UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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KAILA GONZALEZ, *individually and as a representative of a class of similarly situated persons and on behalf of the Northwell Health 403(b) Plan*,

Plaintiff,

v.

NORTHWELL HEALTH, INC.; NORTHWELL HEALTH 403(B) PLAN COMMITTEE; DOES 1-10, INCLUSIVE,

Defendants.
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MEMORANDUM AND ORDER
20-CV-3256 (RPK) (RLM)

RACHEL P. KOVNER, United States District Judge:

Plaintiff Kaila Gonzalez seeks leave to file a Second Amended Complaint against defendants Northwell Health, Inc., the Northwell Health 403(b) Plan Committee, and ten unidentified fiduciaries (collectively, the "defendants"), alleging breaches of fiduciary duties in violation of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* For the reasons stated below, plaintiff's motion for leave to amend is granted in part and denied in part. Plaintiff's request is denied as futile as to her claims premised on the imprudent retention of the 50% Diamond Hill/50% Dodge & Cox Large Value Option and the 50% Causeway/50% BNY Mellon International Option. Plaintiff may proceed with her proposed claim alleging imprudent retention of the Lazard Emerging Markets Fund, her claim of excessive recordkeeping fees, as well as her monitoring, co-fiduciary breach, and knowing-participation claims.

BACKGROUND

Plaintiff, a participant in the Northwell Health 403(b) Plan, filed a putative class action against defendants in 2020 and an Amended Complaint in 2021. *See* Compl. (Dkt #1); Am. Compl. (Dkt. #30). Defendants' motion to dismiss the Amended Complaint was granted in 2022, and plaintiff timely filed her motion seeking leave to file another amended complaint. Mot. for Leave to Amend 1 (Dkt. #52). The Court assumes the parties' familiarity with the facts set out in the prior opinion, *see Gonzalez v. Northwell Health, Inc.*, 632 F. Supp. 3d 148 (E.D.N.Y. 2022), which are briefly summarized below.

I. Prior Proceedings

A. Amended Complaint

The Amended Complaint alleged that defendants breached their fiduciary duties to plan participants in two ways: (1) they "allowed unreasonable recordkeeping/administrative expenses to be charged to the Plan," and (2) they "selected, retained, and/or otherwise ratified high-cost and poorly-performing investments, instead of offering more prudent alternative investments," which were readily available. Am. Compl. ¶ 6.

Excessive-Fee Claim. The Plan pays its recordkeeper, Transamerica, recordkeeping and administrative fees, which I refer to generally as "recordkeeping fees." The Amended Complaint contended that defendants allowed the Plan to pay excessive recordkeeping fees of between $52 to $60 per participant during the period at issue in the Amended Complaint, and that those excessive fees were passed on to Plan participants. The Amended Complaint relied on an industry publication, the 401k Averages Book, which reported that smaller plans paid average recordkeeping fees of $35 per participant. *Id.* ¶¶ 24–25. It alleged that large plans, such as the Northwell Plan, "have significant bargaining power" and therefore should have been able to negotiate fees lower than those charged by smaller plans. *Id.* ¶¶ 4, 24.

Imprudent-Retention Claims. The Plan provides its participants with 25 investment options, consisting of target funds, index funds, and mutual funds. *Gonzalez*, 632 F. Supp. 3d at 156. The Amended Complaint alleged that defendants breached their fiduciary duties by imprudently retaining four lackluster options: (1) the 50% Diamond Hill/50% Dodge & Cox Large Value Option (the "Large Value Option"); (2) the 50% Champlain/50% Diamond Hill Small Cap Option (the "Small Cap Option"); (3) the Lazard Emerging Markets Fund; and (4) the 50% Causeway/50% BNY Mellon International Option (the "Causeway/BNY Mellon Option"). *Id.* ¶¶ 30–37. Each is an actively managed mutual fund. *Gonzalez*, 632 F. Supp. 3d at 156. These challenged funds, according to the Amended Complaint, lagged their respective benchmarks on three-year and five-year bases. Am. Compl. ¶¶ 30–37. Plaintiff alleged that defendants should have replaced the challenged funds with index funds that tracked the benchmark indices and charged lower fees. *Ibid.*

B. Dismissal Decision

The Court granted defendants' motion to dismiss both claims. *Gonzalez*, 632 F. Supp. 3d at 155.

The Court concluded that plaintiff had failed to set out factual allegations allowing the Court to reasonably infer that the defendants' process of managing the Plan's recordkeeping fees was flawed. First, plaintiff's fee comparisons improperly compared the Plan's *total* recordkeeping fees—including both direct and indirect fees—with only the *direct* fees paid by the comparator plans. *Id.* at 166. As a result, plaintiff's comparisons provided little insight into whether the Plan's total recordkeeping fees were excessive. *Ibid.* Second, plaintiff failed to plead that the Plan paid higher recordkeeping fees than its comparators for the same "basket of services." *Id.* at 167. The Amended Complaint failed to specify what services the recordkeeper provided to the Plan and

whether the comparators' recordkeepers provided services of a similar quantity and quality at a lower rate. *Ibid*. Third, the Amended Complaint was silent as to whether any comparable plans in fact paid the lower rates plaintiff asserted the Plan should have paid. *Ibid*.

The Court also dismissed plaintiff's imprudent-retention claims, holding that plaintiff "failed to set out circumstantial factual allegations from which a court may reasonably infer that the decision to retain each Challenged Fund was the product of a flawed decision-making process." *Id*. at 163. The Court stated that "[w]hile a plaintiff may allege a breach of fiduciary duty based on a fund's underperformance relative to a benchmark, the comparative underperformance must generally be 'consistent' and 'substantial' to support an inference of imprudence." *Ibid.* (citation omitted). Plaintiff's performance comparisons did not include "the ten-year data that is a traditional hallmark of viable claims based on underperformance relative to an index." *Ibid*. In addition, the alleged underperformance was "relatively modest," and not "substantial" or "consistent" enough to create an inference of fiduciary-breach. *Id.* at 164–65. Finally, plaintiff failed to identify alternative actively managed funds—as opposed to passive index funds—that the Plan could have invested in instead. *Id*. at 164. Plaintiff's allegation accordingly fell short.

