ¶ 73.

Second, Plaintiffs allege that Lockheed Martin engaged in prohibited transactions under ERISA. Compl. ¶¶ 75-83. Their general theory is that Athene was a "party in interest" because it had provided services to the plans, *id.* at ¶ 79, and that Athene "received more than reasonable compensation for its services" because of the "substantial risk that Athene's retention posed to participants' retirement benefits," *id.* at ¶ 80.

Third, Plaintiffs allege that Lockheed Martin failed to monitor other fiduciaries in selecting Athene. Compl. ¶¶ 84-88. They claim that, had Lockheed Martin properly monitored the process, either "Athene would have been rejected in favor of the safest annuity possible" or Lockheed Martin "would have decided not to proceed with the transactions." *Id.* at ¶ 88.

ARGUMENT

"The party invoking federal jurisdiction bears the burden" to establish the "three elements" of standing: injury-in-fact, traceability, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The injury must be an "invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 561 (quotations omitted). And "there must be a causal connection between the injury and the conduct complained of." *Id.* (quotations omitted).

If there is jurisdiction, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The "plausibility" standard is met only when a complaint alleges "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "[T]hread-bare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

In deciding whether a complaint will survive a motion to dismiss, a court evaluates the complaint in its entirety, as well as documents attached to or incorporated into the complaint. *E.g.*, *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011); *see also Phillips v. LCI Int'l Inc.*, 190 F.3d 609, 618 (4th Cir. 1999) (noting that "a court may consider [a document outside the complaint] in determining whether to dismiss the complaint" where the document "was integral to and explicitly relied on in the complaint" and there is no authenticity challenge). The Court may also "properly take judicial notice of matters of public record." *Bowman v. Jack Cooper Transp. Co.*, 399 F. Supp. 3d 447, 451 (D. Md. 2019).

I. This Court Lacks Jurisdiction Under Rule 12(b)(1).

Plaintiffs' claims must be dismissed for failure to satisfy the minimum requirements of Article III. At the pleading stage, Plaintiffs have an obligation to allege facts demonstrating that they have suffered a concrete injury-in-fact that is fairly traceable to the challenged conduct and that is likely to be redressed by a favorable judicial decision. But Plaintiffs cannot establish the requisite injury-in-fact when they have received—and are receiving—all the benefits due to them. Although they claim that there is "significant risk that they will not receive the benefit payments to which they are entitled," Compl. ¶ 4, their theory is based on the occurrence of a highly attenuated chain of events that is far from imminent. At the very least, their speculative claims are unripe. And they premise some of their claims on sections of ERISA that by their plain language do not encompass former participants like Plaintiffs.

A. Plaintiffs must show that they satisfy Article III's standing requirements.

The Constitution limits the type of cases appropriate for adjudication in the federal courts. Article III provides those courts "'jurisdiction only over cases and controversies,' and standing is 'an integral component of the case or controversy requirement.'" *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011) (quoting *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006)). When confronted with a Rule 12(b)(1) standing challenge, the "plaintiff has the burden of proving that subject matter jurisdiction exists." *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). Plaintiffs cannot do so here.

To establish "the irreducible constitutional minimum of standing" at the pleading stage, *Lujan*, 504 U.S. at 560, Plaintiffs must "clearly . . . allege facts demonstrating" that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision," *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). An "injury in fact" is " 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Id.* at 339 (quoting *Lujan*, 504 U.S. at 560). The injury must be "legally and judicially cognizable," and the dispute one that "is traditionally thought to be capable of resolution through the judicial process." *United States v. Texas*, 599 U.S. 670, 676 (2023) (quotations omitted). And the injury must "actually exist"; that is, it must be "real, and not abstract." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021). Put simply, "federal court[s] may resolve only a real controversy with real impact on real persons." *Id.* (quotations omitted).

Plaintiffs cannot simply point to a federal statute and call it a day. Under a long line of binding precedent, a statutory violation, standing alone, is insufficient to show constitutional injury-in-fact. For Article III standing purposes, only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue over that violation. *See, e.g.*, *TransUnion*, 594 U.S. at 426 ("Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III."); *Spokeo*, 578 U.S. at 341 ("Article III standing requires a concrete injury even in the context of a statutory violation.").

The requirement to show an actual concrete injury beyond a mere statutory violation applies with full effect to ERISA claims. As the Supreme Court succinctly put it: "There is no ERISA exception to Article III." *Thole*, 590 U.S. at 544, 547 (rejecting the argument that

ERISA affords "participants in a defined-benefit plan [] a general cause of action to sue for restoration of plan losses and other equitable relief"). That is, courts have "subject matter jurisdiction over ERISA claims only where the [plaintiffs] have both statutory *and* constitutional standing." *David*, 704 F.3d at 338; *accord, e.g.*, *Winsor v. Sequoia Benefits & Ins. Servs. LLC*, 62 F.4th 517, 528-29 (9th Cir. 2023); *Lee*, 837 F.3d at 530.

B. Plaintiffs cannot meet their burden to show a constitutionally cognizable injury-in-fact.

Plaintiffs fail to meet their burden under Article III. They do not allege that they have suffered—or will imminently suffer—*any* loss of benefits. Instead, their allegations demonstrate, at most, an inchoate fear about PRTs and Athene's fiscal management going forward. That is insufficient to establish constitutional injury-in-fact.

Plaintiffs devote much of their complaint to a highly generalized attack on the use of PRTs writ large. Compl. ¶¶ 27-45. They complain, for instance, about what they call "an industry-wide uptick in employers seeking to reduce their pension funding risk through [PRTs]." *Id.* at ¶ 27. Among other things, they say PRTs "remove PBGC premium obligations," which "poses a funding risk to the PBGC and therefore threatens the level of protection applied to plans still protected by the PBGC," *id.* at ¶ 31—in other words, plans other than theirs. And they discuss at length their concerns that PRTs have attracted outside investment, including from private equity firms. *Id.* at ¶¶ 42-44. This, they say, has led some "lawmakers and industry experts" to express "concern," *id.* at ¶ 44–but, it seems, has not led to any congressional action to limit PRTs. Very little of that discussion has anything to do with Lockheed Martin, Athene, or Plaintiffs. And none of it even attempts to establish an actual, concrete injury specifically suffered by Plaintiffs.

