UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MATTHEW WEHNER, Plaintiff, v. GENENTECH, INC., et al., Defendants.	Case No. 20-cv-06894-WHO **ORDER GRANTING MOTION TO DISMISS WITH LEAVE TO AMEND** Re: Dkt. No. 26

Plaintiff Matthew Wehner, a participating employee of the U.S. Roche 401(k) Savings Plan ("Plan"), brings this class action under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132, against defendants Genentech, Inc. ("Genentech") and the U.S. Roche DC Fiduciary Committee ("Committee") for breach of their fiduciary duties and related breaches of applicable law. Before me is defendants' motion to dismiss the Complaint for failure to state a claim.

The facts as alleged do not raise a plausible inference that defendants breached their fiduciary duties of prudence and loyalty. Imprudence cannot be reasonably inferred from Wehner's apples-to-oranges comparisons regarding the Plan's fees and funds. And he does not allege any additional facts to support his duty of loyalty claim outside of those alleged to support his duty of prudence claim. Because Wehner fails to plead a duty of prudence or loyalty claim, his second claim for relief, which is a derivative failure to monitor claim, also fails. His alternative non-fiduciary liability claim is not plausible because he does not allege that defendants participated in a "prohibited transaction" nor explain why his requested form of equitable relief is within the scope of "appropriate equitable relief" allowed for this type of claim. For these reasons, defendants' motion to dismiss is GRANTED with leave to amend.

BACKGROUND

Wehner is former employee of Genentech and a current participant in the Plan. Complaint ("Compl.") [Dkt. No. 1] ¶¶ 2–4, 9. Participants direct the investment of their contributions into various investment options offered by the Plan. *Id.* ¶ 17. Each participant's individual account is credited with his or her contributions, employer-matching contributions from Genentech, any discretionary contributions from Genentech, and the earnings and losses on the account. *Id.* Each participant's account is charged with an allocation of expenses for the cost of the Plan's administration. *Id.* As of December 31, 2018, the Plan had "33,693 participants with account balances and assets totaling over $7.6 billion, placing it in the top 0.1% of defined contribution plans by plan size." *Id.* ¶ 4.

Genentech is the Plan sponsor and a fiduciary charged with administering the Plan. *Id.* ¶¶ 5, 10. Genentech assembled the Committee and appointed Committee members to administer the Plan on Genentech's behalf, all of whom are also Plan fiduciaries. *Id.* ¶¶ 11–12. Genentech and the Committee (collectively "defendants") contracted with the Fidelity Workplace Services LLC ("Fidelity") to serve as the Plan's recordkeeper, responsible for maintaining records of the participants' accounts, effecting investment elections, and performing administrative functions such as loan processing and withdrawal requests. *Id.* ¶ 19. Defendants also hired State Street Corporation to serve as the Plan trustee, holding Plan assets in trust and performing all investments and asset allocations for the Plan. *Id.* ¶ 20. The Plan pays its administrative expenses from Plan assets, generally as a reduction of participants' investment income. *Id.* ¶ 17.

Wehner alleges that defendants breached their fiduciary duties to the Plan in three ways – (i) imposing recordkeeping and administrative fees that were too high; (ii) imposing investment management fees that were too high; and (iii) retaining investment funds that allegedly underperformed and had high fees. *See id.* ¶¶ 26, 28, 38, 40.

He supports his excessive administrative fees claim with "one industry publication," the 401k Averages Book (20th Ed.), which suggests that the average cost for recordkeeping and administration in 2017 for plans much smaller than the Plan (plans with 100 participants and $5 million in assets) was $35 per participant. *Id.* ¶ 22. He contends that the Plan's administrative fees, which ranged between $57 and $85 between 2014 and 2018, should have been "significantly lower" than $35 per participant given the Plan's bigger size and resulting negotiating power. *Id.* ¶ 22.

Wehner alleges that the Plan's investment management fees of 0.31% –0.32% of its total assets is, alone, higher than the average Total Plan Cost ("TPC") for plans with more than $1 billion, which stands at 0.28% according to the most recent Brighscope/ICI study published in August 2020. *Id.* ¶ 27. When the investment management fees are added with the other components for the metric, he asserts that the Plan's TPC, at 0.34% to 0.36% of net assets during the relevant period, is also significantly above that benchmark. *Id.* ¶ 28.

Of all the funds offered in the Plan's three-tiered investment structure, Wehner complains about the Tier One option and one of the two Tier Two options. *Id.* ¶¶ 29–40. Tier One investments, which consist of custom-designed target date funds (the "Roche TDFs"), are for participants who do not want to choose several investments but instead desire a self-adjusting portfolio that will help them reach their retirement goals. *See* Declaration of William G. Gaede, III in Support of Defendants' Motion to Dismiss ("Gaede Decl.") [Dkt. No. 26-2], Ex. 6 at 6.[1] He asserts that the Roche TDFs were expensive in comparison to other products and performed poorly. Compl. ¶¶ 30, 40.