Plaintiff's remaining claims were dismissed because they could not survive absent a viable fiduciary-breach claim. *Id*. at 169.

II. The Proposed Second Amended Complaint

Plaintiff filed this motion for leave to file another amended complaint on October 31, 2022. *See* Mot. for Leave to Amend. The attached proposed Second Amended Complaint brings the same underlying claims as the Amended Complaint, except that plaintiff abandoned her imprudent-retention claim pertaining to the retention of the Small Cap Option. *See* Prop. Sec. Am. Compl. 20 n.3 (Dkt. #52-1). The claims cover a proposed class period from July 21, 2014—six years from the date the initial complaint was filed—to the present. *Id*. ¶ 1.

The following facts are drawn from the proposed Second Amended Complaint and are accepted as true for the purpose of this motion.

A. The Imprudent-Retention Claims

1. The Large Value Option

The proposed Second Amended Complaint alleges that the Large Value Option "has consistently and significantly underperformed its benchmark, a 50/50 split of the Russell 1000 and S&P 500 Indexes." *Id.* ¶ 70; *see id.* at ¶ 70 n.9. Plaintiff also proposes two "superior, readily investable alternative funds": the Parnassus Endeavor Fund and the Hartford Core Equity Fund. *Id.* ¶ 71. The Parnassus Endeavor Fund is a "large value" fund, while the Hartford Core Equity Fund is a "large blend" fund. *Id.* at ¶ 71 n.11. Plaintiff provides both types of comparators because "[c]onflicting materials . . . report the Large Value Option as a domestic large cap value fund and a domestic large cap blend fund." *Ibid.* The proposed Second Amended Complaint states that it relies on data the was available in real time to defendants during the Class Period. *Id.* ¶ 74.

Plaintiff compares the Large Value Option against its benchmark and the two comparator funds based on annualized three-year, five-year, and ten-year returns. *Id.* ¶¶ 71–73. From the first quarter of 2015 through the third quarter of 2022, the Large Value Option's annualized performance for the prior ten-year period was worse than that of the benchmark. The amount by which the Large Value Option annualized returns underperformed relative to its benchmark during those quarters, on a ten-year rolling basis, ranged from 0.24% to 2.65%, with an average of 1.17%. *Ibid.* And for much of that period—from the first quarter of 2018 through the third quarter of 2022—the Large Value Option also trailed its benchmark when measured over annualized three-year and five-year bases. *Ibid.*

During its period of underperformance relative to the benchmark index, the Large Value Option underperformed relative to both the Parnassus Endeavor Fund and the Hartford Core Equity

Fund as well, when assessed based on annualized returns for the preceding ten years. *Ibid*. In particular, the fund underperformed relative to the Hartford Core Equity Fund on a rolling ten-year retrospective basis by amounts ranging from 0.75% to 3.71%. *Ibid*. And it underperformed relative to the Parnassus Endeavor Fund, when measured on a rolling ten-year retrospective basis, by 1.63% to 6.03%. *Ibid*.

2. The Lazard Emerging Markets Fund

The proposed Second Amended Complaint alleges that the Lazard Emerging Markets Fund "substantially and repeatedly underperformed the benchmark chosen by its own manager, the MSCI Emerging Markets Index." *Id*. ¶ 76. Plaintiff also compares the Lazard Emerging Markets Fund to two "readily investable alternative emerging markets funds": the American Funds New World Fund and the Fidelity Advisor Emerging Markets Fund. *Ibid*.

Plaintiff alleges that for eighteen consecutive quarters—from the second quarter of 2018 through the third quarter of 2022—the Lazard Emerging Markets Fund's returns trailed its benchmark over the preceding three-year, five-year, and ten-year periods. The amount by which the Lazard Emerging Markets Fund's annualized returns underperformed relative to its benchmark, on a ten-year rolling basis, during those eighteen quarters ranged from 0.54% to 3.20%, with an average of 1.73%. *Id*. ¶¶ 76–78. The Lazard Emerging Markets Fund also underperformed relative to its benchmark index on three-year and five-year annualized bases for almost every quarter during the class period up to and including the third quarter of 2022. *Ibid*.

The American Funds New World Fund and the Fidelity Advisor Emerging Markets Fund outperformed the Lazard Emerging Markets Fund throughout this period, when measured on a three-year, five-year, and ten-year rolling basis. For instance, in 2020 and 2021, the American Funds New World Fund's annualized returns on a rolling ten-year basis bested those of the Lazard Emerging Markets Fund by between 4.30% and 6.12%, and the Fidelity Advisor Emerging

Markets Fund's annualized returns on a rolling ten-year basis exceeded those of the Lazard Emerging Markets Fund by between 3.79% and 6.05% when measured on a rolling ten-year basis. *Ibid*.

A ranking of emerging-markets funds by the financial services firm Morningstar ranked the Lazard Emerging Markets Fund between the 82nd and 97th percentile of emerging markets funds when measured on a ten-year-returns basis during these two years. *Id*. ¶ 78. Meanwhile, measured on the same metric, the American Funds New World Fund was ranked between the 3rd and 15th percentile, and the Fidelity Advisor Emerging Markets Funds was ranked between the 3rd and 7th percentile. *Ibid*.

3. The Causeway/BNY Mellon Option

The proposed Second Amended Complaint also alleges that the Causeway/BNY Mellon Option underperformed its manager-chosen benchmark, the MSCI EAFE Index. *Id*. ¶ 80. Plaintiff offers two other investments benchmarked to the same index as possible alternatives: the Mercer Non-US Core Equity Fund and the MFS International Equity Fund. *Ibid*.