Plaintiffs go on to speculate that, at some untold point in the future, Athene may not have the resources to pay benefits because of its corporate ownership structure and (Plaintiffs imply) because of the history of companies that have some attenuated connection to Athene's owner, Apollo Global Management. Compl. ¶¶ 46-56. But that, too, is insufficient to establish injury. Plaintiffs never allege that they have received anything less than their full benefits; and their claimed risk of default impermissibly rests on the unlikely occurrence of an attenuated series of events.

The Supreme Court's decision in *Thole* effectively decides this case. In *Thole*, the Court held that allegations that a defined-benefit plan is currently underfunded were insufficient to satisfy Article III's injury requirement. 590 U.S. at 542-46. The Court did so despite allegations that the underfunding "substantially increased the risk that the plan and the employer would fail and be unable to pay the participants' future pension benefits." *Id.* at 546. The reasoning in *Thole* echoes that reached by courts of appeals in ERISA challenges brought by participants in defined-benefit plans, including the Fourth Circuit. *See David*, 704 F.3d at 338 (rejecting arguments that pension plan participants had Article III standing because the alleged "risk that . . . pension benefits will at some point in the future be adversely affected as a result of the present alleged ERISA violations is too speculative to give rise to Article III standing"); *Lee*, 837 F.3d at 546 (same with respect to a plan left only 66% funded due to alleged fiduciary mismanagement).

The *Thole* Court's holding rests on what it called "a simple, commonsense reason"—that the plaintiffs had "received all of their vested pension benefits so far, and they are legally entitled to receive the same monthly payments for the rest of their lives." 590 U.S. at 547. They had "not sustained any monetary injury." *Id.* at 540.[18] And their entitlement to future benefits

[18] The Fourth Circuit's decision in *Peters v. Aetna Inc.*, 2 F.4th 199 (4th Cir. 2021), does not undercut this requirement. In the context of addressing ERISA claims involving a self-funded *healthcare* plan, the court included *dicta* suggesting that a plaintiff may be able to seek equitable relief on a breach-of-fiduciary-duty claim even without suffering financial loss. *Id.* at 219-21. That observation was unnecessary to its holding, because the court was "persuaded that Peters suffered a financial injury sufficient to establish an injury-in-fact for the purpose of Article III standing." *Id.* at 218. Moreover, *Peters* never addressed *Thole* and premised its *dicta* on pre-*Thole* circuit case law. *See id.* at 219-21; *see also Winsor*, 62 F.4th at 528-29 (noting that *Peters* "found Article III standing based on the plaintiffs' 'financial' injury" and "did not address *Thole*"). And a later panel found *Peters* inconsistent with yet another of the Supreme Court's earlier ERISA decisions about equitable remedies and held *Peters* abrogated on that basis. *See Rose*, 80 F.4th at 504 (discussing *Montanile v. Bd. of Trs. of the Nat'l Elevator*

remained the same "regardless of how well or poorly the plan is managed." *Id.* at 543. As a result, the Court concluded, "plaintiffs have no concrete stake in th[e] dispute and therefore lack Article III standing." *Id.* at 547.

The Court's holding in *Thole* is not limited to the precise facts before it. Courts—including this Court—have employed it broadly to emphasize the need for plaintiffs to show that actual loss is imminent to meet Article III standing requirements. *See Fitch v. Maryland*, 2020 WL 5362097, at *4 (D. Md. Aug. 25, 2020) (Messitte, J.) (applying *Thole* by analogy to claims alleging that defendants improperly diverted funds from a post-retirement prescription drug benefit plan because "Plaintiffs here concede they have received the prescription drug benefits they say they are entitled to, and the State will be obliged to continue to fund these benefits if the Court ultimately finds Plaintiffs have a contractual right to them, regardless of the source of funding").

In any event, Plaintiffs' allegations here are even farther from the line than those in *Thole*. After all, in *Thole*, Plaintiffs could at least substantiate their risk-of-default argument by pointing to "$750 million in losses that the plan allegedly suffered." 590 U.S. at 541. That was still not enough to show injury. *Id.* at 547. Here, by contrast, Plaintiffs do not even do that: They never allege that anyone has suffered losses as a result of a PRT to Athene. By all accounts, their annuities are fully funded, and they continue to receive their full benefits.

Plaintiffs' claim that having an annuity with Athene nonetheless presents an inherent concrete risk is belied by their own complaint and the documents they reference in it. *See* Compl. ¶¶ 47 & n.42, 52. Among other things, Athene: (1) is one of the leading insurance companies in the pension risk transfer market, having completed over 47 pension risk transfer

---

Indus. Health Benefit Plan, 577 U.S. 136 (2016)). And, in any event, the Supreme Court's subsequent decision in *TransUnion* cleared away any doubt that a statutory provision is no substitute for constitutional injury-in-fact. 594 U.S. at 426.

transactions valued at $51 billion;[19] (2) has been in business for well over a decade;[20] (3) is solvent;[21] (4) has an investment portfolio that is highly rated by the National Association of Insurance Commissioners;[22] and (5) has an A+ credit rating.[23] Thus, not only do Plaintiffs not point to any loss in their benefits—which alone is sufficient to foreclose their claim—but Plaintiffs' allegations undercut any idea that losses might be just around the corner.

