UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LANELL PIERCY, WILLA G. WARD, THOMAS L. MAZZEO, SUE RUSH, CATHERINE SCHLOSS, PATRICIA TATE-JACKSON, and DARLENE WILSON, individually and as representatives on behalf of a class of similarly situated persons,

Plaintiffs,

v.

AT&T INC., AT&T SERVICES, INC., THE BENEFIT PLAN INVESTMENT COMMITTEE, PASCAL DESROCHES, GEORGE GOEKE, DEBRA DIAL, WILLIAM HAMMOND, JULIANNE GALLOWAY, STATE STREET GLOBAL ADVISORS TRUST CO., and DENISE R. SISK,

Defendants.

Case No. 1:24-cv-10608-NMG

Consolidated with
Case No. 1:24-cv-10656-NMG

PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

Plaintiffs' core claim is that Defendants should not have selected Athene, in this instance, as the annuity provider to replace federally protected and regulated pension benefits. As a risky Bermuda-affiliated insurer, Athene was not a prudent choice to offload over eight-billion dollars' worth of retirement benefit obligations. Magistrate Judge Levenson's prior opinion, adopted by the District Court, identified two "essential" issues that prevented Plaintiffs' original complaint from clearing the hurdle of plausibly alleging a duty of prudence violation for this choice. The Amended Complaint cures those two defects.

First, although the original complaint detailed risky Athene practices that "a diligent fiduciary would be required to consider," it did not state how some of those practices stacked up against other annuity providers Defendants could have selected. R. & R. on Mots. to Dismiss, ECF 131 ("R&R") at 50. The complaint needed comparators. *Id.* at 73-75. Now it has them. The Amended Complaint explains that, of the 703 Life and Annuity providers in the United States, Athene ranks dead last—703rd—on key riskiness metrics. It also draws out the practices of five traditional annuity providers and compares each against Athene. For each, Athene is the worst—often by a mile. Myriad other possible annuity providers would have been a safer choice for the retirees to which Defendants owe a fiduciary duty. But, because of its risky practices, Athene was cheap. As the Amended Complaint explains, Athene offered to take on Defendants' pension obligations for a cut-rate price, saving AT&T hundreds of millions of dollars.

Second, the Court held that the original complaint insufficiently addressed Athene's "separate account," a factor discussed in Department of Labor ("DOL") guidance. The Amended Complaint now elaborates that, although Athene had a separate account, as nearly all annuity providers do, it was filled with risky assets. It also did not have enough assets. Unlike traditional

annuity providers, Athene' projections led it to underfund this account. It then commingled the account with those of its other pension-risk transfer deals (plus still other, unrelated obligations) and exposed this "separate" account to the risk of its general account. The account was (and is) "separate" in name only. This factor identified in the DOL guidance, like all the others, point against the selection of Athene.

The Amended Complaint does what was asked, following the Court's clear framework for alleging a violation of the duty of prudence. As a result, these claims—the ones alleging a violation directly and derivatively, against both State Street and the AT&T Defendants—should now be permitted to proceed to discovery. Other claims (including those alleging disloyalty and prohibited transactions) are not materially changed between the original and Amended Complaint. For these, out of respect for the Court and the law-of-the-case doctrine, Plaintiffs preserve our arguments for appellate review, but do not seek to relitigate the issues before this Court.

Defendants, for their part, seem unsure what to make of the Court's existing opinion. When it suits them, they adhere to it. They bang the "law of the case" drum for issues they won before that are not modified in the Amended Complaint—points Plaintiffs merely preserve for appellate review. But when it comes to issues they lost—Article III standing most notably—they seek to rehash old fights, making no mention of law of the case. And on the two "essential" issues the Court previously identified, and the new allegations in the Amended Complaint addressing those issues, Defendants are again close to silent. They dedicate just five of their collective 40 pages of briefing to comparators and the separate account.

This Court's task is straightforward. The Court has already ruled on these issues. Plaintiffs have standing. For counts alleging a violation of the duty of prudence in Defendants' selection of Athene, the Court has already set out the applicable legal standards and identified specific

deficiencies in the prior complaint, which the Amended Complaint now cures. Those Counts (I, II, IV, and X, as they relate to the duty of prudence) should proceed. Other claims, which the Court previously dismissed and are unaltered in the Amended Complaint, are preserved for appellate review.

BACKGROUND

This round of briefing does not write on a blank slate. Given the over one-hundred pages of judicial opinions already written in this matter, Plaintiffs will recount the factual background of the case only briefly, focusing on the key developments that precede this latest round of briefing.

Plaintiffs are retirees who spent years working for AT&T, one of the country's most valuable companies. In return, AT&T promised them secure retirement income in the form of defined benefit pensions regulated by the Employee Retirement Income Security Act of 1974 ("ERISA"). But in 2023, State Street and the AT&T Defendants shipped to Athene, a risky Bermuda-affiliated insurer, AT&T's entire obligation to pay Plaintiffs more than eight billion dollars of retirement benefits. Plaintiffs never agreed to depend on Athene for the security of their retirements. It is undisputed that ERISA forbids plan fiduciaries from shedding pension obligations to risky annuity providers whose selection is not in retirees' best interest and provides retirees a cause of action to sue for such fiduciary breaches. 29 U.S.C. §§ 1104, 1132(a)(9); R&R at 33. Plaintiffs thus filed suit, arguing that, by executing the Athene transaction, Defendants violated ERISA. The transaction greatly reduced the value of Plaintiffs' benefits and exposed them to a substantial risk that they will not receive the retirement income that they earned, are legally entitled to, and have counted on.

Defendants moved to dismiss the original complaint. That motion was referred to Magistrate Judge Levenson, who considered, and rejected, Defendants' standing arguments. The

Court concluded that "Plaintiffs' contention that they received a riskier annuity than they otherwise would have been entitled to receive—but for Defendants' alleged breach of fiduciary duty—implicates a concrete present injury sufficient to constitute a genuine case or controversy." R&R at 8.

On the merits, the Court resisted Defendants' "invitation," conveyed by 1,300 pages of exhibits, to turn a motion to dismiss into a bench trial. R&R at 71. That approach "risks drawing the Court into a balancing of the probable weight of the evidence, which is decidedly *not* what Rule 12(b)(6) is for." R&R at 71.

Focusing, as it should, on the complaint's allegations, the Court (as explained more below) concluded that the complaint discussed factors that were important in considering whether it alleged a plausible claim for a duty of prudence breach. *See infra* at 9-10. But the two issues mentioned above and described in more detail *infra* prevented the claim from getting over the line. *Id.* Because the Court found no breach of the duty of prudence, it dismissed all claims that depended on such a breach. That included Counts I, II, and X against the AT&T Defendants, and Count IV against State Street. R&R at 80-81. The Court also dismissed the disloyalty claims, prohibited transaction claims, and Count III. R&R at 40-49, 80-91.

