Tricia B. O'Reilly
Joseph L. Linares
WALSH PIZZI O'REILLY
FALANGA LLP
Three Gateway Center
100 Mulberry Street, Floor 15
Newark, New Jersey 07102
Tel.: (973) 757-1100

Of counsel (admitted *pro hac vice*):
Amanda S. Amert
LaRue L. Robinson
Patrick E. Cordova
Reanne Zheng
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654-3456

Attorneys for Defendants
The Prudential Insurance Company of America,
Prudential Employee Savings Plan Administrative Committee, and
Prudential Employee Savings Plan Investment Oversight Committee

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

YOUNG CHO, Individually and as Representative of a Class of Similarly Situated Persons, and on Behalf of the PRUDENTIAL EMPLOYEE SAVINGS PLAN,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, PRUDENTIAL EMPLOYEE SAVINGS PLAN ADMINISTRATIVE COMMITTEE, PRUDENTIAL EMPLOYEE SAVINGS PLAN INVESTMENT OVERSIGHT COMMITTEE, and DOES NO. 1-20

Defendants.

Civil Action No. 2:19-cv-19886 (JMV)(SCM)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

Electronically Filed

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

BACKGROUND 2

ARGUMENT 9

I. Cho Fails to State a Claim for Breach of Fiduciary Duty (Count I). 11

A. Cho's Failure to Plead Facts Showing Prudential Had an Imprudent Process for Selecting, Evaluating, or Retaining Funds Is Fatal to His Claim for Breach of the Duty of Prudence. 12

1. The Plan's Reasonable Mix and Range of Investment Options and Low Fees Are Inconsistent With an Inference That Prudential Lacks a Prudent Process. 12

2. Cho's Allegations About Fund Performance Do Not Support an Inference That Prudential Breached Its Duty of Prudence. 17

3. Cho Has Not Alleged Any Facts That Support an Inference That the PESP Paid Excessive Recordkeeping Fees. 19

B. Cho's Breach of the Duty of Loyalty Claim Fails Because He Does Not Allege Facts Suggesting Defendants Acted to Further Their Own Interests. 20

II. Cho Lacks Standing to Bring Claims Regarding All But Four of the Funds He Challenges. 23

III. Cho Fails to State a Claim for Violation of ERISA's Prohibited Transaction Provisions, Because He Alleges No Facts That Support an Inference That Prudential Intended to Benefit Its Affiliates at the Expense of Participants. 27

IV. Cho's Breach of Fiduciary Duty, Prohibited Transaction, and Duty to Monitor Claims are Time-Barred 30

V. Cho's Duty to Monitor and Knowing Breach of Trust Claims Fail. 33

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

CASES

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 10

Ballentine v. U.S.,
486 F.3d 806 (3d Cir. 2007) 10, 25

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 10, 21

Bernaola v. Checksmart Fin. LLC,
322 F. Supp. 3d 830 (S.D. Ohio 2018) 35, 36

Birse v. CenturyLink, Inc,
No. 17-02872, 2019 WL 1292861 (D. Colo. Mar. 20, 2019) 19

Briscoe v. Health Care Serv. Corp.,
281 F. Supp. 3d 725 (N.D. Ill. 2017) 36, 37

Buck v. Hampton Twp. Sch. Dist.,
452 F.3d 256 (3d Cir. 2006) 2

Caltagirone v. N.Y. C'mty. Bancorp, Inc.,
257 F. App'x 470 (2d Cir. 2007) 27

Comm'r v. Keystone Consol. Indus., Inc.,
508 U.S. 152 (1993) 26

Crocker v. KV Pharm. Co.,
782 F. Supp. 2d 760 (E.D. Mo. 2010) 35

Edes v. Verizon Commc'ns, Inc.,
417 F.3d 133 (1st Cir. 2005) 35

Edgar v. Avaya, Inc.,
503 F.3d 340 (3d Cir. 2007), *abrogated on other grounds, Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014) 36

Ferguson v. Ruane Cunniff & Goldfarb Inc.,
No. 17-6685, 2019 WL 4466714 (S.D.N.Y. Sept.18, 2019) 22, 23, 24

Gluck v. Unisys Corp.,
960 F.2d 1168 (3rd Cir. 1992) 32

Great W. Mining & Mineral Co. v. Fox Rothschild LLP,
615 F.3d 159 (3d Cir. 2010) 10

Harmon v. FMC Corp.,
No. 16-6073, 2018 WL 1366621 (E.D. Pa. Mar. 16, 2018) 12, 13

Hecker v. Deere & Co.,
556 F.3d 575 (7th Cir. 2009) 13, 14, 15, 16

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999)..26

In re Citigroup Erisa Litig.,
No. 07-9790, 2009 WL 2762708 (S.D.N.Y. Aug. 31, 2009), *aff'd sub nom. In re Citigroup ERISA Litig.*, 662 F.3d 128 (2d Cir. 2011) 36

In re UBS ERISA Litig.,
2014 WL 4812387 (S.D.N.Y. Sept. 29, 2014), *aff'd sub nom. Taveras v. UBS AG*, 612 F. App'x 27 (2d Cir. 2015)..27

Int'l Ass'n of Machinists & Aerospace Workers v. Nw. Airlines, Inc.,
673 F.2d 700 (3d Cir. 1982) 25

Johnson v. Radian Grp., Inc.,
No. 08-2007, 2009 WL 2137241 (E.D. Pa. July 16, 2009) 2

Kamal v. J. Crew Grp., Inc.,
918 F.3d 102 (3d Cir. 2019) 11

LaRue v. DeWolff, Boberg & Assoc., Inc.,
552 U.S. 248 (2008)..26

Long v. Se. Penn. Transp. Auth.,
903 F.3d 312 (3d Cir. 2018) 11

Loomis v. Exelon Corp.,
658 F.3d 667 (7th Cir. 2011) 14, 15

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992)..11

Meiners v. Wells Fargo & Co.,
No. 16-3981, 2017 WL 2303968 (D. Minn. May 25, 2017), *aff'd*,
898 F.3d 820 (8th Cir. 2018) 16, 22

Montrose Med. Group Participating Savings Plan v. Bulger,
243 F.3d 773 (3d Cir. 2001) 32

Morse v. Stanley,
732 F.2d 1139 (2d Cir. 1984) 24

Patterson v. Stanley,
No. 16-6568, 2019 WL 4934834 (S.D.N.Y. Oct. 7, 2019) ....passim

Pekar v. U.S. Steel/Edgar Thomson Works,
No. 09-844, 2010 WL 419421 (W.D. Pa. Jan. 29, 2010) 26

Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan ("PBGC") v. Morgan Stanley Inv. Mgmt. Inc.,
712 F.3d 705 (2d Cir. 2013) 13, 18

Perelman v. Perelman,
793 F.3d 368 (3d Cir. 2015) 26

Prospect Med., P.C. v. Cigna Corp.,
No. 09-5912, 2013 WL 3146867 (D.N.J. June 19, 2013) 2

Renfro v. Unisys Corp.,
671 F.3d 314 (3d Cir. 2011) 13, 14, 15, 24

Sweda v. Univ. of Pennsylvania,
No. CV 16-4329, 2017 WL 4179752 (E.D. Pa. Sept. 21, 2017)..........................2

Sweda v. University of Pennsylvania,
923 F. 3d 320 (3d Cir. 2019) 17, 29, 30, 31

Tibble v. Edison Int'l,
729 F.3d 1110 (9th Cir. 2013), *vacated on other grounds*, 575 U.S.
523 (2015)...15

