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

LATASHA DAVIS, *et al.*, Plaintiffs, v. WASHINGTON UNIVERSITY IN ST. LOUIS, *et al.*, Defendants.	))))))))))	Case No. 4:17-cv-01641-RLW

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Brian T. Ortelere (*pro hac vice*)
Jeremy P. Blumenfeld (*pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
1701 Market St.
Philadelphia, PA 19103
Tel.: 215-963-5000
Fax: 215-963-5001
brian.ortelere@morganlewis.com
jeremy.blumenfeld@morganlewis.com

Deborah S. Davidson (*pro hac vice*)
Matthew A. Russell (*pro hac vice*)
Samuel D. Block (*pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Chicago, Illinois 60601
Tel.: 312-324-1000
Fax: 312-324-1001
deborah.davidson@morganlewis.com
matthew.russell@morganlewis.com
Samuel.block@morganlewis.com

Christopher A. Smith
HUSCH BLACKWELL
The Plaza in Clayton
190 Carondelet Plaza, Suite 600
St. Louis, Missouri 63105
Tel.: 314-480-1836
Fax: 314-480-1505
chris.smith@huschblackwell.com

Counsel for Defendants

TABLE OF CONTENTS

Page

INTRODUCTION 1

FACTUAL BACKGROUND 3

I. Key Features of the Plan 3

II. The Named Plaintiffs 6

ARGUMENT 7

I. Plaintiffs' Motion Is Devoid Of Evidence To Establish Each Rule 23 Requirement 7

II. Plaintiffs Are Not Adequate Or Typical Representatives Of Absent Class Members 8

A. Plaintiffs Cannot Assert Claims On Behalf Of Absent Class Members Who Invested In Different Funds And Paid Different Fees To Different Providers 9

B. Plaintiffs And Absent Class Members Are Subject To Individualized Defenses 12

1. Defendants Are Entitled To Show The Alleged Fiduciary Breaches Did Not Cause Loss To Plaintiffs Or Other Absent Class Members 12

2. Application of ERISA Section 404(c)'s Safe-Harbor Defense Similarly Requires Individualized Inquiry And Precludes Certification 14

3. Section 404(c) Applies To Plaintiffs' Challenges To Plan Investments 17

4. The University Is Entitled To Assert ERISA's Statute of Limitations, Which Will Require Highly Individualized Evidence And Inquiries 19

III. If The Court Certifies A Class, It Should Be Limited To Participants Who Paid The Same Fees And Invested In The Same Funds As Plaintiffs 20

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott v. Lockheed Martin Corp.,
725 F.3d 803 (7th Cir. 2013) 20

Am. Exp. Co. v. Italian Colors Rest.,
570 U.S. 228 (2013)....................7

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997)....................8

Barnhardt v. Sigmon Coal Co.,
534 U.S. 438 (2002)....................18

Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984)....................18

Comcast Corp. v. Behrend,
569 U.S. 27 (2013)....................7

Dezelan v. Voya Ret. Ins. & Annuity Co.,
2017 WL 2909714 (D. Conn. July 6, 2017) 12

Golan v. Verita Entm't, LLC,
788 F.3d 814 (8th Cir. 2015) 8

Intel Corp. Inv. Policy Comm. v. Sulyma,
140 S. Ct. 768 (2020)....................2, 19

Kisor v. Wilkie,
139 S. Ct. 2400 (2019)....................18

Langbecker v. Elec. Data Sys. Corp.,
476 F.3d 299 (5th Cir. 2007) 2, 15, 16, 18

Luiken v. Domino's Pizza, LLC,
705 F.3d 370 (8th Cir. 2013) 7

Meiners v. Wells Fargo & Co.,
898 F.3d 820 (8th Cir. 2018) 13

In re Milk Prods. Antitrust Litig.,
195 F.3d 430 (8th Cir. 1999) 12

Patterson v. Morgan Stanley,
2019 WL 4934834 (S.D.N.Y. Oct. 7, 2019) 10, 11, 12

Pennell v. Corizon Health, Inc.,
2018 WL 4088084 (W.D. Mo. Aug. 27, 2018)....................8

Renfro v. Unisys Corp.,
2010 WL 1688540 (E.D. Pa. Apr. 26, 2010), *aff'd*, 671 F.3d 314 (3d Cir. 2011) 18

Sacerdote v. New York Univ.,
328 F. Supp. 273 (S.D.N.Y. July 31, 2018)....................12

Skidmore v. Swift & Co.,
323 U.S. 134 (1944)....................18

Spano v. The Boeing Co.,
633 F.3d 574 (7th Cir. 2011) 9, 10, 11, 20

In re Target Corp. Customer Data Security Breach Litig.,
847 F.3d 608 (8th Cir. 2017) 8

Thole v. U.S. Bank N.A.,
140 S. Ct. 1615 (2020)....................2, 10, 11

Thomas v. Aris Corp. of Am.,
219 F.R.D. 338 (M.D. Pa. 2003)....................16

Troudt v. Oracle Corp.,
325 F.R.D. 373 (D. Colo. 2018) 10, 11, 20

Tussey v. ABB, Inc.,
2008 WL 379666 (W.D. Mo. Feb. 11, 2008) 14

In re Unisys Sav. Plan Litig.,
74 F.3d 420 (3d Cir. 1996)....................14, 15, 17

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011)....................1, 2, 7, 8

Wiseman v. First Citizens Bank & Tr. Co.,
212 F.R.D. 482 (W.D.N.C. 2003)....................1, 16

Statutes

29 U.S.C.
§ 1104(c) .... *passim*
§ 1109(a) 13
§ 1113...2, 19, 20
§ 1132...1, 10, 11

Other Authorities

29 C.F.R.
§ 2550.404a-5 15
§ 2550.404c-1(b)-(c) 15

74 Fed. Reg. 64,910 (Oct. 20, 2010), § 2550.404c-1(d)(2)(iv) 18

Fed. R. Civ. P. 23 .... *passim*

INTRODUCTION

Plaintiffs are three participants in the Washington University Retirement Savings Plan ("Plan"), a 403(b) plan Washington University in St. Louis ("University") offers to employees. Plaintiffs' Second Amended Complaint ("SAC") claims that, over more than a decade, Defendants violated ERISA by (1) allowing Plan participants to pay excessive fees for recordkeeping services (Count I); and (2) offering certain investment options they say were too expensive for one reason or another (Count II). Dkt. 83, ¶¶ 146-163. Although these claims are distinct and implicate different class members, timeframes, and factual circumstances, Plaintiffs lump their disparate theories together and ask the Court to certify a class that indiscriminately includes *everyone* who ever participated in the Plan since April 28, 2011. Dkt. 93, Mot. for Class Cert. ("Mot.") at 8.

