UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LORI BILEWICZ, and all others similarly situated, Plaintiff, v. FMR LLC, FMR LLC INVESTMENT COMMITTEE, and John and Jane Does 1-25, Defendants.	Civil Action No. 13-10636-DJC **ORAL ARGUMENT REQUESTED**

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S CLASS ACTION COMPLAINT AND TO STRIKE JURY DEMAND

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Defendants FMR LLC ("FMR") and FMR LLC Investment Committee (the "Investment Committee" or "Committee") (collectively, "Defendants," and collectively or individually, as the context requires, "Fidelity") submit this Memorandum in Support of Their Motion To Dismiss Plaintiff's Class Action Complaint and To Strike Jury Demand pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

The Complaint should be dismissed because it fails to state a claim that Fidelity violated the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Plaintiff, a former participant in Fidelity's 401(k) plan—the FMR LLC Profit Sharing Plan (the "Plan")—claims that Defendants acted disloyally and engaged in transactions prohibited by ERISA by offering a wide range of Fidelity-managed mutual funds—and only Fidelity funds—as investment options under the Plan. In essence, the Complaint asserts that Defendants' motive for this longstanding practice was to enrich Fidelity by increasing its mutual fund advisory fees. But the Complaint pleads no facts that can sustain a charge of fiduciary disloyalty.

Fidelity is the world's largest manager of retirement assets.[1] Its mutual funds are widely utilized in hundreds of thousands of unaffiliated 401(k) plans.[2] There is no reason why Fidelity's Plan could not—or would not—do the same. Indeed, the United States Department of Labor ("DOL") has expressly authorized financial services company plans to invest in mutual funds affiliated with the sponsoring employer; according to the DOL, it would be "contrary to normal business practice for a company whose business is financial management to seek financial

[1] *See, e.g.,* Pensions & Investments' Annual Defined Contribution Money Manager Survey as of Dec. 31, 2011 ("P&I Survey"), *cited at* Fidelity Overview, http://www.fidelity.com/inside-fidelity/about-fidelity/overview (last visited May 31, 2013); Cerulli Associates Quantitative Update Retirement Markets 2012 Survey as of Dec. 31, 2011 ("Cerulli Survey"), *cited at* Fidelity Overview, http://www.fidelity.com/inside-fidelity/about-fidelity/overview (last visited May 31, 2013).

[2] *See* Compl. ¶ 10.

management services from a competitor."[3] It is thus implausible to suggest that offering an all-Fidelity lineup of funds violates ERISA.

Given Fidelity's breadth of product offerings, the Plan is able to provide participants with a full spectrum of high quality mutual funds in which to invest. The Plan's "investment lineup" includes funds in many different asset classes, with a wide variety of risk profiles, and a range of fee structures, including numerous funds with fees far below the level that the Complaint acknowledges to be appropriate. Not surprisingly, two separate Courts of Appeal have endorsed very similar lineups offered by plan sponsors unaffiliated with Fidelity, affirming the dismissal at the pleading stage of complaints charging that defendants breached their fiduciary duties by offering a large range of Fidelity mutual funds. Further, given Fidelity's business, it is not surprising that many of its employees desire a broad range of choices and welcome the ability to construct their own mix of investments from a diverse lineup. And for those participants with less investment experience, the Plan offers *free* professional investment advisory services. Thus, the decision to offer Fidelity's employees a wide range of alternatives, including giving them the freedom to have an expert choose investments for them, provides no basis for Plaintiff's claim of disloyalty.

Fidelity went above and beyond its obligations to its employees and the Plan in other ways as well. The public record—ignored by the Complaint—demonstrates that Fidelity contributed over *$2.1 billion* of its *own money* to the accounts of Plan participants between 2007 and 2011. Those employer contributions significantly exceeded the amounts contributed to the Plan by employees, and far surpass the level of employer contributions made by most companies that sponsor 401(k) plans. Indeed, Fidelity's contributions to the Plan between 2007 and 2011

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[3] Notice of Proposed Rule-Making, Participant Directed Individual Account Plans, 56 Fed. Reg. 10724, 10730 (Mar. 13, 1991) (discussing Prohibited Transaction Exemption 77-3).

are approximately *ten times* greater than the amount of "excess" fees that the Complaint claims Fidelity received from the Plan. Because no company would contribute such sums if its intensions vis-à-vis the plan were motivated by financial gain, the Complaint's central thesis defies common sense.

Instead, there is an "obvious alternative explanation" for the challenged conduct, *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009): The Plan offered a broad, diverse investment lineup of Fidelity funds in order to help participants achieve their individualized retirement goals and objectives. Because the factual allegations do not give rise to any plausible inference of disloyal conduct in the face of such an "obvious alternative," *see id.*, the Complaint should be dismissed.

In addition, the Complaint suffers from numerous other fatal defects:

- Plaintiff lacks standing to sue because she has not pleaded any personalized injury, and could not possibly plead any injury with respect to the more than 150 Fidelity funds in which she never invested.

- Plaintiff's claims are barred by ERISA's three-year statute of limitations because the only facts that are alleged in the Complaint were in the public domain and available to Plaintiff and other Plan participants more than three years ago. The claims are also barred by ERISA's six-year statute of repose, given the express allegation that Defendants made the decision to offer a wide array of Fidelity funds more than six years ago.

- Plaintiff cannot establish a prohibited transaction under ERISA because the conduct complained of—investment in mutual funds advised by Fidelity affiliates—is expressly permitted by the DOL.

- As to FMR, the Complaint fails to allege the requisite ERISA fiduciary status.

- Plaintiff's demand for a jury trial should be stricken because there is no right to a jury trial for breach of fiduciary duty claims under ERISA.

In light of this multitude of defects, the Court should grant Defendants' motion to dismiss the Complaint in its entirety. Any other outcome risks imposing on Fidelity precisely the type of "litigation expenses" that Congress feared might "unduly discourage employers from offering

[ERISA] plans in the first place." *Conkright v. Frommert*, 130 S. Ct. 1640, 1649 (2010) (internal quotations omitted; alterations in original).

FACTUAL BACKGROUND[4]

I. Fidelity's Successful and Generous Plan

Fidelity is a broadly diversified financial services company. As of December 2012, it administered approximately $3.7 trillion in assets, and it provided investment management services for $1.6 trillion in invested assets. Compl. ¶ 10. Approximately $1 trillion of those assets are managed through retirement plans,[5] making Fidelity the nation's largest manager of retirement plan assets.[6] Fidelity is also the nation's largest provider of recordkeeping services to 401(k) plans;[7] it serves "more than 20 million individual and institutional clients." Compl. ¶ 10. Fidelity has received accolades for the retirement plan services that it provides.[8]

Fidelity manages these assets, and services these retirement plans and other clients, through a workforce of over 40,000 employees, ranging from those who answer customer service

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[4] In ruling on a Rule 12(b)(6) motion to dismiss, courts routinely consider ERISA plan documents—even if not expressly referenced in the Complaint—as well as public filings containing pertinent information. *See, e.g.*, *Beddall v. State Street Bank and Trust Co.*, 137 F.3d 12, 16-17 (1st Cir. 1998); *In re Lernout & Hauspie Sec. Litig*., 286 B.R. 33, 37 (D. Mass. 2002); *Town of Norwood v. New England Power Co*., 23 F. Supp. 2d 109, 112 (D. Mass. 1998), *rev'd on other grounds,* 202 F. 3d 408 (1st Cir. 2000). Additionally, with respect to Defendants' standing argument under Rule 12(b)(1), which challenges this Court's subject matter jurisdiction over Plaintiff's claims, the Court may consider any relevant extrinsic evidence. *See, e.g.*, *Valentin v. Hospital Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001).

[5] There are two primary types of employer-sponsored retirement plans, defined benefit plans and defined contribution plans. As explained by the DOL: "A defined benefit plan, funded by the employer, promises you a specific monthly benefit at retirement," whereas a "defined contribution plan . . . does not promise you a specific benefit amount at retirement. Instead, you and/or your employer contribute money to your individual account in the plan. . . . The value of your account depends on how much is contributed and how well the investments perform." Department of Labor, What You Should Know About Your Retirement Plan, *available at* http://www.dol.gov/ebsa/publications/wyskapr.html. "The 401(k) plan is a popular type of defined contribution plan." *Id.*

[6] *See, e.g.,* P&I Survey; Cerulli Survey.

[7] *See* PLANSPONSOR Defined Contribution Recordkeeping Survey as of Dec. 31, 2011, *cited at* Fidelity Overview, http://www.fidelity.com/inside-fidelity/about-fidelity/overview (last visited May 31, 2013).

[8] *See, e.g.*, Alison Cooke Mintzner, *Fidelity: For its innovation in the 401(k) industry*, http://www.plansponsor.com/PS11Profile.aspx?id=6442493007 (last visited May 31, 2013) (naming Fidelity one of the "20 Institutional Leaders of the Past 20 Years" due to its "innovation" and "leadership" in the 401(k) market).

calls to highly-trained portfolio managers.[9] Among the benefits Fidelity makes available to its workforce is a 401(k) profit sharing plan, the Plan. As the "sponsor" or "settlor" of the Plan, FMR designed the Plan to allow participating employees to "share in [Fidelity's] profits" and "to save and invest funds for their retirement."[10]

Participating employees can elect how much, if any, of their salary to contribute to the Plan. In addition, Fidelity makes contributions to eligible employees' accounts in the form of both matching contributions and profit-sharing contributions. Fidelity's contributions to the Plan are exceptionally generous. Fidelity has traditionally made annual profit-sharing contributions of at least 10% of each eligible employee's total compensation.[11] Additionally, Fidelity matches eligible employee contributions to the Plan, dollar for dollar, up to 7% of each eligible participant's compensation—a level of match enjoyed by only approximately 2% of 401(k) plan participants nationwide.[12] In total, Fidelity contributed approximately $2.175 billion to the Plan from 2007 through 2011—averaging over $430 million per year.[13]

Not surprisingly, the Plan is very popular with Fidelity employees: Between 2007 and 2011 employees contributed over $1.37 billion of their salaries to the Plan and rolled over more

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[9] *See* Fidelity Investments Corporate Fact Sheet, http://www.fidelity.com/inside-fidelity/fidelity-facts/fidelity-corporate-fact-sheet (last visited May 31, 2013).

[10] *See* FMR Corp. Profit Sharing Plan Document, as amended (2005 Restatement) ("Plan Document") at FID-LB-0000, § 1.2, attached as Exhibit 1 to the Declaration of Abigail K. Hemani ("Hemani Decl.").

[11] *See* Plan Document at FID-LB-00024, § 5.1(c), Hemani Decl. Ex. 1.

[12] *See* 2011 FMR LLC Profit Sharing Plan Form 5500 (Oct. 15, 2012) ("2011 Form 5500") at FID-LB-00244, Hemani Decl. Ex. 2; United States Bureau of Labor Statistics, Bulletin 2589, Table 71, *available at* http://www.bls.gov/ncs/ebs/benefits/2008/home.htm.