The proposed Second Amended Complaint provides no ten-year returns data regarding the Causeway/BNY Mellon Option, and only provides three-year and five-year returns data for limited portions of the class period. *Id*. ¶¶ 80–82. Plaintiff alleges that from the second quarter of 2014 through the fourth quarter of 2016, the Causeway/BNY Mellon Option's annualized returns measured on a three-year rolling basis trailed the fund's benchmark by amounts ranging from 0.43% to 2.99%. *Ibid*. Plaintiff does not allege that the Causeway/BNY Mellon Option's three-year annualized returns trailed its benchmark from 2017 through October 2022. *Ibid*.

During a different, overlapping period—from the first quarter of 2015 through the third quarter of 2018—plaintiff alleges that the Causeway/BNY Mellon Option's annualized returns measured on a five-year rolling basis trailed its benchmark, by amounts ranging from 0.13% to

1.64%. *Ibid*. During that period, the Mercer Non-US Core Equity Fund allegedly outperformed the Causeway/BNY Mellon Option by 0.60% to 2.75% each quarter on a five-year rolling basis, and the MFS International Equity Fund outperformed the Causeway/BNY Mellon Option by 0.53% to 1.81% each quarter on a five-year rolling basis. *Ibid*. Plaintiff does not allege that the Causeway/BNY Mellon Option's annualized returns trailed its benchmark when measured on a five-year rolling basis over the earlier or later portions of the class period—that is, from July 2014 to the first quarter of 2015, or from the fourth quarter of 2018 through October 2022. *See Ibid*.

B. The Excessive Recordkeeping Fee Claim

The proposed Second Amended Complaint compares the recordkeeping fees the Plan paid with fees paid by other "similarly sized defined contribution plans," which received "materially identical services." *Id*. ¶¶ 50–58. The proposed Second Amended Complaint compares the Plan to a different set of plans for each year. *Ibid*.

From 2014 through 2017, the Plan paid $60 in total recordkeeping fees. *Id*. ¶¶ 50–54. In 2014, two plans of similar participant and asset size paid $39 and $33; in 2015, two such plans paid $37 and $33; in 2016, two such plans paid $36 and $33; in 2017, two such plans paid $35 and $33; in 2018, three such plans paid $36, $33, and $30. *Ibid*. In 2019, the Plan paid $45 while two plans of similar participant and asset size paid $35 and $34. *Id*. ¶ 56. In 2020, the Plan paid $37 while two smaller plans paid $35 and $23. *Id*. ¶ 57. And in 2021, the Plan continued to pay $37 while two plans of similar participant and asset size paid $31. *Id*. ¶ 58.

The proposed Second Amended Complaint calculates these total recordkeeping fees by using data "pulled from publicly available Summary Plan Descriptions, annual participant fee disclosures and Form 5500 filings." *Id*. ¶ 59. The total recordkeeping fees include "all the disclosed direct compensation paid to the recordkeeper, as well as indirect compensation." *Ibid*. Direct fees are "paid directly from plan assets and [are] reflected as a deduction in the value of

participant accounts." *Id.* ¶ 26. Indirect fees are paid to the recordkeeper "by third parties" from "investment options before the value of the investment option is provided to the participant," through processes such as asset-based "revenue sharing." *Id.* ¶ 27. When the recordkeeper keeps some or all the revenues shared, "the appropriate amount of revenue sharing is also included to calculate the [total recordkeeping] fees." *Id.* ¶ 59. But when the recordkeeper returns all the shared revenues to the plan, those revenues would not impact the total recordkeeping fees. *Ibid.*

The direct fees paid by the Plan "represent the total [recordkeeping] fee charged to the Plan." *Id.* at 14 n.2. This is because Transamerica redirects the shared revenues back to the Plan participants' accounts. *Ibid.* Thus, the shared revenues have "no impact on the amount each [Plan] participant must pay for [recordkeeping] services or on the amount Transamerica receives from the Plan as compensation for providing such recordkeeping services." *Ibid.*

The Plan and its comparators receive a comparable basket of services from their respective recordkeepers. Large plans are serviced by similarly large recordkeepers that offer recordkeeping services on a "bundled" and "a la carte" basis. Recordkeepers generally provide a "buffet style" bundle of essential services for a fixed per capita price, regardless of whether a plan's customers use each service. *Id.* ¶¶ 29–30. These services include, among others: recordkeeping, transaction processing, administrative services, participant communications, fund maintenance, document services, consulting services, accounting and audit services, and compliance related services. *Id.* ¶ 29. And if a plan participant needs more particular services—such as loan processing, brokerage services, or distribution services—she may separately pay the recordkeeper for those services "a la carte." *Id.* ¶ 31.

The large recordkeepers all "have the capability to provide all of the aforementioned [recordkeeping] services to large defined contribution plans." *Id.* ¶ 32. For large plans such as the

Plan, "any minor variations in the way these essential [recordkeeping] services are delivered have no material impact on the fees charged by recordkeepers to deliver the services." *Id.* ¶ 33. This is borne out by the "industry-wide practice of recordkeepers quoting fees for Bundled [recordkeeping] services on a per-participant basis without regard for any individual differences in services requested." *Ibid.*; *see id.* ¶ 41 ("[M]ost recordkeepers only require a plan's participant count and asset level in order to provide a fee quote.").

Ultimately, "[w]hile recordkeepers in the defined contribution industry attempt to distinguish themselves through marketing and other means, they all offer the same bundles and combinations of services." *Id.* ¶ 34. Therefore, the market for recordkeeping services is "price competitive, particularly for larger plans like the Plan, that have a considerable number of participants and significant assets." *Ibid.*

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 15(a), a party may seek to amend its pleadings by leave of the court. "[I]t is within the sound discretion of the district court to grant or deny leave to amend." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007). Leave shall be freely given "when justice so requires." Fed. R. Civ. P. 15(a). But leave is properly denied in cases of "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, [or] futility of the amendment." *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). "The party opposing the motion bears the burden of establishing that an amendment would be prejudicial or futile." *Eberle v. Town of Southampton*, 985 F. Supp. 2d 344, 346 (E.D.N.Y. 2013).