Plaintiffs presume that, because this is an ERISA case, certification of their sweeping class is a foregone conclusion. But their Motion rests on a flawed premise: that no matter what claim or injury they have personally, they can fairly and adequately represent the 27,000 current (and many more former) Plan participants for *any* alleged fiduciary breach, at *any* time, simply because they sue "on behalf of the Plan" under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). Mot. at 1, 12, 15. This simplistic theory confuses ERISA's statutory cause of action with Rule 23's prerequisites to class certification, which Plaintiffs have not established. And they scarcely even try, citing almost no actual evidence, relying instead on generic conclusions coupled with allegations in their SAC. Accordingly, they offer no insight into their own circumstances, alleged injury, interests, or any other facts that would allow the Court to assess their ability to protect the rights of absent class members, as Rule 23 requires. The Court should deny Plaintiffs' Motion for several reasons.

First, Plaintiffs offer insufficient evidence to establish each Rule 23 requirement. Doing so is *Plaintiffs'* burden—and it is not a mere pleading standard. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). This failure alone warrants denying their Motion.

Second, Plaintiffs have not established Rule 23(a)'s typicality or adequacy requirements

by showing that their claims and interests align sufficiently with those of absent class members, who invested in different funds and paid different fees at different times. Rule 23 requires that a class representative "'possess the same interest and suffer the same injury' as the class members." *Dukes*, 564 U.S. at 348-49. This safeguard ensures a representative has a sufficient stake in proving absent class members' claims, so he or she will protect and maintain those claims when forced to make difficult strategic decisions or allocate limited resources at trial. Here, Plaintiffs provide no factual basis for finding they have a sufficient stake in claims related to the 100-plus investments they never held or fees they never paid. In fact, no Plaintiff invested in *any* Vanguard fund before June 2016, when Vanguard was removed as a Plan recordkeeper—meaning no named Plaintiff paid *any* fee to Vanguard over that critical period. Plaintiffs will receive "not a penny more" if they persuade the Court that any one or more of those options were imprudent. *See Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1619 (2020). Nor would proving Plaintiffs' own claims also establish these other claims, which require evidence unique to each challenged investment or fee.

Third, Plaintiffs also fail Rule 23(a) because they are subject to unique, individualized defenses. Plaintiffs must prove that any fiduciary breach they establish caused a loss to their Plan accounts. They also are subject to the related defense in ERISA Section 404(c), 29 U.S.C. § 1104(c), which provides that fiduciaries of an individual-account plan (like the Plan) shall not be liable for losses resulting from a participant's "exercise of control" over her account. Plaintiffs' testimony shows why these defenses turn on a participant's unique circumstances. *See Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 308-13 (5th Cir. 2007). Defendants also are entitled to prove that a class member's claims are untimely, if she had "actual knowledge" of an alleged breach more than three years before the case was filed. 29 U.S.C. § 1113(2). This, too, requires individualized inquiry. *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 777-78 (2020).

Fourth, even if the Court certifies a class (which it should not), any such class should be limited to the funds in which the named Plaintiffs invested or their challenges to TIAA's

recordkeeping fees, the only such fees any proposed class representative ever paid.

FACTUAL BACKGROUND

I. Key Features Of The Plan.

The Plan is a defined contribution plan that allows participants to save a portion of their income for retirement. Mot. at 5-6; Dkt. 86, Ans. ¶¶ 16, 19. Each participant's benefit consists of the value of his or her individual account, which is the accumulation of all contributions, plus all investment gains (net of expenses) on the specific funds he or she selects. *Id.* Participants are responsible for deciding how to invest their accounts among the options available in the Plan. *Id.*

To assist participants in shaping their individual portfolios, the Plan provided various materials disclosing detailed information about the Plan and each investment's strategy, risks, returns, and fees. Ex. A, Decl. of J. Schaefer ("Schaefer Decl.") ¶¶ 7-10 & Exs. 1-6. As Plaintiffs acknowledge, participants also could review this performance and fee information, along with a host of other material, through the Plan's website or by contacting the Plan's recordkeepers. *Id.* ¶ 10.[1] In addition, participants received periodic account statements showing the investments they held and their performance over various periods of time. Schaefer Decl. ¶ 17, Exs. 11-13.

Throughout the proposed class period, the Plan has offered a diverse array of investment choices, including a guaranteed annuity, variable annuities, and an array of mutual funds. Schaefer Decl. ¶ 6 & Exs. 3-6; *see also* Dkt. 35-13. These options have included both passively- and actively-managed funds in major asset categories and spanning the risk/return spectrum. *Id.* The Plan offered these investments for a range of reasonable fees, which have varied since 2011 but at all times have included numerous low-fee index funds for those who prefer to control costs. *Id.*

That said, the Plan's investment line-up has not remained static, as Plaintiffs' Motion would suggest. Many key factual predicates to Plaintiffs' claims have changed materially over the

---

[1] *See, e.g.*, Ex. B, Davis Dep. at 19-21, 35, 46-47, 103-04; Ex. C, Elliott Dep. at 172-73, 187-89-191-92.

past decade, which their Motion obscures by relying almost entirely on the SAC's allegations.

- ***"Two Recordkeepers."*** Plaintiffs assert that Defendants "retained both TIAA and Vanguard as recordkeepers for" those providers' respective investment options, which resulted in excessive fees. Mot. at 7. But Plaintiffs know from discovery that this is not accurate after June 2016, when the Plan consolidated to one recordkeeper, TIAA. Schaefer Decl. ¶ 11 & Ex. 7. Accordingly, any alleged fiduciary breach based on using two recordkeepers applies *only* to participants in the Plan before June 2016, but not to the many who joined over the past five years, who could never have paid Vanguard a recordkeeping fee. Even before June 2016, participants paid different amounts to TIAA and Vanguard for different services with respect to different investment options. Ans. ¶¶ 55, 57, 84. Thus, someone who chose to invest exclusively in TIAA funds before 2016 did not pay Vanguard one cent for recordkeeping, and *vice versa*. This is not a hypothetical concern; as noted below (at 6-7), *none* of the Plaintiffs invested in *any* Vanguard fund before June 2016, meaning they never paid Vanguard *any* recordkeeping or investment fee, leaving absent class members who did pay such fees without any representative possessing such a claim.