[13] *See* 2007 FMR LLC Profit Sharing Plan Form 5500 (Oct. 15, 2008) ("2007 Form 5500") at FID-LB-00267, Hemani Decl. Ex. 3; 2008 FMR LLC Profit Sharing Plan Form 5500 (Oct. 15, 2009) ("2008 Form 5500") at FID-LB-00285, Hemani Decl. Ex. 4; 2009 FMR LLC Profit Sharing Plan Form 5500 (Oct. 15, 2010) ("2009 Form 5500") at FID-LB-00321, Hemani Decl. Ex. 5; 2010 FMR LLC Profit Sharing Plan Form 5500 (Oct. 15, 2011) ("2010 Form 5500") at FID-LB-00365, Hemani Decl. Ex. 6; 2011 Form 5500 at FID-LB-00177, Hemani Decl. Ex. 2. The Form 5500 for 2012 is not yet available.

than $100 million *into* the Plan from 401(k) plans offered by prior employers.[14] Further, although participants who have left Fidelity's employ may withdraw their Plan account balances and roll them over to another retirement arrangement, as of the end of December 2011, over 14,000 of those retired or separated participants had decided to retain their assets in the Plan.[15]

The Plan is entirely participant-directed, meaning that each participant can allocate the employee and employer contributions in her Plan account into any available investment option. These options include a broad array of more than 160 mutual funds advised by Fidelity affiliates.[16] The use of Fidelity's mutual funds is specified in the governing Plan Document.[17] The Fidelity mutual funds that are made available include both index funds (*i.e.*, funds that are designed to track the performance of a specified index) and actively-managed funds (*i.e.*, funds with advisors who use their expertise to attempt to beat the fund's benchmark); funds that invest in a full range of asset categories, including stocks, bonds, commodities, and treasury notes; domestic and international funds; funds that carry different levels of risk and potential reward; and funds that have a range of investment management fees, including ten funds with fees of 25 basis points (0.25% of the assets invested) or less per year.[18]

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[14] 2007 Form 5500 at FID-LB-00267, Hemani Decl. Ex. 3; 2008 Form 5500 at FID-LB-00285, FID-LB-00297, Hemani Decl. Ex. 4; 2009 Form 5500 at FID-LB-00321, FID-LB-00333, Hemani Decl. Ex. 5; 2010 Form 5500 at FID-LB-00365, FID-LB-00379, Hemani Decl. Ex. 6; 2011 Form 5500 at FID-LB-00177, FID-LB-00245, Hemani Decl. Ex. 2.

[15] *See* Compl. ¶ 21 (noting that the Plan had 55,862 participants as of Decembers 31, 2011); Fidelity Corporate Fact Sheet, http://www.fidelity.com/inside-fidelity/fidelity-facts/fidelity-corporate-fact-sheet (last visited May 31, 2013) (noting that Fidelity has approximately 41,000 employees).

[16] *See* Compl. ¶ 32. In addition, the Plan offers as an option the Pyramis Aggressive Equity Collective Investment Trust, which is managed by a Fidelity affiliate. *See* 2011 Form 5500 at FID-LB-00253, Hemani Decl. Ex. 2.

[17] *See* Plan Document at FID-LB-00066-00067, §§ 12.2, 12.5, Hemani Decl. Ex. 1 (limiting investment options to "Investment Companies"); *id.* at FID-LB-00009, § 2.50 (defining "Investment Companies" to include "any regulated investment company or unit investment trust managed by the Management Company, and any common or collective trust fund available only to employee plan trusts that satisfy the requirements of the Code"); *id.* at FID-LB-00010, § 2.53 (defining the "Management Company" as Fidelity).

[18] *See* App. A. Plaintiff did not invest her Plan account in any of these very low-cost funds. *See generally* Bilewicz FMR LLC Profit Sharing Plan Statements ("Bilewicz Plan Statements"), Hemani Decl. Ex. 7. In contrast to these low-fee index funds, the Plan also offers a small number of specialty funds which require greater work and skill to

Fidelity also offers several different programs for participants who desire assistance with fund selection. For example, Fidelity offers online financial planning tools to assist participants in retirement decision-making, and even offers a free, personalized portfolio advisory service, Fidelity Retirement Plan Manager, that will select appropriate funds for participants if they so desire.[19] If a participant does not make any fund selection, her assets are defaulted into the age-appropriate "Freedom Fund," a "lifecycle" fund managed to provide an appropriate mix of equity, fixed-income and other asset classes for her age group.[20] As a result of the design, funding and operation of the Plan, Fidelity's employees are doing far better than most in accumulating assets for retirement: The average participant account balance in the Plan is more than twice the national average.[21]

II. <u>The Complaint's Allegations</u>

Plaintiff, a former Fidelity employee and former Plan participant, purports to bring her claims on behalf of "[a]ll participants in the [] Plan who invested in any mutual fund established by FMR [] or any of its subsidiaries and affiliates in the Plan from March 20, 2007 to the present." Compl. ¶ 110. Plaintiff ceased participating in the Plan, and withdrew her entire account balance, in July 2011.[22] Between March 20, 2007 and July 2011, Plaintiff invested her

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manage and, thus, charge higher fees. Plaintiff did not invest her Plan account in any of these specialty funds, either. *See generally id.*

[19] *See* FMR LLC, Choosing Your Investments Brochure ("Choosing Your Investments") at FID-LB-00557-00558 (Feb. 2008), Hemani Decl. Ex. 9. After 2008, the Fidelity Retirement Plan Manager was renamed Portfolio Advisory Services at Work (PAS-W).

[20] *See* FMR LLC Profit Sharing Plan Summary Plan Description ("Summary Plan Description") at FID-LB-00536 (Dec. 1, 2008), Hemani Decl. Ex. 8; Compl. ¶¶ 70-71.

[21] *Compare* 2011 Form 5500 at FID-LB-00165, FID-LB-00177 (average Plan balance, determined by plan assets divided by number of participants, of approximately $152,000) *with* Russell Investments, *Seven Attributes of an Excellent Defined Contribution Plan* at 1 (Feb. 2012) (national average plan account balance is $71,000) (cited in Compl. ¶¶ 25, 32, 34, 37).

[22] *See* Bilewicz Plan Statements at FID-LB-00526, Hemani Decl. Ex. 7. These records are submitted solely for the purposes of Fidelity's Rule 12(b)(1) motion as to standing in Argument § I, below, and thus are appropriately

Plan account in only 14 of the more than 160 funds available.[23]

The Complaint alleges that FMR, the Committee, and unspecified individual Committee members are ERISA fiduciaries, and that they breached their fiduciary obligations by seeking to enrich Fidelity at the expense of Plaintiff and other Plan participants. *See* Compl. ¶¶ 11, 16-17, 102, 122-27. The Complaint does not plead any direct factual allegation of wrongful intent. Instead, the Complaint asks the Court to *infer*, based on the nature of the investment options made available, that Defendants must have been acting disloyally. Specifically, Count I of the Complaint alleges that Defendants (i) "caus[ed] the Plan to invest exclusively in Fidelity Funds;" (ii) caused the Plan to offer too many investment options to participants; (iii) "fail[ed] to remove or replace" higher-fee options "from the Plan's investment options menu;" and (iv) "us[ed] Plan assets to seed new Fidelity Funds." *Id.* ¶¶ 123-25. In Count II, the Complaint alleges that, between March 20, 2007 and the present, each time Defendants added a new Fidelity fund to the plan lineup, they engaged in a prohibited transaction under ERISA § 406(a), 29 U.S.C. § 1106(a). *Id.* ¶ 131.

ARGUMENT

I. The Complaint Should Be Dismissed for Lack of Subject Matter Jurisdiction Because Plaintiff Lacks Constitutional Standing To Bring Her Claims.

The Complaint should be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure because Plaintiff has not shown that she has standing to bring her claims.

Whether a plaintiff has Article III standing is a "threshold question in every federal case," *Warth v. Seldin*, 422 U.S. 490, 498 (1975), because, where a plaintiff lacks constitutional standing, courts lack subject matter jurisdiction, *see Animal Welfare Inst. v. Martin*, 623 F.3d 19,

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considered at this juncture without turning this motion into one for summary judgment. *See, e.g., Aversa v. United States*, 99 F.3d 1200, 1209-10 (1st Cir. 1996).

[23] *See generally* Bilewicz Plan Statements, FID-LB-00391A-00525, Hemani Decl. Ex. 7.

25 (1st Cir. 2010). To satisfy Article III's case and controversy requirement, a plaintiff must establish that she "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct." *Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 335 (1990) (internal quotations omitted).[24]

Even at the motion to dismiss stage, the plaintiff bears the burden of establishing standing. *Bingham v. Mass.*, 616 F.3d 1, 5-7 (1st Cir. 2010) (affirming dismissal for lack of standing). Moreover, because standing is a jurisdictional issue, a court must consider and weigh all facts relevant to a standing challenge at the outset of the litigation. *See, e.g.*, *Valentin*, 254 F.3d at 363 (noting that "the court must address the merits of the jurisdictional claim by resolving the factual disputes between the parties"). Where those facts fail to establish that a plaintiff has incurred any harm, the court should grant a defendant's motion to dismiss. *See, e.g.*, *Fishman Haygood Phelps Walmsley Willis & Swanson, LLP v. State Street Corp.*, No. 1:09–10533–PBS, 2010 WL 1223777, at *7 (D. Mass. Mar. 5, 2010) (dismissing under Rule 12(b)(1) a putative ERISA class action for lack of Article III standing where, after limited expert discovery as to the named plaintiff's alleged injury, plaintiff could prove no harm).

Here, the Complaint does not allege that Plaintiff has suffered any "actual" injury as a result of Fidelity's allegedly disloyal decision-making process in selecting the Plan lineup. *Franchise Tax Bd. of Cal.*, 493 U.S. at 335. Since March 20, 2007 (the beginning of the "Relevant Period," Compl. ¶ 4), Plaintiff invested in only 14 of the more than 160 Fidelity funds

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[24] *See also Merriam v. Demoulas Super Markets, Inc.*, Civ. A. No. 11-10577, 2012 WL 931347, at *3 (D. Mass. Mar. 20, 2012) (dismissing ERISA lawsuit for failure to establish constitutional standing, including injury-in fact). The fact that a suit is brought as a putative class action "adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class." *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (internal quotations and citations omitted).

about which she complains.[25] Because the Complaint does not allege that the 14 funds in which Plaintiff invested charged excessive fees, performed poorly, or otherwise caused her to suffer a loss, Plaintiff has failed to sustain her burden of establishing actual injury. *See Fishman*, 2010 WL 1223777, at *7 ("in an ERISA case, . . . a plaintiff [must] satisfy the strictures of constitutional standing by demonstrating individual loss") (citation and internal quotations omitted)). Nor can Plaintiff demonstrate any "threatened injury" from Defendants' allegedly wrongful conduct, given that she has not participated in the Plan since July 2011.[26] *Franchise Tax Bd. of Cal.*, 493 U.S. at 335. Because she is at no risk of future harm, Plaintiff lacks standing to seek prospective relief.[27]

Moreover, even if the Complaint had alleged some injury-in-fact with respect to any of the 14 funds in which Plaintiff invested, which it does not, the case law makes clear that Plaintiff would still lack standing to assert any claim with respect to the remaining 140-plus funds available under the Plan. In the Supreme Court's words: "[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982). Applying this principle, the First Circuit held in *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 771 (1st Cir. 2011), that, although plaintiffs had standing to assert securities law claims with respect to the two trusts that issued the certificates they had purchased, they lacked constitutional standing

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[25] *See generally* Bilewicz Plan Statements, Hemani Decl. Ex. 7.