A proposed amendment is futile if it "would fail to cure prior deficiencies or to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure." *IBEW Loc. Union No. 58 Pension Tr. Fund & Annuity Fund v. Royal Bank of Scot. Grp., PLC*, 783 F.3d 383, 389 (2d Cir. 2015) (quoting *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012)). A proposed amended complaint must therefore contain "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 is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In evaluating futility, courts apply the ordinary Rule 12(b)(6) standard, "accept[ing] all factual allegations in the [proposed amended] complaint as true and draw[ing] all reasonable inferences in the plaintiff's favor." *Chung v. City Univ. of N.Y.*, 605 F. App'x 20, 21 (2d Cir. 2015) (citing *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012)).

DISCUSSION

Plaintiff's motion for leave to amend is granted in part. Leave to amend is denied as to plaintiff's proposed claim that defendants acted imprudently by retaining the Large Value Option and the Causeway/BNY Mellon Option. But leave to amend is granted as to plaintiff's claims that defendants breached their fiduciary duties by retaining the Lazard Emerging Markets Fund and by paying excessive recordkeeping fees. Because plaintiff has pleaded a viable fiduciary-breach claim, she may also proceed with the dependent claims for failure to monitor fiduciaries, co-fiduciary breach, and liability for knowing participation in breaches of fiduciary duty.

I. The Proposed Second Amended Complaint Adequately Pleads Certain Claims

Defendants principally argue that leave to amend should be denied as futile. As explained below, that argument is persuasive as to plaintiff's claims of imprudent retention as to the Large Value Option and Causeway/BNY Mellon Option, but not as to plaintiff's claim of imprudent

retention as to the Lazard Emerging Markets Fund and plaintiff's claim of excessive recordkeeping fees.

A. The Proposed Second Amended Complaint Sufficiently Pleads That Defendants Imprudently Retained the Lazard Emerging Markets Fund, But Not the Large Value Option or Causeway/BNY Mellon Option

Plaintiff's proposed Second Amended Complaint adequately alleges that defendants breached their duty of prudence by retaining the Lazard Emerging Markets Fund as an option for plan participants, but fails to contain adequate allegations pertaining to the Large Value Option or the Causeway/BNY Mellon Option.

ERISA requires fiduciaries to use "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). This duty "is measured according to the objective prudent person standard developed in the common law of trusts." *Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 107–08 (2d Cir. 2021) ("*Sacerdote II*") (citation and quotation marks omitted), *cert. denied*, 142 S. Ct. 1112 (2022). When reviewing fiduciary-breach claims under Federal Rule of Civil Procedure 12(b)(6), courts conduct a "context specific" inquiry that gives "due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022). A court therefore "focuses on a fiduciary's conduct in arriving at an investment decision, not on its results, and asks whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." *Sacerdote II*, 9 F.4th at 107 (citation and quotation marks omitted). A fiduciary's decision to retain an investment option is subject to challenge—just like a decision to offer an investment option in the first place—because "[a]n ERISA fiduciary's investment decisions . . . must account for changed circumstances." *Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv.*

Mgmt. Inc., 712 F.3d 705, 716–17 (2d Cir. 2013) (citation omitted); s*ee, e.g.*, *Patterson v. Morgan Stanley*, No. 16-CV-6568 (RJS), 2019 WL 4934834, at *10 (S.D.N.Y. Oct. 7, 2019); *see also Morrissey v. Curran*, 567 F.2d 546, 549 n.9 (2d Cir. 1977). A "trustee who simply ignores changed circumstances that have increased the risk of loss to the trust's beneficiaries is imprudent." *St. Vincent*, 712 F.3d at 717 (citation omitted).

In the ERISA context, the Second Circuit has counseled "particular care . . . in order to ensure that the complaint alleges nonconclusory factual content raising a plausible inference of misconduct and does not rely on the vantage point of hindsight." *Sacerdote II*, 9 F.4th at 107 (ellipses and alterations omitted) (quoting *St. Vincent*, 712 F.3d at 718). Doing so does not require a plaintiff to make "factual allegations referring *directly* to" a fiduciary's "knowledge, methods, or investigations at the relevant times." *St. Vincent*, 712 F.3d at 718. Instead, a complaint is sufficient when it sets out "circumstantial factual allegations" from which the court "may reasonably 'infer from what is alleged that the [fiduciary's decision-making] process was flawed.'" *Ibid.* (quoting *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009)). This requires plaintiff to "allege facts, accepted as true, showing that a prudent fiduciary in like circumstances would have acted differently." *Id* at 720.

It is "well-established that allegations of poor results alone do not constitute allegations sufficient to state a claim" that a plan breached its fiduciary duties by retaining a fund. *Laboy v. Bd. of Trs. of Bldg. Serv. 32 BJ SRSP Fund*, 513 F. App'x 78, 80 (2d Cir. 2013). For instance, in *Laboy*, the Second Circuit affirmed the dismissal of a claim that a plan breached its fiduciary duties by maintaining an investment option alleged to have "lagged behind comparable funds in its performance" on a one-year, three-year, and five-year basis, explaining that this allegation of past underperformance was "not adequate to permit a plausible inference that the [d]efendants breached

their fiduciary duties." *Id*. at 80–81. In other words, "[m]erely pointing to another investment that has performed better in a five-year snapshot of the lifespan of a fund that is supposed to grow for fifty years does not suffice to plausibly plead an imprudent decision—largely a process-based inquiry—that breaches a fiduciary duty." *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1166 (6th Cir. 2022). Indeed, "any other rule would mean that every actively managed fund with below-average results over the most recent five-year period would create a plausible ERISA violation." *Ibid.*