Both sides submitted objections to the District Court: Defendants on standing, Plaintiffs on the merits. AT&T Defs.' R. & R. Objs., ECF 134 ("AT&T R&R Obj."); Pls.' R. & R. Objs., ECF 135 ("Pls. R&R Obj."). The District Court overruled the objections, accepting and adopting the report and recommendation in full. Mem. & Order, ECF 143 ("Op.").

After reviewing a proposed amended complaint, the District Court did, however, grant Plaintiffs' request for leave to amend. Endorsed Order, ECF 145. Plaintiffs thus filed an Amended

Complaint, which focuses on curing the two duty-of-prudence gaps identified by the Court. *See* Am. Consolidated Class Action Compl., ECF 146 ("Am. Compl.").

Defendants again moved to dismiss, in two separate motions. *See* State Street Global Advisors Mem. in Support of their Mot. to Dismiss Am. Consolidated Compl., ECF 150 ("SSGA Br."); Mem. of Law in Support of AT&T Defs.' Mot. to Dismiss Pls.' Am. Consolidated Compl., ECF 153 ("AT&T Br."). This opposition responds to both.

ARGUMENT

I. THIS COURT HAS ALREADY HELD THAT PLAINTIFFS HAVE STANDING

The Court has already held that Plaintiffs possess Article III standing to bring their claims. Nothing that Plaintiffs add in the Amended Complaint does anything to undermine that conclusion. Defendants do not even attempt to argue that it does. The Court need not dwell long here. Magistrate Judge Levenson's standing analysis was careful, thorough, and correct, and the District Court accepted and adopted that analysis. Although Defendants cannot seem to let this go, the Court can.

Plaintiffs' standing has already been thoroughly litigated. In their initial motion to dismiss, Defendants' lead argument was that "Plaintiffs' allegations about the supposed riskiness of Athene[]" were insufficient to "clear Article III's threshold requirements." Mem. of Law in Support of AT&T's Mot. to Dismiss Pls.' Compl. at 10, ECF 51 ("AT&T MTD"). In the 21 pages of the opinion dedicated to standing, Magistrate Judge Levenson carefully considered this argument and rejected it. R&R at 7-28. Defendants' argument, the Court explained, "ignores the fundamental financial concept of counterparty risk." *Id.* at 13. Defendants had argued that Plaintiffs are not injured because they are still "entitled to the same stream of future benefit payments" and no payment had been missed. AT&T MTD at 6. To explain why this was wrong, the Court analogized to bonds, "which are, like annuities, long-term promises to provide a stream

of payments." R&R at 14. And for bonds, "[i]t would be ridiculous to suppose" that the value depends "on a simple binary: whether the debtor has, or has not, missed any payments." R&R at 14. Defendants then argued that annuities are different from bonds because they cannot be sold, but the Court considered, and rejected, this too. It concluded that "Defendants' argument overshoots the target," because, while "proof may be easier" (R&R at 22) when there is a market, the "value of a financial instrument (transferable or not) does not necessarily depend on whether the instrument is readily marketable, or even marketable at all." R&R at 24. And finally, although Defendants placed much weight on the Supreme Court's bottom-line holding in *Thole*, the Court pointed out that the "*Thole* case … did not present" the "scenario" alleged here, but did include "dicta that bears heavily on this case"—and supported a finding of standing. R&R at 10.

Having marched through each of Defendants arguments, Magistrate Judge Levenson reached the conclusion: "delivery of less valuable—that is, riskier—annuities as a result of alleged breaches of fiduciary duty by Defendants constitutes an actual injury for Article III standing." R&R at 28. This opinion is correct. *See, e.g.*, *Doherty v. Bristol-Myers Squibb Co.*, No. 24-CV-06628 (MMG), 2025 WL 2774406, at *4-10 (S.D.N.Y. Sept. 29, 2025) (reaching the same conclusion).

Defendants nevertheless raised objections to the District Court. They argued again that the "analogy to Plaintiffs' annuities" to a bond "does not withstand scrutiny" because "[t]here is no market for Plaintiffs' pension benefit" and there is thus no "diminution of value to satisfy Article III." AT&T R&R Obj. at 7. And they asserted that "[t]he Magistrate Judge misread dictum in *Thole*" and that "the Magistrate Judge posited" a "sea change in standing jurisprudence." AT&T R&R Obj. at 7-8.

The District Court also rejected these arguments. It pointed out that "courts look for comparisons to harms traditionally recognized as providing the basis for a lawsuit." Op. at 3. And for that reason, the Court concluded that the fact "[t]hat the annuities at issue here cannot be resold is not controlling." *Id*. Plaintiffs were harmed because they "received an inferior financial benefit than that to which they were entitled." *Id*.

That should have ended it. But now Defendants return, raising the exact same arguments on the same record. In this motion to dismiss, the AT&T Defendants argue that Plaintiffs cannot "sell their pension benefit" plans, a riskier annuity "does not diminish the value of Plaintiffs' pension benefits," and "any attempt to analogize Plaintiffs' pension benefits to bonds and other marketable securities is 'unsupported.'" AT&T Br. at 15 (citation omitted). Again, Defendants take issue with how the "Court … interpreted dicta in *Thole*," which "did not 'alter or expand' the long-standing test for imminent injury." AT&T Br. at 18 (citation omitted).

While Defendants try yet another run at the Court, this is exactly why law-of-the-case doctrine exists. As this District Court has recognized, the whole point is to "avoid 'relitigation' of matters" already decided. *O'Brien v. Lowell Gen. Hosp.*, 749 F. Supp. 3d 209, 213 (D. Mass. 2024) (Gorton, J.) (quoting *United States v. Vigneau*, 337 F.3d 62, 67 (1st Cir. 2003)), *aff'd sub nom. O'Brien v. United States*, 155 F.4th 50 (1st Cir. 2025).