Tier Two investments, which consist of various custom-designed actively-managed funds (the "Roche Actively-Managed Funds") and various passively-managed index funds managed by BlackRock (the "BlackRock Index Funds"), are for participants who wish to exercise more control than in Tier 1 by selecting investments within one or more asset classes. *See* Gaede Decl., Ex. 6 at 6. Wehner alleges that the inclusion of the Roche Small and Mid-Cap Equity Fund was imprudent because it underperformed its benchmark based on five-year annual returns, and had higher fees than a BlackRock index fund in its asset class. Compl. ¶ 40. He contends that the Plan's continued retention of the underperforming and unjustifiably expensive Roche U.S. Small and Mid-Cap Equity Fund is another indication of a defective fiduciary process. *Id.*

[1] As set forth below, defendants' request for judicial notice of plan-related documents is GRANTED.

Based on these allegations, Wehner asserts the following causes of action in his Complaint: (i) defendants' breach of duties of prudence and loyalty; (ii) a derivative claim alleging Genentech's failure to monitor fiduciaries and co-fiduciary breaches; and (iii) in the alternative, liability for participation in a breach of fiduciary duty to the extent that any of the defendants are not deemed a fiduciary or co-fiduciary under ERISA. Defendants moved to dismiss the Complaint for failure to state a claim. Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) ("MTD") [Dkt. No. 26]. I heard argument on January 27, 2021.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads facts that "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). There must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *See Twombly*, 550 U.S. at 555, 570.

In deciding whether the plaintiff has stated a claim upon which relief can be granted, the court accepts the plaintiff's allegations as true and draws all reasonable inferences in favor of the plaintiff. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *See In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

DISCUSSION

I. REQUEST FOR JUDICIAL NOTICE

Defendants seek judicial notice of plan-related documents that consist of a document setting forth the terms of the Plan (Ex. 1) as well as the Plan's Investment Policy Statement

("IPS") (Exs. 2 –6) and its Fee Policy Statement ("FPS") (Ex. 7) adopted by the Committee. Defendants' Request for Judicial Notice in Support of Their Motion to Dismiss the Complaint ("RJN") [Dkt. No. 26-1] 2; *see* Gaede Decl., Exs. 1–7.

Wehner accuses defendants of attempting to litigate the merits of his claims by requesting a "presumption of prudence" through judicial notice of the Plan documents. Plaintiff's Opposition to Defendants' Motion to Dismiss ("Oppo.") [Dkt. No. 34] 11–12. But Wehner has put the terms of those documents directly at issue. In the Complaint, he alleges that defendants did not loyally or prudently make decisions about the Plan's fees and funds or make those decisions consistent with the Plan's governing documents. Compl. ¶ 61. Exhibits 1 through 7 set forth the requirements for decisions regarding the Plan's fees and funds that the Committee must follow and are "central" to the fee and fund claims asserted in the Complaint. Defendants do not use these documents to show a "presumption of prudence;" they use these judicially noticeable documents to explain why Wehner's allegations are insufficient.

Defendants' request with respect to the plan documents (Exs. 1–7) is GRANTED. *See, e.g., White v. Chevron Corp.* ("*White I*"), No. 16-CV-0793-PJH, 2016 WL 4502808, at * 3–4 (N.D. Cal. Aug. 29, 2016) (judicial notice of an investment policy statement); *Rodrigues v. Bank of Am.*, NA, No. 16-CV-1390, 2016 WL 3566950, at *1 n.1 (N.D. Cal. Jul. 1, 2016) (judicial notice of plan document and summary plan description under the "incorporation by reference" doctrine). Their remaining unopposed request for judicial notice of the Plan's Forms 5500 from 2014 to 2019 (Exs. 8–13) and the 401(k) Averages Book study that Wehner references as a market comparator in his Complaint (Ex. 14) is also GRANTED. *See, e.g., Terraza v. Safeway Inc.*, 241 F. Supp. 3d 1057, 1067 (N.D. Cal. 2017) (judicial notice of Form 5500); *Davis v. Salesforce.com*, No. 20-CV-01753-MMC, 2020 WL 5893405, at *1 n. 2 (N.D. Cal. Oct. 5, 2020) (same).

II. BREACH OF FIDUCIARY DUTIES

For his first claim, Wehner alleges that defendants breached their fiduciary duties of prudence and/or loyalty to the Plan based on: (i) recordkeeping and administrative fees that were too high (Compl. ¶ 22–26); (ii) investment management fees that were too high (*Id.* ¶¶ 27–28); and (iii) the Plan's retention of the Roche TDFs and U.S. Small and Mid-Cap Equity Fund (*Id.* ¶¶

29–40).

A. Duty of Prudence

Under ERISA, a plan fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries," *see* 29 U.S.C. § 1104(a)(1), and must do so "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims," *see* 29 U.S.C. § 1104(a)(1)(B). To evaluate whether a plan fiduciary has breached his fiduciary duty of prudence, courts focus "not only on the merits of the transaction, but also on the thoroughness of the investigation into the merits of the transaction." *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996). "Because the content of the duty of prudence turns on the circumstances . . . prevailing at the time the fiduciary acts, the appropriate inquiry will necessarily be context specific." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014) (internal quotation and citation omitted). This standard "focus[es] on a fiduciary's conduct in arriving at an investment decision, not on its results, and ask[s] whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." *White I*, 2016 WL 4502808, at *5 (quoting *Pension Benefit Guar. Corp. ex rel. St. Vincent v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 716 (2nd Cir. 2012)).