White, *v. Chevron Corp.*,
No. 16-0793, 2016 WL 4502808 (N.D. Cal. Aug. 29, 2016)......................passim

Wilcox v. Georgetown Univ.,
No. 18-422, 2019 WL 132281 (D.D.C. Jan. 8, 2019) 27

Yost v. Anthem Life Ins. Co.,
No. 16-00079, 2016 WL 4151214 (M.D. Pa. Aug. 2, 2016)................................2

Young v. GM Inv. Mgmt. Corp.,
550 F. Supp. 2d 416 (S.D.N.Y. 2008), *aff'd*, 325 F. App'x 31 (2d Cir. 2009) 34

STATUTES

29 U.S.C. § 1002(34) 26

29 U.S.C. § 1106(a)(1)(D) 29, 30

29 U.S.C. §1108(b)(5)...31

29 U.S.C. §1108(b)(8)...31

29 U.S.C. § 1113(2) 32

Employee Retirement Income Security Act of 1974 ....passim

OTHER AUTHORITIES

29 C.F.R. § 2509.75-8, FR-17 35

29 C.F.R. § 2550.404a-5(c)-(d) 34

42 Fed. Reg. 18734-01, 18735 (Apr. 8, 1977)...31

56 Fed. Reg. 10724-01 (Mar. 13, 1991) 31

Federal Rules of Civil Procedure Rule 12(b)(1)..10, 25

Federal Rules of Civil Procedure Rule 12(b)(6)..2, 10

PGIM Investments, *Products Overview*, https://www.pgim.com/pgim-investments/investments-products (last visited Jan 23, 2020) 23

Prudential Financial, Inc., *For Institutions: PGIM at a Glance*, https://www.prudential.com/institutions/investment-management (last visited Jan. 23, 2020) 2, 3, 23

Prudential Financial, Inc., *Prisma Health Renews Partnership* (Jan. 8, 2020), https://news.prudential.com/prisma-health-renews-partnership-with-prudential-to-oversee-13b-in-retirement-assets.htm; 24

Prudential Financial, Inc., *Wayne County and Prudential Retirement Continue 20-year Partnership* (July 22, 2019), https://news.prudential.com/wayne-county-and-prudential-retirement-continue-20-year-partnership-with-650m-in-assets.htm 24

INTRODUCTION

Notwithstanding Plaintiff's claim that Defendant The Prudential Insurance Company of America ("Prudential Insurance"), along with the other named defendants (collectively, "Prudential"), managed its 401(k) plan for its own interests, his factual allegations show the opposite—that Prudential offered a high-quality, well-managed plan that provided its participants with attractive investment options at reasonable costs.

At the heart of Plaintiff's complaint is his belief that the mere fact that Prudential offers its 401(k) plan participants investment fund options managed by its affiliates is in and of itself sufficient to allege that Prudential violated the Employee Retirement Income Security Act of 1974 ("ERISA"). It is not. Indeed, not only does ERISA expressly permit the use of affiliated funds, but given that Prudential funds are typically offered in large United States and global retirement plans, it would be troublesome if Prudential's own plan did not offer such options to its employees. It was careful arms-length decision-making designed to benefit plan participants that resulted in the inclusion of a selected group of affiliate funds in Prudential's 401(k) investment menu, alongside a variety of non-affiliated funds – and not some nefarious motive.

Because Plaintiff has failed to adduce factual allegations that could support an inference of fiduciary breach, and for the other reasons described in this

memorandum, the Court should dismiss Plaintiff's Complaint, in its entirety, with prejudice.

BACKGROUND[1]

<u>The Prudential Plan</u>

Prudential, with its affiliates, is a leader in the financial services industry. (Form 10-K for FY2018, Ex. 1 at 2.) Prudential has over $1.3 trillion in assets under management and ranks as a top ten money manager worldwide. (*Id.*); Prudential Financial, Inc., *For Institutions: PGIM at a Glance*, https://www.prudential.com/institutions/investment-management (last visited Jan. 23, 2020). Prudential offers a large assortment of products and services including life insurance, annuities, retirement-related products and services, investment

[1] On a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, courts 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) (quotations, citations omitted). In ERISA cases, courts may also consider plan documents and statutorily required disclosures. *See, e.g.*, *Sweda v. Univ. of Pennsylvania*, No. CV 16-4329, 2017 WL 4179752, at *2 n.4 (E.D. Pa. Sept. 21, 2017) (considering exhibit listing plan's offered investment options), *aff'd in part, rev'd in part on other grounds and remanded*, 923 F.3d 320 (3d Cir. 2019); *Prospect Med., P.C. v. Cigna Corp.*, No. 09-5912, 2013 WL 3146867, at *2 (D.N.J. June 19, 2013) (taking notice of plan documents); *Yost v. Anthem Life Ins. Co.*, No. 16-00079, 2016 WL 4151214, at *3 n.1 (M.D. Pa. Aug. 2, 2016) (same); *Johnson v. Radian Grp., Inc.*, No. 08-2007, 2009 WL 2137241, at *1 n.1 (E.D. Pa. July 16, 2009) (noting court may take notice of public filings with the SEC and taking notice of numerous plan documents outlining rules for contributions).

management, and various funds. (Form 10-K for FY2018, Ex. 1 at 2.) Prudential's funds are widely used in U.S. retirement plans; the company serves 79 of the largest 100 U.S. pension plans and counts 160 of the top 300 global pension funds as clients. Prudential Financial, Inc., *For Institutions: PGIM at a Glance*, https://www.prudential.com/institutions/investment-management (last visited Jan. 23 2020).

Plaintiff Young Cho ("Cho') is a former Prudential agent and former participant of the Prudential Employee Savings Plan (the "Plan"). (Compl. ¶ 19.) The Plan is a 401(k) plan offered to eligible Prudential associates pursuant to ERISA, and Prudential Insurance is the Plan's sponsor and recordkeeper. (*Id.* ¶¶ 6, 20-21.) Since 2016, the Plan's administrative expenses, including recordkeeping fees, are not paid by the Plan. (*Compare* 2016 DOL 404(a) Notice, Ex. 2 at 14-15 *with* 2017 DOL 404(a) Notice, Ex. 3 at 14-15.) As of 2018, the Plan had approximately 45,000 participants and over $8 billion in net assets. (2018 Form 5500, Ex. 4 at 2, Sched. H at 2.)

The Plan offers participants a diversified portfolio of 21 investment options, including mutual funds, pooled insurance company separate accounts, separately managed accounts, company stock, collective investment trusts, guaranteed retirement income products, and a fixed rate fund. (Compl. ¶¶ 28, 57; 2018 Form 5500, Supp. Info., Ex. 4 at 7-11.) Those investment options allow participants to

choose among options with a wide variety of risk profiles, investment management strategies, asset classes, and fees. (Compl. ¶¶ 28-33, 57; *see also* 2018 Form 5500, Supp. Info., Ex. 4 at 7-11.)

Prudential's Investment Oversight Committee (the "IOC") is a named fiduciary of the Plan and selects and manages the investment of Plan assets. (Compl. ¶ 23.) The IOC regularly monitors all investment options in the Plan and modifies the investment lineup as needed. (*See Id.*) For example, in 2019, the IOC removed the Prudential-affiliated Jennison Opportunistic Equity Collective Investment Trust and the Wells Capital International Bond Fund.[2] (Compl. ¶ 70; *see also* 2019 DOL 404(a) Notice, Ex. 5 at 3-1.) Plan participants can direct their retirement assets into the investment offerings of their individual choice to meet their specific financial needs. (Compl. ¶ 26.) Prudential's Administrative Committee is a named fiduciary of the Plan and is responsible for Plan administration. (*Id.* ¶ 22.)

