APPENDIX

TABLE OF CONTENTS

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WINSTON R. ANDERSON; CHRISTOPHER M. SULYMA, and all others similarly situated, *Plaintiffs-Appellants*, v. INTEL CORPORATION INVESTMENT POLICY COMMITTEE; INTEL RETIREMENT PLANS ADMINISTRATIVE COMMITTEE; FINANCE COMMITTEE OF THE INTEL CORPORATION BOARD OF DIRECTORS; CHRISTOPHER C. GECZY; RAVI JACOB; DAVID S. POTTRUCK; ARVIND SODHANI; RICHARD TAYLOR; TERRA CASTALDI; RONALD D. DICKEL; TIFFANY DOON SILVA; TAMI GRAHAM; CARY KLAFTER; STUART ODELL; CHARLENE BARSHEFSKY; SUSAN L. DECKER; JOHN J. DONAHOE; REED HUNDT; JAMES D.	No. 22-16268 D.C. Nos. 3:19-cv-04618-VC 3:15-cv-04977-VC 5:16-cv-00522-LHK OPINION

PLUMMER; FRANK D. YEARY; STACY SMITH; ROBERT H. SWAN; TODD UNDERWOOD; GEORGE S. DAVIS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Vince Chhabria, District Judge, Presiding

Argued and Submitted October 5, 2023
Honolulu, Hawaii

Filed May 22, 2025

Before: Marsha S. Berzon; Eric D. Miller; and Lawrence VanDyke, Circuit Judges

Opinion by Judge Miller;
Concurrence by Judge Berzon

SUMMARY[*]

ERISA / Fiduciary Duty

The panel affirmed the district court's dismissal of Winston R. Anderson's putative class action under the Employee Retirement Income Security Act alleging that the trustees of Intel Corporation's proprietary retirement

[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

funds breached their fiduciary duty of prudence and duty of loyalty.

Anderson alleged that the trustees breached their duty of prudence by investing some of the funds' assets in hedge funds and private equity funds. He alleged that they breached their duty of loyalty by steering retirement funds to companies in which Intel's venture-capital arm, Intel Capital, had already invested.

The panel held that Anderson did not state a claim for breach of ERISA's duty of prudence. Because prudence is evaluated prospectively, based on the methods the fiduciaries employed, rather than retrospectively, based on the results they achieved, it is not enough for a plaintiff simply to allege that the fiduciaries could have obtained better results. Instead, a plaintiff must provide some further factual enhancement. When a plaintiff relies on a theory that a prudent fiduciary in like circumstances would have selected a different fund, the plaintiff must provide a sound basis for comparison. The panel concluded that Anderson did not plausibly allege that Intel's funds underperformed other funds with comparable aims. Anderson failed to state a claim for breach of the duty of prudence because he made only general arguments about the riskiness and costliness of hedge funds and private equity funds without providing factual allegations sufficient to support the claim that the investments that were actually made were ill-suited to the Intel funds.

The panel held that Anderson failed to state a claim that Intel's fiduciaries breached their duty of loyalty because he did not plausibly allege a real conflict of interest, rather than the mere potential for a conflict of interest.

Concurring in full in the majority opinion, Judge Berzon wrote separately to clarify the role of comparisons and circumstantial allegations in duty-of-prudence claims. She wrote that comparison is not a pleading requirement, and ERISA does not require pleading an empirical comparator— in the form of a "meaningful benchmark" alternative investment or otherwise—to state a claim. The ultimate question, absent direct allegations about the fiduciary's investment methods, is not how other plans were managed or what other investments were available, but whether the facts alleged—comparative or not—lead to the plausible inference that the actual process used by the defendant fiduciary was flawed. With appropriate evidence, Anderson could have stated a claim by pleading a true benchmark comparison, by providing other circumstantial allegations that plausibly suggested imprudence, or by directly showing that the specific investments the Intel fiduciaries selected or the general methodologies they used were imprudent.

COUNSEL

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OPINION

MILLER, Circuit Judge:

Winston R. Anderson brought this putative class action under the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (29 U.S.C. § 1001 *et seq.*), against the trustees of Intel Corporation's proprietary retirement funds. He alleged that the trustees breached their duty of prudence by investing some of the funds' assets in hedge funds and private equity funds. He also alleged that they breached their duty of loyalty by steering retirement funds to companies in which Intel's venture-capital arm, Intel Capital, had already invested. The district court dismissed Anderson's claims, concluding that he had not plausibly alleged a breach of either the duty of prudence or the duty of loyalty. We affirm.

I

From 2000 to 2015, Anderson was an Intel employee who participated in Intel's employee retirement plans, including the Intel 401(k) Savings Plan and the Intel Retirement Contribution Plan. Both plans are "employee

pension benefit plans" subject to ERISA. 29 U.S.C. § 1002(2)(A).

ERISA requires that private pension plan assets "be held in trust." 29 U.S.C. § 1103(a). To that end, it imposes certain fiduciary duties on a plan's trustees, two of which are relevant here. First, the trustees have a duty of prudence: They must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *Id.* § 1104(a)(1)(B). Second, they have a duty of loyalty: They must "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries." *Id.* § 1104(a)(1).

Participants in Intel's plans may choose to invest their accounts in one or more customized funds managed by the plans' trustees. Those funds include target-date funds, which hold a mix of asset classes including stocks, bonds, and cash equivalents that are adjusted to become more conservative as the fund approaches the target retirement date, and global diversified funds, which invest in a variety of assets, including domestic and international equity funds, bonds, and short-term investments.

In response to the 2008 market crash and the ensuing recession, Intel redesigned its funds so that they included not just stocks and bonds but also hedge funds and private equity funds. A hedge fund is a privately organized pooled investment vehicle that engages in active trading of various assets, often including securities and commodity futures and options contracts. A private equity fund acquires and manages companies with the goal of improving them to earn a profit when the companies are

sold again. Intel told participants that its new strategy was aimed at decreasing volatility and reducing the risk of large losses during a market downturn. It also disclosed the price that participants would pay for this risk mitigation: Because of their broad diversification, the funds would not compare favorably with equity-heavy funds during bull markets.

In 2019, Anderson brought this action in the Northern District of California against the managers of the plans. *See* 29 U.S.C. § 1109(a) (making ERISA plan fiduciaries personally liable for any losses to the plan resulting from a breach of fiduciary duty); *id.* § 1132(a)(2) (permitting plan participants to bring a civil action for relief under section 1109). He alleged that they had breached their duty of prudence because their large allocations to hedge funds and private equity funds had "drastically departed from prevailing standards of professional asset managers." He also alleged that they had breached their duty of loyalty by improperly favoring investments that benefited Intel Capital—Intel's venture capital arm—at the expense of the plan participants. (He also asserted several additional claims, but because the parties agree that those claims are derivative of the claims based on breach of fiduciary duty, we do not separately discuss them.) Anderson asked the district court to certify a class consisting of all plan participants whose accounts were invested in the target-date funds or global diversified funds after October 2009. The case was subsequently consolidated with a case brought by Christopher Sulyma, another former Intel employee.

The district court dismissed the complaint for failure to state a claim. The court rejected the duty-of-prudence claim because Anderson had not alleged facts sufficient to

support the allegation that the funds suffered from poor performance compared to peer funds. To make such an allegation plausible, the court reasoned, Anderson would need to provide "a meaningful benchmark against which to compare the Intel Funds," but he had "failed to allege facts that would demonstrate that [his] chosen 'comparable funds'" were indeed meaningful benchmarks. As to the duty-of-loyalty claim, the court held that Anderson's allegations were "devoid of plausible allegations that could show a conflict of interest or self-dealing."

The district court granted leave to amend. In the amended complaint—the operative pleading here—Anderson again asserted claims based on breach of the duty of prudence and the duty of loyalty. The amended complaint detailed how the funds underperformed allegedly comparable alternatives, including published indices like the S&P 500 and Morningstar categories of peer-group funds. It also alleged "that hedge funds and private equity pose challenges and risks beyond those posed by 'traditional investments' such as mutual funds" and "do not increase diversification of asset classes." It included further detail on how the fiduciaries' investment decisions had benefited Intel and Intel Capital.

The district court again dismissed, this time with prejudice. The court concluded that Anderson still had not identified a "meaningful benchmark" against which to compare the performance of Intel's funds. The court explained that "simply labeling funds as comparable or as in the same category as the Intel [target-date funds] and Intel [global diversified funds] is insufficient to establish that those funds are meaningful benchmarks." The court also stated that, although Anderson had added more detail

to his duty-of-loyalty allegations, the allegations were "much the same as" those of the first complaint and were insufficient to support the claim that the fiduciaries had engaged in self- dealing.

Anderson appeals. We review de novo the district court's dismissal of a complaint for failure to state a claim. *Wells Fargo Bank, N.A. v. Mahogany Meadows Ave. Tr.*, 979 F.3d 1209, 1213 (9th Cir. 2020). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

II

We begin with Anderson's claim that the plan trustees breached their duty of prudence. Anderson contends that the trustees acted imprudently both by initially allocating some of the plans' assets to hedge funds and private equity funds and by failing to adjust that allocation as it became clear that hedge funds and private equity funds were producing lower returns than those available from more traditional assets like stocks and bonds. We agree with the district court that Anderson has not stated an imprudence claim under ERISA.

ERISA requires plan trustees to act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B); *see also* 29 C.F.R. § 2550.404a-1(b)(1). "At times, the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable

judgments a fiduciary may make based on her experience and expertise." *Hughes v. Northwestern Univ.*, 595 U.S. 170, 177 (2022).

ERISA "requires prudence, not prescience." *Debruyne v. Equitable Life Assurance Soc'y of the U.S.*, 920 F.2d 457, 465 (7th Cir. 1990) (quoting *DeBruyne v. Equitable Life Assurance Soc'y of the U.S.*, 720 F. Supp. 1342, 1349 (N.D. Ill. 1989)). We therefore assess "a fiduciary's actions based upon information available to the fiduciary at the time of each investment decision and not from the vantage point of hindsight." *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) (quoting *In re Citigroup ERISA Litig.*, 662 F.3d 128, 140 (2d Cir. 2011)); *accord In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996) (explaining that the inquiry turns on "a fiduciary's conduct in arriving at an investment decision, not on its results"). Specifically, we ask "whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1097 (9th Cir. 2004) (quoting *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983)).

Because we evaluate prudence prospectively, based on the methods the fiduciaries employed, rather than retrospectively, based on the results they achieved, it is not enough for a plaintiff simply to allege that the fiduciaries could have obtained better results—whether higher returns, lower risks, or reduced costs—by choosing different investments. Instead, a plaintiff must provide "some further factual enhancement" to take the claim

across "the line between possibility and plausibility." *Twombly*, 550 U.S. at 557.

There are a "myriad of circumstances that could violate the [prudence] standard." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1102 (9th Cir. 2008). For example, a plaintiff can plead a breach of the duty of prudence by alleging facts that would directly show that the fiduciaries employed unsound methods in making their investment decisions. *See, e.g.*, *Appvion, Inc. Ret. Sav. & Emp. Stock Ownership Plan ex rel. Lyon v. Buth*, 99 F.4th 928, 946 (7th Cir. 2024) (trustees of employee stock ownership plan purchased stock in reliance on appraiser's valuation but "were careless in failing to scrutinize [the appraiser's] valuation methods"); *Stegemann v. Gannett Co., Inc.*, 970 F.3d 465, 476 (4th Cir. 2020) (trustees of retirement fund allegedly did not monitor a stock fund even though "two years elapsed" during which they "received risk warnings from auditors").

Alternatively, a plaintiff can make "circumstantial factual allegations" from which the court "may reasonably 'infer from what is alleged that the process was flawed.'" *St. Vincent*, 712 F.3d at 718 (quoting *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009)). When an ERISA plaintiff attempts to do so by relying on a theory that "'a prudent fiduciary in like circumstances' would have selected a different fund based on the cost or performance of the selected fund," that plaintiff "must provide a sound basis for comparison." *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018) (quoting *St. Vincent*, 712 F.3d at 720); *accord Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136, 1149 (10th Cir. 2023) ("A court cannot reasonably draw an inference of imprudence simply from the allegation that a cost disparity exists;

rather, the complaint must state facts to show the funds or services being compared are, indeed, comparable."); *Albert v. Oshkosh Corp.*, 47 F.4th 570, 581–82 (7th Cir. 2022) ("The fact that actively managed funds charge higher fees than passively managed funds is ordinarily not enough to state a claim because such funds may also provide higher returns," so a plaintiff must offer "more detailed allegations providing a 'sound basis for comparison.'" (quoting *Meiners*, 898 F.3d at 822)); *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1166 (6th Cir. 2022) ("[P]ointing to an alternative course of action, say another fund the plan might have invested in, will often be necessary to show a fund acted imprudently . . . ."). In other words, when a plaintiff alleges imprudence based on a fiduciary's decision to make one investment rather than an alternative, "[t]he key to nudging an inference of imprudence from possible to plausible is providing 'a sound basis for comparison—a meaningful benchmark'—not just alleging that 'costs are too high, or returns are too low.'" *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022) (quoting *Davis v. Washington Univ. in St. Louis*, 960 F.3d 478, 484 (8th Cir. 2020)).

The need for a relevant comparator with similar objectives—not just a better-performing plan or investment—is implicit in ERISA's text. By making the standard of care that of a hypothetical prudent person "acting *in a like capacity* . . . in the conduct of an enterprise *of a like character* and *with like aims*," the statute makes clear that the goals of the plan matter. The Department of Labor regulations implementing ERISA do the same. Those regulations provide that the duty of prudence is satisfied if the fiduciary has made a determination that a chosen investment "is reasonably designed, as part of the portfolio . . . , to further the

purposes of the plan, taking into consideration the risk of loss and the opportunity for gain . . . *compared to* the opportunity for gain . . . associated with *reasonably available alternatives with similar risks*." 29 C.F.R. § 2550.404a-1(b)(2)(i) (emphasis added).

Anderson has made no direct allegation about Intel's investment-selection methods, and he attempts to show a breach of the duty of prudence only through the circumstantial route. Specifically, he argues that the decision to invest in hedge funds and private equity funds caused Intel's funds to underperform other funds and to incur higher fees. But the district court correctly determined that Anderson did not plausibly allege that Intel's funds underperformed other funds with comparable aims.

Intel clearly disclosed the aims of its funds. Disclosures for the global diversified funds explained Intel's risk- mitigation objective, noting that assets were allocated to "provide greater downside protection in faltering markets, with the tradeoff being slight underperformance in rallying ones, as has been the case in the current bull market." Disclosures for the target-date funds similarly made clear that the goal was to "reduce investment risk by investing in assets whose returns are less correlated to equity markets."