Courts recognize that the omission of factual allegations referring directly to a plan fiduciary's "knowledge, methods, or investigations at the relevant times" is "not fatal to a claim alleging a breach of fiduciary duty" because "ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." *St. Vincent*, 712 F.3d at 718. Thus, "[e]ven when the alleged facts do not 'directly address[ ] the process by which the Plan was managed,' a claim alleging a breach of fiduciary duty may still survive a motion to dismiss if the court, based on circumstantial factual allegations, may reasonably 'infer from what is alleged that the process was flawed.'" *Id.* (citation omitted).

"[I]f the complaint relies on circumstantial factual allegations to show a breach of fiduciary duties under ERISA, those allegations must give rise to a 'reasonable inference' that the defendant committed the alleged misconduct," thus "'permit[ting] the court to infer more than the mere possibility of misconduct,'" *St. Vincent*, 712 F.3d at 718 (quoting *Iqbal*, 556 U.S. at 678–79). Although details about a fiduciary's methods and actual knowledge tend to be "in the sole possession of [that fiduciary]," "ERISA imposes extensive disclosure requirements on plan administrators, thus giving plan beneficiaries (i.e., prospective plaintiffs) the opportunity to find out how the fiduciary invested the plan's assets." *Id.* at 719–20 (citation omitted). "Armed with this extensive data about a fiduciary's investment decisions, a prospective plaintiff must show, through reasonable inferences from well-pleaded facts, that the fiduciary's choices did not meet ERISA's requirements." *Id.* at 720.

With that understanding, I address whether Wehner has alleged sufficient facts to give rise to a "reasonable inference" that the Plan fiduciaries engaged in conduct constituting a breach of fiduciary duty.

1. Recordkeeping and Administrative Fees

Wehner contends that he has alleged sufficient circumstantial facts from which an imprudent process can be reasonably inferred, including "apples-to-apples" comparisons of the Plan's fees and funds. Oppo. 11. With respect to recordkeeping and administrative fees, he alleges that the Plan, with $7.6 billion in assets and 33,693 participants, paid between $85.29 to $57.91 per participant in recordkeeping and administrative costs from 2014 to 2018, while the average cost for recordkeeping and administration in 2017 for "plans much smaller than the Plan (plans with 100 participants and $5 million in assets)" was only $35 per participant. Compl. ¶ 22.[2] He further alleges that Fidelity's recordkeeping portion of the Plan's administrative fees was $38 per participant starting in 2017 and "[e]ven at $38 per participant, the Plan compensated Fidelity at a level far in excess of the $14–$21 per-participant figure that Fidelity itself admitted its recordkeeping services were worth." *Id.* ¶ 24. Given the Plan's size and advantages in economies of scale and negotiating power, he contends that the recordkeeping and administrative fees could

[2] Defendants point out that the 401(k) Averages Book (20th Ed.) provides that the average recordkeeping costs was $40 per participant, not $35 as alleged in the Complaint. MTD 13–14. Wehner admits that he inadvertently cited the 20th edition rather than the 18th edition for this figure, but argues that the $40 per participant figure is still significant compared to the Plan's per participant range. Oppo. 13.

have been much lower. Oppo. 12.

Defendants argue that Wehner has failed to provide an adequate market comparator given that "recordkeeping and administration" is defined differently in the 401(k) Averages Book than it is under the Plan. MTD 14. The 401(k) Averages Book defines "recordkeeping and administration" as "any hard dollar charges for recordkeeping and administration services" including "5500 form preparation, non-discretionary trustee, communications and document preparation." *See* The 401(k) Averages Book "Frequently Asked Questions," definition of "recordkeeping and administration," https://www.401ksource.com/faq/. Notably absent from this definition are services rendered for auditing the Plan and investment consulting. Thus, defendants contend, Wehner does not appear to have calculated the Plan's per participant "recordkeeping and administration fees"—which include audit and investment fees as acknowledged in the Complaint[3]—by using the same metrics by which the 401(k) Averages Book did. MTD 14. Further, they argue that it is unclear whether the plans in the study included certain expenses, such as for self-directed funds and self-directed brokerage accounts, in the same way the Plan does. *Id.*

Wehner responds that it would be absurd to demand that he, a participant of the Plan, obtain bids from other service providers to conduct a price comparison specifically for the Plan when he has no authority or access to the necessary information in order to plead excessive administrative fee allegations. Oppo. 14 (citing *St. Vincent*, 712 F.3d at 718). In any event, he argues that "there is no indication that the Plan receives recordkeeping services beyond that which is normally provided, *i.e.*, maintaining records of employee accounts, effecting participants' investment elections, and processing loan and withdrawal requests, and defendants identify none." *Id.*; *see* Compl. ¶ 19 (alleging the kinds of services provided by Fidelity as recordkeeper).