As of the Plan's June 30, 2018 404(a) Notice, 11 of the Plan's 21 investment options were funds managed by Prudential affiliates, which received compensation or investment management fees: (1) Core Bond Enhanced Index/PGIM Fund, (2)

[2] The IOC also added two new funds in 2019, the DFA Global Allocation 60/40 Portfolio Institutional Class and the PGIM Global Total Return Bond. (*See* 2019 DOL 404(a) Notice, Ex. 5 at 3, 5.)

Jennison Opportunistic Collective Equity Investment Trust ("CIT"),[3] (3) PESP Fixed Rate Fund, (4) PESP IncomeFlex Target Balanced Fund, (5) Prudential High Yield Fund CIT, (6) Prudential IncomeFlex Select Aggressive Fund, (7) Prudential IncomeFlex Select Conservative Fund, (8) Prudential IncomeFlex Select Moderate Fund,[4] (9) Prudential Retirement Real Estate Fund, (10) QMA International Developed Markets Index Account, and (11) QMA U.S. Broad Market Index Fund. (*See* 2018 DOL 404(a) Notice, Ex. 6 at 3-12 (listing offered investment options); 2018 Form 5500, Supp. Info., Ex. 4 at 28 (stating which of those funds are managed by Prudential affiliates); *accord* Compl. ¶¶ 57, 77.) Nine of the Plan's investment options were funds managed by third-party managers: (1) Alliance Bernstein Core Opportunities Fund, (2) Delaware Small Cap Core Equity Fund, (3) Vanguard Emerging Markets Stock Index Fund, (4) Vanguard Intermediate-Term Government Bond Index Fund, (5) Vanguard Short-Term Investment Grade Fund,

---

[3] The account balances in the Core Bond Enhanced Index/PGIM Fund were transferred to the Prudential Core Conservative Bond Fund in November 2018, however the two funds are essentially the same option as the investment strategy and investment fund manager are the same. (2018 Form 5500, Supp. Info. Ex. 4 at 8.) The Jennison Opportunistic CIT was removed in 2019. (Compl. ¶ 70; *see also* 2019 DOL 404(a) Notice, Ex. 5 at 3-8.)

[4] The Prudential IncomeFlex Aggressive, Conservative, and Moderate funds were all closed to new contributions on December 31, 2013. (2018 Form 5500, Supp. Info, Ex. 4 at 10.)

(6) Vanguard Small Cap Index Fund, (7) Wells Capital International Bond Fund,[5] (8) Wellington Trust Company ("WTC") Diversified Inflation Hedges Fund, and (9) WTC International Opportunities Fund. (2018 Form 5500, Supp. Info., Ex. 4 at 28.) The final investment option, the Prudential Common Stock Fund, does not charge an investment management fee. (*Id.* at 17.)

Each of the Plan's investment options serves a different purpose. Many are tied to specific industry markets, such as real estate, government bonds, small companies, emerging markets, and international stocks or bonds. (*Id.* at 7-11.) The performance of these funds is impacted by the market fluctuations of those various industries. Other funds differ in the nature of their returns to participants. For example, Prudential's IncomeFlex options provide participants with guaranteed income for life. (*Id.* at 10-11.)

The Plan's investment options that charge an investment management fee are low-cost. They carry expense ratios that range from 0.02% for the QMA U.S. Broad Market Index Fund, which is a passively-managed index fund, to 1.01%[6] for

---

[5] The Wells Capital International Bond Fund was removed from the investment lineup in 2019. (*See* 2019 DOL 404(a) Notice, Ex. 5 at 3-7.)

[6] The expense ratios in the Plan's December 31, 2018 Financial Statements attached to its 2018 Form 5500 are lower than those in the Complaint and are referenced here. (*Compare* 2018 Form 5500, Supp. Info. Ex. 4 at 17 *with* Compl. ¶ 57.)

the PESP IncomeFlex Target Balanced Fund, which is a retirement income fund with guaranteed income. (2018 Form 5500, Supp. Info., Ex. 4 at 17.) The majority of the funds have expense ratios of 0.32% or less. (*Id.*) Outside of the four IncomeFlex Funds and the PESP Fixed Rate Fund, which all provide certain guarantees and have fees that reflect those additional features, Prudential-affiliated funds have an average expense ratio of 0.248%[7]. (*See id.*)

Prudential has also consistently and successfully reduced the Plan's fees over time. (*See* 2013-2019 DOL 404(a) Notices, Exs. 2-3, 6-9.) For example, the Prudential Retirement Real Estate Fund's fees were reduced incrementally over time from 1.20% in 2013 to 0.70% in 2018, and the Prudential High Yield CIT's fees were reduced over the years from 0.48% in 2013 to 0.32% in 2018. (*Compare* 2013 DOL 404(a) Notice, Ex. 7 at 3, 7 *with* 2018 DOL 404(a) Notice, Ex. 6 at 3, 7.)

The Plan's investment options also perform well. As of June 30, 2019, over 85% of the Plan's available investment options with mandated benchmarks, including Prudential-affiliated funds, outperformed their benchmarks on a one,

[7] This average does not include the Prudential Common Stock Fund, which does not charge an investment management fee. (2018 Form 5500, Supp. Info., Ex. 4 at 17.) This average also includes the Prudential Core Conservative Bond Fund instead of the Core Bond Enhanced Index/PGIM Fund, which is essentially the same fund as noted in footnote 3. (*Id.* at 8.)

five, or ten year basis. (*See* Performance Chart, Ex. 10; 2019 DOL 404(a) Notice, Ex. 5 at 3-7.) Of these, instances of funds underperforming their benchmarks have been short-lived, with the majority showing consistent outperformance on a long-term five or ten year basis. (*Id.*)

In his complaint, Cho argues that three Prudential-affiliated and three third-party managed funds have both underperformed benchmarks and charged excessive fees (*see* Compl. ¶¶ 58-66, 69-77), two more third-party funds charge excessive fees (*id.* ¶¶ 58-60), and that one Prudential-affiliated fund unperformed its benchmark only (*id.* ¶¶ 69, 73). Cho only invested in four of these nine funds, only one of which is a Prudential-affiliated fund. (Cho December 31, 2018 PESP Statement, Ex. 11 at 2; Compl. ¶ 77.) Cho also challenges the recordkeeping fees paid to Prudential Insurance as excessive. (Compl. ¶ 9.)

The Complaint

Cho asserts five causes of action under ERISA. In Count I, Cho alleges breaches of the fiduciary duties of loyalty and prudence due to the inclusion of Prudential-affiliated funds, allegedly underperforming funds, and funds with purportedly excessive fees. (*Id.* ¶¶ 92-95.) In Count II, Cho asserts that Prudential engaged in prohibited transactions with parties in interest by investing in Prudential-affiliated funds. (*Id.* ¶¶ 96-102.) In Count III, Cho alleges that Prudential engaged in prohibited transactions with a fiduciary by paying

investment management fees to Prudential affiliates from Plan assets. (*Id.* ¶¶ 103-107.) In Count IV, Cho alleges that Prudential failed to monitor the fiduciary acts of the IOC and the Administrative Committee in connection with the challenged funds. (*Id.* ¶¶ 108-115.) Alternatively, in Count V, Cho asserts that, to the extent any defendant is not a fiduciary, that defendant is liable for a knowing breach of trust. (*Id.* ¶¶ 116-118.) Cho asserts his claims on behalf of himself as well as a proposed class including other participants in the Plan.