Notably, Intel developed its own customized benchmarks, made up of a "composite of the underlying . . . benchmarks" for each asset class included in the Intel funds, which it disclosed to plan participants and beneficiaries. Intel explained that the benchmarks had "the same asset allocation as the Fund's target asset allocation and use[d] index returns to represent the performance of the asset classes." But rather than

presenting a comparison to Intel's composite benchmarks or to available funds with similar risk-mitigation strategies and objectives, Anderson sought to compare Intel's funds to equity-heavy retail funds that pursued different objectives—typically revenue generation. As the district court observed, "simply labeling funds as 'comparable' or 'a peer' is insufficient to establish that those funds are meaningful benchmarks against which to compare the performance of the Intel funds." Anderson's putative comparators were not truly comparable because they had "different aims, different risks, and different potential rewards." *Davis*, 960 F.3d at 485.

Anderson emphasizes that the duty of prudence is "derived from the common law of trusts," *Tibble v. Edison Int'l*, 575 U.S. 523, 528 (2015) (quoting *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985)), and that "[n]o fixed formula exists for determining whether a trustee has met the standard of care," George G. Bogert, *The Law of Trusts & Trustees* § 541 (3d ed. 2019). He also insists that the "appropriate inquiry will be context specific." *Hughes*, 595 U.S. at 177 (quoting *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014)). That is true as far as it goes: As we have already explained, a plaintiff does not necessarily need to identify comparable funds or investments; he might, for example, make direct allegations of a breach of ERISA's duty of prudence. We do not hold that a plaintiff must *always* identify a comparator when relying on circumstantial allegations of a breach of the duty of prudence. But to the extent a plaintiff asks a court to infer that a fiduciary used improper methods based on the performance of the investments, as Anderson in part does here, he must compare that performance to funds or

investments that are meaningfully similar. *Meiners*, 898 F.3d at 822.

The same reasoning holds for Anderson's allegations that investors in the Intel-created plans incurred higher fees. As with the performance allegations, the fact that different kinds of funds with distinct objectives and approaches carried different fees does not by itself demonstrate imprudence. Anderson's comparison to off-the-shelf funds that did not seek to mitigate risk to the same degree as Intel's funds is not enough to show that the Intel funds' fees were excessive to the point of imprudence.

Anderson argues that there are "*no* meaningful comparators for the fiduciaries' decision" because Intel's approach "was unusual, if not unparalleled." That argument conflates the risk-mitigation objective of the Intel funds with the allocation decisions made to implement that objective. Anderson's complaint suggests that what he is really challenging is the former: He alleges that "in pursuing a purported risk-mitigation strategy, the Intel Funds gave up the long-term benefit of investing in equity, which delivers superior returns." But as the district court noted, "ERISA fiduciaries are not required to adopt a riskier strategy simply because that strategy may increase returns." To the contrary, courts have routinely rejected claims that an ERISA fiduciary can violate the duty of prudence by seeking to minimize risk. *See Pizarro v. Home Depot, Inc.*, 111 F.4th 1165, 1181 (11th Cir. 2024) ("Home Depot offered the stable value fund because it was conservative, advertised it as conservative, and benchmarked it against a conservative metric. Because the fund met the expectations set for it, the plaintiffs' breach-of-fiduciary-duty claim relying on

comparisons to other, more aggressive benchmarks fail[s]."); *Ellis v. Fidelity Mgmt. Tr. Co.*, 883 F.3d 1, 10 (1st Cir. 2018) (rejecting an argument "that a plan fiduciary's choice of benchmark, where such a benchmark is fully disclosed to participants, can be imprudent by virtue of being too conservative").

Anderson insists that he is challenging the implementation of the risk-minimization strategy, as opposed to the strategy itself. In that respect, his argument appears to rest on the proposition that the fiduciaries' allocation strategy was imprudent because hedge funds and private equity funds are *inherently* so risky that no prudent investor with the same aims would have invested in them, or at least not in the proportions the fiduciaries selected. As Anderson puts it, Intel should have been aware of "contemporaneous reports of poor hedge-fund returns, the exorbitant expenses of hedge funds and private equity, and [their] well-recognized risks."

Anderson's *per se* challenge to hedge funds and private equity investments overlooks that "the prudence of each investment is not assessed in isolation but, rather, as the investment relates to the portfolio as a whole." *St. Vincent*, 712 F.3d at 717; *see also California Ironworkers Field Pension Tr. v. Loomis Sayles & Co.*, 259 F.3d 1036, 1043 (9th Cir. 2001). ERISA requires that a fiduciary "diversify[] the investments of the plan so as to minimize the risk of large losses." 29 U.S.C. § 1104(a)(1)(C). And the Department of Labor's regulations contemplate that a fiduciary should act as a prudent investment manager following the principles of modern portfolio theory, which recognizes that while the individual riskiness of a particular investment cannot be eliminated, it can be

managed through the diversification of investment assets. *See* 29 C.F.R. § 2550.404a-1(b)(1)(i)– (ii); *see also DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 423 (4th Cir. 2007) ("[M]odern portfolio theory has been adopted by the investment community and, for the purposes of ERISA, by the Department of Labor." (citing 29 C.F.R. § 2550.404a-1)); *Laborers Nat'l Pension Fund. v. Northern Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 322 (5th Cir. 1999) ("Since 1979, investment managers have been held to the standard of prudence of the modern portfolio theory by the Secretary's regulations." (citing 29 C.F.R. § 2550.404a-1)). Indeed, in some cases, "an investment in a risky security as part of a diversified portfolio is . . . an appropriate means to increase return while minimizing risk." *DiFelice*, 497 F.3d at 423. Thus, generalized attacks on hedge funds and private equity funds as a category have been rejected both by courts, *see, e.g.*, *St. Vincent*, 712 F.3d at 723, and by the Department of Labor, which has opined that "a fiduciary may properly select an asset allocation fund with a private equity component as a designated investment alternative for a participant directed individual account plan," Letter to Jon W. Breyfogle from Louis Campagna, Chief, Division of Fiduciary Interpretations, Office of Regulations and Interpretations, Employee Benefits Security Administration, United States Department of Labor (June 3, 2020), available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020.

It is possible that a plaintiff could make out an imprudence claim by alleging that a plan invested much more in a particularly risky class of assets than did other, comparable plans, even if investing in that asset class is not *per se* imprudent in smaller amounts. *Cf. California*

Ironworkers, 259 F.3d at 1045 (holding it sufficient to allege that a fiduciary allocated nearly one third of a plan to a "highly risky investment[]" and the same fiduciary allocated only five percent and seven percent of its other plans to that same investment). But Anderson has not plausibly alleged that Intel's specific investments were imprudent at the scale it made them. Although Intel identified the hedge funds and private equity funds in which it invested, Anderson has not alleged that those investments were particularly risky, individually or in the aggregate. Notably, the complaint suggests that the fiduciaries' choices had their intended effects. For example, one chart in the complaint shows that hedge funds (albeit a composite index rather than the specific funds the Intel fiduciaries selected) underperformed the global stock market in "up" months, but overperformed in "down" months—precisely the tradeoff Intel had disclosed.

Nor does Anderson's "risk-adjusted" analysis suffice. He alleges that the Intel funds had a greater "risk per unit of return" than did other target-date funds. But an ERISA plaintiff cannot make incomparable funds comparable simply by using a ratio. The "risk-adjusted" analysis does not allege that any funds with comparable risk profiles and greater returns actually existed; it only speculates that if a fund with a comparable risk profile had followed the trend of other, presumably riskier, funds, it would have generated higher returns than the Intel funds did.

Finally, Anderson emphasizes the liberal pleading standards of Federal Rule of Civil Procedure 8, arguing that the district court impermissibly "parsed" his chosen comparators, and improperly engaged in factfinding. But

Anderson's complaint explained that "there are considerable differences among [target-date funds] offered by different providers, even among [target-date funds] with the same target date," so it was appropriate for the district court to consider those differences carefully. Furthermore, the district court had to assess the similarities and differences between Anderson's chosen comparators and the Intel funds so that it could determine whether they were appropriate comparators in the first place. *See Davis*, 960 F.3d at 485 ("Comparing apples and oranges is not a way to show that one is better or worse than the other.").

Such analysis—even at the pleading stage—is appropriate in ERISA cases. To be sure, plaintiffs "typically lack extensive information regarding the fiduciary's 'methods and actual knowledge' because those details 'tend to be in the sole possession of [that fiduciary].'" *Meiners*, 898 F.3d at 822 (alteration in original) (quoting *St. Vincent*, 712 F.3d at 719). And a court cannot reasonably demand that plaintiffs plead "facts which tend systemically to be in the sole possession of defendants." *Braden*, 588 F.3d at 598. But ERISA requires plan administrators to make extensive disclosures to participants, including a summary plan description and an annual report with audited financial statements. 29 U.S.C. §§ 1022, 1023. Those disclosures give prospective plaintiffs "the opportunity to find out how the fiduciary invested the plan's assets." *St. Vincent*, 712 F.3d at 720. An ERISA plaintiff can "use the data about the selected funds and some circumstantial allegations about methods to show that 'a prudent fiduciary in like circumstances would have acted differently.'" *Meiners*, 898 F.3d at 822 (quoting *St. Vincent*, 712 F.3d at 720); *see also* 29 U.S.C. § 1104(a)(1)(B).

Anderson has not made such a showing. He has had access to detailed information about the Intel funds—including the identities of the hedge funds and private equity funds in which they invested—and therefore has been well positioned to find appropriate comparators or to explain why these specific investments are so inherently risky, individually or in the aggregate, that selecting them was imprudent. Nevertheless, he makes only general arguments about the riskiness and costliness of hedge funds and private equity funds without providing factual allegations sufficient to support the claim that the investments that were actually made were ill-suited to the Intel funds. The district court therefore correctly held that he failed to state a claim for breach of ERISA's duty of prudence.

III

Anderson also claims that Intel's fiduciaries breached their duty of loyalty. They did so, he says, by giving hedge funds and private equity funds more capital to invest in companies and startups in which Intel Capital had already invested, so as to benefit Intel Capital by reducing the risk of its investments. The district court dismissed that claim, explaining that an ERISA plaintiff asserting a breach of the duty of loyalty must "plausibly allege a real conflict of interest, rather than the mere potential for a conflict of interest." We agree.

ERISA imposes a duty of loyalty on plan fiduciaries: A fiduciary must administer plan assets "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1); *see also id.* § 1106(b)(1) ("A fiduciary with respect to a plan shall not deal with the assets of the plan in his own interest or for his own account."); *Pegram v. Herdrich*, 530 U.S. 211, 225 (2011). Like the duty of

prudence, ERISA's duty of loyalty finds its source in the common law of trusts. *See Central States*, 472 U.S. at 570. The Supreme Court has explained, however, that "the analogy between ERISA fiduciary and common law trustee" is imperfect because unlike a trustee at common law, "the trustee under ERISA may wear different hats," and "a fiduciary may have financial interests adverse to beneficiaries." *Pegram*, 530 U.S. at 225. For example, employers "can be ERISA fiduciaries and still take actions to the disadvantage of employee beneficiaries, when acting as employers (*e.g.*, firing an employee for reasons unrelated to the ERISA plan)." *Id.*

The statute requires that fiduciaries "wear the fiduciary hat when making fiduciary decisions." *Pegram*, 530 U.S. at 225; *see Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443–44 (1999). But it does not prohibit "the mere act of becoming a trustee with conflicting interests." *Friend v. Sanwa Bank California*, 35 F.3d 466, 469 (9th Cir. 1994); *see id.* ("ERISA does not expressly prohibit a trustee from having dual loyalties."). Thus, "the potential for a conflict, without more, is not synonymous with a plausible claim of fiduciary disloyalty." *Kopp v. Klein*, 894 F.3d 214, 222 (5th Cir. 2018); *accord Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982) (explaining that corporate officers who also serve as trustees of the company's retirement plans "do not violate their duties as trustees by taking action which . . . they reasonably conclude best to promote the interests of participants and beneficiaries simply because it incidentally benefits the corporation").

Anderson insists that the Intel fiduciaries' investment in certain hedge funds and private equity funds "had the potential to benefit" Intel Capital "by allowing Intel

Capital to invest in technology startups more effectively and with reduced risk." But as the district court observed, nowhere in the complaint did Anderson allege that the Intel fiduciaries had any influence over any investment firm's decision "to invest in one of the startups in which Intel [had already] invested." And the mere fact that members of senior management at Intel Capital also served as members of Intel's Investment Policy Committee does not, on its own, support an inference that such individuals acted disloyally while discharging their fiduciary duties.

All Anderson presented was the potential for conflicts of interest, with nothing more. The district court was correct to hold that Anderson did not adequately plead a claim of breach of the duty of loyalty.

AFFIRMED.

BERZON, Circuit Judge, concurring:

I concur in full in the majority opinion. I write separately to clarify the role of comparisons and circumstantial allegations in duty-of-prudence claims.

Comparison is not a pleading requirement for a breach of fiduciary claim. ERISA's fiduciary provisions do define the legal standard of conduct using comparisons. But the statute does not require pleading an empirical comparator— in the form of a "meaningful benchmark" alternative investment or otherwise—to state a claim. There is a crucial difference between (a) comparisons that define the standard of conduct with (b) comparisons that can, but need not, be pleaded to show that the standard has been violated. I address these two different uses of comparisons in ERISA imprudence claims in turn.

A.

ERISA requires that a fiduciary "discharge" her duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1). Duty-of-prudence claims thus require, by definition, a legal comparison between the defendant fiduciary and the hypothetical "prudent man."

Crucially, this invited comparison is not a factual requirement, and so does not require pleading any *facts* about the "prudent man." Instead, the comparison is a way of defining the applicable legal standard. The "prudent man" is an imaginary archetype, like the "reasonable person" in negligence law or the "bad man" imagined by Justice Holmes. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).[1] As the "prudent man" is not real, a plaintiff cannot plead facts that empirically demonstrate how a "prudent man" would have acted. Instead, the "prudent man" personifies the ideal of prudence and emphasizes that perfection is not required; only what is humanly attainable is expected. A plaintiff need only provide evidence from which a factfinder can determine that the investment process did not meet this standard.

The upshot is that although ERISA's standard of prudent conduct is defined by comparison, a plaintiff need

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[1] In this essay, Holmes distinguishes between morality and law by arguing that even a hypothetical "bad man" who "cares nothing for an ethical rule" will nevertheless want to "avoid being made to pay money, and will want to keep out of jail if he can." 10 Harv. L. Rev. at 459.

not plead facts about a "prudent man"—or his investment decisions— to establish a comparator and so show that the comparative legal standard has been violated.[2]

B.

Even though comparative allegations are not required to state an ERISA imprudence claim, they can be useful—indeed, they are often the best way for a plaintiff to plead such a claim at the outset of a case. The reason is simple: ERISA's duty of prudence is a standard of *conduct* rather than results. But plaintiffs generally will know only the outcome of a fiduciary's decisions—which investments were selected, for example, and how those investments performed. They typically will not know details about the process by which these decisions were made—which other options were considered, or how and why certain investments were selected over alternatives. "ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009).

