UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

DEBRA D. HANIGAN, individually, and a representative of a Class of Participants and Beneficiaries of the Bechtel Trust & Thrift Plan, Plaintiff, v. BECHTEL GLOBAL CORPORATION, BOARD OF DIRECTORS OF BECHTEL GLOBAL CORPORATION, and BECHTEL TRUST & THRIFT PLAN COMMITTEE, Defendants.	Case No. 1:24-CV-00875-AJT-LRV

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

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I. INTRODUCTION

The Amended Complaint of Plaintiff Debra D. Hanigan ("Plaintiff") is fatally deficient and should be dismissed. Plaintiff complains that Defendants violated the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), by selecting an allegedly overpriced managed account service, called the Professional Management Program (the "PMP"), as the default investment option for participants in the Bechtel Trust & Thrift Plan (the "Plan") who, for whatever reason, do not elect their own plan investments. But Plaintiff fails to identify, as she must to survive dismissal, any *similarly situated* plans that paid less for *comparable* services.

Plaintiff attempts to show that the PMP must be overpriced by citing five supposedly "comparable plans" with purportedly lower "administrative fees." However, the PMP managed account fees Plaintiff challenges are investment management fees, not administrative fees. In contrast, the "administrative fees" of Plaintiff's alleged comparator plans include *no component whatsoever* for investment management services. Thus, Plaintiff fails to allege that the PMP fees are excessive compared to a meaningful benchmark—*i.e.*, one that actually offers the same services as the PMP. Plaintiff's theory plainly turns on an apples-to-oranges comparison that cannot form a plausible basis for pleading an excessive fee fiduciary breach claim under ERISA: An apple is not overpriced because it is more expensive than an orange.

In the alternative, Plaintiff challenges the use of *any* managed account service as a default option, allegedly because of the cost of such services. But Plaintiff's argument ignores both the benefits that a managed account service like the PMP offers and the Department of Labor ("DOL") regulation that expressly authorizes the use of a managed account service as a default option. In light of that regulation, and given that she neither identifies any valid comparator plans nor alleges specific facts to support her argument that the PMP was not a prudent default option for the Plan, Plaintiff's Amended Complaint must be dismissed.

II. FACTUAL BACKGROUND AND ALLEGATIONS

A. The Bechtel Trust & Thrift Plan

Bechtel Global Corporation ("BGC") is part of the Bechtel group of companies ("Bechtel"), which was founded over 125 years ago. Bechtel is "an engineering, procurement, construction, and project management company." AC ¶ 35.

BGC offers eligible employees the opportunity to save for retirement through the Plan by creating a plan account ("Plan Account") for each eligible enrolled participant. Riffee Decl. Ex. 1, at MTD0005 (Bechtel Trust & Thrift Plan Summary Plan Description ("SPD")).[1] Participants choose the portion of their compensation to be contributed to their Plan Accounts, which amount is then supplemented by matching contributions and discretionary Trust Contributions from BGC and other participating employing entities within the Bechtel group of companies. Riffee Decl. Ex. 1, at MTD0006 (SPD). Participants may elect to direct the investment of the assets in their

[1] Exhibits refer to those attached to the accompanying Declaration of Matthew L. Riffee, filed herewith. At the Rule 12(b)(6) stage, the Court may consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Firemen's Ret. Sys. of St. Louis v. Telos Corp.*, 2023 WL 1512207, at *6 (E.D. Va. Feb. 1, 2023) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). Thus, the Court may properly consider Plan documents that are referenced in the Amended Complaint (for both the Plan and Plaintiff's selected comparators). AC ¶¶ 39, 108-09; *see Fairfax v. CBS Broad. Inc.*, 534 F. Supp. 3d 581, 591 (E.D. Va. Feb. 11, 2020) (court may consider "documents incorporated by reference into the complaint" and "items in the public record" when resolving a Rule 12(b)(6) motion). In particular, courts regularly consider Forms 5500 when resolving motions to dismiss in ERISA cases. *See, e.g.*, *Hilton Worldwide, Inc. Glob. Benefits Admin. Comm. v. Caesars Entm't Corp.*, 532 B.R. 259, 269 n.6 (E.D. Va. 2015) (considering the plan's Form 5500 because it "is a publicly-available document, and, as such, judicial notice of this document is appropriate"); *see also Rosen v. Prudential Ret. Ins. & Annuity Co.*, 2016 WL 7494320, at *9 (D. Conn. Dec. 30, 2016), *aff'd* 718 F. App'x 3 (2d Cir. 2017); *Wehner v. Genentech, Inc.*, 2021 WL 2417098, at *3 (N.D. Cal. June 14, 2021); *Kurtz v. Vail Corp.*, 511 F. Supp. 3d 1185, 1191 (D. Colo. 2021). Here, Plaintiff refers to the Plan's 2021 data (AC ¶ 109), and Defendants thus cite the Plan's 2021 Form 5500.

Plan Accounts, on a tax-deferred or after-tax basis, into a variety of investment funds. AC ¶ 7; *see also* Riffee Decl. Ex. 1, at MTD0003, MTD0008 (SPD). The Plan provides eleven investment funds for this purpose, which are selected by the Bechtel Trust & Thrift Plan Committee ("Committee") as administrator of the Plan. These funds offer various diversified U.S. and international equity and fixed income investments with different investment styles. Riffee Decl. Ex. 2, at MTD0037 (Plan 2021 Participant Disclosure Notice ("PDN")).