"The law of the case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *United States v. Moran*, 393 F.3d 1, 7 (1st Cir. 2004) (quoting *Arizona v. California,* 460 U.S. 605, 618 (1983)). For that reason, "a legal decision made at one stage … should remain the law of that case throughout the litigation, unless and until the decision is modified or overruled by a higher court." *Id.*

Although exceptions to this rule exist, they are "narrow" and arise only in "exceptional circumstances." *O'Brien*, 749 F. Supp. 3d at 213 (citation omitted). It is not at all clear what exception Defendants seek to invoke; they do not say. Perhaps they intend the exception for "a material change in controlling law." *Ellis v. United States*, 313 F.3d 636, 647-48 (1st Cir. 2002). Defendants gesture in that direction, telling the Court that, "[s]ince the Court's" ruling, "two additional decisions … have held that plaintiffs lack standing." AT&T Br. at 13. But that exception applies only "where '*controlling* legal authority has changed *dramatically*.'" *O'Brien*, 749 F. Supp. 3d at 213, 213 (emphases added) (quoting *Vigneau*, 337 F.3d at 68). And the cases Defendants cite are nowhere near controlling. The first is an unpublished report and recommendation from a Magistrate Judge in the Western District of Pennsylvania, on which the District Court ordered full briefing, which is now pending. *Schoen v. ATI, Inc.*, No. 2:24-CV-01109, 2025 WL 2970339, at *1 (W.D. Pa. Oct. 7, 2025) (report and recommendation). The second is an unpublished decision from a district court in the Northern District of New York. *Bueno v. Gen. Elec. Co.*, No. 1:24-CV-0822 (GTS/DJS), 2025 WL 2719995, at *1 (N.D.N.Y. Sept. 24, 2025).

Despite citing these two new, unpublished opinions, Defendants don't dwell on them. Most of their argument "simply doubles down on the theories"—even relying on the same cases—that "the Court already correctly rejected." AT&T Br. at 1. Their unhappiness does not grant them another shot. To overcome this Court's rejection of their position, they must be able to show that "the Court committed a 'blatant error' in its prior decision that will result in a 'serious injustice.'" *O'Brien*, 749 F. Supp. 3d at 213 (quoting *Vigneau*, 337 F.3d at 68). Nowhere do they attempt to make that argument.

Nor could they. This Court's careful decision on standing was right. It addressed the key financial concepts at play and the impact that Defendants' conduct, as alleged, had on Plaintiffs. By delivering an inferior financial product, Defendants inflicted a concrete and particularized harm on Plaintiffs. This chapter in the litigation is closed.

II. THE AMENDED COMPLAINT PLAUSIBLY ALLEGES A VIOLATION OF THE DUTY OF PRUDENCE (COUNT IV)

Turning to the 12(b)(6) issues, the Court's prior opinion explained, in clear terms, what was necessary to state a viable claim for a violation of the duty of prudence. The Amended Complaint now does that.

The Court explained that the information already in the prior complaint was important. That "Complaint identifie[d] various factors that a diligent fiduciary would be required to consider in evaluating Athene as a potential annuity provider." R&R at 50; *see also id.* at 65 ("It seems obvious that most, perhaps all, of the factual matters that Plaintiffs list are matters that a diligent fiduciary, acting in accordance with the guidance of IB 95-1, would need to *consider.*"). And recent DOL guidance, the Court ruled, "reinforces that the considerations raised by Plaintiffs in the Complaint are indeed matters of meaningful concern that cannot lightly be ignored." *Id.* at 67. These prior allegations thus made meaningful progress toward a plausible claim: "Considered in the aggregate, Plaintiffs' various factual allegations about Athene's financial arrangements point toward an inference that, Athene, as a company, may be less creditworthy than some other insurance companies." *Id.* at 75.

But there was an "obstacle"—the old complaint did not address two factors that, the Court concluded, were necessary. *Id.* at 50. First, the complaint had not included enough comparators, which were "important" and "possibly essential" to a claim of this nature. *Id.* at 73. Second, the Complaint did not address one of the IB 95-1 factors: the use of separate accounts. *Id.* at 75-80.

The Court held that these omissions prevented it from denying the motions to dismiss. *Id.* at 73-80.

But the opinion suggested that, if these two issues were fixed, the complaint would have alleged a breach of the duty of prudence. After noting the lack of comparators, the Court wrote that, "[a]ssuming this obstacle can be surmounted, an inference of fiduciary misfeasance would be plausible *if* all relevant factors militated against selecting Athene." *Id.* at 50. The only "relevant factor[]" missing was a discussion of separate accounts. *Id.* If separate accounts were addressed and thus "all major factors, considered together, pointed against selecting Athene," then the fact that Athene was selected may "by itself show that the decision-making process was defective." *Id.* at 51. The Court even suggested that, in that case, "the Complaint might arguably be viable," even without "identification of apt comparators." *Id.* at 75.

As discussed in more detail below, the Amended Complaint adds the precise information this Court wanted to see. It makes clear that "all major factors" identified in IB 95-1 pointed against the selection of Athene. And that a comparison between Athene and comparable annuity providers would have made clear to any prudent fiduciary that Athene was not the right choice for AT&T's retirees. ERISA placed on Defendants a duty to act prudently, and solely in the interest of beneficiaries. 29 U.S.C. § 1104(a)(1). That duty is the "highest known to law." *Moitoso v. FMR LLC*, 451 F. Supp. 3d 189, 203-04 (D. Mass. 2020) (quoting *Braden v. Wal–Mart Stores, Inc.*, 588 F.3d 585, 597-98 (8th Cir. 2009)). Defendants fell short.

A. The Amended Complaint Plausibly Alleges that Athene Is Unduly Risky Relative to Comparators

The Amended Complaint adds detailed comparisons of Athene to five other annuity providers: New York Life, Mass Mutual, Pacific Life, Northwestern Life, and Nationwide Life.

On key metrics, the Amended Complaint also shows how Athene stacks up against all other providers nationwide. On each, Athene is at the back of the pack.

Start with reinsurance. The Court's opinion suggested including a comparison: how Athene's "re-insurance arrangements" compare to "insurers other than Athene." R&R at 61. The Amended Complaint provides the answer. Of all the life and annuity companies in the United States, Athene's practices are the riskiest. "[A]s of year-end 2022 Athene reported more than $129 billion in reinsurance or ModCo exposure to its Bermuda affiliate." Am. Compl. ¶ 107. Its competitors? "New York Life and Northwestern Mutual had no affiliated reinsurance or ModCo whatsoever." *Id*. And for the others, Athene has more than 30 times the amount of affiliated reinsurance. *Id.* Mass Mutual was the highest (other than Athene) with about $3.9 billion, while Nationwide and Pacific Life each had far less than $1 billion. *Id.* Athene's massive amount of affiliated reinsurance and ModCo brings with it a massive risk: "If only 5% of the liabilities ceded (transferred) to Bermuda for reinsurance proved problematic, Athene's entire surplus would be wiped out," plunging Athene into default. *Id.* And for this structure, Athene is awarded a rare distinction. There are 703 Life and Annuity companies in the United States. *Id.* ¶ 102. When comparing "total exposure to reinsurance and ModCo with affiliates to its reported surplus," Athene ranks as the "very worst." *Id.* ¶ 108. It is 703rd out of 703. *Id.* That means, according to this measure, that Athene is "the riskiest annuity provider in the country." *Id.* To state the obvious, that should have been a red flag.

