IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:20-cv-21784-DPG

AUGUSTINO SANTIAGO, LILLY LEYVA, GUILLERMO CREAMER, and MARIA ACEITUNO, individually and as representative of a class of participants and beneficiaries on behalf of the University of Miami Retirement Savings Plan,

Plaintiffs,

v.

UNIVERSITY OF MIAMI,

Defendant.

DEFENDANT'S MOTION TO DISMISS PURSUANT TO RULES 12(b)(1) AND 12(b)(6) AND MEMORANDUM OF LAW

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INTRODUCTION

This lawsuit is the latest in a wave of nearly two dozen copycat complaints filed against many of the country's top private universities since 2016. Plaintiffs claim the University of Miami ("Miami") breached its fiduciary duties under ERISA by causing the Retirement Savings Plan ("Plan") it maintains for faculty and staff to pay unreasonable fees and by allowing the Plan's participants the option of investing in two allegedly "underperforming" investments since May 1, 2014. Dkt. 1 ("Compl.") ¶ 95. Without any allegations about the Plan fiduciaries' *actual* decision-making process, Plaintiffs rely on a litany of alleged characteristics about the Plan's investment menu to try, futilely, to create an *inference* that the fiduciary process was imprudent.

Courts have rejected Plaintiffs' theories even when the underlying facts are well-pleaded. But here, the Complaint is a *literal* copy-and-paste: Its allegations, right down to the typos, are lifted directly from complaints in other cases about other plans offered by other universities, without regard for how (or even if) they relate to Plaintiffs, Miami, or the Plan.[1] As a result, the Complaint contains holdover allegations that do not apply; rests on outdated data that leaves Plaintiffs with no factual support for certain claims during the relevant period; and asserts "facts" that are contradicted by documents referenced or incorporated in the Complaint and must therefore be disregarded. Borrowing allegations might be an unfortunate but inconsequential reality in some cases. But, here, Plaintiffs got wrong *every* fact from which they ask the Court to draw an inference of fiduciary imprudence. As a result, the Complaint must be dismissed.

Count I fails to state a claim based on unreasonable recordkeeping fees. Compl. ¶¶ 99-105. Plaintiffs allege the Plan "continues to contract with *six* recordkeepers," duplicating work and costs. *Id.* ¶ 34. Plaintiffs are wrong. As judicially-noticeable documents confirm, the Plan

[1] Most of the Complaint's allegations are identical to those in *Nicolas v. Trustees of Princeton University*, aside from minor adjustments. *Compare* Compl. ¶¶ 1-42, 62-119, *with* Dkt. 1, ¶¶ 1-51, 56-111, No. 2:17-cv-03695 (D.N.J. May 23, 2017); *see also* Compl. ¶ 67 n.10 (containing typo); *Princeton*, Dkt. 1, ¶ 61 n.12 (containing same typo).

uses a *single* “master” recordkeeper—Fidelity—and has done so at all relevant times.[2] Plaintiffs next allege that the Plan paid for recordkeeping services using “asset based” fees amounting to “over $100” per participant, whereas a prudent fiduciary would have negotiated a “fixed” fee of around $35 per participant for those services. *Id.* ¶¶ 23, 37. Plaintiffs, again, are wrong. As the recordkeeping contract and statutorily-required disclosures confirm, the Plan has paid Fidelity a flat fee of just $39 per participant since mid-2018, and just $54 before then. Last, Plaintiffs allege that a “prudent fiduciary must ensure that the recordkeeper rebates to the plan all revenue sharing payments that exceed a reasonable, negotiated recordkeeping fee.” *Id.* ¶ 26. But of course the Plan fiduciaries did that, too. In short, the allegations underlying Count I bear no resemblance to the Plan, much less plausibly suggest an imprudent fiduciary process.

Count II fares no better, as Plaintiffs can sustain no inference of an imprudent fiduciary process based on the Plan’s investment menu or the alleged “underperformance” of two funds. Plaintiffs claim Miami “freighted” the Plan with “a staggering array of over 390 investments,” while a narrower menu of 15 options (excluding target-date funds) would reflect “the output of an evaluation and selection by a prudent fiduciary[.]” Compl. ¶¶ 30, 54-57. Since before 2014, however, the Plan’s investment menu offered between 15 and 26 options (excluding target-date

[2] In deciding a motion to dismiss, the Court “is allowed to look at matters outside the pleadings if those matters are necessarily embraced by the pleadings.” *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018). In ERISA cases, courts routinely consider the plan and plan-related documents, statutorily required disclosures, IRS/DOL Form 5500s, and investment fund prospectuses. *Id.* at 822-23 (considering prospectuses and plan-related documents, noting “ERISA plaintiffs typically have extensive information . . . because of ERISA’s disclosure requirements”); *Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 484 n.3 (8th Cir. 2020) (considering “fund prospectuses and plan disclosure documents”) (quotations omitted); *Hecker v. Deere & Co.*, 556 F.3d 575, 582-83 (7th Cir. 2009) (plan summaries, prospectuses); *White v. Chevron Corp. (“White I”)*, 2016 WL 4502808, at *5 (N.D. Cal. Aug. 29, 2016) (plan documents, Form 5500 filings), *aff’d* 752 F. App’x 453 (9th Cir. 2018). Here, Plaintiffs expressly incorporate this information into the Complaint, either by direct reference or by their assertion that their Complaint is based upon, *inter alia*, “[i]nformation currently available to Plaintiff [*sic*] regarding the Plan’s features.” Compl. ¶ 37; *see, e.g.*, *id.* ¶¶ 55, 60, 63 (relying on fund prospectuses and fact sheets); ¶ 64 (TIAA’s service agreement); ¶ 67 (“participant communications”); ¶ 42 (Form 5500 filings).

funds), allowing participants to choose among mutual funds and annuities spanning a diverse range of asset categories, investment styles, and fund managers. Plaintiffs also allege the Plan's menu should be organized as "a 'tiered' structure," *id.* ¶ 30, but that is *exactly* what the Plan does by offering participants four tiers of options corresponding to participants' varying savings goals and investment styles (hands-on or hands-off). Finally, Plaintiffs baldly assert that the Plan offered funds for which low-cost institutional share classes were available. *Id.* ¶¶ 59-61. But they do not offer a single example of this ever happening because, in fact, the Plan already was composed of predominately institutional share-class investments in 2014, and offers such low-cost investments today in *every* fund for which they are available, belying any inference of fiduciary neglect.

