

Issue Spotting In DC Plans: How to Turn a \$7,800 Individual Account “Service Fee” Into a \$6.25 Million Class Action Recovery

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Agenda

- Katziff v. Beverly Enterprises
- Fiduciary Litigation
 - Legal Framework
 - Hot Issues

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Fiduciary Responsibilities and Risks

- Fiduciary Litigation on the Rise
- Types of Cases
 - Imprudent investments
 - Excessive fees of investments
 - Prohibited transactions

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Katziff v. Beverly Enterprises

- **Pension Action Center**
 - Letters/Calls to Beverly
 - Beverly's failure to respond/explain
- **Liner Grode et al.**
 - Efforts to settle before filing the complaint
 - Class action complaint
 - Mediation
 - Settlement

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Katziff v. Beverly Enterprises-- Claims

- Market Value Adjustment
- Mapping
- Excessive Fees/Prohibited Transactions
- Stephens – fees for unknown services
- Underperforming Investments

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Katziff v. Beverly Enterprises— Defenses and Counter Claims

- Defenses
 - *Hecker v. Deere*
 - *ERISA Section 404(c)*
 - *Class Certification*
 - *Statute of Limitations*
- Counter Claims
 - Diversified Investment Advisors

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Katziff v. Beverly Enterprises

➤ Settlement Issues

- Insurance
- Cost of Discovery
 - E-discovery
 - Depositions
- Unsettled area of Law
- Burden of Proof

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Katziff v. Beverly Enterprises

➤ Settlement Administration Issues

- Current participants
- Former participants – return of postcards

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ERISA Litigation

Large Settlements/Recent Decisions

- Rite Aid/McKesson
- Enron/World Com
- Caterpillar

<http://caterpillarerisasettlement.com/>

<http://caterpillarerisasettlement.com/wp-content/uploads/2010/05/Sample-Annual-Fee-Disclosure-to-Plan-Participants.pdf>

- General Dynamics
<http://www.plansponsor.com/print.aspx?id=6442473358>
- Braden v. Wal-Mart
- Tibble v. Southern Edison

ERISA Class Action Settlement Clearinghouse

<http://www.erisasettlements.com/main.htm>

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Fiduciary Issues

- Fiduciary Duties
- ERISA Section 404(c)
- QDIA
- Procedural Prudence - Monitoring
- Investment Policy Statement
- Prudent Selection of Investment Alternatives
 - Company Stock
 - Target Date Funds
 - Evaluation of reasonableness of fees

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Who is a Fiduciary?

Any person who:

- Exercises any discretionary authority or discretionary control in managing the plan or who has any authority or control in managing or disposing of its assets;
- Has any discretionary authority or responsibility in administering the plan; or
- Renders investment advice for a fee or compensation with respect to any monies or other property belonging to the plan

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Plan Fiduciaries

- **Plan Sponsor:** Fiduciary decisions include selecting funds and deciding to hire a third-party to provide investment management services, recordkeeping services, plan education, or trustee services
- **Plan Administrator:** Responsible for the day-to-day administration of the plan, including complying with ERISA's reporting and disclosure requirements; maintaining plan records; and routine tasks such as processing election forms distribution requests
- **Named Fiduciary:** Each plan has a "named fiduciary," a party named in the plan document with the authority to manage and control the plan's operation and supervise all other fiduciaries. Unless the authority to do so is otherwise delegated, the named fiduciary is responsible for the selection and monitoring of plan investments
- **De Facto Fiduciary**
- **Independent Fiduciary**
- **Investment Manager**

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Fiduciary Duties – Duty of Loyalty

- **Duty of loyalty:** act for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of plan administration
- **Two hats:** a corporate officer may also serve as a fiduciary, the duty of loyalty requires that a "dual capacity fiduciary" consider only the interests of participants and beneficiaries as such when making decisions regarding the plan

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Fiduciary Duties – Duty of Loyalty

- Scrutinize conflicts of interest to ensure that they are not adversely affecting a fiduciary decision. A fiduciary operating under a conflict may prefer to abstain from participating in the decision
- Ensure administrative expenses paid by the plan are reasonable (not necessarily cheapest)

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Fiduciary Duties – Prudence

- **Duty of prudence:** act with the care, skill, prudence and diligence that a person 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:
 - undertake an independent investigation into the merits of an investment decision, including comparable alternatives
 - continue to monitor investment performance and alter available plan investments if circumstances change or if an investment alternative's performance targets are not met
 - If a fiduciary is ill-equipped to evaluate the merits of a proposed investment, the fiduciary should seek independent, qualified assistance, such as from a third-party investment adviser

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Fiduciary Duties – Prudence

- Documentation is an essential component of prudence and should include the following:
 - The merits of the proposed investment: Take minutes of meetings where the investment is considered and retain copies of reports, analysis and opinions
 - The final decision regarding the proposed investment: Reflect the final conclusion justifying the decision
 - Contractual relationships: Enter into written agreements accurately describing the parties' obligations, including an effective delegation of fiduciary responsibility if needed, regular reporting, indemnification and reasonable termination provisions

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Fiduciary Duties -- Diversify

- **Duty to Diversify:** diversify plan investments to minimize the risk of large losses to participants, unless it is clearly prudent not to do so:
 - A fiduciary who fails to diversify the plan's investments bears the burden of providing that not doing so was prudent
 - When contemplating and undertaking the duty to diversify plan investments, a fiduciary should:
 - Consider facts and circumstances relevant to the performance of investments
 - Document process regarding investment selection
 - Solicit input from an investment adviser or investment consultant, if necessary

