**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

GENEVA HENDERSON, *et al.*, Plaintiffs, v. EMORY UNIVERSITY, *et al.*, Defendants.	Civil Action No. 1:16-cv-02920-CAP

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

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INTRODUCTION

This is one of twelve lawsuits filed by the same law firm challenging the retirement plans of major universities in the United States. In this case, Plaintiffs allege that Emory University and other defendants (collectively "Emory") breached fiduciary duties under the Employee Retirement Income Security Act ("ERISA") by (i) offering participants in the Emory University Retirement Plan and the Emory Healthcare, Inc. Retirement Savings and Matching Plan (collectively, the "Plans") the opportunity to select certain investment options that were too expensive; (ii) offering participants in the Plans the opportunity to invest in two specific annuity investment options—the TIAA Real Estate Account ("Real Estate Account") and the CREF Stock Account ("Stock Account")—that Plaintiffs claim were imprudent due to poor performance; and (iii) "locking" the Plans into certain investment options. All of Plaintiffs' claims fail as a matter of law.

First, courts routinely have rejected the fundamental premise of Plaintiffs' claims—namely, that ERISA fiduciaries must offer the cheapest possible investment options. Instead, fiduciaries satisfy their duties by offering a broad array of investments with different risks, in different asset classes and with a range of fees, and that provide participants the ability to choose the funds that best suit their personal circumstances. *See Renfro v. Unisys*, 671 F.3d 314, 326-28 (3d Cir.

2011); *Loomis v. Exelon*, 658 F.3d 667, 671 (7th Cir. 2011); *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009); *Tibble v. Edison Int'l* ("*Tibble I*"), 729 F.3d 1110, 1134 (9th Cir. 2013), *vacated on other grounds*, *Tibble v. Edison Int'l* ("*Tibble II*"), 135 S. Ct. 1823 (2015); *White v. Chevron Corp.*, No. 16-cv-0793, 2016 WL 4502808, at *14 (N.D. Cal. Aug. 29, 2016).

Second, courts reject underperformance claims (like those asserted against the Real Estate Account and Stock Account) where a complaint does not allege that the challenged investment was too risky. *See Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt., Inc.* ("*Morgan Stanley*"), 712 F.3d 705, 718 (2d Cir. 2013). The Amended Complaint ("AC") is devoid of such allegations. Instead, Plaintiffs merely identify, in hindsight, other investments that performed better during some years.

Third, the allegation that Emory breached its fiduciary duties by "locking" in TIAA-CREF as a recordkeeper and the Stock Account as an investment option finds no support in the law. ERISA does not prohibit this type of arrangement, and the claim is time-barred in any event.

Finally, the newly-added prohibited transaction claims simply repackage the flawed fiduciary-breach claims. They should be dismissed because the alleged transactions occurred outside ERISA's six-year statute of repose, 29 U.S.C. §

1113(1), and because Plaintiffs have not pled plausible claims under ERISA.

FACTUAL BACKGROUND

I. Section 403(b) Plans.

Section 403(b) plans are retirement savings plans offered by certain not-for-profit organizations, including universities. 26 U.S.C. § 403(b). 403(b) plans are similar to 401(k) plans, but with important differences. 403(b) plans initially could offer only annuities,[1] which provide a stream of monthly payments for life—or for a fixed term of years—depending on the specific contract and individual choices.[2] Congress amended Section 403(b) in 1974 to allow 403(b) plans to offer mutual funds. 26 U.S.C. § 403(b)(7). Other investment vehicles available to 401(k) plans, including "commingled trusts," are not permitted in 403(b) plans. *Id.*

In the typical 401(k) plan, participants must take their account balance at retirement in a lump sum. The participants then need to ensure that they have sufficient funds to last through retirement, *i.e.*, that they do not outlive their retirement nest egg. By contrast, in a typical 403(b) plan, participants can elect to receive their benefits as an annuity by investing in one or more annuity options

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[1] Technical Amendments Act of 1958, Pub. L. No. 85-866, § 23, 72 Stat. 1606 (1958) (codified in IRC § 403(b)).

[2] *See generally* U.S. Securities and Exchange Commission, *Fast Answers: Annuities*, https://www.sec.gov/answers/annuity.htm (last modified Apr. 7, 2011).

offered by the plan, as set forth in the contracts with the plan's annuity providers.[3]

TIAA (formerly TIAA-CREF) was established in 1918 "to provide guaranteed retirement income and life insurance to educators."[4] TIAA was rated the "Best Overall Large Fund Company" in 2012, 2013, 2014, and 2015.[5] TIAA annuities have among the lowest costs in the industry.[6]

II. The Emory Plans.

Emory is a top-ranked private institution recognized internationally for its outstanding liberal arts colleges, graduate and professional schools, and health system. It offers employees a range of benefits, including the opportunity to save for retirement through the Plans, which are defined contribution plans governed by ERISA. (AC ¶ 9). As of December 31, 2014, the Plans had over 40,000 participants and $3.66 billion in assets. (*Id*. ¶ 12). The Plans are funded through employee salary deferrals and employer contributions. (*Id*. ¶ 119). Emory automatically contributes an amount equal to 6% of an employee's regular salary

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[3] *See* TIAA, *Annuities*, https://www.tiaa.org/public/offer/products/annuities.
[4] *See* TIAA, *Who We Are*, https://www.tiaa.org/public/why-tiaa/who-we-are.
[5] *See id*. 69% of TIAA funds and variable annuity accounts "received a[] Morningstar overall rating of 4 or 5 stars (45.33% 4 stars and 24.00% 5 stars), based on risk-adjusted returns as of June 30, 2016." *See* TIAA, *Annuities*, https://www.tiaa.org/public/offer/products/annuities.
[6] *See* TIAA, *Annuities*, https://www.tiaa.org/public/offer/products/annuities/retirement-plan-annuities ("CREF Variable Annuities[] have total net expense ratios ranging from .255% to .715% as of May 1, 2016 versus the industry average variable annuity sub-account total net expense ratio average of 2.14%.").