As the Amended Complaint explains, Athene is dead last in another category too. When comparing total affiliated assets relative to surplus, Athene again ranks 703rd. *Id*. ¶ 102. These are assets that originate from a parent company (Apollo, for Athene) and are riskier and less liquid because they are tied to the insurer's (or its parent's) underlying financial health and do not

diversify risk. *Id.* ¶ 99. Athene's growth in affiliated assets relative to its peers is, to put it mildly, concerning. Of the five comparable annuity providers, the highest growth (other than Athene) in affiliated assets between 2018 and 2022 was Nationwide Life, with a 95.54% increase. *Id.* Athene's increase during this time was a staggering 639.21%. *Id.*

The case for *not* choosing Athene does not stop there. On other metrics, when compared with traditional annuity providers, Athene fares no better. Consider the surplus to liabilities ratio. This "critical measure" is "important in considering an insurer's ability to pay claims to policyholders." *Id.* ¶ 92.[1] Athene's ratio—a mere 1.44%—was dwarfed by the other providers. New York Life's ratio was 12.01%, Mass Mutual was 9.89% and even the second lowest rate, for Nationwide, clocked in at only 6.74%, nearly five times Athene's ratio. *Id.* ¶ 93.

Defendants assert that Athene's ratio should be calculated using different data, which they claim would produce a different result. SSGA Br. at 14. But they can make this argument only by injecting yet more documents outside the Amended Complaint, SSGA Br. at 14 & nn. 29-31, which is not appropriate at the 12(b)(6) stage.[2]

In addition, looking instead at the "actual dollar amounts of surplus tell a similar story." *Id.* ¶ 95. Three of the relevant companies had *eleven times* the amount of surplus, and the "closest comparable PRT provider to Athene had nearly *five times* the amount of surplus." *Id.* Or consider

[1] Defendants seek to contradict the "critical measure" allegation. SSGA Br. at 13. Again, that is an issue for another day.

[2] Although no further explanation is required at this point, at an appropriate time, Plaintiffs will demonstrate that the Athene ALC comparison is proper because the six insurers listed in ¶ 93 of the Amended Complaint—Athene ALC plus the comparators—are the entities filing annual statements with the NAIC using Statutory Accounting Principles ("SAP"), a common set of accounting principles with special relevance to insurers. These six insurers all file the same type of annual statements under their own specific and unique NAIC code numbers. By contrast, holding companies like Athene Holding Ltd. do not file under this same, common set of accounting principles—so it is not appropriate to compare Athene Holding's non-SAP numbers to insurers governed by SAP.

the amount of liabilities. During the relevant period, Athene's liabilities as a percentage of assets increased by over 250%, an "outlier" figure that should have served as a "red flag for any life and annuity carrier." *Id.* ¶¶ 96-97.

In response to these added allegations, Defendants say little. *See* SSGA Br. at 11-15. In the few mentions of these other companies and metrics, Defendants rely for their argument (as mentioned above) on 217 additional pages of exhibits they submitted with their motion to dismiss. SSGA Br. at 12-14; *see also* ECF 151-1 to 151-13 (exhibits). They use these exhibits to nitpick some of the data, or suggest that the factual assertions are insufficient because they are made "without support." SSGA Br. at 12.

This is not summary judgment. As the Court explained, the "fact-intensive inquiry" Defendants tried before and reprise now "does not comport with the strictures of Rule 12(b)(6)." R&R at 71. Defendants' "invitation" for the Court to review hundreds of pages of their own documents "risks drawing the Court into a balancing of the probable weight of the evidence" and "falls decidedly on the side of premature factfinding." *Id*. Just as the Court rejected this approach before, it should do so now again. They key point—the one the Court identified before, the Amended Complaint emphasizes, and Defendants do not challenge—is that on all key metrics, Athene fares worse than many (and sometimes all) of its peers. Based on these facts, a prudent fiduciary would not have entrusted Athene with eight-billion-dollars' worth of AT&T's employees' retirement benefits. That breach is evident under any standard, but it is certainly at least plausible, drawing all reasonable inferences in Plaintiffs' favor—the standard at this stage of the litigation.

B. The Amended Complaint Plausibly Alleges the Inadequacy of Athene's "Separate Accounts"

Although the Court said that comparators were "important," the "fatal" flaw that doomed the prior complaint was the need for further discussion of separate accounts. R&R at 73, 75. The Amended Complaint has that.

As the Court held, the factors listed in DOL IB 95-1 are "persuasive." *Id.* at 32. IB 95-1 lists the "key considerations that a fiduciary must weigh in selecting the annuity provider for a PRT," because it "reflects DOL's expertise and comports with the requirements for ERISA." *Id.* at 52, 78. When "all major factors" from this guidance point in the same direction, that may plausibly "show that the decision-making process" in selecting Athene "was deficient." *Id.* at 51. Although the original complaint got close to making this showing, it missed "a substantial factor"—the "use of separate accounts." *Id.* at 51, 60 (citing 29 C.F.R. § 2509.95-1(c)(5)). It was only by "omitting this important factor" that, according to the Court, "Plaintiffs' circumstantial case for fiduciary dereliction falls apart." *Id.* at 51.

The Amended Complaint now addresses that factor. As this Court pointed out, what is important is not whether there was a separate account, but its nature: "The fact that there was a separate account does not by itself exclude the possibility that the selection process was flawed." *Id.* at 79. That makes sense. *Every* major annuity provider uses separate accounts in funding pension risk transfers. *See* Am. Compl. ¶ 153. So the fact that an annuity provider has one cannot be a reason for preferring that provider to another. In distinguishing between and among these providers, the question for a prudent fiduciary is about the ability of the separate account's structure to protect retirees. On this issue, the safety of Athene's separate accounts pales in comparison to its peers. It is riskier, smaller, and commingled.

Most traditional life insurers fill their separate accounts with highly rated corporate bonds and U.S. Treasury notes. *Id.* But not Athene. Athene placed the same risky assets of its general account into the relevant separate account. *Id.* Athene then projected an unduly high rate of return of its risky assets—at least 6.5%, where other insurers using more traditional assets only projected close to 4%. *Id.* ¶¶ 155-156. Then, based on that projection, Athene opted to underfund its separate account: "Athene placed a significantly smaller amount of assets in the separate account … than large, highly-rated insurers would have placed in their separate account to fund a comparable set of benefits." *Id.* ¶¶ 154-155. Athene thought it could do this because the lofty rate of return it projected on its risky assets would make up the shortfall. *Id.* ¶¶ 155-156.

In sum, instead of sufficiently funding the account with enough money to provide the guaranteed stream of revenue with secure assets, as other annuity providers do, Athene placed "only a far smaller pool" of "riskier assets" in the accounts. *Id.* ¶ 157. The infirmity of Athene's funding of its separate account was yet another red flag that should have driven Defendants away from Athene.

