IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BRYAN P. SPENCE, individually and as a representative of a class of similarly situated, and on behalf of the AMERICAN AIRLINES, INC. 401(k) PLAN and the AMERICAN AIRLINES, INC. 401(k) PLAN FOR PILOTS,	§ § § § § §	Case No. 4:23-cv-00552-O
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
AMERICAN AIRLINES, INC., et al,	§	
	§	
Defendants.	§	

MOTION TO DISMISS AMENDED COMPLAINT BY DEFENDANTS AMERICAN AIRLINES, INC. AND THE AMERICAN AIRLINES EMPLOYEE BENEFITS COMMITTEE AND BRIEF IN SUPPORT

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INTRODUCTION

As in his Original Complaint, Plaintiff asserts two counts for breach of fiduciary duty against the alleged fiduciaries of the American Airlines, Inc. 401(k) Plan for Pilots (the "Pilots Plan") and the American Airlines, Inc. 401(k) Plan (collectively, the "Plans"). He asserts both counts under two theories. First, Plaintiff contends that Defendants improperly included in the Plans' investment lineups so-called "Environmental, Social and Governance" ("ESG")-themed funds ("Challenged Funds"), whose investment strategies allegedly prioritize ESG goals—not just financial performance. Second, he complains that some of the Plans' funds that pursue only pecuniary objectives are run by managers who allegedly use their proxy voting power in favor of ESG-themed shareholder proposals ("Challenged Managers"). In advancing these theories, Plaintiff seeks to insert himself into the ongoing, politicized debate over the wisdom of ESG-themed investing.

This Court, however, need not wade into that policy dispute to dispose of the Amended Complaint. Plaintiff's Challenged Fund theory fails at the outset for lack of Article III standing. Plaintiff does not allege that he has invested any portion of his Pilots Plan account in the Challenged Funds he lists in the Amended Complaint. Nor could he, as he has never invested in any of the 25 Challenged Funds. Indeed, it would have been impossible for Plaintiff to find any such ESG-themed investment strategies in the Pilots Plan's core investment lineup, where he has chosen to invest, because there are none. Thus, he is without Article III standing to pursue his claims based on the Challenged Funds. And even if Plaintiff had invested in a Challenged Fund, his Challenged Fund theory would be dismissible under Federal Rule of Civil Procedure 12(b)(6). As Plaintiff acknowledges, the Challenged Funds are accessible exclusively through a self-directed brokerage account ("SDBA" or "brokerage account")—a feature that enables those participants who do not wish to be restricted to the investment options selected by the Plans' fiduciaries to instead open their own brokerage account and choose freely from thousands of mutual funds, exchange-traded funds, and individual stocks at their own risk. As Plaintiff correctly recognized in his Original Complaint, no fiduciary is responsible for the selection or monitoring of the individual investments within an individual participant's brokerage account. Indeed, the very purpose of a brokerage account is to free participants from the constraints of a fiduciary-curated investment lineup. A fiduciary breach cannot exist where no fiduciary duty applies, and Plaintiff's Challenged Fund theory thus would fail even if he had invested in the Challenged Funds.

Plaintiff's second theory underlying his claims—that the Plan should not be using a broader list of Challenged Managers with allegedly sub-par proxy voting practices even to manage investment strategies that pursue purely pecuniary objectives—also fails to state a claim. As to this second theory, Plaintiff has patched over the standing problem with his Original Complaint—that he had not invested in any investment options managed by the Challenged Managers—by expanding the list of managers he targets to conveniently include ones involved with options he has personally chosen for his Pilots Plan account. But he has done nothing to remedy a separate fatal flaw: Plaintiff does not allege any facts sufficient to infer that the unspecified options sponsored by the Challenged Managers are financially inferior to those available from other managers, and thus that a prudent fiduciary would not select them. For instance, he does not allege that options relying on the Challenged Managers have delivered lower returns than other options, or that the options' performance would have disqualified the managers on any other financial ground; in fact, he doesn't discuss their financial performance at all. He likewise alleges nothing that remotely permits an inference that Defendants selected the Challenged Managers in an effort to serve their own financial interests or otherwise engaged in acts of disloyalty. It should go without saying that to state a viable federal claim over the financial performance of the Plans' investment options, he has to plead facts about the performance of those options. Plaintiff says not a single word, and thus fails to state a claim.

Plaintiff's refusal to discuss the historical returns of the actual investment options in the Plans highlights the internal contradiction that undermines his proxy-voting theory. He insists that Defendants are duty-bound to avoid funds managed in whole or in part by any of an expanding set of Challenged Managers even if their financial performance is stellar, simply because the managers might lend support to a shareholder ESG proposal through proxy voting. But the broader premise underlying his Complaint—that ERISA fiduciaries must curate a menu of core investment options or "Designated Investment Alternatives" based exclusively on the goal of "maximiz[ing] *financial* benefits" for participants—confirms the exact opposite. Am. Compl. ¶¶ 6, 43. If, based on traditional risk and return measures, a prudent fiduciary would judge an investment option to offer the best prospects for "maximiz[ing] financial benefits" for plan participants, that fiduciary would be no more justified in rejecting the option based on a manager's proxy votes in favor of an ESG proposal than it would in excluding the option for any other non-pecuniary reason.

For these reasons, and as detailed below, the Court should dismiss Plaintiff's Amended Complaint in its entirety. And because Plaintiff has already had the opportunity to cure these same deficiencies in response to Defendants' motion to dismiss his Original Complaint, the Amended Complaint should be dismissed with prejudice.