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[2] Labor Department regulations specify that a fiduciary satisfies her duty of prudence if she has "determine[ed] . . . that [a] particular investment or investment course of action is reasonably designed . . . to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain . . . associated with the investment or investment course of action *compared to* the opportunity for gain . . . associated with reasonably available alternatives with similar risks." 29 CFR § 2550.404a-1(b) (emphasis added). This regulation requires the *fiduciary* to make a comparison and to evaluate the relative costs and benefits of different investments. It does not set forth a pleading requirement for *plaintiffs* alleging that the fiduciary breached her duty.

As a result, a plaintiff is not "required to describe directly the ways in which [defendants] breached their fiduciary duties," *Braden*, 588 F.3d at 595; "a claim . . . may still survive a motion to dismiss if the court, based on circumstantial factual allegations, may reasonably 'infer from what is alleged that the process was flawed,'" *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 718 (2d Cir. 2013) (alterations omitted) (quoting *Braden*, 588 F.3d at 596). Consequentially, plaintiffs often plead a claim using allegations that do not directly describe the fiduciary's decision-making process but support the inference that the methods used were unwise.[3]

But of course, as with any other kind of claim, indirect allegations are not the only way to state a claim. The straightforward approach is to plead facts that directly show that the fiduciary's methods, processes, or objectives were imprudent. For example, if a plaintiff learned that a plan manager chose investments by writing the ticker symbol for each publicly traded U.S. company on a bingo ball and then drawing ten to invest in at random, the plaintiff could almost certainly plead a duty-of-prudence claim attacking this process simply by recounting these facts. A court could determine as a matter of law that no prudent investor would select investments entirely at random.

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[3] The permission to state a claim with indirect allegations that support an inference of liability is not some special carveout for ERISA imprudence claims. It is an application of Federal Rule of Civil Procedure 8, under which a complaint need only include "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).

Also, unlike some other rules and statutes, ERISA does not impose a heightened pleading standard for imprudence or any other claims. *Cf.* Fed. R. Civ. P. 9(b) (particularity standard for allegations of fraud); 15 U.S.C. § 78u-4(b)(2) (particularity standard for state-of-mind allegations supporting private class action securities claims). So, as with any other claim not required to be pleaded with special particularity, the question is simply whether the plaintiff has adequately pleaded facts, direct or circumstantial, showing that he is entitled to relief.

C.

What sort of indirect facts are sufficient to support an inference that a fiduciary breached the duty of prudence? There are a "myriad of circumstances that could violate the [prudent man] standard," *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1102 (9th Cir. 2008), so there is no fixed formula for the facts from which we might infer imprudence, nor is there a specific requirement to plead a particular kind of indirect allegation to support such an inference. As the majority notes, though, bare allegations that "costs are too high, or returns are too low" are not enough to suggest that the investment process was flawed. *See* Maj. Op. at 12 (quoting *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022)). With these principles in mind, I address several kinds of indirect allegations that can support an inference of imprudence, although the list is of course not exhaustive.

I first note that, although many cases in which plaintiffs have pleaded imprudence with indirect facts involve comparative allegations, comparisons are not the only form of indirect allegation that could support a claim. For example, imagine a plaintiff who had no idea how a

fiduciary selected investments but knew that the fiduciary had allocated a significant portion of the plan's assets to a new type of security backed entirely by lottery tickets. The inherent risk of that category of investment might be sufficient, even without any details about how the fiduciary selected it or any comparison to other investments or other plans, to support a claim of imprudence—and that would be so even if, against all odds, the plan purchased a winning ticket.

A common way of pleading imprudence with indirect allegations is to provide comparisons that support an inference that a fiduciary's methods were imprudent. One category of comparison is the "meaningful benchmark" comparison, championed by the district court and the majority opinion. This kind of comparison is one between individual investments that were actually available to the fiduciary. The "meaningful benchmark" language originated in *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018). *Meiners*, in turn, coined the phrase in reference to the Eighth Circuit's earlier decision in *Braden v. Wal-Mart Stores*. *Id.*

Braden involved an ERISA-covered employee retirement plan that allowed individual participants to direct how their assets were invested by selecting from a menu of investment options selected by the plan's fiduciary. 588 F.3d at 589. The plaintiff alleged that the plan was large enough that it had the ability to offer as choices on this menu of investment options either retail-class or institutional shares of the same mutual funds. 588 F.3d at 590. Retail shares "charge[d] significantly higher fees than institutional shares for the same return on investment," and the complaint included "specific allegations about the relative cost of institutional and

retail shares in the funds." *Id.* at 595 & n.5. Based on the allegation that the plan's managers chose to make available the higher-cost version of an otherwise identical investment, the Eight Circuit concluded that it was reasonable to infer that the process by which the plan was managed was flawed. *Id.* at 596; *see also Meiners*, 898 F.3d at 822.

Notably, in *Braden*, the allegation was not just that "cheaper alternative investments exist in the marketplace." 588 F.3d at 596 n.7. *Braden* emphasized that such allegations would be insufficient. *Id.* Instead, Braden alleged that the plan managers had the option to choose between two different classes of shares in the *same* mutual funds, with the only difference being that one class of shares had higher fees than the other. *Id.* at 595–96. An investor need not peer into a crystal ball to discern, even at the outset, that selecting the more expensive of the two share classes will lead to lower returns. Because the only difference between the available investments was their varying costs, the allegations in *Braden* were sufficient to suggest that opting for the more expensive option was imprudent *at the time the decision was made*, not just in retrospect. *Id.* at 596.

These kinds of "benchmark" comparisons to individual real-world investment options are useful in "an investment- by-investment challenge"—a theory of breach based on a fiduciary's failure to "remove imprudent investment options" when there exist better specific alternatives. *Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 484 (8th Cir. 2020). But investment-versus-investment benchmarks are just one way of providing comparative allegations that could show imprudence.

A plaintiff might also support an inference of imprudence by providing a plan-level comparison rather than an individual *investment*-level comparison. For example, in *California Ironworkers Field Pension Trust v. Loomis, Sayles & Co.*, plaintiffs asserted that an investment manager breached ERISA's duty of prudence in managing an ERISA-covered employee benefit plan that had adopted "conservative investment guidelines," seeking to "achieve decent returns with minimum market risk." No. CV964036, 1999 WL 1457226 at *3, *6. (C.D. Cal. Mar. 26, 1999). The manager invested nearly a third of the plan's assets in a form of mortgage-backed security called an "inverse floater." *Id.* On appeal, we affirmed the district court's conclusion that the manager breached the duty of prudence by investing so high a proportion of the plan's assets in this single form of security, which we noted "could be highly risky." *California Ironworkers Field Pension Tr. v. Loomis Sayles & Co.*, 259 F.3d 1036, 1045 (9th Cir. 2001).

In concluding that it was imprudent to allocate nearly a third of the plan's assets to this one, risky kind of asset, we emphasized (as had the district court) that two other employee benefit plans managed by the same fiduciary had allocated much smaller percentages—less than 10%—to the same risky inverse floaters. 259 F.3d 1036, 1045; 1999 WL 1457226 at *3. In other words, we inferred imprudence based in part on a plan-versus-plan comparison rather than an investment-versus-investment comparison.

In *California Ironworkers*, we compared plans managed by the same fiduciary and evaluated their varying allocations to risky assets. But there is no reason this logic could not extend to plans managed by different

fiduciaries as well. For example, if a plaintiff showed that a fiduciary allocated a third of a plan to one kind of risky asset and asserted that several other plans with comparable aims but different managers each allocated much smaller percentages to that same asset, those allegations might similarly support an inference of imprudence. And the inference might be stronger still if the plaintiff analyzed the entire market and alleged that no comparable plan adopted a similar allocation—a plan-versus-aggregate comparison rather than a plan-versus-plan comparison.

Either way, though, such a comparison operates somewhat differently than an investment benchmark comparison. A benchmark investment comparison between two otherwise-identical investments that differ on only one characteristic, like fee amount, can suggest that the fiduciary who selected the worse of the two options acted imprudently. A plan-by-plan or aggregate comparison, by contrast, can suggest imprudence by demonstrating that the fiduciary's actions were an outlier. Deviation alone may not be enough to suggest imprudence, but coupled with some reason why the fiduciary should have known at the time the decision was made that the aberrant allocation or investment decision would be imprudent, divergence could suggest that the fiduciary's conduct fell short of the prudent person standard. Thus, in *California Ironworkers*, we looked not only to the fact that the one plan's allocation to risky inverse floaters far exceeded two similar plans' allocations, but also to the noncomparative facts "that inverse floaters could be highly risky investments" and "that the [plan] had very conservative investment guidelines." 259 F.3d at 1045.

The foregoing discussion is not exhaustive. My point, instead, is that *any* set of allegations which, taken as true and viewed in the plaintiff's favor, plausibly support an inference that a fiduciary acted imprudently is sufficient at the pleading stage. The ultimate question, absent direct allegations about the fiduciary's investment methods, is not how *other* plans were managed or what *other* investments were available, but whether the facts alleged—comparative or not—lead to the plausible inference that the actual process used by the defendant fiduciary was flawed.

* * *

With appropriate evidence, Anderson could state a claim by pleading a true benchmark comparison, by providing other circumstantial allegations that plausibly suggested imprudence, or by directly showing that the specific investments the Intel fiduciaries selected or the general methodologies they used were imprudent. But I agree with the majority opinion's conclusion that Anderson has failed to plead facts that support his claim either directly or inferentially, and so concur in full in the majority opinion.

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WINSTON R. ANDERSON, Plaintiff, v. INTEL RETIREMENT PLANS ADMINISTRATIVE COMMITTEE, et al., Defendants.	Case No. 5:19-cv-04618-VC ~~[~~**PROPOSED**~~]~~ **ORDER OF DISMISSAL OF COUNT VII WITH PREJUDICE**

PURSUANT TO THE STIPULATION OF DISMISSAL OF COUNT VII WITH PREJUDICE, IT IS SO ORDERED that Count VII of the above-captioned action (as set forth in the Amended Consolidated Complaint (ECF No. 113)) is dismissed with prejudice.

Dated: July 25, 2022

/s/ Vince Chhabria
HON. VINCE CHHABRIA
UNITED STATES
DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WINSTON R. ANDERSON, et al., Plaintiff, v. INTEL CORPORATION INVESTMENT POLICY COMMITTEE, et al., Defendants.	Case No. 5:19-cv-04618-LHK **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COUNTS I–VI OF PLAINTIFFS' FIRST AMENDED CONSOLIDATED CLASS ACTION COMPLAINT** Re: Dkt. No. 117

Plaintiffs Winston Anderson and Christopher Sulyma (collectively, "Plaintiffs"), on behalf of themselves and all others similarly situated, bring this action against twenty-one individual Defendants and three committees of the Intel Corporation, Inc. (collectively, "Defendants"), alleging violations of the Employee Retirement Income Security Act ("ERISA"). Before the Court is Defendants' motion to dismiss Counts I–VI of Plaintiffs' First Amended Consolidated Class Action Complaint, ECF No. 117 ("Mot."). Having considered the parties' briefing, the

relevant law, and the record in this case, the Court GRANTS with prejudice Defendants' motion to dismiss Counts I–VI of Plaintiffs' First Amended Consolidated Class Action Complaint.

I. BACKGROUND

A. Factual Background

1. The Parties

Plaintiff Anderson is a former employee of the Intel Corporation, where Anderson worked from 2000 to 2015. First Amended Consolidated Class Action Complaint, ECF No. 113 ¶ 19 ("FAC"). Through his employment with Intel, Plaintiff Anderson participated in the Intel 401(k) Savings Plan and the Intel Retirement Contribution Plan (collectively, "the Intel Plans"). *Id.* Plaintiff Sulyma is also a former employee of the Intel Corporation, where Sulyma worked from 2010 to 2012. *Id.* ¶ 20. Through his employment with Intel, Plaintiff Sulyma was a participant in the Intel Plans. *Id.*

Plaintiffs name the following committees and individuals as defendants in this action: the Intel Corporation Investment Policy Committee ("the Investment Committee") and its members;[1] the Intel Retirement Plans Administrative Committee ("the Administrative Committee") and its members;[2] the Finance Committee of the Intel Corporation Board of

[1] Plaintiffs have named as Defendants five individual members of the Investment Committee. Those Defendants are Christopher Geczy, Ravi Jacob, David Pottruck, Arvind Sodhani, and Richard Taylor. FAC ¶¶ 22–26.

[2] Plaintiffs have named as Defendants six individual members of the Administrative Committee. Those Defendants are Terra Castaldi, Ronald D. Dickel, Tiffany Doon Silva, Tami Graham, Cary Klafter, and Stuart Odell. FAC ¶¶ 29–34.

Directors ("the Finance Committee" and its members;[3] and the Chief Financial Officers of the Intel Corporation ("the Chief Financial Officers").[4] *Id.* ¶¶ 21–49. Additionally, Plaintiffs named the Intel 401(k) Savings Plan and the Intel Retirement Contribution Plan as nominal defendants. *Id.* ¶¶ 50–51.

Before January 1, 2018, the "Investment Committee Defendants had the authority, discretion, and responsibility to select, monitor, and remove or replace investment options" in the Intel Plans. *Id.* ¶ 132. Effective January 1, 2018, the "Global Trust Company" allegedly was appointed to serve as trustee for the Intel Plans. *Id.* ¶ 5. The Investment Committee and the Administrative Committee are both named fiduciaries of the Intel Plans. *Id.* ¶¶ 21, 28.

2. The Intel Plans

According to Plaintiffs' First Amended Consolidated Class Action Complaint ("FAC"), both of the Intel Plans are "employee pension benefit plan[s]" within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), and "defined contribution plan[s]" within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34). Both Intel Plans are "maintained and sponsored by Intel." FAC ¶¶ 50, 51.

The Intel 401(k) Savings Plan is a "contributory defined contribution plan" that covers eligible United States employees of Intel Corporation and its

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[3] Plaintiffs have named as Defendants six individual members of the Finance Committee. Those Defendants are Charlene Barshefsky, Susan Decker, John Donahoe, Reed Hundt, James Plummer, and Frank Yeary. FAC ¶¶ 37–42.

[4] Plaintiffs have named as Defendants four individual Chief Financial Officers. Those Defendants are Stacy Smith, Robert Swan, Todd Underwood, and George Davis. FAC ¶¶ 45–48.

subsidiaries. *Id.* ¶ 77. All eligible Intel employees are automatically enrolled in the 401(k) Savings Plan pursuant to Section 3(a) of the Plan. *Id.* Benefits under the 401(k) Savings Plan are funded by Plan participants' tax-deferred contributions and discretionary contributions made by Intel. *Id.* ¶ 78. Participants in the Intel 401(k) Savings Plan are able to direct the investment of their individual account balances into the investment options of their choice that are offered by the Plan. *Id.* ¶ 82.