The Plan offers participants three approaches for the allocation of their Plan Account assets across these eleven investment funds. *See id.* One approach is the PMP, offered by registered investment adviser Empower Advisory Group ("EAG"), which is "[d]esigned for people who prefer to leave ongoing investment decisions to experienced investment professionals." *Id.* Another approach is "Online Advice" provided by EAG, which is designed for those "who actively manage their accounts but who want specific advice on investment allocations between the individual funds available in the Plan." *Id.* The last approach is the "Mix & [M]onitor" option, which is for those "who want to take a more hands-on approach and select their own mix of funds." *Id.*

B. Qualified Default Investment Alternatives and the Plan's Use of the PMP

ERISA encourages employers to automatically enroll eligible workers in 401(k)-type retirement savings plans. *See* DOL, *Regulation Relating to Qualified Default Investment Alternatives in Participant-Directed Individual Account Plans* 1 (Apr. 2008) ("DOL, *QDIA Fact Sheet*"), https://bit.ly/4bnjdDB.[2] Prior to ERISA's amendment under the Pension Protection Act

[2] The Court may take judicial notice of publicly available DOL publications. *See, e.g.*, *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (noting that the Court may properly take judicial notice of "publicly available" government statistics); *Rahman v. Schriro*, 22 F. Supp. 3d 305, 311 (S.D.N.Y. 2014) (explaining that "the Court is permitted to take judicial notice of United

of 2006 ("PPA"), approximately one-third of eligible employees did not participate in employer-sponsored defined contribution plans, thus losing out on significant retirement savings. *Id.* While research suggested that employees would choose to remain invested in a retirement plan if automatically enrolled, employers were hesitant to adopt automatic enrollment (and automatic investment of participants' accounts) given the potential liability. The PPA addressed these concerns by, among other things, creating a "safe harbor," which "insulat[es]" plan sponsors who meet certain requirements "from liability for default investments made on behalf of retirement-plan participants who failed to elect their preferred investment vehicle." *Bidwell v. Univ. Med. Ctr., Inc.*, 685 F.3d 613, 615 (6th Cir. 2012). Under the safe harbor, if a plan complies with the DOL's "qualified default investment alternative" ("QDIA") regulation, then any participant invested in the QDIA will be treated as though she selected the investment for herself in the first instance. *See* ERISA § 404(c)(5)(A), 29 U.S.C. § 1104(c)(5)(A); *see generally Tullgren v. Hamilton*, 2023 WL 2307615, at *1 (E.D. Va. Mar. 1, 2023).

Following passage of the PPA—and after extensive investigation—the DOL identified, by regulation, three QDIAs to be covered by the PPA's safe harbor. 29 C.F.R. § 2550.404c-5(e)(4); *see also* DOL, *QDIA Fact Sheet* at 2.[3] The first QDIA is a target date fund ("TDF"): a "product with a mix of investments that takes into account the individual's age or retirement date (an example of such a product could be a life-cycle or targeted-retirement date fund)." *QDIA Fact Sheet* at 2; 29 C.F.R. § 2550.404c-5(e)(4)(i). TDFs use age-based portfolio management to

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States government publications" before considering a fact sheet "published on the website of the Environmental Protection Agency"); *Zappier v. Sun Life Assurance Co. of Can.*, 2006 WL 2621110, at *8 n.12 (S.D.N.Y. Aug. 10, 2006) ("the Court clearly can take judicial notice of" a DOL publication as "a United States government publication").

[3] Employers may also utilize certain capital preservation vehicles, but only for 120 days immediately following a participant's first elective contribution. 29 C.F.R. § 2550.404c-5(e)(4)(iv).

assign investors to target retirement dates in 5-year increments (*e.g.*, retirement in 2045 or 2050). *See* DOL, *Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries 1* (Feb. 2013), https://bit.ly/43YdMYu. They mechanically shift their asset allocation "to include a higher proportion of more conservative investments" as that "target retirement date approaches." *Id.* The second QDIA is a balanced fund: a "product with a mix of investments that takes into account the characteristics of the group of employees as a whole, rather than each individual (an example of such a product could be a balanced fund)." *QDIA Fact Sheet* at 2; 29 C.F.R. § 2550.404c-5(e)(4)(ii). The third QDIA is a managed account service: an "investment management service" under which "a fiduciary, [] applying generally accepted investment theories, allocates the assets of a participant's individual account to achieve varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures, offered through investment alternatives available under the plan, based on the participant's age, target retirement date (such as normal retirement age under the plan) or life expectancy." 29 C.F.R. § 2550.404c-5(e)(4)(iii).

All three QDIA options are intended "to ensure that an investment qualifying as a QDIA is appropriate as a single investment capable of meeting a worker's long-term retirement savings needs." *Id.* at 1. And all three options were selected to fulfill this goal specifically for participants who "do not give investment directions." 72 Fed. Reg. 60,452, 60,465 (Oct. 24, 2007). Nothing in the DOL's regulation suggests that any given option is preferred or otherwise better than the others for achieving this goal. *See* 29 C.F.R. § 2550.404c-5(e)(3). To the contrary, the DOL made clear that each of these QDIAs is "appropriate for achieving meaningful retirement savings over the long-term for those participants and beneficiaries who, for one reason or another, do not elect to direct the investment of their pension plan assets." 72 Fed. Reg.

60,452, 60,460 (Oct. 24, 2007).

Consistent with the regulation, the Plan offers a managed account service, the PMP, as its QDIA. AC ¶ 11. The PMP's features reflect the added benefits that managed accounts offer to all participants over other QDIAs.

The PMP is a service under which investment professionals manage enrolled participants' Plan accounts. Riffee Decl. Ex. 1, at MTD008 (SPD); Riffee Decl. Ex. 3, at MTD0046-48 (EAG Form ADV Disclosure Brochure ("ADV")). Under the service, EAG and its sub-adviser, Financial Engines Advisors, LLC (a registered investment adviser), utilize proprietary software to develop individualized recommendations for allocation of assets within participants' accounts. Riffee Decl. Ex. 3, at MTD0046-48 ("ADV"). The PMP methodology is designed to provide personalized and diversified investment decisions for enrolled participants. *Id.*

The PMP determines an allocation target for each enrolled participant based upon a variety of inputs. *Id.* at MTD0048. Those inputs include the menu of investment alternatives that the plan sponsor (here, BGC) has made available for Plan investment, and information about the participant (such as age, pensions, and state of residence) supplied by the plan or its providers. *Id.* Participants may also provide additional information to the PMP about themselves (such as risk preference or assets held outside the Plan), if desired. *Id.* Using these inputs, the PMP simulates thousands of scenarios to find an investment mix designed to optimize the participant's opportunity for potential future value, including the goal of providing steady income through retirement. *Id.* Throughout the participant's enrollment in the Plan, the PMP transitions the participant's investment allocations in accordance with the strategy designed for that participant. *Id.* The PMP also conducts periodic portfolio monitoring and rebalancing with the goal of providing participants with steady income through retirement. Ex. 3 at MTD0048.