Federal district courts in California have held that a plaintiff must plead administrative fees that are excessive in relation to the *specific* services the recordkeeper provided to the *specific plan* at issue. A plaintiff must allege "facts from which one could infer that the same services were

[3] *See* Compl. ¶ 23 ("In addition to recordkeeping fees paid to Fidelity (and in 2015, to Means and Associates as well), the Plan also paid annual administrative fees to two separate investment consultants and an auditor. These fees added up to significant costs far above what the Plan should have reasonably been paying.").

available for less on the market." *White I*, 2016 WL 4502808, at *14 (citing *Young v. GM Inv. Mgmt. Corp.*, 325 Fed. Appx. 31, 33 (2nd Cir. 2009) (plaintiffs did not plausibly allege that the fiduciaries agreed to pay excessive fees where they "fail[ed] to allege that the fees were excessive relative to the services rendered")).

In *Kong v. Trader Joe's Co.* ("*Kong I*"), No. CV2005790PAJEMX, 2020 WL 5814102, at *5 (C.D. Cal. Sept. 24, 2020), the court found that the plaintiffs failed to offer facts to suggest that a $48 per participant recordkeeping fee is "unreasonable." It noted that "[c]ourts regularly dismiss imprudence claims such as these for failing to allege an adequate comparison." *Id.* For example, in *Divane v. Nw. Univ.*, 953 F.3d 980, 990 (7th Cir. 2020), the Seventh Circuit affirmed dismissal finding that defendant "was not required to search for a recordkeeper willing to take $35 per year per participant as [p]laintiffs would have liked," and that the plaintiffs "failed to explain how a hypothetical lower-cost recordkeeper would perform at the same level necessary to serve the best interests of the plans' participants." *Id.* Similarly, the plaintiffs in *Kong I* "[did] not allege any facts as to what would constitute a reasonable fee, or any facts suggesting that the fee charged by Capital Research is excessive *in relation to the services Capital Research provides*." *Id.* (emphasis added). The court further noted that the single 1998 Department of Labor study plaintiffs cited in the complaint purporting to show that a retirement plan can negotiate lower recordkeeping fees was "unpersuasive" because "[o]ne study from 1998 cannot support a claim for excessive fees that occurred starting in 2014." *Id.*

The *Kong* plaintiffs failed to fix these pleading insufficiencies in the second round of motions to dismiss. In addition to the problems previously identified, the court found:

> The surveys cited by Plaintiffs, as well as evidence of the recordkeeping fees of other plans, have no connection to the question of whether *this* Plan could have obtained lower recordkeeping fees for the services provided by Capital Research. For example, several of the plans referenced in the FAC have either far more participants with account balances or far greater assets under management than this Plan. (See FAC ¶ 141 n. 30 citing *Spano v. The Boeing Co.*, 6-cv-00743 (S.D. Ill. Sept. 28, 2006) Dkt. No. 1 (alleging plan with almost five times the number of participants). In addition, Plaintiffs do not make any allegations as to whether the services provided to this plan by Capital Research could have been obtained for a lower cost.

Kong v. Trader Joe's Co. ("*Kong II*"), No. CV2005790PAJEMX, 2020 WL 7062395, at *6 (C.D.

Cal. Nov. 30, 2020) (emphasis in original).

Wehner attempts to distinguish *Kong I* and *Kong II* on grounds that the dated 1998 study and surveys from larger plans, which have the economies of scale and negotiating power that smaller plans do not, provide a far less compelling inference than the metrics he presents here. Oppo 15–16. But he fails to explain why his market comparator is adequate absent allegations "suggesting that the fee charged by [the recordkeeper] is excessive *in relation to the services* [the recordkeeper] provides." *Kong I*, 2020 WL 5814102, at *5 (emphasis added); *see Kong II*, 2020 WL 7062395, at *6 ("Plaintiffs do not make any allegations as to whether the *services provided* to this plan by Capital Research could have been obtained for a lower cost.") (emphasis added). In particular, the allegations in Wehner's Complaint do not make clear why the market comparator from the 401(k) Average Book provides an accurate comparison to the fees charged by the Plan at issue in this case. Nor is there any indication of how Wehner calculated the per-participant fees for recordkeeping and administrative costs and whether that calculation includes services that go beyond the regular amount of recordkeeping and administrative services reflected in the 401(k) Average Book. *See* Compl. ¶ 23.

Wehner's other market comparator, specific to the amount of fees charged by Fidelity's recordkeeping services, also fails to reasonably support an inference of higher fees. He alleges that Fidelity's recordkeeping portion of the Plan's administrative fees was $38 per participant starting in 2017, which was too high because Fidelity itself admitted its recordkeeping services were worth $14–21. Compl. ¶ 24. As reflected in the Complaint, he obtained the $14–21 figure from another case, *Moitoso v. FMR LLC*, No. 18-CV-12122 (WGY), 2020 WL 1495938, at *15 (D. Mass. Mar. 27, 2020). *Id.* n. 4. Fidelity took that position in litigation regarding the recordkeeping services it provided to *its own plans*. Wehner does not explain how the services that Fidelity provided to its own plans are equivalent in value to the services Fidelity provided to the Plan at issue in this case. Without more, the $14–21 figure cannot serve as an adequate market comparator.