and provides an additional generous matching contribution.[7]

The Plans offer participants the option to invest in (1) tax-deferred annuities through TIAA; and (2) mutual funds through TIAA, Vanguard, and Fidelity. Each of these vendors makes available a diverse array of investment funds from which participants may choose. Emory discloses, on an annual basis, the investment performance and fees of each investment option available through the Plans.[8]

Annuities. Plan participants may select fixed annuities that pay a guaranteed rate of return or variable annuities with different investment strategies, such as the CREF Money Market Account, the Stock Account, and the Real Estate Account. The Plans presently offer eleven TIAA fixed and variable annuity investment options. (*See* Exs. 9 & 10 at 34-35, 37). TIAA requires that the Plans offer certain annuity options—including the Stock Account—if the Plans offer the fixed annuity to participants, but participants are not required to invest in any of them. (AC ¶¶

[7] *See* http://www.hr.emory.edu/eu/docs/spd-403b.pdf.

[8] (*See* Exs. 1-10, 2012-16 Participant Disclosure Notices). Plaintiffs cite some but not all of the Participant Disclosure Notices, which are issued to participants pursuant to Department of Labor regulations. *See* 29 C.F.R. § 2550.404a-5. When ruling on a Rule 12(b)(6) motion, the Court can consider documents incorporated into the complaint by reference, those central to a plaintiff's claims, and matters subject to judicial notice, such as public records. *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1276-78(11th Cir. 1999); *Brooks v. Blue Cross & Blue Shield of Fla.*, 116 F.3d 1364, 1369 (11th Cir. 1997); *Taylor v. NCR Corp.*, No. 1:14-cv-2217-WSD, 2015 WL 5603040, at *5 (N.D. Ga. Sept. 23, 2015).

97, 120). The variable annuity investment options offered in the Plans charge investment fees of between 0.29% and 0.87%. (*See* Exs. 9 & 10 at 34-35, 37).

Mutual Funds. Presently, the Plans offer 100 mutual funds to those participants who do not want annuities, including both actively managed mutual funds and lower-cost index funds.[9] These funds cover a broad range of asset classes, investment styles, and strategies—*e.g.*, fixed income, balanced, growth, large-cap, domestic, international, target date, and others. (*See generally* Exs. 9 & 10). The mutual fund options available to participants span the risk/return spectrum and offer participants a range of fees across various share classes. For instance, the Plans offer several index funds with expense ratios[10] less than 10 basis points—*i.e.*, under 0.10%, including the Fidelity Spartan Total Market Index, Spartan 500 Index Fund, and Spartan Extended Market Index Fund, all with an

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[9] Index funds "do not make any independent investment choices but simply track a designated portfolio such as the Standard & Poor's 500 Index and have features that discourage turnover." *Loomis*, 658 F.3d at 669-70. For actively managed funds, "the fund's investment advisers try to find and buy underpriced securities while selling ones that the advisers think are overvalued[] and to allow rapid turnover both in the funds' holdings and the participants' investments." *Id*. at 170.

[10] Mutual funds charge shareholders an annual fee (the "expense ratio"), expressed as a percentage of fund assets, to cover expenses such as management and administrative fees. Mutual funds may offer separate "share classes" with a range of expense ratios, which are often expressed as "basis points." "A basis point equals one-hundredth of 1 percent (0.01 percent), so 100 basis points =1 percentage point. When applied to $1.00, 1 basis point equals $0.0001; 100 basis points equals one cent ($0.01)." *See* Investment Company Institute, *2016 Investment Company Fact Book*, http://www.icifactbook.org/ch5/16_fb_ch5.

expense ratio of 0.07%. (*See*, *e.g.*, Ex. 9 & 10 at 10-12).

The Plans also offer a suite of passively managed, age-based "target date" funds (with expense ratios as low as 0.16%) that adjust their stock and bond holdings (and risk profile) over time as the investor gets closer to retirement.[11] Participants who want actively managed or specialized funds have the option to invest in those funds if they so choose. And participants have access through a self-directed brokerage window to thousands of other mutual funds.[12]

III. The Plans' Recordkeeping And Administrative Expenses.

There are specific costs associated with administering a 403(b) plan, both at the participant and plan levels, including maintaining account records; processing contributions, rollovers, and transfers; generating reports and account statements; executing fund transfers and exchanges; and mailing participant communications. (*See* AC ¶ 57). For the Plans, recordkeeping also includes personalized on-site investment advice, based on each participant's financial circumstances, risk tolerance and life plans. (*Id.*) These services are included as part of the investment offerings by each vendor. Thus, participants pay a single fee (the expense ratio) based on the investment options they select for a bundle of all of these services. Participants are free to choose the investment options and associated fees they

[11] (*See* Exs. 9 & 10 at 24-25).
[12] (*See id.* at 5, 31).

prefer, depending on their individual risk/reward profiles, their investment horizons, their preference for active or passive management, and other factors.

ARGUMENT

I. Plaintiffs' Prudence Claims Fail As A Matter Of Law.

A claim of imprudence requires Plaintiffs to allege facts showing that the fiduciary failed to act "with the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use." *Tibble II*, 135 S. Ct. at 1828; 29 U.S.C. § 1104(a)(1)(B).[13] "When evaluating an alleged breach of fiduciary duty under ERISA, courts use an objective standard, focusing on whether the fiduciary employed appropriate methods to reach an investment decision." *New Orleans Emp'rs Int'l Longshoremen's Ass'n Pension Fund v. Mercer Inv. Consultants*, 635 F. Supp. 2d 1351, 1372 (N.D. Ga. 2009).