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Fiduciary Duties – Follow Plan Documents

- **Duty to Follow Plan Documents:**
 - A fiduciary should follow the terms of the plan documents as long as they comply with ERISA
 - Where it is imprudent to follow the terms of the plan documents, a fiduciary may elect not to follow the terms

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Personal Liability

- **Co-fiduciary liability:** fiduciary knowingly participates in or knowingly conceals an act or omission of another fiduciary knowing that such act or omission constitutes a breach
- **Enable:** Liability may be incurred if, through a failure to satisfy his own fiduciary duties, a fiduciary "enables" another fiduciary to commit a breach. Thus, a fiduciary may not claim ignorance of fiduciary conduct within his oversight responsibility
- **Failure to Remedy:** If a fiduciary has knowledge of another fiduciary's breach, he or she may be held personally liable unless he makes reasonable efforts to remedy the breach
 - Reasonable efforts could entail: reversing a transaction; informally obtaining restitution; establishing procedures to ensure such conduct does not recur; terminating an appointment; taking formal legal action or reporting the conduct to appropriate regulatory authorities

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Common Breaches

- *Improper selection of investments*
- *Failure to follow the Plan*
- *Failure to monitor*
- *Prohibited transactions*

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404(c) Safe Harbor

- Requires notification in writing of intent to comply with 404(c) safe harbor
- Three different investment options with differing risk/return profiles
- Information and education on the different investment options
- Opportunity to change investments with appropriate frequency

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Investment Policy Statement (IPS)

- IPS provides framework under which plan will operate with respect to the selection, monitoring, and evaluation of the plan's investment options. It should include:
 - Plan objectives
 - Roles/responsibilities of those responsible for investment of plan's assets
 - Permissible investment vehicles
 - Criteria and procedures for selecting investment options
 - Investment categories
 - Objectives for prudently monitoring and evaluating investment procedures, measurement standards, and monitoring procedures
 - How to address investment options that fail to satisfy objectives

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PPA Safe Harbors

QDIA - Plan sponsor can limit liability for participant investment decisions by offering QDIA - investment fund/model portfolio that is:

- Based on age, target retirement date, or life expectancy
- Consistent with target level of risk appropriate for participants of plan as a whole
- Not a stable value fund or MMF

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PPA Safe Harbors

➤ Investment advice prohibited transaction exemption for fiduciary advisors:

- RIA
- Bank trust department
- Insurance company
- Broker-dealer
- Employee, agent, registered representative of any of the above parties

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PPA Safe Harbors

- Advisory services must be provided under “eligible investment advice” arrangement approved by an independent fiduciary:
 - Provides that the fees received by the fiduciary adviser do not vary based on investment; or
 - Uses a computer model under investment advice program meeting certain conditions, including annual audit requirement

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Monitoring & Reporting

Watch List Procedures

Replacing Funds

Communication of Changes

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ERISA Section 408(b)(2)

- Exemption under Section 408(b)(2) from ERISA's prohibited transaction rules permits a service provider to an employee benefit plan to receive compensation for the services if no more than "reasonable compensation" is paid for "necessary" services under a "reasonable" arrangement

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ERISA Section 408(b)(2) Interim Final Regulations

- July 16, 2010, the DOL released an "interim final regulation" under ERISA Section 408(b)(2) related to the disclosure of fees by service providers
- Covered service providers will need to comply with the regulation by July 16, 2011, for all contracts or arrangements, regardless of whether they were entered into before the effective date

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ERISA Section 408(b)(2)

- Services will be treated as "reasonable" only if the service provider discloses to the plan specified compensation-related information
- These new regulations do not apply to medical and other "welfare" plans, and the DOL is expected to issue additional rules applicable to those plans

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ERISA Section 408(b)(2)

- Failure to meet the requirements for the 408(b)(2) exemption could cause the payment of compensation to a provider of services to an employee benefit plan to be a prohibited transaction under ERISA and the corresponding provisions of the U.S. tax code
- Consequences of a prohibited transaction may include punitive excise taxes, disgorgement of fees and other potential liabilities on the service provider, and liability for the plan fiduciary

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ERISA Section 408(b)(2)

- For recordkeeping services provided together with the offering of designated investment alternatives, the following disclosures must be made:
 - description of all direct and indirect compensation expected to be received by the recordkeeper or any affiliate or subcontractor;
 - If services are provided without explicit compensation, a reasonable and good faith estimate of what the services will actually cost the plan, with a detailed explanation of how the estimate was made, taking into account prevailing market rates or rates that would be charged to similar third parties; and
 - Fees and expense ratios for each designated investment alternative, and any additional operating expenses

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ERISA Section 408(b)(2)

- **What Happens if Required Disclosures are Not Made?**
- A failure to comply with the new regulations on or after July 16, 2011 can cause an arrangement for services to be treated as a prohibited transaction, unless an exception or exemption applies
 - An exception for inadvertent errors or omissions is available, if the service provider has acted in good faith and with reasonable diligence and discloses the correct information as soon as practicable and not later than 30 days from discovering the failure
 - The regulations focus exclusively on the service provider's actions in this circumstance. Although the plan fiduciary too faces risk if it imprudently engages in a non-exempt prohibited transaction, it is unclear how a fiduciary would know whether its service provider used reasonable diligence, or whether a failure has been corrected within 30 days of its being discovered

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Questions

Contact:

Ronald Kravitz, Esq. or Kim Zeldin, Esq.