ARGUMENT

Cho's Complaint should be dismissed pursuant to Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure for failure to state a claim and lack of standing. To overcome a motion to dismiss under Rule 12(b)(6), Cho must plead facts that "accepted as true . . . '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)). This standard requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. It demands a "'showing,' rather than a blanket assertion, of entitlement to relief." *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 176 (3d Cir. 2010) (quoting *Twombly*, 550 U.S. at 555 n.3). Cho must therefore allege sufficient facts to allow a court to "infer more than the mere possibility of misconduct" and support a "reasonable inference that

the [defendants are] liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678-79. If the facts alleged are merely *consistent* with liable acts, then the complaint "stops short of the line between possibility and plausibility" and dismissal is proper. *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557.)

Where a plaintiff lacks standing, his or her claims should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction. *Ballentine v. U.S.*, 486 F.3d 806, 810 (3d Cir. 2007). Federal courts' jurisdictional scope is limited by the "cases' and 'controversies'" requirement of Article III. *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 110 (3d Cir. 2019). To have standing, a plaintiff must have suffered an "injury in fact," an "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff who lacks standing fails to meet the case or controversy requirement. *Long v. Se. Penn. Transp. Auth.*, 903 F.3d 312, 320-21 (3d Cir. 2018).

Cho's claims fail to meet the applicable standards for several reasons. *First*, he fails to plead facts showing Prudential had an imprudent process for managing the PESP investment lineup, and instead pleads facts about the PESP's reasonable mix and range of investment options that actually demonstrate Prudential's prudent management. *Second*, Cho's claim that Prudential breached its duty of loyalty fails because he does not allege facts suggesting Prudential acted to further its own

interests. *Third*, Cho only invested in four of the funds he challenges, and therefore lacks standing to bring claims related to the Plan's other 17 funds. *Fourth*, Cho's prohibited transactions claims are inadequate because he does not allege any facts supporting an inference that, by offering affiliated funds, Prudential intended to benefit itself at the expense of Plan participants. *Fifth*, Cho's claims are barred by the statute of limitations, because he had actual knowledge of the facts he alleges more than three years before he filed suit. *Sixth*, Cho's duty to monitor and knowing breach of trust claims fail because they are derivative of his other failed claims and are inadequately pled. Accordingly, his insufficiently pled, time-barred claims should be dismissed, with prejudice.

I. Cho Fails to State a Claim for Breach of Fiduciary Duty (Count I).

Cho fails to state a claim for breach of fiduciary duty because his allegations fail to support any reasonable inference of fiduciary misconduct, and in fact demonstrate the opposite. In Count I, Cho purports to state claims for breaches of the duties of prudence and loyalty. (Compl. ¶ 93.) But Cho does not plead any facts at all concerning Prudential's process for evaluating and selecting funds, which is fundamental to stating a prudence-based claim. *Harmon v. FMC Corp.*, No. 16-6073, 2018 WL 1366621, at *5 (E.D. Pa. Mar. 16, 2018) (citing *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan ("PBGC") v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 718 (2d Cir. 2013)). Similarly,

Cho does not plead any facts concerning Prudential's intent in selecting affiliated funds, as he must to make out his loyalty claim. *Patterson v. Stanley*, No. 16-6568, 2019 WL 4934834, at *12 (S.D.N.Y. Oct. 7, 2019). As a result, Cho's claim for fiduciary breach should be dismissed.

A. Cho's Failure to Plead Facts Showing Prudential Had an Imprudent Process for Selecting, Evaluating, or Retaining Funds Is Fatal to His Claim for Breach of the Duty of Prudence.

When evaluating a claim that ERISA's duty of prudence has been violated, courts focus on the fiduciary decision-making process. *Harmon*, 2018 WL 1366621, at *5. If, like Cho, a plaintiff does not allege any facts regarding the fiduciary process used to select, evaluate, and retain funds, he or she must allege sufficient circumstantial facts to allow the court to reasonably infer that the "process of managing the plan's investments was flawed." *Id.; accord PBGC*, 712 F.3d at 718. When such facts are not alleged, dismissal is appropriate. *Renfro v. Unisys Corp.*, 671 F.3d 314, 327 (3d Cir. 2011); *see PBGC*, 712 F.3d at 718, 721-22.

1. The Plan's Reasonable Mix and Range of Investment Options and Low Fees Are Inconsistent With an Inference That Prudential Lacks a Prudent Process.

Cho challenges the Plan's entire list of investments, claiming that Prudential inadequately investigated, selected, and monitored investment options. (Compl. ¶¶ 8-10, 44-52, 56, 77.) He further claims that participants paid excessive investment

management fees. (*Id*. ¶¶ 59-67.) These allegations must be measured "against the backdrop of the reasonableness of the mix and range of investment options" offered by the Plan. *Renfro*, 671 F.3d at 326-27; *accord Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009). If, "[l]ooking . . . at the . . . plan as a whole in the context of plaintiffs' allegations[,]" the Plan's offerings appear reasonable, then Cho's claim fails. *Renfro*, 671 F.3d at 327-28; *accord Hecker*, 556 F.3d at 586 (affirming dismissal of fiduciary breach claim where "no rational trier of fact could find" a breach based on the mix of options offered).

A range of investment options that allows participants to choose products that fit their own specific risk and investment preferences is inconsistent with an inference that defendants followed a flawed selection process. *See Loomis v. Exelon Corp.*, 658 F.3d 667, 673-74 (7th Cir. 2011). When a defendant "offer[s] participants a menu that includes high-expense, high-risk, and potentially high-return funds, together with low-expense index funds . . . and low-expense, low-risk, modest-return bond funds. It has left choice to the people . . . and it cannot be faulted for doing this." *Id.*

Looking at the Plan as a whole, Cho's challenge to Prudential's prudence is unsustainable. The Plan offers a range of diverse investment options with fees ranging from 0.02% to 1.01%. (2018 Form 5500, Supp. Info., Ex. 4 at 17.) These options have a variety of risk profiles and opportunities to obtain different types of

market exposure; they include mutual funds, separately managed accounts, company stock, collective investment trusts, guaranteed retirement income products, and a fixed rate fund. (Compl. ¶¶ 28-33.)

Courts considering similar investment line-ups have concluded that dismissal is appropriate because plaintiffs' complaint allegations did not support an inference of fiduciary breach. In *Renfro*, for example, the Third Circuit considered analogous allegations: a 401(k) plan with investment options that included "company stock, commingled funds, and mutual funds," with expense ratios ranging from 0.1% to 1.21%. *Renfro*, 671 F.3d at 319, 327. The Court concluded that "in light of the reasonable mix and range of investment options in the . . . plan, plaintiffs' factual allegations . . . [did] not plausibly support their claims." *Id.* at 327.

Other courts that have evaluated similar allegations against the backdrop of comparable plans have reached similar conclusions. *See Loomis*, 658 F.3d at 669-70 (concluding that plan offering 32 investment options with fees ranging from 0.03% to 0.96% was an acceptable offering incompatible with fiduciary breach); *Hecker*, 556 F.3d at 586-87 (complaint failed to allege fiduciary breach where plan offered 26 funds and a brokerage window with fees ranging from 0.07% to just over 1%); *accord Tibble v. Edison Int'l*, 729 F.3d 1110, 1135 (9th Cir. 2013) (expense ratio range of 0.03% to 2% was not "out of the ordinary enough to make

the funds imprudent"), *vacated on other grounds*, 575 U.S. 523 (2015). Prudential is not required to "offer the cheapest possible fund[s]" for the PESP "which might, of course, be plagued by other problems." *Hecker*, 556 F.3d at 586; *accord White, v. Chevron Corp.*, No. 16-0793, 2016 WL 4502808, at *14 (N.D. Cal. Aug. 29, 2016) ("Fiduciaries have latitude to value investment features other than price (and indeed, are required to do so).").