[26] *See* Bilewicz Plan Statements at FID-LB-00526, Hemani Decl. Ex. 7.

[27] *See*, *e.g.*, *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 103 (2d. Cir. 2011) (plaintiff who had closed account through which plan administrator allegedly invested funds for its own profit in violation of ERISA had not alleged ongoing violation that could be redressed by injunctive relief); *Impress Commc'ns v. Unumprovident Corp.*, 335 F. Supp. 2d 1053, 1060 (C.D. Cal. 2003) (plaintiffs had no standing to seek injunction because they no longer participated in the ERISA plan); *Selby v. Principal Mut. Life Ins. Co.*, 197 F.R.D. 48, 64 (S.D.N.Y. 2000) (same).

to raise claims concerning six other, similar trusts whose certificates plaintiffs had not acquired. It made no difference that the same defendant was accused of the same wrong as to each of the eight trusts. As the Court explained: "Although Nomura Asset is a properly named defendant, the named plaintiffs have no stake in establishing liability as to misconduct involving the sales of th[]e certificates" in which plaintiffs did not invest. *Id.*

Applying the same principles the First Circuit employed in *Nomura*, courts in this district have held that investors in one mutual fund cannot seek to recover for violations pertaining to mutual funds they did not own. *See Stegall v. Ladner*, 394 F. Supp. 2d 358, 363 (D. Mass. 2005) (purchaser of single mutual fund lacked constitutional standing to sue investment company for claims involving other mutual funds; purchaser was not permitted "to bootstrap claims arising out of investment decisions made in relation to other funds in which he was not a participant"); *see also Forsythe v. Sun Life Fin., Inc.*, 417 F. Supp. 2d 100, 118 (D. Mass. 2006) (no standing to sue on behalf of mutual funds that plaintiffs did not own or had only formerly owned).

Moreover, in *Fuller v. SunTrust Banks, Inc.*, Civ. A. No. 11-cv-784, 2012 WL 1432306 (N.D. Ga. Mar. 20, 2012), the court dismissed for lack of standing virtually identical ERISA claims to those brought here. There, plaintiff brought a putative class action involving breach of fiduciary duty and prohibited transaction claims against a plan sponsor, SunTrust Bank, and various other parties alleging that the defendants violated ERISA by offering plan participants investment options consisting of proprietary mutual funds. *Id.* at *1. In ruling on defendants' motion to dismiss, the court held that plaintiff lacked standing to raise her claims with respect to the fund in which she did not invest. *Id.* at *8. The court explained that dismissal for lack of standing was required because the complaint did "not describe[] how the offering of a fund in which [plaintiff] did not invest caused her a non-speculative injury." *Id.* Similarly, in *David v.*

Alphin, 817 F. Supp. 2d 764 (W.D.N.C. 2011), *aff'd*, 704 F.3d 327 (4th Cir. 2013), the court dismissed, for lack of standing, claims virtually identical to those asserted in this case because the plaintiff had not invested in any funds added to plan during the applicable limitations period. *Id.* at 781.

Under these authorities, Plaintiff lacks standing. It is beyond dispute that Plaintiff owned only 14 of the more than 160 funds made available to Plan participants. As in *Fuller*, the Complaint does not, and could "not[,] describe[] how the offering of a fund in which [plaintiff] did not invest caused her a non-speculative injury." 2012 WL 1432306, at *8. Further, because Plaintiff invested in only one fund that was added to the Plan lineup within ERISA's six-year statute of repose, and invested in no funds that were added to the lineup within ERISA's three-year statute of limitations, any claims that she might once have had standing to raise are now time-barred. *See* Argument § II, *infra*; *see also David*, 817 F. Supp. 2d at 781.[28]

II. <u>The Complaint Should Be Dismissed Because Plaintiff's Claims Are Time-Barred.</u>

The Complaint also should be dismissed as untimely under either ERISA's three-year statute of limitations or its six-year statute of repose.

A. Plaintiff's Claims Are Barred by ERISA's Three-Year Statute of Limitations.

ERISA § 413(2) precludes claims that are filed more than "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2). "An ERISA plaintiff may not [] avoid the statute of limitations by refusing to read or

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[28] The Fidelity Mid Cap Enhanced Index Fund was added to the Plan in 2007, and Plaintiff first invested in this fund in late 2008. *Compare* 2006 FMR LLC Profit Sharing Plan Form 5500 (Oct. 15, 2007) ("2006 Form 5500") at FID-LB-00629-00633, Hemani Decl. Ex. 10, *with* 2007 Form 5500 at FID-LB-00270-00273, Hemani Decl. Ex. 3 (showing that the Mid Cap Enhanced Index Fund was added to the Plan in 2007); *see generally* Bilewicz Plan Statements, Hemani Decl. Ex. 7 (showing 14 funds in which Plaintiff invested); 2006 Form 5500 at FID-LB-00629-00633, Hemani Decl. Ex. 10 (showing that 13 of the 14 funds in which Plaintiff invested were added to the Plan lineup before March 20, 2007).

examine information disclosing relevant facts." *Fuller*, 2012 WL 1432306, at *5 n.6 (granting motion to dismiss where documents available to plaintiff more than three years before she filed suit contained disclosures on the performance and fees of the funds) (internal quotations omitted); *see also Young v. Gen. Motors Inv. Mgmt. Corp.*, 550 F. Supp. 2d 416, 419 (S.D.N.Y. 2008) (granting motion to dismiss where conduct at issue was evident in fund prospectuses that were made public more than three years before plaintiff filed suit), *aff'd on other grounds*, 325 Fed. App'x 31 (2d Cir. 2009). As explained by the First Circuit, "we do not think Congress intended the actual knowledge requirement [of ERISA's statute of limitations] to excuse willful blindness by a plaintiff." *Edes v. Verizon Commc'ns, Inc.*, 417 F.3d 133, 142 (1st Cir. 2005).

Here, the Complaint challenges Fidelity's practice of making a broad range of Fidelity mutual funds available as Plan investment options—a practice that the Complaint admits has existed for far more than three years. *See* Compl. ¶¶ 34, 44-45, 47.[29] Anticipating the statute of limitations problem, the Complaint nonetheless conclusorily alleges that Plaintiff only "discovered her claims shortly before commencing this action." Compl. ¶ 9. But the Complaint does not, and consistent with good faith pleading could not, deny the incontrovertible—that the Plan lineup was fully disclosed to all participants, and that Plaintiff knew more than three years ago what funds were offered in the Plan, which is how she was able to select 14 for herself.[30]

Instead, the Complaint claims Plaintiff could not have "discovered her claims" until recently because she lacked information "regarding the substance of the deliberations—if any—

[29] "Affirmative defenses, such as the statute of limitations, may be raised in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), provided that the facts establishing the defense [are] clear on the face of the plaintiff's pleadings." *Trans-Spec Truck Serv., Inc. v. Caterpillar, Inc.*, 524 F.3d 315, 320 (1st Cir. 2008).

[30] *See*, *e.g.*, 2006 Form 5500 at FID-LB-00629-00633, Hemani Decl. Ex. 10 (listing funds offered to Plan) *see also* Summary Plan Description at FID-LB-00543, Hemani Decl. Ex. 8 (referring participants to the "Choosing Your Investments brochure" that is "included in the Profit Sharing Plan enrollment information and is available on NetBenefits®"); Choosing Your Investments at FID-LB-00559-00616 (listing and describing all funds offered to Plan participants), Hemani Decl. Ex. 9.

of Defendants concerning the Plan's menu of investment options." Compl. ¶ 9. This assertion is beside the point and a concession to the obvious pleading defect. Plaintiff's claims are not premised on any factual allegation concerning Defendants' deliberations. Nor does Plaintiff claim to have any insight into that deliberative process. Instead, the Complaint is based *entirely* on the nature of the Plan lineup—which indisputably was known to Plaintiff at the time she invested—and information about the fees and performance of the funds that was public and available to Plaintiff well over three years ago. Compl. ¶¶ 34, 44-45, 47. Accordingly, the Complaint is time-barred and should be dismissed.

B. Plaintiff's Breach of Fiduciary Duty Claim Is Barred by ERISA's Six-Year Statute of Repose.

Although Count II of the Complaint (alleging prohibited transactions) is limited by its terms to funds added to the Plan within the last six years, Count I (alleging breach of fiduciary duty) is not, and instead challenges practices that allegedly date back 15 years or more. Because more than six years have passed since this allegedly wrongful conduct, even if ERISA's three-year statute of limitations had not run, Count I would be barred by ERISA's statute of repose.

ERISA § 413(1) provides a six-year statute of repose that begins to run upon "the last action which constituted a part of the breach or violation." 29 U.S.C. § 1113(1). This provision bars challenges to conduct occurring before that period, whether or not known to plaintiffs. Applying this statute, the Ninth Circuit Court of Appeals recently held in *Tibble v. Edison Int'l*, 711 F.3d 1061 (9th Cir. 2013), that plaintiffs could not maintain claims relating to decisions to include retail mutual funds in a plan lineup because the decisions were made more than six years before plaintiffs filed suit. *Id.* at 1068-69. Earlier this year, the Fourth Circuit also affirmed summary dismissal of the precise type of claims asserted here based on ERISA's six-year statute of repose. In *David*, plaintiffs claimed that defendants affiliated with Bank of America breached

ERISA's fiduciary duties by including Bank of America proprietary funds in the bank's employee benefit plans. 704 F.3d at 340-41. The court held that, because the challenged funds were added to the plan lineups more than six years before plaintiffs filed their complaint, plaintiffs' claim was untimely. *Id.* at 342. The fact that defendants did not remove the funds during the six-year repose period or that participants continued investing in the funds during those six years did not change the fact that plaintiffs' claims were time-barred. *Id.*[31]

Here, it is clear from the face of the Complaint that the challenged conduct—the decision to offer a diverse array of Fidelity mutual funds—was made long before March 20, 2007. The Complaint expressly asserts that Fidelity "has kept the investment management practices of the Plan stuck in the 1990's . . . ." Compl. ¶ 34. Additionally, the Complaint alleges that the practice of "seeding" funds had begun by at least 1999. *See* Compl. ¶¶ 44-45, 47. That these funds may have remained in the Plan lineup into the limitations period is of no moment: As the Fourth and Ninth Circuits have held, ongoing obligations to monitor plan investment options simply are not relevant where plaintiff's claims concern the initial selection of those options, made more than six years prior to filing suit. *See Tibble*, 711 F.3d at 1068-69 (the "continued offering of a plan option, without more," does not give rise to a subsequent breach that would restart the limitations period); *David*, 704 F.3d at 341-42.