Tel: 415-489-7700

**ERISA Excessive Fee Case Settled By
Ronald S. Kravitz and Kim Zeldin of
LINER GRODE STEIN YANKELEVITZ SUNSHINE REGENSTREIF & TAYLOR LLP**

March 25, 2010 – (San Francisco, CA) Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP ("Liner") is pleased to announce success in one of the first ERISA excessive fees case to settle. Courts have dismissed many similar cases leaving the plaintiffs with no recovery. This case was handled by Ronald S. Kravitz and Kim Zeldin of Liner's San Francisco Office.

The case, *Katziff, et al. v. Beverly Enterprises Inc., et al.*, was settled in the United States District Court of Massachusetts, Case No. 07-11456-NMG. The Plaintiffs who brought this suit are persons who participated in or were beneficiaries of the Plan from 1996 to the present, and the Defendants are Beverly Enterprises, Inc., Golden Gate National Senior Care Administrative Services, LLC, and certain present or former officers, directors and employees of those companies.

The class action began as a claim for \$2.3 million and ultimately settled for \$6.25 million plus the requirement that the fiduciaries of the Plan obtain training to ensure they fulfill their responsibilities under ERISA. The class consists of approximately 44,000 people. Each participant and located former participant will receive a proportionate share of the net settlement amount depending upon the amount invested in the Plan, and the time period in which the participant was in the Plan. The exact amount each participant will obtain from the settlement will not be known until the search for the former participants has been completed.

Mr. Kravitz commented, "The named plaintiffs in the case kept fighting for their benefits despite the fact that government officials were unable to help them. If it were not for the perseverance of the named plaintiffs (Lois Katziff, Carolyn Shapiro, and Dave Richards) and the tireless efforts of Ellen Bruce of the Pension Action Center at the University of Massachusetts the case never would have materialized."

About the Firm

Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP is a full service law firm with offices in Los Angeles and San Francisco that serve individual, entrepreneurial and Fortune 100 clients domestically and internationally. Our lawyers are listed in the *Hollywood Reporters'* Power Lawyers List, the *Daily Journal's* Rainmakers List and our firm was recently named one of the best places to work in Los Angeles by the *Los Angeles Business Journal*.



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Investments

Court Approves \$6.25M ERISA Settlement Between Beverly Enterprises and Participants

A \$6.25 million settlement between Beverly Enterprises Inc. and its tax code Section 401(k) plan participants was approved March 24 by the U.S. District Court for the District of Massachusetts, ending the participants' claim that the plan's fiduciaries committed several fiduciary breaches (*Katziff v. Beverly Enterprises Inc.*, D. Mass., No. 07-11456-NMG, 3/24/10). "We are very pleased with the class action settlement as it provides a meaningful recovery to the Plan and its participants. The class action began as a claim for \$2.3 million and ultimately settled for \$6.25 million," plaintiffs' attorney Ronald S. Kravitz of Liner Yankelevitz Sunshine & Regenstein, San Francisco, told BNA April 16.

"We believe it is one of the first class actions involving claims for excessive fees in the post *Hecker v. Deere* world to achieve a final settlement and a substantial recovery for the Plan and its participants," Kravitz said. A spokesman for Beverly Enterprises, now known as Golden Living, told BNA April 16 that the company agreed to the settlement to avoid the costs and risks of a lengthy trial and possible appeal. "The company continues to deny the validity of the claims," the spokesman said, adding that the company was "pleased to be able to put this matter behind us in a manner that is satisfactory to all parties."

"We continue to be proud of the Golden Living 401(k) plan and the significant value it has delivered to participants," the spokesman said.

"We believe it is one of the first class actions involving claims for excessive fees in the post *Hecker v. Deere* world to achieve a final settlement and a substantial recovery for the Plan and its participants."

PLAINTIFFS' ATTORNEY RONALD S. KRAVITZ

Beverly Enterprises' attorney, Ashley B. Abel of Jackson Lewis, Greenville, S.C., told BNA April 16 that the "defendants believed that they had strong defenses to the plaintiffs' claims in light of the trend in the federal courts against revenue sharing and excessive fee claims." "The settlement was advantageous to the defendants because given the scope of discovery, need for expert testimony, and likely length of trial, the cost of defending this lawsuit through trial would have been in excess of several million dollars," Abel said.

The MVA Penalty. The participants' Employee Retirement Income Security Act lawsuit against Beverly Enterprises and several other entities was filed in August 2007. The participants alleged that the plan's fiduciaries

tions [in relation to the news articles] fail to state a claim," the court said. A spokesman for BNY Mellon told BNA April 16 that the company was "gratified by the court's decision to dismiss this lawsuit."

\$2.5 Million Lost. The trustees filed their lawsuit against BNY Mellon in October 2009, claiming that as investment manager for the plan BNY Mellon had breached its fiduciary duties under the Employee Retirement Income Security Act by investing a portion of the plan's assets in a floating-rate note issued by Lehman Brothers.

The trustees alleged that the plan lost more than \$2.5 million when Lehman Brothers collapsed and filed for bankruptcy. They claimed that a sophisticated investment manager would have known, from news reports and other sources, that investment in Lehman Brothers was too risky because of the company's involvement with securities lending.

BNY Mellon filed a motion to dismiss, arguing that the trustees' complaint did not set forth sufficient allegations to support their fiduciary breach claim. The court granted the motion after finding that the trustees' complaint failed to support a reasonable inference that BNY Mellon breached its ERISA fiduciary duties. "Plaintiffs' allegation that there was, in hindsight, a loss of principal from the investment of the Plan's collateral in the Lehman floating rate note is not, without further 'factual enhancement,' sufficient to sustain a claim under ERISA § 404 and 406," the court said.