Wehner cites a number of cases that he contends compels the inference that the Plan should have been able to achieve a much lower per-participant figure, but did not because of a deficient fiduciary process. Oppo. 12; *see Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, 250 F. Supp. 3d 460, 467 (N.D. Cal. 2017); *Sacerdote v. New York Univ.*, No. 16-CV-6284 (KBF), 2017 WL 3701482, at *9 (S.D.N.Y. Aug. 25, 2017); *Cassell v. Vanderbilt Univ.*, 285 F. Supp. 3d 1056, 1064 (M.D. Tenn. 2018). In those cases, however, plaintiffs provided some plausible basis that the market comparators were "similarly-sized plans" or are "plans like those at issue." *Fujitsu*, 250 F. Supp. 3d at 467; *Sacerdote*, 2017 WL 3701482, at *9. Wehner's Complaint does not achieve the same here. Without more, I cannot draw the reasonable inference that defendants are liable for misconduct alleged.

2. Investment Management Fees

Wehner alleges that defendants breached their fiduciary duties "by failing to ensure that the Plan only paid reasonable investment management fees." Compl. ¶ 27. He contends that the Plan's investment management fees of 0.31%–0.32% of its total assets is, alone, higher than the average Total Plan Cost ("TPC") for plans with more than $1 billion, which stands at 0.28% according to the most recent Brighscope/ICI study published in August 2020. *Id.* When the investment management fees are added with the other components for the metric, the Plan's TPC, at 0.34% to 0.36% of net assets during the relevant period is also significantly above that benchmark. *Id.* ¶ 28.

Defendants argue that these allegations are insufficient because Wehner does not plead that defendants could have invested the Plan in cheaper alternative options. *See, e.g.*, *Terraza*, 241 F. Supp. 3d at 1077 ("Terraza alleges that the Defendants could have offered the exact same investment option for a lower price based on the Plan's size. The Court can reasonably infer from this allegation that the Defendants acted imprudently by selecting the more expensive option, all else being equal."). The Complaint only states that "[f]rom 2014 through 2018, the Plan paid out investment management fees of 0.31%–0.32% of its total assets, a figure higher than that of comparable plans." Compl. ¶ 27. There is no explanation of what those "comparable plans" are and why they are comparable.

Even if Wehner had alleged that defendants could have invested the Plan in cheaper alternative options, defendants argue that his claims still would fail because when a plan offers an overall lineup of a diversified array of investment options—like the Plan here—the fact that some other funds in the marketplace might be cheaper is irrelevant as ERISA does not require fiduciaries to "scour the market to find and offer the cheapest possible fund[s]." *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) (The "fact that it is possible that some other funds might have had even lower ratios is beside the point"); *White v. Chevron Corp.* ("*White II*"), No. 16-CV-0793-PJH, 2017 WL 2352137, at *14 (N.D. Cal. May 31, 2017), *aff'd,* 752 F. App'x 453 (9th Cir. 2018) (finding complaint "fail[ed] to allege facts sufficient to state a claim of breach of the duty of prudence in connection with defendants' selection of funds with allegedly higher management fees over funds with lower management fees," where the complaint "simply provide[d] comparisons between funds that were in the Plan lineup and funds that plaintiffs claim were less expensive," and failed to provide "factual allegations sufficient to create a plausible inference that defendants' process of selecting funds and their monitoring of the funds was imprudent")

Wehner spends much of his opposition (but none of his Complaint) explaining that a portion of a fund's investment management fees can sometimes be kicked back to a recordkeeper to pay for administrative services. Oppo. 15. This practice, known as revenue sharing, can result in a portion of investment management fees going to the recordkeeper for administrative services. *Id.* But at no point in his Complaint does he allege that the Plan engages in revenue sharing. There are no plausible allegations that any portion of the 0.31%–0.32% in investment management fees is paid for administrative or recordkeeping services. *See Marks v. Trader Joe's*, No. 19-CV-10942, 2020 WL 2504333, at *6 (C.D. Cal. Apr. 24, 2020) (dismissing fee claim because plaintiffs alleged, without factual support, that the recordkeeper was receiving "indirect compensation" in addition to flat per-participant fees); *White II*, 2017 WL 2352137, at *16 (dismissing fee claims where, inter alia, plaintiffs alleged that the plan paid administrative and recordkeeping fees in the form of "internal revenue sharing," but judicially noticeable documents did not reflect any such payments).

As pleaded, Wehner's allegations regarding the Plan's investment management fees are insufficient to show imprudence.