BACKGROUND

A. The Plans and Plaintiff's Allegations

Plaintiff Brian Spence is a pilot at American Airlines and a participant in the Pilots' Plan which, along with the American Airlines, Inc. 401(k) Plan (the "AA 401(k) Plan"), is one of two defined contribution plans that are the focus of the Amended Complaint. Am. Compl. ¶¶ 2, 15–16. As defined contribution plans, both Plans allow eligible American Airlines' employees to contribute a percentage of their earnings on a pre-tax basis and have their employee contributions combined with contributions from American Airlines. *Id.* ¶¶ 23, 25. Participants in the Plans are then able to invest among a range of investment options offered by the Plans. *Id.* ¶ 26. Those investment options include a core menu of Designated Investment Alternatives that are selected and monitored by the American Airlines Employee Benefits Committee (the "Committee"). *Id.* ¶ 27; *see also id.* ¶¶ 18, 26, 31. Like many other defined contribution plans in the country, the Plans also allow participants the freedom to reject the choices arranged by the Committee and to invest entirely at their own risk through an individual, self-directed brokerage account in "a broad array of stocks, bonds, and mutual funds." *Id.* ¶ 31. Through their self-directed brokerage accounts, participants are free to invest in a broad range of securities and other instruments rather than being limited to the Designated Investment Alternatives selected by the Committee. *Id.*

Plaintiff asserts two counts regarding the Plans' investments. In Count I, Plaintiff alleges that Defendants breached fiduciary duties of prudence and loyalty by offering unreasonable investment options. *See Id.* ¶¶ 114–124. In Count II, Plaintiff alleges that Defendants failed to adequately monitor the Plans' other alleged fiduciaries. *See Id.* ¶¶ 125–133. Plaintiff asserts two theories targeting two separate categories of alleged investment options.

First, Plaintiff alleges that the Plans offer at least 25 "ESG funds" accessible through a brokerage account—the "Challenged Funds"—that "pursue nonfinancial and nonpecuniary ESG policy agendas as part of their investment strategies[.]" *Id.* ¶¶ 97–98. Plaintiff's own allegations, however, confirm that he has never invested his own Pilots Plan account in any Challenged Funds. *Id.* ¶¶ 35–38. And he expressly alleges that the funds he challenges are not among the Plans' Designated Investment Alternatives selected by the Committee, but instead can be accessed only by opening a brokerage account with Fidelity, *id.* ¶¶ 33, 97, which Plaintiff has never done, *id.* ¶¶ 35–38.

Second, Plaintiff alleges that the Plans also offer non-ESG-themed investment options with portfolios that were managed, at least in part, by a long list of Challenged Managers who have at some point purportedly used their proxy voting power to vote for "ESG policy mandates." *Id.* ¶¶ 5, 68–69. Plaintiff does not specifically identify any investment options in the Plans' core investment lineups that fall within this category, but instead lists approximately 100 Challenged Managers by name who allegedly engage in ESG-themed proxy voting on behalf of non-ESG strategies available only through brokerage accounts and cites unspecified resolutions aimed at causing portfolio companies to "divest[] in oil and gas stocks" and "ban[] plastics" as examples of shareholder initiatives he opposes. *Id.* ¶¶ 68, 94. Plaintiff seeks to represent a class consisting of all participants and beneficiaries in the Plans (with certain exclusions) "from June 1, 2017 through the date of judgment." *Id.* ¶ 101.

B. Facts Bearing on Plaintiff's Lack of Article III Standing

During the proposed class period, the Plans offered a set of Designated Investment Alternatives chosen by the Plans' fiduciaries. These alternatives have included a range of index funds each of which invests exclusively in a collective investment trust managed by BlackRock Institutional Trust Co. ("BlackRock") or State Street Global Advisors; an inflation protection fund that invests in a BlackRock TIPS Index Fund; an option that makes deposits in the American Airlines Federal Credit Union; and a stable value option. Am. Compl. ¶ 33; AA-APP002–003[1] at ¶¶ 7–9 (Menezes Decl.); *see also* AA-APP027–30, 41–45, 57–60, 71–75, 87–90, 103–07, 119–22,

[1] Citations to "AA-APP" refer to the appendix submitted in connection with Defendants' motion to dismiss the Amended Complaint.

135–39 (participant fee disclosures listing the Designated Investment Alternatives in the Plans). They also include a series of actively managed custom funds that the Committee has arranged exclusively for participants in the Plans. *Id.* Finally, the Designated Investment Alternatives include a suite of custom American Airlines target date funds ("TDFs"), which automatically adjust their risk profile and asset allocation as investors move closer to their chosen retirement date. *Id.* The TDFs invest in certain of the Plans' other Designated Investment Alternatives and in one additional BlackRock index fund. AA-APP003 at ¶ 9 (Menezes Decl.).[2]

As Plaintiff recognizes, none of the investment options identified in the Amended Complaint as Challenged Funds is or has been a Designated Investment Alternative in the Plans' core investment lineups during the proposed class period. Am. Compl. ¶ 97 (the Challenged Funds are "offered to Plan participants through the SDBA"); AA-APP005 at ¶ 12 (Menezes Decl.). Rather, participants have only been able to invest in these ESG-themed strategies by opening a brokerage account with Fidelity Investments. *Id.* This "brokerage account" feature affords those participants who do not wish to be restricted to the curated set of Designated Investment Alternatives chosen by the Plans' fiduciaries with the freedom to access the broader securities markets through a traditional brokerage account. AA-APP003–004 at ¶¶ 10–11. The Plans' annual disclosures inform participants that the "fiduciary neither evaluates nor monitors the investments available through" individual participants' brokerage accounts. *See, e.g.,* AA-APP116; AA-APP132 (2023 404(a)(5) Annual Participant Disclosures); *see also* AA-APP024, 38,

[2] The Designated Investment Alternatives in the AA 401(k) Plan are similar except that there are approximately five index funds (instead of nine), which invest exclusively in a collective investment trust managed by BlackRock Institutional Trust Company. AA-APP002 at ¶ 7 (Menezes Decl.).

54, 68, 84, 100, 116, 132 ("The Plan's fiduciaries do not monitor the investments available in [brokerage accounts].").