The court went on to say that the trustees' conspiracy allegation that the investment in the Lehman note was imprudent was insufficient to prove there was a fiduciary breach. The court said that while the allegations might suggest that it was "theoretically conceivable" that BNY Mellon should have known about Lehman Brothers' precarious financial condition, the allegations in the complaint were insufficient to support the trustees' claim.

Moreover, the court said there were no allegations by the trustees that BNY Mellon's investment of plan assets in Lehman Brothers' floating-rate notes was a violation of any particular provision in the plan's investment guidelines.

The trustees were represented by Stephen R. Astley, Holly Kimmel, Elizabeth A. Shonson, and Sabrina E. Tirabassi of Coughlin Stola Geller Rudman & Robbins, Boca Raton, Fla.; Erin Whitney Boardman, David Avi Rosenfeld, and Samuel Howard Rudman of Coughlin Stola Geller Rudman & Robbins, Melville, N.Y.; Michael Colihan of Brooklyn, N.Y.; and William Edward Bernard and Robert A. Izard of Schatz & Nobel, Hartford, Conn.

BNY Mellon was represented by Christopher Emmanuel Duffy and Damien Jerome Marshall of Boies Schiller & Flexner, New York.

By Joel J. Meyer

The full text of the opinion is at <http://op.bna.com/penn.us/r?Open=mer-84k/53>.

Lewis, White Plains, N.Y.; and Jason M. Stein and René E. Thorne of Jackson Lewis, New Orleans.

By Jo-El J. MEYER

The full text of the opinion is at <http://op.bna.com/pen.nsf/r?Open=Jmer-84k3z>.

Employer Stock

Citigroup, JPMorgan Stock-Drop Decisions Spark Debate Between DOL Official, Attorneys

Two recent employer "stock-drop" decisions by a federal judge in New York set off a lively debate April 13 between a Department of Labor official and employee benefits practitioners during a webcast sponsored by the Practising Law Institute.

The two cases that triggered the debate were rendered by Judge Sidney Stein of the U.S. District Court for the Southern District of New York. In both cases, Stein dismissed employer stock-drop claims against well-known financial institutions, Citigroup Inc. and JPMorgan Chase & Co.

In the Citigroup case, Judge Stein ruled that Citigroup did not breach its Employee Retirement Income Security Act fiduciary duties when it continued to offer its stock as a retirement plan investment option during a period when the company was incurring tremendous losses due to the subprime mortgage crisis. Among other things, Stein said there was no fiduciary responsibility to remove Citigroup stock from the plan because the plan mandated that the stock be offered as an investment option (*In re Citigroup ERISA Litigation*, 47 EBC 2025 (S.D.N.Y. 2009) (167 PBD, 9/1/09, 36 BPR 2054, 9/8/09)).

The Citigroup case now is on appeal to the Second Circuit. The Department of Labor in January filed a strongly worded amicus brief, urging the appeals court to overturn Judge Stein's decision (16 PBD, 1/27/10, 37 BPR 268, 2/2/10).

"You can't opt out of ERISA's fiduciary regime by mandating in plan documents that certain investments be part of the plan."

LABOR DEPARTMENT OFFICIAL TIMOTHY D. HAUSER

Recently, Judge Stein granted judgment on the pleadings to JPMorgan Chase & Co. in a long-running employer stock-drop case. Stein said in that case that even though JPMorgan's tax code Section 401(k) plan did not require that the company's stock be offered as an investment option, the JPMorgan defendants still would be entitled to the favorable "presumption of prudence" that courts typically apply in situations where plans mandate employer stock investment (*Fisher v. JPMorgan Chase & Co.* (S.D.N.Y. 2010) (62 PBD, 4/2/10, 37 BPR 786, 4/6/10)).

The presumption of prudence has been applied by numerous federal courts in the context of these stock-drop cases. The presumption favors employers and typically can only be overcome if plaintiffs can present

breached their duties by causing the plan to incur a \$2.3 million market value adjustment (MVA) penalty.

This MVA penalty occurred in July 2006 when the plan changed service providers from Diversified Investment Advisors to Fidelity Investments. In this same month, the fiduciaries elected to liquidate one of the plan's investment options, called the Stable Value or "Fixed Income" Fund. The fund was allegedly the safest option for plan participants and was a preferred investment for older participants.

According to the motion for approval of the settlement, the plan fiduciaries took the position that the MVA penalty was appropriate because they believed that switching service providers from Diversified to Fidelity and incurring the charge was in the best interest of the plan. The fiduciaries also claimed that any loss caused by the MVA penalty would be compensated by Beverly's 2006 matching contributions to participants' plan accounts.

During discovery in the case, the participants claimed that they learned that the fiduciaries had never taken into consideration the possibility of the MVA penalty before they decided to switch service providers. The participants also allegedly learned that the fiduciaries could have avoided the MVA penalty altogether.

New Charges in Amended Complaint. The participants amended their complaint in December 2008 to add several additional fiduciary breach and prohibited transactions claims. Among those claims was the allegation that the fiduciaries caused the plan to pay excessive fees to its service providers. They also alleged that the plan's investment options underperformed.

Notably, the participants' amended complaint charged that when the fiduciaries caused the plan to switch providers from Diversified to Fidelity, they chose to map the money from the safe Stable Value Fund to "untested, risky" Fidelity funds that lost tens of millions of dollars. The fiduciaries allegedly agreed to switch to the Fidelity funds because Fidelity had agreed to waive transition fees if the fiduciaries elected to map the assets of the plan into Fidelity's target date funds.