A. Plaintiffs Fail To State A Plausible Claim That The Plans' Investment Management Fees Were Excessive (Count V).

Plaintiffs' contention that the Plans had excessive investment management fees is based on three flawed theories: (1) the Plans were required to offer only low cost, passively managed funds; (2) the Plans included too *many* investments;

[13] Dismissal is warranted when a complaint fails to allege facts sufficient to establish each element of a claim. To survive dismissal, a complaint must plead sufficient factual matter to render the claims plausible, and the claims must rise above those that are "speculative" or "conceivable." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

and (3) the variable annuity accounts included unnecessary "layers" of fees. (*E.g.*, AC ¶¶ 140-46, 169-79, 274-87). However, Plaintiffs' excessive fees claim ultimately founders on the fact that the Plans' investment management fees are entirely consistent with those approved by every court to consider similar claims.

1. The Plans' Investment Management Fees Fall Within The Range That Courts Have Held To Be Prudent.

ERISA does not require fiduciaries to choose the least expensive investment option. *See, e.g.*, *Hecker*, 556 F.3d at 586 ("nothing in ERISA requires [a] fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)"); *Tibble I*, 729 F.3d at 1135 (rejecting idea that fiduciary must offer lowest-cost "wholesale" or "institutional" funds). As one court explained in dismissing similar claims:

> Fiduciaries have latitude to value investment features other than price (and indeed, are required to do so), as recognized by the courts. In particular where, as here, a plan offers a diversified array of investment options, the fact that some other funds might offer lower expense ratios is not relevant, as ERISA does not require fiduciaries to scour the market to find and offer the cheapest possible funds (which might, of course, be plagued by other problems).

White, 2016 WL 4502808, at *10 (citations and quotations omitted).

Rather, fiduciaries satisfy their duties by offering a diverse array of investment options with a range of fees. For example, the Third Circuit affirmed the dismissal of "excessive fee" claims where the plan offered 73 investment

options with expense ratios ranging from 0.10% to 1.21% because the duty of prudence simply requires offering "participants meaningful choices about how to invest their retirement savings" and a "reasonable mix and range of investment options." *Renfro*, 671 F.3d at 327-28. The Seventh Circuit reached the same conclusion in *Hecker*, where the plan offered funds with expense ratios ranging from 0.07% to "just over 1%," even though other funds with lower fees might have been available. 556 F.3d at 586; *accord Loomis*, 658 F.3d at 669-70, 673-74 (endorsing an investment lineup with expense ratios ranging from 0.03% to 0.96%). The Ninth Circuit followed suit, approving a plan that offered mutual funds with expense ratios ranging from 0.03% to 2.0%. *Tibble I*, 729 F.3d at 1135. Recently, a district court dismissed similar where the investment options had fees ranging from 0.05% to 1.24%. *White*, 2016 WL 4502808, at **11-12.

Here, from 2012 to 2016, the Plans' investment options had expense ratios between 0.07% and 1.41%. (Exs. 1-10). These fees fall squarely within the range that *Hecker*, *Loomis*, *Renfro* and *Tibble* held reasonable as a matter of law.[14] And

[14] The contention that Emory breached fiduciary duties by offering retail share classes of mutual funds when less expensive institutional share classes were available is likewise deficient. (AC ¶¶ 176-79, 274-87). Courts soundly reject the claim "that the mere inclusion of a fund with an expense ratio that is higher than that of the lowest share class violates the duty of prudence." *White*, 2016 WL 4502808, at *11; *accord Loomis*, 658 F.3d at 671-72; *Hecker*, 556 F.3d at 586; *Renfro*, 671 F.3d at 326-28.

the Plans' expense ratios are consistent with those in 403(b) plans that Plaintiffs tout in the AC as being prudently managed. For example, the average expense ratios for the Plans' investment options from 2012 to 2016 were 0.46-0.49%. (Exs. 1-10). These averages, and the range of fees, fit squarely within those in 2016 of CalTech (range 0.04-1.01%; average 0.47%), Loyola (range 0.04-1.10%; average 0.54%), Pepperdine (range 0.05-1.13%; average 0.55%) and Purdue (range 0.04-1.10%; average 0.32%).[15] (*See* AC ¶¶ 102-06).

Finally, there is no legal support for Plaintiffs' assertion that offering too many investments is imprudent. Rather, the opposite is true: ERISA "encourages [plan] sponsors to allow more choice to participants." *Loomis*, 658 F.3d at 673.

2. Plaintiffs Cannot State A Claim For Imprudence Based On The Use Of Actively Managed Funds.

Plaintiffs assert that Emory should have offered only passively managed index funds (AC ¶¶ 204-08, 217), but fiduciaries are not required "to include any particular mix of investment vehicles in their plan." *Hecker*, 556 F.3d at 586.

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[15] *See Plan and Investment Notice,* TIAA, https://www.tiaa.org/public/pdf/obiee/101205_Plan_Investment_Notice.pdf (**CalTech)**; *Fund Performance and Fees*, TRANSAMERICA, https://fp.trsretire.com/PublicFP/fpClient.jsp?c=TT069304&a= 00001&l=TDA (**Loyola Marymount)**; *Retirement Plan Quarterly Investment Review*, TRANSAMERICA, https://www.trsretire.com/webportal/pepperdine/page.html? page_0 (follow "Investment Review – 3/31/2016") (**Pepperdine)**; *Investment Options*, Fidelity, https://nb.fidelity.com/public/nb/purduenonexempt/planoptions/plandetails?planId=84808 (**Purdue)**.