Plaintiff's breach of fiduciary duty claim is therefore time-barred.

III. <u>Count I of the Complaint Should Be Dismissed because It Fails To State a Claim for Breach of the Duty of Loyalty.</u>

The Complaint also fails to state a claim for breach of fiduciary duty (Count I) because its allegations of disloyalty do not meet the federal pleading requirements.

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[31] *David* and *Tibble* are consistent with First Circuit law. *See, e.g., Edes*, 417 F.3d at 139-40 (ERISA claim accrued when employees were hired and classified as to be paid through third-party payroll, not each time they received a third-party payroll check as a result of the alleged wrongful classification).

To survive a Rule 12(b)(6) motion to dismiss, a complaint "must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). Instead, it must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570; *Rederford v. U.S. Airways, Inc.*, 589 F.3d 30, 35 (1st Cir. 2009) (same); *Winter v. Chase Bank*, Civ. A. No. 12-10109, 2013 WL 980607, at *2 (D. Mass. Mar. 12, 2013) (Casper, J.) (same). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

Factual allegations that are merely "consistent with" unlawful conduct are insufficient to state a plausible claim where "more likely explanations" or "obvious alternative explanations" of lawful conduct exist. *Id.* at 682. Thus, for example, the First Circuit reversed a district court's denial of a motion to dismiss where an airline claimed that FAA inspectors had delayed inspections of its aircraft in retaliation for protected First Amendment activity, given the "obvious alternative explanation" that the delay had been due to the airline's failure to submit the request for inspection correctly. *Air Sunshine, Inc. v. Carl*, 663 F.3d 27, 37 (1st Cir. 2011). The First Circuit concluded: "As between [this] 'obvious alternative explanation[]' for the delays, and the 'purposeful, invidious discrimination [Air Sunshine] asks us to infer, discrimination is not a plausible conclusion.'" *Id.* (quoting *Iqbal*, 556 U.S. at 682).

ERISA § 404(a)(1)(A) provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and beneficiaries; and . . . defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A). This duty focuses on the fiduciary's

motivation: "a breach of th[e] duty [of loyalty] requires some showing that the fiduciaries' decisions were *motivated by* a *desire to serve the interests of [the company] over those of the beneficiaries*." *Tibble v. Edison Int'l*, No. CV 07-5359, 2010 WL 2757153, at *24 n.19 (C.D. Cal. July 8, 2010) (emphasis added). Thus, to survive dismissal, a claim for disloyalty must allege facts plausibly suggesting an improper motive, rather than an "obvious alternative explanation" for the conduct. *Iqbal*, 556 U.S. at 682.

Additionally, in assessing whether or not a plan fiduciary has breached his obligations under ERISA § 404, 29 U.S.C. § 1104, courts are mindful that some degree of deference generally is due to the fiduciary's interpretation of his obligations under the ERISA plan. *See, e.g.*, *Tibble*, 711 F.3d at 1077-78; *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 711-12 (6th Cir. 2000); *Moench v. Robertson*, 62 F.3d 553, 565 (3d Cir. 1995). As the Supreme Court has recognized, in enacting ERISA, "Congress sought to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Conkright*, 130 S. Ct. at 1649 (internal quotation marks omitted; alterations in original). Accordingly, Courts seek to avoid superimposing their own views upon reasonable decisions reached by Plan fiduciaries. *See Tibble*, 711 F.3d at 1078 (citing *Conkright*, 130 S. Ct. at 1649).

As explained below, the facts alleged here do not give rise to any plausible inference of improper motivation. Instead, there is an "obvious alternative explanation," *Iqbal*, 556 U.S. at 682, for the conduct alleged: That the Plan's investment lineup was intended to offer Fidelity employees a wide array of choices so that they could determine the best path for meeting their own retirement goals and objectives. Accordingly, Count I of the Complaint should be dismissed.

A. The Allegation that the Plan Invested Exclusively in Fidelity Funds Does Not Support an Inference of Disloyalty.

The Complaint first asks the Court to infer that "Defendants" acted disloyally because they "caus[ed] the Plan to invest exclusively in Fidelity Funds." Compl. ¶ 123. But the fact that the Plan lineup consisted exclusively of Fidelity funds provides no support for such an inference.

Not only do financial services companies routinely utilize their own investment products for their plans, but this practice is expressly allowed by Congress and the DOL. As the DOL explains, it would be "contrary to normal business practice for a company whose business is financial management to seek financial management services from a competitor." Notice of Proposed Rule-Making, Participant Directed Individual Account Plans, 56 Fed. Reg. at 10730. For this very reason, when ERISA was enacted, Congress created express exemptions to the "prohibited transaction" rules described *infra*, at Argument § IV—provisions that were designed to protect against self-dealing and conflicts of interest—to allow plans sponsored by banks and insurance companies to offer their own products to their plan participants. *See* ERISA § 408(b)(5), (8), 29 U.S.C. § 1108(b)(5), (8).[32] The DOL extended this congressional authorization to plans sponsored by mutual fund advisors and their affiliates through Prohibited Transaction Exemption ("PTE") 77-3. In so doing, the DOL recognized that making proprietary mutual fund investments available to employees of mutual fund companies is "in the interests of plans and of their participants and beneficiaries" and "protective of the rights of participants and

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[32] *See* H.R. Conf. Rep. No. 93-1280 (Aug. 12, 1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5094 ("[I]t would be contrary to normal business practice for a bank to invest its plan assets in another bank."); *id.* ("[I]t would be contrary to normal business practice to require the plan of an insurance company to purchase its insurance from another insurance company."); *id.* at 5096 (allowing "banks, trust companies, and insurance companies" to continue their "common practice" of investing their plans' assets in their own pooled investment funds).

beneficiaries of Plans." Class Exemption Involving Mutual Fund In-House Plans Requested by the Investment Company Institute, 42 Fed. Reg. 18734, 18735 (Mar. 31, 1977).[33]

Conformity with a typical practice that has been condoned by the responsible regulator and by Congress creates no inference of wrongdoing. As explained by one court in a case much like this one, that defendants "followed such a practice—the very result Congress [and the DOL] intended to approve by enacting the[se] exemptions—*does not give rise to an inference of disloyalty*." *Dupree*, 2007 WL 2263892, at *45 (emphasis added).

Moreover, two courts of appeal have endorsed plan lineups consisting almost exclusively of Fidelity mutual funds, affirming dismissal on the pleadings of claims similar to those raised here. First, in *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009), the Seventh Circuit affirmed dismissal of claims that defendants breached fiduciary duties to participants in a very large plan by offering only Fidelity mutual funds. *Id.* at 583. The court recognized that there is "no statute or regulation prohibiting a fiduciary from selecting funds from one management company." *Id.* at 586. Second, in *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011), the Third Circuit affirmed dismissal of a complaint alleging that defendants "breached [their] fiduciary duties [of prudence and loyalty] in composing the mix and range of investment options" in another very large plan because 67 of the 73 investment options were Fidelity mutual funds. *Id.* at 318, 326. As the Third and Seventh Circuits recognized, where, as here, a breach of fiduciary duty claim is premised entirely on alleged facts concerning the nature of a plan lineup, no breach can be inferred from the decision to offer Fidelity mutual funds. *See id.*, 671 F.3d at 327-28; *Hecker*,

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[33] Fidelity is, of course, not the only financial services company that offers its proprietary products to the employees participating in its plan. *See*, *e.g.*, *Dupree v. The Prudential Ins. Co. of Am.*, No. 99-8837, 2007 WL 2263892, at *46 (S.D. Fla. Aug. 7, 2007). Indeed, even Russell Investments—the fund manager on whose publication the Complaint relies for evidence of "best practices" in plan management, *see* Compl. ¶ 34—offered exclusively its own investment products to its plan participants during the relevant time period. *See* 2009 Russell Retirement Plan Form 5500 at FID-LB-00670, Hemani Decl. Ex. 11; 2010 Russell Retirement Plan Form 5500 at FID-LB-00725, Hemani Decl. Ex. 12; 2011 Russell Retirement Plan Form 5500 at FID-LB-00782, Hemani Decl. Ex. 13.

556 F.3d at 586-87. This is especially true where, as here, Plaintiff is asking the Court to infer not just that the fiduciaries acted imprudently, but that their choices could only have been the result of *disloyalty*.

Moreover, here, the Plan Document expressly *precluded* the use of mutual funds other than those managed by Fidelity.[34] The fiduciary duty provisions of ERISA require all fiduciaries to act "in accordance with the documents and instruments governing the plan." *See* 29 U.S.C. § 1104(a)(1)(D), ERISA § 404(a)(1)(D).[35] In the face of a Plan Document that prohibits the use of non-Fidelity mutual funds, the decision to comply with that directive is an "obvious alternative explanation" for the Plan lineup. *Iqbal*, 556 U.S. at 682.

B. The Allegation that the Plan Offered Participants a Broad Choice of Fidelity Investment Options Does Not Support an Inference of Disloyalty.

The Complaint also asks the Court to infer disloyalty from the fact that Plan participants were offered a large number of investment options. Compl. ¶ 123. But offering a diverse array of funds from which to choose does not give rise to an inference of disloyalty.

ERISA is a flexible statute, allowing a wide range of fiduciary practices; there is no statutory requirement that one size fits all. *See*, *e.g.*, *DiFelice v. U.S. Airways, Inc.*, 397 F. Supp. 2d 758, 773 (E.D. Va. 2005) ("fiduciaries are entitled to substantial latitude[,] and their judgments must not be assessed using 20/20 hindsight"); *Renfro*, 671 F.3d at 322 ("The fiduciary standard is flexible" and draws context from "the character and aims of the particular type of plan." (internal quotations omitted)). In light of this flexible standard, no court has ever

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[34] *See* fn. 17. These Plan terms were established by Fidelity in its capacity as sponsor and settlor of the Plan. As described *infra*, at Argument § V, the employer sponsoring a plan does not act as an ERISA fiduciary in designing, establishing, or amending the terms of the plan it sponsors, and therefore is not constrained by ERISA's fiduciary obligations in determining the terms of such plan. *See, e.g.*, *Lockheed Corp. v. Spink*, 517 U.S. 882, 889-891 (1996) (a plan sponsor "act[s] not as a fiduciary but as a settlor" when it establishes an employee benefit plan).