The settlement approved by Judge Nathaniel M. Gordon calls for Beverly Enterprises and its fiduciary insurers to pay \$6.25 million plus interest to as many as 30,000 class members. The settlement funds will be allocated on a pro-rata basis to class members, depending on whether their losses were attributable to the MVA penalty, the allegedly excessive service provider fees, or the Fidelity investment-related claims.

The class members consist of all participants and beneficiaries in the plan from 1996 through the settlement date. It is a nonopt-out class and thus no class member has the right to opt out of the settlement class. In addition, the court awarded the plaintiffs' attorneys \$1.9 million in attorneys' fees to be paid from the settlement funds.

The plaintiffs were represented by Ronald S. Kravitz of Liner Yankellevitz Sunshine & Regenstein, San Francisco; Matthew B. Borden of BraunHagey, San Francisco; and Mala M. Rafik of Rosenfeld & Rafik, Boston. The Beverly Enterprises defendants were represented by Ashley B. Abel of Jackson Lewis, Greenville, S.C.; Matthew D. Freeman and Matthew A. Porter of Jackson Lewis, Boston; Michael Jacobster of Jackson



DIVERSIFIED
INVESTMENT
ADVISORS
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Beverly 401(k) Savingsplus Plan

Customer Service

Account Information

Account Number

Statement Period: April 1, 2006 to July 7, 2006

Includes contributions received in this period for payroll dates April 5, 2006 through June 28, 2006.

Account Summary

Opening Balance as of April 1, 2006	\$218,459.54
Money In	\$4,401.02
Money Out	-\$217,413.48
Gain or Loss	-\$5,447.08
Closing Balance as of July 7, 2006	\$0.00

Investment Allocation of Your Account Balance

Your Personalized Rate of Return

Your rate of return for the period 01/01/2006 to 07/07/2006 was 2.03%, and for the period 07/08/2005 to 07/07/2006 was 3.99%.

Your personalized rate of return indicates the specific performance of your own investment strategy, reflecting the funds you have chosen and the allocation of your assets among these funds, as well as any activity in your account such as deposits, withdrawals and loans. Compare these results to the sample investment mixes described at the end of your statement to see if you should consider reevaluating your investment strategy.

Messages

Your account balance in the Beverly Enterprises, Inc. 401(k) SavingsPlus Plan has been transferred to Fidelity Investments as of July 10, 2006. Keep this statement and verify that the amounts shown on page 2 under "Account Activity - Money Out" are the same amounts listed on the initial statement you will receive from Fidelity. Note that the "Plan Service Fee" shown on page 2 is the market value adjustment as described in the Fidelity Transition Brochure. Also note that any references to the current Fixed Interest Fund is the same as the Beverly Stable Value Fund. Please call Fidelity Investments at 800-835-5095 for questions about your account.

This statement has been carefully prepared to ensure that it is accurate and up-to-date. Any discrepancy should be brought to Diversified's attention within 30 days.

The Account Summary section provides an overview of activity in your account during the statement period.



The Account Activity section provides details of the activity in your account during the statement period. The first summary is organized by "money source" or the type of money involved. The second summary is organized by investment fund. The last section(s) shows the date and type of each transaction.

Account Activity

Source	Opening Balance	Money In	Money Out	Gain/Loss/ Fee	Closing Balance				
Associate Contrib	\$154,902.32	\$4,401.02	-\$155,403.34	-\$3,900.00	\$0.00				
Employer Contrib	\$63,557.22	\$0.00	-\$62,010.14	-\$1,547.08	\$0.00				
Total	\$218,459.54	\$4,401.02	-\$217,413.48	-\$5,447.08	\$0.00				
Fund	Opening Balance	Money In	Money Out	Gain/Loss/ Fee	Closing Balance	Numt Units/\$			
Fixed Interest	\$218,459.54	\$4,401.02	-\$217,413.48	-\$5,447.08	\$0.00				
Total	\$218,459.54	\$4,401.02	-\$217,413.48	-\$5,447.08	\$0.00				
Transaction Date	Transaction Type	Amount	Transaction Date	Transaction Type	Amount	Am			
07/07/2006	Withdrawal	\$217,413.48							
Total	Withdrawals	\$217,413.48							
07/07/2006	Plan Service Fee	\$7,758.99							
Total	Plan Service Fees	\$7,758.99							
Date	Fund	Transaction Amount	Number of Units/Shares	Unit/Share Value	Date	Fund	Transaction Amount	Number of Units/Shares	Unit/\$
Contributions									
04/07/2006	Fixed Interest	\$198.36	N/A	N/A					
04/13/2006	Fixed Interest	\$361.93	N/A	N/A					
04/24/2006	Fixed Interest	\$347.10	N/A	N/A					
04/28/2006	Fixed Interest	\$496.89	N/A	N/A					
05/10/2006	Fixed Interest	\$415.99	N/A	N/A					
05/12/2006	Fixed Interest	\$339.67	N/A	N/A					
05/22/2006	Fixed Interest	\$259.20	N/A	N/A					
05/26/2006	Fixed Interest	\$367.37	N/A	N/A					
06/05/2006	Fixed Interest	\$345.72	N/A	N/A					
06/09/2006	Fixed Interest	\$418.62	N/A	N/A					
06/16/2006	Fixed Interest	\$256.44	N/A	N/A					
06/27/2006	Fixed Interest	\$360.89	N/A	N/A					
06/29/2006	Fixed Interest	\$232.84	N/A	N/A					
Total Contributions		\$4,401.02							

GGNSC Administrative Services LLC

1000 Beverly Way
Fort Smith, AR 72919

August 11, 2006

RE: Information Regarding the Beverly Enterprises, Inc. 401(k) SavingsPlus Plan Liquidation of the Fixed Interest Fund (also called Beverly Stable Value Fund) and Market Value Adjustment

DEAR :):

The purpose of this letter is to provide you with information about the market value adjustment on the liquidation of the Fixed Interest Fund (also called the Beverly Stable Value Fund) as part of the transition of investment and recordkeeping services from Diversified Investment Advisors (DIA) to Fidelity Investments. The market value adjustment is identified as a "plan service fee" on your final DIA statement.