- ***"Too Many Choices."*** Plaintiffs' Motion maintains that the Plan "offers about 35 investment choices managed by TIAA-CREF and over 80 mutual funds offered by Vanguard." Mot. at 6. This purportedly "dizzying" and "confusing array" of options is the basis for several of Plaintiffs' theories. SAC ¶¶ 9, 56, 157. But they know from discovery that this has been inaccurate since May 2018, when the Plan streamlined its menu to around 30 options. Schaefer Decl. ¶ 12.[2] The revised line-up is not limited to TIAA and Vanguard funds, but includes well-known managers such as JPMorgan, American Funds, and MassMutual. *Id.* Plaintiffs' proposed class thus includes many participants who *never* experienced the "confusing" menu on which Plaintiffs' claims rely.

---

[2] *See, e.g.*, Wash Univ. Ret. Savings Plan Website, "Investment Options," *available at* https://www.tiaa.org/public/tcm/wustl/investment-options/plan1; *see also* Wash Univ. Ret. Savings Plan, 2020 Fee Disclosure, *available at* https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/e/910/files/2020/10/Retirement-Savings-Plan-Participant-Fee-Disclosure-2020.pdf.

- ***Lower-Cost Share Classes***. The Motion asserts that most Vanguard options are offered in "retail 'investor' class" versions, which had "higher fees than the 'institutional' class products" the Plan might have offered. Mot. at 7. Plaintiffs concede the Plan always offered the lowest-cost version of all TIAA funds (*id.*; SAC ¶ 96), meaning no participant who invested solely in TIAA options *even has* a "share-class" claim. That includes *all three* Plaintiffs for most of the proposed class period, as Ms. King-Sims[3] held only TIAA funds at all times; Ms. Davis[4] did so from 2011 to May 2018; and Ms. Elliott did so from 2011 to late 2016. Schaefer Decl. Exs. 11-14. Moreover, discovery has confirmed that the Plan repeatedly moved to lower-cost share classes of Vanguard funds at different times over the class period. Dkt. 35, at 7-8; Dkts. 35-13, 35-14; Schaefer Decl. ¶ 13. This means that whether any individual has a viable "share-class" claim depends on what funds she held and when. Certain changes occurred before June 2016, and then the Plan switched 40-plus Vanguard funds to lower-cost versions in connection with the recordkeeper consolidation at that time. *Id.* & Exs. 7, 9-10; *see* Dkt. 35-14. As a result, by the end of 2016, the Plan offered a lower-cost, non-retail version of 94 of the 95 funds for which such classes were available. *Id.* Here, *no* Plaintiff invested in *any* Vanguard option before November 2016. *See* Schaefer Decl. Exs. 11-14. As such, whatever "share-class" claim the three named Plaintiffs might have, if any, necessarily differs from claims held by others who invested in Vanguard funds before June 2016.

- ***"Uncapped" Revenue Sharing***. Plaintiffs' Motion claims the Plan "could have capped the amount of revenue sharing payments made to recordkeepers." Mot. at 7. Discovery confirms that this is precisely what Defendants did over the entire class period. Schaefer Decl. ¶ 14. However, the Plan's fee structure changed materially since 2011. Before June 2016, TIAA and Vanguard received separate recordkeeping fees at different rates for distinct levels of service. *Id.*

---

[3] Each of Plaintiffs' complaints in this case has misstated Ms. King-Sims' surname as "Sims-King."

[4] Ms. Davis recently married and changed her surname to Smith. Because the case caption includes her maiden name, and to remain consistent, Defendants continue to refer to her as Ms. Davis.

Participants thus paid different amounts depending on which provider they used and which funds they chose. After TIAA became the Plan's sole recordkeeper, Defendants reduced its fee to just 0.053%, *id.*, meaning anyone who joined the Plan after June 2016 has a much different claim than Plaintiffs and others who invested through TIAA before that date—one that can no longer rest on the Plan's use of two recordkeepers. Moreover, after Vanguard's removal as recordkeeper in June 2016, the Vanguard mutual funds on the Plan menu did not pay "revenue sharing" to TIAA, meaning that participants who held only Vanguard funds *paid no* recordkeeping fees at all; rather, TIAA's fee was covered by revenue sharing from certain TIAA funds. *Id.* ¶¶ 15-16 & Ex. 8. Then, in October 2018, Defendants again modified the fee structure, instituting a separate fee assessed equally to all participants, which Defendants have since reduced further. *Id.* & Ex. 1, at 12.

II. The Named Plaintiffs.

Plaintiffs' Motion says little at all about the three proposed class representatives, limiting the discussion to their names and a combined list of investments that they, collectively, held at unidentified times during the putative class period. Mot. at 3-4. This list includes only eight TIAA funds and an unspecific reference to "several Vanguard funds," out of the 120-plus options available through the Plan since 2011. *Id.* Each Plaintiff also submits a boilerplate declaration stating identical assertions that largely track the language of Rule 23. *See* Dkts. 93-7 to -9.

Ms. Davis is a current Plan participant. Schaefer Decl. ¶ 17 & Ex. 14. She left the University in February 2019, and later withdrew her Plan account except for the TIAA Traditional Annuity. *Id.* Ex. 14. Since 2011, Ms. Davis invested in the TIAA Traditional Annuity, CREF Stock Account, CREF Money Market Account, CREF Equity Index, TIAA-CREF Large-Cap Growth Index, and, starting in May 2018, the Vanguard Institutional Index Fund. *Id.* Exs. 11, 14.