What is more, "[w]hat Athene describes as a separate account is not really separate at all." *Id.* ¶ 161. Athene provided that, in addition to AT&T annuitants, the separate account "may *also* be used to support Athene's payment obligations under other, separate [Group Annuity Contracts] issued by Athene." *Id.* ¶ 159. "Athene's separate account supports liabilities for *multiple* PRT deals, not just the subject transaction with AT&T." *Id.* ¶ 161. Even Athene's own financial statements show this commingling. *Id.* ¶¶ 162-163.

Athene also gave itself the right to periodically (and under certain conditions) "withdraw assets from the separate account and transfer them to its general account." *Id.* ¶ 159. That condition occurs whenever the stated value of the assets exceeds its liabilities under the Group

Annuity Contract. *Id.* That is a problem. With risky assets in the account, fundamental financial principles would suggest more variability in the returns. If the highs could cover the lows, perhaps that would help over the long term. But under Athene's structure, whenever there are highs, Athene can withdraw them for its general account. And that means that, when there are lows, the risk falls squarely on the annuitants—Plaintiffs here. A prudent fiduciary could not have selected such a scheme.

Defendants only briefly address the separate account issue. They dedicate less than two pages of briefing to it—despite it being the critical issue identified by the Court, and despite Defendants' acknowledgement that "[m]uch of the Amended Complaint's 'new' allegations" focus on "the adequacy of Athene's separate account." *See* SSGA Br. at 15.

What they do raise is off the mark. Defendants once again start by faulting the Amended Complaint for making "alleg[ations]" "without support." SSGA Br. at 15. Right. This is a motion to dismiss. The whole point is to ask whether the *allegations*—on the "assumption that" they "are true"—state a plausible claim. *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011). The Court previously dedicated an entire sub-section of the opinion to the proposition that "The Well-Pleaded Factual Allegations of the Complaint Must Be Taken as True." R&R at 70-73. Defendants will have an opportunity for the factual battle they so clearly want to wage. But not today.

Next, Defendants repeatedly fault the Amended Complaint for not addressing whether insurance "regulators have taken … any remedial actions against Athene" or "any regulator has declined to approve the investment of the separate account." SSGA Br. at 15-16. To use Defendants' language: "So what?" *Id.* at 13. Plaintiffs in this case do not seek to hold Athene liable for violating state insurance law; the question is whether a prudent fiduciary could have

selected Athene, given its worst-in-the-industry risk profile. These standards are not synonymous. All sorts of industries are subject to regulation—securities and consumer products, to name a couple. Within those industries, there are greater and lesser quality products, even among providers with "clean" records. A fiduciary has the obligation to choose a better product—the one in Plaintiffs' best interest. That this is a regulated industry, and that there has not (yet) been a sanction for this particular provider, thus proves nothing. Courts do not hold, for example, that there can be no private 10b-5 action unless and until the Securities & Exchange Commission has also taken regulatory action, or that a product is insulated from tort exposure until regulators have pulled it from the shelves. The same is true here. Surely a fiduciary's responsibility to evaluate an annuity provider—the "highest known to law," *Moitoso*, 451 F. Supp. 3d at 203-04—does not begin only when the fiduciary sees that the provider has been sanctioned by a regulator.

Defendants also say the Amended Complaint does not "suggest[] that Athene's separate account is insufficiently capitalized to meet its current and future obligations." SSGA Br. at 16. Again, the question is how a prudent fiduciary would evaluate the *risk profile* of Athene's separate account relative to others. And the Amended Complaint makes clear, through detailed factual allegations, that Athene's separate account is far riskier, because it contains riskier assets, and fewer of them, with less separation, than other annuity providers. Am. Compl. ¶¶ 152-163.

In its opinion, the Court asked whether IB 95-1's consideration of "separate accounts" pointed for, or against, the selection of Athene. R&R at 51. The Amended Complaint provides the answer. All peers have separate accounts, and Athene's separate account has riskier assets than those peers. It has fewer assets than other annuity providers would have placed in it to cover the liabilities. And it has exposed these assets to risk from both other PRT deals and its general liabilities. This factor, like the others, points in the same direction: Based on the new allegations,

the "separate account is [a] significant factor" that disfavors Athene and thus suggests "that Defendants failed to conduct a diligent and prudent selection process." R&R at 79. And because Plaintiffs' allegations now establish that "all major factors" listed in IB 95-1 "point[] against selecting Athene," it is at least reasonable to infer from Defendants' selection of Athene "that the decision-making process was defective." *Id.* at 51.

C. The Amended Complaint Includes Additional Details Demonstrating the Imprudence of Defendants' Selection of Athene

Finally, in addition to curing the two primary defects identified by the Court, the Amended Complaint adds three additional sets of details to bolster its allegation of imprudence.

First, and critically, the AT&T Defendants ditched their pension obligations on the cheap. In a typical PRT transaction with a traditional annuity provider, the employer agrees to pay the insurer *more* than the present value of obligated benefits. Am. Compl. ¶ 195. That is logical—the delta compensates the insurer for the risks entailed in carrying the new obligations. *Id.* But for Athene, the price the AT&T Defendants paid Athene was low—"extremely low"—relative to the obligations' value. *Id.* ¶ 194. Athene accepted "far, far, less than the value of the liabilities offloaded," saving the AT&T Defendants "*hundreds of millions of dollars* at Plaintiffs' expense." *Id.* ¶¶ 196, 198. And far less than if the AT&T Defendants had engaged "a traditional annuity provider." *Id.* ¶ 197. The reason Athene was willing to accept so little money was the very reason it was imprudent for Defendants to select them: Athene engages in "dangerous, high-risk strategies" that "allow Athene to make greater spreads on the premiums paid by plan sponsors." *Id.* ¶ 199. This is the same strategy Executive Life used, which contributed to its implosion. *Id.* ¶ 200. Athene's bargain basement price should have told Defendants that Athene was not a safe and prudent place to guarantee their employees' retirement. But they went forward anyway,

making a choice no prudent fiduciary could have, and pocketing the savings "dollar-for-dollar." *Id.* ¶ 201.

Second, the Amended Complaint adds more detail about Athene's exposure to high-risk assets. In particular, Athene held $64 billion in funding agreements as of June 2025, which exposes Athene to risk in a market downturn. *Id.* ¶¶ 112-113. In fact, by the end of 2024, 24.5% of Athene's total assets and 30% of its invested assets were pledged to third parties. *Id.* ¶ 115. It was practices just like this that led to the near-collapse of AIG during the 2008 financial crisis. *Id.* ¶ 118.