As you know, the Company has taken great care to evaluate our current retirement program and providers to ensure that the investment offerings and supporting services can provide the best plan possible for all of our participants. As part of this process, numerous enhancements were recently made to the program including the discretionary Company match, immediate vesting on the 2006 Company discretionary match, expanded investment opportunities and better tools and services to assist participants with their investment objectives.

The desire to offer participants these enhancements required a transition away from our current provider (DIA) and investment options, including the Fixed Interest Fund (also called the Beverly Stable Value Fund). Due to the current market environment, liquidation of assets in this fund resulted in a market value adjustment applied to those participants with a balance in the fund as of July 7, 2006. The Company made every reasonable effort to minimize the impact of the transition on all of the participants by communicating well in advance and working directly with DIA and Fidelity Investments to ensure a smooth transition.

Consistent with its description, the Fixed Interest Fund (or Beverly Stable Value Fund) implies the stability of principal, meaning the fund will invest in a portfolio of underlying securities (bonds, investment contracts and cash) in order to try and maintain the principal invested. In addition to the principal invested, the fund will attempt to provide some level of interest income. Important to note is that no investment is completely guaranteed. During a transition such as the one just completed, these types of funds may be subjected to market value adjustments to account for dramatic changes in interest rates (as we have recently experienced in the market).

(see reverse side)

It should also be noted that the fund was originally established by DIA as an investment option available only to participants in the Beverly Enterprises, Inc. 401(k) SavingsPlus Plan. This meant the entire fund (including all short and long-term investments) had to be liquidated and converted to cash upon transition of plan assets to Fidelity.

We believe the enhancements to the retirement program including the new investment options and supporting services available to all plan participants will provide better retirement opportunities for everyone. Finally, we determined, with the assistance of investment advisors, that the fund line up, lower expense charges, and solid track records of out-performance against their peer group was in the best interest of the participants in the plan over the long-term investment horizon.

Sincerely,

A handwritten signature in black ink that reads "Michael Karicher". The script is fluid and cursive, with the first name "Michael" and last name "Karicher" clearly legible.

Michael Karicher
Senior Vice President
Human Resources



August 17, 2006

Mr Michael Karicher
GGNSC
Human Resources
One Thousand Beverly Way
Fort Smith, Arkansas 72919

Dear Sir:

After seeing correspondence written regarding the exorbitant Plan Service Fees deducted from my 401K plan because of the transfer to Fidelity, I felt compelled to express my feeling on the subject.

I am 72 years old and have been employed by Beverly for over 30 years. I have enjoyed my service with Beverly and plan to continue working as long as my health is good, but that is still a relatively short time. It will take quite a long time to make up the \$7,800. deducted from my 401K plan because the new management decided that the plan should be with Fidelity. I did not request that my funds be with Fidelity -- the new management did. So my question is why can't I leave the funds up to July 2006 in the Diversified account and not be charged the fees. I was not unhappy with Diversified and would not have changed if I were given the option. I would be happy to invest any new funds in Fidelity, but I don't feel I should have to pay fees on my hard earned investment money now and again when I retire.

c.c.

Heathwood Nursing and Rehabilitation Center

188 Florence Street
Chestnut Hill, MA 02467
617.332.4730 • fax: 617.969.6592
www.heathwood.com

INDIVIDUAL ANALYSIS –

1. MVA Impact:	(\$4,824.98)
2. 2006 Match Impact:	\$1,020.84
3. 2007 Match Impact:	\$ 998.00
4. Net Impact of MVA and 2006 and 2007 Matches:	(\$2,806.14)
5. Net Improved Market Performance: (Fidelity vs. DIA)	\$4,147.15
6. Net Impact of Switch to Fidelity:	\$1,341.01
7. Estimated 2008 Match	\$1,000.00

INDIVIDUAL ANALYSIS:

1. MVA Impact:	(\$1,644.05)
2. 2006 Match Impact:	\$ 961.18
3. 2007 Match Impact:	\$ 974.25
4. Net Impact of MVA and 2006 and 2007 Matches:	\$ 291.38
5. Net Improved Market Performance: (Fidelity v. DIA) (July 10, 2006 to August 24, 2007)	\$1,596.82
6. Net Impact of Switch to Fidelity:	\$1,888.20
7. Estimated 2008 Match:	\$ 975.00

588 F.3d 585, 48 Employee Benefits Cas. 1097, Pens. Plan Guide (CCH) P 24006H
(Cite as: 588 F.3d 585)

United States Court of Appeals,
Eighth Circuit.
Jeremy BRADEN, Appellant,

v.

WAL-MART STORES, INC.; Stanley Gault; Betsy Sanders; Don Soderquist; Jose Villareal; Stephen R. Hunter; Debbie Davie Campbell, Appellees.

Secretary of Labor, Amicus on Behalf of Appellant, ERISA Industry Committee; Chamber of Commerce; American Benefits Council, Amici on Behalf of Appellees.