Plaintiffs' speculation that they might suffer an injury at some untold point in the future also ignores the multiple layers of protection in place before any hypothetical problems at Athene would result in a failure to pay benefits to Plaintiffs. Together, these layers protect against the risk of default to Athene's annuity holders. Before any harm would materialize, a series of events would have to transpire:

- Athene would first have to exhaust its ability to draw down the plan assets transferred to it as part of the PRT. *See* Compl. ¶¶ 57-59. Plaintiffs never allege that these assets are insufficient to cover their benefits. And the assets are "ring-fenced" in a separate account, insulating them from any general liabilities at Athene.[24]
- In the event that the PRT assets in the separate account would be insufficient to cover benefit liabilities, Athene could draw on additional assets in its general account.[25]
- Athene would also be entitled to payments from reinsurers for the portion of the annuity liabilities for which it has purchased reinsurance.[26] And because the PRT assets are "ring fenced" in a separate account, they remain on Athene's balance sheet and are not

[19] *Pension Group Annuities*, Athene, https://www.athene.com/pension-group-annuities (cited at Compl. ¶ 47). The numbers have been updated based on the source cited in Plaintiffs' complaint.

[20] Compl. ¶ 46.

[21] *Id.* at ¶ 52.

[22] *Id.* at ¶ 48 n.44 (citing *Home Page*, Athene Life Re, https://www.athenelifere.bm/).

[23] *Id.*

[24] *The Plan Sponsor's Guide to Pension Risk Transfer*, Pensions & Investment, https://www.pionline.com/pension-risk-transfer-guide.

[25] *Id.*

[26] *Athene Life Re Overview*, https://www.athenelifere.bm/about/athenelifere-overview/.

transferred to any reinsurers, whether in the U.S. or offshore—contrary to Plaintiffs' suggestion. *See, e.g.*, Compl. ¶ 48.

- If that were to prove insufficient, Athene would be able to raise funds on credit markets. Plaintiffs tacitly concede that this would be a readily available option, given Athene's A+ credit rating.[27]
- And if all of that were to prove insufficient and Athene went into default, state guaranty associations would provide backstops to protect Plaintiffs' benefits. Like the PBGC, these state guaranty associations are primarily funded by industry participants. *See* Compl. ¶¶ 31-32.

Before Plaintiffs would lose any benefits, *every layer* of protection would have to fail. But Plaintiffs do not allege that even a *single* one of these layers has failed.

Instead, Plaintiffs largely direct their ire at the removal of PBGC protections—but that is true for every PRT. Compl. ¶¶ 30-32. No court has ever suggested that a PRT, standing alone, constitutes an injury under ERISA. In any event, Plaintiffs project a faulty image of the PBGC as the *sine qua non* of pension guarantees, employing what they say is "one standard limit" for benefit protection, in contrast to state-guaranty protections of varying limits. Compl. ¶ 32. The PBGC's protections are anything but standard. The PBGC applies a payment cap on an eligible pensioner's benefits according to a formula that varies widely across participants: The *difference* in maximum monthly benefits between someone who retired early and someone who retired late is nearly $20,000 per month.[28] And even these varied protections are not entirely risk free. The PBGC is no stranger to underfunding problems, as reflected in its large annual budget deficits. For example, as recently as 2019, it had a deficit of $65.2 billion.[29] A recent

[27] *Athene Life Re Key Facts*, https://www.athenelifere.bm/about/key-facts.

[28] *Maximum Monthly Guarantee Tables*, PBGC, https://www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee.

[29] *PBGC Releases FY 2019 Annual Report*, PBCG (Nov. 18, 2019), https://www.pbgc.gov/news/press/releases/pr19-12.

PBGC study "showed $8.5 billion of participant losses."[30] By contrast, in the last thirty years, "no one has lost a penny under a PRT annuity" with state guaranty backstops.[31]

This case has all the hallmarks of insufficient constitutional injury. Plaintiffs' theory of harm is dependent on an "attenuated chain of possibilities," which "does not satisfy the requirement that threatened injury must be certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). These multiple layers of protection render the risk that "pension benefits will at some point in the future be adversely affected . . . too speculative to give rise to Article III standing." *David*, 704 F.3d at 338.[32] In short, Plaintiffs have no present injury. They are receiving their benefits. And whether they were to win or lose this case, they "would still receive the exact same monthly benefits that they are already slated to receive." *Thole*, 590 U.S. at 541.

C. Plaintiffs' claims are unripe.

Plaintiffs' claims fail for the additional reason that they are unripe. "The ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (quoting *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57 n.18 (1993)). Two factors govern ripeness considerations: "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration" until future events transpire. *Id.*; *accord, e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010). Whether as a matter of Article III or prudence, Plaintiffs should not be allowed to press these claims at this time.

---

[30] Statement of the 2023 Advisory Council, *supra* n.9, at No. 11.

[31] *Id.*

[32] *See also, e.g.*, *Thole*, 590 U.S. at 546 n.2 (observing that the existence of backstop protections reduces the risk of harm "[e]ven if a defined-benefit plan is mismanaged into plan termination"); *Lee*, 837 F.3d at 545 (reasoning that two layers of protection—employer funding obligations and a statutory guarantee—meant that ERISA claims were too "attenuated" to constitute an "imminent risk of default by the plan" sufficient to show Article III injury).

Plaintiffs' complaint is a textbook example of claims unfit for present judicial resolution. As discussed, Plaintiffs' theory of injury rests on an attenuated chain of events that has yet to transpire and whose occurrence is far from certain or even imminent. Ripeness is "peculiarly a question of timing." *Anderson v. Green*, 513 U.S. 557, 559 (1995) (per curiam). And a claim is "not ripe for adjudication" when, like here, "it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotations omitted).

Nor would any hardship result from adjudication at a later time, in the event any of the problems Plaintiffs theorize actually were to become imminent or materialize. The ripeness doctrine "reflects a judgment that the disadvantages of premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of . . . postimplementation litigation." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735 (1998).

D. Plaintiffs' claimed jurisdictional basis is lacking.

Finally, Plaintiffs claim that the Court has subject-matter jurisdiction because their action is "brought under 29 U.S.C. § 1132(a)(2), (a)(3), and (a)(9)." Compl. ¶ 6; *see also id.* at ¶ 7 (similarly pointing to those provisions for support that their "injuries may be redressed by this Court.") But two of those provisions are inapplicable on their face because, as the complaint alleges, Plaintiffs are *former* participants in the plans. *Id.* at ¶¶ 13-16.