The Intel Retirement Contribution Plan is a "non-contributory defined contribution plan" in which benefits provided under the Plan are funded by discretionary contributions by Intel. *Id.* ¶ 89. Before January 1, 2011, United States Intel Employees were automatically enrolled in the Intel Retirement Contribution Plan when they became eligible to participate. *Id.* ¶ 88. In contrast, after January 1, 2011, employees hired on or after January 1, 2011, are no longer eligible to participate in the Retirement Contribution Plan. *Id.* Before January 1, 2015, participants in the Retirement Contribution Plan under the age of 50 were not allowed to direct the investment of Intel's contributions on their own behalf, and Investment decisions were made by the Investment Committee. *Id.* ¶ 94. Participants aged 50 and over had some discretion in directing the investment of Intel's contributions. *Id.* ¶ 93. However, after January 1, 2015, the Retirement Contribution Plan was amended to allow all participants to direct their investments into any of the investment options made available under the Plan. *Id.* ¶ 96.

3. The Intel Funds

Plaintiffs allege that the Investment Committee designed and implemented two retirement investment strategies. The first, the Target Date Funds (also called

"TDFs"), use a dynamic allocation model whereby the allocation to asset classes within the fund changes over time. *Id.* ¶ 2. These funds hold a mix of asset classes that include "stocks, bonds, and cash equivalents," which are "readjusted to become more conservative over the time horizon of the fund," as the fund approaches the target date. *Id.* ¶ 227. Target date funds "are generally offered as a suite of 'vintages' in five-year or ten-year intervals where the vintage refers to the date of the fund such as 2045." *Id.* ¶ 7. This date indicates that the fund is intended for participants who will reach normal retirement age (i.e., 65) around that given year. Therefore, the Intel TDF 2045 is intended for those who would reach normal retirement age around 2045. According to the FAC, the Intel target date funds are the default investments for the Intel 401(k) Savings Plan. *Id.* ¶ 9. However, participants in the Intel Retirement Contribution Plan can also choose to invest in target date funds.

The second investment strategy, the Global Diversified Fund (also called "GDF"), is a multi-asset portfolio with a fixed allocation model. *Id.* ¶ 2. The Intel Global Diversified Fund is the default investment option of the Intel Retirement Contribution Plan, which means that unless a participant makes an alternative election, that participant is defaulted into the Global Diversified Fund. *Id.* ¶ 98. However, participants in the Intel 401(k) Savings Plan can also choose to direct their investments to a Global Diversified Fund. *See id.* ¶ 202.

4. The Investment Committee's Alleged Conduct

Plaintiffs allege that, beginning after the 2008 Financial Crisis, the Investment Committee redesigned the Intel Funds to include not only stocks and bonds but

also other asset classes like hedge funds, private equity and commodities (collectively, "Non-Traditional Investments"). *Id.* ¶¶ 127, 329.

Plaintiffs allege that the Investment Committee began to allocate an increased percentage of the Intel TDFs' assets to Non-Traditional Investments. *Id.* ¶ 129. The Intel TDFs' assets included approximately 23% hedge funds and commodities in 2011. *Id.* Plaintiffs further allege that the strategy of increasing the Funds' allocation to Non-Traditional Investments increased in the following years, such that by September 2015, Intel TDFs in the Intel 401(k) Savings Plan had between 27.46% and 37.2% of the funds' assets in Non-Traditional Investments. *Id.* ¶ 199.

Similarly, by September 2015, 56.22% of the assets in the Intel GDF in the 401(k) Savings Plan were allocated to Non-Traditional Investments. *Id.* ¶ 202. Plaintiffs allege that this strategy of investing in Non-Traditional Investments continued through at least March of 2017. *Id.* ¶ 203.

Additionally, starting in 2011, the Investment Committee allegedly began to dramatically increase the Intel GDF's investment in Non-Traditional Investments. *Id.* ¶ 127. Specifically, at the end of 2008, the Intel GDF held approximately 6.17% of its assets in Non-Traditional Investments. In comparison, by the end of 2013, the Intel GDF held approximately 36.71% of its assets in Non-Traditional Investments. *Id.*

Although the Intel Funds allegedly invested heavily in Non-Traditional Assets as a risk mitigation strategy, *id.* ¶ 217, Plaintiffs allege that the Intel TDFs and GDFs have performed poorly, and that the Funds' poor performance can be attributed largely to the Funds' "substantial

allocations to hedge funds." *Id.* ¶ 205. According to Plaintiffs, the Funds "gave up the long-term benefit of investing in equity, which delivers superior returns" to hedge funds. *Id.* ¶ 217.

Plaintiffs further allege that the strategy of allocating significant proportions of the Intel Funds' assets to Non-Traditional Investments deviated from prevailing professional asset manager standards of investment. *Id.* ¶¶ 222–40. More specifically, Plaintiffs allege that peer TDFs allocate much fewer assets to hedge funds or private equity funds, *id.* ¶ 224–25, and that funds comparable to the Intel GDFs allocate almost no assets to private equity funds, *id* ¶ 232. Plaintiffs also allege that the Intel 401(k) Savings Plan's disclosure documents hide "the true nature of the underlying investments" by being silent as to any potential risks of Non-Traditional Investments. *Id.* ¶ 300. Moreover, Plaintiffs allege that the Administrative Committee failed to properly disclose to the Plan participants the risks associated with investing in hedge funds and private equity. *Id.* ¶ 364.

Finally, Plaintiffs allege that the Investment Committee used the Funds to invest in Non-Traditional Assets such as hedge funds in order to benefit Intel and the Intel Capital Corporation ("Intel Capital") to the detriment of Plan participants. *Id.* ¶¶ 306–21. Intel Capital, Intel's venture capital division and an Intel subsidiary, *id.* ¶ 53, invests in privately held companies that compliment Intel's business, such as technology startup companies, *id.* ¶ 306. Plaintiffs allege that the Investment Committee invested the Intel Funds' assets in private equity funds established by some of these investment companies, such as BlackRock, General Atlantic, and Goldman Sachs, which invest in the same

startups as Intel Capital. *Id.* ¶ 306. Plaintiffs allege that the investment companies with whom Intel Capital partners "have served as [intermediaries] between Intel Capital and the startups that Intel Capital wants to assess." *Id.* Plaintiffs also allege that, since at least 2009, Intel or Intel Capital also invested in private equity companies that complimented Intel's business, *id.* ¶ 312, and that the Investment Committee failed to consider the negative repercussions of these investments on participants' benefits under the Retirement Contribution Plan because Investment Committee members were less likely to suffer those repercussions, *id.* ¶ 216–21.

Plaintiffs bring the instant action on behalf of a proposed class consisting of "[a]ll participants in the Intel Retirement Contribution Plan and the Intel 401(k) Savings Plan, whose accounts were invested in any one of the Intel Target Date Funds, the Intel Global Diversified Fund, or the Intel 401K Global Diversified Fund at any time on or after October 29, 2009." *Id.* ¶ 56.

B. Procedural History

This case has a long and complicated history involving three lawsuits filed in the U.S. District Court for the Northern District of California.

1. *Sulyma v. Intel Corporation Investment Policy Committee*, No. 15-CV-04977

On October 29, 2015, Plaintiff Christopher Sulyma ("Sulyma") filed *Sulyma v. Intel Corporation Investment Policy Committee*, No. 15-CV-04977 (N.D. Cal.), a class action complaint alleging six violations of ERISA regarding the Intel Funds at issue in the instant case. Class Action Complaint, *Sulyma*, No. 15-CV-04977 (N.D. Cal. October 29, 2015), ECF No. 1. The Court hereafter

refers to this 2015 case as "*Sulyma*." In *Sulyma*, Sulyma sued the Investment Committee, the Administrative Committee, and the Finance Committee, as well as some of the same individual defendants as in the instant case. *Id.*

Sulyma is also a plaintiff in the instant case. Plaintiffs' counsel in *Sulyma* also represents Plaintiffs in the instant case. *Compare id.*, *with* FAC.

In *Sulyma*, the parties consented to magistrate judge jurisdiction, and the case was assigned to United States Magistrate Judge Nathanael Cousins. Plaintiff's Consent to Magistrate Jurisdiction, *Sulyma*, No. 15-CV-04977 (N.D. Cal. Nov. 9, 2015), ECF No. 30; Defendants' Consent to Magistrate Judge Jurisdiction, *Sulyma*, No. 15-CV-04977 (N.D. Cal. June 7, 2016), ECF No. 107.

2. *Lo v. Intel Corp.*, No. 16-CV-00522

On January 31, 2016, Plaintiff Florence Lo ("Lo") filed *Lo v. Intel Corp.*, No. 16-CV-00522 (N.D. Cal.), a class action complaint alleging five violations of ERISA regarding the Intel Funds at issue in the instant case. Class Action Complaint, *Lo v. Intel Corp.*, No. 16-CV-00522 (N.D. Cal. Jan. 31, 2016), ECF No. 1. The Court hereafter refers to this case as "*Lo*." In *Lo*, Lo sued the Investment Committee, the Administrative Committee, and the Finance Committee, as well as some of the same individual defendants in the instant case. *Id.*

Lo was a plaintiff in the instant case. However, Lo was not included as a plaintiff in the First Amended Consolidated Class Action Complaint ("FAC") in the instant case. Therefore, Lo is no longer a plaintiff in the instant case as of March 22, 2021. *See* ECF No. 113.

Plaintiffs' counsel in *Lo* was different than Plaintiffs' counsel in *Sulyma*.

In *Lo*, the parties consented to magistrate judge jurisdiction, and the case was assigned to United States Magistrate Judge Susan van Keulen. *See* Plaintiff's Consent to Magistrate Judge Jurisdiction, *Lo*, 16-CV-00522 (N.D. Cal. Feb. 16, 2016), ECF No. 4.

3. The Consolidation of *Sulyma* and *Lo*

On February 17, 2016, Sulyma filed a motion to consolidate the *Sulyma* case with *Lo*. Motion to Consolidate Cases, *Sulyma*, No. 15-CV-04977 (N.D. Cal. Feb. 17, 2016). Judge Cousins granted the motion to consolidate on February 18, 2016. *See* Order Granting Plaintiffs' Unopposed Motion to Consolidate, *Sulyma*, No. 15-CV-04977 (N.D. Cal. Feb. 18, 2016), ECF No. 68. *Lo* was thereafter transferred to Judge Cousins.

On April 5, 2016, Judge Cousins appointed plaintiffs' counsel in the original *Sulyma* case to represent the plaintiffs in the consolidated cases. Order Appointing Interim Lead Counsel and Interim Lead Plaintiff, *Sulyma* No. 15-CV-04977 (N.D. Cal. April 5, 2016), ECF No. 88. The plaintiffs in the consolidated cases filed a consolidated class action complaint on April 26, 2016. Consolidated Class Action Complaint, *Sulyma*, No. 15-CV-04977 (N.D. Cal. April 26, 2016), ECF No. 93.

On May 26, 2016, defendants in the consolidated cases filed a motion to dismiss. *Sulyma*, No. 15-CV-04977 (N.D. Cal. May 26, 2016), ECF No. 103. In their motion to dismiss, defendants made several arguments, but they primarily argued that plaintiffs' claims were barred by the relevant statute of limitations. *Id.*

On August 18, 2016, Judge Cousins issued an order converting defendants' motion to dismiss into one for summary judgment on the statute of limitations question. *Sulyma*, No. 15-CV-04977 (N.D. Cal. Aug. 18, 2016), ECF No. 114. After the parties conducted discovery and submitted briefing on the motion for summary judgment, Judge Cousins found in favor of the defendants on March 31, 2017 and entered judgment in the case. Order Granting Defendants' Motion for Summary Judgment, *Sulyma*, No. 15-CV-04977 (N.D. Cal. March 31, 2017), ECF No. 145.

Plaintiffs filed a notice of appeal to the Ninth Circuit on April 24, 2017. Notice of Appeal, *Sulyma*, No. 15-CV-04977 (April 24, 2017), ECF No. 147. The Ninth Circuit reversed Judge Cousins' order on November 28, 2018. *Sulyma v. Intel Corp. Inv. Pol'y Comm.*, 909 F.3d 1069 (9th Cir. 2018). On February 26, 2020, the United States Supreme Court affirmed the Ninth Circuit and remanded the consolidated cases back to the district court. *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768 (2020).

4. *Anderson v. Intel Corporation Investment Policy Committee*, No. 19-CV-4618

On August 9, 2019, Plaintiff Winston Anderson ("Anderson") filed *Anderson v .Intel Corporation Investment Policy Committee*, No. 19-CV-04618 (N.D. Cal.). Anderson's initial class action complaint alleged seven violations of ERISA regarding the Intel Funds. ECF No. 1. Just as in *Sulyma* and *Lo*, Anderson sued the Investment Committee, the Administrative Committee, and the Finance Committee, as well as several individual defendants. *Id.*

Plaintiff's counsel in Anderson were identical to plaintiffs' counsel in the *Sulyma* and *Lo* consolidated

cases. *Compare* Consolidated Class Action Complaint, *Sulyma*, No. 15-CV-04977 (April 26, 2016), ECF No. 93, *with* ECF No. 1.

Anderson was originally assigned to United States Magistrate Judge Susan van Keulen. However, Plaintiffs' counsel in *Anderson* declined magistrate judge jurisdiction. ECF No. 4. Therefore, the case was reassigned to the undersigned judge.

On May 7, 2020, less than three months following the United States Supreme Court's decision in *Sulyma*, Anderson filed a motion to consolidate his case with *Sulyma* and *Lo*. ECF No. 77. On May 27, 2020, the Court granted the motion to consolidate the *Sulyma*, *Lo*, and *Anderson* cases, and the consolidated *Sulyma* and *Lo* cases was reassigned from Judge Cousins to the undersigned judge because Anderson had declined magistrate judge jurisdiction. ECF No. 89.

On June 24, 2020, Plaintiffs filed their first consolidated class action complaint. ECF No. 95. On July 22, 2020, Defendants filed a motion to dismiss. ECF No. 99. On August 19, 2020, Plaintiffs filed an opposition to Defendants' motion to dismiss. ECF No. 101. On September 2, 2020, Defendants filed their reply. ECF No. 104.

On January 2, 2021, the Court granted Defendants' motion to dismiss with leave to amend ("2021 Order"). ECF No. 109. Specifically, the Court held that Plaintiffs failed to plausibly allege that the Investment Committee violated the duty of prudence by selecting and maintaining the Intel Funds' investment in Non-Traditional Investments. *Id.* at 23–24. The Court also held that Plaintiffs failed to allege that the Investment Committee breached its duty of loyalty under ERISA because

Plaintiffs' allegations were conclusory and duplicative of their allegations supporting their claim of violation of the duty of prudence. *Id.* at 24–25. Additionally, the Court held that Plaintiffs lacked Article III standing to bring their claims alleging breach of the duty of prudence against the Administrative Committee. *Id.* at 26–28. Finally, the Court held Plaintiffs' derivative claims necessarily failed because Plaintiffs did not plausibly allege a primary violation of ERISA. *Id.* at 28–29. The Court gave Plaintiffs leave to amend their first consolidated class action complaint in order to address the deficiencies identified in the 2021 Order and in Defendants' motion to dismiss. *Id.* at 29.