Similarly meaningless are Cho's allegations that some Plan investment options paid investment management fees that were higher than the fees charged by Vanguard index funds. The Vanguard fund alternatives Cho references are not comparable to the PESP funds – the Vanguard funds are index funds, whereas the PESP funds are actively managed. (*See* Compl. ¶¶ 58-66.) A party alleging imprudence based on retaining one fund instead of a lower-fee alternative must demonstrate that its alternative is a comparable fund. *See Patterson*, 2019 WL 4934834, at *12. Although different types of funds may have the same benchmark, index funds are not an appropriate comparator for actively managed funds, because they do not employ similar operations or investment strategies. *Id.*; *see also Meiners v. Wells Fargo & Co.*, No. 16-3981, 2017 WL 2303968, at *3 (D. Minn. May 25, 2017) ("fees . . . cannot be analyzed in a vacuum"), *aff'd*, 898 F.3d 820 (8th Cir. 2018). Cho also ignores that the Plan already offers five low-cost

index funds that charge fees within the range he alleges is appropriate.[8] (*Compare* Compl. ¶ 57 (listing Plan's index funds charging fees ranging from 0.02% to 0.11%) *with id.* ¶ 58 (listing Cho's purported comparator funds charging fees ranging from 0.07% to 0.13%).) The Third Circuit's holding in *Sweda v. University of Pennsylvania* that a meaningful mix and range of investment options alone does not *insulate* plan fiduciaries from liability for breach of fiduciary duty does not alter the analysis of Cho's claims. 923 F.3d 320, 330 (3d Cir. 2019). The *Sweda* court's reasoning was that such insulation would allow fiduciaries to "avoid liability by stocking a plan with hundreds of options, even if the majority were overpriced or underperforming." *Id.* Unlike the plaintiffs in *Sweda*, Cho does not allege that the PESP includes an overwhelming number of options, or make facially plausible allegations of inattention to underperformance or excessive fees. Rather, Cho's allegations confirm that Prudential offered an appropriate fund line-up with excellent performance and low fees.

Therefore, Cho's allegations about the characteristics of the Plan's investment options do not support an inference that Prudential was imprudent.

[8] Although the Core Bond Enhanced Index/PGIM Fund has index in its name, it is not an index fund. (2018 Form 5500, Supp. Info., Ex. 4 at 8.)

2. Cho's Allegations About Fund Performance Do Not Support an Inference That Prudential Breached Its Duty of Prudence.

Cho's assertions that specific funds underperformed at times do not make his attack on Prudential's prudence plausible. Investment underperformance is not, on its own, enough to support a claim for fiduciary breach. *PBGC*, 712 F.3d at 721. ERISA does not require fiduciaries to accurately predict how an investment will perform; ERISA's "fiduciary duty of care . . . requires prudence, not prescience." *PBGC*, 712 F.3d 705 (quoting *DeBruyne v. Equitable Life Assurance Soc'y of the U.S.,* 920 F.2d 457, 465 (7th Cir.1990)). Fiduciaries may choose or retain an investment for any number of reasons, including "retain[ing] investments through a period of underperformance as part of a long-range investment strategy." *White*, 2016 WL 4502808, at *17 (citing *Jenkins v. Yager*, 444 F.3d 916, 926 (7th Cir. 2006)). Allegations of underperformance relative to benchmarks "do not raise a plausible inference [of fiduciary breach]." *Patterson*, 2019 WL 4934834, at *10 (quotation omitted); *accord PBGC*, 712 F.3d at 721 ("[A]n allegation that an investment's price dropped, even precipitously, does not alone suffice to state a claim under ERISA.").

Here, Cho has not even alleged facts that support an inference that the Plan's investment options underperformed. Courts evaluating allegations of poor performance should "consider all relevant circumstances" including the plan's

"entire portfolio." *Birse v. CenturyLink, Inc*, No. 17-02872, 2019 WL 1292861, at *5 (D. Colo. Mar. 20, 2019). Cho alleges that seven of the Plan's 21 funds underperformed. (Compl. ¶¶ 69-76.) But these allegations are based on cherry-picked rolling return metrics designed to exaggerate brief periods of underperformance compared to inappropriate benchmarks; Cho has selected time periods that paint a bleak picture. (*See id.*)

That picture does not withstand comparison with the full view provided by the Plan's average annual total returns, which are explained in its required disclosures. (*See* 2019 DOL 404(a) Notice, Ex. 5 (listing average annual total returns as of June 30, 2019); 2018 DOL 404(a) Notice, Ex. 6 (listing average annual total returns as of June 30, 2018)). Of the seven allegedly underperforming funds, four have performance histories longer than ten years. (*See* 2019 DOL 404(a) Notice, Ex. 5 at 3, 6-7.) Two of these, the Prudential High Yield CIT and the QMA International Developed Markets Index Fund, *outperformed* their benchmarks on a one, five, and ten year basis. (*See Id.* at 3, 6.) The other two, the Prudential Real Estate Fund and the WTC CIF II Diversified Inflation Hedges Portfolio, exceeded their benchmarks on a ten year basis. (*Id.* at 7.)

Of the remaining three funds, the WTC CIF II International Opportunities Portfolio outperformed its benchmark on a five year basis and performed within 1.25% of its one year benchmark. (*Id.* at 6.) In addition, Prudential removed the

Wells Capital International Bond Institutional Select and the Jennison Opportunistic Equity CIT from the Plan's investment lineup in 2019 (*see id.* at 3-8; Compl. ¶ 70), which is inconsistent with an imprudent process. *See White*, 2016 WL 4502808, at *17-18 (finding that the plaintiff failed to state a claim for breach of fiduciary duty in part because the defendants "plainly engaged in a process for removal of [the challenged] [f]und").

Nearly all of the Plan's funds performed very well over time compared to their benchmarks. (*See* Performance Chart, Ex. 10.) Considering that those benchmarks are various indexes reflecting the average performance of the sector where each fund fits, this is an excellent track record by any objective standard and is consistent with ongoing, prudent investment management monitoring, and inconsistent with a faulty or biased fiduciary process. (*See Id.* (dismissing claim for breach of duty of prudence).) Therefore, Cho cannot rely on the Plan's investment performance to support an inference that Prudential lacked a prudent process.

3. Cho Has Not Alleged Any Facts That Support an Inference That the PESP Paid Excessive Recordkeeping Fees.

Cho makes conclusory allegations that Prudential Insurance's role as the recordkeeper for the Plan provides Prudential with "a further stream of revenue" in the "form of direct participant fees." (Compl. ¶¶ 6, 11.) He also asserts Prudential "fail[ed] to adequately disclose the amount of recordkeeping fees." (*Id*. ¶ 9.) Cho

fails to provide any facts at all to support these statements, despite having access to Prudential 404(a) notices and Form 5500s. Instead, his allegation is based on his disbelief of the actual information he admits to having. (*See Id.*) Such conclusory allegations carry no weight and should be disregarded. *Twombly*, 550 U.S. at 555.

* * *

Because Cho fails to plead any facts that could support an inference that Prudential's fiduciary process was flawed, Count I should be dismissed to the extent it is based on a claim of breach of the duty of prudence.

B. Cho's Breach of the Duty of Loyalty Claim Fails Because He Does Not Allege Facts Suggesting Defendants Acted to Further Their Own Interests.