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3. The Plan's Inclusion of Certain Funds

Wehner alleges that the selection and retention of two products in the Plan, the Roche TDFs and the Roche Small and Mid-Cap Equity Fund, was imprudent. I address each in turn.

a. Roche TDFs

Wehner alleges that the Roche TDFs are significantly more expensive and poorer performing than many of the alternatives offered by other TDF providers, including the Vanguard TDFs and the Fidelity TDFs. Compl. ¶¶ 30–38. Defendants argue that Wehner's chosen comparators, the Vanguard and Fidelity TDFs, which are retail funds available to the public, are improper "apples-to-oranges" comparisons to the Roche TDFs, which are custom funds designed specifically for the Plan. MTD 18.

Defendants explain "well-known differences" between custom and retail TDFs. The investment strategy employed by an investment manager when structuring the glide path for a retail TDF is generic and reflects the manger's own proprietary considerations. Pavilion Global Markets, "Custom vs. off-the-shelf target date funds," available at https://www.paviliongm.com/custom-vs-off-the-shelf-target-date-funds/. In contrast, a custom strategy can be designed to the specific needs of a specific plan's demographics based on factors such as pay levels, expected retirement ages, contribution levels, or other sources of retirement income. *Id.* A custom TDF strategy affords greater flexibility to fiduciaries when choosing the underlying investments, whereas a retail TDF is typically managed by only one investment manager, and plan fiduciaries will have no control over the investment lineup or asset classes comprising the fund. *Id.*

Custom TDFs may also have added expenses due to the design and need to occasionally rebalance the offerings and strategy to fit specific participants' needs. *See* Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries, U.S. Department of Labor, at 2–3 (February 2013) available at https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/factsheets/target-date-retirement-funds.pdf. Accordingly, defendants conclude, these disparities between the investments, investment strategies, and cost structure underlying a custom TDF product compared to a retail TDF product make it implausible to meaningfully compare one's performance and fees to the other.

Wehner's response that all three products (Roche TDFs and the Vanguard and Fidelity TDFs) are TDFs, so they must be comparable, is insufficient to make this an "apples-to-apples" comparison. Oppo. 19. The Hon. Lucy H. Koh's recent opinion in *Anderson v. Intel Corp.*, No. 19-CV-04618-LHK, 2021 WL 229235 (N.D. Cal. Jan. 21, 2021) explains why. The plaintiffs in that case similarly alleged that the Intel TDFs "underperformed comparable alternatives such as those offered by Vanguard," and charged fees "significantly higher" than comparable plans. *Id.* at *8. Judge Koh found that "simply labeling funds as 'comparable' or 'a peer' is insufficient to establish that those funds are meaningful benchmarks against which to compare the performance of the Intel Funds." *Id.* Absent factual allegations to support a finding that the funds identified provide a "meaningful benchmark" against which to evaluate the performance of the Intel Funds, Judge Koh concluded that the plaintiffs' "allegations regarding poor performance are insufficient to state a claim for breach of the duty of prudence, even in conjunction with further allegations of higher-than-average fees and self-dealing." *Id.* For the same reasons, she found that "the central deficiency with Plaintiffs' allegations regarding excess fees is that Plaintiffs have again failed to adequately plead factual allegations to support their claim that Plaintiffs have provided a meaningful benchmark against which to compare the fees incurred by the Intel Funds." *Id.* at * 9.

Wehner's conclusory allegations regarding the Roche TDF's performance and fees suffer from the same flaw. He cannot "dodge the requirement for a meaningful benchmark by merely finding a less expensive alternative fund or two with some similarity." *Id.* (quoting *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018)); *see also Davis v. Wash. Univ.*, 960 F.3d 478, 485 (8th Cir. 2020) (funds are not adequate comparators to other funds when they have "different aims" and "different risks"; affirming dismissal of claims premised on funds that broadly shared similar investing strategies, but which were "not close enough"); *White I*, 2016 WL 4502808, at *12 (dismissing breach of prudence allegations premised on "apples-to-oranges" comparisons of "distinct investment vehicles").

Moreover, Wehner's hindsight assessment of the Roche TDFs alleged underperformance is based on annual returns over three- and five-year periods. Compl. ¶¶ 37–38. There is nothing presumptively imprudent about a retirement plan retaining investments "through periods of underperformance as part of a long-range investment strategy." *White II*, 2017 WL 2352137, at *20; *see Davis v. Salesforce.com, Inc.*, No. 20-CV-01753-MMC, 2020 WL 5893405, at *4 (N.D. Cal. Oct. 5, 2020) (allegations "based on five-year returns are not sufficiently long-term to state a plausible claim of imprudence"); *Dorman v. Charles Schwab Corp.*, No. 17-CV-00285, 2019 WL 580785, at *6 (N.D. Cal. Feb. 8, 2019) (characterizing five years of underperformance as "relatively short" and insufficient to support plaintiffs' allegation that funds "persistent[ly]" or "materially" underperformed); *Jenkins v. Yager*, 444 F.3d 916, 925-26 (7th Cir. 2006) (defendant did not breach his fiduciary duties retaining funds that underperformed for three years because investment strategy "to find long-term, conservative, reliable investments that would do well during market fluctuations" was not unreasonable or imprudent); *Patterson v. Stanley*, No. 16-CV-6568 (RJS), 2019 WL 4934834, at *10 (S.D.N.Y. Oct. 7, 2019) (noting that "consistent, ten-year underperformance may support a duty of prudence claim" if the underperformance is "substantial").