Nevertheless—as I noted in addressing defendants' motion to dismiss plaintiff's amended complaint—a plaintiff may allege a plausible breach of fiduciary duty based on underperformance relative to a benchmark index if the comparative underperformance is "consistent" and "substantial." *Gonzalez*, 632 F. Supp. 3d at 163; *see Patterson*, 2019 WL 4934834, at *10; *Antoine v. Marsh & McLennan Cos.*, No. 22-CV-6637 (JPC), 2023 WL 6386005, at *10 (S.D.N.Y. Sept. 30, 2023) (same); *Stark v. Keycorp*, No. 20-CV-01254 (PAB), 2021 WL 1758269, at *10 (N.D. Ohio May 4, 2021) (same); *Dorman v. Charles Schwab Corp.*, No. 17-CV-00285 (CW), 2019 WL 580785, at *2, *6 (N.D. Cal. Feb. 8, 2019) (requiring "persistent[]" and "material[]" underperformance). Consistent and substantial underperformance is required because a prudent "fiduciary may—and often does—retain investments through a period of underperformance as part of a long-range investment strategy," *White v. Chevron Corp.*, No. 16-CV-0793 (PJH), 2016 WL 4502808, at *17 (N.D. Cal. Aug. 29, 2016), instead of "reflexively jettison[ing] investment options in favor of the prior year's top performers," *Patterson*, 2019 WL 4934834, at *11. In fact, "[p]recipitously selling a well-constructed portfolio in response to disappointing short-term losses . . . is one of the surest ways to frustrate the long-term growth of a retirement plan." *CommonSpirit*, 37 F.4th at 1166. Permitting plaintiffs to proceed to discovery by pointing to slight or short-term

underperformance relative to an index would allow litigants to impose substantial burdens associated with discovery on plans (and by extension plan participants) without facts that genuinely support a reasonable inference of breach of fiduciary duty. *St. Vincent*, 712 F.3d at 719.

Applying these standards, I found the allegations concerning imprudent retention in plaintiff's Amended Complaint lacking because they did not present "the type of substantial underperformance over a lengthy period that gives rise to a plausible inference that a prudent fiduciary would have removed those funds from the plan's menu of options." *Gonzalez*, 632 F. Supp. 3d at 164. The Amended Complaint had alleged that the Large Value Option underperformed its benchmark on average by 1.03% on a rolling three-year trailing basis and 1.94% on a rolling five-year trailing basis, that the Lazard Emerging Markets Fund underperformed its benchmark on average by 1.86% on a rolling three-year trailing basis and 1.99% on a rolling five-year trailing basis, and that the Causeway/BNY Mellon Option underperformed its benchmark on average by 0.96% on a rolling three-year trailing basis and 0.32% on a rolling five-year trailing basis. *Ibid*. These allegations were deficient, I explained, because plaintiff "offer[ed] calculations based only on three- and five-year trailing averages, without the ten-year data that is a traditional hallmark of viable claims based on underperformance relative to an index," and because "the scope of the underperformance over even these more limited time periods is relatively modest." *Id.* at 163. Plaintiff's allegations in the proposed Second Amended Complaint as to the Causeway/BNY Mellon Option and Large Value Option suffer from the same deficiencies, but the claim against the Lazard Emerging Markets Fund squeaks across the plausibility line.

Causeway/BNY Mellon Option and Large Value Option. As to the Causeway/BNY Mellon Option, the proposed Second Amended Complaint includes only performance data based on rolling

three-year and five-year trailing averages, not the "ten-year data that is [the] traditional hallmark of viable claims based on underperformance relative to an index." *Ibid.* (citing *Patterson*, 2019 WL 4934834, at *10); *see, e.g.*, *Davis v. Salesforce.com, Inc.*, No. 20-CV-01753 (MMC), 2020 WL 5893405, at *4 (N.D. Cal. Oct. 5, 2020); *Dorman*, 2019 WL 580785, at *6; *CommonSpirit*, 37 F.4th at 1166. And plaintiff's allegations cover only a relatively discrete period from the second quarter of 2014 to the third quarter of 2018, with no allegation that the fund performed below its benchmark from the fourth quarter of 2018 through the filing of the proposed Second Amended Complaint in October 2022. *See* Prop. Sec. Am. Compl. ¶¶ 80–82. Plaintiff's allegations as to the Causeway/BNY Mellon Option therefore still fail to allege underperformance over the duration necessary to raise a plausible inference of imprudent retention.

Moreover, the extent of the underperformance alleged as to both the Causeway/BNY Mellon Option and the Large Value Option is again the type of modest underperformance that does not by itself plausibly signal imprudent retention. See *Gonzalez*, 632 F. Supp.3d at 164 (compiling cases concluding that "*substantial* underperformance over a lengthy period" is needed to state an imprudent-retention claim based solely on underperformance) (emphasis added). During the period of the Causeway/BNY Mellon Option's alleged underperformance, plaintiff alleges returns between 0.13% and 1.64% below the fund's benchmark on a five-year annualized returns basis from the first quarter of 2015 to the third quarter of 2018, and between 0.43% and 2.99% below the benchmark on a three-year annualized returns basis from the second quarter of 2014 to the fourth quarter of 2016. Prop. Sec. Am. Compl. ¶¶ 80–82. As to the Large Value Option, for which plaintiff does include ten-year data, plaintiff alleges that—when annualized returns are compared on a ten-year rolling basis—the Large Value Option underperformed relative to the index by amounts from 0.24% to 2.65%, with an average underperformance of 1.17% over

the quarters within the Class Period in which the underperformance relative to the index occurred. *Id.* ¶¶ 71–73.