Section 1132(a)(2) claims can only be brought "by the Secretary, or by a participant, beneficiary or fiduciary." 29 U.S.C. § 1132(a)(2). Similarly, Section 1132(a)(3) claims can only be brought "by a participant, beneficiary, or fiduciary." *Id.* § 1132(a)(3). Plaintiffs are none of the above. They were participants and beneficiaries in the plans, but they are no longer.[33] *See, e.g.*, Compl. ¶ 13 ("Bruce Konya . . . *was* a participant in the Salaried Plan under

[33] Under ERISA, "participant" means "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose

29 U.S.C. § 1002(7).") (emphasis added); *see also id.* at ¶¶ 14-16 (same). Indeed, elsewhere in their complaint, Plaintiffs recognize that they have "lost their status as 'participants' in the ERISA governed Plans and consequently are no longer subject to the statute's protections for employee retirement benefits." Compl. ¶ 3.

Only Section 1132(a)(9) applies to those like Plaintiffs who were but are no longer participants in an ERISA plan. It allows "an individual who was a participant or beneficiary at the time of the alleged violation" to seek relief in the specific scenario at issue here—"the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan." 29 U.S.C. § 1132(a)(9). It also expressly limits the remedy to "appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts." *Id.* That section provides the sole basis upon which Plaintiffs may bring this suit—and, crucially, excludes Plaintiffs' vague request for "disgorgement of all sums derived from the improper transactions." Compl. ¶ 31. *See Rose v. PSA Airlines, Inc.*, 80 F.4th 488, 494 (4th Cir. 2023) (discussing disgorgement as relief available under Section 1132*(a)(3)*).

II. Plaintiffs' Claims Fail Under Rule 12(b)(6).

Plaintiffs' claims fare no better under Rule 12(b)(6). Their complaint is devoid of facts necessary to show that Lockheed Martin is the relevant fiduciary here, let alone that Lockheed Martin breached a duty it owed to Plaintiffs that caused them harm. At best, their allegations amount to nothing more than "conclusory statements" that merely "recit[e] the elements of a cause of action," and cannot survive a motion to dismiss. *Iqbal*, 556 U.S. at 678.

beneficiaries may be eligible to receive any such benefit." 29 U.S.C § 1002(7). The term "beneficiary" means "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." *Id.* § 1002(8). Here, the named plaintiffs are not only former employees, they are also *former participants*. *See also* 29 C.F.R. 2510.3-3(d)(2)(ii) ("An individual is not a participant covered under an employee pension plan or a beneficiary receiving benefits under an employee pension plan if . . . [t]he entire benefit rights of the individual . . . [a]re fully guaranteed by an insurance company.").

A. Plaintiffs fail to state a claim for breach of fiduciary duty.

Plaintiffs allege that Lockheed Martin breached its fiduciary duty by engaging in PRTs of plan assets with Athene as the annuity provider. Compl. ¶¶ 68-74. They assert that, based on "objective criteria and relative to other providers in the market," Lockheed Martin failed to select the "safest annuity available," and that Lockheed Martin selected Athene as its annuity provider solely to "enhance corporate profits." *Id.* at ¶ 72. But Plaintiffs' threadbare, conclusory allegations do not plausibly raise an inference of fiduciary misconduct. In fact, to the extent the complaint engages in any detail, it shows just the opposite—a lawful PRT with a well-established leader in the PRT market fully in keeping with industry standards.

1. Plaintiffs do not sufficiently allege breach.

Plaintiffs do not allege any facts showing that Lockheed Martin acted as the relevant fiduciary selecting Athene. Under ERISA, "[a] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). Thus, a fiduciary's duties are limited to the extent "it retains or exercises any discretionary authority over the management or administration of a plan."[34] *Coyne & Delany Co.*, 98 F.3d at 1465 (quoting 29 U.S.C. § 1002(21)(A)).

The complaint entirely fails to explain how Lockheed Martin acted in a fiduciary capacity with respect to Plaintiffs' claims. *See* Compl. at ¶ 69 (alleging only that Lockheed Martin "acted as a 'fiduciary' as defined by ERISA with respect to the Plans and transactions

[34] For example, a company's 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 *limited* to the selection and retention of fiduciaries." 29 C.F.R. § 2509.75-8 (emphasis added).

at issue"); *see also id.* ¶ 60 (alleging that "Lockheed Martin failed to lawfully discharge its duties in selecting Athene"). Plaintiffs include no supporting allegations that Lockheed Martin served as the fiduciary that selected Athene. Without sufficient allegations connecting Lockheed Martin to the alleged breach, Plaintiffs' claim necessarily fails as a matter of law.

Courts have routinely dismissed ERISA actions for precisely this kind of failure to include specific allegations about the defendant's fiduciary status with regard to the alleged misconduct, and the Fourth Circuit has affirmed. *See, e.g.*, *Custer v. Sweeney*, 89 F.3d 1156, 1163 (4th Cir. 1996) (affirming dismissal of complaint for lacking "any specific allegations" regarding fiduciary status); *Paasch v. Nat'l Rural Elec. Coop. Ass'n*, 177 F. Supp. 3d 930, 939 (E.D. Va. 2016) ("[I]t is appropriate for a court to dismiss a claim for breach of fiduciary duty when, as here, the plaintiff has failed to sufficiently allege the party's fiduciary status.").

Moreover, plan fiduciaries must engage in a prudent *process* when making decisions affecting the plan. *See, e.g.*, *Tatum*, 761 F.3d at 356 ("Our focus is on whether the fiduciary engaged in a reasoned decision[-]making process, consistent with that of a 'prudent man acting in [a] like capacity.'") (quotations omitted). Thus, "where a plaintiff fails to allege facts about a defendant fiduciary's decision-making process, the claim may survive only if there are enough circumstantial factual allegations to allow the court to reasonably infer the process was flawed." *Ferguson v. Ruane Cunniff & Goldfarb Inc.*, 2019 WL 4466714, at *5 (S.D.N.Y. Sept. 18, 2019) (citing *PBGC ex rel. St. Vincent's Catholic Med. Ctrs. Retirement Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 718 (2d Cir. 2013)); *accord, e.g.*, *Kendall v. Pharm. Prod. Dev., LLC*, 2021 WL 1231415, at *4 (E.D.N.C. Mar. 31, 2021). Here, Plaintiffs' complaint says nothing that could even remotely substantiate a plausible inference of breach by Lockheed Martin as a result of these PRTs. Plaintiffs are entirely silent about the process. Their only attempt to describe process is found where they simply list factors that fiduciaries must consider under DOL's guidance on PRTs, Interpretive Bulletin 95-1. Compl. ¶ 41.