On March 22, 2021, Plaintiffs submitted their First Amended Consolidated Class Action Complaint ("FAC"). ECF No. 113. Lo was not a plaintiff in the FAC and was thus dismissed on March 22, 2021.

On May 5, 2021, Defendants filed their motion to dismiss, ECF No. 117 ("Mot."). On June 9, 2021, Plaintiffs filed an opposition to Plaintiffs' motion to dismiss, ECF No. 122 ("Opp."). On July 1, 2021, Defendants filed a reply, ECF No. 124 ("Reply").

C. Requests for Judicial Notice

In connection with the instant motion to dismiss, Defendants request judicial notice of 21 documents: Intel's 2013 Summary Plan Description ("Exhibit 1"); Intel's 2015 Summary Plan Description ("Exhibit 2"); Intel's 401(k) Savings Plan Investment Policy Statement as of January 12, 2017 ("Exhibit 3"); Global Diversified Fund Fact Sheet as of December 31, 2011 ("Exhibit 4"); Global Diversified Fund Fact Sheet as of September 30, 2015 ("Exhibit 5"); Global Diversified Fund Fact Sheet as of December 31, 2017 ("Exhibit 6"); Global Diversified

Fact Sheet as of September 30, 2015 ("Exhibit 7"); Target Date 2045 Fund Fact Sheet as of December 31, 2011 ("Exhibit 8"); Target Date 2035 Fund Fact Sheet as of September 30, 2015 ("Exhibit 9"); Target Date 2015 Fund Fact Sheet as of September 30, 2015 ("Exhibit 10"); Target Date 2035 Fund Fact Sheet as of December 31, 2017 ("Exhibit 11"); a Report of the Investors' Committee to the President's Working Group on Financial Markets as of April 15, 2008 ("Exhibit 12"); a United States Government Accountability Office Report regarding the challenges and risks of investing in hedge funds and private equity as of August 2008 ("Exhibit 13"); "Plans Face Valuation and Other Challenges When Investing in Hedge Funds and Private Equity" ("Exhibit 14"); "Plans Face Challenges When Investing in Hedge Funds and Private Equity" ("Exhibit 15"); Letter from Louis J. Campagna, Chief of the Division of Fiduciary Interpretations within the Employee Benefits Security Administration's Office of Regulations and Interpretations ("Exhibit 16"); "Target Date Retirement Funds—Tips for ERISA Plan Fiduciaries" ("Exhibit 17"); "Intel Custom Target-Date Evolution" ("Exhibit 18"); "Morningstar 2018 Target-Date Fund Landscape" ("Exhibit 19"); T. Rowe Price Retirement 2015 Fund Fact Sheet ("Exhibit 20"); and a Fidelity Freedom 2035 Fund Summary Prospectus ("Exhibit 21"). Request for Judicial Notice, ECF No. 118 ("RJN").

The 2021 Order either judicially noticed or deemed incorporated by reference into Plaintiffs' first consolidated class action complaint Exhibits 1–6, 8–11, and 15–20. *See* ECF No. 109 at 7–9.

The Court may take judicial notice of matters that are either "generally known within the trial court's territorial

jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Moreover, courts may consider materials referenced in the complaint under the incorporation by reference doctrine, even if a plaintiff failed to attach those materials to the complaint. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). Public records, including judgments and other publicly filed documents, are proper subjects of judicial notice. *See*, *e.g.*, *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007). However, to the extent any facts in documents subject to judicial notice are subject to reasonable dispute, the Court will not take judicial notice of those facts. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

Defendants argue that Exhibits 1–15, 18, and 19 are properly incorporated by reference in Plaintiffs' FAC because they form the basis for Plaintiffs' claims and are referenced throughout the FAC. RJN at 4–8. Defendants also argue that Exhibits 16, 17, 19, and 21 are properly subject to judicial notice because they are government documents and publicly available investor sheets. RJN at 7–8. In response, Plaintiffs argue that Exhibits 1, 6, 9, 10, and 18 are not mentioned in their FAC and therefore cannot properly be incorporated by reference. Plaintiffs' Opposition to Defendants' Request for Judicial Notice, ECF No. 121, at 1, 3. Plaintiffs also argue that the rest of Defendants' exhibits could be properly considered under the doctrines of judicial notice or incorporation by reference but that Defendants "attempt improperly to use statements in those documents as if they are presumptively true or accurate, and as proof of Defendants' intent and fiduciary prudence." *Id.* at 1.

Therefore, Plaintiffs argue that the Court should deny Defendants' request for judicial notice. *Id.* at 1–2.

The Court agrees with Defendants that Exhibits 1–15, 18, and 19 are properly incorporated by reference. Although Exhibits 1, 6, 9, 10, and 18 were not expressly cited in the FAC, all five exhibits are referenced, mentioned, or quoted. FAC ¶ 389 (quoting Exhibit 1); *id.* ¶¶ 137, 178, 301–02 (referencing TDF factsheets, which include Exhibits 6, 9, and 10); id ¶¶ 85, 267 n.40 (referencing exhibit 18). Additionally, all five exhibits that Plaintiffs challenge were incorporated by reference in Plaintiffs' first consolidated class action complaint, and many references to these documents remain unaltered.

The Court therefore GRANTS Defendants' request for judicial notice. However, the Court notes that to the extent any facts in documents subject to judicial notice are subject to reasonable dispute, the Court does not take judicial notice of those facts. *See* Lee, 250 F.3d at 689.

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an action for failure to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted).

For purposes of ruling on a Rule 12(b)(6) motion, the Court "accept[s] factual allegations in the complaint as

true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). However, a court need not accept as true allegations contradicted by judicially noticeable facts. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). Mere "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004).

III. DISCUSSION

Six of Plaintiffs' seven causes of action in Plaintiffs' First Amended Consolidated Class Action Complaint ("FAC") are made on behalf of Plaintiffs and a putative class of participants in the Intel Plans. These six causes of action are: (1) breaches of duty under ERISA § 404(a) by the Investment Committee in selecting and monitoring the investments in the Intel Plans; (2) breaches of duty under ERISA § 404(a) by the Investment Committee in managing the assets of the Intel Plans, including failure to monitor and evaluate the asset allocation of the Intel Funds; (3) breaches of duty under ERISA §§ 404(a)(1)(A) and 404(a)(1)(B) by the Administrative Committee for failing to provide material and accurate disclosures to plan participants; (4) violation of ERISA § 102(a) by the Administrative Committee for issuing summary plan descriptions that failed to properly disclose and explain the risks associated with the asset allocations in the Intel Funds; (5) breaches of duty under ERISA § 404(a) by the Finance Committee and Chief Financial Officers for failure to monitor the Investment Committee; and (6) co-fidicuary liability under ERISA § 405 against all Defendants. FAC. ¶¶ 393–466. Defendants move to dismiss each of these six causes of action.

Plaintiffs' seventh cause of action is an individual cause of action brought by Plaintiff Winston Anderson ("Anderson"), which alleges that the Administrate Committee failed to provide documents upon request to Anderson in violation of ERISA § 104(b)(4), 29 U.S.C. § 1024(B)(4) and 29 C.F.R. § 2550.404a-5. Defendants do not move to dismiss this cause of action.

Below, the Court first addresses the parties' arguments regarding the Investment Committee's alleged breach of the duties of prudence and loyalty. The Court then addresses the parties' arguments regarding the Administrative Committee's alleged breach of the duty of prudence with regard to summary plan descriptions and plan summaries. Finally, the Court addresses the parties' arguments regarding Plaintiffs' claims of failure to monitor and co-fiduciary liability.

A. Counts I and II: Breaches of Fiduciary Duty Under ERISA § 404(a)

As with Plaintiffs' first consolidated class action complaint, Plaintiffs allege in their FAC that the Investment Committee committed several breaches of duty under ERISA § 404(a). Under ERISA, plan fiduciaries, like the Investment Committee, must discharge their duties in accordance with the duty of prudence, duty of loyalty, duty to diversify investments, and duty to act in accordance with the documents governing the Plan. 29 U.S.C. § 1104(a)(1). In their FAC, Plaintiffs allege in both Count I and Count II that the Investment Committee breached the duty of prudence and the duty of loyalty.

Below, the Court addresses whether Plaintiffs have stated a claim for breach of the duty of prudence then

addresses whether Plaintiffs have stated a claim for breach of the duty of loyalty.

1. Breach of the Duty of Prudence

a. Legal Background

ERISA requires that plan fiduciaries 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." *Id.* § 1104(a)(1)(B). Under this standard, the Court must determine "whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983); *see also White v. Chevron Corp*, 2017 WL 2352137, at *4 (N.D. Cal. May 31, 2017) (same). This duty extends not only to the initial selection of investments, but also to the continuous monitoring of investments, and requires that imprudent investments be removed. *See Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015). When analyzing prudence, the Court's focus is on the fiduciary's "conduct in arriving at a decision, not on its results." *See Pension Benefit Guar. Corp. ex rel. St. Vincent v. Morgan Stanley Inv. Mgmt.* ("*St. Vincent*"), 712, F.3d 705, 716 (2d Cir. 2013). Therefore, "[p]oor performance, standing alone, is not sufficient to create a reasonable inference that plan fiduciaries failed to conduct an adequate investigation . . . ERISA requires a plaintiff to plead some other indicia of imprudence." *White*, 2017 WL 2352137, at *20; *see also Dorman v. Charles Schwab Corp.*, 2019 WL 580785, at *6 (N.D. Cal. Feb. 8, 2019) (same).

When plaintiffs allege that a defendant has breached the duty of prudence because "a prudent fiduciary in like circumstances would have selected a different fund based on the cost or performance of the selected fund, [plaintiff] must provide a sound basis for comparison—a meaningful benchmark." *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 833 (8th Cir. 2018). Case law shows that labeling funds as "comparable" or as a "peer" is insufficient to establish that comparator funds are meaningful benchmarks against which to compare a challenged funds' performance. In *Meiners*, the Eighth Circuit found that plaintiffs cannot "dodge the requirement for a meaningful benchmark by merely finding a less expensive alternative fund or two with some similarity." *Id.* at 823. This is because even funds with some similarity may have different "aims, different risks, and different potential rewards that cater to different investors." *Davis v. Wash. Univ.*, 960 F.3d 478, 485 (8th Cir. 2020).

A fund that is a "meaningful benchmark" must therefore have similar aims, risks, and potential rewards to a challenged fund. The rationale for the rule that plaintiffs must identify a meaningful benchmark is that "[c]omparing apples and oranges is not a way to show that one is better or worse than the other." *Id.* at 484–85; *see also Wehner v. Genentech, Inc.*, 2021 WL 507599, at *10 (N.D. Cal. Feb. 9, 2021) (noting that the allegation that comparator funds were in the same category as a challenged fund was "insufficient" to make an "apples-to-apples comparison" (internal quotation marks omitted)); *Davis v. Salesforce.com*, 2020 WL 5893405, at *4 (N.D. Cal. Oct. 5, 2020) (holding that conclusory allegations that funds had "the same investment style" were "not sufficient to state a claim of relief").

b. The 2021 Order

The Court's January 1, 2021 Order on Defendants' first motion to dismiss ("2021 Order") dismissed Plaintiffs' claim that the Investment Committee Defendants violated the duty of prudence based on the allegations in Plaintiffs' first consolidated class action complaint. Specifically, the Court held that Plaintiffs had failed to state a claim for the Investment Committee's violation of the duty of prudence because Plaintiffs failed to identify a "meaningful benchmark" in their first consolidated class action complaint. ECF No. 109 at 16. The Court explained that Plaintiffs' allegations went no further than labeling funds as "comparable" or "a peer," and that absent factual allegations "to support a finding that the funds that Plaintiffs identify" provided a meaningful benchmark against which to evaluate the performance or the fees of the Intel Funds, Plaintiffs' first consolidated class action complaint failed to state a claim for breach of the duty of prudence. *Id.* at 16, 18. The Court also explained that any factual allegations that supported a finding that the funds Plaintiffs identified were meaningful would explain why those funds did not have "different 'aims, different risks, and different potential rewards that cater to different investors.'" *Id.* at 18 (quoting *Davis v. Wash. Univ.*, 960 F.3d at 485). The Court further clarified that absent factual allegations identifying meaningful benchmarks, Plaintiffs' complaint would not adequately state a claim for breach of the duty of prudence, "even in conjunction with further allegations of poor performance and self-dealing by the Investment Committee." *Id.*; *see also id.* at 23 ("Plaintiffs have failed to allege facts that would demonstrate that their chosen 'comparable' funds are a meaningful benchmark.").

In the 2021 Order, the Court informed Plaintiffs that "failure to cure the deficiencies identified in [the Court's] Order and in Defendants' motion to dismiss" would result in "dismissal of Plaintiffs' deficient claims with prejudice.

c. Plaintiffs Do Not Identify a Meaningful Benchmark

As discussed above, Plaintiffs allege that the Investment Committee designed and implemented two retirement investment strategies. The first, the Target Date Funds (also called "TDFs"), use a dynamic allocation model whereby the allocation to asset classes within the fund changes over time. *Id.* ¶ 2. These funds hold a mix of asset classes that include "stocks, bonds, and cash equivalents," which are "readjusted to become more conservative over the time horizon of the fund," as the fund approaches the target date. *Id.* ¶ 227. Target date funds "are generally offered as a suite of 'vintages' in five-year or ten-year intervals where the vintage refers to the date of the fund such as 2045." *Id.* ¶ 7. This date indicates that the fund is intended for participants who will reach normal retirement age (i.e., 65) around that given year. Therefore, the Intel TDF 2045 is intended for those who would reach normal retirement age around 2045. According to the FAC, the Intel target date funds are the default investments for the Intel 401(k) Savings Plan. *Id.* ¶ 9. However, participants in the Intel Retirement Contribution Plan can also choose to invest in target date funds.

The second investment strategy, the Global Diversified Fund (also called "GDF"), is a multi-asset portfolio with a fixed allocation model. *Id.* ¶ 2. The Intel Global Diversified Fund is the default investment option of the Intel Retirement Contribution Plan, which means

that unless a participant makes an alternative election, that participant is defaulted into the Global Diversified Fund. *Id.* ¶ 98. However, participants in the Intel 401(k) Savings Plan can also choose to direct their investments to a Global Diversified Fund. *See id.* ¶ 202.