Moreover, the Plans' participants could choose to invest in low-cost passively managed index funds. (*See* Exs. 9 & 10 at 10-12). In other words, the Plans' fiduciaries "offered participants a menu that includes high-expense, high-risk, and potentially high-return funds, together with low-expense index funds that track the market, and low-expense, low-risk, modest-return bond funds. [They have] left choice to the people who have the most interest in the outcome, and [they] cannot be faulted for doing this." *Loomis*, 658 F.3d at 673-74.[16]

3. Plaintiffs' Fee "Layering" Claim Fails As A Matter of Law.

Plaintiffs allege that the annuities offered in the Plans had "multiple layers" of fees (AC ¶¶ 139-46, 278), yet do not claim that the *overall* fees charged on the annuities were excessive, nor could they. The Aon Hewitt study Plaintiffs cite states that the average fee on variable annuities held by 403(b) plans is 2.25%.[17] By contrast, the CREF variable annuity accounts offered in the Plans have expense

[16] Plaintiffs also contend that the Plans' "Statement of Investment Objectives, Policies, and Guidelines" (the "IPS") mandates the use of "passively managed investment options . . . in efficient markets such as large capitalization U.S. stocks," (AC ¶ 202), and that the "continued retention" of the Stock Account and (presumably) other actively-managed large cap funds violates the IPS. (*Id.* ¶ 228, 281.) However, the IPS states that "[p]assive, index fund mutual funds may be used in markets considered efficient." (Ex. 11 at 6). It does not require the Plans' fiduciaries to offer only passively-managed index funds. And ERISA "encourages [plan] sponsors to allow more choice to participants." *Loomis*, 658 F.3d at 673.

[17] *See* AonHewitt, *How 403(b) Plans Are Wasting Nearly $10 Billion Annually, and What Can Be Done to Fix It* (Jan. 2016), https://retirementandinvestmentblog.aon.com/getattachment/36ff81a4-db35-4bc0-aac1-1685d2a64078 (*See* AC ¶ 114).

ratios ranging from 0.29% to 0.87%, (Exs. 9 & 10 at 34-35, 37), well *below* the average across all 403(b) plans. These numbers defeat any excessive fees claim relating to the annuity products. *E.g.*, *White*, 2016 WL 4502808, at *10.

B. Plaintiffs Fail To Plausibly Allege That Defendants Imprudently Retained Underperforming Funds (Count V).

According to Plaintiffs, two of the Plans' 100-plus investment options were imprudent due to "underperformance": the Stock Account and Real Estate Account. (*E.g.*, AC ¶¶ 282-83). Plaintiffs also allege that stable value funds would have been "prudent alternatives" to the TIAA Traditional Annuity. (*Id.* ¶¶ 128, 138, 250). But a fiduciary breach claim turns on the *process* fiduciaries used to select a particular investment, not how that investment performed. *E.g.*, *Morgan Stanley*, 712 F.3d at 718. Thus, to state a claim, Plaintiffs must allege facts that suggest the investment decision-making process was deficient, and that a prudent process would have yielded a different result. *See* 29 U.S.C. § 1104(a)(1)(B); *Morgan Stanley*, 712 F.3d at 718 (plaintiff must allege "facts that, if proved, would show that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident").

The AC contains no allegations from which the Court could plausibly find that Emory's investment selection and monitoring processes were deficient. Instead, Plaintiffs point to the allegedly "poor" performance of the two selected

funds, but "underperformance" alone fails to state a claim. *Morgan Stanley*, 712 F.3d at 723 ("As we have explained, an allegation that an investment's price dropped, even precipitously, does not alone suffice to state a claim under ERISA."); *White*, 2016 WL 4502808, at *17 ("Poor performance, standing alone, is not sufficient to create a reasonable inference that [Defendants] failed to conduct an adequate investigation—either when the investment was selected or as its underperformance emerged[.]"). Plaintiffs also aver that "underperformance" *must* mean Emory did not follow a prudent process, (AC ¶ 118), but this is the type of speculative allegation rejected by *Iqbal* and *Twombly*. In any event, Plaintiffs' challenge of just *two* funds underscores that the fiduciary process is working.[18]

1. CREF Stock Account.

Plaintiffs allege, in hindsight, that the Stock Account underperformed in comparison to its benchmark, (AC ¶ 220), but do not compare the Stock Account to its *actual* benchmark. The Stock Account's prospectus states that "the CREF

[18] Plaintiffs allege that 60% of the Plans' funds underperformed their benchmark and that this "fact" is evidence of an imprudent process. (AC ¶ 280). This is wrong for at least two reasons. First, Plaintiffs' analysis includes index funds; net of fees, index funds always underperform the index against which they are benchmarked because the index itself does not have fees. Second, in the marketplace generally, more than 70% of actively managed funds underperform their benchmark. (*See* http://mutualfunds.com/ index-funds/do-mutual-fund-benchmarks-matter/). In other words, the Plans' investments performed better on average than those in the market as a whole, which supports the conclusion that Emory followed a prudent process.

Stock Account composite index consisted of: 70.0% Russell 3000® Index (domestic equities) and 30.0% MSCI ACWI ex-USA IMI (foreign equities)."[19] Instead, Plaintiffs compare the Stock Account to one *part* of the benchmark: the Russell 3000 Index holding domestic equities. In fact, the Stock Account's performance has tracked its benchmark:

	Total Return		Average Annual Total Return[3]				
	3 Months	YTD	1 Year	3 Years	5 Years	10 Years	Since Inception
CREF Stock Account	1.51%	1.60%	-2.60%	7.86%	7.71%	5.50%	9.69%
CREF Composite Benchmark	1.65%	2.27%	-1.50%	8.25%	8.18%	5.71%	-

Moreover, "underperformance" does not equal "imprudence." Plaintiffs do not allege that the Stock Account was too risky, or even that the Russell 3000 earned greater returns for the same level of risk. Absent such allegations, the mere fact that one investment outperformed another fails to state a claim of imprudence. *See Morgan Stanley*, 712 F.3d at 722 ("the Amended Complaint offers no insight into how risky those unspecified investments became relative to their price, nor does it allege any facts suggesting that a prudent investor at the time would have viewed this unspecified risk as high enough to render the investments imprudent.").