But parroting the 95-1 factors does not state a claim for breach of fiduciary duty under ERISA. For one thing, the Fourth Circuit has squarely rejected Plaintiffs' oft-repeated assertion, based on those factors, that a fiduciary has an ERISA duty to select the "safest annuity available." Compl. ¶¶ 21, 40, 60, 71, 72. In *Riley v. Murdock*, the court declined to "adopt a standard that an ERISA fiduciary must select the safest available annuity to assure payment of the benefits that a plan promises to its participants," and noted that "no federal court has adopted such a standard." 1996 WL 209613, at *1; *accord, e.g.*, *Bussian*, 223 F.3d at 298 ("[W]e are not persuaded that [ERISA] § 1104(a) imposes on fiduciaries the obligation to purchase the 'safest available annuity' in order to fulfill their fiduciary duties."). And, in any event, Plaintiffs do not contend that the 95-1 factors were not considered here. Instead, they ask the Court to infer that the process must have been imprudent, without any allegations to back that up. The Court should decline to do so. *See, e.g.*, *Iqbal*, 556 U.S. at 678 ("[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.") (citing *Twombly*, 550 U.S. at 556).

2. Plaintiffs do not sufficiently allege harm.

Plaintiffs also fail to make a sufficient showing of harm from any breach.

First, for all of Plaintiffs' complaints about PRTs in general (*see, e.g.*, Compl. ¶¶ 23-38), those actions are lawful settlor functions. In fact, "[i]t is well established in this Court's cases that an employer's decision whether to terminate an ERISA plan is a settlor function immune from ERISA's fiduciary obligations." *Beck*, 551 U.S. at 101; *accord, e.g.*, *Hughes*, 525 U.S. at 444 (describing "decision[s] regarding the form or structure" of a plan as settlor functions); *Lee*, 837 F.3d at 537 ("We consider the decision to transfer pension assets outside ERISA coverage as a sponsor decision immune from fiduciary obligations. . . . [T]he decision to amend a pension plan concerning the composition or design of the plan [is] a settlor function, immune from fiduciary strictures."). Thus there is no legal basis for Plaintiffs' repeated suggestions that PRTs are themselves somehow *per se* unlawful under ERISA. *See* Compl. ¶¶ 30-32, 42-45, 88.

Second, Plaintiffs' complaint is also devoid of any allegations substantiating a plausible inference of harm as a result of these specific PRTs. Instead, Plaintiffs merely speculate that there is a greater risk that they might at some point in the future lose their funds. *See* Compl. ¶ 7. Just as Plaintiffs cannot show injury, they do not sufficiently allege harm resulting from any breach. *See* pp.13-16, *supra* (discussing the attenuated series of events that would have to occur before Plaintiffs' benefits would be at risk, the many layers of protection around insurance company annuities, and well-publicized PBGC inadequacies).

Third, Plaintiffs yet again simply state a conclusion—that "Lockheed Martin received an economic benefit from the selection of Athene in the form of reduced premium payments relative to what it would have paid to an established and reputable insurance provider." Compl. ¶ 61. Not only is the allegation that Athene is not "an established and reputable insurance provider" conclusory, it is belied by Plaintiffs' own complaint. Just paragraphs earlier, Plaintiffs concede that "Athene is one of the leading players in the PRT market" that has been around for well over a decade and completed dozens of transactions worth billions of dollars. *Id.* at ¶ 47. To say that a "leading player in the PRT market" is not "established" or "reputable" defies common sense. *Cf. Iqbal*, 556 U.S. at 663-64 (2009) (counseling a reviewing court to "draw on its experience and common sense" when assessing the plausibility of allegations).

That leaves the second part of Plaintiffs' theory—Lockheed Martin's supposed "economic benefit" of going with the insurance provider with "reduced payment premiums" instead of a provider like Prudential. Compl. ¶ 62. In essence, Plaintiffs allege that Lockheed Martin received an improper economic benefit because Athene's services allegedly cost less than that of some other insurance providers. *See id.*

But even taking the allegation that Lockheed Martin selected Athene as true for purposes of this motion, nothing in ERISA obligates fiduciaries to choose one particular insurance provider, provided others satisfy ERISA's obligations. *See, e.g.*, *Lee*, 837 F.3d at 540 (discussing how "a fiduciary satisfies ERISA's obligations if, based upon what it learns in its investigation, it selects an annuity provider it 'reasonably concludes best to promote the interests of [the plan's] participants and beneficiaries'") (quotations omitted); *see also Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006) ("ERISA does not impose a duty to take any particular course of action if another approach seems preferable.") (quotations omitted). As Plaintiffs note, many current Lockheed Martin employees remain in the company's retirement plans. *See* Compl. ¶ 64. And as Plaintiffs' own sources explain, selecting one of the "safest annuity providers" available, which also is provided at a reasonable cost, benefits both those participants transferred out of the plans and those who remain in the plans.[35] Plaintiffs' suggestion that Lockheed Martin could satisfy its fiduciary obligations only by choosing the most expensive insurance provider for any PRT would risk Lockheed Martin running afoul of its obligation to those remaining in the plans not to incur unreasonable expenses in operating the plans. This is not a hypothetical concern. *See, e.g.*, *Lee*, 837 F.3d at 540-41 (discussing competing claims from plan transferees and those remaining in the plan premised in part on allegations of incurring unreasonable expenses).