The FAC alleges that the Investment Committee breached its duty of prudence by adopting and maintaining an asset allocation model for the Intel TDFs and Intel GDFs that allocates a significant proportion of those funds to Non-Traditional Assets, such as private equity and hedge funds. FAC ¶¶ 398, 399, 409–10. Defendants argue that Plaintiffs have still failed to provide meaningful benchmarks against which to examine the Intel TDFs and the Intel GDFs. Mot. 5–12.[5] Below, the Court addresses Plaintiffs' chosen benchmarks for the Intel TDFs then the Intel GDFs.

i. Intel TDFs

Plaintiffs attempt to cure the deficiencies from their first consolidated class action complaint in their FAC by adding several paragraphs identifying common benchmarks for Intel TDFs. Plaintiffs note that "[c]ommon benchmarks include: (1) published indices such as the S&P 500; (2) peer groups such as the categories established by Morningstar, Inc., a leading provider of

[5] Defendants make several other arguments explaining why Plaintiffs' FAC does not properly state a claim. The Court need not address these additional arguments because, as discussed in the Court's 2021 Order, Plaintiffs cannot properly allege that a prudent fiduciary would have acted differently in like circumstances without "a sound basis for comparison—a meaningful benchmark." *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 833 (8th Cir. 2018). Absent such allegations, Plaintiffs' allegations are insufficient so state a claim for breach of the duty of prudence.

investment data, and (3) specific peer alternatives within a given asset class." FAC ¶ 136.

Plaintiffs argue that all of these "common benchmarks" are also "meaningful benchmarks" against which to compare the performance of the Intel TDFs. Specifically, Plaintiffs compare the Intel TDFs to (1) the S&P 500, (2) the Intel TDFs' "peer group category" as defined by Morningstar, Inc.,[6] and (3) "four TDF fund families," which are allegedly peer alternatives in the Intel TDFs' asset class.

As to the "four TDF fund families, two of the "four TDF fund families" consist of passively managed funds and two consist of actively managed funds. *Id.* Plaintiffs argue that these four fund families are meaningful benchmarks to the Intel TDFs in part because "all TDFs share common fundamental traits so it is fair to compare them to one another." *Id.* ¶ 151. Additionally, Plaintiffs argue that the four "TDF fund families" to which they compare the Intel TDFs are appropriate benchmarks because "all four fund families are among the most widely-recognized providers in the industry with strong reputations" such that "plan fiduciaries following reasonable and standard practice would have considered them in comparison to a specific fund under consideration or review." *Id.*

However, Plaintiffs still fail to provide factual allegations explaining why their chosen benchmarks are "meaningful" benchmarks that have similar aims, risks, and rewards as the Intel TDFs. Rather than explaining why the Intel TDFs have similar aims, risks, and rewards

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[6] According to Plaintiffs, Morningstar, Inc. investment data "is a common resource used by institutional investors and retirement plan fiduciaries." FAC ¶ 137.

as Plaintiffs' chosen comparators, Plaintiffs only conclude that these comparators are "common." FAC ¶ 136. In addition to the allegation that the S&P 500, the Morningstar "peer group category" and the four TDF fund families are "[c]ommon benchmarks," *id.*, Plaintiffs provide only generalizations or citations to generic TDF features. For instance, Plaintiffs argue that "[c]omparing a given target date fund . . . to peer TDFs of the same vintage is standard and reasonable practice for several reasons related to their common goals and features," *id.* ¶ 141, but Plaintiffs only identify goals and features that are common to all TDFs. *See id.* (listing the features as (1) being a long-term investment vehicle, (2) consisting of a combination of asset classes, (3) having a "glidepath" that reduces risk over time, and (4) being only moderately risky overall). However, Plaintiffs acknowledge that TDFs can have differing "investment strategies, glide paths, and investment-related fees," FAC ¶ 150, and that determining an appropriate benchmark for a given fund "[d]epends largely on the stated investment strategy and the actual investments of the fund" because "sometimes the stated investment strategy does not match the actual fund investments," *Id.* ¶ 138. Plaintiffs do not provide any information regarding the investment strategies, glide paths, and fees of any specific TDFs with the same target date as the Intel TDFs. *Wehner*, 2021 WL 507599 at *8 (holding that a plaintiff's comparison of three TDF products, simply by virtue of each product being a TDF, was "insufficient to make . . . an 'apples- to-apples' comparison"). The argument that all TDFs are meaningful benchmarks cannot survive a motion to dismiss.

Moreover, Plaintiffs' allegation that peer TDFs of the same vintage (i.e., share the same target date) are

meaningful benchmarks is especially conclusory given that Plaintiffs' own FAC explains that "there are considerable differences among TDFs offered by different providers, even among TDFs with the same target date." FAC ¶ 150 (quoting Ex. 17).

In addition, Plaintiffs' argument that the Morningstar "peer group category" is a meaningful benchmark with which to compare the Intel TDFs ignores the fact that the Morningstar "peer group category" is an average of a large group of TDFs. Ex. 9. For example, Morningstar's peer group category for Intel's TDF with a target date of 2035 is an average of 224 funds with a target date of 2035. *Id.* Plaintiffs provide no information as to the aims, risks, or rewards of any individual fund within the 224 funds that constitute the peer group funds with a target date of 2035. *Id.*

Similarly, Morningstar's "peer group category" for Intel's TDF with a target date of 2015 is an average of the performance of 188 funds with a target date of 2015. Ex. 10. Here too, Plaintiffs do not allege what the aims risks, and rewards are for any individual fund within this aggregate of 188 funds. *Id.*

Moreover, for any Morningstar "peer group category," Plaintiffs do not allege that all the funds within that category have similar aims, risks, and rewards as the Intel TDFs. The TDFs in these categories could all have differing aims, risks, and rewards than the Intel TDFs. Courts have held that it is insufficient for an average to be a meaningful benchmark. *Davis v. Salesforce.com, Inc.*, 2021 WL 1428259, at *3 (N.D. Cal. 2021) (rejecting reliance on "median" or "average" fees because of potential differences within funds).

Plaintiffs also argue in their opposition brief that because Plaintiffs compare the Intel TDFs to the benchmarks designated by Intel itself, Plaintiffs have properly stated a claim. Opp. 5. Specifically, Plaintiffs state that because the Intel TDFs were benchmarked against the Morningstar "peer group category," the Morningstar "peer group category" is a meaningful benchmark. *Id.* Plaintiffs do identify case law that establishes that a plan's own benchmarks are plausibly meaningful benchmarks against which to compare funds. *See e.g.*, *Terraza v. Safeway Inc.*, 241 F. Supp. 3d 1057, 1076 (N.D. Cal. 2017) (finding that a plaintiff plausibly alleged a breach of fiduciary duty when the investment options underperformed compared to their benchmark).

However, as Defendants point out, the document on which Plaintiffs rely, which is incorporated by reference into the FAC, unambiguously shows that the Intel TDFs are not benchmarked against the Morningstar "peer group category" but against a customized benchmark. *See* Exhibit 9 at 1, 2 (showing that the benchmark for the 2035 TDF is a "2035 Composite Benchmark" and explaining that "[t]he benchmark for each target-date fund is a customized benchmark that has the same asset allocation as the Fund's target asset allocation, and uses index returns to represent the performance of the asset classes"). Plaintiffs do not allege that the Intel TDFs performed worse than the customized benchmark. Instead Plaintiffs rely on the Intel TDFs' performance against the Morningstar "peer group category," which Intel did not designate as a benchmark. Thus, Plaintiffs do not compare the Intel TDFs to their own benchmarks. FAC ¶ 183.

Plaintiffs also argue that the FAC properly explains why Morningstar "peer group categories" are plausible benchmarks. Opp. 6–7. Plaintiffs note that Intel itself commissioned fact sheets from Morningstar, Opp. 6, and that "[a]ll the funds within a given Morningstar category share common attributes and the funds within a given category are a set of peer funds within a given asset class," Opp. 7; *see* FAC ¶ 139. Plaintiffs then conclude that because Morningstar categorizes TDFs by "vintage year," TDFs of the same vintage year (or target date) are comparable "in light of their common goals and features." Opp. 7. However, as discussed above, these Morningstar "peer group categories" are inappropriate benchmarks for the Intel TDFs because the Morningstar "peer group categories" are an average of a large group of funds.

Additionally Plaintiffs argue that they have stated a meaningful benchmark because "retirement plan fiduciaries commonly benchmark funds against specific, prominent funds" that have the same target date as the TDFs. FAC ¶ 172–173; Opp. 7. Plaintiffs argue that because they have identified 21 other TDFs in the Intel TDFs' asset class, Plaintiffs have provided a meaningful benchmark against which to compare the Intel TDFs. *Id.* Plaintiffs' FAC fails because, again, Plaintiffs have only alleged that the Intel TDFs and the 21 other TDFs share characteristics common to all TDFs. FAC ¶ 15. Plaintiffs fail to make any factual allegations about the aims, risks, and rewards of these 21 other funds. Without factual allegations regarding the characteristics of these funds, the Court cannot make an apples-to-apples comparison of the Intel TDFs and the 21 other funds.

Courts have consistently held that conclusory allegations that funds "have 'the same investment style' or

'materially similar characteristics' . . . are not sufficient to state a claim for relief." *Davis*, 2020 WL 5893405, at *4. Without more factual allegations about how and why the "prominent funds" that Plaintiffs cite are similar to the Intel TDFs at issue in this case, Plaintiffs fail to allege a meaningful benchmark to the Intel TDFs.

Because Plaintiffs do not provide any factual allegations that explain why the S&P 500, the Intel TDFs' "peer group category" as defined by Morningstar, Inc., and four identified TDF fund families" are apples-to-apples comparators rather than funds with different aims, risks, and potential rewards, Plaintiffs have not sufficiently alleged that these comparators are meaningful benchmarks to the Intel TDFs. *See Davis v. Wash. Univ.*, 960 F.3d at 485; *Wehner*, 2021 WL 507599, at *8–9.

ii. Intel GDFs

Plaintiffs attempt to cure the deficiencies in their first consolidated class action complaint by identifying the following "meaningful benchmarks" for the Intel GDFs: (1) the "Morningstar World Allocation Category" and (2) "a traditional blend of 60% equities and 40% bonds." FAC ¶ 143.

As to the Morningstar World Allocation Category, that category is merely an average of a group of funds that invest in global stocks and bonds. Moreover, the only explanation Plaintiffs give for why the Intel GDFs are properly compared to the funds in the Morningstar World Allocation Category is that both invest in global stocks and bonds. *Id.* ¶ 143. Plaintiffs do not provide any information about the funds in the Morningstar World Allocation Category. For example, Plaintiffs provide no information about the aims, risks, and rewards of any of the individual

funds within the Morningstar World Allocation Category. Plaintiffs do not allege that all funds within the Morningstar World Allocation Category have the same aims, risks, and rewards. Plaintiffs only allege that both the Intel GDF and the funds in the Morningstar World Allocation Category invest in global stocks and bonds. Courts have held that such allegations are not sufficient to survive a motion to dismiss. *Davis v. Salesforce.com, Inc.*, 2021 WL 1428259, at *3 (rejecting reliance on "median" or "average" fees because of potential differences within funds); *Davis v. Wash. Univ.* 960 F.3d at 485 ("Different funds can "have different aims, different risks, and different rewards that cater to different investors. Comparing apples and oranges is not a way to show that one is better or worse than the other.").

Moreover, even if the Morningstar World Allocation Category was a benchmark, the Intel GDFs outperformed 80% of the largest funds in the Morningstar World Allocation Category in the 10-year period ending in December 2018, the most recent date in Plaintiffs' data. FAC ¶ 184, tbl. 14. The fact that the Intel GDFs outperformed 80% of the largest funds that Plaintiffs claim are benchmarks is yet another reason why Plaintiffs' FAC fails to state a claim for breach of the duty of prudence.

Plaintiffs also allege that it is appropriate to compare the Intel GDFs to "a traditional blend of 60% equities and 40% bonds" because it is the "default benchmark for static allocation funds like the Intel GDFs." FAC ¶ 143 (internal quotation marks omitted). The FAC does not identify any specific fund with this traditional blend of 60% equities and 40% bonds. A hypothetical fund with a mix of 60% equities and 40% bonds simply does not allow the Court to

make an apples-to- apples comparison with the Intel GDFs.

Plaintiffs also argue that the Intel GDFs failed to perform against their benchmarks as defined by Intel's own documents. FAC ¶¶ 180–81. Specifically, the FAC briefly states as an aside that the Morningstar fact sheet for the Intel GDFs lists two benchmarks: (1) a customized benchmark; and (2) the MCSI World Index. FAC ¶ 178; Exhibit 6. First, as to the customized benchmark, the FAC makes no allegations about the customized benchmark. The FAC does not attempt to identify the aims, risks, and rewards. Therefore, it cannot serve as a meaningful benchmark. Second, as to the MCSI World Index. in the one table in which the Intel GDFs were compared to the MCSI World index, the Intel GDFs outperformed the MCSI World Index during the five-year period ending in December 2011. *See id.* Plaintiffs cannot state a claim for breach of the duty of prudence by comparing the Intel GDFs to a benchmark that the Intel GDFs outperformed over a five-year period.

In sum, Plaintiffs do not compare the Intel GDFs to their own benchmarks. Moreover, when compared to two of Plaintiffs' proposed benchmarks, the Intel GDFs outperformed them over a five-year period ending in 2011 and a ten-year period ending in 2018. Therefore, the facts alleged in the FAC and the documents incorporated by reference into the FAC demonstrate that Plaintiffs fail to identify meaningful benchmarks.

d. Plaintiffs' Additional Arguments

Plaintiffs assert that their FAC pleads meaningful benchmarks for the Intel TDFs and GDFs by presenting three additional arguments contesting Defendants' arguments regarding meaningful benchmarks.

First, Plaintiffs argue that it is sufficient to compare the Intel TDFs and GDFs to similarly sized contribution plans throughout the country because the size of the funds at issue goes to whether a "prudent man acting in a like capacity" would have conducted himself in the same way. Opp. 7–8 (quoting 29 U.S.C. § 1104(a)(1)(B)). Plaintiffs are correct that the fact that funds are similarly sized may support the argument that the plans may be meaningful benchmarks. However, the argument that all plans with similarly sized contributions are meaningful benchmarks is again too conclusory to survive motion to dismiss. Essentially, Plaintiffs' argument that similarly sized TDFs must be meaningful benchmarks is just another way of stating that all funds in the same category are meaningful benchmarks of one another, regardless of whether they have different aims, risks, and potential rewards. *See Davis*, 960 F.3d at 485. Courts in this circuit have consistently held that such categorical allegations are insufficient to support that a comparator is a "meaningful benchmark" to a challenged fund. *Davis*, 2020 WL 5893405, at *4 (N.D. Cal. Oct. 5, 2020); *Wehner*, 2021 WL 507599, at *8–9. Therefore, Plaintiffs' argument that the TDFs of a similar size must be meaningful benchmarks to the Intel TDFs is insufficient to support Plaintiffs' claim.

Second, Plaintiffs argue that the determination of the appropriate benchmark for a fund is not a question properly resolved at the motion to dismiss stage. Opp. 10. For this proposition, Plaintiffs cite an out-of-circuit district court case. Opp. 10 (citing *In re MedStar ERISA Litig.*, 2021 WL 391701, at *6 (D. Md. Feb. 4, 2021)). However, courts within this district have consistently considered the question of whether a meaningful benchmark has been pled at the motion to dismiss stage.