Cho cannot state a claim for breach of the duty of loyalty because he fails to allege that defendants were acting for the benefit of anyone but Plan participants. *White*, 2016 WL 4502808, at *4-5. To state a claim for breach of the duty of loyalty under § 404(a)(1)(A), a plaintiff "must allege plausible facts supporting an inference that the defendant acted *for the purpose of providing benefits* to itself or someone else." *Patterson*, 2019 WL 4934834, at *12 (quotation omitted); *see also Meiners*, 2017 WL 2303968, at *3-4. When a complaint's allegations do not support an inference that the defendants' actions were intended to benefit themselves, and simply had that incidental effect, loyalty claims should be dismissed. *See, e.g.*, *Ferguson v. Ruane Cunniff & Goldfarb Inc.*, No. 17-6685,

2019 WL 4466714, at *4 (S.D.N.Y. Sept.18, 2019) (dismissing breach of duty of loyalty claim where complaint was "devoid of factual allegations supporting *purposeful* action by [defendants] to benefit themselves or a third-party"). In addition, complaint allegations that do not differentiate between the facts purportedly supporting claims for breach of the duty of prudence and those purportedly supporting claims for breach of the duty of loyalty are insufficient to state a disloyalty claim. *See Id.; Chevron*, 2016 WL 4502808, at *5.

Cho alleges *no* facts that support a plausible claim that defendants included affiliated funds *in order to* further their own interests. Cho pleads only that the IOC selected Prudential-affiliated funds, and that Prudential collected fee revenue from the Plan's use of Prudential-affiliated funds.[9] (Compl. ¶ 11.) Cho pleads no facts suggesting any improper purpose, and the fact that a handful of Prudential-affiliated funds were offered and Prudential Insurance served as a recordkeeper to the Plan cannot fill that gap. Prudential-affiliated funds are widely offered in retirement plans. *See* Prudential Financial, Inc., *For Institutions: PGIM at a Glance*, https://www.prudential.com/institutions/investment-management (last visited Jan. 23, 2020). Prudential affiliates manage $1.3 trillion in assets and offer

---

[9] The Court should disregard Cho's conclusory allegation that the IOC "did not investigate" whether Plan participants' interests would be served by the selected funds (Compl. ¶ 49), which is inconsistent with the detailed facts pled regarding Plan investment options and the IOC's management of those options. *See Ferguson*, 2019 WL 4466714, at *4.

hundreds of investment funds—nearly all of which are not offered in the PESP, and many of those have higher fees than those offered in the PESP. *See id.*; PGIM Investments, *Products Overview*, https://www.pgim.com/pgim-investments/investments-products (last visited Jan 23, 2020) (listing over 300 Prudential-affiliated funds with expense ratios ranging up to 2.9%). The fact that the Plan offers only a small, low-cost selection of those funds is inconsistent with a fee-based motive. Thus, the fact that the PESP offers some Prudential-affiliated funds is unremarkable—it would be more surprising if the PESP offered no Prudential-affiliated funds.

Prudential's service as recordkeeper to the Plan is similarly unremarkable, given Prudential's extensive work in a similar role for numerous retirement plans with billions of dollars in assets. *See, e.g.*, Prudential Financial, Inc., *Prisma Health Renews Partnership* (Jan. 8, 2020), https://news.prudential.com/prisma-health-renews-partnership-with-prudential-to-oversee-13b-in-retirement-assets.htm; Prudential Financial, Inc., *Wayne County and Prudential Retirement Continue 20-year Partnership* (July 22, 2019), https://news.prudential.com/wayne-county-and-prudential-retirement-continue-20-year-partnership-with-650m-in-assets.htm.

Cho's conclusory assertions about defendants' motives do not support a different conclusion. (*See* Compl. ¶¶ 11, 52.) Conclusory assertions about

defendants' intent cannot substitute for factual allegations. *See Renfro*, 671 F.3d at 327-28. Cho's allegations that Prudential's affiliates receive revenue from Plan investments also cannot fill the holes in his pleading. Courts have distinguished affiliates' receipt of fees for services as fundamentally different from an act taken with the goal of furthering the interests of a third party.[10] *See Morse v. Stanley*, 732 F.2d 1139, 1146 (2d Cir. 1984) (holding that a course of action "which reasonably best promotes the interest of plan participants" does not violate fiduciary duties "simply because it incidentally also benefits the corporation").

Cho's failure to plead facts to support any inference that Prudential intended to benefit itself at the expense of the Plan makes his claim insufficient as a matter of law. *See Chevron*, 2016 WL 4502808, at *5. Accordingly, Count I should be dismissed to the extent it purports to state a claim for breach of the duty of loyalty.

II. Cho Lacks Standing to Bring Claims Regarding All But Four of the Funds He Challenges.

Cho lacks standing to bring any claim with respect to all but four of the funds he targets. As the party claiming subject matter jurisdiction, Cho bears the burden of demonstrating standing. *See Ballentine*, 486 F.3d at 810. Because a standing-based motion to dismiss arises under Rule 12(b)(1), Prudential may

[10] Cho's conclusory assertion that Prudential failed to act for the exclusive purpose of providing benefits to participants (Compl. ¶ 93) is also insufficient. *See Ferguson*, 2019 WL 4466714, at *4.

contest Cho's standing in fact by presenting evidence. *Int'l Ass'n of Machinists & Aerospace Workers v. Nw. Airlines, Inc.*, 673 F.2d 700, 710-11 (3d Cir. 1982). Once evidence disputing a plaintiff's standing is presented, "no presumptive truthfulness attaches to [the] plaintiff's allegations" and the Court may determine for itself whether the jurisdictional requirements have been met. *Id.*

In a defined contribution individual account plan like the PESP, each participant has a plan account to which individual contributions are credited and through which the individual participant directs investment into selected funds.[11] *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999); *Pekar v. U.S. Steel/Edgar Thomson Works*, No. 09-844, 2010 WL 419421, at *2 n.5 (W.D. Pa. Jan. 29, 2010). Plan participants' retirement benefits are calculated as the value of those individual accounts, "which is largely a function of the amounts contributed . . . and the investment performance of those contributions." *LaRue v. DeWolff, Boberg & Assoc., Inc.*, 552 U.S. 248, 250 n.1 (2008) (quotation omitted); *see also* 29 U.S.C. § 1002(34). Because each participant has his or her own account, injuries for fiduciary breach are limited to actions that cause a loss to "a participant's individual account." *See LaRue*, 552 U.S. at 256; *Perelman v.*

---

[11] A defined contribution plan is distinct from a defined benefit plan, where there are no individual accounts, but instead a general pool of assets from which each "employee, upon retirement, is entitled to a fixed periodic payment." *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 154 (1993).

Perelman, 793 F.3d 368, 375 (3d Cir. 2015) (holding a participant suffers injury-in-fact when defendant breaches its fiduciary duty and participant has individual right to recovery). Thus, Cho may only bring claims based on injuries to the funds in which he actually participated.