This individualization, which is achieved through information made available to the PMP about all enrolled participants, makes managed account services like the PMP fundamentally different from TDFs, the QDIA that Plaintiff alleges Defendants were required to select. For instance, the PMP constructs each participant's individualized investment strategy around his or her actual expected retirement date, Riffee Decl. Ex. 3, at MTD0048 (ADV), and not merely to a date within five years of it, like a TDF does. The PMP also facilitates the "[s]trategic[] reallocat[ion]" of "investments as conditions warrant and as goals, timeframes or other material realities of [participants] change." *Id.* at MTD0052. The PMP thus allows for adjustments based on changes in participant "objectives, preferences or data." *Id.* at MTD0053. TDFs offer none of these features.

For participants electing to take part in the investment of their Plan Accounts, the PMP offers opportunities for even further personalization, through information participants provide about, *e.g.*, risk tolerance, preferred exposure limits for certain asset classes, and holdings outside of their retirement accounts. *Id.* at MTD0048. With this information, the PMP can "personalize[] each portfolio to fit the [participant's] needs and the specific characteristics of the plan by using the program's methodology and information provided by the [participant]." *Id.* The PMP also offers those participants the ability to discuss, with investment advisors, one-on-one planning and advice, including customized suggestions on withdrawal management and spending strategies for retirement. *Id.* at MTD0048-MTD0049. In this situation, as well, TDFs offer none of these features.

Plaintiff and other Plan participants are not required to use the PMP. Rather, as Plaintiff concedes, the PMP merely serves as the Plan's default option. Before being enrolled in a QDIA, "[p]articipants and beneficiaries must have been given an opportunity to provide investment direction, but have not done so." DOL, *QDIA Fact Sheet* 1; *see generally* 29 U.S.C. § 1104(c)(5)(B)(i)(I). Here, the Plan's SPD—a document required by statute to, among other things, "apprise ... participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a)—clearly informs participants that their accounts will be "invested in the Plan's Qualified Default Investment Alternative (QDIA) if [they] fail to make an investment election." Riffee Decl. Ex. 1, at MTD0008 (SPD). Plan participants who are defaulted into the PMP remain free to elect another investment option at any time. *See id.* (informing participants that they "may change the investment options into which [their] future contributions will be invested, and the investment of [their] existing Plan Account balance, on a daily basis," subject to certain limited trading restrictions).

C. The Plan's Providers and Fees

Like all large individual account plans, the operation of the Plan requires recordkeeping and related administrative services. Recordkeepers "track the balances of individual accounts, provide regular account statements, and offer information and accessibility services to participants." *Hughes v. Nw. Univ.*, 595 U.S. 170, 174 (2022); *see also* DOL, *Understanding Retirement Plan Fees and Expenses* 2 (Sept. 2021), https://bit.ly/3xAfeFS (describing recordkeeping services). Great-West/Empower Retirement LLC ("Empower") serves as the Plan's recordkeeper pursuant to a recordkeeping and administrative services contract ("RKA"). AC ¶ 11; Riffee Decl. Ex. 4 (RKA); *see also* Riffee Decl. Ex. 8, at MTD0089, MTD0102 (Plan 2021 Form 5500). Under that agreement, Empower provides "the full range of record keeping, enrollment, outreach and administrative services necessary or advisable for the orderly and efficient administration of the" Plan. Riffee Decl. Ex. 4 at MTD0065 (RKA § 3(b)); *see also id.*

at MTD0064 (describing the "record keeping and administrative services agreement" as "provid[ing] comprehensive recordkeeping, outreach, communications and administrative services for the Plan[]"); Riffee Decl. Ex. 1, at MTD0017, MTD0019 (SPD); Riffee Decl. Ex. 7, at MTD0089, MTD0102 (Plan 2021 Form 5500). Each Plan participant's Plan Account is assessed $24 per year in fees for these recordkeeping and other administrative services. Riffee Decl. Ex. 1, at MTD0017 (SPD); *see also* AC ¶ 102.

A different entity, EAG, provides the separate PMP managed account services to the Plan. EAG is an investment adviser registered under the Investment Advisers Act of 1940. EAG is affiliated with, but separate from, Empower.[4] EAG charges participants enrolled in the PMP a separate, asset-based fee for these services, which include both investment management and advice services, at rates that range from 0.27% to 0.10% of covered assets, depending on the overall amount of the participant's assets managed or advised through the PMP. Riffee Decl. Ex. 1, at MTD0018 (SPD); Ex. 3, at MTD0046 (ADV); *see also* Riffee Decl. Ex. 5, at MTD0069 (2013 Investment Advisory and Management Service Agreement ("IAMSA")) (explaining that EAG provides both investment advice and management services).[5]

Plaintiff conflates Empower with EAG and aggregates the separate fees that they charge in an attempt to support her false comparison to the purely *administrative* fees paid by alleged

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[4] Plaintiff alleges that EAG "is a wholly owned direct subsidiary of Empower Services Holdings US, LLC," which she in turn alleges is owned by Empower Annuity Insurance Company. AC ¶ 11 n.2. She does not allege, nor could she, that EAG and Empower Retirement LLC, the Plan Recordkeeper, are the same entity—they are not.