[35] *See also Alves v. Harvard Pilgrim Health Care Inc.*, 204 F. Supp. 2d 198, 210 (D. Mass. 2002) ("[T]here can be no breach of fiduciary duty where an ERISA plan is implemented according to its written, nondiscretionary terms."), *aff'd by,* 316 F.3d 290, 291 (1st Cir. 2003) (describing the district court's opinion as "admirable").

suggested—much less held—that offering participants a large number of investment options implies a breach of fiduciary duty. To the contrary, "[b]ecause participant choice is the centerpiece of what ERISA envisions for defined-contribution plans," *Tibble*, 711 F.3d at 1083, offering a "broad range of investment alternatives" is *encouraged*. *Hecker*, 556 F.3d at 587 (quoting 29 C.F.R. § 2550.404c-1(b)(1)(ii)); *see also Renfro*, 671 F.3d at 318, 329 (affirming dismissal where plan lineup included 73 funds); *Loomis v. Exelon Corp.*, 658 F.3d 667, 673 (7th Cir. 2011) (noting "the absence from ERISA of any rule that forbids plan sponsors to allow participants to make their own choices").

To support its position that offering too many choices is nefarious, the Complaint first cites to one industry commentator who suggests that, while it was common-place in the 1990s to offer "a vast array of investment options," the supposed "best practices" for plan investment have changed since the 1990s, and "excellent plans" no longer offer as many choices. Compl. ¶ 34. But this commentator is not purporting to address plans designed for employees of financial services firms, some of whom may desire greater investment choice. And in any event, one commentator's personal views are hardly sufficient to establish a legal standard of liability under ERISA: ERISA does not mandate that plan fiduciaries follow the subjective views of "best practices" advanced by a plaintiff's hand-selected "expert." Instead, the statute allows plan fiduciaries to follow a range of reasonable alternative courses tailored to the needs of their own individual plan and participant base. *See Hecker*, 556 F.3d at 586 ("nothing in [ERISA] requires plan fiduciaries to include any particular mix of investment vehicles in their plan"); *DiFelice*, 397 F. Supp. 2d at 773.

Second, the Complaint alleges that "too many fund choices leads plan participants to over concentrate in equities, to their detriment." Compl. ¶ 35. But this is precisely the "sort[] of

paternalistic argument[] [that] ha[s] had little traction in the courts." *Tibble*, 711 F.3d at 1083 (rejecting argument that "union did not know what was in its members' best interest" when it "requested 'forty name-brand retail mutual funds for inclusion in the Plan'"); *see also Loomis*, 658 F.3d at 673 (rejecting as "paternalistic" plaintiff's argument that participants' choices should be limited). Moreover, the Complaint does not allege that participants in *this* Plan did, in fact, "overinvest" in equities.[36] Nor could it, given that Fidelity offers a free, personalized portfolio advisory service—and defaults participants into the lifecycle Freedom Funds—to help ensure that each of its employees achieves an appropriate asset allocation for his or her goals and objectives.[37]

Third, the Complaint contends that too many choices resulted in diffusion of the Plan's assets and prevented the Plan from taking advantage of breakpoints in fees schedules. Compl. ¶¶ 36-37. This, too, is unsupported. The Complaint does not, and could not, identify any fund offered to Plan participants that provided for breakpoints that the Plan was unable to access.[38] Instead, the Complaint suggests that such breakpoints might have been available had the Plan offered other types of investment vehicles—including commingled trusts and separate accounts—instead of mutual funds. *Id.*

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[36] The Complaint also fails to allege how an overinvestment in equities would benefit Fidelity at the participants' expense: Although the Complaint asserts that "Defendants" make more money from managing actively-managed funds, *see* Compl. ¶ 35, it does not allege any correlation between equity funds and actively-managed funds. Nor could it. The least expensive funds offered under the Plan are equity funds designed to track the S&P 500 and other equity indices. *See* App. A.

[37] Choosing Your Investments at FID-LB-00557-00558, Hemani Decl. Ex. 9.

[38] To the contrary, the Complaint apparently concedes that Plan participants were offered the least expensive share class available to fund investors. *See* Compl. ¶ 75 (alleging with respect to Freedom Funds that "K Shares [were] selected by the Plan Fiduciaries for inclusion in the Plan."); Fidelity Contrafund Prospectus at FID-LB-00794-00795 (March 1, 2011), Hemani Decl. Ex. 14 ("Class K shares generally are available only to employer-sponsored retirement plans (including profit sharing, 401(k), 403(b), 457(b), and similar plans) for which an affiliate of FMR provides recordkeeping services. . . . Fidelity Contrafund shares have higher expenses than Class K shares.").

This allegation is just a recasting of an argument that already has been rejected by three Circuit Courts of Appeal. *See Loomis*, 658 F.3d at 675 (affirming dismissal of complaint alleging that very large plan should have offered separate accounts and commingled trusts instead of mutual funds); *Tibble*, 711 F.3d at 1082-83 (rejecting argument that it is categorically imprudent for very large plans to offer retail mutual funds instead of commingled pools or separate accounts); *Renfro*, 671 F.3d at 326-27 (affirming dismissal of complaint alleging that very large plan should have insisted on better fee structure than that offered by retail mutual funds).

For example, in *Loomis*, the Seventh Circuit affirmed dismissal of claims that a very large plan "should have arranged for access to 'wholesale' or 'institutional' investment vehicles," as opposed to mutual funds, so that the plan "could exercise 'buying power' by negotiating lower fees." 658 F.3d at 670, 672. The Seventh Circuit quoted from its *Hecker* decision, where it noted: "The fact that it is possible that some other funds might have had even lower [expense] ratios is beside the point; 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)." *Id.* at 670 (quoting *Hecker,* 556 F.3d at 586). It explained that mutual funds offer unique benefits:

> "retail" funds, being open to the public, give participants the benefits of competition. A pension plan that directs participants into privately held trusts or commingled pools (the sort of vehicles that insurance companies use for assets under their management) lacks the mark-to-market benchmark provided by a retail mutual fund. It can be hard to tell whether a closed fund is doing well or poorly, or whether its expenses are excessive in relation to the benefits they provide. It can be hard to value the vehicle's assets (often real estate rather than stock or bonds) when someone wants to withdraw money, and any error in valuation can hurt other investors.

Id. at 671-72.[39] This is entirely consistent with guidance from the DOL, that "[f]ees are just one of several factors fiduciaries need to consider in deciding on . . . plan investments."[40]

Many of the other allegations raised in the Complaint are simple variations on this same theme. For example, the Complaint alleges that "peer mega plans have moved away from mutual funds to less expensive commingled and single client investment funds," Compl. ¶¶ 74, 85-86;[41] that Defendants should have transitioned its Plan investment options from mutual funds to separate accounts and commingled trusts managed by Fidelity's affiliate, Pyramis, *id.* ¶¶ 86-92; and that Plan participants would have paid less in fees if they had been offered target date funds managed by Pyramis, instead of the Fidelity Freedom Funds, *see* Compl. ¶¶ 74, 76-78. But none of these allegations can give rise to an inference of disloyalty. Instead, as recognized by the Third, Seventh and Ninth Circuits, there is nothing inherently problematic—let alone disloyal—about choosing to offer plan participants a wide array of retail mutual funds.

C. The Allegation that Defendants Failed To Remove or Replace Poorly Performing or Expensive Funds Does Not Support an Inference of Disloyalty.

The Complaint also asks the Court to infer disloyal intent because Defendants allegedly "fail[ed] to remove or replace poorly performing and heavily fee-laden Fidelity Funds." Compl. ¶ 124. To the extent that the Complaint suggests that mutual funds should have been replaced by

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[39] *See also Tibble*, 711 F.3d at 1082-83 ("[m]utual funds . . . have a variety of unique regulatory and transparency features" that make them "easy to track via newspaper or internet sources"). Additionally, mutual funds benefit from having an independent board of trustees, SEC oversight, mandatory and uniform disclosure obligations, and from all of the other protections that go along with being one of the most extensively regulated industries in America. CLIFFORD E. KIRSCH, 1 MUTUAL FUNDS AND EXCHANGE TRADED FUNDS REGULATION, § 1:4:1 (3d ed. 2011) ("A mutual fund is one of the most regulated types of companies in the United States.").

[40] Meeting Your Fiduciary Responsibilities, *available at* http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html (last visited May 31, 2013). Notably, although the Complaint quotes heavily from this publication, *see* Compl. ¶ 107, it omits this particular sentence—despite the fact that it is the very first sentence of the passage quoted in the Complaint. Nor does the Complaint contain any allegation comparing the Plan's fees (reflected in the mutual funds' expense ratios) to the services provided to the Plan, which is also a relevant factor under the DOL guidance.

[41] The Complaint defines a "mega plan" as one with more than $1 billion in assets. Compl. ¶ 29.

commingled trusts and separate accounts, that claim fails for the reasons discussed above. *See* Argument § III.B, *supra*. And, to the extent that the Complaint suggests that funds should have been removed from the Plan lineup because they performed worse or cost more than non-Fidelity mutual funds, such an inference is not supported.

First, the Complaint fails to allege that the funds offered to Plan participants performed poorly. Indeed, the Complaint does not identify any specific fund that was a consistent "poor performer"—let alone any fund in which Plaintiff herself invested.[42] Instead, the Complaint charges that, for a subset of 40 funds hand-selected by Plaintiff, 23 had performance in the "bottom half" of their peer group in 2008 and 30 had "bottom half" performance in 2011. *See* Compl. ¶¶ 96, 101. But, even assuming these allegations are true, they say nothing about whether those funds should have been offered to Plan participants—let alone whether it was disloyal to continue including them in the Plan lineup. A baseball team that finishes in the bottom half of the league one year may well finish on top the next. Similarly, the fact that a particular fund may perform at or below average one year does not mean that it will not perform well in the future.[43]

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[42] The Complaint includes several conclusory allegations concerning fund performance. *See* Compl. ¶ 99 ("Due to the Fidelity Funds' poor performance and high fees, the Plan has suffered millions of dollars a year in losses because Defendants failed to remove or replace the Fidelity Funds as Plan investment options . . . ."); *id.* ¶ 101 ("During the proposed class period, Fidelity Funds also significantly underperformed relevant benchmarks and comparable funds during the time that they were offered in the Plan."). But where "plaintiffs' allegation that the committee defendants breached duties of prudence and care by selecting affiliated mutual funds that 'substantially under-performed similar products available from unaffiliated investment managers' is supported by nothing beyond plaintiffs' bare assertion," that allegation cannot support a claim for breach of fiduciary duty. *Leber v. Citigroup, Inc.*, No. 07 Civ. 9329, 2010 WL 935442, at *14 (S.D.N.Y. Mar. 16, 2010); *see also Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55 (1st Cir. 2012) (conclusory and speculative allegations fail to state a claim).

[43] *See* Jonathan B. Berk & Richard C. Green, *Mutual Fund Flows and Performance in Rational Markets*, 112 J. POL. ECON. 1269, 1270 & n.1 (2004) (writing that "[t]he relative performance of mutual fund managers appears to be largely unpredictable from past relative performance"). Indeed, although Plaintiff elects to focus on 2008 and 2011, publicly-available data demonstrate that in the intervening years—2009 and 2010—each and every one of the ten funds with the most Plan assets outperformed its benchmark. *See* App. B (showing that 9 of the 10 funds outperformed their benchmarks in both years and that one fund essentially matched its benchmark in 2009 and outperformed it in 2010).