As the decision dismissing plaintiff's Amended Complaint noted, *Gonzalez*, 632 F. Supp.3d at 164, courts consistently decline to find it plausible that an ERISA plan breached its fiduciary duties simply because it retained a plan that underperformed relative to its benchmark to this modest an extent. *See Patterson*, 2019 WL 4934834, at *11 (holding that performance 1.14% below benchmark was "relatively small and certainly not enough to support a claim for breach of the duty of prudence"); *Bekker v. Neuberger Berman Grp. LLC*, No. 16-CV-6123 (LTS), 2018 WL 4636841, at *2, *7 (S.D.N.Y. Sept. 27, 2018) (underperformance of approximately 4.4% not sufficient to allege a plausible fiduciary-breach claim); *see also, e.g.*, *Cho v. Prudential Ins. Co.*, No. CV-19-19886 (JMV) (SCM), 2021 WL 4438186, at *9 (D.N.J. Sept. 27, 2021) (granting dismissal on the ground that alleged underperformance was not "sufficiently substantial," when "five-year trailing performance had underperformance percentages ranging from .07% to 3.71%" and "ten-year trailing performance reflected underperformance ranging from 1.19% to 2.86%"); *Forman v. TriHealth, Inc.*, 563 F. Supp. 3d 753, 765 (S.D. Ohio 2021) (observing that "[c]ourts have previously held that less than 1% or just over 2% differences in performance between the challenged fund and the alleged benchmark was not sufficient to create a plausible inference of imprudence" and rejecting claims based on underperformance in that range), *aff'd in relevant part*, 40 F.4th 443 (6th Cir. 2022); *Smith v. CommonSpirit Health*, No. 20-CV-95 (DLB) (EBA), 2021 WL 4097052, at *8 (E.D. Ky. Sept. 8, 2021) (dismissing claim premised on 1.58% underperformance over five-year period because such a disparity is "insufficient to plausibly allege imprudence"), *aff'd*, 37 F.4th 1160 (6th Cir. 2022). Such decisions stand in contrast to claims that have gone forward where a challenged fund "*dramatically* underperformed the market," *Karpik v.*

Huntington Bancshares Inc., No. 17-CV-1153 (MHW), 2019 WL 7482134, at *5 (S.D. Ohio Sept. 26, 2019) (emphasis added); *see, e.g.*, *Jacobs v. Verizon Commc'ns, Inc.*, No. 16-CV-1082 (PGG), 2017 WL 8809714, at *9 (S.D.N.Y. Sept. 28, 2017) (holding that plaintiff adequately pleaded duty-of-prudence violation based on ten-year annualized underperformance of 8.63%), or where underperformance was just one of several ingredients of a failure-to-monitor claim, *see, e.g.*, *Falberg v. Goldman Sachs Grp., Inc.*, No. 19-CV-9910 (ER), 2020 WL 3893285, at *9–10 & n.17 (S.D.N.Y. July 9, 2020) (holding that ten-year underperformance of "more than 1.00%" for some proprietary funds and "over 2.00%" for other proprietary funds were sufficient when "plaintiff alleged several other indicia of imprudence," such as comparison of the Plan's treatment of proprietary and non-proprietary funds).

Plaintiff's comparison of the Large Value Option to the Parnassus Endeavor Fund and Hartford Core Equity Fund do not change the equation. These funds were stronger performers in the portion of the Class Period in which the Large Value Option underperformed relative to its benchmark. *See* Prop. Sec. Am. Compl. ¶¶ 71–73. But while identifying "another fund the plan might have invested in[] will often be necessary to show a fund acted imprudently (and to prove damages)," such an allegation "is not by itself sufficient," *CommonSpirit Health*, 37 F.4th at 1166. Instead, because "past performance is no guarantee of future success," *Patterson,* 2019 WL 4934834, at *11, courts consistently reject the suggestion that an ERISA trustee acts imprudently by not replacing an offered fund with the recent top performer against its benchmark. *Ibid.* (noting that "the duty of prudence does not compel ERISA fiduciaries to reflexively jettison investment options in favor of the prior year's top performers"); *CommonSpirit Health*, 37 F.4th at 1166 (similar); *see Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018) ("No authority requires a fiduciary to pick the best performing fund.").

In sum, because prudent fiduciaries often "retain investments through a period of underperformance as part of a long-range investment strategy," *White*, 2016 WL 4502808, at *17, plaintiff does not "raise a plausible inference that a prudent fiduciary would have found [the Causeway/BNY Mellon Option or Large Value Option] to be 'so plainly risky' as to render the investments in [it] imprudent," based solely on modest underperformance relative to an index for a portion of the Class Period. *Patterson*, 2019 WL 4934834, at *10 (citation and alterations omitted). Amending the complaint to include imprudent-retention claims pertaining to these funds would therefore be futile.

Lazard Emerging Markets Fund. Plaintiff's allegations about the Lazard Emerging Markets Fund, though, include just enough additional data to make her imprudent-retention claim plausible. The proposed Second Amended Complaint alleges that the Lazard Emerging Markets Fund underperformed relative to the fund's benchmark on a ten-year rolling retrospective basis for 18 consecutive quarters, with underperformance ranging from 0.54% to 3.20%, and averaging 1.73%, during the period of underperformance. Prop. Sec. Am. Compl. ¶¶ 76–78. Plaintiff thus alleges slightly greater underperformance here than with respect to the other challenged investments—but still the type of limited underperformance relative to a benchmark that is not, standing alone, sufficient to render an imprudent-retention claim plausible. Additional context renders plaintiff's circumstantial basis for claiming imprudent monitoring more plausible, though. Specifically, plaintiff alleges that during 2020 and 2021, the Lazard Emerging Markets Fund was among the worst performing funds in the emerging markets category—ranked between the 82nd and 97th percentile of emerging market funds when measured on a ten-year-returns basis, according to Morningstar's ranking of such funds. *Id.* ¶ 78. While merely alleging that Morningstar gave some other funds a higher ranking would not support a claim of imprudent

retention, *see, e.g., Patterson*, 2019 WL 4934834, at *11, plaintiff's allegation that the Lazard Emerging Markets Fund was among the worst performers in its category for several years makes plaintiff's imprudent-retention claim somewhat stronger than a claim that rests solely on an index comparison and edges the claim across the plausibility line. Amending the complaint to state that claim is therefore not futile.