[5] The 2013 IAMSA was entered into between the Plan and J.P. Morgan Institutional Investments. In 2015, Advised Assets Group, LLC (now Empower Advisory Group, LLC), assumed J.P. Morgan Institutional Investment's rights and obligations under the IAMSA. *See* Riffee Decl. Ex. 6, at MTD0078 (2015 Amendment and Assignment and Assumption Agreement). The October 1, 2020 Amendment to Investment Advisory and Management Services Agreement, *see* Riffee Decl. Ex. 7, reflects the current fee structure for EAG's services.

comparator plans. However, as shown above, Empower and EAG are separate entities providing different types of services under separate contracts for different fees. The Plan's Form 5500, the annual return/report filed with the DOL and IRS, also underscores that Empower and EAG each provides different types of services to the Plan. Forms 5500 use different service codes that capture "both the kind of services provided and the type of compensation received." DOL, *2023 Instructions for Form 5500* 30, https://bit.ly/3L2etZ8. The Plan's Form 5500 lists multiple service codes for Empower, including 15 (recordkeeping and information management), 49 (other services), 64 (recordkeeping fees), 30 (employee (plan)), and 37 (participant loan processing). Riffee Decl. Ex. 8, at MTD0089 (Plan 2021 Form 5500). In contrast, the Form 5500 lists a single, different service code for EAG – *i.e.*, 26 (advisory services). *Id.* In other words, the Form 5500 reflects that Empower provides core administrative services such as recordkeeping, information management and participant loan processing, while EAG provides separate investment advisory services.

D. Plaintiff's Allegations

Plaintiff, a former employee of a BGC affiliate and a current Plan participant, alleges only that she "was automatically defaulted at least two times" into the PMP, accounting for approximately three years out of her twenty-year employment with a BGC affiliate. AC ¶ 26. Plaintiff does not provide any factual details regarding her investments for the fifteen years before she was allegedly first defaulted into the PMP, nor does she provide any factual details surrounding her investment decisions. Based on the alleged defaults, Plaintiff raises two claims, both stemming from BGC's decision to offer a managed account, and the PMP specifically, as the Plan's QDIA.

First, Plaintiff characterizes PMP fees as "administrative fees," and alleges that the

Committee breached ERISA's duty of prudence, 29 U.S.C. § 1104(a)(1)(B), by failing to "ensure that the Plan's administrative fees (including QDIA managed account compensation) were objectively reasonable." AC ¶ 136; *see also id.* ¶¶ 131-41. Specifically, she alleges that Defendants required Plan participants to pay excessive "administrative fees" to the Plan's recordkeeper, Empower, by selecting and maintaining the PMP as the Plan's QDIA without a reasonable fiduciary process. AC ¶ 134. Plaintiff does not offer any allegations regarding that process itself. Instead, Plaintiff argues that Defendants must have acted unreasonably because the Plan's cost for recordkeeping and other administrative services, when combined with the PMP services (described as the "Bundled RKA Fee Plus Managed Account Compensation"), allegedly exceeded just the recordkeeping and other administrative service costs of five other "comparable plans." *Id.* ¶ 109. Plaintiff also argues that, absent personalized information from Plan participants in addition to their age, "managed accounts are essentially expensive [TDFs]." *Id.* ¶ 13. In Plaintiff's view, "an adequate investigation would have revealed to a reasonable fiduciary that the Plan's administrative fees were excessive, unreasonable, and imprudent and that the Plan MA QDIA should have been replaced by a much less expensive TDF QDIA." *Id.* ¶ 17.

Second, Plaintiff alleges that BGC and the Board acted imprudently by failing to adequately monitor the Committee's performance in maintaining the PMP as the QDIA. AC ¶¶ 142-48.

III. ARGUMENT

A. Courts Are Required to Undertake a Careful, Context-Sensitive Review of an ERISA Complaint's Allegations.

"In assessing ERISA fiduciary-breach claims under Rule 12(b)(6), courts apply the *Iqbal* and *Twombly* pleading standards by evaluating a complaint's allegations 'as a whole' and 'giv[ing] due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise.'" *Tullgren*, 2023 WL 2307615, at *4 (quoting *Hughes*, 595 U.S. at 177). Under *Iqbal* and *Twombly*, a "claim has facial plausibility" only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Applying this standard, dismissal is appropriate "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability," but fails to "nudge" the claim "across the line from conceivable to plausible." *Id.* at 678, 680.

In ERISA class actions in particular, the Supreme Court has stressed that motions to dismiss are an "important mechanism for weeding out meritless claims." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). Thus, when evaluating whether a plaintiff has sufficiently plead her claims, the Supreme Cout has repeatedly directed courts to employ a "careful, context-sensitive scrutiny of a complaint's allegations." *Id.*; *see generally Tullgren*, 2023 WL 2307615, at *4 (citing authority).

B. The Amended Complaint Does Not Plausibly Allege a Claim for Breach of Fiduciary Duty (Count I).

As Plaintiff acknowledges, she has no knowledge of the process used by Defendants to select and maintain the PMP in the Plan. AC ¶ 34. Instead, she asks the Court to infer imprudent conduct based on conclusory allegations that the use of EAG's PMP as the Plan's QDIA caused Plan participants to pay excessive "administrative fees" to the recordkeeper, Empower. AC ¶¶ 14, 17. She argues that Defendants were required to use a cheaper TDF as the Plan's QDIA instead. *Id.* ¶¶ 17, 107. However, Plaintiff offers no reliable *factual* allegations showing that the Plan's fees for the PMP were excessive. Indeed, the facts support the opposite conclusion.

1. Plaintiff's Allegation that Use of the PMP as the Plan's QDIA Caused the Plan to Pay Excessive Administrative Fees Fails to State a Claim.

To state an ERISA excessive fee claim, a plaintiff must "allege that the fees were excessive relative to the services rendered." *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1169 (6th Cir. 2022) (affirming dismissal of excessive-fee claim). To meet this burden, a plaintiff must provide a "meaningful benchmark" that offers "a sound basis for comparison." *Matousek v. MidAm. Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022) (affirming dismissal of excessive-fee claim). "[T]he relevant comparative data point in this context is the services offered for the price charged." *Matney v. Barrick Gold of N. Am., Inc.*, 80 F.4th 1136, 1157 (10th Cir. 2023) (affirming dismissal of excessive-fee claim). In other words, a plaintiff must allege sufficient facts to render it plausible that the fees are "unreasonable in light of available alternatives." *Albert v. Oshkosh Corp.*, 47 F.4th 570, 583 (7th Cir. 2022) (affirming dismissal of excessive-fee claim). This "meaningful benchmark" standard requires a "like-for-like comparison" based on plausible allegations that "similarly sized plans spend less on the *same* services" than the challenged plan. *Matousek*, 51 F.4th at 279 (emphasis added). An allegation that "costs are too high" is insufficient, *id.* at 278, as are mere "'labels and conclusions' about the fees." *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 824 (8th Cir. 2018) (affirming dismissal of excessive-fee claim) (quoting *Bell Atlantic Corp. v.* Twombly, 550 U.S. 544, 555 (2007)).