Ms. King-Sims has not been a University employee since June 1996, but has retained an account in the Plan over the past 25 years. Schaefer Decl. Exs. 13, 14. Since April 2011, Ms. King-Sims has invested in only two conservative options, the TIAA Traditional Annuity and the

CREF Bond Market Fund. *Id.* She never invested in any Vanguard fund over that period. *Id.*

Ms. Elliott joined the University in 2008 and is a current Plan participant. Schaefer Decl. Ex. 14. From before the class period until late 2016, Ms. Elliott invested in a single option, the TIAA-CREF Lifecycle 2030 Fund. *Id.* In November 2016, Ms. Elliott moved her Plan holdings into five Vanguard options. *Id.* Exs. 12, 14. In 2018, *after* filing her complaint, Ms. Elliott expanded her investments, adding several TIAA options, including the CREF Stock Account and the TIAA Real Estate Account—both of which her June 2017 complaint claimed were imprudent and should not have been offered. *Id.*; Dkt. 1, ¶¶ 126-127. In 2019, Ms. Elliott added more holdings, including other options offered by JPMorgan, MassMutual, and Western Asset. *Id.*

ARGUMENT

A class action "is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 564 U.S. at 348 (quotations omitted). Rule 23 therefore imposes "stringent requirements" to ensure collective adjudication of the named plaintiffs' claims will be consistent with the rights of those absent from the proceedings, who will be bound by the outcome. *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). Plaintiffs bear the burden of establishing each Rule 23 requirement. *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 372 (8th Cir. 2013). They have not done so here.

I. Plaintiffs' Motion Is Devoid Of Evidence To Establish Each Rule 23 Requirement.

At the threshold, the Court should deny Plaintiffs' Motion because they offer virtually no evidence in support of several Rule 23 prerequisites. Rule 23 "does not set forth a mere pleading standard." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Rather, Plaintiffs must "affirmatively demonstrate" all four Rule 23(a) requirements and at least one provision of Rule 23(b). *Dukes*, 564 U.S. at 350. The Court therefore must ensure it has "sufficient material" to issue findings on each prerequisite, which is why "[t]he propriety of class action status can seldom be determined on the basis of the pleadings alone." *Pennell v. Corizon Health, Inc.*, 2018 WL

4088084, at *2 (W.D. Mo. Aug. 27, 2018) (citation omitted). Particularly where, as here, the "adequacy of class representation is at issue, 'close scrutiny' . . . is even more important." *In re Target Corp. Customer Data Security Breach Litig.*, 847 F.3d 608, 612 (8th Cir. 2017).

Plaintiffs are four years into this lawsuit and nearing the end of fact discovery. Defendants have produced well over 100,000 pages of documents. Yet Plaintiffs seek to certify a class of all Plan participants since 2011, based almost entirely on the SAC's allegations. Mot. at 4-7. They do not support several assertions with *any* citation, to the SAC or otherwise.[5] These deficiencies alone warrant denying the Motion. But they also matter here because they obscure critical differences in the claims, circumstances, and interests of the 30,000-plus individuals Plaintiffs seek to represent. The Court should not rubber-stamp the proposed class on such a paltry showing.

II. Plaintiffs Are Not Adequate Or Typical Representatives Of Absent Class Members.

Putting aside their evidentiary failure, Plaintiffs have not satisfied Rule 23(a)'s typicality or adequacy requirements. These criteria serve as "guideposts" for ensuring that the "maintenance of a class action is economical" and "the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997); *Golan v. Verita Entm't, LLC*, 788 F.3d 814, 821 (8th Cir. 2015). Accordingly, Rule 23 allows certification only when class representatives "'possess the same interest and suffer the same injury' as the class members." *Dukes*, 564 U.S. at 348-49 (citation omitted). Otherwise the representatives have too small a stake in proving the elements of the absent class members' claims. Here, Plaintiffs have not established that their interests align sufficiently with those of absent class members.

---

[5] For example, Plaintiffs conclude without citation that "[a]ll participants paid a portion of the Plan's recordkeeping fees, which were charged in a 'uniform' manner to all participants." Mot. at 13. As noted (at 6), discovery has shown this assertion is incorrect. Plaintiffs also declare without citation that any loss to a participant's account "resulted from the same course of plan-level conduct"; that all "share a common interest in establishing Defendants' liability"; and that the evidence needed to do so "is exclusively common proof." Mot. at 3. But "[t]hese are conclusions, not *reasons*" for reaching them, and Plaintiffs do not satisfy the "rigorous analysis" required by Rule 23. *In re Target Corp.*, 847 F.3d at 612 (emphasis added).

A. Plaintiffs Cannot Assert Claims On Behalf Of Absent Class Members Who Invested In Different Funds And Paid Different Fees To Different Providers.

To satisfy Rule 23, there "must be enough congruence between the named representative's claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group." *Spano v. The Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011). Here, Plaintiffs' circumstances and stake in this lawsuit do not qualify them, for each asserted theory of liability, to represent a class of participants who invested in different funds and paid different fees.

From 2011 until the Plan moved to TIAA as sole recordkeeper in June 2016—the SAC's central focus—Plaintiffs collectively invested in only *eight* of the roughly 120 options available in the Plan. *Supra* at 6-7. All eight were offered by TIAA; *none* were managed by Vanguard. *Id.* Plaintiffs thus paid nothing to Vanguard over this period (for recordkeeping, investment management, "higher-cost" share-classes, or anything else)—meaning the many absent class members who did invest through Vanguard lack *any* representative with similar claims. Plaintiffs also allege no personal harm caused by any breach as to the more than 20 TIAA options they did not personally choose over that same period. And, although two Plaintiffs (Ms. Elliott and Ms. Davis) broadened their holdings modestly since late 2016—mostly *after* filing this suit—Plaintiffs, combined, still invested in only 25 funds over the entire proposed period. *Id.* Many of these recent changes occurred only after the Plan's menu was streamlined to 30 funds in May 2018. *Id.*

Despite their limited grievances, Plaintiffs seek to assert claims challenging discrete decisions at different times that resulted in the Plan offering "imprudent" investments Plaintiffs never held and in which they have no concrete financial stake. Indeed, they ask to represent *all* Plan participants to challenge apparently *any* fund or fee in the Plan over more than a decade. But Plaintiffs suffered no injury from, and have no interest in, any claim relating to fees or the 100-plus funds for which none of them has anything to gain or lose. Certainly, their Motion does not describe any harm they suffered from any breach as to these funds, nor could they. *Patterson v.*

Morgan Stanley, 2019 WL 4934834, at *5 (S.D.N.Y. Oct. 7, 2019) ("Losses incurred by funds in which Plaintiffs did not invest cannot have impaired the value of Plaintiffs' individual accounts.").