Plaintiffs' "underperformance" allegations fail, too. Plaintiffs cannot focus on the outcome of an investment in hindsight or rely on faulty, hand-picked comparators with different objectives or strategies. This is because courts recognize such apples-to-oranges comparisons shed no light whatsoever on the prudence of a fiduciary's decision-making *process*. But here again, Plaintiffs' allegations are even weaker than those rejected in other cases. For starters, none of the Plaintiffs ever invested a penny in the challenged funds—the TIAA Real Estate Account and CREF Stock Account—and thus they lack Constitutional standing to pursue these claims. And even if they had standing, Plaintiffs only allege facts about the performance of the two funds as of December 2014. Compl. ¶¶ 67, 69-70, 73, 79-80. They allege *nothing* about how these funds performed after December 2014, much less offer apples-to-apples comparisons to alterative funds or otherwise plausibly demonstrate that these funds were so imprudent that participants should not even have been given the option to invest in them during the alleged class period (May 1, 2014 to present).

Count III's claim that Miami did not prudently monitor other fiduciaries is derivative of Plaintiffs' underlying fiduciary breach claims in Counts I and II and fails for the same reasons.

For these reasons and as discussed further below, Miami respectfully requests that the Court dismiss the Complaint with prejudice.

FACTUAL BACKGROUND

I. Section 403(b) Plans.

A "403(b)" plan is a tax-sheltered annuity retirement program available to employees of nonprofit, charitable, religious, medical, and educational entities like Miami. 26 U.S.C. § 403(b)(1)(A). Section 403(b) plans are similar to 401(k) plans in that they give participants the ability to choose from a menu of investments options for directing their plan contributions. But there are important differences, too, stemming from 403(b) plans' unique statutory underpinnings.

Originally, 403(b) plans were limited to offering participants only annuity products, which provide a stream of monthly payments for life or a fixed term of years depending on the contract and individual choices.[3] Congress later amended Section 403(b) to allow such plans to offer both annuities and mutual funds—but not collective investment trusts, separate accounts, or other vehicles that are commonplace in 401(k) plans. 26 U.S.C. § 403(b)(7). As a result, unlike most 401(k) plans, a typical 403(b) plan allows participants to elect to receive their benefits as an annuity by investing in one or more annuity options offered by the plan, as prescribed in contracts with the plan's annuity provider.[4] This annuity focus is even more pronounced in the university context, where academic faculty often change institutions over their careers, and annuities thus historically have served as a portable, *individual* contract with an insurer that would "move" with the employee and ensure steady retirement income regardless of his or her employer. In short, unlike 401(k) plan participants, who rarely have access to annuity products, 403(b) plan participants have come to expect having the option of selecting annuities as a way to obtain retirement income.[5]

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[3] Tech. Amends. Act, Pub. L. No. 85-866, § 23, 72 Stat. 1606 (1958) (codified in IRC § 403(b)).

[4] *See* SEC, *Fast Answers: Annuities* (Apr. 6, 2011), https://www.sec.gov/answers/annuity.htm.

[5] *See* Saxon & Powell, *Preparing Educational & Nonprofit Employees for Retirement: 403(b) Plans and ERISA Fiduciaries*, Journal of Taxation, 127 J. Tax'n 53, 55, 2017 WL 3206157, at *3 (Aug. 2017). The GAO identified the *absence* of annuities in 401(k) plans as a *flaw* in their ability to ensure retirement security. Highlights of GAO-16-433, www.gao.gov/assets/680/678925.pdf.

II. Key Facts About the Plan.

The Plan is generous. Miami automatically contributes 5% of an eligible employee's compensation each pay period, without requiring any contribution by the employee. Ex. A, 2020 SPD at 126-27. Participants also can elect to defer a portion of their compensation into the Plan on a tax-deferred basis, and if they choose to do so, Miami makes an additional dollar-for-dollar matching contribution on the first 5% of compensation the employee elects to defer/save. *Id.*[6]

A. The Plan's Investment Menu.

The Plan provides a menu of investment options, allowing participants to choose from a range of annuities and mutual funds. Each participant is responsible for deciding in which of the Plan's options to invest and may change those investments at any time. Ex. A, 2020 SPD at 124, 128. The Plan currently offers 20 total options: 16 mutual funds and four TIAA annuity options. Ex. B, Inv. Choices (May 15, 2020).[7] These options are organized into four tiers. *Id.*; Ex. A, 2020 SPD at 128. Tier 1 consists of the Plan's "target date" funds (Fidelity Freedom Index Funds) for "the new investor, or someone who prefers their retirement planning to run on auto-pilot." Ex. B, Inv. Choices. Tier 2 includes 15 passively and actively managed mutual funds across major asset classes, for a more "active investor, whether novice or expert, who wants to take the driver's seat when planning for retirement." *Id.* Tier 3 offers four TIAA annuity options, for someone "who wants to ensure lifetime income, or for those who currently invest with TIAA-CREF." *Id.* And Tier 4 is a "brokerage window," giving participants access to around 4,500 additional mutual funds beyond the Plan's designated investment menu. *Id.*[8]

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[6] Miami recently suspended its Plan contributions, temporarily, due to the COVID-19 emergency.