Second, the Complaint fails to allege facts demonstrating that any of the Plan's funds charged excessive fees, let alone that Plaintiff personally was charged more than the fair value of the services she received. Instead, the Complaint contains misleading assertions about fees. For example, Complaint Figure 1 purports to show the effect of a 125 basis point fee on a "typical employee invested in a retirement plan," but makes no reference to the fees for funds in the Plan, or funds in which Plaintiff actually invested. Compl. ¶ 95.[44] Where, as here, a plan "offer[s] 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[,] [i]t has left choice to the people who have the most interest in the outcome, and it cannot be faulted for doing this." *Loomis*, 658 F.3d at 673-74. As the Third Circuit observed, a court cannot infer a flawed investment selection process from allegations that the plan contained "funds with a variety of risk and fee profiles, including low-risk and low-fee options." *Renfro*, 671 F.3d at 327. Indeed, the Third and Seventh Circuits have affirmed dismissals of breach of fiduciary duty claims based on Plan lineups including Fidelity mutual funds with expense ratios ranging from 1 to 121 basis points, *id.* at 319, and 7 to 100 basis points, *Hecker*, 556 F.3d at 586, respectively: virtually identical to the expense ratio range of 5-135 basis points at issue here.

[44] The public record documents that only *two* of the many Fidelity mutual funds offered to the Plan in 2011 had expense ratios (*i.e.*, total fund expenses) of 125 basis points or more, whereas *ten* had expense ratios *below* 25 basis points. *Compare* App. A (listing ten funds offered by the Plan with expense ratios of 25 bps or below), *with* Fidelity Mt. Vernon Street Trust Prospectus at FID-LB-00814 (Jan. 28, 2012), Hemani Decl. Ex. 15 (130/30 Large Cap Fund has a bps of 128), *and* Fidelity Investment Trust Prospectus at FID-LB-00817 (Dec. 30, 2011), Hemani Decl. Ex. 16 (Emerging Europe, Middle East, and Africa Fund has a bps of 135). Notably, in 2011 participants allocated over $1.21 *billion* in Plan assets in the ten funds with expense ratios below 25 bps, but allocated less than $16 *million* to the two specialty funds with expense ratios of 125 bps or more. *See* App. A; 2011 Form 5500, at FID-LB-00253-00256, Hemani Decl. Ex. 2. Moreover, according to Morningstar, an independent entity, the ten funds with the most Plan assets all charge average or below average fees. *See* App. C (excepting the money market fund, whose fees are not rated by Morningstar). These public data, therefore, rebut any inference that unsuspecting participants were steered to the higher-priced funds on the lineup.

Third, the Complaint improperly asks this Court to draw an inference of disloyalty from the alleged fact that "88% of the Plan's mutual funds were actively managed Fidelity Funds" that generate "increased fee revenue" for Fidelity, as compared to comparable index funds. Compl. ¶ 35; *see also id.* ¶¶ 73-79. Although the Complaint provides certain cherry-picked examples of circumstances in which actively-managed funds allegedly underperformed their benchmarks, Compl. ¶¶ 74-76, it does not suggest that there is anything inherently imprudent—let alone disloyal—about offering actively-managed funds. Nor could it. *See, e.g.*, *Taylor v. United Techs. Corp.*, No. 3:06cv1494, 2009 WL 535779, at *10 (D. Conn. Mar. 3, 2009) (rejecting plaintiff's argument based on the supposition "that actively-managed mutual funds generally underperform passive index funds"). Moreover, given the breadth of funds offered under the Plan, even if 88% of the 160-plus funds were actively-managed, participants still had approximately 20 index funds from which to choose.

In short, because Fidelity employees were offered "funds with a variety of risk and fee profiles, including low-risk and low-fee options," *Renfro*, 671 F.3d at 327, Plaintiff's allegations of underperformance and excessive fees cannot give rise to any inference of disloyalty.

D. The Allegation that Defendants Used the Plan To "Seed" New Funds Does Not Support an Inference of Disloyalty.

Finally, the Complaint suggests that the Court should infer disloyalty because "Defendants" allegedly "us[ed] Plan assets to seed new Fidelity Funds." Compl. ¶ 125. But the allegations concerning "seeding" do not plausibly support Plaintiff's claim.

First, the Complaint fails to offer any reason why Fidelity—one of the nation's largest fund managers, with nearly $1 trillion in assets under management—would have needed to rely on the investment of assets from its own Plan in order to successfully establish new funds. The asserted theory simply is not plausible. Instead, there is a "common sense," "obvious alternative

explanation," *Iqbal*, 556 U.S. at 679, 682, for the addition of these funds to the Plan lineup: A wide array of Fidelity funds provided the greatest participant choice. *See Dupree*, 2007 WL 2263892, at *39 (the fact that the plan provided money for new Prudential investment products does not give rise to an inference that these products were added to the plan platform for the purpose of benefitting Prudential).

Second, given that there were more than 160 investment options available to Plan participants, it defies logic that Defendants would believe they could "seed" a handful of smaller funds by adding them to the Plan lineup. Defendants had no ability whatsoever to direct any Plan assets to the newer or smaller funds; instead, the participants had *complete discretion* to choose their investment options. Most participants did not select these newer and smaller funds. Indeed, between 2007 and 2011, Plan participants maintained, in total, less than 2% of their Plan assets in the 9 funds allegedly "seeded" during that time period.[45]

Third, the Complaint fails to make any factual allegations from which one could infer that the Plan lineup included funds that were too new or too small. The Complaint asserts—with no credible support—that it is inherently problematic for a Plan to include funds that have fewer than $75 million in assets under management, or where the Plan investments comprise more than 5% of the fund's total assets.[46] But the Complaint does not address how these considerations might differ where, as here, (1) the Plan offers more than 160 different options, many of which are extremely large and well-established funds, (2) the Plan sponsor is a mutual fund company, with numerous employees who are sophisticated about the markets and may wish to invest in

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[45] *See* Compl. ¶¶ 48-56; 2008 Form 5500 at FID-LB-00303-00307, Hemani Decl. Ex. 4; 2009 Form 5500 at FID-LB-00341-00350, Hemani Decl. Ex. 5.

[46] *See* Compl. ¶ 41. In support, the Complaint relies on one web-based publication by a self-proclaimed "independent accredited fiduciary." *Id.* There is no basis in ERISA for one such supposed 'expert" to establish a test by which all fiduciaries must comply. *See* Argument § III.B, *supra*.

more novel products, and (3) the Plan sponsor provides free advisory services to assist less sophisticated participants in avoiding whatever unwanted risks might be posed by investing in a smaller or less established fund.

Furthermore, the facts alleged here do not evidence that the Plan's investments regularly failed to comply with these "tests" during the relevant time period. Of the nine funds identified in the Complaint that were added to the Plan since 2007, fewer than half allegedly had less than $75 Million in assets under management and only two allegedly had Plan assets that accounted for 5% or more of total fund assets during the year in which they were first introduced to the Plan. Compl. ¶¶ 48-56. Moreover, Plaintiff only invested in—and, thus, only has standing to assert a claim with respect to—one such fund.[47]

* * *

In sum, the Complaint's disloyalty claim is belied by both the public record and "common sense." *Iqbal*, 556 U.S. at 679. Plaintiff asks this Court—without any alleged proof of bad intent—to infer that the decision to offer a broad array of Fidelity mutual funds to current and former Fidelity employees participating in the Plan was motivated by a desire to enrich Fidelity at the expense of the Plan and its participants. That inference is implausible. Congress and the DOL have expressly authorized the practice of offering proprietary investment products to plans sponsored by financial services companies like Fidelity, and every plan attribute criticized in the Complaint has been endorsed by one or more courts.

Moreover, Plaintiff's theory makes no economic sense.[48] Since 2007, Fidelity has voluntarily contributed over two billion dollars of its own money to the Plan—approximately *10*

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[47] *See* Argument § I, *supra*; *see also* Compl. ¶ 45. Moreover, because all 19 allegedly "seeded" funds identified in the Complaint were added to the Plan lineup before 2009, Plaintiff's "seeding" claims fall outside of the three-year limitations period. *See* Compl. ¶¶ 57-66; *see also* Argument § II.B, *supra*.

[48] Courts regularly reject liability theories that "make[] no economic sense" *In re Pharm. Industry Average*

times more than the alleged excessive fees. *See* Compl. ¶ 84. If Fidelity were motivated by its own financial gain, it could have simply contributed less to the Plan. Instead, the "obvious alternative explanation" for the challenged conduct is that it was intended to offer a wide range of investment options and tools that would allow each of Fidelity's employees to accumulate wealth for retirement in the manner best suited to his or her own objectives. *Iqbal*, 556 U.S. at 682. This goal is not only legal, it is laudable. Count I should be dismissed.

IV. Count II of the Complaint Should Be Dismissed Because It Fails To State a Prohibited Transaction Claim.

Count II of the Complaint, asserting a violation of ERISA § 406(a), 29 U.S.C. § 1106(a), also fails to state a claim. The Complaint alleges that, each time the Investment Committee added a new Fidelity mutual fund to the Plan lineup, that decision constituted a prohibited transaction under ERISA § 406(a).[49] The Complaint is incorrect.

Notably, "Count II is alleged only with respect to Fidelity Funds added to the Plan within the Relevant Period"—*i.e.*, from March 20, 2007 through the present. Compl. ¶ 131. In total, only forty-three funds meet this criterion, and Plaintiff owned only one of those forty-three funds—the Mid Cap Enhanced Index Fund, added in 2007.[50] Thus, at most Plaintiff has standing in Count II with respect this one, discrete fund. *See* Argument § I, *supra*. Moreover, even with

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Wholesale Price Litig., 307 F. Supp. 2d 196, 213 (D. Mass. 2004) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

[49] ERISA §§ 406(a)(1)(C) and (D) prohibit a fiduciary, except as provided in ERISA § 408, from "caus[ing] the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—(C) furnishing of goods, services, or facilities between the plan and a party in interest; [or] (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." 29 U.S.C. §§ 1106(a)(1)C) and (D). ERISA § 408(a) authorizes the DOL to promulgate exemptions from Section 406, including class exemptions, that are, among other things, "in the interests of the plan and of its participants and beneficiaries, and [] protective of the rights of participants and beneficiaries of such plan." 29 U.S.C. § 1108(a). ERISA § 408(b)(2) exempts "[c]ontracting or making reasonable arrangements with a party in interest for . . . services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C. § 1108(b)(2).