Following these principles, courts in this District have repeatedly dismissed ERISA imprudence claims based on a plaintiff's failure to plead a meaningful benchmark under the relevant circumstances. In *Tullgren*, the court dismissed an imprudence claim with prejudice because the plaintiff had "not pled meaningful benchmarks against which this Court c[ould] assess his allegations of the fiduciaries' imprudence." 2023 WL 2307615, at *6 (citing *Smith*, *Meiners*, and *Matousek*, among others); *see also Hall v. Cap. One Fin. Corp.*, 2023 WL

2333304, at *6 (E.D. Va. Mar. 1, 2023) (same). As the court explained, a complaint "must provide a sound basis for comparison—a meaningful benchmark." *Tullgren*, 2023 WL 2307615, at *6 (quoting *Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 484 (8th Cir. 2020)).

Likewise, in *Morales v. Capital One Financial Corp.*, the court dismissed the plaintiff's excessive recordkeeping fee claim where the plaintiff failed to provide "adequate allegations of comparators that would allow a reasonable inference of a breach of fiduciary duty." ECF No. 43 at 32:7-11, Case No. 1:21-cv-1454-AJT (E.D. Va. May 27, 2022); *see also id.*, ECF No. 42 (May 27, 2022) (dismissal order). As this Court explained, "when you squeeze it down," there was "really not much more than an allegation that there are other plans referenced that have less expensive recordkeeping fees," which is insufficient to state a claim. *Id.*, ECF No. 43 at 32:4-7.

Courts have been particularly skeptical of claims that purport to compare fees among plans that are receiving different types of services. For example, in *Matousek*, the plaintiffs challenged the "*total* compensation" the service provider received for "services rendered to the plan" which were "more than just standard recordkeeping services"—a bucket that "include[d] investment-management fees, redemption fees, shareholder-servicing fees, and securities-brokerage commissions." 51 F.4th at 279. For their alleged comparators, however, the plaintiffs selected examples that "reflect[ed] only basic recordkeeping services." *Id.* at 280. In light of this "mismatch," the court dismissed the complaint because plaintiffs had failed to allege "a *meaningful* benchmark," and had, therefore, "not created a plausible inference that the decision-making process itself was flawed." *Id.*; *see also Forman v. TriHealth, Inc.*, 40 F.4th 443, 449 (6th Cir. 2022) (rejecting plaintiffs' allegations based on "[o]verall plan fees" where "the employees never alleged that these fees were high in relation to the services that the plan provided").

The court reached the same conclusion in *Probst v. Eli Lilly and Co.*, 2023 WL 1782611 (S.D. Ind. Feb. 3, 2023), where the plaintiff—represented by the same counsel as Plaintiff here—alleged that her plan paid excessive fees for bundled "recordkeeping and related administrative (RKA) services." *Id.* at *3, 7. She provided a chart purporting to compare the RKA fees paid by her plan against those paid by thirteen other plans. *Id.* at *5. However, the alleged RKA fees for her plan included additional fees for services beyond recordkeeping—they included "expenses associated with the operation of the investment funds" and fees for "investment management." *Id.* at *7, 11. Because none of the plaintiff's thirteen alleged comparator plans received investment management services, the court dismissed the complaint. *Id.* at *11-12. In dismissing the complaint, the court emphasized that it was impossible to draw an accurate comparison with the plaintiff's comparators because "all services [were] lumped into one sum." *Id.* at *12.

Like the plaintiffs in those dismissed cases, Plaintiff fails to plead that similarly-situated plans paid less than the Plan for comparable services. First, she wrongly conflates the Plan's recordkeeping and administrative fees, which are paid to Empower, with its PMP fees, which are paid to EAG. AC ¶ 108. Next, she compares the Plan's conflated fees to the strictly administrative fees of five alleged comparator plans that *exclude* any investment-related fees paid by those plans (AC ¶ 110). Plaintiff's comparisons are thus misleading, and her comparator plans do not offer a meaningful benchmark from which to infer any breach of the duty of prudence.

a. Plaintiff Wrongfully Conflates Recordkeeping Fees Paid to Empower with Separate PMP Fees Paid to Registered Investment Advisor EAG for Different Services.

Plaintiff repeatedly alleges that using the PMP as the Plan's QDIA caused the Plan's participants to pay excessive "administrative fees" to what she refers to as "Empower/EAG."

AC ¶¶ 92, 116; *see also* AC ¶¶ 14, 17-18, 91-92, 94, 98. To start, there is no "Empower/EAG." Fees for the PMP were paid to EAG; Empower is a separate legal entity that provides the Plan with separate recordkeeping services. And managed account investment services like the PMP are not administrative services. Plaintiff conflates the former with the latter in an attempt to obscure the differences in her alleged comparators, which include only fees for recordkeeping and other administrative services.

Most fundamentally, "administrative" services are not "investment" services. Administrative services involve just that—administration—and include day-to-day tasks like maintaining records, tracking account information, and processing transactions. *See supra*, pp. 8-9. By contrast, investment services involve investment management and advisory services. Multiple DOL regulations thus repeatedly distinguish investment services from recordkeeping and other administrative services. One regulation describes "administrative services" as including "legal, accounting, [and] recordkeeping" services, and expressly distinguishes fees for these "general plan administrative services" from "fees for investment advice." 29 C.F.R. § 2550.404a-5(c)(2)(i)(A), (3)(i)(A).[6] Another regulation likewise separates "[s]ervices as a fiduciary or registered investment adviser," 29 C.F.R. § 2550.408b-2(c)(1)(iii)(A), from "[c]ertain recordkeeping or brokerage services," 29 C.F.R. § 2550.408b-2(c)(1)(iii)(B). And it expressly categorizes "investment advisory" fees as distinct from accounting, auditing, and recordkeeping fees, among others. 29 C.F.R. § 2550.408b-2(c)(1)(iii)(C). Yet another regulation identifies managed account services such as PMP as "investment management

[6] Courts similarly view retirement plan "administrative services" as including "maintaining records, tracking account balances, overseeing investment selections, processing transactions, providing call center support, and handling other miscellaneous administrative tasks." *Mateya v. Cook Gr. Inc.*, 2023 WL 4608536, at *1, 4 (S.D. Ind. June 16, 2023).

services." 29 C.F.R. § 2550.404c-5(e)(4)(iii).