[7] *See also* Inv. Choices (May 2019), Univ. of Miami, RSP Website, *available* here (last accessed July 7, 2020). This counts the Plan's target-date fund series as a one option, given that participants typically select only the fund designed to most closely target their anticipated retirement date.

[8] Plaintiffs do not challenge the Plan's brokerage window or allege Miami had any duty to monitor funds selected through Tier 4, which is intended for the "savvy investor, who prefers a more hands-on approach" and is "willing to take on the potential for more risk." Ex. B, Inv. Choices.

Within Tiers 1, 2, and 3, the Plan offers an array of funds across the risk-return spectrum, including varying asset categories (*e.g.*, large cap, small cap), investment objectives (*e.g.*, growth, value), and investment styles (*e.g.*, active and passive). *See* Ex. B, Inv. Choices. These funds are not limited to a single fund company, but rather are provided by several well-regarded managers, including Vanguard, Fidelity, John Hancock, MassMutual, and T. Rowe Price. *Id.* And for those who want annuity options, the Plan offers four choices from TIAA-CREF, including the Traditional Annuity, an "insurance company fixed income account" that guarantees a minimum annual return of at least 3.0% and has continually provided a higher rate of return during the alleged class period.[9] The Plan offers these options at a range of low overall fees, or "expense ratios."[10] The Plan's target date funds in Tier 1—also the default for participants who do not make an election—are index funds with an expense ratio of 0.08% (or just 80 cents for every $1,000 invested).[11] The Plan offers four widely held Vanguard index funds in major asset classes, charging 0.035% to 0.08%, allowing participants who prioritize costs or prefer index funds to construct a well-diversified portfolio. *Id.* The Plan's remaining options in Tiers 2 and 3 carry low expense ratios ranging from 0.11% to 0.81%. *Id.*

Most Plan participants choose to invest in the mutual funds offered in Tiers 1 and 2 or through the brokerage window in Tier 4. Fidelity is the custodian for these options, meaning it, *inter alia*, establishes individual accounts, holds the assets, and allocates funds according to

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[9] The other three annuity options are the CREF Stock Account, TIAA Real Estate Account, and CREF Money Market Account. Ex. B, Inv. Choices; Ex. C, 2019 TIAA 404a-5 Discl. at 7.

[10] An expense ratio is a charge expressed as a percentage of an investor's fund holdings. For example, a participant who invests $1,000 in a fund with an expense ratio of 0.10% would be charged an annual fee of $1 ($1,000 x .001).

[11] *See* Ex. D, 2019 Fidelity 404a-5 Discl. at 8-19; Ex. E, Fidelity, Q1 2020 408(b)(2) Discl. at 3-4; Ex. C, 2019 TIAA 404a-5 Discl. at 5-7.

participants' directives. Ex. F, Fidelity Agmt. at 1-12.[12] At the end of 2018, the Plan held roughly $743 million of its total $837 million (or 89%) in mutual funds in Tiers 1, 2, and 4, while around $65 million (or 8%) of all Plan assets were invested in TIAA annuity options, for which TIAA serves as custodian. This trend has been similar since 2014.[13]

In the past, long before May 2014, the Plan allowed participants to invest through two other annuity providers, VALIC and Lincoln Financial. Ex. H, RSP Form 5500 (2014), Notes 5-6 (pdf 41-42). These options have not been available for new investment at any time relevant here; they are not part of the Plan's investment menu; and no Plaintiff claims to have invested in them. *Id.*

B. Fidelity is the "Master" Recordkeeper for the Plan, and is Paid a Flat, Per Participant Fee for its Services.

The Complaint challenges the Plan's "recordkeeping" fees. Recordkeeping a defined contribution plan requires, among other things, maintaining up-to-date records; processing daily transactions; generating account statements; executing fund transfers and exchanges; issuing communications; maintaining the Plan website; and tax-reporting requirements.[14]

Fidelity has served as the Plan's "master" recordkeeper since before 2014. On top of the services above, Fidelity is responsible for: obtaining and communicating information about all Plan investment options; maintaining a single contribution and remittance process, allowing Miami to make one wire transfer for all contributions to the Plan (thus "simplifying personnel and payroll data feeds" and "reducing electronic fund transfers," Compl. ¶ 26); and providing a single on-line enrollment that includes all Plan investment options in one place (thus "avoiding

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[12] Exhibit F contains the relevant excerpts of the Fidelity Agreement and amendments, and the pages cited herein refer to the bold numbers applied to the bottom right corner of Exhibit F.

[13] *See* Ex. G, RSP Form 5500 (2018), Sched. H (pdf at 57, 59). At the end of 2014, the Plan held roughly 85% of its $458 million in total assets in Tiers 1, 2, and 4, and 9% in TIAA annuity options. Ex. H, RSP Form 5500 (2014), Sched. H (pdf at 58-59).

[14] *See, e.g.*, DOL, *Understanding Ret. Plan Fees and Expenses* ("DOL Fee Brochure"), at 3-5 (Dec. 2011), *available* here (last accessed July 7, 2020).

duplication of services," *id.*). *See, e.g.*, Ex. F, Fidelity Agmt., Apr. 2016 Amend., at 19-24.