Finally, Plaintiffs do not marshal any plausible allegations to support their conclusory assertion that a prudent fiduciary would not have engaged in a PRT at all or a PRT with Athene in particular. Even if Lockheed Martin were the relevant fiduciary here, Plaintiffs' allegations would still have to support a plausible inference that Lockheed Martin's fiduciary processes were out of step with those of "prudent [fiduciaries] acting in a like capacity . . . in the conduct

---

[35] *See* Compl. ¶ 55 (quoting David Eichorn, *Pension Risk Transfers (PRT) May Be Transferring Risk to Beneficiaries*, NISA (2022), https://www.nisa.com/perspectives/pension-risk-transfers-prt-may-be-transferring-risk-to-beneficiaries/).

of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B)—*i.e.*, the actions of its peers. *See, e.g.*, *Sweda v. Univ. of Pa.*, 923 F.3d 320, 331 (3d Cir. 2019) ("[W]e employ a holistic approach, considering all of Sweda's well-pleaded factual allegations . . . and practices of similarly situated fiduciaries, to determine whether her allegations plausibly demonstrate entitlement to relief."). Plaintiffs not only fail to do so but, if anything, their allegations show that the decision to institute these PRTs with Athene was in line with those of Lockheed Martin's peers, in full conformity with ERISA. *See, e.g.*, Compl. ¶¶ 47, 64.

As discussed above (*supra* at pp.4-5), PRTs are not new. Plaintiffs repeatedly invoke IB-95-1, which as the name suggests, DOL issued back in 1995. Compl. ¶¶ 21, 34, 39-41. And Plaintiffs concede that PRTs are a popular tool for dealing with old defined-benefit plans—discussing "an industry-wide uptick" in the practice and claiming that the PRT market has "exploded." *Id.* at ¶¶ 27, 29. Yet in all this time, and despite the explosive popularity of PRTs, no court has held that engaging in a PRT constitutes some sort of *per se* ERISA violation. Plaintiffs, moreover, highlight Athene's significant market share of PRTs. *See id.* at ¶ 47. And they label it a "trend" for "employers [to] select[] the lowest cost annuity" in partial PRT buyouts, adding that "employers choose the lowest cost annuity in 78% of partial buyout transactions." *Id.* at ¶ 64. Taking these allegations as true for the purpose of a motion to dismiss, they situate Lockheed Martin's conduct well within those of its peers.

3. Plaintiffs do not sufficiently allege causation.

Finally, Plaintiffs have failed sufficiently to allege that any breach of a fiduciary duty by Lockheed Martin *caused* them harm. At least until they show breach and loss, they retain the burden of proof on causation. *E.g.*, *Tatum*, 761 F.3d at 363 (discussing the burden-shifting framework). As discussed above, Plaintiffs have not made that antecedent showing.

Among other things, Plaintiffs fail to plausibly allege that Lockheed Martin served as the relevant fiduciary here, let alone that any breach of duty resulted from the PRT decisions.

Under ERISA, only "a fiduciary who breaches his duties shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." *Plasterers' Loc. Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 217 (4th Cir. 2011) (quoting 29 U.S.C. § 1109(a)). Without sufficient allegations to show breach, the burden does not shift to a defendant to show that the breach did not cause the loss. *Tatum*, 761 F.3d at 363.

B. Plaintiffs' prohibited-transactions claim fails.

In addition to alleging that the Athene transactions breached Lockheed Martin's fiduciary duties, Plaintiffs also allege that they constituted "prohibited transactions" under Sections 406(a) and (b) of ERISA. Compl. ¶¶ 75-83.

1. Plaintiffs do not state a claim under Section 406(a).

As relevant here, Section 406(a) categorically prohibits transactions between a plan and a "party in interest" involving the "sale or exchange, or leasing, of any property" (29 U.S.C. § 1106(a)(1)(A)); the "furnishing of goods, services, or facilities" (*id.* § 1106(a)(1)(C)); and the "transfer to, or use by or for the benefit of a party in interest, of any assets of the plan" (*id.* § 1106(a)(1)(D)). Plaintiffs allege that Lockheed Martin engaged in each when it "knowingly" caused the plans to engage in transactions with Athene, an alleged "party in interest" to the plans. Compl. ¶ 79. There are three elements to a Section 406(a) claim: "(1) the fiduciary causes (2) a listed transaction to occur (3) between the plan and a party in interest." *Sweda*, 923 F.3d at 335. Section 406(a) also has specific statutory exemptions. 29 U.S.C. § 1108.

Plaintiffs' claim under 406(a) fails for three reasons. As a threshold reason, Athene is not a party in interest to the plans. Second, the complaint does not allege that the transactions were intended to benefit *Athene*. Finally, even if the transactions were considered prohibited transactions, they are subject to several statutory exemptions.

i) Athene was not a "party in interest" to the plans.

ERISA defines "party in interest" as "a person *providing services* to [an employee benefit] plan." 29 U.S.C. § 1002(14)(b) (emphasis added). That section is the only basis for Plaintiffs' contention that Athene is a party in interest. Compl. ¶ 79. But Plaintiffs do not allege that Athene was "providing services" to the plans at the time the two challenged PRT transactions occurred, 29 U.S.C. § 1002(14)(B), nor is there anything in the complaint that suggests as much. On the contrary, Plaintiffs allege that Athene was selected in discrete, one-off transactions to *replace* the plans as the party responsible for paying future benefits to the putative class. Without allegations that Athene was providing services to the plan *at the time* of the alleged prohibited transaction, Athene is not a "party in interest" under Section 406(a). *See, e.g.*, *Lauderdale v. NFP Ret., Inc.*, 2022 WL 422831, at *21 (C.D. Cal. Feb. 8, 2022) ("At the time the flexPATH CITs were added to the plan, flexPATH was no longer the investment manager, and thus was not a party in interest . . . [and] those transactions do not support a section 406(a) claim."); *cf. Sweda*, 923 F.3d at 339 (finding vendors "parties in interest" only because they were providing services to the plan "*at the time* fees were paid") (emphasis added). The complaint's own description forecloses any contrary contention. *See* Compl. ¶ 79 ("Athene *was* a party in interest because it provided services to the Plans.") (emphasis added).