The range of investment options available to participants electing to open a Fidelity self-directed brokerage account includes thousands of investment options designed to reflect the broader securities market. AA-APP003–004 at ¶ 10 (Menezes Decl.). Indeed, as of the end of the first quarter of 2023, participants in the Pilots Plan were invested through their brokerage accounts in over 2,000 different mutual funds or exchange-traded funds representing more than 200 different investment management firms. *Id.* The brokerage window also offers participants the freedom to select other types of investments, such as real estate investment trusts and certificates of deposit, as well as to invest directly in the securities of thousands of individual companies. Participants have used their brokerage accounts to invest directly in such sectors as oil and gas companies (*e.g.*, Exxon Mobil, Chevron, and ConocoPhillips) and plastics manufacturers (*e.g.*, Dow, Inc. and DuPont). AA-APP004 at ¶ 11 (Menezes Decl.). Participants can also invest in funds offered by Vanguard—the firm that Plaintiff lauds for not pursuing ESG goals—and funds that describe themselves as "anti-ESG funds," including, for example, the Strive US Energy fund (with ticker "DRLL"), which invests exclusively in securities of oil, gas, and energy companies, and the AdvisorShares TR Vice ETF, which invests exclusively in "vice" industries like alcohol, tobacco, and gambling companies. AA-AhPP003–004 at ¶ 10 (Menezes Decl.); AA-APP009 (Prospectus for Strive US Energy fund); AA-APP016 (Prospectus for AdvisorShares TR Vice ETF); *see also* Am. Compl. ¶ 48. The breadth of options is a function of the offerings in the securities markets, not fiduciary decision making: as Plaintiff asserted in his original Complaint, "there is no fiduciary responsible for selecting or monitoring the investments within an SDBA." Dkt. 1 (Compl. ¶ 33 (citing 29 C.F.R. §§ 2550.404a-5(f), (h)(5))).

Plaintiff has limited the investments in his Pilots Plan account to Designated Investment Alternatives in the core lineup. At no time since the beginning of the proposed class period on June 1, 2017, has Plaintiff invested any portion of his account through a brokerage account. Am. Compl. ¶ 35. From June 1, 2017 through March 14, 2023, Plaintiff invested his entire account in the American Pilot Target Date Fund 2045, one of the custom TDFs constructed by the Committee. Am. Compl. ¶ 35; AA-APP005–006 at ¶¶ 14–16 (Menezes Decl.); AA-APP146–266 (Plaintiff's account statements). Since March 15, 2023, Plaintiff has also allocated portions of his account to five of the index fund Designated Investment Alternatives. Am. Compl. ¶ 35; AA-APP005–006 at ¶¶ 14–16 (Menezes Decl.); AA-APP267–278 (account statements).

ARGUMENT

I. PLAINTIFF'S CHALLENGED FUND THEORY SHOULD BE DISMISSED FOR LACK OF STANDING AND FOR FAILURE TO STATE A CLAIM

Plaintiff lacks Article III standing to assert that Defendants breached fiduciary duties under ERISA by making Challenged Funds available to participants in the Plans because he concedes that he has not invested in any such fund. This theory also fails for the independent reason that, as the Amended Complaint makes clear, the Challenged Funds with ESG-focused investment strategies were available exclusively through a brokerage account, where Plaintiff has acknowledged ERISA's fiduciary selection and monitoring responsibilities do not apply. Plaintiff, therefore, has not plausibly alleged a fiduciary breach.

A. Plaintiff Lacks Article III Standing to Pursue Claims Related to the Challenged Funds.

Plaintiff's theory that Defendants improperly caused the Plans to include the Challenged Funds as investment options fails for lack of standing because, as the Amended Complaint indicates and Pilots Plan records confirm, he has not invested in any Challenged Fund. *Compare* Am. Compl. ¶¶ 35–38 (alleging Plaintiff's investments) *with* ¶ 97 (identifying Challenged Funds);

see also AA-APP003–005 at ¶¶ 8–9, 12 (Menezes Decl.); AA-APP145–279 (account statements).[3] Indeed, none of the Challenged Funds has ever been included in the Plans' menu of Designated Investment Alternatives, including during the entire six-year ERISA repose period. AA-AAP005–006 at ¶¶ 7–9, 12 (Menezes Decl.); AA-APP027–30, 41–45, 57–60, 71–75, 87–90, 103–07, 119–22, 135–39 (participant fee disclosures listing the Designated Investment Alternatives in the Plans); *see also* Am. Compl. ¶ 33 (identifying Designated Investment Alternatives), ¶ 97 (admitting that the Challenged Funds are "offered to Plan participants through the SDBA"). Rather, if a participant wants to allocate retirement monies to a Challenged Fund, he or she must shop outside the Plans' Designated Investment Alternatives by opening a brokerage account. Am. Compl. ¶¶ 31, 97; AA-AAP005 at ¶ 12. As Plaintiff's allegations and account statements demonstrate, he has never opened a self-directed brokerage account as required to access the vast array of funds and securities that have not been curated by the Plans' fiduciaries. AA-APP005 at ¶ 16 (Menezes Decl.); AA-APP145–279 (Plaintiff's account statements); Am. Compl. ¶ 35.

Of course, "the performance and fees of the investments ***not selected*** by a participant" in a defined-contribution plan have "no effect on the value of the participant's" account. *Locascio v. Fluor Corp.*, 2023 WL 320000, at *3 (N.D. Tex. Jan. 18, 2023) (emphasis in original). Because Plaintiff has not suffered a concrete and particularized injury from the conduct that he challenges, he, therefore, lacks standing to bring these claims under well-established case law. *See, e.g.*,

[3] When attacking a plaintiff's constitutional standing, a "party may . . . direct the court to matters outside of the pleadings." *Innova Hosp. San Antonio, L.P. v. Blue Cross & Blue Shield of Ga., Inc.*, 2014 WL 360291, at *4 (N.D. Tex. Feb. 3, 2014) (O'Connor, J.); *see also Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (*per curiam*) (proper to consider documents outside the pleadings under Rule 12(b)(1)). "To defeat [such] a factual attack," in turn, "a plaintiff must prove the existence of subject-matter jurisdiction by a preponderance of the evidence and is obliged to submit facts through some evidentiary method to sustain his burden of proof." *Superior MRI Servs., Inc. v. Alliance Healthcare Servs., Inc.*, 778 F.3d 502, 504 (5th Cir. 2015) (citations omitted).