Plaintiffs lack Article III standing to assert challenges to funds they never held or fees they never paid. *See Thole*, 140 S. Ct. at 1618 (a plaintiff must show "an injury in fact that is concrete, particularized, and actual or imminent"). But standing and class certification are distinct inquiries. So even assuming Plaintiffs have standing to challenge every fund or fee since 2011, the lack of a concrete injury renders Plaintiffs atypical and inadequate under Rule 23 to represent the sweeping class they propose. Plaintiffs (as opposed to their attorneys) have no personal stake in such claims, meaning they lack sufficient incentive to vigorously litigate them, maximize potential recovery, or otherwise protect the rights of absent class members. Plaintiffs provide no assurance that their prosecution of their own claims will prove (or even advance) challenges to other funds or fees. Indeed, these concerns led the Seventh Circuit to conclude that, under basic Rule 23 principles, an ERISA class representative "would *at a minimum* need to have invested in the same funds as the class members." *Spano*, 633 F.3d at 586 (emphasis added); *see also Troudt v. Oracle Corp.*, 325 F.R.D. 373, 380-81 (D. Colo. 2018) (absent a plaintiff who invested in a fund, the court "cannot be adequately assured that the interests of the absent . . . investors will be sufficiently protected").

Plaintiffs' Motion does not even attempt to address these concerns. In fact, they disavow any need to do so, ostensibly because they assert claims on behalf of the Plan under ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2). That is, they contend that because such a claim "is inherently a representative claim, *any participant's* claim is *necessarily typical* of the claims of the class." *Id.* (emphases added); *see also id.* at 15 (arguing they are adequate representatives simply because they "are pursuing claims on behalf of the Plan"). This flawed reasoning confuses ERISA's statutory authorization of a claim with Rule 23's requirements to bring that claim as a class action.

Section 502(a)(2) establishes a statutory cause of action to recover losses to a plan arising from a particular fiduciary breach. 29 U.S.C. § 1132(a)(2). But it says nothing about the scope of

any such claim, nor does it abrogate Rule 23's requirements for asserting it as a class action. *See, e.g.*, *Spano*, 633 F.3d at 581 (while an ERISA participant is "entitled to resort to section 502(a)(2) after a breach of fiduciary duty reduces the value of plan assets in their . . . accounts, that tells us very little about whether or under what circumstances employees resorting to section 502(a)(2) may properly proceed as a class under [Rule 23]").[6] By Plaintiffs' logic, any participant who ever participated in the Plan, no matter what funds she selected (if any) or fees she paid (if any), could assert *any* breach "on behalf of the Plan," and automatically represent a sprawling class of its entire population. And she could do so without any proof of injury or monetary stake in the claims. This is not the law. Plaintiffs must satisfy Rule 23 even when purporting to sue "on behalf of the Plan."[7]

Nor is it any answer for Plaintiffs to conclude, without support, that *every* challenge to *any* specific Plan investment or fee at any time necessarily derives from the "same course of plan-level conduct" or relies on "exclusively common proof" regarding the "centralized" administration of the Plan. Mot. at 3, 10-11, 13. Proof of a breach by Defendants with respect to one Plan investment option or fee will not resolve Plaintiffs' challenges to others. And they do not even try to explain how an omnibus class challenging more than 100 different funds and various fees over a decade is achievable consistent with Rule 23's goals of fairness, efficiency, and judicial economy.

The Court need not take Defendants' word for it. Plaintiffs' Motion, like their SAC, claims that Defendants failed to prudently monitor "*each* investment option" and its fees over the past ten years. SAC ¶ 131 (emphasis in original); *id.* ¶ 85 (alleging Defendants failed to "evaluate each" fund); Mot. at 5 (arguing Defendants did not "evaluate each of the TIAA and Vanguard investment

---

[6] *See also Troudt*, 325 F.R.D. at 380 ("It is not enough for plaintiffs to counter . . . that a more broadly defined class is appropriate because the injury is to the Plan itself and damages will be paid to the Plan.").

[7] The Supreme Court recently made clear "[t]here is no ERISA exception to Article III." *Thole*, 140 S. Ct. at 1622. The "mere fact" that ERISA plaintiffs purport to sue "in a derivative capacity does not absolve them of the need to establish a constitutional injury-in-fact" for funds they did not select; to hold otherwise "would essentially exempt derivative suits from Article III's requirement that plaintiffs suffer an individual harm." *Patterson*, 2019 WL 4934834, at *5. Likewise, there is no "ERISA exception" to Rule 23 either. Plaintiffs cannot bypass Rule 23 simply because Congress authorized a "derivative" claim under ERISA.

options" to ensure reasonable fees). The SAC also alleges that Defendants breached their duties concerning more than 100 funds at different points of time and in different ways, including by allowing extraneous "layers" of fees, suboptimal share classes, "duplicative" holdings, or any combination of other variables. Not every alleged flaw applies to each investment or fee at all times; rather, establishing a particular breach will require a fund-by-fund evaluation. Yet Plaintiffs do not explain how the Court can resolve such challenges with common evidence at a single proceeding, nor do they describe what proof these inquiries will require. Any trial of their claims will demand specific evidence and scrutiny of considerations relevant to each challenged option or fee.[8] *See, e.g.*, *Sacerdote v. New York Univ.*, 328 F. Supp. 273 (S.D.N.Y. July 31, 2018).[9] Unless a class representative's claims are typical of the absent class members' claims, there is a risk the representative will focus on the specific proof needed to establish her own claims, to the detriment of those of others. This is precisely the risk Rule 23(a) is designed to prevent.

B. Plaintiffs And Absent Class Members Are Subject To Individualized Defenses.

Plaintiffs also fail Rule 23(a) because they are "subject to a unique defense" requiring individualized inquiry. *In re Milk Prods. Antitrust Litig.*, 195 F.3d 430, 437 (8th Cir. 1999).

1. Defendants Are Entitled To Show The Alleged Fiduciary Breaches Did Not Cause Loss To Plaintiffs Or Other Absent Class Members.

First, each of the three Plaintiffs is subject to unique defenses in establishing that any fiduciary breach caused a loss to her Plan account. A fiduciary may only be held liable for losses

[8] *See, e.g.*, *Patterson*, 2019 WL 4934834, at *6 (finding the "evidence that Plaintiffs will have to put forward to establish liability will vary from fund to fund, and Plaintiffs' ability to establish liability as to decisions made in connection with one fund will do little to advance their case for liability as to other funds"); *Dezelan v. Voya Ret. Ins. & Annuity Co.*, 2017 WL 2909714, at *8 (D. Conn. July 6, 2017) (same).