Nor do Plaintiffs allege that Athene had any pre-existing relationship with the plans. Simply entering into a transaction with a party does not make them a "party in interest" under Section 406(a). For example, the Tenth Circuit has rejected as "absurd" the notion that an "initial agreement with a service provider would simultaneously transform that provider into a party in interest." *Ramos v. Banner Health*, 1 F.4th 769, 787, (10th Cir. 2021). "ERISA [does not] open[] plan fiduciaries up to litigation merely because they engaged in an arm's length deal with a service provider. Instead, ERISA is meant to prevent fiduciaries from engaging in transactions with parties with whom they have pre-existing relationships, raising concerns of impropriety." *Id.*; *accord, e.g.*, *Cunningham v. Cornell Univ.*, 86 F.4th 961, 975 (2d Cir. 2023), *pet. for cert. filed*, Mar. 13, 2024 (No. 23-1007); *Albert v. Oshkosh Corp.*, 47 F.4th 570, 584-85 (7th Cir. 2022); *Sweda*, 923 F.3d at 336. Thus, Plaintiffs' claim fails to satisfy the third element of a Section 406(a) prohibited transaction claim.

ii) There are no allegations that the transactions were intended to benefit Athene.

To plausibly allege a violation of Section 406(a), a plaintiff must proffer factual allegations that support an element of intent to benefit a party in interest. "Congress adopted section 406(a) of ERISA to prevent plans from engaging in certain types of transactions that had been used in the past to benefit other parties at the expense of the plans' participants and beneficiaries." *Reich v. Compton*, 57 F.3d 270, 275 (3d Cir. 1995), *amended* (Sept. 8, 1995). For example, a plaintiff suing under Section 406(a)(1)(D) must allege that a fiduciary intended to benefit the party in interest (here, Athene) at participants' expense. *Sweda*, 923 F.3d at 339-40 (to state a claim under Section 1106(a)(1)(D), a plaintiff must allege the fiduciary had subjective intent to benefit a party in interest by the use or transfer of plan assets). Similarly, a plaintiff must plead "factual allegations that support an element of intent to benefit a party in interest" to state a prohibited-transaction claim under Section 406(a). But here, Plaintiffs include *no* allegations that the challenged transactions were intended to benefit Athene. For this reason, too, Plaintiffs' 406(a) claim fails.

iii) The transactions qualify for two statutory exemptions to Section 406(a).

Finally, even if Athene were a party in interest, Plaintiffs' Section 406(a) prohibited-transaction claims would fail because the alleged transactions fall within the safe harbor of Section 408(b). Section 408(b) exempts certain categories of transactions from Section 406—including, as relevant here, payments for transactions between a plan and a party in interest who "has or exercises any discretionary authority or control with respect to the investment of the plan assets involved in the transaction . . . solely by reason of providing services to the plan" *if* the plan "pays no more than adequate consideration." 29 U.S.C. § 1108(b)(17).

Plaintiffs do not plausibly allege that Lockheed Martin paid more than adequate compensation to Athene. They simply assert that "[t]he transactions at issue do not qualify for any exemption from the prohibitions of § 1106(a)." Compl. ¶ 80. But "it is not enough to allege that a fiduciary caused the plan to compensate a service provider for its services; rather, the complaint must plausibly allege that the services were unnecessary or involved unreasonable compensation." *Cunningham*, 86 F.4th at 968. Indeed, Plaintiffs plead that many other plans have similarly transacted with Athene (Compl. ¶ 47)—and thus have not stated a claim for a prohibited transaction with a party in interest.

Moreover, "[t]he purchase, with plan assets, of an insurance or annuity contract from an insurance company" is also exempt from Section 406. *See* 71 Fed. Reg. 5887, 5889 (Feb. 3, 2006). A contrary holding would create an irreconcilable tension with ERISA and IB 95-1: It would be absurd to conclude that what 29 U.S.C. § 1132(a)(9) expressly permits, and DOL has provided guidance on, constitutes a *per se* ERISA violation. *See Akkus v. Rocket Mortg., LLC*, 2024 WL 473733 at *4 (D. Md. Feb. 7, 2024) ("[C]ourts should avoid interpretations that would produce absurd results contrary to congressional intent.") (quotations omitted).

2. Plaintiffs do not state a claim under Section 406(b).

Plaintiffs also allege that Lockheed Martin violated Section 406(b) by using the plans' assets to purchase Athene annuities "instead of the safest available annuity," thereby increasing Lockheed Martin's "corporate profits" and "deal[ing] with the assets of the Plans in [its] own interest." Compl. ¶ 81. Section 406(b) prohibits plan fiduciaries from engaging in transactions that are "tainted by a conflict of interest and thus highly susceptible to self-dealing." *Cunningham*, 86 F.4th at 973 (quotations omitted); *Acosta v. WH Adm'rs, Inc.*, 449 F. Supp. 3d 506, 519 (D. Md. 2020) ("ERISA provides that a fiduciary may not 'deal with the assets of the plan in his own interest or for his own account.'"). To state a claim, a plaintiff must show that the fiduciary "deal[t] with the assets of the plan in his own interest or for his own account" or that the fiduciary, in his individual or in any other capacity, "act[ed] in any transaction involving the plan on behalf of a party . . . whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." *Walsh v. M-E-C Co.*, 2021 WL 1909904, at *3-4 (D.S.C. May 12, 2021) (quoting 29 U.S.C. § 1106(b)(1)).

The complaint contains no plausible, non-conclusory allegations of self-dealing. Plaintiffs allege that Lockheed Martin received an economic benefit from selecting Athene in the form of reduced premium payments relative to what it would have paid to another insurance provider. Compl. ¶ 62. In other words, Plaintiffs allege, Lockheed Martin benefitted from paying a lower price to Athene for the group annuity contracts than it would have paid to a "reputable insurance provider." *Id.* But the complaint simply asserts a conclusion that Lockheed Martin "pocketed" savings, without alleging any facts explaining why cost savings here would not have remained in the plans. *Id.* at ¶¶ 74, 83. In fact, public records show that the group annuity "contracts were purchased using assets from Lockheed Martin's master retirement trust," and therefore Lockheed Martin did not "pocket" any savings.[36] Nor do Plaintiffs allege that the transaction with Athene was anything but arm's length.