[19] *See* TIAA, *Retirement Plan Variable Annuities: CREF Accounts Prospectus*, 62 (May 1, 2016) http://www.tiaa.org/public/prospectuses/cref_prospectus.pdf?fundclass=RPVA.

2. TIAA Real Estate Account.

Plaintiffs' contention that the Real Estate Account underperformed derives from an even more egregious fund comparison. (*See* AC ¶¶ 236-41 & charts). First, the Real Estate Account is not a mutual fund; it is a separate account available *exclusively* to participants invested in TIAA variable annuities (which contain specific annuity benefit options, death benefits, and other features).[20] By contrast, Plaintiffs' chosen comparator—the Vanguard REIT Index—*is* a mutual fund that was *not* available through a TIAA annuity. The performance of the REIT Index is thus irrelevant as a matter of law. *Tibble I*, 729 F.3d at 1134 (rejecting comparison between separate account and mutual fund because mutual a fund has "a variety of unique regulatory and transparency features that make it an apples-to-oranges comparison to judge them against [plaintiff's] suggested options.").

Second, Plaintiffs do not allege that the Real Estate Account was so risky as to be imprudent, or even that the REIT Index earned greater returns for the same level of risk. *See Morgan Stanley*, 712 F.3d at 722. Third, the performance history of the two funds makes Plaintiffs' claims implausible. The annual performance history of the Real Estate Account and the REIT Index is reflected below:

[20] *See* TIAA, *TIAA Real Estate Account Prospectus*, 12, 14 (May 1, 2016) https://www.tiaa.org/public/pdf/realestate_prosp.pdf (stating "TIAA offers the Account as a variable option for the annuity contracts listed on the cover page of this prospectus" and describing benefit options).

Fund	2010	2011	2012	2013	2014	2015
TIAA Real Estate Account[21]	13.29	12.99	10.06	9.65	12.22	8.16
Vanguard REIT Index[22]	28.56	8.70	17.65	2.48	30.28	2.45
Difference	-15.27	4.29	-7.59	7.17	-18.06	5.71

As shown, over the last six years, the Real Estate Account has outperformed the REIT Index three times and underperformed three times. If the Plans switched investment options based on short-term underperformance, each year they would switch into an investment that underperformed the following year. That is not what ERISA requires or participants want. *White*, 2016 WL 4502808, at *17 ("A fiduciary may—and often does—retain investments through a period of underperformance as part of a long-range investment strategy.") (Citation omitted); *see also Jenkins v. Yager*, 444 F.3d 916, 926 (7th Cir. 2006) (three consecutive years of losses alone "is not evidence that [defendant] violated his fiduciary duty").

3. The TIAA Traditional Annuity.

Plaintiffs allege that stable value funds are "prudent alternatives" to the Traditional Annuity. (AC ¶¶ 128, 138, 250). However, the Traditional Annuity significantly outperformed stable value products during the relevant time period.

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[21] *See* TIAA, *TIAA Real Estate Account Prospectus* (May 1, 2016), https://www.tiaa.org/ public/pdf/realestate_prosp.pdf, at 11.
[22] *See* Vanguard, *Vanguard REIT Index Fund Prospectus* (May 25, 2016), https://www.vanguard.com/pub/Pdf/i3123.pdf, at 3.

For example, the Traditional Annuity had returns in excess of 4% over the last 1, 3 5 and 10 years.[23] By comparison, the average stable value fund returns were under 2% over the last 1, 3, and 5 years and under 3% for the last 10 years.[24] Plaintiffs do not allege that there was a stable value annuity option that was less risky or better performing than the Traditional Annuity. This claim fails as a matter of law. *See White*, 2016 WL 4502808, at **5-8 (dismissing breach of fiduciary duty claim alleging that fiduciaries acted imprudently by selecting a money market fund instead of a stable value fund as a capital preservation option).

C. Plaintiffs' Claim That The Plans Paid Excessive Administrative Fees (Count III) Fails As A Matter Of Law.

Plaintiffs do not complain about additional fees beyond the expense ratios of the mutual funds. Instead, Plaintiffs complain that some of the fund managers use the fees they are paid (*i.e.*, the expense ratios) to cover recordkeeping, personalized advice, and other services. Plaintiffs raise three primary allegations to support their claim that Emory caused the Plans' participants to pay "unreasonable" recordkeeping fees: (1) Emory should have negotiated a per-participant fee rather

[23] *See* https://www.tiaa.org/public/investment-performance/tiaatraditional/profile?ticker=47933632.

[24] *See* Galliard, *How Do Stable Value Funds Compare with Money Market Funds*, www.galliard.com/LiteratureRetrieve.aspx?ID=66271. The Hueler Index is a compilation of 15 to 25 stable value funds offered by various financial institutions. *See* The Hueler Analytics Pooled Fund Comparative Universe, HUELER COMPANIES, https://www.hueler.com/stable-value-pooled-fund-data.asp.

than paying recordkeeping costs through the investment expense ratios; (2) the asset-based fees paid by participants were too high compared to Plaintiffs' arbitrary benchmark; and (3) the failure to consolidate to a single recordkeeper resulted in excessive fees. (AC ¶¶ 160-62, 262-64). None of these allegations states a claim for breach of fiduciary duty.

1. "Revenue Sharing" Is A Common And Accepted Practice.