Public regulatory filings and the Plan's own service agreements reflect these distinctions, as well, showing that Empower provides recordkeeping and administrative services for a certain fee while EAG provides investment management and advisory services for a different fee. *Compare* Riffee Decl. Ex. 4 (RKA), *with* Riffee Decl. Ex. 5 (IAMSA); *see also supra*, pp. 8-10. For example, the Plan's public Form 5500 filings show that Empower receives a flat annual fee of $24 per participant for administrative services, while EAG receives an asset-based fee for investment services. *Supra*, p. 9. Further, the IAMSA governs EAG's PMP services, while a separate recordkeeping agreement governs Empower's recordkeeping and administrative services. *Supra*, pp. 8-10. Consistent with these documents, EAG's Form ADV explains that EAG provides "discretionary investment advisory services through the Professional Management Program," while "EAG-serviced plans receive recordkeeping services through Empower Retirement, LLC (Empower), the recordkeeping entity affiliated with EAG." Riffee Decl. Ex. 3, at MTD0046 (ADV). The Form ADV also states that while Empower is a "related entit[y]," Empower "receive[s] certain fees that are unrelated to EAG's fees for its services." *Id.* at MTD0055 (describing Empower as "a comprehensive administrative and recordkeeping services provider" that is distinct from EAG). These distinctions are critical, as only registered investment advisers, such as EAG, are permitted to provide investment management and advisory services like the PMP.[7]

Plaintiff attempts to erase these distinctions by alleging that Empower and EAG are "one

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[7] Firms or sole practitioners compensated for advising others about securities investments must register with the U.S. Securities and Exchange Commission and conform to regulations designed to protect investors. *See generally* https://www.sec.gov/investment/laws-and-rules; Investment Advisers Act of 1940, 15 U.S.C. § 80b-1, et seq.

in the same company," on the theory that "EAG is wholly-owned by Empower." AC ¶ 93. She further alleges that "fees that are paid to EAG are paid by extension to Empower, who wholly owns EAG." *Id.* Plaintiff is wrong that these are the same entity, *see supra*, pp. 8-10, and the fact that they are affiliates does not somehow turn EAG into Empower—or, by extension, turn PMP managed account fees into administrative fees—for the purpose of assessing the fees charged to the Plan for different services. The Plan is still paying different fees to different legal entities under different contracts for different services.

The relevance of these distinctions is emphasized by the DOL's fee disclosure regulation. That regulation imposes disclosure obligations on each entity "that enters into a contract or arrangement with the covered plan." 29 C.F.R. § 2550.408b-2(c)(1)(iii). Here, there are two such entities, EAG and Empower, each with a separate contract with the Plan. *Compare* Riffee Decl. Ex. 4 (RKA), *with* Riffee Decl. Ex. 5 (IAMSA). The regulation also distinguishes between investment advisory services and recordkeeping or other administrative services. *Compare* 29 C.F.R. § 2550.408b-2(c)(1)(iii)(A) ("Services as a fiduciary or registered investment adviser"), *with* 29 C.F.R. § 2550.408b-2(c)(1)(iii)(B) ("Certain recordkeeping or brokerage services"); *see also* 29 C.F.R. § 2550.408b-2(c)(1)(iii)(C) (separately referring to "investment advisory (for plan or participants)" and "recordkeeping" and "third party administration" services). In short, Plaintiff is wrong in alleging that the separate administrative and PMP fees paid to different entities under different contracts can properly be lumped together in analyzing whether they were prudently incurred.

b. Plaintiff's "Comparable Plan" Analysis Is Inapt and Fails to Support Any Inference of Breach.

Critically, Plaintiff does not challenge the actual recordkeeping and administrative fee of $24 charged to all participants for recordkeeping and administrative services under Empower's

Recordkeeping and Administrative Services Agreement during the Class Period. Nor could she, as that rate was far lower than the recordkeeping fees paid by the other plans she references. AC ¶¶ 108-109; *see Matousek*, 51 F.4th at 280 (dismissing claims where "plan compares favorably" to plaintiffs' comparators for "basic recordkeeping services"). Thus, her actual challenge is only to the PMP fee itself, and she offers no relevant comparators by which to analyze that particular fee.

The only comparators that Plaintiff offers are completely inapt. As Plaintiff concedes, all her comparator plans "selected a TDF as their QDIA instead of an MA like the Bechtel Plan," AC ¶ 109. Notwithstanding—or perhaps because of—this critical distinction, in making her comparison Plaintiff first bundles the Plan's PMP fees together with the Plan's recordkeeping and other related administrative service fees under the label "Bundled RKA Fee Plus Managed Account Compensation." *Id.* She then compares those bundled Plan fees to the alleged recordkeeping and related administrative service fees of the five allegedly "similarly-situated plans" that use a TDF instead of a managed account as their default investment option. AC ¶ 109. This is a quintessential apples-to-oranges comparison.