See e.g., *Davis v. Salesforce.com*, 2020 WL 5893405, at *3–4 (granting motion to dismiss because of failure to plead a meaningful benchmark); *Tobias v. NVIDIA Corp.*, 2021 WL 4148706, at *13 (N.D. Cal. Sept. 13, 2021) (granting motion to dismiss in part because of plaintiffs' failure to plead a meaningful benchmark); *Wehner*, 2021 WL 2317098, at *8–9 (granting motion to dismiss based on plaintiffs' failure to plead a meaningful benchmark). Moreover, this Court dismissed the first consolidated class action complaint because of a failure to allege meaningful benchmarks. ECF No. 109 at 16–18.

The Court concludes that a decision on whether a "meaningful benchmark" has been pleaded is appropriate at this stage for the same reasons that the Eighth Circuit cited. "A complaint cannot simply make a bare allegation that costs are too high, or returns are too low," and an allegation that a fund is mismanaged must be fact-specific because "there is no one-size- fits-all approach" to investment. *Davis*, 960 F.3d at 484. Without finding a *meaningful* benchmark, the Court cannot evaluate if an allegation of a violation of the duty of prudence is plausible because a plaintiff's comparison of "apples to oranges is not a way to show that one is better or worse than the other." *Id.* at 485. Therefore, the Court reiterates that evaluation of meaningful benchmarks is appropriate at this stage because of the guidance of holdings of district courts within this district.

Third, Plaintiffs assert that they need not compare the Intel TDFs and Intel GDFs to meaningful benchmarks with similar characteristics because the instant case also alleges that the Intel TDFs' and Intel GDFs' investment strategy itself is imprudent. Opp. 9. However, Plaintiffs' FAC does not reflect Plaintiffs' assertion that their FAC

challenges the overall investment strategy, rather than simply the allocations chosen to implement that strategy. In Plaintiffs' opposition brief, Plaintiff cite only two paragraphs of their FAC. In the first cited paragraph, which is materially unchanged from Plaintiffs' first consolidated class action complaint, Plaintiffs state that "in pursuing a risk-mitigation strategy, the Intel TDFs and Intel GDFs gave up the long- term benefit of investing in equity, which delivers superior returns." FAC ¶ 217. In the second cited paragraph, Plaintiffs state that the "Department of Labor counsels plan fiduciaries to compare actively managed funds to passive or index funds," because "'there are considerable differences among TDFs offered by different providers, even among TDFs with the same target date.'" FAC ¶ 150 (quoting U.S. Dep't of Labor, *Target Date Retirement Funds—Tips for ERISA Fiduciaries* (Feb. 2013)). In short, Plaintiffs argue that Defendants never should have pursued a risk mitigation strategy at all and that Defendants should have been looking for ways to change their risk mitigation strategy to a riskier strategy that could provide more returns for employees.

However, Plaintiffs' new theory fails to state a claim under current case law. ERISA fiduciaries are not required to adopt a riskier strategy simply because that strategy may increase returns. *See Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016) ("ERISA does not guarantee substantive benefits."); *White v. Chevron Corp.*, 2017 WL 2352137, at *10 (N.D. Cal. May 31, 2017), *aff'd*, 52 F. App'x 453 (9th Cir. 2017) ("A fiduciary may reasonably select an investment alternative in view of its different risks and features, even if that investment option turns out to yield less than another option."); *St. Vincent*, 712 F.3d at 718 (stating that courts must be careful to "not

rely on the vantage point of hindsight" when assessing a fiduciary's prudence). Plaintiffs also do not cite a single case to support their new theory that a risk mitigation strategy can be deemed imprudent under the law.

Therefore, because Plaintiffs do not support their new theory with case law, or with new factual allegations in the FAC, Plaintiffs' new theory that Defendants' risk mitigation strategy was imprudent cannot survive a motion to dismiss. *Adams*, 355 F.3d at 1183 (holding that "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss").

In sum, Plaintiffs' FAC fails to cure the deficiencies identified in the 2021 Order. Plaintiffs still fail to identify a meaningful benchmark with which the Court can compare the performance and fees of the Intel TDFs and Intel GDFs. As the 2021 Order held, simply labeling funds as comparable or as in the same category as the Intel TDFs and Intel GDFs is insufficient to establish that those funds are meaningful benchmarks. *See* ECF No. 117 at 16. Absent such allegations, Plaintiffs' allegations regarding the imprudence of Defendants are insufficient to state a claim for breach of the duty of prudence. Therefore, the Court GRANTS Defendants' motion to dismiss regarding Plaintiffs' claims for breach of the duty of prudence.

The Court next addresses leave to amend. Ninth Circuit case law holds that the "decision of whether to grant leave to amend . . . remains within the discretion of the district court, which may deny leave to amend due to 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment,

[and] futility of amendment.'" *Leadsinger Inc. v. BMG Music Pub'g*, 512 F.3d 522, 532 (9th Cir. 2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Defendants' first motion to dismiss and the 2021 Order identified the deficiencies of Plaintiffs' breach of the duty of prudence allegations. *See* ECF No. 99 at 18–20; ECF No. 109 at 16, 18, 23. The 2021 Order expressly warned Plaintiffs that "failure to cure the deficiencies identified in [the] Order and in Defendants' motion to dismiss" would result in dismissal of Plaintiffs' deficient claims with prejudice. ECF No. 109 at 29. Allowing Plaintiffs a third attempt to identify a meaningful benchmark would be futile. *Leadsinger*, 512 F.3d at 532. Plaintiffs have already had two chances to amend their pleadings, and in each one, the Plaintiffs have failed to identify a meaningful benchmark against which to compare the Intel TDFs and Intel GDFs. Additionally, allowing Plaintiffs to file a fourth complaint and requiring Defendants to file a third motion to dismiss would cause undue delay and prejudice to Defendants. *Id.* Accordingly, Defendants' motion to dismiss Plaintiffs' breach of the duty of prudence claim is granted with prejudice.

2. Breach of the Duty of Loyalty

Plaintiffs second claim alleges that the Investment Committee breached its duty of loyalty under ERISA. FAC ¶¶ 404–14; Opp. 4–25. ERISA requires that plan fiduciaries, like Defendants, act "solely in the interest of the participants and beneficiaries," and "for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1)(A). As such, plan fiduciaries must act "with an eye single to the interests of the participants and fiduciaries." *White*, 2016 WL

4502808, at *4 (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982)).

Plaintiffs assert that Defendants breached the duty of loyalty both because of Defendants' initial choice of asset allocation in 2011, FAC ¶ 409, and because of Defendants' choice to maintain the asset allocation in the Intel Funds after 2011, *id.* ¶ 410. Defendants argue that Plaintiffs failed to plausibly allege that Defendants acted in Defendants' own self interest in investing in Non-Traditional Assets and in maintaining and monitoring the Intel Funds. Mot. 20– 26.

In the 2021 Order, the Court held that Plaintiffs must provide specific factual allegations to support their claim that the Investment Committee's investments in private equity benefitted Intel Capital. ECF No. 109 at 24–25. The Court also explained that allegations that support at most the potential of a conflict of interest are not sufficient to state a claim for breach of the duty of loyalty. *Id.* at 25 (citing *Kopp v. Klein*, 894 F.3d 214, 222 (5th Cir. 2018) (per curiam) (noting that the "potential for a conflict, without more, is not synonymous with a plausible claim of fiduciary disloyalty"). In order to allege that the Investment Committee breached the duty of loyalty, Plaintiffs must allege that the Investment Committee's decisions were made because of self- dealing. *See Terraza v. Safeway Inc.*, 241 F. Supp. 3d 1057, 1069 (N.D. Cal. 2017) (noting that the duty of loyalty prevents fiduciaries from "engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests") (quoting Restatement (Third) of Trusts § 78 (2007)).

The FAC attempts to bolster Plaintiffs' allegations of self-dealing by Defendants. Plaintiffs' FAC continues to

allege that Intel Capital, an Intel subsidiary, has "partnered with investment companies such as hedge fund and private equity investors to co-invest in and secure sequential funding for third-party startups." Opp. 21; FAC ¶¶ 306–07. Plaintiffs' FAC bolsters this new theory with three sets of new allegations. The Court addresses each of Plaintiffs' three new theories in turn.

First, Plaintiffs argue that Intel Capital invested in privately held companies that benefitted Intel's business and that Intel used the Intel Funds to incentivize hedge funds to give follow-up funding to these beneficial privately held companies. *Id.*; Opp. 21. Plaintiffs argue that "[o]btaining sequential funding from hedge funds and private equity" benefits Intel because "additional investment by hedge funds and private equity ensures that the companies in which Intel Capital has invested have sufficient funding to grow," "Intel Capital reduces its own risk by having an outside firm invest in these companies," and "when hedge funds or private equity invest in the investment companies, that investment increases the value of Intel Capital's investment." FAC ¶ 308.

Second, Plaintiffs allege that Intel and Intel Capital invested in the private equity of companies that complemented Intel's business, and "used hedge funds to come in and invest in those same companies" when those same companies sought a second round of funding. Opp. 21; FAC ¶¶ 312–15. Plaintiffs state that Intel and Intel Capital benefitted from this alleged collaboration with hedge funds (1) because Intel's investments gained funding without Intel investing, which increased the value of the companies in which Intel invested, and (2) because of the increase in the value of the companies in which Intel

invested, Intel Capital had a basis to continue investing in those same companies. Opp. 21.

Third, Plaintiffs allege that Intel and Intel Capital failed to consider the interests of employees with low pay grades while conducting the alleged collaboration with the hedge funds. Opp. 21–25; FAC ¶¶ 316–321. Plaintiffs' theory centers on the Intel Minimum Pension Plan, which provides a "floor" of benefits to plan participants, meaning participants will receive at least what they are entitled to under the Minimum Pension Plan. *See* FAC ¶¶ 54, 317; Opp. 22 & n.18. Those participants who also receive benefits under the Intel Retirement Contribution Plan will receive those benefits only if those benefits exceed the value of the minimum pension plan. *Id.* However, if the Intel Retirement Contribution Plan's benefit does not exceed the Minimum Pension Plan, the beneficiaries will receive the "minimum pension" benefit, which is determined by the beneficiaries' paygrade. FAC ¶¶ 317–18; Opp. 22. One of the Intel GDFs is the default investment option for the Intel Retirement Contribution Plan. FAC ¶ 98. According to Plaintiffs, employees with higher pay grades usually received benefits under the Minimum Pension Plan no matter the circumstances, but employees with lower paygrades could have earned under the Intel Retirement Contribution Plan more if that Intel GDF had better performance and lower fees.

As to Plaintiffs' paygrades theory, the FAC also alleges that, in a 2015 meeting, a "confidential witness" raised the issue of the difference in interests in the Intel Retirement Contribution Plan between higher-paid and lower-paid employees with Ravi Jacobs, a member of the Investment Committee, and Stuart Odell, a member of the Administrative Committee. FAC ¶¶ 23, 34, 315. At the

meeting, the confidential witness "raised the issue that employees in lower pay grades including [the confidential witness] were adversely affected by the high fees of the Intel GDF and its poor performance." FAC ¶ 319. Jacobs allegedly told the "confidential witness" that he "should not be concerned because his pay grade was such that he would only get the floor minimum pension benefit under the [Minimum Pension] Plan." *Id.* In other words, Jacobs allegedly told the confidential witness that any problems with the Intel GDF would not affect the confidential witness. Plaintiffs argue that this interaction shows that Jacobs and Odell, who had higher pay grades, "had no personal interest in lowering the fees for the Intel GDF or improving the performance of the Intel GDF or the Retirement Contribution Plans." *Id.* ¶ 320.

Although Plaintiffs have added more allegations since their first consolidated class action complaint, Plaintiffs have still failed to plausibly allege that the Investment Committee acted in order to aid Intel Capital in its venture capital investments at the expense of investors. The Court identifies two main deficiencies. First, Plaintiffs have again failed to cure the deficiencies in the first consolidated class action complaint related to the connection between (1) the Investment Committees' investment in private equity and hedge funds and (2) the actions that those private equity and hedge funds took after receiving the investments. Second, Plaintiffs' argument regarding the Minimum Pension Benefit Plan is implausible based on the facts alleged in the FAC. The Court addresses each deficiency in turn.

First, Plaintiffs have again failed to provide any factual allegations to support their claim that the aim of the Investment Committee's investment in private equity and

hedge funds was to aid Intel Capital and its venture capital investments. Plaintiffs only allege that such investments would stand to benefit Intel if the private equity and hedge funds acted in a way that benefitted Intel. As the Court previously stated in the 2021 Order, "[t]he mere fact that Intel Capital invested in a tiny percentage of the same companies that also received investments from private equity funds that the Intel Funds invested in is not sufficient to plausibly allege a real conflict of interest, rather than the mere potential for a conflict of interest." ECF No. 109 at 23; *Kopp*, 894 F.3d at 222 (The "potential for conflict without more, is not synonymous with a plausible claim of fiduciary disloyalty"). For example, Plaintiffs never allege that the Investment Committee had any influence over any investment firm's decision to invest in one of the startups in which Intel invested. As the Court has previously stated, Plaintiffs must provide factual allegations to "support the claim that the aim of the Investment Committee's investment in the various private equity funds was to aid Intel Capital in its venture capital investments." ECF No. 109 at 23. Plaintiffs' FAC merely shows that Intel Capital and some investment companies happened to invest in similar startups. Such allegations, standing alone, are not sufficient to plausibly support Plaintiffs' claim that the Investment Committee acted disloyally in its fiduciary duties.

Second, Plaintiffs' allegation that the Minimum Pension Benefit Plan insulates higher-paid employees from the effects of a poorer performing Intel GDF is not plausible even based on the facts of the FAC. The FAC alleges that at least some of the individuals on the Investment Committee are Intel employees. FAC ¶¶ 23, 25. The FAC also alleges that the individuals on the Investment Committee have higher paygrades than

Plaintiffs. FAC ¶ 318. However, even the higher-paid employees on the Investment Committee could receive greater benefits if the Retirement Contribution Plan and the Intel GDF outperformed the Minimum Pension Benefit Plan. *See* FAC ¶ 317 (suggesting that all employees could receive benefits under the Intel Retirement Contribution Plan if those benefits exceeded the value of the benefits under the Minimum Pension Benefit Plan). Simply because higher-paid employees are more likely to receive benefits under the Minimum Pension Benefit Plan does not mean those employees are not also incentivized to increase their returns by improving the performance of the Intel GDF and the Retirement Contribution Plan, which would directly benefit Plaintiffs.