Paying recordkeeping costs through the expense ratios—sometimes called "revenue sharing"—is a common industry practice. *Hecker*, 556 F.3d at 585; *White*, 2016 WL 4502808, at *14. With this type of asset-based fee arrangement, recordkeeping fees decrease when plan assets decrease, whereas a per-participant fee remains fixed. As the Seventh Circuit explained in dismissing similar claims:

> [I]t isn't clear to us why participants would view a [flat] fee as a gain. A flat-fee structure might be beneficial for participants with the largest balances, but, for younger employees and others with small investment balances, a [flat] fee could work out to more, per dollar under management, than a fee between 0.03% and 0.96% of the account balance.

Loomis, 658 F.3d at 672. Other courts agree, as long as the range of fees is reasonable. *Tibble I*, 729 F.3d at 1135; *Renfro*, 671 F.3d at 327-28; *Hecker*, 556 F.3d at 586.

2. ERISA Does Not Require Fiduciaries To Utilize A Single Recordkeeper Or Solicit Recordkeeping Bids.

Plaintiffs suggest that the Plans should have utilized a single vendor for all recordkeeping services, instead of allowing each vendor to recordkeep its own products, and that such an arrangement would have lowered recordkeeping fees. (AC ¶ 264). But Plaintiffs do not allege that one vendor would have been willing or able to recordkeep all of the mutual funds and annuity investments in the Plans, or could have provided competent advice about all of the investment options. On the other hand, it is entirely reasonable to conclude that Fidelity, TIAA and Vanguard are best equipped to keep the records for their own products. Regardless, nothing in ERISA imposes the "consolidation" Plaintiffs advocate.

Plaintiffs' attempt to mandate a competitive bidding process for vendor services is also without merit. (AC ¶¶ 165-66, 262). As in *White*, "the allegation that the Plan[s'] fiduciaries were required to solicit competitive bids on a regular basis has no legal foundation." *White*, 2016 WL 4502808, at *14. "[N]othing in ERISA compels periodic competitive bidding." *Id.*

D. Plaintiffs' "Locking In" Claim (Count I) Fails As A Matter Of Law And Is Time-Barred.

Plaintiffs allege that Emory "shackled the Plans" with the Stock Account and TIAA recordkeeping services in violation of ERISA because (1) the Stock

Account is an imprudent investment; and (2) the Plans could not engage "alternative recordkeepers who could provide superior services at a lower cost." (AC ¶¶ 250-51). These claims fail as a matter of law because Plaintiffs do not plausibly allege that Emory followed an imprudent process for selecting the Stock Account or that the Stock Account itself is imprudent, and fiduciaries are not liable for investment losses—even in the face of a deficient process—if the investments are "objectively prudent." *Renfro*, 671 F.3d at 322; *Fink v. Nat'l Sav. & Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part) (a fiduciary who fails to investigate investment decisions is not liable if he "happened—through prayer, astrology or just blind luck—to make . . . objectively prudent investments"). As discussed *supra*, Plaintiffs contend that the Stock Account is "imprudent" based solely on a hindsight allegation that it "underperformed" an incorrect benchmark. In short, Plaintiffs have not plausibly pled that the Stock Account is anything but an objectively prudent investment.

Thus, Plaintiffs fail to state a claim that Emory breached any duty by agreeing to make the Stock Account a mandatory investment. Plaintiffs' allegations that the Plans were "locked" into utilizing TIAA as a recordkeeper fails for similar reasons: Plaintiffs do not plausibly allege that recordkeeping fees were excessive in light of the services TIAA offered, much less identify with any

specificity the services offered or the fees that other providers would charge for comparable services. *White*, 2016 WL 4502808, at *14-15.

Plaintiffs' "locking" claims also are time-barred because they challenge actions that occurred more than six years prior to the filing of the complaint. A claim is properly dismissed under Rule 12(b)(6) if it is clear that the claim is barred by the relevant statute of repose. *E.g.*, *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980) ("If the running of the statute is apparent on the face of the complaint, the defense may be raised by a motion to dismiss."). ERISA § 413(1)(A) provides a six-year statute of repose for fiduciary breach and prohibited transaction claims: "No action may be commenced . . . [more than] six years after (A) the date of the last action which constituted a part of the breach[.]" 29 U.S.C. § 1113(1)(A). Section 413(A)'s limitations period begins running "when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted."[25] *David v. Alphin*, 704 F.3d 327, 339 (4th Cir. 2013).

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[25] Plaintiffs may argue that *Tibble II* saves their claims, but *Tibble II* is inapposite. *Tibble II* rejected the Ninth Circuit's conclusion that ERISA's statute of repose bars a fiduciary breach claim that challenged investments which were added to a plan more than six years prior to filing the complaint, reasoning that "a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones." 135 S. Ct. at 1828-29. "In such a case, so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely." *Id.* at 1829. The alleged breach here, however, is not a failure of the duty to monitor, but instead agreeing to a contract that "locked in" the Stock Account.

Here, Plaintiffs contend that Emory breached its fiduciary duties by "committ[ing] the Plans to an imprudent arrangement" in which "certain investments could not be removed" and "prevented the Plans from using alternative recordkeepers." (AC ¶ 250). This conduct, however, occurred more than six years before the filing of the Complaint. The annual Forms 5500 for the Plans confirms that TIAA-CREF has provided services to the Plans and managed Plan investment options, including the Stock Account, since at least 2009. (*See* Exs. 12 & 13 at 27-28). Any "locking in" thus occurred more than six years ago, and Plaintiffs' claim is time-barred. *David*, 704 F.3d at 340.