At all relevant times, Fidelity has been paid for recordkeeping based on a fixed dollar amount per participant. Since July 2018, the Plan has paid a flat annual fee of $39 per participant. Ex. F, Fidelity Agmt., Aug. 2018 Amend., at 46-50; Ex. E, Fidelity, Q1 2020 408(b)(2) Discl. This rate was reduced from $54, which the Plan paid since July 2015. *See* Ex. F, Fidelity Agmt., Sept. 2015 Amend., at 16-18; Ex. I, Fidelity, Q3 2015 408(b)(2) Discl. Moreover, the Plan does not charge *any* recordkeeping fee to participants with account balances below $5,000.[15]

While Fidelity serves as the Plan's master recordkeeper, TIAA is the custodian for the small percentage of Plan assets invested in its annuities. It is well-recognized that if a 403(b) plan wants to offer TIAA annuity options—including the Traditional Annuity—then TIAA must retain custody and keep records of assets invested in those options.[16] All costs associated with a participant's investment are covered by the fund's total expense ratio. *See* Compl. ¶ 25. TIAA then allocates a portion of that amount to its custodial and recordkeeping costs. Here, however, the Plan capped the amount TIAA may receive for those costs. From July 1, 2014 through mid-2019, TIAA's cap was 0.12% of assets held in TIAA funds, and it rebated anything it received above that amount back to the Plan. Ex. J, TIAA Agmt., Amend. 4. At the end of 2018, the 0.12% fee would have been around $78,000—or less than $5 per participant.[17]

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[15] *See* Ex. F, Fidelity Agmt., Sept. 2015 Amend., at 17; *id.*, Aug. 2018 Amend., at 46-47. Fidelity also agreed to return virtually all "revenue sharing" it received—a practice described below—back to the Plan. *See id.*, Sept. 2015 Amend., at 16-17; *id.*, Aug. 2018 Amend., at 46-50. Any amounts Fidelity receives but does not rebate to the Plan pursuant to its contract is then applied first to the Plan's fixed total fee. *See, e.g.*, Ex. E, Fidelity, Q1 2020 408(b)(2) Discl. at 2, 7.

[16] *See Divane v. Northwestern Univ.*, 953 F.3d 980, 984, 988-90 (7th Cir. 2020); *Cunningham v. Cornell Univ.*, 2017 WL 4358769, at *5 (S.D.N.Y. Sept. 29, 2017); *Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273, 302-03 (S.D.N.Y. July 31, 2018) (finding, after trial, that "literally no other vendor had ever recordkept TIAA annuities"), *appeal pending* No. 18-2707 (2d Cir.).

[17] *See* Ex. G, RSP Form 5500 (2018), Sched. (pdf at 59) (showing balances in TIAA funds).

C. The Plan Fiduciaries Repeatedly Adjusted the Investment Lineup Over Time.

The Plan fiduciaries took several other actions over the putative class period to ensure a diversified investment menu and reduce costs for participants. For example, the Plan already offered predominantly lower-cost "institutional" share classes of the Plan's investments in 2014—and today the *entire* Plan menu is made up of institutional shares where available.[18] Likewise, Plan fiduciaries added, replaced, or removed several investment options over the relevant period.[19]

ARGUMENT

The Supreme Court has emphasized that a motion to dismiss is an "important mechanism for weeding out meritless [ERISA] claims." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014). ERISA class actions impose "asymmetric costs on defendants," *P.B.G.C. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013), and the statute was not meant to impose "litigation expenses" that "unduly discourage employers from offering" plans in the first place, *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (citation omitted). Therefore, before unlocking the discovery floodgates, a motion to dismiss a fiduciary breach claim "requires careful judicial consideration of whether the complaint states a

[18] *See* Ex. B, Inv. Choices; Ex. D, 2019 Fidelity 404a-5 Discl. at 8-19; Ex. C, 2019 TIAA 404a-5 Discl. at 5-7; Ex. K, 2014 Fidelity 404a-5 Discl. at 8-15. Indeed, the Complaint concedes the Plan converted the TIAA variable annuity options to lower-cost "R2" shares promptly after TIAA first began offering multiple share classes in April 2015. Compl. ¶¶ 64, 68, 71; *see also* Ex. L, TIAA Change Notice (Dec. 1, 2014); Ex. M, 2016 TIAA 404a-5 Discl. at 5-6. In 2018, TIAA variable annuities then were converted to an even lower-cost "R3" class. Ex. C, 2019 TIAA 404a-5 Discl. at 5-6. In January 2017, as Plan assets continued to grow, the Plan converted the Fidelity Freedom Index Funds to the "Institutional Premium" class, reducing their expense ratios. Ex. F, Fidelity Agmt., Oct. 2016 Amend., at 25-45. In May 2020, the Plan moved the Fidelity Contrafund from the institutional "K" shares to lower-cost "K6" shares, and the Vanguard Institutional Index Fund (Institutional shares) to lower-cost "Institutional Plus" shares. *Id.*, Mar. 2020 Amend., at 51-56.

[19] For example, the Plan added the Fidelity Contrafund in January 2015. Ex. F, Fidelity Agmt., Nov. 2014 Amend., at 13-15. In January 2017, the Plan replaced four options with new funds, *see id.*, Oct. 2016 Amend., at 25-45, and removed six of the ten TIAA annuity options from Tier 3 of the Plan menu, freezing them to new investments, *see* Ex. J, TIAA Agmt., Amend. 6. And in May 2020, the Plan fiduciaries replaced three other funds with new alternatives. Ex. F, Fidelity Agmt., Mar. 2020 Amend., at 51-56.

claim that the defendant has acted imprudently." *Dudenhoeffer*, 573 U.S. at 425.

To state a claim of imprudence, Plaintiffs must offer well-pleaded facts plausibly showing Miami—acting as a fiduciary—did not exercise "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). ERISA's prudence standard is objective, focusing "on the *process* by which decisions are made, rather than the results of those decisions." *Davis*, 960 F.3d at 482 (emphasis added) (quotations omitted); *see also St. Vincent*, 712 F.3d at 718. This standard reflects the flexibility and discretion ERISA affords fiduciaries in administering a plan suited to the unique needs of its participants, without bright-line rules or turning courts into *quasi* plan administrators. *See, e.g.*, *Divane*, 953 F.3d at 989 ("[I]t would beyond the court's role to seize ERISA for the purpose of guaranteeing individual litigants their own preferred investment options"); *Renfro v. Unisys Corp.*, 671 F.3d 314, 322 (3d Cir. 2011) ("[T]he fiduciary standard is flexible[.]") (quotations omitted); *Martin v. CareerBuilder, LLC*, 2020 WL 3578022, at *4 (N.D. Ill. July 1, 2020) (explaining "courts cannot use ERISA to paternalistically dictate" a plan investment menu). Simply put, a fiduciary does not act imprudently just because a participant (or even a court) might disagree with or second-guess its decisions in retrospect.