Third, the Amended Complaint adds more about Athene's reinsurance. *Id.* ¶¶ 89-91. It explains how reinsurance "with an affiliate, located in a 'regulation light' jurisdiction"—exactly what Athene does—"puts pensioners at [a] substantial risk." *Id.* ¶ 89. This is a factor the Court identified as one upon which "[t]he risk of default associated with an annuity depends." R&R at 6; *see also id.* at 50.

* * *

Because the Amended Complaint cures the two primary issues related to the duty of prudence identified by the Court, Count IV (as it relates to prudence) should proceed to discovery. While Defendants pick around the edges of this conclusion, their primary worry seems to be this: a ruling in Plaintiffs' favor would mean that "Athene should be barred from the PRT annuity market." SSGA Br. at 9 (quoting R&R at 65). But this is not a regulatory action. The only question before this Court is whether the selection of Athene, on the facts alleged about Athene's form at the relevant time, was prudent for AT&T's eight-billion-dollar transaction. Whether it could be prudent to select Athene under different facts or if it operated in a different form—if it, for example, bolstered the security of its annuity offerings—is not before the Court. And, in any event, Athene

carries no special right to operate in the market in whatever manner it wants. There are 703 life and annuity providers in the United States and, on at least two critical metrics related to their riskiness, Athene is ranked last. The point of ERISA's prudence protection in this context is to safeguard retirees by discouraging fiduciaries from making dangerous selections, encouraging insurers to maintain safe practices, and holding accountable those who refuse to act responsibly.

The Court should deny the motion to dismiss as to the prudence claim in Count IV, which plausibly alleges that State Street is liable for imprudently selecting Athene.

III. PLAINTIFFS PLAUSIBLY ALLEGE THAT THE AT&T DEFENDANTS ARE LIABLE FOR THE IMPRUDENT SELECTION OF ATHENE

As explained above, the Amended Complaint alleges that the selection of Athene was imprudent. The next question is who is liable for it. State Street does not dispute that it acted as a fiduciary with respect to its role in selecting Athene. The AT&T Defendants, however, insist that their role was so ancillary as to be non-fiduciary. This is not so.

The AT&T Defendants point the finger at State Street: "AT&T Defendants appointed SSGA as the independent fiduciary responsible for making that decision," they say, suggesting that this appointment removed them of "fiduciary responsibility." AT&T Br. at 5. State Street, as just noted, does not dispute that it is liable for any breach with respect to the selection of Athene. But the AT&T Defendants are, too. Their appointment of another fiduciary does not relieve them of responsibility. As explained below, the AT&T Defendants retained sufficient authority to remain fiduciaries with respect to the selection of Athene. And even if they are not, the law is crystal clear that they retained a co-fiduciary duty, a similar duty to monitor, and a separate non-fiduciary duty that they breached by allowing an unsafe deal to proceed.

These are questions the Court did not previously reach (although its opinion provides a framework for portions of them). It instead based its dismissal of all prudence Counts —I, II, IV,

and X—on its conclusion that the original complaint had not sufficiently alleged a breach of the duty of prudence. R&R at 80-81. The Court can now reach these issues.

A. AT&T Is Directly Liable as A Fiduciary (Count I)

The Court's opinion sets out a framework for determining when an employer acts a fiduciary in setting up a PRT (which Plaintiffs accept for the purpose of this motion). Under this framework, the mere decision to terminate a plan through a PRT is not fiduciary one. R&R at 36. But, the Court wrote, a "distinction must be drawn … between the decision to terminate a plan and the *manner* in which that decision is *implemented*." *Id.* at 37 (emphasis added) (quoting *Jackson v. Truck Drivers' Union Loc. 42 Health & Welfare Fund*, 933 F. Supp. 1124, 1143 (D. Mass. 1996)). So although the mere "ability to cancel" a PRT transaction is not sufficient to confer fiduciary status, according to the Court, involvement in the process of selecting an annuity provider is. *Id.* at 39. That is because, as the Ninth Circuit has said and the Court noted, the "choice of an annuity provider is the quintessential exercise of 'discretionary control.'" *Waller v. Blue Cross of Cal.*, 32 F.3d 1337, 1342 (9th Cir. 1994) (quoting 29 U.S.C. § 1002(21)(A)); *see also* R&R at 37 (quoting this passage). For this reason, "[i]n cases where an employer selects the annuity provider, that selection process is subject to the fiduciary duties of loyalty and care." R&R at 37. Under this framework, an employer is a fiduciary with respect to the selection itself when it retains involvement in the process of selecting the annuity provider(s).

The Amended Complaint adds allegations demonstrating the AT&T Defendants' continued involvement in every step of the process. Although the AT&T Defendants engaged State Street to "recommend an annuity provider," among other tasks, "State Street did not undertake this work independently from the AT&T Defendants." Am. Compl. ¶¶ 177-78. The whole time, "State Street reported to the AT&T Defendants." *Id.* ¶ 178. In fact, the AT&T Defendants "retained the

authority" to select "an annuity provider (or multiple providers) other than the one(s) State Street recommended." *Id.* ¶ 180.

More specifically, it was the AT&T Defendants who "prepared and conveyed to Athene a request for annuity proposal." *Id.* ¶ 181. State Street then "evaluated multiple candidates for a potential PRT with AT&T, one of which was Athene." *Id.* ¶ 176. When it came time for the final decision, given the authority it retained for selection, AT&T remained an active participant. After State Street made a recommendation, it was "the AT&T Defendants" that "chose to purchase annuities from Athene specifically." *Id.* ¶ 182. For those reasons, "[a]s a factual matter, the decision to select Athene as the annuity provider was made jointly by all of the Defendants." *Id.* ¶ 183.

The Amended Complaint thus demonstrates, with supplemental factual allegations, that the AT&T Defendants did far more than "merely . . . wr[iting] the check" with an ability to cancel the transaction. R&R at 39. They were active participants throughout the selection process. The AT&T Defendants are thus not like "every settlor" who "*could* cancel a planned PRT." *Id*. They, rather, were key players in the "choice of an annuity provider." *Waller*, 32 F.3d at 1342; *accord* R&R at 37. As another court has explained, the AT&T Defendants' conduct in "the selection of Athene" was "an administrator decision involving *how* to terminate the Plan" and thus "implicates ERISA's fiduciary duties." *Doherty*, 2025 WL 2774406, at *10.

Defendants, in retort, opt not to engage with the added allegations. They only and summarily assert that Plaintiffs' position is unchanged from the initial Complaint: that AT&T "retained the authority to 'cancel the whole transaction.'" AT&T Br. at 5-6. But a mere glance at the Amended Complaint and the allegations above show that's wrong. The Amended Complaint

demonstrates AT&T's deep involvement and retained authority throughout the process, not just its ability to cancel the transaction.