Wehner does not address the case law cited above or provide any authority to the contrary. Instead, he simply points to the following quote from the Plan's IPS: "Although over shorter time periods the performance of any given fund may not meet its goals, it is expected that the fund net of fee returns will meet or exceed these benchmarks over a market cycle, typically defined as a rolling 3–5 year period." *See* Gaede Decl., Ex. 6 at App'x B. As Defendants explain, the stated time periods in the IPS, consistent with the case law, merely indicate that funds which do not meet the benchmark over these periods would be placed on a watch list for additional performance monitoring, not removed from the Plan entirely. *See* Gaede Decl., Ex. 6 (2019 IPS) at 7 ("Significant over or under performance…will trigger a prompt review.").

Without more factual allegations to support a reasonable inference, Wehner fails to state an imprudence claim on predicated defendants' retention of the Roche TDFs.

b. Roche U.S. Small and Mid-Cap Equity Fund

The Plan's Tier Two investments consist of various custom-designed actively-managed funds (the "Roche Actively-Managed Funds") and various passively-managed index funds managed by BlackRock (the "BlackRock Index Funds"). *See* Gaede Decl., Ex. 6 (2020 IPS) at 6. Wehner alleges that the inclusion of the Roche Small and Mid-Cap Equity Fund, an actively-managed fund, was imprudent because it underperformed its benchmark based on five-year annual returns, and had higher fees than a passively-managed fund, the BlackRock index fund, in its asset class. Compl. ¶ 40. Unlike his allegations regarding the Roche TDFs, he does not suggest that the Plan should have invested in an alternative less expensive, better-performing option. Rather, he alleges that "there was and is no reason to include an actively managed fund in the U.S. small/mid-cap space" in the Plan at all because the Plan also offered a BlackRock index fund in that same asset class. *Id.* ¶ 40. Defendants argue that the comparator provided, the BlackRock U.S. Small Cap Equity Index Fund, is inappropriate because it is a passively-managed fund, whereas the U.S. Small and Mid-Cap Equity Fund is an actively-managed fund. MTD 20–21.

Plaintiffs in *Davis v. Salesforce.com, Inc.*, No. 20-CV-01753-MMC, 2020 WL 5893405, at *3 (N.D. Cal. Oct. 5, 2020) similarly alleged that the plan's actively managed funds "lagged behind in performance when compared with certain passively managed funds, as demonstrated by their five-year returns as of January 2020." (internal quotation marks omitted). The court agreed with the defendants that passively-managed funds are "not comparable to actively-managed funds in any meaningful way" because the two types of funds "'have different aims, different risks, and different potential rewards that cater to different investors.'" *Id.* (quoting *Davis v. Wash. Univ.*, 960 F.3d 478, 485 (8th Cir. 2020)). In light of the differences, the court concluded that the allegations "do not suffice to demonstrate imprudence." *Id.*

The same conclusion is compelled here. Wehner contends that it is appropriate to compare actively-managed and passively-managed funds in this situation because the Plan's IPS specifically designates the Russell 2000 Index as the U.S. Small and Mid-Cap Equity Fund's benchmark, while the BlackRock U.S. Small Cap Equity Index Fund is simply an investable version of that benchmark. Compl. ¶ 40; *see* Gaede Decl., Ex. 6 at App'x B. Even assuming that a passively-managed fund can be used for purposes of comparison, the Complaint contains no factual allegations to support a finding that the passively-managed fund identified provides a "meaningful benchmark." *Davis*, 2020 WL 5893405, at *4 (finding allegation that passively-managed funds have "the same investment style" or "materially similar characteristics" as certain actively-managed funds offered in the plan "conclusory" and "not sufficient to state a claim for relief"). Further, as explained above, a purported five-year underperformance is "not sufficiently long-term to state a plausible claim of imprudence." *Id.*

Wehner's allegations regarding the Roche U.S. Small and Mid-Cap Equity Fund's "high fees" are similarly insufficient. He cannot rely on "apples-to-oranges" comparisons of an actively-managed fund's fees to a passively-managed index fund's fees due to the differences in the way the funds are managed. *See Davis*, 2020 WL 5893405, at *3; *see also Patterson v. Stanley*, No. 16-CV-6568 (RJS), 2019 WL 4934834, at *12 (S.D.N.Y. Oct. 7, 2019) (finding plaintiffs' allegation that defendants imprudently retained certain funds insufficient to state claim, where plaintiffs asserted, "in a conclusory manner," that less costly alternative funds were comparable "without ever explaining how or why the funds were comparable" (internal quotation and emphasis omitted)).

In sum, Wehner fails to provide sufficient facts to give rise to a "reasonable inference" that the Plan fiduciaries engaged in conduct constituting a breach of the fiduciary duty of prudence.