[9] At trial in *Sacerdote*—a similar ERISA lawsuit challenging New York University's 403(b) plan—only *two* specific investment options were at issue (CREF Stock Account and TIAA Real Estate Account), as well as the plan's recordkeeping fees. Even though the court accepted direct testimony by declaration, the bench trial lasted eight days and involved 17 witnesses, plus hundreds of pages of deposition designations. *See Sacerdote*, Dkts. 272, 279-6 to -9, 342, No. 16-cv-6284 (S.D.N.Y.). As the court's post-trial findings confirm, the parties presented voluminous evidence about the factors relevant to each of the two challenged funds—*both* of which are also among the myriad funds Plaintiffs challenge here. 328 F. Supp. at 307-16.

"resulting from" a breach. 29 U.S.C. § 1109(a); *see Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018) (to state a claim under ERISA, a plaintiff must show "the defendant acted as a fiduciary, breached its fiduciary duties, and thereby caused a loss to the Plan") (citation omitted). Therefore, whether and to what extent any alleged loss to a participant's account was caused by an alleged breach is a highly individualized question that depends on the nature of that breach.

Plaintiffs' testimony proves the point. For example, long *after* filing this lawsuit in June 2017, Ms. Davis and Ms. Elliott each chose to continue investing in some of the same funds they claim are too expensive and should never have been offered. *Supra* at 6-7. Ms. Davis invested in the CREF Stock Account, a fund featured prominently in each complaint. *See* Dkt. 1, ¶ 126; SAC ¶ 159. But despite alleging this actively-managed variable annuity charged 1,800% more in fees than the passively-managed Vanguard Institutional Index mutual fund (*id.* ¶ 104), Ms. Davis not only held her existing assets in the CREF Stock Account, she *increased them* until she left the University in 2019. Schaefer Decl. Ex. 14. And Ms. Davis indisputably knew she could choose a lower-fee option if that was her preference, because she did just that, also investing in the same Vanguard Institutional Index Fund her SAC suggests as a lower-cost alternative. *Id.* Ms. Davis said she "just kind of left things where they were" after filing suit, agreeing her allocation "works for [her] given [her] unique circumstances." Ex. B, Davis Dep. at 43-45. And she admitted it was "easily understood" from Plan disclosures that a passively-managed index fund in the same asset category as the CREF Stock Account was available for "much cheaper." *Id.* at 69-75.

Ms. Elliott's decisions are even more instructive. She never invested in the CREF Stock Account or TIAA Real Estate Account before filing her complaint, which expressly challenged both funds. Schaefer Decl. Ex. 14; Dkt. 1, ¶¶ 126-127. These remain the only two funds named in Count II. SAC ¶¶ 159-160. However, in 2018, after filing suit, Ms. Elliott moved money *into*, and continues to hold, both the CREF Stock Account and TIAA Real Estate Account, and she is the only Plaintiff who *ever* invested in the TIAA Real Estate Account. Schaefer Decl. Ex. 14.

These individuals cannot disclaim knowledge of the supposed problems with these funds after June 2017, as they had signed onto a class action claiming those very funds were so badly flawed and expensive that no reasonable fiduciary would offer them. Any loss they incurred by investing in these funds thus resulted from their own informed decision-making, not action by Defendants. Indeed, this also calls into serious question the extent to which Defendants' alleged fiduciary breaches as to these funds were the cause of losses to these Plaintiffs *before* the lawsuit, considering they selected them even after indisputably knowing of the supposed deficiencies.

2. Application of ERISA Section 404(c)'s Safe-Harbor Defense Similarly Requires Individualized Inquiry And Precludes Certification.

A variation of this causation defense—which Defendants are permitted to assert for each class member to whom it applies—is codified directly into ERISA. Section 404(c) provides that if an individual account plan, like the Plan here, allows a participant to "exercise control over the assets in his account," then a fiduciary will not be liable "for *any loss*, or *by reason of any breach*, which results from such participant's . . . exercise or control." 29 U.S.C. § 1104(c)(1)(B) (emphases added). Section 404(c) thus "allows a fiduciary, who is shown to have committed a breach of duty in making an investment decision, to argue that despite the breach, it may not be held liable because the alleged loss resulted from a participant's exercise of control." *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 445 (3d Cir. 1996). Stated differently, the Section 404(c) defense applies "if the fiduciary proves that any losses sustained by the Plan are *caused* by a plan participant exercising control over his or her investments." *Tussey v. ABB, Inc.*, 2008 WL 379666, at *3 (W.D. Mo. Feb. 11, 2008) (emphasis in original). After all, where a "plan participant chooses an investment with a higher expense ratio, it is logical to assume that the participant thought he or she was getting some benefit in return for the fund's higher overhead." *Id.*

Here, the Plan satisfies the requirements for the Section 404(c) safe harbor. As Plaintiffs admit, they and other "[p]articipants have the right to direct the investment of their accounts among

the available investment choices." SAC ¶ 19; *id.* ¶ 69. The Plan offers a number of options with varying fees, risks, and potential rewards. *Supra* at 3; *see* 29 C.F.R. § 2550.404c-1(b)(3) (discussing "Broad range of investment alternatives" requirements). Defendants also gave participants detailed information about the Plan investment options, including annual disclosures pursuant to 29 C.F.R. § 2550.404a-5, informing them about the performance and fees of each fund. *Supra* at 3; *see* 29 C.F.R. § 2550.404c-1(b)(2)(i) (discussing "Opportunity to exercise control" requirements). Defendants arranged for education services and other tools to help participants allocate their savings consistent with their personal risk tolerance and retirement timeline. *Supra* at 3. The Summary Plan Description ("SPD") expressly informs participants that the Plan is a Section 404(c) plan and that they are responsible for their own investment decisions. Dkt. 93-11, at 11; *see* 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1). In short, Section 404(c) applies to the Plan, and the question becomes whether certain Plaintiffs or absent class members are subject to the defense.