Carney v. Adams, 141 S. Ct. 493, 498 (2020) (to establish standing, a plaintiff must demonstrate an injury in fact that is "concrete and particularized, as well as actual or imminent") (citation omitted); *Ortiz v. Am. Airlines, Inc.*, 5 F.4th 622, 628–29 (5th Cir. 2021) (similar); *see also Town of Chester, N.Y. v. Laroe Estates, Inc.*, 581 U.S. 433, 438 (2017) (similar); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (a plaintiff must identify an injury that affects him "in a personal and individual way").

Two recent cases in this Court confirm the legal principles that doom any argument by Plaintiff that he has standing. In *Perkins v. United Surgical Partners International Inc.*, the Court dismissed the plaintiffs' claims because they "fail[ed] to allege injury to their own investment accounts or their investment in any of the challenged funds." 2022 WL 824839, at *4 (N.D. Tex. 2022). While the plaintiffs' breach-of-fiduciary-duty claims "alleged an injury to the Plan and participants generally," the plaintiffs lacked standing because they had not invested in any of the challenged funds and, therefore, could not allege an injury to "themselves." *Id*. Likewise in *Locascio*, the Court held that one of the named plaintiffs "suffered no injury, and therefore ha[d] no standing, because she invested in none of the twelve options of the Plan." 2023 WL 320000, at *3. The plaintiff, as the district court aptly concluded, had pleaded "her way out of court." *Id.*[4] Plaintiff has done the same here.

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[4] Courts in other circuits are in accord. *See, e.g.*, *In re LinkedIn ERISA Litig.*, 2021 WL 5331448, at *4 (N.D. Cal. Nov. 16, 2021) (dismissing complaint for lack of standing where "none of the Plaintiffs have alleged that they personally invested in the" challenged funds, and noting that "district courts across the country have" held that ERISA plaintiffs lack standing unless they "can plead injury to their own plan account"); *Garthwait v. Eversource Energy Co.*, 2021 WL 4441939, at *6 (D. Conn. Sept. 27, 2021) (similar); *Lange v. Infinity Healthcare Physicians, S.C.*, 2021 WL 3022117, at *2–4 (W.D. Wisc. July 16, 2021) (similar); *Santiago v. Univ. of Miami*, 2021 WL 1173164, at *6–8 (S.D. Fla. Mar. 1, 2021) (similar), *R&R adopted by* 2021 WL 1165441 (S.D. Fla. Mar. 26, 2021); *Johnson v. Delta Airlines, Inc.*, 2017 WL 10378320, at *2 (N.D. Ga. Dec. 12, 2017) (similar).

In his Amended Complaint, Plaintiff appears to suggest that it is enough for standing purposes that he maintained a balance in the Pilots Plan "during the Class Period," because "ERISA authorizes ***any participant*** to bring suit as a representative of a plan." Am. Compl. ¶ 16 (emphasis added). But in its recent decision in *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020), the Supreme Court specifically rejected "the argument that a plaintiff automatically satisfies the injury-in-fact requirement [of Article III standing] whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* at 1620 (citation omitted); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) (same); *Lee v. Verizon Comm'cns, Inc.*, 837 F.3d 523, 546 (5th Cir. 2016) ("Article III standing is distinct from statutory standing, and we decline to undermine this distinction by recognizing the latter as conferring the former."). Rather, a plaintiff suing under ERISA "as representative[] of the plan itself" must still establish that he "suffered an injury in fact, thus giving [him] a sufficiently concrete interest in the outcome of the issue in dispute." *Thole*, 140 S. Ct. at 1620 (quotations omitted); *see also Lee*, 837 F.3d at 544–48 (similar); *David v. Alphin*, 704 F.3d 327, 333–39 (4th Cir. 2013) (similar). Plaintiff fails to satisfy this threshold requirement because he has not invested in a Challenged Fund. There is, in short, "no ERISA exception to Article III," *Thole*, 140 S. Ct. at 1622, and thus Plaintiff's theory that Defendants breached fiduciary duties under ERISA by allowing participants in the Plans to invest in Challenged Funds through their brokerage accounts must be dismissed.[5]

[5] It is irrelevant for standing purposes that Plaintiff seeks to represent a class because even putative class representatives "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong." *Spokeo*, 578 U.S. at 338 n.6 (citation omitted); *see also Warth v. Seldin*, 422 U.S. 490, 502 (1975) (underscoring that plaintiff must allege a distinct and palpable injury to himself).

B. Plaintiff's Challenged Fund Theory Also Fails to State a Claim for Breach of ERISA Fiduciary Duties.

Plaintiff's Challenged Fund theory fails for the separate and independent reason that he does not plausibly allege facts sufficient to establish that Defendants fell short of their fiduciary responsibilities.[6] As Plaintiff correctly acknowledges, the Challenged Funds with ESG-themed strategies were ***not*** among the Plans' menu of Designated Investment Alternatives. Am. Compl. ¶¶ 33, 97. Instead, participants in the Plans could access the Challenged Funds only "through the SDBA option"—*i.e.*, by rejecting the Plans' curated investment options, opening their own brokerage account, and then personally selecting one of the Challenged Funds from among the many thousands of options. *Id.* ¶ 97. Plaintiff cannot sustain a claim with respect to the availability of any individual securities in a brokerage account—including the Challenged Funds—because, as Plaintiff conceded in his Original Complaint, ERISA's selection and monitoring duties do not apply to investment options available exclusively through a brokerage account. In Plaintiff's own words, "there is no fiduciary responsible for selecting or monitoring the investments within an SDBA." Dkt. 1 (Compl. ¶ 33 (citing 29 C.F.R. §§ 2550.404a-5(f), (h)(5))). After Defendants pointed out that this allegation foreclosed his claims, Plaintiff struck it from his Amended