Where, as here, the Complaint includes no allegations about the fiduciaries' actual process for making the challenged decisions, Plaintiffs must allege sufficient facts from which the Court may reasonably *infer* that this process was flawed. *See, e.g.*, *Meiners*, 898 F.3d at 822 (this "challenging" burden requires "us[ing] data about the selected funds and some circumstantial allegations about methods to show that a prudent fiduciary in like circumstances would have acted differently") (quotations omitted); *St. Vincent*, 712 F.3d at 718. Proper application of the *Iqbal* and *Twombly* standards is therefore critical when evaluating circumstantial fiduciary breach claims like those Plaintiffs assert here. There are myriad ways a prudent fiduciary could manage a plan;

decisions often are interrelated and require tradeoffs; and a plaintiff almost always can find some alternative that might have turned out better. Thus, "[w]here there are two *possible* explanations" for the fiduciary's actions, "only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are merely *consistent* with [their] favored explanation but are also consistent with the alternative explanation." *White v. Chevron Corp.*, 752 F. App'x 453, 454 (9th Cir. 2018) (emphases added) (quotations omitted); *see also Meiners*, 898 F.3d at 822 ("If the pled facts are merely consistent with liable acts, the complaint 'stops short of the line between possibility and plausibility.'") (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

As shown below, the Complaint falls far short of satisfying these pleading standards.

I. Plaintiffs' Broadside Attacks on the Plan's Investment Menu Fail.

Plaintiffs' central theories are built upon a fundamental mischaracterization of the Plan's investment lineup. Absent those errors, the house of cards falls because the Plan exhibits the same characteristics that Plaintiffs' own Complaint says one should expect in a *prudently* managed plan.

Plaintiffs allege Miami blindly "freighted" the Plan with nearly 400 options, allowing six vendors to add "whatever investments" they wanted, "without any prior screening." Compl. ¶¶ 54-58. But, as explained, the Plan in reality has offered a well-organized and diversified menu of between 15 and 26 core funds, a series of low-cost index target-date funds, and a brokerage window. *Supra* at 5-6. These choices include mutual funds (from various managers) and annuities (from TIAA), across all major asset classes and in both active and passive strategies. *Id.* The menu is organized into tiers to guide participants depending on their individual circumstances. *Id.* And the Complaint itself endorses this very type of investment menu. Compl. ¶ 56.

Plaintiffs also generically allege the Plan offered unspecified "investment options" at unreasonable cost, by including more expensive retail share classes when lower-cost versions were available. Compl. ¶¶ 59-61. But Plaintiffs are wrong about this, too. Since before the alleged class period, the Plan has always offered primarily institutional funds, and as the Plan's assets grew, the

Plan fiduciaries continued to convert others to lower-cost share classes—exactly what Plaintiffs say a prudent fiduciary should do. Compl. ¶ 60; *see, e.g.*, *Martin*, 2020 WL 3578022, at *6 (that fiduciaries "removed or modified a majority of the funds" suggested "Defendants *did* have a prudent process"); *White v. Chevron Corp.* ("*White II*"), 2017 WL 2352137, at *12 (N.D. Cal. May 31, 2017) (changes to investment menu supported inference that fiduciaries acted prudently), *aff'd*, 753 F. App'x 453. As a result of these efforts, the Plan's investments are available at low expense ratios ranging from 0.035% to 0.81%—objectively reasonable by any measure. *Supra* at 6.[20]

Indeed, the Plan's *actual* investment menu shares all the characteristics that the Complaint itself says would be the result of a *prudent* fiduciary process. Compl. ¶ 56. Numerous courts agree, dismissing claims where a plan offered "meaningful choices" from a "reasonable mix and range of investment options," including low-cost funds for those who want them. *Renfro*, 671 F.3d at 327-28 (affirming dismissal where plan offered 73 options, almost *all retail-class* Fidelity funds, at expense ratios of 0.10% to 1.21%).[21] The Plan here falls squarely within these holdings, offering "something for everyone" at objectively low costs. To be sure, simply offering a range of funds does not absolve a fiduciary of its duty to act prudently. But these cases recognize that where a fiduciary has developed a well-diversified range of options, at low costs, then it is far less plausible that the same fiduciary acted imprudently when it comes to underlying *components* of that same reasonable lineup. *See Martin*, 2020 WL 3578022, at *4-5. The Plan's investment menu

[20] Even if Plaintiffs had not so badly misstated the Plan's investment menu, the Complaint's conclusory allegation that lower-cost share classes "were and are available for a plan" of the Plan's size does not state a plausible claim. Compl. ¶¶ 59-61. The Complaint does not identify a *single* investment for which this is purportedly true, and it alleges no facts indicating the Plan could have simply switched any fund offered at any point in time to lower-cost versions. *See, e.g.*, *Marks v. Trader Joe's Co.*, 2020 WL 2504333, at *7-8 (C.D. Cal. Apr. 24, 2020) (dismissing claim because complaint provided no examples of lower-cost share classes that were available).

[21] *See also Divane*, 953 F.3d at 991-92 (affirming dismissal of claims like Plaintiffs' here); *Loomis v. Exelon Corp.*, 658 F.3d 667, 671-73 (7th Cir. 2011) (same, where plan offered 32 funds with expense ratios of 0.03% to 0.96%); *Hecker*, 556 F.3d at 586 (same, where plan offered 26 core options and a brokerage window, at expense ratios of 0.07% to "just over" 1.00%).

thus serves as the backdrop against which the Court must then carefully evaluate whether the Complaint alleges specific facts sufficient to create a plausible inference that—*despite* reasonable investments and fees—the Plan fiduciaries nonetheless failed to use a prudent decision-making process. Plaintiffs do not, and cannot, do so.