B. Duty of Loyalty

ERISA's loyalty duty requires a fiduciary to act "solely in the interest" of the Plan's participants and for the "exclusive purpose" of providing benefits and defraying reasonable plan administration expenses. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). To state a claim for breach of the duty of loyalty, the complaint must allege facts from which it plausibly can be inferred that the Plan's fiduciaries subjectively intended to benefit themselves or a third party at the expense of the Plan's participants.

The Complaint fails to differentiate between Wehner's breach of prudence claims and his breach of loyalty claims. Nor does it include separate allegations that would permit an inference that Genentech or the Committee selected funds or charged fees to benefit themselves or someone other than the Plan's participants. This failure warrants dismissal of his breach of loyalty claims. *White I*, 2016 WL 4502808, at *4 (dismissing claim where plaintiffs alleged that defendants had breached their fiduciary duties of "loyalty and prudence," without distinguishing between "prudence" and "loyalty"); *Kong II*, 2020 WL 7062395, at *7 (plaintiffs must "differentiate between breach of the duty of prudence and breach of the duty of loyalty").

Wehner attempts to cure this error in his opposition by asserting, for the first time, that the Committee continued to retain the custom funds—which were "presumably" designed and managed by investment consultant Russell Investments—in order to "keep Russell satisfied at the expense of [Plan] participants' interests" or "save themselves costs[.]" Oppo. 22. Even if these statements were pleaded, such conclusory statements are not enough. Without factual allegations suggesting that the Plan fiduciaries engaged in self-dealing or failed to act solely in the interest of the Plan's participants, Wehner's duty of loyalty claim fails.

Given the insufficiencies discussed above, defendants' motion to dismiss the first claim for breach of fiduciary duties is GRANTED with leave to amend.

III. FAILURE TO ADEQUATELY MONITOR OTHER FIDUCIARIES

Wehner alleges that Genentech breached its fiduciary monitoring duties in multiple ways. Compl. ¶ 70. This claim is derivative of the first claim for relief. Because Wehner's first claim is subject to dismissal, his second claim necessarily fails. *See Davis*, 2020 WL 5893405, at *7 (dismissing failure to monitor claim as derivative of insufficiently pleaded breach of fiduciary claim); *Dorman v. Charles Schwab Corp.*, No. 17-CV-00285-CW, 2018 WL 6803738, at *7 (N.D. Cal. Sept. 20, 2018) (same).

Defendants' motion to dismiss the second claim is GRANTED with leave to amend.

IV. LIABILITY AS NON-FIDUCIARIES

Wehner alternatively pleads that if defendants are not themselves considered ERISA fiduciaries, then defendants are liable as non-fiduciaries for knowingly participating in fiduciary breaches. Compl. ¶¶ 74–76.

Defendants argue that Wehner's generic allegations do not give rise to a plausible "knowing participation" claim because he does not allege that there was a "prohibited transaction" under ERISA section 406 and that defendants knowingly participated in a prohibited transaction; instead, his claims are based on fiduciary breaches under ERISA section 404. MTD 24–25. In addition, they argue that Wehner does not allege that they are liable for a form of equitable relief that is "appropriate" under the circumstances, such as the restitution or disgorgement of Plan assets received in connection with the prohibited transaction.

Wehner asserts that he is not required to plead a prohibited transaction to maintain this claim. Though other circuits may have placed such limitations, he argues that the Ninth Circuit has explained that a plaintiff "may (1) seek an injunction or 'other appropriate equitable relief (2) against a party in interest (3) for participating in a transaction for services for which more than reasonable compensation is paid." *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 660 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 223 (2019) (internal quotation marks and citation omitted).

Depot does not help Wehner's argument. In relevant part, the Ninth Circuit found that the third component was satisfied because the alleged conduct in the case—imposing unreasonable charges for kickbacks and unrequested benefits—"[was] arguably a *prohibited transaction* for 'services' between plan fiduciaries (plaintiffs) and parties in interest (defendants) for which 'more than reasonable compensation is paid.'" *Depot*, 915 F.3d at 660 (quoting 29 U.S.C. §§ 1106(a)(1)(C), 1108(b)(2)) (emphasis added). Wehner does not convincingly argue that he can maintain this claim without pleading a prohibited transaction.

With respect to "appropriate equitable relief," Wehner contends that he has requested such injunction or other equitable relief, which includes removal of the members of the Committee should they be deemed to be non-fiduciaries. Oppo. 24 (citing Compl. ¶ 75). Paragraph 75 of the Complaint only generally alleges that "Defendant should be enjoined or otherwise subject to equitable relief as a non-fiduciary from further participating in a breach of trust." Compl. ¶ 75. Even if the Complaint reflected what he contends in his opposition, he fails to adequately explain why that form of equitable relief is within the scope of what the Ninth Circuit in *Depot* considered to be "appropriate equitable relief." *Depot*, 915 F.3d at 660.

Defendants' motion to dismiss the third claim is GRANTED with leave to amend.

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Northern District of California

CONCLUSION

For the reasons stated above, defendants' motion to dismiss is GRANTED with leave to amend within 20 days of this order.

IT IS SO ORDERED.

Dated: February 9, 2021

William H. Orrick
United States District Judge