Defendants also suggest that the Court already held that AT&T is not a fiduciary with respect to the selection of Athene. AT&T Br. at 5. But that is not what the opinion holds. In Section IV, the Court took "a brief pit-stop" before "delving into the Complaint's allegations regarding breach of fiduciary duties" to "clarify that AT&T's decision *whether to enter into the PRT* is not at issue in this case." R&R at 34. Defendants seem to conclude that this Section disposed of Count I. AT&T Br. at 5. That is not what the Court said. Although the Court's analysis is undoubtedly relevant to Count I, it was not in that Section that the Court held that Count I should be dismissed. That came more than 40 pages later, only after the Court had held that the complaint had not sufficiently alleged a violation of the duty of prudence. R&R at 80. It was because "Plaintiffs have failed to plausibly allege breaches of fiduciary duty" that Count I, which "assert[s] that the AT&T defendants … breached their fiduciary duty by selecting annuity contracts sold by Athene … should be dismissed." *Id*.

In any event, even if the Court did previously conclude that there were insufficient allegations connecting the AT&T Defendants to this (now sufficiently alleged) breach, that defect has been cured—for all the reasons discussed above. *See supra* at 21-22. Under the framework set out by the Court's opinion, the AT&T Defendants retained more than sufficient authority to remain a fiduciary in the selection of Athene. Plaintiffs could not possibly allege more facts about the AT&T Defendants' role in the selection process (which has been closely guarded under lock and key), and they do not need to. Anything further would be information quintessentially within the exclusive control of Defendants that Plaintiffs need not plead. *See Brookins v. Ne. Univ*., 731 F. Supp. 3d 112, 118 (D. Mass. 2024); *Sellers v. Trustees of Boston Coll.*, 647 F. Supp. 3d 14, 19,

25 (D. Mass. 2022); *Tracey v. Mass. Inst. of Tech.*, No. 16-11620-NMG, 2017 WL 4453541, at *11 (D. Mass. Aug. 31, 2017). For those reasons, Count I of the Amended Complaint (as it relates to AT&T's direct fiduciary duty) should proceed to discovery.

B. AT&T Is Derivatively Liable

AT&T is also derivatively liable for the selection. That is true whether or not it is directly liable as a fiduciary. As the Court held, "a plan sponsor's ability to cancel a PRT"—something all agree exists here—"may ultimately be part of the analysis[] in considering various theories of *derivative* liability." R&R at 39.

This Court did not have an opportunity to address theories of derivative liability in its prior opinion. That is because, as the Court explained, for "derivative claims, there must first be a valid claim for breach of fiduciary duty." R&R at 38. With the defects with respect to the allegations of a breach cured, the Court can now consider derivative liability for the breach. The Amended Complaint sets out three forms of derivative liability, addressed in turn below.

1. *AT&T is Liable As a Co-Fiduciary (Count I)*

"In addition" to direct liability, ERISA sets out the circumstances when a fiduciary "shall be liable for a breach of … another fiduciary." 29 U.S.C. § 1105(a). Count I asserts that the AT&T Defendants are liable both as fiduciaries for the selection of Athene (addressed above) and liable as co-fiduciaries for State Street's breach in selecting Athene. As the Amended Complaint explains, the AT&T Defendants "knowingly participated in the breach of those duties by the other Defendants, knowing that such acts were a breach." Am. Compl. ¶ 237.

This co-fiduciary duty often kicks in when a fiduciary (like the AT&T Defendants) delegates their fiduciary duties to another (like State Street). When that happens, the law does not permit the original fiduciary to shed all its obligations: "[s]uch delegation is not absolute." *Jackson*, 933 F. Supp. at 1140–41 (quoting *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d

1335, 1340 (11th Cir. 1992)). Rather, a "fiduciary who attempts to delegate a duty to another person or entity may nevertheless be liable for the breach of that duty." *Id.* Co-fiduciary duty, under 29 U.S.C. § 1105(a), is one such mechanism. *Id.*

That is precisely what Plaintiffs seek to do here. Even if the AT&T Defendants shifted some responsibility for the selection of Athene, they retained responsibility (in the circumstances set out in § 1105(a)(1)-(3)) to ensure that State Street did not violate its fiduciary duties. The AT&T Defendants' only retort is that they had no "actual knowledge" that "SSGA's selection of Athene was a breach." AT&T Br. at 7-8 (emphasis omitted). That is unhelpful to them. It's wrong on both the facts and the law.

On the facts, Plaintiffs *do* plausibly allege "knowledge"—both actual and constructive. The Amended Complaint states clearly that the AT&T Defendants were involved with State Street every step of the way. "State Street did not undertake" its selection "independently from the AT&T Defendants" and "reported to the AT&T Defendants regarding its recommendations." Am. Compl. ¶ 178; *see also In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 661–62 (S.D. Tex. 2003) (finding breach of co-fiduciary duty where the defendants failed "to supervise" their delegee "regarding the prudence of their decision to invest assets of the Savings Plan and the ESOP in Enron stock"). It was the AT&T Defendants who were tasked with the final decision—not just on whether to go forward with a transaction, but on whether Athene was the right choice for it. The AT&T Defendants retained authority to "perform a PRT with an annuity provider … other than the one[] State Street recommended, or not perform any PRT at all." Am. Compl. ¶ 180 (emphasis omitted). And when the AT&T Defendants ultimately "chose to purchase annuities from Athene," AT&T was a party to the agreement. *Id.* ¶¶ 182, 184. That agreement revealed that

Athene charged an "extremely low" price, out of step with the market, as a result of its "high-risk strategies." Am. Compl. ¶¶ 194, 199. The AT&T Defendants knew exactly what was happening.

The Court has already explained the relevance of these sorts of allegations. "Of course," it wrote, "a plan sponsor's ability to cancel a PRT" may be relevant to "considering various theories of *derivative* liability." R&R at 39. That includes when an employer goes forward with a transaction "after learning that there has been a breach . . . in the selection of the annuity provider." *Id.* That is what happened here.

On the law, knowledge of another fiduciary's breach is *not* required to establish co-fiduciary liability under one provision of co-fiduciary liability—29 U.S.C. § 1105(a)(2). *See Appvion, Inc. Ret. Sav. & Emp. Stock Ownership Plan v. Buth,* 99 F.4th 928, 949 (7th Cir. 2024). Unlike Sections 1105(a)(1) and (a)(3), "all [Section 1105(a)(2)] requires is that the fiduciary's breach of duty gave the co-fiduciary the opportunity to breach." *Appvion,* 99 F.4th at 949.

In any event, Plaintiffs' factual allegations suffice at this stage to meet any standard, especially because (i) "knowledge" (where it is required) may be "alleged generally," Fed. R. Civ. P. 9(b), and (ii) any other facts bearing on the AT&T Defendants' knowledge is "in [their] sole possession," *Brookins*, 731 F. Supp. 3d at 118.