[50] *See* 2006 Form 5500 at FID-LB-00629-00633, Hemani Decl. Ex. 10; 2007 Form 5500 at FID-LB-00270-00274, Hemani Decl. Ex. 3; 2008 Form 5500 at FID-LB-00303-00307, Hemani Decl. Ex. 4; 2009 Form 5500 at FID-LB-00341-00350, Hemani Decl. Ex. 5; 2010 Form 5500 at FID-LB-00387-00390, Hemani Decl. Ex. 6; 2011 Form 5500 at FID-LB-00253-00256, Hemani Decl. Ex. 2.

respect to that one fund, for the reasons discussed above, the prohibited transaction claim is barred by ERISA's three-year statute of limitations. *See* Argument § II.A, *supra*.

The prohibited transaction count also fails to state a claim for two independent and dispositive reasons: (1) the addition of a Fidelity fund to the Plan lineup does not constitute a transaction with a "party in interest" that is prohibited by ERISA § 406(a); and (2) in any event, through PTE 77-3, the DOL expressly exempted the investment of a plan in proprietary mutual funds from the scope of ERISA § 406, 29 U.S.C. § 1106.

First, the Complaint does not allege an essential element of a claim under ERISA § 406(a). According to the Complaint, adding new Fidelity mutual funds violates § 406(a)(1)(C) and (D) because it "constitute[s] a direct or indirect furnishing of services between the Plan and a party in interest for more than reasonable compensation and a transfer of assets from the Plan to a party in interest." Compl. ¶ 131. But while, as the Plan sponsor, FMR falls within the definition of a "party in interest" for purposes of ERISA § 406, *see* ERISA § 3(14)(A), 29 U.S.C. § 1002(14)(A), the mutual funds in which the Plan is invested are expressly excluded from this definition, *see* ERISA § 3(21)(B), 29 U.S.C. § 1002(21)(B).[51] Accordingly, inclusion of the funds on the Plan lineup cannot violate ERISA § 406(a). Similarly, because the fees paid to Fidelity's affiliates for managing the mutual funds are paid by the mutual funds themselves—and not by the Plan[52]—such payment also does not constitute a prohibited transaction. *See Hecker*,

[51] "If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [a/k/a a mutual fund], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law." 29 U.S.C. § 1002(21)(B).

[52] Under the mutual fund structure imposed by the Investment Company Act of 1940, a fund pays fees to its adviser as agreed to by the mutual fund's directors and/or shareholders, and an express cause of action is granted under that separate statute as to the fees paid by mutual funds. *See generally* 15 U.S.C. §§ 80a-15(a), (c); 80a-35(b). ERISA

556 F.3d at 584 ("Once the fees are collected from the mutual fund's assets and transferred to one of the [service provider's] entities, they become [the service provider's] assets—again, not the assets of the Plans."). Applying these provisions, the United States District Court for the District of New Jersey dismissed a virtually identical prohibited transaction claim, reasoning that mutual funds are not themselves parties in interest even where, like here, a mutual fund is affiliated with a party in interest. *Goldenberg v. Indel, Inc.*, 741 F. Supp. 2d 618, 633 (D.N.J. 2010).

Second, no prohibited transaction occurred because the DOL provides an exemption to all of ERISA § 406, PTE 77-3, which expressly permits the challenged conduct: "the acquisition and sale of shares of a . . . 'mutual fund' by an employee benefit plan which covers employees of the mutual fund or the mutual fund's investment advisor . . . ."[53] PTE 77-3 includes four conditions, each of which is met under the allegations here.[54] The Complaint does not allege that the Plan paid any advisory fees, redemption fees or sales commissions to Fidelity, nor does it allege that the Plan was treated differently than any other investor in the mutual funds. To the contrary, the Complaint assumes (correctly) that the lowest cost share class of each mutual fund available to any investor was included in the Plan lineup. *See* Compl. at 21, n.9.

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expressly provides that the assets of mutual funds, which are used to pay the funds' advisory fees, are not considered to be ERISA plan assets. *See* ERISA § 401(b)(1), 29 U.S.C. § 1101(b)(1). And the Complaint expressly acknowledges that the investment advisory fees at issue are paid by the mutual funds, as reflected in the funds' expense ratios (along with other fund expenses, including record keeping fees, custody fees, and fees for accounting services). *See, e.g.*, Compl. ¶ 96. The Complaint challenges no fees other than the ones paid by the mutual funds.

[53] Class Exemption Involving Mutual Fund In-House Plans Requested by the Investment Company Institute, 42 Fed. Reg. at 18735.

[54] The four conditions are that "(a) The plan does not pay any investment management, investment advisory or similar fee to such investment adviser, principal underwriter or affiliated person . . . (b) The plan does not pay a redemption fee in connection with the sale by the plan to the investment company of such shares . . . (c) . . . the plan does not pay a sales commission . . . [and] (d) All other dealings between the plan and the investment company, the investment adviser or principal underwriter for the investment company, or any affiliated person of such investment adviser or principal underwriter, are on a basis no less favorable to the plan than such dealings are with other shareholders of the investment company." *Id.*

Where, as here, the facts alleged suggest that a defendant's decision to make proprietary funds available to plan participants falls within PTE 77-3, courts have dismissed prohibited transaction claims. *See, e.g.*, *Mehling v. N.Y. Life Ins. Co.*, 163 F. Supp. 2d 502, 510-11 (E.D. Pa. 2011) (dismissing claim because "[p]laintiffs do not allege that the fees paid by the Plans are not in compliance with the requirements of PTE 77-3, or that the Plans have had dealings with the [f]unds on terms that are less favorable than are offered to other shareholders"); *Leber*, 2010 WL 935442, at *10 (dismissing claim because, "even in the light most favorable to plaintiffs, the complaint asserts nothing more than that defendants purchased shares in an affiliated mutual fund, a transaction to which 'the restrictions of section [] 406 . . . shall not apply.'").

For each of these independent reasons, Count II of the Complaint should be dismissed.

V. <u>FMR Should Be Dismissed Because the Complaint Does Not Plead that It Was a Fiduciary with Respect to Investment Selection.</u>

The claims against FMR also should be dismissed because the Complaint fails to allege that FMR had a fiduciary obligation with respect to the selection of investment options.[55]

As explained by the Supreme Court: "In every case charging breach of ERISA fiduciary duty, the threshold question is . . . whether [the defendant] was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). Here, although the Complaint charges FMR with several fiduciary obligations vis-à-vis the Plan, none of them relate to the conduct about which Plaintiff complains—the selection of Plan investment options. For example, the Complaint alleges that FMR is an ERISA fiduciary because "FMR or its subsidiaries . . . provided trustee, record-keeping, and administrative services to the Plan." Compl. ¶ 11. But the Complaint does not

[55] Both counts of the Complaint seek relief available only from plan fiduciaries. *See* Compl. ¶¶ 129, 135 (invoking ERISA § 409(a), 29 U.S.C. § 1109(a), which applies only to "[a]ny person who is a fiduciary with respect to a plan").

allege any breach relating to the provision of trustee, record-keeping, or administrative services provided by FMR or its affiliates. *See, e.g., Renfro*, 671 F.3d at 324 (Fidelity's trustee functions do not equate to fiduciary responsibility for investment selection).

Similarly, although the Complaint alleges that FMR acts as a fiduciary when it "appoints, monitors and removes the members of the FMR Investment Committee," Compl. ¶ 12, it does not allege that FMR breached this fiduciary obligation in any way. *See, e.g.*, *Dupree*, 2007 WL 2263892, at *36 (dismissing claims where there is no suggestion that monitoring fiduciaries "acted inappropriately in appointing or monitoring [committee] members").[56] Instead, the Complaint's sole focus is the allegedly improper selection of investment options for the Plan. And, because the Complaint concedes that it is the Investment Committee—and not FMR—that had fiduciary "responsib[ility] for selecting, evaluating, monitoring, and maintaining the Plan's investment options," Compl. ¶ 16, its claims against FMR should be dismissed.[57]

VI. <u>This Court Should Strike the Demand for a Jury Trial Because ERISA Does Not Provide a Right to Trial by Jury.</u>

The Complaint demands a jury trial on all claims triable. Compl. ¶ 136. But ERISA does not expressly provide a right to a jury trial, and "the overwhelming weight of authority holds that no such right exists." *Gammell v. Prudential Ins. Co. of Amer.*, 502 F. Supp. 2d 167, 172 (D. Mass. 2007) (striking jury demand for ERISA claim). In fact, "every Circuit Court to have considered the issue has concluded that ERISA does not confer a jury trial right." *Id.*; *see*

[56] *See also In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 473 (S.D.N.Y. 2005) ("ERISA does not attach liability for investment decisions to fiduciaries whose roles were limited to appointing, retaining and removing other fiduciaries.").

[57] Moreover, the fact that FMR may have employed members of the Investment Committee, and that it sponsors the Plan, does not give rise to any fiduciary responsibility over the conduct alleged here. Compl. ¶¶ 13-15. It is well settled that an employer sponsoring a plan is not an ERISA fiduciary absent specific conduct bringing it within ERISA's fiduciary definition. *See, e.g.*, *Lockheed*, 517 U.S. at 889-891 (plan sponsors are only fiduciaries "when fulfilling certain defined functions" (internal quotation marks omitted)). Nor can FMR be held liable because it employs individual members of the Investment Committee: there is no doctrine of *respondeat superior* with respect to ERISA fiduciary duty claims. *See DeFelice*, 397 F. Supp. 2d at 780.

Hampers v. W.R. Grace & Co., Inc., 202 F.3d 44, 54 (1st Cir. 2000) (affirming trial court's decision to strike jury demand where plaintiff's state law claim was preempted by ERISA).[58] Following First Circuit precedent, courts in this District consistently have held that jury trials are unavailable in ERISA fiduciary duty cases. *See, e.g.*, *Jackson v. Truck Drivers' Union Local 42 Health & Welfare Fund*, 933 F. Supp. 1124, 1147 (D. Mass. 1996) ("ERISA actions are equitable and therefore no right to trial by jury is provided by statute or the Seventh Amendment of the Constitution."); *Turner v. Fallon Cmty. Health Plan Inc.*, 953 F. Supp. 419, 422 (D. Mass. 1997) ("this . . . Court has consistently held that there is no right to a jury trial under ERISA"). Accordingly, the Court should strike Plaintiff's demand for a jury trial.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed with prejudice.

[58] *See also, e.g.*, *Sullivan v. LTV Aerospace & Def. Co.*, 82 F.3d 1251, 1258 (2d Cir. 1996), *abrogated on other grounds by McCauley v. First Unum Life Ins. Co.*, 551 F.3d 126 (2d Cir. 2008); *Pane v. RCA Corp.*, 868 F.2d 631, 636 (3d Cir. 1989); *Berry v. CIBA-GEIGY Corp.*, 761 F.2d 1003, 1006-07 (4th Cir. 1985); *Borst v. Chevron Corp.*, 36 F.3d 1308, 1323-24 (5th Cir. 1994); *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 883 (6th Cir. 1997); *Matthews v. Sears Pension Plan*, 144 F.3d 461, 468 (7th Cir. 1998); *In re Vorpahl*, 695 F.2d 318, 322 (8th Cir. 1982); *Thomas v. Oregon Fruit Prod. Co.*, 228 F.3d 991, 996 (9th Cir. 2000); *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156, 1161-62 (10th Cir. 1998); *Blake v. Unionmutual Stock Life Ins. Co. of Am.*, 906 F.2d 1525, 1526 (11th Cir. 1990).