Numerous courts have concluded that ERISA claims based on fees charged by, or the performance of, 401(k) plan investment funds that an individual plaintiff did not utilize should be dismissed for lack of standing. For example, in *Caltagirone v. N.Y. C'mty. Bancorp, Inc.*, the Second Circuit found that the plaintiff lacked standing because "the crux of the complaint" related to fiduciaries' failure to disclose the risks of a stock the plaintiff never held. 257 F. App'x 470, 473 (2d Cir. 2007). Similarly, a federal court in New York recently found that plaintiffs lacked standing to sue regarding 401(k) funds they did not invest in. *Patterson*, 2019 WL 4934834, at *4-5. In reaching its conclusion, the court noted that plaintiffs had failed to "argue that the value of their individual accounts [were] impaired by the poor performance of the Non-Selected Funds." *Id.* at *5; *accord Wilcox v. Georgetown Univ.*, No. 18-422, 2019 WL 132281, at *9 (D.D.C. Jan. 8, 2019) ("Plaintiffs clearly cannot allege an individual violation of ERISA as to the [funds] . . . neither [p]laintiff selected."); *see also In re UBS ERISA Litig.*, 2014 WL 4812387, at *6 (S.D.N.Y. Sept. 29, 2014) ("Plaintiff can only demonstrate a

constitutionally sufficient injury by pointing to her individual account's specific losses."), *aff'd sub nom. Taveras v. UBS AG*, 612 F. App'x 27, 29 (2d Cir. 2015).

Here, Cho invested in only seven of the PESP's 21 funds, meaning any purported underperformance or excessive fees associated with the Plan's 14 other funds did not and cannot affect Cho's ERISA benefits. He therefore lacks standing to bring claims regarding them. *See Caltagirone*, 257 F. App'x at 473 (plaintiff lacked standing where they "never chose the [challenged] investment option"). Of the seven he chose, only four are alleged to have been the subject of fiduciary breaches: (1) Jennison Opportunistic Equity CIT, (2) Wellington Trust Company CIF II International Opportunities Portfolio, (3) Alliance Bernstein Core Opportunities Fund, and (4) Delaware Small Cap Core Equities Fund. (Compl. ¶¶ 59, 60-61, 66, 70, 76.) Cho has not alleged that he personally suffered any injury regarding the other three investment funds he utilized,[12] and the fact that he purports to allege injuries to the Plan that did not and cannot affect him personally is not sufficient to give him standing. And as a former participant, Cho is at no risk of future losses because he cannot invest in other Plan funds in the future. Therefore, Cho lacks standing to sue for fiduciary breach regarding any fund other

[12] Those are the QMA U.S. Broad Market Index Fund, the Prudential Company Stock Fund, and the Vanguard Small Cap Index Fund.

than the four he utilized, and all of his claims regarding other funds should be dismissed with prejudice.

III. Cho Fails to State a Claim for Violation of ERISA's Prohibited Transaction Provisions, Because He Alleges No Facts That Support an Inference That Prudential Intended to Benefit Its Affiliates at the Expense of Participants.

The Court should dismiss Cho's prohibited transaction claims because Cho's conclusory allegations regarding Prudential's intent for including Prudential-affiliated funds are insufficient, particularly in light of applicable prohibited transaction exemptions permitting Prudential to offer Prudential-affiliated funds.

In Counts II and III of his complaint, Cho alleges that Prudential caused the Plan to engage in prohibited transactions within the meaning of ERISA §§ 1106(a)(1)(C) and (D) by causing the Plan to invest in options managed by Prudential or its affiliates. (Compl. ¶¶ 101, 106.) These claims should be dismissed because both ERISA provisions require an element of specific intent that Cho's allegations lack.

ERISA § 1106(a)(1)(C) provides that a fiduciary shall not cause a plan to engage in a transaction if the fiduciary knows or should know that the transaction constitutes a direct or indirect furnishing of goods, services, or facilities between the plan and a party in interest. However, because § 1106 is not meant to impede necessary service transactions, a plaintiff must establish the "element of *intent to benefit a party in interest*" to make out a prohibited transaction claim. *Sweda*, 923

F.3d at 338 (emphasis added). Absent factual allegations of intent to benefit a party in interest, a plaintiff cannot plausibly allege that a "transaction that constitutes a direct or indirect . . . furnishing of goods, services, or facilities between the plan and a party in interest prohibited by § 1106(a)(1)(C) has occurred." *Id.* Section 1106(a)(1)(D) provides that a fiduciary shall not cause a plan to engage in a transaction if the fiduciary "knows or should know that the transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." 29 U.S.C. § 1106(a)(1)(D). The Third Circuit has interpreted § 1106(a)(1)(D) and § 1106(a)(1)(C) similarly, holding that a violation requires a fiduciary to have a "subjective intent" to benefit a party in interest. *Sweda*, 923 F.3d at 337-38.

Cho alleges that Prudential caused the Plan to invest in "unduly expensive investment options managed by Prudential and/or its affiliates" and caused the Plan to pay fees to other Prudential subsidiaries and affiliates. (Compl. ¶¶ 51, 100.) These allegations are insufficient to establish a prohibited transaction within the meaning of § 1106(a)(1). *Sweda*, 923 F.3d at 337. "Reading § 1106(a)(1) as a per se rule barring all transactions between a plan and party in interest would miss the balance that Congress struck in ERISA" and "ignore other parts of the statute." *Id.* Even if Cho had plausibly alleged that the Plan's fees were excessive—which he has not—Cho fails to allege facts supporting a specific intent by Prudential to

benefit affiliates at the expense of participants. Instead, Cho pleads that the investments occurred, and makes the conclusory assertion that "the only reasonable inference to be drawn is that Defendants [included Prudential-affiliated funds] to generate profits for Prudential and its affiliates." (Compl. ¶ 81.) This is insufficient factual support for Cho's allegations that Prudential had a subjective intent to benefit Prudential or its affiliates, as required to establish violations of §§ 1106(a)(1)(C) and (D).[13] *See Sweda*, 923 F.3d at 340 (declining to consider conclusory allegations "such as 'Defendants served [the] financial interests [of parties in interest]'").

Moreover, there is nothing improper or out of the ordinary about the Plan's arrangements with Prudential affiliates. Congress has recognized that it would be "contrary to normal business practice for a bank or insurer to purchase the products of another company for its own in-house plans." 56 Fed. Reg. 10724-01 (Mar. 13, 1991) (quotation omitted). Accordingly, ERISA and its regulations expressly contemplate and permit arrangements with plan sponsor affiliates through exemptions to its prohibited transaction provisions. The types of affiliated investments that Cho challenges are covered by specific exemptions. *See, e.g.*, 29 U.S.C. §1108(b)(8) (permitting use of collective investments trusts and pooled

---

[13] It is also wrong. As described in detail above, the Plan's investment fund menu and expenses as a whole reflects a prudent decision-making process.

insurance company separate accounts); DOL Prohibited Transaction Exemption 77-3, 42 Fed. Reg. 18734-01, 18735 (Apr. 8, 1977) (permitting use of affiliated mutual funds); 29 U.S.C. §1108(b)(5) (permitting use of annuity contracts). The existence of these exemptions underscores that there are valid reasons for Prudential to utilize its affiliates' funds; the fact that it did therefore does not suggest an improper motive to benefit those affiliates at the expense of the Plan participants.

Accordingly, Counts II and III should be dismissed.

IV. Cho's Breach of Fiduciary Duty, Prohibited Transaction, and Duty to Monitor Claims are Time-Barred.

To be timely, claims for breach of ERISA fiduciary duties under §§ 1104, 1105, and 1106 must be brought within "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2). Plaintiffs have actual knowledge of a breach or violation when they know "all relevant facts at least sufficient to give the plaintiff[s] knowledge that a fiduciary duty has been breached or ERISA provision violated." *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1178 (3rd Cir. 1992). Actual knowledge requires that a plaintiff "knew not only of the events that occurred which constitute the breach or violation but also that those events supported a claim of breach of fiduciary duty or violation under ERISA." *Montrose Med. Group Participating Savings Plan v. Bulger*, 243 F.3d 773, 787 (3d Cir. 2001) (quoting *Int. Union of Elec., Elec.,*

Salaried, Mach., and Furniture Workers, ALF CIO v. Murata Erie N. Amer., Inc., 980 F.2d 889, 900 (3d Cir. 1992)). The facts Cho relies on to support his breach of fiduciary duty claims under § 1104, prohibited transaction claims under § 1106, and failure to monitor claim under § 1105 were readily apparent from the information provided to all Plan participants more than three years before Cho filed this lawsuit. Because Cho thus had actual knowledge of the alleged breaches and violations under §§ 1104, 1105, and 1106, Counts I-IV are time-barred.