II. Count I Does Not State a Plausible Challenge to the Plan's Recordkeeping Fees.

Plaintiffs claim Miami breached its fiduciary duties by causing the Plan to pay excessive recordkeeping fees. However, this claim, like all the others, rests entirely on erroneous allegations, including that (1) the Plan used six recordkeepers, (2) paid each using uncapped, asset-based "revenue sharing," and (3) caused the Plan to pay "over $100" per participant. Compl. ¶¶ 21-42. According to Plaintiffs, a prudent fiduciary would use one vendor and "negotiate recordkeeping fees based on a fixed dollar amount per participant rather than a percentage of plan assets," while obtaining a rebate of "all revenue sharing payments that exceed a reasonable, negotiated recordkeeping fee." *Id.* ¶¶ 23, 25, 26, 37. Not only do these allegations fail to raise a plausible inference of a fiduciary breach, but once again Miami administered the Plan almost exactly as Plaintiffs' own Complaint suggests it should have.

Multiple Recordkeepers. The Plan does not use six recordkeepers, the crux of Count I. As explained, the Plan uses Fidelity as a master recordkeeper, while TIAA provides services with respect to its annuities, as only it can do. Plaintiffs allege no facts suggesting this arrangement is imprudent, nor could they. "ERISA does not require a sole recordkeeper or mandate any specific recordkeeping arrangement at all." *Divane*, 953 F.3d at 990. In *Divane*, the Seventh Circuit held that using multiple recordkeepers—Fidelity and TIAA—is prudent where, like the Plan here, Northwestern wanted to offer TIAA's popular annuity options. *Id.* And Miami has gone further, using Fidelity as a "master" recordkeeper to consolidate services as much as possible, while retaining TIAA annuity options only for those participants who want them. By Plaintiffs' own admission, the Plan's streamlined investment menu and administration reflects the "output of an evaluation and selection by a prudent fiduciary." Compl. ¶ 56.

Revenue Sharing. The Plan does not pay for recordkeeping through "uncapped," asset-based revenue sharing. For the entire putative class period, the Plan has paid Fidelity a fixed, per participant fee, while Fidelity returns any and all revenue sharing it receives back to the Plan. *Supra* at 7-8. Plaintiffs concede this is precisely what "prudent fiduciaries" would and should do. Compl. ¶ 23. And although the Plan uses revenue sharing to pay TIAA for maintaining its unique annuity options, the amount has been "capped" at less than $5 per participant throughout the putative class period, requiring TIAA to credit any additional amounts back to the Plan. *Supra* at 8. Again, Plaintiffs themselves concede that imposing precisely this type of a "capped" fee model is what "prudently administered plans do." Compl. ¶ 39. In short, none of the central allegations upon which Count I is premised can sustain a plausible inference of a fiduciary breach.

Moreover, Plaintiffs' copycat allegations are insufficient even *ignoring* the Plan's existing fee models. Revenue sharing is "common and acceptable," *Tussey v. ABB Inc.*, 746 F.3d 327, 336 (8th Cir. 2014); it "violates no statute or regulation," *Hecker*, 556 F.3d at 585; and it can offer some benefits over a flat-fee approach, *Loomis*, 658 F.3d at 672-73. Therefore, it is not reasonable to infer imprudence from the mere fact that a plan uses revenue sharing (capped or uncapped) to pay a recordkeeper. Thus, particularly when combined with a diverse range of low-cost options like the Plan offers here, it takes more to state a claim than conclusory allegations that a plan used uncapped revenue sharing and therefore *must* have paid "excessive" fees. *See, e.g.*, *Divane*, 953 F.3d at 989 (affirming dismissal of challenges to a plan recordkept by Fidelity and TIAA, because "plaintiffs fail[ed] to support that a flat-fee structure is required by ERISA . . . or would even benefit plan participants"). Plaintiffs offer nothing more, and what little they do offer is demonstrably inaccurate and properly disregarded in any event.

"Reasonable" Recordkeeping Fee. Plaintiffs' allegations that Plan participants pay "over $100" in annual recordkeeping fees and that some unidentified vendor would do the same work for only $35 per participant, likewise, are insufficient to avoid dismissal. Compl. ¶ 37. To start, the Plan has paid Fidelity based on a flat rate of $39 per participant since 2018, which it reduced from the $54 rate the Plan paid since 2015—far less than "over $100" and even in the ballpark of Plaintiffs' concededly "reasonable" fee. *Supra* at 7-8. The flat, per participant fees the Plan paid during the alleged class period are not the result of luck, but are the obvious product of the Plan fiduciaries' efforts to monitor and control the Plan's recordkeeping fees.

That these fees approached but did not reach quite as low as $35 per participant does not suggest otherwise. To the contrary, Plaintiffs' $35 fee is pure guesswork, unsupported by data or even a *single* comparator plan that pays that amount for an equal level of service, and thus it is not a sufficient basis for inferring a fiduciary breach. As the Seventh Circuit recently made clear in rejecting materially identical allegations and claims, the fiduciaries of Northwestern University's 403(b) retirement plan were "not required to search for a recordkeeper willing to take $35 per year per participant." *Divane*, 953 F.3d at 990-91. There, like here, the plaintiffs "identified no alternative recordkeeper that would have accepted such a low fee," and further "failed to explain how a hypothetical lower-cost recordkeeper would perform at the level necessary to serve the best interests of the plans' participants." *Id.*; *see also Martin*, 2020 WL 3578022, at *4 (dismissing claim that plan paid $131-$222 while a reasonable fee was $40); *White II*, 2017 WL 2352137, at *15 (dismissing claim that plan paid $167-$181 while a reasonable fee was $30.50).