No. 08-3798.

Submitted: Sept. 24, 2009.

Filed: Nov. 25, 2009.

Background: Employee brought putative class action against employer and various executives involved in management of employee retirement plan alleging they violated fiduciary duties imposed by Employee Retirement Income Security Act (ERISA). The United States District Court for the Western District of Missouri, Gary A. Fenner, J., 590 F.Supp.2d 1159, granted defendants' motion for dismissal. Employee appealed.

Holdings: The Court of Appeals, Murphy, Circuit Judge, held that:

- (1) employee had Article III standing;
- (2) participant stated a claim for violation of fiduciary duties of prudence and loyalty imposed by ERISA;
- (3) participant stated a claim for breach of ERISA imposed fiduciary duties of loyalty and disclosure; and
- (4) participant stated a claim for breach of ERISA imposed fiduciary duty barring direct or indirect furnishing of services between plan and party in interest.

Reversed and remanded.

*588 Derek W. Loeser, argued, Seattle, WA, Lynn Lincoln Sarko, Michael Woerner, Gretchen Freeman Cappio, Gretchen S. Obrist, Benjamin Gould, Seattle, WA; Gregory W. Aleshire, and William R. Robb, Springfield, MO, on the brief, for appellant.

*589 Robin Springberg Parry, argued, Washington, DC, on Behalf Amicus, Secretary of Labor.

Paul J. Ondrasik, Jr., argued, Washington, DC, William C. Martucci, Kristen A. Page, Kansas City, MO, Morgan D. Godgson, Eric G. Serron, Washington, DC, on the brief, for appellees.

Janet M. Jacobson, Robin S. Conrad, Shane B. Kawka, John M. Vine, Thomas L. Cabbage, III, Washington, DC, for Amici on Behalf of appellees.

Before MURPHY, BRIGHT, and RILEY, Circuit Judges.

MURPHY, Circuit Judge.

Jeremy Braden, an employee of Wal-Mart and participant in its employee retirement plan (Plan), brought this putative class action against appellees-Wal-Mart and various executives involved in the management of the Plan. Braden alleges that they violated fiduciary duties imposed by the Employee Retirement Income Security Act (ERISA). Appellees moved for dismissal under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The district court granted the motion, concluding that Braden lacked constitutional standing to assert claims based on breaches of fiduciary duty prior to the date he first contributed to the Plan and that he otherwise failed to state any plausible claim upon which relief could be granted.^{FN1} Braden timely appealed. We reverse and remand for further proceedings.

FN1. See *Braden v. Wal-Mart Stores, Inc.*, 590 F.Supp.2d 1159 (W.D.Mo.2008).

I.

Wal-Mart's "Profit Sharing and 401(k) Plan" is an "employee pension benefit plan" covered by ERISA. 29 U.S.C. § 1002(2)(A). It is also an "individual account plan," 29 U.S.C. § 1002(34), establishing an individual profit sharing and 401(k) account for each participating employee. Wal-Mart is the Plan's sponsor and administrator under 29 U.S.C. § 1002(16). Merrill Lynch & Co., Inc. is the Plan's trustee, hold-

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ing its assets in trust and providing various administrative services necessary to the maintenance of participants' accounts.

At the end of 2007, the Plan had over one million participants and nearly \$10 billion in assets. Individual participants directed investment of the assets in their Plan accounts by selecting from a menu of investment options. During the period relevant to Braden's claims, the available options included ten mutual funds, a common/collective trust, Wal-Mart common stock, and a stable value fund. These options were selected by Wal-Mart's Retirement Plans Committee, the Plan's named fiduciary and the entity responsible for the operation, investment policy, and administration of the Plan.

Jeremy Braden began working for Wal-Mart in May 2002. He became eligible to participate in the Plan in June 2003 and made his first contribution on October 31, 2003. He continued his employment with Wal-Mart and his participation in the Plan throughout the period relevant to this appeal.

Braden filed his complaint on March 27, 2008, alleging five causes of action against Wal-Mart and the individual appellees, executives serving on or responsible for overseeing the Retirement Plans Committee.^{FN2} The gravamen of the complaint is that ***590** appellees failed adequately to evaluate the investment options included in the Plan. It alleges that the process by which the mutual funds were selected was tainted by appellees' failure to consider trustee Merrill Lynch's interest in including funds that shared their fees with the trustee. The result of these failures, according to Braden, is that some or all of the investment options included in the Plan charge excessive fees. He estimates that these fees have unnecessarily cost the Plan some \$60 million over the past six years and will continue to waste approximately \$20 million per year.

FN2. Braden does not assert each claim against each named defendant. Because the distinctions between the different groups of defendants are not material to the resolution of this appeal, however, we refer generally to "appellees" for the sake of convenience.

Braden alleges extensive facts in support of these claims. He claims that Wal-Mart's retirement plan is

relatively large and that plans of such size have substantial bargaining power in the highly competitive 401(k) marketplace. As a result, plans such as Wal-Mart's can obtain institutional shares of mutual funds, which, Braden claims, are significantly cheaper than the retail shares generally offered to individual investors. Nonetheless, he alleges that the Plan only offers retail class shares to participants. Braden also avers that seven of the ten funds charge 12b-1 fees, which he alleges are used to benefit the fund companies but not Plan participants.

Braden alleges further that the relatively high fees charged by the Plan funds cannot be justified by greater returns on investment since most of them underperformed lower cost alternatives. In support of this claim, he offers specific comparisons of each Plan fund to an allegedly similar but more cost effective fund available in the market. In comparison to an investment in index funds, Braden estimates that the higher fees and lower returns of the Plan funds cost the Plan some \$140 million by the end of 2007.