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[6] The Supreme Court has emphasized that a Rule 12(b)(6) motion is an "important mechanism for weeding out meritless claims" in the ERISA context. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). ERISA cases "require[] careful judicial consideration of whether the complaint states a claim that the defendant has acted imprudently," *id.*—i.e., that the fiduciary did not act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use." *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 253 (5th Cir. 2008) (quoting 29 U.S.C. § 1104(a)(1)(B)); *see also Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006). Therefore, where, as here, a complaint lacks any "allegations relating directly to the methods employed by the ERISA fiduciary," it cannot survive a motion to dismiss unless the court "may reasonably 'infer from what is alleged that the process was flawed.'" *Pension Ben. Guar. Corp., ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 718 (2d Cir. 2013) (quoting *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009)).

Complaint. But, while Plaintiff may try to flee his prior concession, he cannot avoid what that concession acknowledged: ERISA does not impose fiduciary selection and monitoring responsibilities with respect to individual securities available exclusively through a brokerage account.

Unlike a plan fiduciary's function in constructing a menu of Designated Investment Alternatives, merely providing access to a brokerage account does not entail the "fiduciary function" of "limiting or designating investment options[.]" *Final Regulation Regarding Participant Directed Individual Account Plans*, 57 Fed. Reg. 46,906, 46,924 n.27 (Oct. 13, 1992); *see also* 29 C.F.R. § 2550.404c-1(d)(2)(iv); 29 C.F.R. § 2550.404a-5(h)(4) ("The term 'designated investment alternative' shall not include 'brokerage windows,' 'self-directed brokerage accounts,' or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan."). To the contrary, the very purpose of a self-directed brokerage account is to afford participants broad discretion to select investments beyond the limited set of options handpicked by a plan's fiduciaries.[7]

The distinction between selecting Designated Investment Alternatives and providing access to investment options through a brokerage account is also reflected in differences in

[7] Compliance with a requirement that plan fiduciaries individually monitor each of the myriad of investment options available through a self-directed brokerage account would be utterly infeasible. It follows that if such a requirement did exist, it would undoubtedly result in fiduciaries eliminating access to brokerage accounts—and the freedom they offer participants. Plaintiff tries to muddle the obvious implications of his sweeping claim by noting that the self-directed brokerage account arranged by the Plans here already reflects ***some*** restrictions on brokerage account options, and so he contends that the fiduciaries had to go further to curate all individual options available through the window. Am. Compl. ¶ 99. But preventing participants from, for example, engaging in transactions prohibited by ERISA, or investing through margin accounts (*i.e.*, with money they do not have), is fundamentally different than the rule Plaintiff seeks to impose, which would require the Plans' fiduciaries to scrutinize the investment mandate and strategy of every mutual fund and individual security in the market.

applicable participant disclosure requirements. For instance, the Department of Labor regulations require plan administrators to furnish plan participants with detailed information regarding each "designated investment alternative" offered under the plan, 29 C.F.R. § 2550.404a-5(d), but exclude from these requirements "'brokerage windows,' 'self-directed brokerage accounts,' or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan," *id.* § 2550.404a-5(h)(4). Instead, plan administrators need only provide a "description of any 'brokerage windows,'" not the funds within the window, *id.* § 2550.404a-5(c)(1)(i)(F), and "an explanation of any fees and expenses that may be charged against the individual account of a participant or beneficiary on any individual, rather than on a plan-wide basis," *id.* § 2550.404a-5(c)(3)(i)(A). *See also* Am. Compl. ¶¶ 27, 31–32; U.S. Dep't of Labor, Field Assistance Bulletin No. 2012-02R at Q29 (July 30, 2012) ("[T]he [participant] disclosure requirements in paragraph (d) of the regulation (investment-related information) do not apply to brokerage windows, self-directed brokerage accounts, and similar arrangements, because such windows, accounts, and arrangements are not designated investment alternatives.").[8]

Because a fiduciary's selection and monitoring duties do not apply to options available exclusively through a self-directed brokerage account, and because Plaintiff (correctly) alleges that the Challenged Funds were available only through a brokerage account, he fails to state a breach-of-duty claim.

II. PLAINTIFF'S CHALLENGED MANAGER THEORY FAILS TO STATE A CLAIM AS WELL

Plaintiff's sweeping second theory of breach—that Defendants were duty bound to exclude all funds sponsored by a long list of over 100 Challenged Managers (Am. Compl. ¶¶ 69, 94), no

[8] Plaintiff does not allege that the Plans failed to meet these narrow disclosure requirements with respect to the Plans' brokerage accounts.

matter the investment strategy or the fund's actual performance—does not "plead 'enough facts to state a claim to relief that is plausible on its face.'" *New Orleans City v. Ambac Assur. Corp.*, 815 F.3d 196, 200 (5th Cir. 2016) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiff's threadbare factual allegations do not describe either a failure to act prudently or a breach of the duty of loyalty.

A. Plaintiff's Challenged Manager Theory Fails to State a Claim of Imprudence.

As Plaintiff acknowledges, ERISA's prudence inquiry focuses on a fiduciary's process. Am. Compl. ¶¶ 53, 64–65; *see, e.g., Kirschbaum*, 526 F.3d at 253; *Main*, 248 F. Supp. 3d at 793. But Plaintiff does not include a single, factual allegation showing or even suggesting that Defendants' decision-making process was somehow flawed. *See Locascio*, 2023 WL 320000, at *6. Instead, he asks the Court to infer a deficient process simply because participants were offered the ability to choose investment options that included underlying component strategies managed by the Challenged Managers. Am. Compl. ¶¶ 69, 94. But the inference Plaintiff draws is utterly implausible. As an initial matter, the Amended Complaint acknowledges that products offered by the Challenged Managers are chiefly available only through a brokerage account where, as discussed above, the fiduciary duty to select and monitor individual investments does not apply. *Id.* ¶ 94; *supra* at 12–14. More broadly, despite alleging that a fiduciary must select investment options based solely on their prospects for financial performance, Am. Compl. ¶¶ 6, 61, 63–64, Plaintiff fails even to mention the financial performance of a single Designated Investment Alternative in the Plans' menus or of any component fund offered by a Challenged Manager—relative to the option's investment benchmarks, relative to peer funds with the same or similar investment strategy, or otherwise. Indeed, Plaintiff says absolutely nothing about the performance of ***any*** of the products offered by the Challenged Managers, whether supposedly among the Plans'

Designated Investment Alternatives or not.