Finally, the Complaint speculates that Miami might not have used a "competitive bidding process" for selecting recordkeeping services. Compl. ¶ 40. But the only bases for inferring this "fact" are the same inaccuracies refuted above: the "number of recordkeepers (six)," and the "level of the fees being paid." *Id.* Without them, Plaintiffs are left with nothing else to sustain their conclusory allegation. Moreover, Plaintiffs' own logic works against them: far from suggesting the *absence* of competitive bidding, that the Plan fiduciaries secured Fidelity's recordkeeping services for just $39 per participant *supports* an inference that this fee arrangement was the product of competitive bidding or a similarly effective process. In any event, "[n]othing in ERISA compels periodic competitive bidding," and thus any supposed failure to do so here cannot support a viable claim for breach of fiduciary duty. *See, e.g.*, *White I*, 2016 WL 4502808, at *14.

III. Count II's "Underperformance" Allegations Do Not State a Plausible Claim.

Count II claims Miami acted imprudently by offering "underperforming" investments. Plaintiffs do not challenge any fund in Tiers 1 and 2 of the Plan menu. Rather, they focus only on two TIAA annuity options in Tier 3: the CREF Stock Account and TIAA Real Estate Account.

A. Plaintiffs Lack Standing Because They Did Not Invest in Any TIAA Funds.

To start, none of the four named Plaintiffs has standing to assert Count II. None invested in *any* TIAA option through Tier 3 of the Plan, let alone the two challenged funds. *See* Ex. N, Decl. of C. Hernandez, ¶¶ 4-7.[22] Consequently, no Plaintiff suffered any investment losses or other individualized harm resulting from the offering of these investment options in the Plan.

Article III standing is an "irreducible constitutional minimum" and a prerequisite to the Court's jurisdiction, requiring that (1) Plaintiffs suffered an "injury in fact" that is concrete, particularized, and actual or imminent; (2) the injury was caused by the defendant; and (3) the injury would likely be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs bear the burden of establishing standing "for each claim" and "for each form of relief that is sought." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (quotations omitted).

"There is no ERISA exception to Article III." *Thole v. U.S. Bank, N.A.*, 140 S. Ct. 1615 (2020). That is, Plaintiffs have standing to assert an ERISA fiduciary breach claim only if they seek redress for injuries they themselves suffered, while they lack standing to assert injuries only

[22] The Complaint does not allege Plaintiffs invested in the challenged TIAA funds. *See* Compl. ¶¶ 14-17. Plaintiffs therefore have not alleged facts sufficient to establish their standing to assert Count II, which can be dismissed under Rule 12(b)(6). But because Plaintiffs in fact *did not* invest in any TIAA funds, Miami also moves under Rule 12(b)(1) for lack of jurisdiction, and the Court may consider materials outside the Complaint. *See, e.g.*, *U.S. Commodity Futures Exch. Comm'n v. Vision Fin. Partners, LLC*, 190 F. Supp. 3d 1126, 1127 (S.D. Fla. 2016).

to others or the plan as a whole. *See id.* at 1619-22. Here, Plaintiffs have no individualized injury given that they did not invest in the challenged funds—and thus suffered *no* losses or harm from any alleged breach. Plaintiffs thus "have no concrete stake in the lawsuit": if they lose on Count II, it will not impact them, and if they prevail, they will receive nothing. *See id.* at 1619.[23]

B. Plaintiffs' Specific Fund Challenges Fail on Several Grounds.

Even if any Plaintiff had standing, their cut-and-paste allegations do not state a plausible claim that offering the CREF Stock Account or TIAA Real Estate Account was a fiduciary breach. *See Davis*, 960 F.3d at 484-86 (dismissing almost identical challenges to the same two funds).

Plaintiffs cannot suggest imprudence simply by alleging, with hindsight, that returns were not good enough. ERISA requires "prudence, not prescience," *St. Vincent*, 712 F.3d at 716, and a fiduciary "deserves discretion to the extent its *ex ante* investment choices were reasonable given what it knew at the time," *Tussey*, 746 F.3d at 338. And even if a fund did "underperform," this still "is not sufficient to create a reasonable inference that plan administrators failed to conduct an adequate investigation." *White I*, 2016 WL 4502808, at *17; *see Patterson*, 2019 WL 4934834, at *10-11 (noting that a "fiduciary may—and often does—retain investments through a period of underperformance as part of a long-range investment strategy") (quotations omitted).

At a minimum, then, the Complaint "must provide a sound basis for comparison—a meaningful benchmark." *Meiners*, 898 F.3d at 822. This standard demands scrutiny of a plaintiff's hand-picked comparators—even at the pleading stage—because the "fact that one fund with a different investment strategy ultimately performed better does not establish anything about whether" the fiduciary process was imprudent. *Id.* at 823; *Davis*, 960 F.3d at 485-86 ("Comparing apples to oranges is not a way to show that one is better or worse than the other.").

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[23] Courts regularly hold that a plaintiff who did not invest in a challenged investment lacks standing to assert a fiduciary breach claim. *See, e.g.*, *Taveras v. UBS AG*, 612 F. App'x 27, 29 (2d Cir. 2015); *Patterson v. Morgan Stanley*, 2019 WL 4934834, at *4 (S.D.N.Y. Oct. 7, 2019); *Marshall v. Northrop Grumman Corp.*, 2017 WL 2930839, at *8 (C.D. Cal. Jan. 30, 2017).

1. The CREF Stock Account.

Plaintiffs' challenge to the CREF Stock Account fails. To start, the Complaint alleges *nothing* about the fund's performance after December 31, 2014, just seven months into the relevant period. This alone dooms Count II because Plaintiffs offer no facts or data suggesting a fiduciary breach during the putative class period, nor can they establish any participant suffered a loss. *See, e.g.*, *Cervantes v. Invesco Holding Co.*, 2019 WL 5067202, at *5-6 (N.D. Ga. Sept. 25, 2019) (plaintiff must establish a breach "caused a loss" as an element of the claim, and dismissing claims where complaint alleged performance data in "some years, but not others"). For all the Complaint says, the Stock Account may have *outperformed* even Plaintiffs' alternatives since 2014.