II. The Prohibited Transaction Claims Fail.

Plaintiffs' "prohibited transaction" claims simply repackage their breach of fiduciary duty claims. Count II repeats the allegation in Count I that Emory "locked in" the Stock Account as an investment option and avers this was a prohibited transaction under 29 U.S.C. § 1106(a). (AC ¶ 256).[26] Counts IV and VI, in turn, piggyback on the excessive fee claims in Counts III and V and allege that the payment of such fees also constituted prohibited transactions. (*Id*. ¶¶ 268-

[26] Section 1106(a)(1) prohibits a fiduciary from knowingly causing a plan to engage in certain transactions with a "party in interest," including a sale or exchange of property (subsection (A)); furnishing of goods, services, or facilities (subsection (C)); or "transfer to, or use by or for the benefit of a party interest, of any assets of the plan" (subsection (D)). A "party in interest" is defined in 29 U.S.C. § 1002(14)(B) to include entities providing services to a plan.

72, 288-92). These claims fail as a matter of law.

A. The Prohibited Transaction Claims Are Time-Barred.

ERISA's six-year statute of repose also applies to prohibited transaction claims. As noted, the relevant limitations period begins running "when a specific event occurs." *David*, 704 F.3d at 339. Plaintiffs are explicit about the "specific event" (*i.e.*, the "transaction") they claim is prohibited. In Count II, it is "allowing the Plans to be locked into an unreasonable arrangement" with TIAA-CREF that required the Plans to include the Stock Account. (AC ¶ 256). In Count IV, the "transaction" is "causing the Plans to use TIAA-CREF, Fidelity, and Vanguard as the Plans' recordkeepers," (*Id.* ¶ 270), and in Count VI it is "placing investment options in the Plans in investment options [sic] managed by TIAA-CREF, Fidelity, and Vanguard." (*Id.* ¶ 290).

Once again, the 2009 Forms 5500 for the Plans establish that the challenged transactions occurred more than six years before Plaintiffs filed suit. (Exs. 12 & 13 at 27-28 (stating that Fidelity, TIAA-CREF, and Vanguard (i) had been engaged to "assist in the administration of the Plan," (ii) "serve as the Custodians for the Plan," and (iii) would "receive all contributions made under the Plan, hold Plan assets, pay benefits as directed by the Plan Administrator," as well as "serve as intermediaries for all asset purchases and redemptions")).

Plaintiffs try to overcome this barrier by invoking a "continuing violation" theory. (*See*, *e.g*., AC ¶ 256). However, courts have uniformly held that the continuing violation theory does not apply to prohibited transaction claims, which are based on a discrete transaction. *See*, *e.g*., *David v. Alphin*, 817 F. Supp. 2d 764, 778 (W.D.N.C. Sept. 22, 2011), *aff'd*, 704 F.3d 327 (4th Cir. 2013); *Abbott v. Lockheed Martin Corp*., No. 06-cv-0701-MJR, 2009 WL 839099, at *6 (S.D. Ill. Mar. 31, 2009); *Kanawi v. Bechtel Corp*., 590 F. Supp. 2d 1213, 1225 (N.D. Cal. 2008).[27] As the Fourth Circuit explained in *David*, "the common understanding of the word 'transaction' implies an affirmative act is required." 704 F.3d at 340. Thus, "a decision to continue certain investments, or a defendant's failure to act, cannot constitute a 'transaction' for purposes of section 406(a) or 406(b) [ERISA's prohibited transaction provisions]." *Id.*; *see also Wright v. Oregon Metallurgical Corp*., 360 F.3d 1090, 1101 (9th Cir. 2004) (decision of fiduciaries to continue holding employer stock was not a "transaction" under Section 1106(a)(1)). The transactions about which Plaintiffs complain occurred more than six years before the filing of the complaint, and their Section 1106(a) claims are time-barred.

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[27] In *Watson v. Paul Revere Life Ins. Co*., No. 11-21492-CIV, 2011 WL 5025120, at *5 (S.D. Fla. Oct. 21, 2011), the court noted that the Eleventh Circuit has not decided whether the continuing violation theory applies to ERISA claims, but went on to observe that "several Circuit Courts have declined to apply a theory of continuing violation in the context of ERISA claims."

B. Plaintiffs Do Not Plausibly Allege Prohibited Transactions In Violation Of Section 1106(a)(1).

The prohibited transaction counts suffer from a host of other flaws, each of which is sufficient to warrant dismissal. *First*, the allegation in Count II that Emory committed a prohibited transaction by agreeing to make the Stock Account a mandatory investment option in the Plans suffers from the same fatal defect as Count I: ERISA does not prohibit such an arrangement. In *Hecker*, the Seventh Circuit rejected a claim that fiduciaries acted imprudently by agreeing to a "bundled" arrangement with Fidelity requiring that *only* Fidelity mutual funds would be available to participants. 556 F.3d at 586-87. The court found "no statute or regulation prohibiting a fiduciary from selecting funds from one management company." *Id*. at 586. If it was permissible for Deere to retain Fidelity as recordkeeper on the condition that *only* Fidelity mutual funds could be offered, surely it cannot be a violation for Emory to agree that the Stock Account, a fund sponsored by the TIAA-CREF, must be available in the Plans' lineup. Plaintiffs point to no legal authority supporting their position that this arrangement, which is common in the retirement plan industry, is a prohibited transaction.[28]

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[28] Plaintiffs' claim in Count I that Emory breached a fiduciary duty by "locking" the Stock Account into the Plans fails for this same, additional reason.

Second, Counts IV and VI, which allege that the payment of recordkeeping and investment fees is a prohibited transaction, fail as a matter of law because ERISA contains an exemption that expressly *permits* such payments. In particular, 29 U.S.C. § 1108(b)(2) exempts arrangements for plan services so long as no more than "reasonable compensation" is paid. This exemption is essential to the operation of plans because, without it, any entity providing services to a plan would automatically violate ERISA's prohibited transaction rules. And it cannot be that a participant can state a claim merely by alleging that a plan paid fees to the plan's service providers.