To state a viable claim, "a complaint cannot simply make a bare allegation that costs are too high, or returns are too low. Rather, it must provide a sound basis for comparison—a meaningful benchmark." *Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 484 (8th Cir. 2020) (citation omitted); *Matney v. Barrick Gold of N. Am.*, No. 22-4045, 2023 WL 5731996, at *7 (10th Cir. Sept. 6, 2023) (holding that "to raise an inference of imprudence . . . a plaintiff has the burden to allege a "meaningful benchmark" and affirming dismissal of plaintiff's claims because the complaint "ma[de] 'apples to oranges' comparisons that d[id] not plausibly [permit the court to] infer a flawed monitoring and decisionmaking process"); *Smith v. CommonSpirit Health,* 37 F.4th 1160, 1162 (6th Cir. 2022) (same); *Albert v. Oshkosh Corp.*, 47 F.4th 670, 574, 582 (7th Cir. 2022) (same); *see also Perkins*, 2023 WL 2899539, at *6 ("[A]t the motion to dismiss stage the plaintiffs still need to plead facts about their own case that, coupled with meaningful benchmarks, allow for a context-specific inference of imprudence."); *Locascio*, 2023 WL 320000, at *6 (dismissing complaint). While some courts in this Circuit have held that the question of whether an alleged benchmark offers an appropriate basis for comparison to the challenged investment option is a question of fact, in those cases, the plaintiffs at least alleged ***some*** benchmark for judging the quality of the manager's performance.[9] But here, Plaintiff alleges nothing of the sort—again, he does not include a single factual allegation regarding how any of the Challenged Managers' products have performed**.** *See* Am. Compl. ¶¶ 5, 68–69, 94–95, 92–93.

Nor does Plaintiff offer any other means to connect the dots between proxy votes on shareholder resolutions he disfavors and the financial performance of the funds managed by the

[9] *See Seidner v. Kimberly-Clark Corp.*, 2023 WL 2728714, at *7 (N.D. Tex. Mar. 30, 2023); *see also Blackmon v. Zachary Holdings, Inc.*, 2021 WL 2190907, at *5 (W.D. Tex. Apr. 22, 2021).

Challenged Managers. *See Id*. ¶¶ 5, 68–69, 92–93; *see also Id.* ¶ 64. In fact, the only Challenged Manager for which the Amended Complaint offers any semblance of factual allegations is BlackRock—a new addition to Plaintiff's list of Challenged Managers. But those allegations merely serve to demonstrate the inadequacy of his Amended Complaint.

Specifically, Plaintiff notes BlackRock's vote for three candidates for outside directors of Exxon—singling out for criticism its vote for Kasia Hietala, whom Plaintiff describes as an "activist." *Id.* ¶¶ 75–76. Plaintiff theorizes that BlackRock's vote caused a decline in the value of Exxon stock and, somehow, of the stock of Exxon's competitor, Chevron, because both stocks allegedly declined relative to the S&P on a particular day "when it was clear that two of the three directors had been voted in." *Id.* ¶¶ 89–90. This, Plaintiff speculates, harmed participants in the Plans by impairing the performance of the BlackRock Equity Index Fund F-CF (the "BlackRock S&P 500 Index Fund") that invests in Exxon and Chevron. *See Id.* ¶¶ 82, 88–90.

But Plaintiff neglects the critical step of comparing BlackRock's vote to that of other managers, such as Vanguard, whom the Amended Complaint holds up as an exemplar of a responsible manager that resists shareholder ESG proposals. *Id.* ¶ 48. According to the proxy records on which Plaintiff's theory rests, Vanguard ***also*** voted for Ms. Hietala, along with one of the other two outside directors in the slate. AA-APP281, 284–286 (proxy voting records).[10] There

[10] Exxon's proxy voting records are incorporated by reference into the Amended Complaint, *see e.g.,* Am. Compl. ¶¶ 75–76, 89, and thus may be considered on a motion to dismiss. *See Lormand v. US Unwired, Inc.*, 565 F.3d 228, 251 (5th Cir. 2009); *see also Vine v. PLS Fin. Servs., Inc.*, 689 F. App'x 800, 804 (5th Cir. 2017); *In re Enron Corp. Sec., Derivative & "Erisa" Litig.*, 2003 WL 23316646, at *4 (S.D. Tex. Mar. 27, 2003). Moreover, these proxy voting records were filed with the SEC and it is well-established that, when deciding a motion to dismiss under Rule 12(b)(6), the Court may consider "legally required public disclosure documents filed with the Securities and Exchange Commission, and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007); *Kopp v. Klein*, 722 F.3d 327, 333 (5th Cir. 2013) (taking judicial notice of

is thus no basis to infer that BlackRock's vote for Ms. Hietala—Plaintiff's sole specific example of an allegedly problematic vote by a Challenged Manager—would have caused a prudent fiduciary to view the BlackRock S&P 500 Index Fund as an imprudent choice when Vanguard—Plaintiff's only example of a manager with reasonable proxy-voting practices—voted the same way.[11] Moreover, even if the director vote had a lasting effect on Exxon's stock price thereafter (Plaintiff makes no such contention), nothing in the Amended Complaint suggests that a fiduciary focused solely on financial prospects would have viewed BlackRock's index funds as inferior to comparable funds. Indeed, such a conclusion would be absurd: The BlackRock S&P 500 Fund is an index fund, which means it seeks to match the performance of a stated index (here the S&P 500) by holding the securities represented in the index in comparable proportions. Am. Compl. ¶ 30. Any comparable fund pinned to the S&P 500 index would thus have had the same exposure to gains or losses in Exxon's share price because index funds generally hold the same securities in approximately the same proportions. *Id.*