C. Plaintiffs similarly fail to state a claim for failure to monitor.

Finally, Plaintiffs append a bare-bones duty-to-monitor claim. Compl. ¶¶ 84-88. But that fails for the same reasons that Plaintiffs fail to state a claim for breach of fiduciary duty.

The duty to monitor is downstream of fiduciary status and breach of fiduciary duty. *See, e.g.*, *In re Constellation Energy Grp., Inc.*, 738 F. Supp. 2d 602, 614 (D. Md. 2010) (describing a failure-to-monitor claim as derivative of a claim for breach of fiduciary duties); *accord, e.g.*,

[36] Lockheed Martin News Release, *Lockheed Martin Reduces Gross Pension Obligation By $4.3 Billion With Purchase Of Group Annuity Contracts*, https://news.lockheedmartin.com/2022-06-27-Lockheed-Martin-Reduces-Gross-Pension-Obligation-by-4-3-Billion-with-Purchase-of-Group-Annuity-Contracts.

Garnick v. Wake Forest Univ. Baptist Med. Ctr., 629 F. Supp. 3d 352, 367 (M.D.N.C. 2022) ("[A] claim for the failure to monitor derives from and depends on an underlying breach of fiduciary duty cognizable under ERISA.") (quotations omitted). Because the complaint fails to point to any breach of fiduciary duty, it necessarily fails to point to any "failure" of Lockheed Martin to monitor any fiduciary or fiduciary process, including the decision to select Athene. *See, e.g.*, *In re Duke Energy ERISA Litig*., 281 F. Supp. 2d 786, 795 (W.D.N.C. 2003) (holding that failure to monitor does "not provide independent grounds for relief, but rather depend[s] upon the establishment of an underlying breach of fiduciary duty cognizable under ERISA").

To state a failure-to-monitor claim, Plaintiffs would, among other things, first need to allege facts to support the inference that Lockheed Martin was the relevant fiduciary here with respect to the PRTs *and* that Lockheed Martin employed inadequate processes in the course of exercising its fiduciary functions. After all, plan sponsors are generally free under ERISA to amend plans without triggering fiduciary status. *Coyne & Delany Co.*, 98 F.3d at 1465 (citing *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996)). And the duty to monitor homes in on a specific aspect of a fiduciary's process—whether it monitored "at regular intervals." *Tibble v. Edison Int'l*, 575 U.S. 523, 529 (2015). The "appropriate inquiry" for any duty-to-monitor claim, then, "will necessarily be context specific." *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022).[37] But Plaintiffs' complaint simply states a conclusion that Lockheed Martin was the relevant fiduciary here and is entirely silent about the process. *See* pp.19-21, *supra*. That is insufficient to state a claim. *See, e.g.*, *Int'l Painters & Allied Trades Indus. Pension Fund v. Apostolos Grp., Inc.*, 2024 WL 916304, at *2 (D. Md. Mar. 4, 2024).

CONCLUSION

For the foregoing reasons, the complaint should be dismissed with prejudice.

---

[37] *See also, e.g.*, *Coyne*, 98 F.3d at 1465 (discussing how fiduciary authority carries with it a duty 'to monitor appropriately' and citing 29 C.F.R. § 2509.75-8 as the appropriate guidance); *see* 29 C.F.R. § 2509.75-8 ("No single procedure will be appropriate in all cases; the procedure adopted may vary in accordance with the nature of the plan and other facts and circumstances relevant to the choice of the procedure.").

Dated: May 3, 2024

Respectfully submitted,

/s/ Reginald R. Goeke
Reginald R. Goeke (No. 13527)
E. Brantley Webb (*pro hac vice*)
Eric A. White (*pro hac vice*)
Michelle N. Webster (*pro hac vice*)
Jennifer L. Weinberg (*pro hac vice*)
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
rgoeke@mayerbrown.com
bwebb@mayerbrown.com
eawhite@mayerbrown.com
mwebster@mayerbrown.com
jlweinberg@mayerbrown.com

Nancy G. Ross (*pro hac vice*)
MAYER BROWN LLP
71 S. Wacker Dr.
Chicago, Illinois 60606
(312) 701-8788
nross@mayerbrown.com

Counsel for Defendant Lockheed Martin Corporation

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

Dated: May 3, 2024 By: *<u>/s/Reginald R. Goeke</u>*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Southern Division)

BRUCE KONYA, SIMON SHIFF, STEPHEN SCHWARZ, and DIANA VASQUEZ, individually and as representatives of a class of participants and beneficiaries on behalf of the LOCKHEED MARTIN CORPORATION SALARIED EMPLOYEE RETIREMENT PROGRAM and the LOCKHEED MARTIN AEROSPACE HOURLY PENSION PLAN,	Civil Action No. 8:24-cv-00750
Plaintiffs,	Hon. Peter J. Messitte
v.	
LOCKHEED MARTIN CORPORATION,	
Defendant.	

[PROPOSED] ORDER GRANTING DEFENDANT LOCKHEED MARTIN CORPORATION'S MOTION TO DISMISS

This matter having come before the Court on Defendant Lockheed Martin Corporation's ("Lockheed Martin") motion, brought under Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the claims asserted against Lockheed Martin in Plaintiffs' Complaint. Upon consideration of the motion and its supporting materials, Plaintiffs' opposition, and Lockheed Martin's reply thereto, it is hereby:

ORDERED that Lockheed Martin's Motion is granted, and

ORDERED that all counts asserted in the Complaint against Lockheed Martin are dismissed WITH PREJUDICE.

It is SO ORDERED.

Dated: __________, 2024.

/s/_________________________
Hon. Peter J. Messitte
United States District Judge