Plaintiff concedes this point, admitting that she has not compared the Plan's fees to the fees of any other plan that uses a managed account service as its default investment option. AC ¶ 107.[8] But she goes even further, admitting that her "comparison" *includes* the PMP fees (*i.e.* the investment management fees) for the Plan, but *excludes* investment management fees from

[8] Publicly available Forms 5500 confirm that Plaintiff's five alleged comparator plans do not offer a managed account at all. *See* Riffee Decl. Ex. 9, at MTD0108 (2022 Air Liquide & Airgas 401(K) Plan Form 5500); Riffee Decl. Ex. 10, at MTD0122-MTD0123 (2021 Linde Retirement Savings Plan Form 5500); Ex. 11, at MTD0133 (2021 MUFG Union Bank N.A. 401(K) Plan and Trust Form 5500); Riffee Decl. Ex. 12, at MTD0144 (Consumers Energy Company Employees' Savings Plan Form 5500); Riffee Decl. Ex. 13, at MTD0155 (Assurant 401(K) Plan Form 5500).

the alleged comparator TDF plans. AC ¶ 110 (noting that investment management fees of the comparable plans are "not tak[en] into account"). Thus, by her own admission, she has compared the Plan to plans that do not offer comparable services and investments.[9] Because Plaintiff does not provide a "like-for-like comparison"—*i.e.*, a comparison to plans that offer "the same services" as the challenged plan, *Matousek*, 51 F.4th at 279, she has failed to demonstrate, as she must, that the Plan's fees are "unreasonable in light of available alternatives," *Albert*, 47 F.4th at 583.

The deficiencies in Plaintiff's alleged comparators require dismissal of Plaintiff's excessive fee claims, as courts have repeatedly held under similar circumstances. For example, in *Dionicio v. U.S. Bancorp*, 2024 WL 1216519 (D. Minn. Mar. 21, 2024), as here, the plaintiff provided no "specific allegations about the managed-account services that [were] offered by the Plan or by any of the comparator plans." *Id.* at *5 ("There are no allegations about the different 'inputs,' investment strategies, or risk profiles from which participants can choose, and that is true with respect to both participants in the Plan and participants in the comparator plans."). And *Dionicio* is not alone; other courts have reached the same conclusion in the context of managed account investments specifically. *See also Glick v. ThedaCare, Inc.*, 2023 WL 9327209, at *6 (E.D. Wis. July 20, 2023) (rejecting the allegation that "all managed account service providers offer the same services"); *Miller v. Packaging Corp. of Am., Inc.*, 2023 WL 2705818, at *12 (W.D. Mich. Mar. 30, 2023) (rejecting allegations comparing managed-account services where the plaintiff "provide[d] no details about those other [comparator] plans to support his assertion

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[9] Even if Plaintiff had included TDF investment management fees in the pleaded fees of her comparator plans, such analysis would still not state a claim. As described, *supra*, pp. 6-8, TDFs are fundamentally different from managed account services. Thus, it is not proper to compare the fees incurred by plans that utilize TDFs as QDIAs to the fees incurred by the Plan, which has a managed account QDIA.

that they are similarly situated").

Moreover, Plaintiff's allegations regarding the alleged fees of the alleged comparator plans are unsupported and unreliable. While Plaintiff vaguely references "financial statements" as the source of her data, the pleaded numbers in Plaintiff's Amended Complaint are unsupported by public records and in several instances are incorrect. For example, the Form 5500 for the Assurant 401(K) Plan for the year 2021 reported direct compensation to the Vanguard Group of $722,689 (Riffee Decl. Ex. 13, at MTD0155 (Assurant Form 5500)), which is higher than the Assurant plan's "bundled" fees in Plaintiff's chart. AC ¶ 109. Similarly, Air Liquide reported that its plan paid $1,035,966 in compensation to its recordkeeper, T. Rowe Price, in plan year 2022, but Plaintiff alleges that this amount was only $647,823. Compare AC ¶ 109, *with* Riffee Decl. Ex. 9, at MTD0108 (Air Liquide Form 5500).

In short, Plaintiff's Amended Complaint is built on a misleading bundling of the Plan's recordkeeping fees with its PMP managed account fees and inapt comparisons to unreliable and non-comparable fees paid by dissimilar plans. This requires dismissal of her claims.

2. Plaintiff's Allegation that Defendants Should Have Offered a TDF as the Plan's QDIA in Lieu of the PMP Fails to State a Claim.

Having failed to offer any valid comparators to support her assertion that the PMP fees were too high for the services provided, Plaintiff resorts to a broad attack on the use of managed accounts as QDIAs generally, including under the Plan, arguing that the Plan should have used a TDF instead. AC ¶¶ 73-76, 89-90. According to Plaintiff, "the appropriate comparison is not managed account versus managed account with regard to a comparison of fees associated with the MAs or services provided by those MAs, but instead whether a TDF should have been selected for the QDIA instead of *any* managed account." AC ¶ 105. These generalized allegations cannot save Plaintiff's deficient comparators.

Plaintiff's allegations that "managed accounts are essentially expensive target-date funds," AC ¶ 13, and that it "was imprudent to have an opt-in [sic] MA program as the Bechtel Plan did," *id.* ¶ 88, are unsupported and demonstrably false. *See supra*, pp. 6-8. Congress expressly delegated authority to the DOL to decide what types of investments would be available as QDIAs, and, in a formal regulation, the DOL expressly sanctioned the use of both TDFs and managed accounts as QDIAs (among others). In so doing, the DOL recognized that managed accounts and TDFs are fundamentally different investment mechanisms. *Compare* 29 C.F.R. § 2550.404c-5(e)(4)(i) (TDFs), *with id.* § 2550.404c-5(e)(4)(iii) (managed accounts); DOL, *QDIA Fact Sheet* at 2 (identifying managed accounts and target date funds as separate "mechanisms for investing participant contributions"). On the one hand, TDFs offer a one-size-fits-all aged-based approach that is the same for all participants investing in the TDF, with no ability to account for inputs other than age, or to reallocate investments in response to changing market or personal conditions. *Supra*, pp. 6-8. In contrast, the PMP (and managed accounts more broadly) offers individualized and diversified investment allocations that account for a participant's specific estimated retirement age, among other information, rather than broadly grouping participants in 5-year increments. *Supra*, pp. 6-8. The PMP also uses a variety of inputs to simulate thousands of scenarios to identify the portfolio that is most appropriate for a particular investor and offers flexibility to adapt to changing market conditions. *See supra*, p. 6. Unique features such as these that plan fiduciaries have available to them when making choices for their plan are precisely what the Supreme Court contemplated when it urged courts to give due regard to "the range of reasonable judgments a fiduciary may make." *Hughes*, 595 U.S. at

177.[10]

Plaintiff offers no specific factual allegations that would allow this Court to infer that the PMP was not a reasonable and prudent selection here.[11] Rather, she simply speculates that some unknown number of Plan participants did not take advantage of the additional features because they "did not even know they were defaulted into the Plan" and "did not provide[] any personalized information to permit more investment individualization." Id. ¶ 106. This speculation is unavailing.