2. *AT&T Failed to Monitor State Street (Count X)*

In addition to remaining liable as a co-fiduciary, a plan sponsor that delegates its fiduciary duty retains a duty to monitor. As courts in this District have held, "[i]mplicit in the power to appoint … fiduciaries is the duty to monitor." *Kling v. Fid. Mgmt. Tr. Co.*, 323 F. Supp. 2d 132, 140 (D. Mass. 2004). That fiduciary duty "carries with it … the duty to take action upon discovery that the appointed fiduciaries are not performing properly." *Id.* at 142 (citation omitted). And that duty—particularly apt here—places an "obligation" to prevent a fiduciary "they appointed from approving an unfair deal." *Bowers v. Russell*, 717 F. Supp. 3d 165, 175 (D. Mass. 2024); *see also*

In re Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp. 2d 511, 553 n.59 (S.D. Tex. 2003) ("[T]his Court has cited a number of opinions holding that the exercise of the power to appoint, retain and remove persons for fiduciary positions triggers fiduciary duties to monitor the appointees.").

Count X alleges a failure to monitor—for all the reasons the AT&T Defendants also breached their co-fiduciary duty. Am. Compl. ¶¶ 281-285. The AT&T Defendants had a responsibility to make sure that State Street did not go rogue, and they failed. In retort, Defendants seek to engage in a factual dispute about who, exactly, appointed State Street, relying on their trove of appended material, extrinsic to the Amended Complaint. AT&T Br. at 8. Their aim is to suggest that they had no responsibility for appointing State Street and thus no duty to monitor. *Id.*

But the Amended Complaint, the operative document for this exercise, alleges clearly that it was "AT&T, AT&T Services, and the Investment Committee"—all Defendants here—who "engaged State Street to assist AT&T in shedding its pension liabilities." Am. Compl. ¶ 168. It alleges so repeatedly. *Id.* ¶ 175 ("AT&T Defendants engaged State Street"); *Id.* ¶ 169 ("AT&T Defendants sought assistance from State Street"). Even Defendants acknowledge this point. They agree that "the Complaint itself recognize[s] that the AT&T Defendants appointed SSGA." AT&R Br. at 5.

Defendants next shy away from that position, suggesting instead that "[r]egardless of whose decision it was to appoint SSGA," it is necessary to know more about AT&T's internal processes. AT&T Br. at 9. But as mentioned a few times now, the Amended Complaint adds plenty about the AT&T Defendants' role in the selection of Athene alongside State Street. *See* Am. Compl. ¶¶ 175-184. Any further facts about Defendants internal processes are facts Plaintiffs cannot access until discovery. *See Braden*, 588 F.3d at 598 ("No matter how clever or diligent,

ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences."); *Bowers*, 717 F. Supp. 3d at 175–76 ("[C]ourts generally decline to decide whether a duty to monitor has been breached on a motion to dismiss because it is a highly fact-specific analysis") (quotation omitted); *Velazquez v. Mass. Fin. Servs. Co.*, 320 F. Supp. 3d 252, 260 (D. Mass. 2018) ("Courts have been unwilling to delineate and probe the scope of defendants' monitoring duties on motions to dismiss, and have permitted such claims to proceed forward to discovery.") (quotation omitted).

3. *AT&T is Liable For Knowing Participation in a Fiduciary Breach (Count II)*

Count II alleges that—even if they were not fiduciaries (which they were)—the AT&T Defendants would still be liable for the Athene annuitization under Section 1132(a)(9) because they "knowingly participate[d]" (Am. Compl. ¶ 240) in the other Defendants' breaches. Am. Compl. ¶¶ 238-241. Defendants make no independent arguments on this Count. Their sole assertion, mimicking the one they make to avoid co-fiduciary duty, is that they did not have actual knowledge of State Street's breach. AT&T Br. at 7-8. For all the reasons discussed above, the AT&T Defendants knew enough to state a claim for knowing participation in a fiduciary breach. *See supra* at 21-22, 25-26; *see also Harris Tr. & Savs. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 251 (2000) (knowing-participation claim requires only that the nonfiduciary have "actual or constructive knowledge of the circumstances that rendered the transaction unlawful"); *Walsh v. Vinoskey*, 19 F.4th 672, 677–78 (4th Cir. 2021) (nonfiduciary need not "know that the transaction was unlawful under ERISA").

IV. PLAINTIFFS PRESERVE THE REMAINING CLAIMS AND ARGUMENTS

Plaintiffs do not seek to relitigate issues this Court already decided. As the law-of-the-case doctrine requires, Plaintiffs will instead seek "modif[ication] or overrul[ing] by a higher court," at

the appropriate time. *Moran*, 393 F.3d at 7. Plaintiffs merely, to ensure an unambiguous record, point to three issues that we preserve for appellate review.

First are the disloyalty claims, which are included in Counts I and IV directly, and Counts II and X derivatively.[3] Plaintiffs have previously explained why they believe these Counts should survive a motion to dismiss. *See* Pls. R&R Obj. at 14-15. Plaintiffs understand, however, that Magistrate Judge Levenson and the District Court did not accept those arguments and, rather than relitigate the issue, preserve them for appellate review.

Second are the prohibited transaction claims, listed in Counts V through IX. The same is true here: Plaintiffs stand by their arguments (*see* Pls.' Consolidated Opp'n to Defs.' Mot. to Dismiss at 52-58, ECF 91; Pls. R&R Obj. at 17-20), but recognize the Court has not accepted them, and thus preserve them for appellate review.

Third is the appropriate standard to apply to the imprudence claim. Under the standards this Court has set out, the Amended Complaint should survive a motion to dismiss for all the reasons stated above. In addition, however, Plaintiffs still maintain that *Dudenhoeffer*'s "'could not have' standard" does not apply (even though, to be clear, the Amended Complaint meets this standard). Pls. R&R Obj. at 9. Plaintiffs raised this point in their objections to the R&R (Pls. R&R Obj. at 9-12) and the District Court did not accept it, so Plaintiffs do not re-raise the issue here, but note that we preserve it for appellate review.

In addition, the AT&T Defendants argue in their motion to dismiss that the Court should dismiss claims against the individual defendants. AT&T Br. at 12-13. For the reasons Plaintiffs

[3] Counts I and IV directly, and Counts II and X derivatively, also contain claims alleging a violation of the duty of prudence. This consolidated opposition brief explains why the Amended Complaint should survive a motion to dismiss these aspects of these counts.

have previously explained, the Court should reject this argument. *See* Consolidated Opp. to Defs. Mot. to Dismiss, ECF 91, at 40 n.14.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motions to dismiss as to the allegations of the duty of prudence in Counts I and IV directly and Counts II and X derivatively.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

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