Plaintiff's remaining allegations regarding BlackRock (Am. Compl. ¶¶ 70–74, 78–81) cannot overcome these pronounced gaps in Plaintiff's theory. While Plaintiff relies upon the "Texas Comptroller's list of financial companies that boycott energy companies," Am. Compl. ¶ 81, as categorically denoting how a prudent fiduciary would view any manager or fund from a

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publicly filed SEC documents in ERISA litigation involving an alleged breach of fiduciary duty), *vacated and remanded on other grounds*, 134 S. Ct. 2900 (2014); *Main v. Am. Airlines Inc.*, 248 F. Supp. 3d 786, 791 (N.D. Tex. 2017) (O'Connor, J.); *see also Golub v. Gigamon Inc.*, 372 F. Supp. 3d 1033, 1043 (N.D. Cal. 2019) (taking judicial notice of proxy statements).

[11] Plaintiff's criticism of BlackRock's vote for the same candidate that Vanguard supported underscores yet another critical flaw in Plaintiff's claim: the absence of any articulable standard for fiduciaries to apply to distinguish between those managers who follow appropriate proxy voting practices and those that do not. This is particularly true because proxy records do not detail the managers' stated rationales for their votes—including whether there were any stated non-pecuniary justifications.

financial perspective, Texas law recognizes that the Comptroller's list has no such utility since it expressly allows state entities to invest with the blacklisted managers and funds where necessary to adhere to their fiduciary responsibilities. Tex. Gov't Code Sec. 809.005.[12] Moreover, the Texas Comptroller is not subject to ERISA's high fiduciary standards and so, unlike plan fiduciaries, can blacklist investment managers for public policy reasons distinct from the managers' prospects for financial performance. Nowhere does the Amended Complaint offer any other basis to infer that a fiduciary concerned only with the financial interest of the Plans' participants would have viewed any particular BlackRock index fund in the Plans as inferior to other comparable alternatives.[13] And Plaintiff has certainly failed to support such an inference for the dozens of other Challenged Managers as to whom he makes zero factual allegations. Am. Compl. ¶¶ 92–95. Plaintiff offers only the blanket conclusory assertion that those Challenged Managers have at some point voted in

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12 Plaintiff's reliance upon the Comptroller's list to support his proxy-voting theory is particularly misguided in that the Comptroller announced that proxy voting was not one of the factors considered in creating the list. AA-APP289 (Texas Comptroller's FAQ); *see also Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 519 (5th Cir. 2015) (holding that "accuracy of . . . public records contained on the Mississippi Secretary of State's and the Virginia State Corporation Commission's websites cannot reasonably be questioned" and taking judicial notice thereof); *Funk v. Stryker Corp.*, 631 F. 3d 777, 783 (5th Cir. 2011) (holding "district court took appropriate judicial notice of publicly-available [letters] produced by the FDA, which were matters of public record directly relevant to the issue at hand").

13 Plaintiff also tries to muster skepticism of the Plans' investments in BlackRock funds by quoting an opinion article's assertion (in 2022) that BlackRock "lost $1.7 trillion of clients' money." Am. Compl. ¶ 91. But the quoted article conspicuously focuses on BlackRock's experience with ***actively managed*** funds, and indeed explains that the firm responded by concentrating its business more significantly in passively managed index funds. *See* AA-APP291, Marc Rubinstein, *BlackRock is Breaking the Wrong Kind of Records*, BLOOMBERG Opinion, July 20, 2022 ("While few firms are able to avoid what the market throws at them, some at least try to overcome it. BlackRock is increasingly giving up . . . . In BlackRock's case, around $21 billion has flowed out of active equity in the past decade, with $730 billion flowing into indexed equity. The firm's passive equity holdings are now 10 times larger than its active business."); *see also Lormand*, 565 F.3d at 251; *Vine*, 689 F. App'x at 804; *Enron*, 2003 WL 23316646, at *4. It is BlackRock's passive index funds, alone, that are among the Plans' Designated Investment Alternatives. Am. Compl. ¶ 33.

favor of unspecified "ESG" policies. *Id.* He fails to allege which (if any) of those voting efforts were successful; fails to allege how any company's securities performed following any of the unidentified votes; and fails to allege that the Challenged Manager's investment funds had greater exposure to those securities than comparable alternative funds the fiduciaries might have considered.

The bottom line is that Plaintiff alleges no facts showing that a prudent fiduciary focused only on a fund's financial performance would reject all funds sponsored by BlackRock (or any of the other Challenged Managers) because his complaint alleges no facts about the actual performance of BlackRock's funds—either on their own or relative to other similar funds a fiduciary might reasonably consider. In the absence of factual allegations about actual fund performance, Plaintiff invites the Court to speculate that the Challenged Managers' funds were all imprudent investment options based on their proxy-voting practices, but speculation cannot form the basis of an imprudence claim under ERISA. *See supra* at 16 (collecting cases).