The essential facts that form the basis of Cho's breach of fiduciary duty claim under § 1104 (Count I) are the alleged underperformance of Prudential's selected investments and the fees associated with available funds. Cho alleges that Prudential's selected funds produced poor returns beginning in March 2014, more than five years before Cho brought this action. (Compl. ¶ 69.) He further alleges that participants have been harmed by excessive fees since at least 2013, six years before this suit. (*Id.* ¶ 67.) Cho's prohibited transaction claims under § 1106 (Counts II and III) are based on the PESP offering the following investment options: (1) PESP Fixed Rate Fund; (2) Prudential Financial, Inc. Common Stock Fund; (3) Prudential High Yield Collective Investment Trust; (4) Prudential IncomeFlex Select Aggressive Fund, Prudential IncomeFlex Select Conservative Fund, Prudential IncomeFlex Select Moderate Fund, and PESP IncomeFlex Target Balanced Fund; (5) Prudential Jennison Natural Resources Fund; (6) Prudential

Retirement Real Estate Fund; (7) Core Bond Enhanced Index/PGIM Fund; and (8) Jennison Opportunistic Equity Collective Investment Trust. (*Id.* ¶ 77.) Cho alleges these funds were offered to participants "[a]t all pertinent times" and Cho was a participant in the Plan by no later than 2013. (*Id.* ¶¶ 67, 77, 82.) Cho's duty to monitor claim under § 1105 (Count IV) is based on the same purported fiduciary breaches and prohibited transactions alleged in Counts I, II, and III.

All of these facts were disclosed to all Plan participants more than three years before Cho filed this lawsuit. Under ERISA § 404(a) and its implementing regulations, fiduciaries are required to provide Plan participants with detailed disclosures of these facts. 29 C.F.R. § 2550.404a-5(c)-(d). Cho does not allege that Prudential ever failed to make these mandatory disclosures, and the PESP's required disclosures to Plan participants disclosed the expense ratios of all funds offered in the PESP and provided one, five, and ten-year or since inception returns of available funds compared to benchmarks. (*See, e.g.*, 2019 DOL 404(a) Notice, Ex. 5 at 3-7.) In addition, the Plan's 5500 forms also clearly labeled the funds Cho challenges as Prudential-affiliated funds. (*See, e.g.*, 2018 Form 5500, Supp. Info., Ex. 4 at 28.) Thus, Cho had actual knowledge of the essential facts of his claims well over three years before the filing of this suit. *See Young v. GM Inv. Mgmt. Corp.*, 550 F. Supp. 2d 416, 419-420 (S.D.N.Y. 2008), (dismissing claim as time-barred based on information provided to participants in required disclosure), *aff'd*,

325 F. App'x 31 (2d Cir. 2009); *Edes v. Verizon Commc'ns, Inc.*, 417 F.3d 133, 142 (1st Cir. 2005) (noting that Congress did not intend for "the actual knowledge requirement to excuse willful blindness by a plaintiff"). Accordingly, Counts I through IV of the complaint are time-barred and should be dismissed, with prejudice.

V. Cho's Duty to Monitor and Knowing Breach of Trust Claims Fail.

Cho claims in Count IV that Prudential failed to monitor the other defendants regarding the fiduciary breaches alleged in Counts I, II, and III. (Compl. ¶¶ 108-115.) Cho also claims in Count V that to the extent none of the defendants acted as an ERISA fiduciary, they participated in a knowing breach of trust by allowing the Plan to offer poor performing, expensive investment options. (*Id.* ¶¶ 117-18.) The elements of a failure to monitor claim are (1) appointment of a fiduciary by a fiduciary, and (2) participation in or knowledge of fiduciary breaches committed by the appointees. *Crocker v. KV Pharm. Co.*, 782 F. Supp. 2d 760, 787 (E.D. Mo. 2010); *see also* 29 C.F.R. § 2509.75-8, FR-17 (describing requirements of duty to monitor). To plead a knowing breach of trust claim, the plaintiff must allege that the defendant had actual or constructive knowledge of the circumstances surrounding an underlying breach. *See Bernaola v. Checksmart Fin. LLC*, 322 F. Supp. 3d 830, 842 (S.D. Ohio 2018) (dismissing knowing breach of trust claim where defendants could not have had knowledge of breach); *Briscoe v.*

Health Care Serv. Corp., 281 F. Supp. 3d 725, 736-37 (N.D. Ill. 2017) (analyzing knowing breach of trust claim).

Both claims fail because Cho has not alleged an underlying fiduciary breach. Counts IV and V are derivative claims that rely on the existence of the purported fiduciary breaches alleged in counts I, II, and III. Because these underlying breaches are not adequately alleged for the reasons discussed above, Cho's derivative claims fail along with them. *See Edgar v. Avaya, Inc.*, 503 F.3d 340, 350 n.15 (3d Cir. 2007) (affirming dismissal of duty to monitor claim because the court affirmed dismissal of the underlying claim for fiduciary breach), *abrogated on other grounds, Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *accord Bernaola*, 322 F. Supp. 3d at 842 (dismissing knowing breach of trust claim where underling ERISA fiduciary breach claim was dismissed).

In addition, with respect to Count IV, Cho has failed to plead any facts indicating how Prudential allegedly failed to adequately monitor the fiduciaries it appointed. Cho's failure to monitor theory amounts to a conclusory assertion that the IOC's and Administrative Committee's actions make Prudential liable. But Cho must specify what underlying misconduct Prudential failed to detect. *See In re Citigroup Erisa Litig.*, No. 07-9790, 2009 WL 2762708, at *26 (S.D.N.Y. Aug. 31, 2009), *aff'd sub nom. In re Citigroup ERISA Litig.*, 662 F.3d 128 (2d Cir. 2011). Because he does not, his failure to monitor claim is insufficiently pled.

With respect to Count V, Cho's knowing breach of trust claim fails for the additional, independent reason that Cho has not alleged with any specificity what particular knowledge defendants had regarding each alleged breach. *See e.g.*, *Briscoe*, 281 F. Supp. 3d at 736-37 (alternative knowing breach of trust claim in ERISA action was dismissed where there were limited allegations regarding defendants' knowledge). Cho's knowing breach of trust claim fails as a result.

Accordingly, Counts IV and V should be dismissed.

CONCLUSION

For all the foregoing reasons, Cho's complaint should be dismissed in its entirety and with prejudice.

Dated: January 24, 2020

Respectfully submitted,

By: *s/Tricia B. O'Reilly*

Tricia B. O’Reilly
Joseph L. Linares
WALSH PIZZI O’REILLY
FALANGA LLP
Three Gateway Center
100 Mulberry Street, Floor 15
Newark, New Jersey 07102
Tel.: (973) 757-1100

Amanda S. Amert (admitted *pro hac vice*)
LaRue L. Robinson (admitted *pro hac vice*)
Patrick E. Cordova (admitted *pro hac vice*)
Reanne Zheng (admitted *pro hac vice*)
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654-3456
Phone: (312) 222 9350

Attorneys for Defendants