That inquiry, however, presents several individualized considerations, because "whether a participant . . . has exercised independent control in fact with respect to a transaction depends on the facts and circumstances of the particular case." 29 C.F.R. § 2550.404c-1(c)(2). In evaluating this question, the Court looks for "proof that a participant's . . . control was a cause-in-fact, as well as a substantial contributing factor in bringing about the loss incurred." *Unisys*, 74 F.3d at 445. This, in turn, requires considering idiosyncratic factors such as the extent to which a given participant had information about the Plan's investments, availed herself of those resources, and made knowing decisions with respect to her account. After all, Section 404(c) "recognizes that participants are not helpless victims of every error. Participants have access to information about the Plan's investments . . . and they are furnished with risk-diversified investment options. . . . Section 404(c) contemplates an *individual, transactional defense* in these situations." *Langbecker*, 476 F.3d at 312 (emphasis added); *see* 29 CFR § 2550.404c-1(b)-(c). As such, courts have found

that a Section 404(c) defense can render class certification inappropriate.[10]

Here, the testimony of the named Plaintiffs alone is sufficient to illustrate that this inquiry is highly individualized. Each admits that Plan participants determine their own investment objectives and tailor their portfolios to their individual risk and cost preferences.[11] But each of the many Plan investment options had unique characteristics, holdings, returns, and fees, and those returns (and in some instances fees) varied considerably depending on the timeframe. The Court must assess whether each Plaintiff caused the "losses" they allege by knowingly or intentionally opting for pricier, rather than cheaper, funds or otherwise making decisions they still would have made even absent the alleged breach (*i.e.*, the breach did not cause the alleged loss).

Plaintiffs' testimony varies on these questions. For example, Ms. King-Sims agreed it was her responsibility to decide how to invest her Plan account; that she could change her selections; that communications disclosed the available options, performance and fees; and that there are tradeoffs between risk and return. *See, e.g.*, Ex. D, King-Sims Dep. at 29-30, 34, 66-68. Given her preferences, she chose to invest conservatively and was pleased with the net-of-fees performance of her two TIAA funds. *Id.* at 30, 40-41, 46. Similarly, Ms. Davis understands that Vanguard mutual funds are "quite different" than the TIAA Traditional Annuity, but she is willing to spend a bit more for the latter because it offers a guaranteed return and lifetime income, with which she remains "quite satisfied." Ex. B, Davis Dep. 36-42, 104-06, 138-39. She also agreed others may have used TIAA's personalized assistance, which might have led to lower costs or a

---

[10] *See Langbecker*, 476 F.3d at 309-13 (vacating lower court's certification order, remanding "for further consideration of the extent to which § 404(c) decisions by participants undermine the feasibility of class action treatment"); *Wiseman v. First Citizens Bank & Tr. Co.*, 212 F.R.D. 482, 487 (W.D.N.C. 2003) (finding "the issue of independent control [under Section 404(c)] will require an individual analysis for each class member," and "[e]xamining the issue . . . for each of hundreds or thousands of Plaintiffs will make a class action unwieldy and impracticable"); *Thomas v. Aris Corp. of Am.*, 219 F.R.D. 338, 342 (M.D. Pa. 2003) (finding the Section 404(c) defense "renders the potential class members' claims significantly different from and atypical of" the claims of proposed class representatives).

[11] *See, e.g.*, Ex. B, Davis Dep. at 37-39, 44-45, 52-53, 146-50; Ex. C. Elliott Dep. at 95-96, 126-27, 142-45, 192-93; Ex. D, King-Sims Dep. at 29-30, 34.

better investment mix—but she chose not to use these services. *Id.* at 112-14.

Contrast this testimony with Ms. Elliott, who disavowed ever making an informed decision about essentially anything. *See, e.g.*, Ex. C, Elliott Dep. at 5-9, 18-21, 64-65. She purported to not even know she was *allowed* to change Plan investments until speaking with a financial advisor in late 2016. *Id.* at 21, 75-78, 126. And she repeatedly stated her belief—even after four years of litigation—that it was the University's responsibility to manage her investments and fees, saying she "trusted Wash U . . . to invest [her] savings" and was not responsible for reviewing fee and performance information admittedly available to her. *Id.* at 31-33, 70-72, 86, 90-91, 153-57. That said, even Ms. Elliott agreed the Plan offered numerous options that allow someone to diversify their choices, and "if so inclined [they] can put their money . . . in the cheapest options." *Id.* at 148. She further acknowledged that Plan disclosures made clear certain funds had "significantly lower" fees than others, and a participant therefore could save money and create a diversified portfolio at relatively low cost by focusing on fees (something she never did). *Id.* at 136-43.

As demonstrated by these Plaintiffs, whether each participant suffered a loss and whether that loss resulted from his or her exercise of control cannot be determined on a class-wide basis.

3. **Section 404(c) Applies To Plaintiffs' Challenges To Plan Investments.**

Plaintiffs may argue Section 404(c) does not apply here, based on a provision added to regulations in 2010 reflecting the Department of Labor's view that the safe harbor does not apply to investment challenges. However, the statute's explicit language leaves no room for the DOL's narrow reading of this provision, meaning it is not entitled to deference.

Section 404(c)'s "plain language" allows a fiduciary to argue that, despite a breach "in making an investment decision," such fiduciary "may not be held liable because the alleged loss resulted from a participant's exercise of control." *Unisys*, 84 F.3d at 445. The Third Circuit found "nothing in section [4]04(c) which suggests that a breach on the part of a fiduciary bars it from asserting section [4]04(c)'s application." *Id.* After other federal courts reached a similar

conclusion, *see, e.g.*, *Langbecker*, 476 F.3d at 311, the DOL amended the Section 404(c) regulations in 2010, to state that the safe-harbor provision "does not serve to relieve a fiduciary from its duty to prudently select and monitor any service provider or designated investment alternative offered under the plan." 29 C.F.R. § 2550.404c-1(d)(2)(iv), 74 Fed. Reg. 64,910 (Oct. 20, 2010). Plaintiffs may rely on this language to suggest Section 404(c) cannot be invoked here.

However, the Court cannot adopt a regulatory interpretation contrary to the statute's plain text. *Barnhardt v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (a court cannot "alter the [statutory] text in order to satisfy the policy preferences of [an agency]. These are battles that should be fought among the political branches [and not] by appeal to the Judicial Branch."). In fact, the Fifth Circuit had already rejected a similar argument based on the DOL's language in the Preamble to the prior version of the 404(c) regulations. *Langbecker*, 476 F.3d at 311. Specifically, the court found the DOL's position "does not reasonably interpret § [1104(c)] itself, because it contradicts the governing statutory language in cases where an individual account plan fully complies with the regulations' disclosure, diversification and participant control provisions, and loss is caused, *notwithstanding some other fiduciary duty breach*, by the participants' investment decisions." *Id.* (emphasis added). The DOL's position "would render the § [1104(c)] defense applicable only where plan managers breached no fiduciary duty, and thus only where it is unnecessary." *Id.*; *see Renfro v. Unisys Corp.*, 2010 WL 1688540, at *8 (E.D. Pa. Apr. 26, 2010) (finding the DOL's position was "not entitled to *Chevron* deference"), *aff'd*, 671 F.3d 314 (3d Cir. 2011).