B. Plaintiff's Challenged Manager Theory Fails to State a Claim of Disloyalty.

Plaintiff's loyalty allegations are equally deficient. Am. Compl. ¶¶ 8–9; *see also id.* ¶¶ 96, 118–19. Plaintiff sets forth no plausible basis for concluding that offering options sponsored by the Challenged Managers was motivated by anything other than the financial interests of the Plans' participants. *See Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 40 (1st Cir. 2018) (disloyalty is established only where the "operative motive" behind the fiduciary's action "was to further its own interests"); *Singh v. RadioShack Corp.*, 882 F.3d 137, 150 (5th Cir. 2018) (affirming dismissal of disloyalty claim where "Defendants' actions were equally consistent with protecting" participants' interests). To be sure, Plaintiff mouths the bare legal conclusion that Defendants acted "to further their own preferences and interests" in electing to include products sponsored by the Challenged Managers as investment options. Am. Compl. ¶ 8. But Plaintiff makes no factual allegations to back up the legal conclusion—he says absolutely nothing regarding the Committee's motivations in selecting investment options, and nothing regarding how those selections supposedly benefited Defendants personally, financially or otherwise. *See* Am. Compl. ¶¶ 6, 68–69, 98, 118–20.

The closest the Amended Complaint comes to asserting a theory of disloyalty is the suggestion that, because American publicly touts certain inclusion and sustainability efforts in its ***corporate*** communications to airline passengers and other constituents, those appointed to make ***fiduciary*** decisions for the Plans likewise must be pursuing ESG goals when selecting investments. But, as the Supreme Court has recognized, a fiduciary may wear "multiple hats"—obligated to pursue the plan's interests when wearing its "fiduciary hat" but free to pursue corporate interests when wearing its "corporate hat." *Pegram v. Herdrich*, 530 U.S. 211, 225–226 (2000). The mere suggestion that American's business leaders may have pursued certain corporate interests in running their business, where they were legally permitted to do so, does not support an inference that the Plans' fiduciaries impermissibly did so where they were not. *See e.g., Troudt v. Oracle Corp.*, No. 16-cv-00175-REB-SKC, 2019 WL 1006019, at *10 (D. Colo. Mar. 1, 2019) (holding that discussions by company's business development and marketing teams regarding ways to develop their business (allegedly at the expense of the plan) was irrelevant to breach of duty of loyalty claim because they were not acting as fiduciaries); *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 422 (4th Cir. 2007) (affirming dismissal of breach of loyalty claim because evidence that high-ranking company officials wanted to sell additional company stock in order to assist their restructuring efforts was insufficient to show that those officials, when acting as fiduciaries, continued to offer the Company Stock Fund based on anything other than the best interests of the

Plan participants); *see also Dormani v. Target Corp.*, 970 F.3d 910, 917 (8th Cir. 2020) ("Where, as here, Plan participants point to nothing more than the tension inherent in the fiduciaries' dual roles as ERISA fiduciaries and Target officers, they fail to state a claim for breach of the duty of loyalty."); *Akers v. Palmer*, 71 F.3d 226, 229 (6th Cir. 1995) ("ERISA is designed to accomplish many worthwhile objectives, but the regulation of purely corporate behavior is not one of them.").

* * *

In sum, Plaintiff offers no factual allegations to suggest, much less conclude, that a prudent and loyal fiduciary selecting investments with "the sole focus of pursuing the highest risk-adjusted financial return" would have avoided each and every non-ESG investment product offered by the Plaintiff's expanding list of Challenged Managers. Am. Compl. ¶ 61. Instead, Plaintiff rests his Amended Complaint on the misguided assertion that ERISA flatly precludes fiduciaries from considering investment products offered by any manager who has ever cast a proxy vote for an ESG-based policy regardless of how those products have performed and regardless of the fiduciaries' judgment as to their prospects for future performance. *Id.* ¶¶ 94–95; *see also id.* ¶ 5 (alleging that "the actions of their investment advisors and managers" in "pursu[ing] ESG policy agendas through proxy voting . . . give rise to the same ERISA violations"). This is as wrong as it sounds. Acceptance of Plaintiff's theory would compel ERISA fiduciaries to ignore actual investment performance and instead screen out investment options "based on non-pecuniary factors" (*i.e.*, the manager's proxy voting record when the rationale for such votes is speculative at best), potentially harming participants by depriving them of access to some of the best performing, most popular, and highest rated funds in the market. Ironically, this is the exact practice that Plaintiff insists is forbidden by ERISA. *See* Am. Compl. ¶ 43; *see also id.* ¶¶ 62–65.

III. PLAINTIFF'S COUNT II IS DERIVATIVE OF COUNT I AND SO FAILS FOR THE SAME REASONS.

Plaintiff's claim in Count II that Defendants breached their duty to monitor the Plans' investment options is derivative of Count I and must be dismissed for the same reasons. Am. Compl. ¶¶ 125–33. Indeed, duty-to-monitor claims "inherently require a breach of duty by the appointed fiduciary." *Singh*, 882 F.3d at 150; *In re Idearc ERISA Litig.*, 2016 WL 7189981, at *7 (N.D. Tex. Oct. 4, 2016). Because Plaintiff does not plausibly allege a primary breach-of-fiduciary duty claim, his derivative monitoring claim necessarily fails as well. *See, e.g.*, *Camera v. Dell Inc.*, 2014 WL 960897, at *5 (W.D. Tex. Feb. 26, 2014); *Fulmer v. Klein*, 2011 WL 1108661, at *6 (N.D. Tex. Mar. 16, 2011); *In re Dell, Inc. ERISA Litig.*, 563 F. Supp. 2d 681, 695 (W.D. Tex. 2008). In addition, Plaintiff fails to allege a single fact concerning Defendants' actual monitoring process—including its purported shortcomings. *See e.g.*, *In re Calpine Corp. ERISA Litig.*, 2005 WL 1431506, at *6 (N.D. Cal. Mar. 31, 2005) ("Plaintiff has not alleged any facts that support his claim that [the defendants] failed to periodically review the performance of the Committee members."). Thus, Count II must also be dismissed.

CONCLUSION

For these reasons, the Amended Complaint should be dismissed with prejudice.

Respectfully submitted,

Dated: September 8, 2023

/s/ Russell D. Cawyer

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CERTIFICATE OF SERVICE

On September 8, 2023, a true and correct copy of the foregoing document was served upon all persons who have requested notice and service of pleadings in this case via the Court's CM/ECF system.

/s/ Russell D. Cawyer
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