Given the extensive benefits offered by managed accounts, which apply *a fortiori* when used as a plan default for participants who are not actively managing their retirement savings, courts have repeatedly rejected claims premised on an argument that TDFs should have been offered in place of managed accounts. In *Dionicio*, the court dismissed claims where plaintiffs likewise alleged "that *any* managed-account-service fees are excessive because such services provide no marginal value over similarly performing, but lower cost, target-date funds that are also available to Plan participants." 2024 WL 1216519, at *5 n.5 (emphasis added). The court disagreed with plaintiffs, explaining, "[a]lthough target-date funds and managed-account services might share some features—such as allocating assets based on age or risk tolerance—to compare the two is to compare 'apples and oranges.'" *Id.* (quoting *Davis*, 960 F.3d at 485); *see*

[10] Plaintiff separately alleges that managed account fees "bear no rational relationship to the costs borne by EAG to deliver the PMP MA service." AC ¶ 75. That is irrelevant, as ERISA does not judge the reasonableness of fees by reference to the provider's profit margin. *See* 29 C.F.R. §§ 2550.408b-2, c-2 (reasonableness of fees is determined relative to market pricing); *see also McLaughlin v. Bendersky*, 705 F. Supp. 417, 421 (N.D. Ill. 1989) (deeming profit irrelevant to whether there has been a breach of fiduciary duty).

[11] Plaintiff suggests that a managed account *might* be a prudent QDIA depending on "participant demographics" (AC ¶ 85) but she offers no factual allegations that the workforce for Bechtel—"an engineering, procurement, construction, and project management company," *id.* ¶ 35—was "unengaged and not financially literate," *id.* ¶ 50.

also Baumeister v. Exelon Corp., 2023 WL 6388064, at *9 (N.D. Ill. Sept. 29, 2023) (rejecting the plaintiff's allegation that the managed account option "added no material value to participants" in comparison to the available "target date options").

Lastly, Plaintiff's underlying theory—that she, not the Committee, should dictate which QDIA is appropriate for the entire Plan—cannot be squared with the flexibility and discretion afforded to fiduciaries under ERISA. As the Supreme Court has emphasized, there are a "range of reasonable judgments a fiduciary may make." *Hughes*, 595 U.S. at 177. Fiduciaries of different plans take different approaches, and Plaintiff cannot survive a motion to dismiss simply by asserting that the Plan should have taken a different approach here.

Applying the Supreme Court's ruling in *Hughes*, numerous courts have rejected attempts to challenge fiduciaries' decisions to offer actively managed investment funds, rather than so-called "index funds" with lower fees, solely on the basis that the actively managed funds had higher fees. Those courts explained that certain plan features, such as actively managed funds, "need to charge higher fees, because they must hire management teams to actively select investments to buy and sell," whereas other features "require less management and less upkeep." *Smith*, 37 F.4th at 1169. Those higher fees do not make the selection of such plan features impermissible, even if some plaintiffs might seek to indict active management generally in favor of (often) cheaper index funds. *See id.* To the contrary, the higher fees can "be justified by the plan's strategic goals relative to their selected comparators." *Forman*, 40 F.4th at 449. "A plan fiduciary might prudently seek value in [certain plan features]—whether aggressively bullish or highly defensive—that might charge higher expense ratios due to the requisite skills of their management teams." *Id.*

This same logic applies here. The PMP provides different features, including more investment individualization, than TDFs. It was well within the Plan fiduciaries' discretion to decide that the features offered by the PMP were the proper choice for Plan participants, even if it might result in higher fees than certain TDFs. If Plaintiff disagreed with that choice, she was free to select a different investment management approach. *See supra*, p. 7. Plaintiff's disagreement with the decision to offer the PMP as the Plan's QDIA is entirely insufficient to state a claim for breach of fiduciary duty. This Court should reject Plaintiff's attempt to second guess the decisions of the Plan Committee based on her personal investment preferences.

C. Count II is Derivative of Count I and Fails on the Same Grounds.

Plaintiff's claim that BGC and the Board failed to monitor the Committee is derivative of Plaintiff's claim for breach of fiduciary duty and, thus, fails for lack of a viable underlying claim. *See Tullgren*, 2023 WL 2307615 (same); *Hall*, 2023 WL 2333304, at *8 (dismissing claim for failure to monitor as "wholly derivative of the underlying fiduciary breach claim"); *In re Constellation Energy Grp., Inc.*, 738 F. Supp. 2d 602, 614 (D. Md. 2010) (plaintiffs' claim for failure to monitor "depend[s] on a finding that the defendants breached the underlying duties of prudence and loyalty").

Moreover, a claim for failure to monitor has distinct legal requirements—requirements that Plaintiff effectively ignores. In particular, the obligation to monitor is a "limited" duty, *In re Calpin Corp. ERISA Litig.*, 2005 WL 1431506, at *6 (N.D. Cal. Mar. 31, 2005), that requires a showing that the defendant was on "notice of possible misadventure by their appointees," *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 555 (S.D. Tex. 2003). Plaintiff has made no such allegations here. This claim must therefore fail for this reason, too.

IV. CONCLUSION

For the foregoing reasons, the Court should dismiss the Amended Complaint in its entirety.

Respectfully submitted,

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Dated: August 27, 2024
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<u>CERTIFICATE OF SERVICE</u>

I, Matthew L. Riffee, hereby certify that a copy of the foregoing document, filed through the CM/ECF system, will be sent electronically to the registered participants as indicated on the Notice of Electronic Filing (NEF) on August 27, 2024.

<u>/s/ Matthew L. Riffee</u>
Matthew L. Riffee