Defendants' criticisms of plaintiff's comparators do not alter this conclusion. Defendants first claim that the comparator data "represents the exact sort of 'hindsight' allegations" courts have cautioned against. Mem. in Opp'n 16 (Dkt. #54). But plaintiff alleges that its comparator data was readily available to defendants in real time during the Class Period. Prop. Sec. Am. Compl. ¶¶ 74, 79, 83. Thus, plaintiff does not allege that "[d]efendants should have acted differently in hindsight; but rather that [d]efendants were aware of [or should have been aware of] the funds' underperformance at the time and chose to ignore it." *Moler v. Univ. of Md. Med. Sys.*, No. 21-CV-1824 (JRR), 2022 WL 2756290, at *4–5 (D. Md. July 13, 2022); *compare Garcia v. Alticor, Inc.*, No. 20-CV-1078 (PLM), 2021 WL 5537520, at *7 (W.D. Mich. Aug. 9, 2021) (finding that "it is plausible that [d]efendants had access to performance data at various points throughout the relevant period, and [p]laintiff's allegation is that [d]efendants did not adequately consider that information; [and] [i]f this allegation is true, it is a breach of ERISA."), *with Patterson*, 2019 WL 4934834, at *10 (dismissing allegations as improperly based on hindsight because plaintiff relied on "data unavailable to the fiduciaries throughout much of the class period").

Defendants' argument that the proffered alternatives to the Lazard Emerging Markets Fund are "incomparable due to their material differences in investment styles, asset allocation, and geographic focus" is also insufficient to defeat plaintiff's claim at the motion-to-dismiss stage.

Mem. in Opp'n 2. Plaintiff alleges that the American Funds New World Fund and the Fidelity Advisor Emerging Markets Fund are also "emerging markets funds," tied to the same benchmark, and that they are "readily investable." Prop. Sec. Am. Compl. ¶ 76. To be sure, those comparators are categorized by Morningstar as "large growth" and "large blend" funds while the Lazard Emerging Markets Fund is categorized as a "large value" fund. Mem. in Opp'n 22 & n.31. And those comparators also have a somewhat different asset composition, with one investing in some companies in the United States (unlike the Lazard Emerging Markets Fund) and another investing in some companies in the Cayman Islands (again, unlike the Lazard Emerging Markets Fund). *Id.* at 23. But the Court cannot meaningfully assess the comparability of the funds' investment styles merely by relying on the labeling by a third-party. And there are bound to be some differences in asset composition between any fund and its comparators. These more granular inquiries into the suitability of comparators are not generally ripe for resolution at the pleadings stage. *See In re Omnicom ERISA Litig.*, No. 20-CV-4141 (CM), 2021 WL 3292487, at *13 (S.D.N.Y. Aug. 2, 2021) (noting that "the overwhelming trend with district courts in this Circuit is to defer deciding the question of whether two funds are proper comparators until after discovery."); *see also Cunningham v. Cornell Univ.*, No. 16-CV-6525 (PKC), 2017 WL 4358769, at *7 (S.D.N.Y. Sept. 29, 2017) (noting that whether "plaintiff used inappropriate benchmarks to assess the performance of the challenged options raises factual questions that are not properly addressed on a motion to dismiss"), *aff'd*, 86 F.4th 961 (2d Cir. 2023).

Accordingly, the Second Amended Complaint has plausibly pleaded an imprudent-retention claim regarding the Lazard Emerging Markets Fund, but not the Large Value Option and the Causeway/BNY Mellon Option.

B. The Proposed Second Amended Complaint Adequately Pleads a Claim for Excessive Recordkeeping Fees

The proposed Second Amended Complaint adequately states a claim based on excessive recordkeeping fees.

Plaintiff alleges that "similarly sized defined contribution plans" paid fees lower than the Plan every year from 2014 to 2021. Prop. Sec. Am. Compl. ¶¶ 50–58. When the Plan paid its recordkeeper $60 in total recordkeeping fees, comparable plans were paying between $30 to $39. *Id.* ¶¶ 50–54. Even when the Plan reduced these fees to $45 and then to $37, plaintiff alleges that there were still comparable plans paying their respective recordkeepers less. *Id.* ¶¶ 56–58. The proposed Second Amended Complaint alleges that the recordkeeping fees it compares are all "total" fees—taking into account both direct and indirect fees. *See id.* at 14 n.2, ¶ 59. Plaintiff calculated these total fees using "publicly available Summary Plan Descriptions, annual participant fee disclosures and Form 5500 filings." *Id.* ¶ 59. Plaintiff further alleges that the comparator plans received "materially identical" recordkeeping services to those received by the Plan. *Id.* ¶¶ 49, 50. Plaintiff asserts that all large recordkeepers can provide the same recordkeeping services, and any minor variation in the way the services are delivered has no material impact on the recordkeeping fees charged. *Id.* ¶¶ 32–33.

Defendants' arguments as to why these allegations fail to state a claim are unconvincing. Defendants first contend that plaintiff neglects to properly consider the indirect fees paid by the comparator funds. Mem. in Opp'n 11. According to defendants, plaintiff could not possibly have accounted for the indirect fees because they are not reported on the Form 5500s. *Ibid.* But the proposed Second Amended Complaint asserts in no uncertain terms that the fees paid by the comparator plans "include all the disclosed direct compensation paid to the recordkeeper, as well as all indirect compensation." Prop. Sec. Am. Compl. ¶ 59. It alleges that the total fees were