Plaintiffs cite several cases to support their theory that the conclusory allegations in the FAC are sufficient to state a claim that the Investment Committee breached its duty of loyalty. Plaintiffs' cases are inapposite. In their opposition brief, Plaintiffs cite *Braden v. Wal-Mart Stores, Inc.*, which found that a plaintiff's complaint was sufficient when the plaintiff alleged that a plan included poorly performing funds in order to "[b]enefit the trustee at the expense of the participants." 588 F.3d 585, 596 (8th Cir. 2009). However, *Braden* included much stronger facts than Plaintiffs included in the FAC. For example, the plaintiff in *Braden* alleged that the defendant received "kickbacks" in exchange for inclusion in the plan at issue. *Id.* at 600. Moreover, Plaintiffs cannot reasonably say that a poorly performing Intel GDF is in the Investment Committee's favor when the employees on that Committee would receive more in benefits if the Intel GDF performed well.

Plaintiff also cites *Cryer v. Franklin Templeton Resources, Inc.*, for the proposition that the allegation that investment decisions made to allow Defendant to collect more money in investment fees was sufficient to support an allegation of breach of the duty of loyalty. 2017 WL 818788, at *4 (N.D. Cal. Jan. 17, 2017). However, unlike in *Cryer*, Plaintiffs do not allege that the Investment Committee received a direct benefit from the investment of the Intel Funds into private equity and hedge funds. Plaintiffs only allege that Intel Capital would be indirectly benefitted if the hedge funds helped build the value of the venture capital companies in which Intel Capital invested.

Although Plaintiffs added more paragraphs to their FAC, the allegations in the FAC are much the same as in the first consolidated class action complaint. Plaintiffs still fail to provide any factual allegations to support Plaintiffs' claim that Defendants engaged in self-dealing. Plaintiffs only plead factual allegations that, at most, support a potential conflict of interest, not a real conflict. As the Court has previously held, the allegation that Defendants may have a *potential* conflict of interest is not sufficient to state a claim for breach of the duty of loyalty. ECF No. 119 at 25; *Kopp*, 894 F.3d at 222 (holding that a plaintiff's request "to infer that the [d]efendants acted with inappropriate motivations because they stood to gain financially" from a company's success, did not, in and of itself, support a claim of fiduciary disloyalty). In sum, Plaintiffs have again failed to allege a plausible conflict of interest that would support Plaintiffs' claim for breach of the duty of loyalty. Therefore, the Court GRANTS Defendants' motion to dismiss regarding Plaintiffs' claims for breach of the duty of loyalty.

The Court next addresses leave to amend. Defendants' first motion to dismiss and the 2021 Order identified the deficiencies in Plaintiffs' breach of the duty of loyalty allegations. The 2021 Order expressly informed Plaintiffs that "failure to cure the deficiencies identified in [the] Order and in Defendants' motion to dismiss" would result in dismissal of Plaintiffs' deficient claims with prejudice. ECF No. 117 at 29. Allowing Plaintiffs a third attempt to identify allege a conflict of interest would be futile. *Leadsinger*, 512 F.3d at 532. Plaintiffs have already had two chances to amend their pleadings, and in each one Plaintiffs have failed to allege facts that support a plausible finding of a real conflict of interest, rather than the mere potential for a conflict of interest. Allowing Plaintiffs to file a fourth complaint and requiring Defendants to file a third motion to dismiss would cause undue delay and prejudice to Defendants. *Id.* Because Plaintiffs have failed to cure the deficiencies identified by the Court, Defendants' motion to dismiss Plaintiffs' breach of the duty of loyalty claim is granted with prejudice.

B. Counts III and IV: Breach of the Duty of Prudence by the Administrative Committee

Defendants argue that Plaintiffs lack Article III standing to bring Counts III and IV. In Count III, Plaintiffs allege that the Administrative Committee violated ERISA §§ 404(a)(1)(A) and 404(a)(1)(B) by failing to make adequate and accurate disclosures to Plaintiffs regarding the Intel Plans. FAC ¶¶ 415–432. In Count IV, Plaintiffs allege that the Administrative Committee violated ERISA § 102(a) and 29 U.S.C. § 1022(a) by failing to prepare Summary Plan Descriptions ("SPDs") that adequately disclosed and explained the risks associated

with the Intel Funds' investments in hedge funds and private equity. *Id.* ¶¶ 433–40.

Defendants argue that Plaintiffs lack standing to bring Counts III and IV because Plaintiffs have failed to allege an injury in fact that is traceable to Defendants' conduct as alleged in the FAC. Mot. 26. Just as Defendants argued in their first motion to dismiss, Defendants again argue that Plaintiffs "still do not allege that Plaintiffs read or relied upon the allegedly defective documents." *Id.* (internal quotation marks omitted). In response, Plaintiffs do not contend that they relied on the allegedly defective documents or that they cured the deficiencies the Court identified in the 2021 Order. *See* Opp. 25–27. Instead, Plaintiffs argue that they are not required to plead that they read or relied upon the disclosures in the Intel Plans or the Summary Plan Descriptions and thus have standing to sue. *Id.*

The Court again finds that Plaintiffs' argument lacks merit.[7] Under Ninth Circuit case law, Plaintiffs are required to show how they have been injured by Defendants' allegedly deficient documents. As the Court explained in 2021 Order, simply because a plaintiff has statutory standing under ERISA does not mean that the plaintiff has Article III standing, which requires that the plaintiff show injury in fact. *See* ECF No. 109 at 27 (citing *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1620 (2020)). In essence, by arguing that Plaintiffs need not plead that they read or relied upon the disclosures in the Intel Plans, Plaintiffs are arguing that they need not plead that they were injured by those disclosures or that those disclosures

[7] Because the Court decides that Plaintiffs lack standing to bring Counts III and IV, the Court need not reach Defendants' law of the case argument. *See* Mot. 27.

caused their injury. That argument does not hold water under United States Supreme Court case law. *Thole*, 140 S. Ct. at 1620; *see also Spokeo v. Robins*, 578 U.S. 330, 341 (2016) ("Congress's role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.").

Plaintiffs cite several cases to contest the Court's conclusion, but all are inapposite. First, Plaintiffs cite *Magadia v. Wal-Mart Associates, Inc.*, for the proposition that "[t]he omission of statutorily required information" suffices for Article III standing. *Magadia*, 999 F.3d 668, 678 (9th Cir. 2021). However, *Magadia* is inapposite. In *Magadia*, the Ninth Circuit held that the plaintiff in that case needed to identify an injury traceable to the conduct alleged in his complaint. *Id.* at 679. Specifically, the Ninth Circuit explained that "[e]ven when a statute 'has afforded procedural rights to protect a concrete interest, a plaintiff may fail to demonstrate concrete injury where violation of the procedure at issue presents no material risk of harm to that underlying interest.'" *Id.* (quoting *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016)). More specifically, allegations of procedural violations of an informational entitlement cannot by themselves keep a claim in court. *Id.* "The plaintiff must further 'allege that the information had some relevance to her.'" *Id.* (quoting *Brintley v. Aeroquip Credit Union*, 936 F.3d 489, 493 (6th Cir. 2019)).

The Ninth Circuit's guidance in *Magadia*, therefore, still supports the Court's finding that Plaintiffs here lack standing. It is not enough to allege procedural violations

of an informational entitlement. Plaintiffs needed to provide some factual allegation to show that they faced a risk of harm because of the procedural violations of that informational entitlement. Here, Plaintiffs have, for the second time, failed to allege that they relied at all upon the disclosures and summary plan descriptions provided by the Administrative Committee. It is therefore difficult to see how the information contained or not contained in the disclosures and summary plan descriptions could have had relevance to Plaintiffs' purported injury in this case.

Second, Plaintiffs cite *CIGNA Corp. v. Amara* for the proposition that plaintiffs need not show that they read and relied on defective disclosures and summary plan descriptions. Opp. 26 (citing *CIGNA Corp. v. Amara*, 563 U.S. 421, 444 (2011)). Specifically, in *CIGNA*, the United States Supreme Court stated that, in that case, it was "not difficult to imagine how the failure to provide proper summary information, in violation of the statute, injured employees even if they did not themselves act in reliance on summary documents—which they might not themselves have seen—for they may have thought fellow employees, or informal workplace discussion, would let them know if, say, plan changes would likely prove harmful." *CIGNA*, 563 U.S. at 444. Unfortunately for Plaintiffs, *CIGNA* does not address Article III standing. Rather, *CIGNA* addresses only the requirement of "detrimental reliance" as it relates to statutory standing. *Id.* As the Court has already discussed above, Plaintiffs must satisfy both statutory standing and Article III standing in order to keep their claim in court. *See Thole*, 140 S. Ct. at 1620. The issue with Plaintiffs' FAC is that they have not satisfied Article III standing. A case on statutory standing does not contradict the Court's finding

and Defendants' argument that Plaintiffs failed to allege an injury in fact caused by Defendants' conduct.

Plaintiffs' other cited authorities are no more helpful than *Magadia* and *CIGNA*. Plaintiff cites *Hurtado v. Rainbow Disposal Co., Inc.*, for the proposition that it is impossible to demonstrate reliance on Defendants' omissions. *Hurtado*, 2019 WL 1771797, at *7 (C.D. Cal. Apr. 22, 2019). However, Plaintiffs take *Hurtado* out of context. *Hurtado* actually discussed the presumption of classwide reliance when it would be impossible to offer "affirmative proof of classwide nondisclosure" as class action plaintiffs are attempting to prove commonality. *Id.* The Central District of California's language on commonality is not relevant to whether or not Plaintiffs' pleaded an injury in fact in their FAC.

Finally, Plaintiffs attempt to distinguish *Thole*, 140, S. Ct. at 1619–20, which the 2021 Order cited. The 2021 Order relied on the United States Supreme Court's holding in *Thole*'s that "statutory standing under ERISA does not absolve a plaintiff of the requirement to demonstrate Article III standing." *See Thole*, 140 S. Ct. at 1620. Plaintiffs now argue that *Thole* is inapposite because that case expressly stated that it did not concern "[t]he omission of statutorily required information." *Id.* at 1621 n.1. However, that footnote followed the United States Supreme Court's statement that plaintiffs must plausibly allege a "concrete" monetary injury. *Id.* However, the problem with Plaintiffs' FAC is not that Plaintiffs failed to allege a concrete monetary injury. Instead, the problem with Plaintiffs' FAC is that Plaintiffs failed to allege that the actions taken by the Administrative Committee injured them at all. Despite the United States Supreme Court's instruction that nonmonetary injuries may still

suffice to adequately plead informational injuries, *Thole* still stands for the proposition that Article III standing is required in all cases and does not vary by cause of action. *Id.* at 1621.

Because Plaintiffs have again failed to allege that they relied in any way upon the allegedly defective documents, Plaintiffs have again failed to allege an injury in fact that is traceable to Defendants' conduct. Therefore, Plaintiffs lack Article III standing to bring Counts III and IV. Because the Plaintiffs lack Article III standing to bring Counts III and IV, Defendants' motion to dismiss Claims III and IV is GRANTED.

The Court next addresses leave to amend. Defendants' first motion to dismiss and the 2021 Order identified the deficiencies in Plaintiffs' allegations regarding the Administrative Committee Defendants and their allegedly deficient disclosures. The 2021 Order expressly warned Plaintiffs that "failure to cure the deficiencies identified in [its] Order and in Defendants' motion to dismiss" would result in dismissal of Plaintiffs' deficient claims with prejudice. ECF No. 117 at 29. Plaintiffs do not even attempt to identify an injury in fact suffered from Defendants' allegedly deficient disclosures. Therefore, any attempt to amend Plaintiffs' pleadings would be futile. *Leadsinger*, 512 F.3d at 532. Allowing Plaintiffs to file a fourth complaint and requiring Defendants to file a third motion to dismiss would cause undue delay and prejudice to Defendants. *Id.* Because Plaintiffs have failed to cure the deficiencies identified by the Court, Defendants' motion to dismiss Plaintiffs' Counts III and IV of Plaintiffs' FAC is granted with prejudice.

C. Counts V and VI: Failure to Monitor and Co-Fiduciary Liability

Defendants next argue that Plaintiffs' derivative claims necessarily fail because Plaintiffs have not plausibly alleged a primary violation of ERISA. Mot. 29. The Court again agrees.

Plaintiffs allege two derivative claims. First, Plaintiffs allege in Count V that the Intel Finance Committee and the Intel Chief Financial Officers, who are tasked with appointing and monitoring the members of the Investment Committee and the Administrative Committee, breached their fiduciary duty under ERISA § 404(a) by failing to monitor those appointees and failing to remove them. FAC ¶¶ 441–49. Second, Plaintiffs allege that all Defendants are subject to "co-fiduciary liability" under ERISA § 405 for violations of each Defendant as to Counts I, II, III, and IV. *Id.* ¶¶ 450–66.

Both derivative claims fail because Plaintiffs have failed to state an underlying ERISA violation. Therefore, Plaintiffs have failed to state a claim for failure to monitor and co-fiduciary liability. *See, e.g.*, *In re HP ERISA Litig.*, 2014 WL 1339645, at *8 (N.D. Cal. April 2, 2014) (dismissing claims for failure to monitor and knowing participation in co-fiduciaries' breaches of duty because these claims were derivative of the claims for breach of the duties of prudence and disclosure); *Romero*, 2013 WL 5692324, at *5 (co-fiduciary claims "necessarily depend[] on at least one underlying breach"). Therefore, Defendant's motion to dismiss Counts V and VI of the Plaintiffs' FAC is GRANTED.

The Court next addresses leave to amend. Defendants' first motion to dismiss and the 2021 Order identified the deficiencies in Plaintiffs' allegations regarding the derivative claims. The 2021 Order expressly warned Plaintiffs that "failure to cure the deficiencies identified in

[the] Order and in Defendants' motion to dismiss" would result in dismissal of Plaintiffs' deficient claims with prejudice. ECF No. 117 at 29. Without allegations supporting underlying ERISA violations, Plaintiffs cannot allege derivative ERISA violations. Therefore, any attempt to amend Plaintiffs' fifth and sixth claims would be futile. *Leadsinger*, 512 F.3d at 532. Allowing Plaintiffs to file a fourth complaint and requiring Defendants to file a third motion to dismiss would cause undue delay and prejudice to Defendants. *Id.* Because Plaintiffs have failed to cure the deficiencies identified by the Court, Defendants' motion to dismiss Plaintiffs' Counts V and VI of Plaintiffs' FAC is granted with prejudice.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss Counts I–VI of Plaintiffs' First Amended Consolidated Class Action Complaint is GRANTED with prejudice.

Defendants' motion to dismiss did not challenge Count VII of Plaintiffs' First Amended Consolidated Class Action Complaint, which alleges that the Administrate Committee failed to provide documents upon request to Anderson in violation of ERISA § 104(b)(4), 29 U.S.C. § 1024(B)(4) and 29 C.F.R. § 2550.404a-5. Thus, that cause of action remains in the case.

IT IS SO ORDERED

Dated: January 8, 2022

/s/ Lucy H. Koh
LUCY H. KOH
United States Circuit Judge[8]

[8] Sitting by designation on the United States District Court for the Northern District of California.