Regardless, Plaintiffs measure the Stock Account against improper "benchmarks" and non-annuity mutual funds with different objectives and strategies. *See Davis*, 960 F.3d at 485-86 (rejecting same proposed alternatives Plaintiffs allege here). The Stock Account is an actively managed variable annuity that invests in a combination of U.S. and foreign stocks—"essentially a one-stop shop for those investors who want broad exposure to both domestic *and* international equities." *Id.*[24] As such, the Stock Account's actual benchmark "is a composite index that is a weighted average of unmanaged benchmark indices that represent the market sectors in which the Account invests"—a measure it has generally tracked. Ex. O, CREF Stock Acct. (R3) Fact Sheet, at 2. Morningstar classifies the Stock Account in the "Allocation–85%+ Equity" category, and it has outperformed its peers over all periods, with an overall rating of four out of five stars. *Id.*

Plaintiffs' comparisons ignore the Stock Account's characteristics and actual benchmark. Instead, they cite the Russell 3000 Index (at ¶ 67), a broad-based index comprised entirely of *domestic* equities. *Davis*, 960 F.3d at 485 n.4 (rejecting same comparison). They also cite two Vanguard index funds (at ¶ 67), both of which are not annuities, are passively (rather than actively)

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[24] *See also* Ex. O, CREF Stock Acct. (R3) Fact Sheet, at 1 (Mar. 2020), available here.

managed, and have different exposure to foreign markets, making them inapt comparisons as well. *Id.* at 485. Finally, Plaintiffs cite (at ¶ 69) three actively managed Vanguard mutual funds (not annuities) with different investment strategies and "a lower percentage of international stocks." *Id.* That the Stock Account happened to underperform these investments at a particular point in time in December 2014 "does not mean [it] is better or worse. It is just different[.]" *Id.* at 486. And "it is not imprudent to provide options with different features . . . , regardless of whether some perform better than others." *Id.*; *see also Sacerdote*, 2017 WL 3701482, at *5 (rejecting, after trial, plaintiffs' challenge to the CREF Stock Account based on the same comparators).

Moreover, the Complaint itself concedes other prudent reasons to offer the Stock Account: so the Plan could also offer the TIAA Traditional Annuity. Compl. ¶¶ 64-65. The Traditional Annuity is the Plan's most popular TIAA option, followed by the Stock Account, and together they accounted for more than half of all Plan assets invested through TIAA in 2018.[25] Thus, as a matter of law, the decision to continue offering the Stock Account—particularly when it was performing largely as expected and gave access to the attractive and equally popular Traditional Annuity—does not support an inference that the Plan fiduciaries breached any fiduciary duty. *Divane*, 953 F.3d at 988-89 (describing "valid reasons . . . to keep the Stock Account as an *option* for participants," including the continued availability "of the Traditional Annuity").

2. The TIAA Real Estate Account.

Plaintiffs fare no better in their attack on the TIAA Real Estate Account. Here again, Plaintiffs provide no data or "benchmarks" at all—meaningful or otherwise—after December 2014. This alone warrants dismissal of Count II for the same reasons outlined above.

Regardless, Plaintiffs again "compar[e] apples and oranges." *Davis*, 960 F.3d at 485. Plaintiffs cite a single alternative, the Vanguard REIT Index Fund (at ¶¶ 78-80). But the two funds

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[25] *See* Ex. G, RSP Form 5500 (2018), Sched. (pdf at 59) (showing assets invested in TIAA funds).

"have different aims, different risks, and different potential rewards that cater to different investors." *Id.* They are different products: the Real Estate Account is a separate account annuity product, while the Vanguard option is a mutual fund. They have different strategies: the Real Estate Account buys and sells *actual* real estate, with a target of holding 75% to 85% of its assets in direct ownership interests in commercial properties. *See id.* at 484.[26] By contrast, the Vanguard option is a passively managed index fund that invests in a conglomeration of publicly-traded REITs and is designed to track a different objective. *Id.* In short, Plaintiffs' challenge depends implausibly on comparing two funds having little in common beyond the term "real estate." Regardless, the Real Estate Account outperformed the Vanguard REIT Index in three of the past seven years, while offering far less volatility, a value-add in its own right.[27]

For any of the foregoing reasons, the Court should dismiss Count II in full.

IV. Count III's Derivative "Failure to Monitor" Claim Fails.

Count III claims Miami is liable for failing to monitor other, unnamed fiduciaries responsible for the breaches alleged in Counts I and II. This claim is derivative of Plaintiffs' other claims and fails for the same reasons. *See, e.g.*, *Cervantes*, 2019 WL 5067202, at *7. Regardless, not one of the Complaint's 100+ allegations says anything about Miami's process for appointing or monitoring others responsible for Plan administration, meaning Count III fails in its own right.

CONCLUSION

For the reasons set forth above, Miami respectfully requests that the Court dismiss the Complaint with prejudice.

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[26] *See also* Ex. P, TIAA Real Estate Acct. Prospectus (May 1, 2020), at 3-4, *available* here.

[27] *Compare* Ex. P, TIAA Real Estate Acct. Prospectus, at 16, *with* Ex. Q, Vanguard REIT Index Prospectus (May 29, 2020), at 4, *available* here; *see also Sacerdote*, 328 F. Supp. 3d at 309-12 (rejecting comparison between the same two funds because there is "no doubt that REITs are riskier," and a "REIT is not a proper comparison").

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2020, I electronically filed the foregoing Defendants' Motion to Dismiss Pursuant to Rules 12(b)(1) and 12(b)(6) and Memorandum of Law, to be served via the Court's ECF system on all counsel of record.

/s/ *Bernard K. Schott*
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