derived not just from the Form 5500s, but also from other publicly available documents such as Summary Plan Descriptions and the annual participant fee disclosures. *Ibid.* The proposed Second Amended Complaint also describes how it accounted for the different structures of indirect fees in calculating total fees. *Ibid.* These allegations, taken as true, are sufficient to survive a motion to dismiss. *See, e.g.*, *Ruilova v. Yale-New Haven Hosp., Inc.*, No. 22-CV-00111 (MPS), 2023 WL 2301962, at *17 (D. Conn. Mar. 1, 2023) (finding it sufficient for plaintiff to have pled the source of data and provided tables with relevant information from the Form 5500 disclosures and the resulting fee calculations). While defendants take issue with the accuracy of plaintiff's fee calculations, *see* Mem. in Opp'n 14 n.13, their challenges "depend[] on calculations and assumptions that are neither easy to make nor obvious from the face of [p]laintiffs' Complaint or the documents embraced therein" and are therefore more appropriately considered at the summary-judgment stage. *Rodriguez v. Hy-Vee, Inc.*, No. 22-CV-72 (SHL) (HCA), 2022 WL 16648825, at *9 (S.D. Iowa Oct. 21, 2022); *see Ruilova*, 2023 WL 2301962, at *17 (declining to consider fee-miscalculation arguments at the motion-to-dismiss stage).

Similarly, defendants have not demonstrated the futility of amendment by raising factual disputes regarding the recordkeeping services provided to the Plan and its comparators. Defendants posit that the Plan may have received "unique additional services" that make plaintiff's cost comparisons inapt. Mem. in Opp'n 13. But the proposed Second Amended Complaint pleads that this is not so: it alleges that all national recordkeepers provide the same basic bundle of recordkeeping services, Prop. Sec. Am. Compl. ¶ 32, that "most recordkeepers only require a plan's participant count and asset level in order to provide a fee quote," *id.* ¶ 41, and that, in fact, the Plan and its comparators received "materially identical" recordkeeping services, *id.* ¶¶ 49, 50.

Challenges to the accuracy of plaintiff's factual claims are not properly resolved at this stage of the case. *See, e.g.*, *Ruilova*, 2023 WL 2301962, at *17.

Defendants suggest that plaintiff's allegations regarding the basket of services received by the Plan and its comparators can be set aside because they are undercut by documents incorporated into the proposed Second Amended Complaint by reference—specifically, the Forms 5500. Mem. in Opp'n 13–14. They argue that the Plan's Forms 5500 include codes for services that are "unusual or out of the ordinary," *id.* at 12, while the "vast majority of the 22 plans [p]laintiff lists" as comparators "do not appear to have received these unique services," *id.* at 13. But plaintiff asserts that there are "multiple ways to complete a Form 5500 with respect to the same services performed for a retirement plan receiving the same services," so that differences in reported service codes do not establish that the Plan and its comparators received materially different offerings. Prop. Sec. Am. Compl. 9 n.1. Accordingly, even if the Forms 5500 are appropriately treated as incorporated into the proposed Second Amended Complaint, they do not by themselves establish the falsity of plaintiff's recordkeeping-service allegations.

In sum, plaintiff adequately alleges that comparable plans paid lower fees than the Plan for the same basket of recordkeeping services. Taking these factual allegations as true, and drawing all reasonable inferences in plaintiff's favor, plaintiff has plausibly alleged that defendants breached their fiduciary duties by failing "to follow a prudent process to ensure that the Plan was paying only reasonable fees." *Id.* ¶ 61.

C. The Proposed Second Amended Complaint Sufficiently Pleads Monitoring, Co-Fiduciary Breach, and Knowing Participation Claims

Defendants do not raise any arguments in opposition to the proposed Second Amended Complaint's failure to monitor, co-fiduciary breach, and knowing participation claims. Because these dependent claims rise or fall with the fiduciary breach claims—and the proposed Second

Amended Complaint adequately pleads fiduciary breach claims—they may also proceed. *See In re Omnicom*, 2021 WL 3292487, at *16 (refusing to dismiss dependent claims where plaintiffs adequately alleged fiduciary duty claims).

II. Amendment Is Not Improper Because of Undue Delay

Defendants only other argument against amendment is a short footnote suggesting undue delay. Mem. in Opp'n 17 n.15. But courts commonly treat arguments raised only in footnotes as inadequately presented, *see, e.g.*, *In re Old Carco*, 809 F. App'x 36, 40 n.1 (2d Cir. 2020) (citing *United States v. Greenfield*, 831 F.3d 106, 118 n.9 (2d Cir. 2016)); *In re Bernard L. Madoff Inv. Sec. LLC*, No. 22-CV-6561 (LGS), 2023 WL 395225, at *5 (S.D.N.Y. Jan. 25, 2023) (citing cases), and typically deny undue-delay-based claims when discovery has not begun. *See, e.g.*, *Olivieri v. Stifel, Nicolaus & Co.*, No. 21-CV-46 (JMA) (ARL), 2023 WL 2740846, at *3 (E.D.N.Y. Mar. 31, 2023); *U.S. Small Bus. Admin. v. Feinsod*, No. 17-CV-3586 (JS) (SIL), 2021 WL 707079, at *6 (E.D.N.Y. Feb. 4, 2021), *report and recommendation adopted*, 2021 WL 695123 (E.D.N.Y. Feb. 23, 2021). Defendants' observation that the latest complaint relies on data that was publicly available when the prior complaint was filed does not justify a different result here. Accordingly, amendment is not improper based on undue delay.

CONCLUSION

For the foregoing reasons, plaintiff's motion for leave to amend is granted in part and denied in part. Leave to amend is denied as to plaintiff's imprudent-retention claims regarding the Large Value Option and Causeway/BNY Mellon Option. Plaintiff may proceed with the imprudent-retention claim regarding the Lazard Emerging Markets Fund, the recordkeeping-fees claim, and the failure-to-monitor, co-fiduciary-breach, and knowing-participation claims. Within 14 days, plaintiff may file a Second Amended Complaint consistent with this Order.

SO ORDERED.

/s/ Rachel Kovner
RACHEL P. KOVNER
United States District Judge

Dated: March 26, 2024
Brooklyn, New York