Respectfully submitted,

FMR LLC,

By its attorneys,

/s/ James O. Fleckner

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Dated: June 3, 2013

LIBA/2393718

CERTIFICATE OF SERVICE

I, James O. Fleckner, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on June 3, 2013.

/s/ James O. Fleckner

Appendix A: Funds with Expense Ratios under 25 Basis Points

Fund	Expense Ratio	Morningstar Category	Plan Assets Allocated to the Fund in 2011
Spartan 500 Index Fund, Institutional Class[i]	0.05%	Large Blend	$124,738,161
Spartan US Bond Index Fund, Institutional Class[ii]	0.07%	Intermediate-Term Bond	$40,408,448
Spartan Total Market Index Fund, Advantage Class[iii]	0.07%	Large Blend	$65,080,359
Four-In-One Index, Investor Class[iv]	0.08%	Aggressive Allocation	$26,212,914
Spartan Extended Market Index, Investor Class[v]	0.10%	Mid-Cap Blend	$39,027,912
Spartan International Index Fund, Advantage Class[vi]	0.17%	Foreign Large Blend	$115,028,336
Fidelity Institutional Money Market, Institutional Class[vii]	0.18%	Money Market Taxable	$767,737,417
Spartan Long-Term Treasury Index Fund, Investor Class[viii]	0.20%	Long-Term Government	$13,925,430
Spartan Intermediate Treasury Index Fund, Investor Class[ix]	0.20%	Intermediate-Term Government	$9,933,642
Spartan Short-Term Treasury Index Fund, Investor Class[x]	0.20%	Short-Term Government	$8,486,369
Total			$1,210,578,988

[i] Fidelity Concord Street Trust Prospectus at FID-LB-00856-00857 (Apr. 29, 2011), Hemani Decl. Ex. 17; Morningstar.com, http://quotes.morningstar.com/ fund/fxsix/f?t=fxsix (last visited May 31, 2013); 2011 Form 5500 at FID-LB-00255, Hemani Decl. Ex. 2.

[ii] Fidelity Salem Street Trust Prospectus at FID-LB-00869 (October 29, 2011), Hemani Decl. Ex. 18; Morningstar.com, http://quotes.morningstar.com/ fund/fbidx/f?t=fbidx (last visited May 31, 2013); 2011 Form 5500 at FID-LB-00255, Hemani Decl. Ex. 2.

[iii] Fidelity Concord Street Trust Prospectus at FID-LB-00838-00839 (Apr. 29, 2011), Hemani Decl. Ex. 17; Morningstar.com, http://quotes.morningstar.com/ fund/fstvx/f?t=fstvx (last visited May 31, 2013); 2011 Form 5500 at FID-LB-00254, Hemani Decl. Ex. 2.

[iv] Fidelity Oxford Street Trust Prospectus at FID-LB-00894 (Apr. 29, 2011), Hemani Decl. Ex. 19; Morningstar.com, http://quotes.morningstar.com/ fund/ffnox/f?t=ffnox (last visited May 31, 2013); 2011 Form 5500 at FID-LB-00253, Hemani Decl. Ex. 2.

[v] Fidelity Concord Street Trust Prospectus at FID-LB-00832 (Apr. 29, 2011), Hemani Decl. Ex. 17; Morningstar.com, http://quotes.morningstar.com/ fund/fsemx/f?t=fsemx (last visited May 31, 2013); 2011 Form

5500 at FID-LB-00253, Hemani Decl. Ex. 2.

[vi] Fidelity Concord Street Trust Prospectus at FID-LB-00835 (Apr. 29, 2011), Hemani Decl. Ex. 17; Morningstar.com, http://quotes.morningstar.com/ fund/fsivx/f?t=fsivx (last visited May 31, 2013); 2011 Form 5500 at FID-LB-00254, Hemani Decl. Ex. 2.

[vii] Fidelity Colchester Street Trust Prospectus at FID-LB-00899 (May 28, 2011), Hemani Decl. Ex. 20; Morningstar.com, http://financials.morningstar.com/ money-market/quote?t=fnsxx (last visited May 31, 2013); 2011 Form 5500 at FID-LB-00254, Hemani Decl. Ex. 2.

[viii] Fidelity Fixed-Income Trust Prospectus at FID-LB-00919 (April 29, 2011), Hemani Decl. Ex. 21; Morningstar.com, http://quotes.morningstar.com/ fund/flbix/f?t=flbix (last visited May 31, 2013). 2011 Form 5500 at FID-LB-00254, Hemani Decl. Ex. 2.

[ix] Fidelity Fixed-Income Trust Prospectus at FID-LB-00916 (April 29, 2011), Hemani Decl. Ex. 21; Morningstar.com, http://quotes.morningstar.com/ fund/fibix/f?t=fibix (last visited May 31, 2013); 2011 Form 5500 at FID-LB-00254, Hemani Decl. Ex. 2.

[x] Fidelity Fixed-Income Trust Prospectus at FID-LB-00921 (April 29, 2011), Hemani Decl. Ex. 21; Morningstar.com, http://quotes.morningstar.com/ fund/fsbix/f?t=fsbix (last visited May 31, 2013); 2011 Form 5500 at FID-LB-00254, Hemani Decl. Ex. 2.

Appendix B:

Top 10 Plan Investment Options Performance Compared to Benchmark[i]

	2009	2010
Institutional Money Market Fund, Institutional Class	0.77%	0.28%
Benchmark (US Treasury T-Bill Auction Ave 3 Months)[ii]	*0.16%*	*0.06%*
Contrafund, K Class	29.43%	17.09%
Benchmark (S&P 500)[iii]	*26.46%*	*15.06%*
Low-Priced Stock Fund, K Class	39.31%	20.87%
Benchmark (S&P 500)[iv]	*26.46%*	*15.06%*
Total Bond Fund, Investor Class	19.80%	8.55%
Benchmark (Barclays US Agg Bond)[v]	*5.93%*	*6.54%*
Leveraged Company Stock Fund, K Class	59.89%	24.76%
Benchmark (S&P 500)[vi]	*26.46%*	*15.06%*
Freedom Fund 2030, K Class	30.57%	14.18%
Benchmark (Morningstar Moderate Target Risk)[vii]	21.77%	*12.33%*
International Discovery Fund, K Class	30.37%	11.25%
Benchmark (MSCI EAFE NR)[viii]	*31.78%*	*7.75%*
Intermediate Bond Fund, Investor Class	17.13%	7.58%
Benchmark (Barclays US Agg Bond)[ix]	*5.93%*	*6.54%*
Emerging Markets Fund, K Class	76.50%	18.49%
Benchmark (MSCI EAFE NR)[x]	*31.78%*	*7.75%*
Growth Company Fund, K Class	41.45%	20.75%
Benchmark (S&P 500)[xi]	*26.46%*	*15.06%*

[i] The 10 funds included in this chart contained more Plan assets than any other funds as of December 31, 2011. If the fund manager does not specify a benchmark, Morningstar assigns the most appropriate benchmark.

[ii] Morningstar.com, http://performance.morningstar.com/fund/performance-return.action?t=FNSXX (last visited May 31, 2013).

[iii] Morningstar.com, http://performance.morningstar.com/fund/performance-return.action?t=FCNKX (last visited May 31, 2013).

[iv] Morningstar.com, http://performance.morningstar.com/fund/performance-return.action?t=FLPKX (last visited May 31, 2013).

[v] Morningstar.com, http://performance.morningstar.com/fund/performance-return.action?t=FTBFX (last visited May 31, 2013).

[vi] Morningstar.com, http://performance.morningstar.com/fund/performance-return.action?t=FLCKX®ion=USA&culture=en-us (last visited May 31, 2013).

[vii] Morningstar.com, http://performance.morningstar.com/fund/performance-return.action?t=FFKEX (last visited May 31, 2013); Morningstar.com, http://performance.morningstar.com/fund/performance-return.action?t=FFFEX (last visited May 31, 2013). For 2009, Fidelity Freedom Fund data is used, as the K Class of shares was not available.

[viii] Morningstar.com, http://performance.morningstar.com/fund/performance-return.action?t=FIDKX (last visited May 31, 2013).

[ix] Morningstar.com, http://performance.morningstar.com/fund/performance-return.action?t=FTHRX (last visited May 31, 2013).

[x] Morningstar.com, http://performance.morningstar.com/fund/performance-return.action?t=FKEMX (last visited May 31, 2013).

[xi] Morningstar.com, http://performance.morningstar.com/fund/performance-return.action?t=FGCKX (last visited May 31, 2013).

Appendix C:

Morningstar Fee Level for Top 10 Plan Investment Options[i]

Fund	Fee Level
Institutional Money Market Fund, Institutional Class	N/A[ii]
Contrafund, K Class	Below Average[iii]
Low-Priced Stock Fund, K Class	Below Average[iv]
Total Bond Fund, Investor Class	Low[v]
Leveraged Company Stock Fund, K Class	Low[vi]
Freedom Fund 2030, K Class	Low[vii]
International Discovery Fund, K Class	Below Average[viii]
Intermediate Bond Fund, Investor Class	Low[ix]
Emerging Markets Fund, K Class	Low[x]
Growth Company Fund, K Class	Average[xi]

[i] The 10 funds included in this chart contained more Plan assets than any other funds as of December 31, 2011.

[ii] Morningstar.com does not rate money market funds' fees. *See* Morningstar.com, http://financials.morningstar.com/money-market/quote?t=FNSXX+ (last visited May 31, 2013).

[iii] Morningstar.com, http://quotes.morningstar.com/fund/fcnkx/f?t=FCNKX (last visited May 31, 2013).

[iv] Morningstar.com, http://quotes.morningstar.com/fund/flpkx/f?t=FLPKX (last visited May 31, 2013).

[v] Morningstar.com, http://quotes.morningstar.com/fund/ftbfx/f?t=FTBFX (last visited May 31, 2013).

[vi] Morningstar.com, http://quotes.morningstar.com/fund/flckx/f?t=FLCKX (last visited May 31, 2013).

[vii] Morningstar.com, http://quotes.morningstar.com/fund/ffkex/f?t=FFKEX (last visited May 31, 2013).

[viii] Morningstar.com, http://quotes.morningstar.com/fund/fidkx/f?t=FIDKX (last visited May 31, 2013).

[ix] Morningstar.com, http://quotes.morningstar.com/fund/fthrx/f?t=FTHRX (last visited May 31, 2013).

[x] Morningstar.com, http://quotes.morningstar.com/fund/fkemx/f?t=FKEMX (last visited May 31, 2013).

[xi] Morningstar.com, http://quotes.morningstar.com/fund/f?t=FGCKX®ion=USA&culture=en-us (last visited May 31, 2013).