Emory demonstrated that the recordkeeping and investment fees paid by the Plans' participants fall in the range courts have found to be prudent, i.e. "reasonable." *See* Section I.A.1, *supra*. This claim therefore fails as a matter of law. *Leber v. Citigroup, Inc.*, No. 07 Civ. 9329(SHS), 2010 WL 935442, at *10 (S.D.N.Y. Mar. 16, 2010) (if a "complaint does not allege any basis for presuming that a defendant's conduct fell outside a statutory exemption . . . it is deficient."); *Mehling v. N.Y. Life Ins.*, 163 F. Supp. 2d 502, 510-11 (E.D. Pa. 2001) (dismissing prohibited transaction claims where the conditions of an exemption were clearly satisfied). Where, as here, there is no plausible claim that fees were unreasonable,

and Plaintiffs allege no facts that would take their prohibited transaction claims out of the safe harbor of a statutory exemption, the claims should be dismissed.

Third, Plaintiffs' allegation in Count VI that Emory violated Sections 1106(a)(1)(A) and (C) by causing the Plans to invest in funds managed by TIAA, Fidelity, and Vanguard cannot state a viable claim. Those sections prohibit the sale or exchange or property, or the furnishing of goods and services, between a plan and "party-in-interest." But ERISA specifically excludes mutual funds and their advisers from the definition of a party-in-interest. 29 U.S.C. § 1002(21)(B).[29] Thus, when a plan invests in a mutual fund, it is not transacting with party-in-interest. *See IATSE Local 33 Section 401(k)Plan Bd. of Trs. v. Bullock*, No. CV 08-3949 AHM, 2008 WL 4838490, at*5-6 (C.D. Cal. Nov. 5, 2008) (mutual fund cannot be held liable for prohibited transactions; Congress exempted mutual funds and their advisers from ERISA's fiduciary and party-in-interest rules). Moreover, the purchase of an annuity from an insurance company such as TIAA is not a prohibited transaction. *See* Prohibited Transaction Exemption (PTE) 84-24, 71 Fed. Reg. 5887, 5889 (Feb. 3, 2006) (stating that the restrictions in Sections 1106(a)(1)(A) through (D) did not apply to "[t]he purchase, with plan assets, of an

[29] Plaintiffs admit that all of the TIAA-CREF, Fidelity, and Vanguard funds, with the exception of the Real Estate Account, are mutual funds. (AC ¶¶ 131-32).

insurance or annuity contract from an insurance company").[30]

Finally, Counts II, IV, and VI must fail because Plaintiffs do not allege that the Plans' fiduciaries intended to benefit TIAA, Fidelity, and Vanguard, as opposed to the Plans and their participants. Unlike some of ERISA's other prohibited transaction provisions, a fiduciary only violates Section 1106(a)(1)(D) if he or she subjectively intends to benefit a party-in-interest.[31] Plaintiffs have not plausibly alleged any such subjective intent here. The only reasonable inference from Defendants' conduct is that they entered into the transactions in order to obtain valuable services for the Plans and participants. This conduct does not violate Section 1106(a)(1)(D). And Plaintiffs' claim that a prohibited transaction occurred each time the Plans paid fees to a vendor through "revenue sharing" fails as a matter of law because revenue sharing payments are not "plan assets," which are required for a Section 1106(a)(1)(D) violation. *Hecker*, 556 F.3d at 584 ("Once the fees are collected from the mutual fund's assets and transferred to one of the Fidelity entities, they become Fidelity's assets again, not the assets of the

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[30] PTE 84-24 was amended in 2016 but the changes are prospective only. 81 Fed. Reg. 21147 (April 8, 2016).

[31] *See, e.g.*, *Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 860-61 (6th Cir. 2000); *see also Bauer-Ramazani v. TIAA-CREF*, No. 1:09-CV-190, 2013 WL 6189802, at *9 (D. Vt. Nov. 27, 2013) (rejecting § 406(a)(1)(D) claim because "[p]laintiffs have not pointed to any facts demonstrating Defendants knew or should have known the practice was a prohibited transaction").

Plans.") (citing ERISA § 401(b)(1), 29 U.S.C. § 1101(b)(1)).

III. Plaintiffs' Remaining Claims Fail As A Matter Of Law.

Courts routinely dismiss disloyalty claims like those here that merely piggyback on other fiduciary breach theories. *E.g.*, *Loomis*, 658 F.3d at 671 (affirming dismissal because there was no reason to think that the defendant chose particular investment options to enrich itself at participants' expense); *White*, 2016 WL 4502808, at *5 (dismissing disloyalty claim where "the complaint does not differentiate between breach of the duty of prudence and breach of the duty of loyalty, and includes no separate allegations to support the duty of loyalty claim"). Plaintiffs have not pled any facts to support an inference that Emory failed to act in the interests of Plan participants and beneficiaries. Merely labeling Emory's acts as disloyal (*see* AC ¶ 263), does not satisfy the standards of Rule 8.[32] *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 812, 838 (N.D. Cal. 2005).

CONCLUSION

For the above reasons, Defendants respectfully request that the Court dismiss all of Plaintiffs' claims with prejudice.

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[32] Plaintiffs' assertion that Emory breached the duty to monitor other fiduciaries, (AC ¶¶ 294-304), fails as a matter of law because (i) it is derivative of Plaintiffs' other fiduciary breach claims and requires an antecedent breach to be viable and (ii) Plaintiffs allege no facts about the monitoring processes or how those processes were deficient. *See White*, 2016 WL 4502808, at *18-19.

Dated: December 16, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE AND TYPE SIZE COMPLIANCE

Pursuant to N.D. Ga. Local Rule 5.1 the foregoing is prepared in Times New Roman, 14 point, and was filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all counsel of record.

This 16th day of December, 2016.

/s/ Sean K. McMahan
Sean K. McMahan

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