These courts correctly declined to accord deference to the DOL's position. There is no ambiguity in Section 404(c), meaning agency deference does not apply.[12] The DOL's position would read the "any loss" and "any breach" language out of the statute. Construing the statute to provide that fiduciaries could avoid liability for losses resulting from participants' choices only

---

[12] *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2410-22 (2019); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

when there *could be no* fiduciary liability in the first place is both illogical and inconsistent with the statutory text. Given Section 404(c)'s clarity, only Congress can modify it. For these reasons, Defendants should be permitted to establish their causation and Section 404(c) defenses to Plaintiffs' claims—which necessarily require individualized determinations.

4. The University Is Entitled To Assert ERISA's Statute of Limitations, Which Will Require Highly Individualized Evidence And Inquiries.

Plaintiffs also fail to satisfy typicality and adequacy because determining whether their claims are time-barred demands individualized inquiries. An ERISA plaintiff must bring suit within three years of having "actual knowledge" of the alleged breach. 29 U.S.C. § 1113(2). The Supreme Court has confirmed the individualized nature of this defense, holding "§ 1113(2) begins only when a plaintiff actually is aware of the relevant facts, not when he should be" through plan disclosures. *Sulyma*, 140 S. Ct. at 777-78. The Court gave examples of how a defendant might show a plaintiff had "actual knowledge"—all requiring a fact-intensive, individualized analysis.[13]

If any Plaintiff or class member had actual knowledge of an alleged breach before June 2014, they are time-barred. Plaintiffs' testimony reveals that participants may be subject to this defense in different ways. For instance, the SAC bases Count II's investment-management fee claim in part on the "confusion" and fees allegedly caused by the number of options in the Plan. SAC ¶¶ 9, 56, 157. Yet Ms. Davis testified she was "confused" by the Plan line-up way back when she first began participating in 1999. Ex. B, Davis Dep. at 40-43. She admittedly did nothing about this for nearly two decades, despite conceding she received disclosures showing the Plan's line-up, fees, and performance. *Id.* Moreover, each Plaintiff admittedly received or had access to various Plan-related information, including the Plan's website. No doubt, the 30,000-plus other putative class members learned information about Plan investments and fees from disclosures,

[13] For example, the Court noted that a defendant might elicit such information via deposition testimony, by "inference from circumstantial evidence," or through "electronic records showing that a plaintiff viewed the relevant [plan-related] disclosures and took action in response to the information." 140 S. Ct. at 779.

account statements, online materials, and other sources such as personal advisors. The Court would need to inquire as to each individual's "actual knowledge" to determine who knew the facts giving rise to the claims before June 2014. These individualized inquiries preclude class treatment.

III. If The Court Certifies A Class, It Should Be Limited To Participants Who Paid The Same Fees And Invested In The Same Funds As Plaintiffs.

While Defendants maintain no class should be certified, if the Court disagrees, any class should be limited to ensure the Plaintiffs' interests align with those of absent class members.[14] Count I should be limited only to Plan participants who paid recordkeeping fees to TIAA, but not Vanguard, before June 2016; as explained (at 6-7), no Plaintiff ever paid any such fee to Vanguard. Likewise, Count II should be limited only to those participants who invested in the same eight TIAA funds as did the Plaintiffs before June 2016; as explained (at 6-7), no Plaintiff ever paid such fees to Vanguard over that period, and the Plaintiffs should not represent those who selected other TIAA funds. For claims arising after June 2016, Plaintiffs' Motion offers no factual basis for finding they satisfy Rule 23, for theories that necessarily can no longer rest on the Plan's alleged use of two recordkeepers. The Court therefore should deny certification of claims over that period.

At the very least, the Court should not certify a class starting April 28, 2011, as proposed. Plaintiffs filed the first complaint in this case on June 8, 2017 (Dkt. 1), meaning no class can extend back before June 8, 2011. *See* 29 U.S.C. § 1113(1) (ERISA's six-year statute of repose).

CONCLUSION

For the above reasons, the Court should deny Plaintiffs' Motion.

---

[14] *See Troudt*, 325 F.R.D. at 379-80 (refusing to certify imprudent-investment class as to a fund in which no named plaintiff invested); *see also Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 814 (7th Cir. 2013) (affirming certification of revised proposed class after *Spano*, because the definition took "care to limit the class to those [p]lan participants who invested in the [challenged fund] during the class period," finding "[t]hese details make all the difference")); *Spano*, 633 F.3d at 596-90 (reversing certification of a plan-wide class including investment options in which the plaintiffs or absent class members invested).

Dated: May 10, 2021

Respectfully submitted,

/s/ *Deborah S. Davidson*

Brian T. Ortelere (*pro hac vice*)
Jeremy P. Blumenfeld (*pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
1701 Market St.
Philadelphia, PA 19103
Tel.: 215-963-5000
Fax: 215-963-5001
brian.ortelere@morganlewis.com
jeremy.blumenfeld@morganlewis.com

Deborah S. Davidson (*pro hac vice*)
Matthew A. Russell (*pro hac vice*)
Samuel D. Block (*pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Chicago, Illinois 60601
Tel.: 312-324-1000
Fax: 312-324-1001
deborah.davidson@morganlewis.com
matthew.russell@morganlewis.com
samuel.block@morganlewis.com

Christopher A. Smith
HUSCH BLACKWELL
The Plaza in Clayton
190 Carondelet Plaza, Suite 600
St. Louis, Missouri 63105
Tel.: 314-480-1836
Fax: 314-480-1505
chris.smith@huschblackwell.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2021, I caused a true and correct copy of the foregoing Opposition to Plaintiffs' Motion for Class Certification to be served on Plaintiffs' counsel of record via the Court's ECF system, which will send a notice of filing to all counsel of record in this case.

/s/ Deborah S. Davidson
Deborah S. Davidson