Finally, the complaint also alleges that the mutual fund companies whose funds were included in the Plan shared with Merrill Lynch portions of the fees they collected from participants' investments. This practice, sometimes called "revenue sharing," is used to cover a portion of the costs of services provided by an entity such as a trustee of a 401(k) plan, and is not uncommon in the industry. Braden alleges, however, that in this case the revenue sharing payments were not reasonable compensation for services rendered by Merrill Lynch, but rather were kickbacks paid by the mutual fund companies in exchange for inclusion of their funds in the Plan. The Plan's trust agreement requires appellees to keep the amounts of the revenue sharing payments confidential.

Count I of the complaint spells out Braden's breach of fiduciary duty claim in detail. Count III alleges that appellees breached their duty of loyalty by failing to inform Plan participants of certain information relating to the fees charged by the Plan funds, as well as the amounts of the revenue sharing payments made to Merrill Lynch. Count V alleges that the revenue sharing payments were "prohibited transactions" under 29 U.S.C. § 1106(a)(1). Finally, Counts II and IV allege, respectively, that those appellees with oversight responsibility failed adequately to monitor those who managed the Plan and that they are liable for the

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breaches of their cofiduciaries pursuant to 29 U.S.C. § 1105(a).

The district court dismissed all claims. It concluded that Braden could not personally have suffered injury before October 31, 2003, the date he first contributed to the Plan. According to the district court, Braden therefore did not have Article III standing to assert claims for breaches before that date. It dismissed the remaining claims on the grounds that Braden had alleged insufficient facts to support the claim of imprudent or disloyal management,*591 that appellees had no duty to disclose the information Braden sought, and that he had failed to show the alleged prohibited transactions with Merrill Lynch were not exempted by 29 U.S.C. § 1108. Because each of the direct claims failed, the court also dismissed the derivative claims based on monitoring and cofiduciary liability.

Braden challenges each of the district court's conclusions on appeal. We review the court's order de novo, accepting as true the complaint's factual allegations and granting all reasonable inferences to the non-moving party. *Taxi Connection v. Dakota, Minn. & E. R.R. Corp.*, 513 F.3d 823, 825 (8th Cir.2008).

II.

In order to proceed with his claims on behalf of the Plan, Braden must have both Article III standing and a cause of action under ERISA. *See, e.g., Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1124 (9th Cir.2006). We conclude that Braden has made a sufficient showing at this stage of the litigation to satisfy both requirements and that the district court erred in concluding that he lacked standing to maintain claims for the period before he began participating in the Plan.

[1][2] The doctrine of standing limits the jurisdiction of federal courts to “those disputes which are appropriately resolved through the judicial process.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). Some elements of the doctrine are prudential, involving self imposed limits on judicial power. These limits may be “modified or abrogated by Congress.” *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). The

heart of standing, however, is the principle that in order to invoke the power of a federal court, a plaintiff must present a “case” or “controversy” within the meaning of Article III of the Constitution. This “irreducible constitutional minimum of standing” requires a showing of “injury in fact” to the plaintiff that is “fairly traceable to the challenged action of the defendant,” and “likely [to] be redressed by a favorable decision.” *Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130 (citations and alterations omitted).

[3] “Injury in fact” is an invasion of a legally cognizable right. Whether a plaintiff has shown such an injury “often turns on the nature and source of the claim asserted.” *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). In most cases, then, a plaintiff's standing tracks his cause of action. That is, the question whether he has a cognizable injury sufficient to confer standing is closely bound up with the question of whether and how the law will grant him relief. *See* William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 239 (1988) (“[T]he question of whether plaintiff ‘stands’ in a position to enforce defendant's duty is determined by looking to the substantive law upon which plaintiff relies.”). It is crucial, however, not to conflate Article III's requirement of injury in fact with a plaintiff's potential causes of action, for the concepts are not coextensive. *See Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152-54, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).

[4] Article III generally requires injury to the plaintiff's personal legal interests, *see* *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771-72, 120 S.Ct. 1858, 146 L.Ed.2d 836 *592 (2000),^{FN3} but that does not mean that a plaintiff with Article III standing may only assert his own rights or redress his own injuries. To the contrary, constitutional standing is only a threshold inquiry, and “so long as [Article III] is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others.” *Id.* at 501, 95 S.Ct. 2197. In such a case, a plaintiff may be able to assert causes of action which are based on conduct that harmed him, but which sweep more broadly than the injury he personally suffered. *See Sprint Comm'ns Co. v. APCC Servs., Inc.*, --- U.S. ---, 128 S.Ct. 2531, 2543, 171 L.Ed.2d 424 (2008) (“[F]ederal courts routinely en-

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ertain suits which will result in relief for parties that are not themselves directly bringing suit.”).

FN3. *But see Sprint Commc'ns Co. v. APCC Servs., Inc.*, ---U.S. ---, 128 S.Ct. 2531, 2542-43, 171 L.Ed.2d 424 (2008).

[5] The district court erred by conflating the issue of Braden's Article III standing with his potential personal causes of action under ERISA. It concluded that Braden had no standing for the period before he began participating in the Plan because “[u]nder ERISA, a fiduciary relationship does not exist towards potential participants in a plan and such potential participants have no standing to sue for ... breach of fiduciary duty.” It therefore granted appellees' motion to dismiss “all claims occurring prior to October 31, 2003.” In reaching this conclusion, the district court mixed two distinct issues. Whether Braden may pursue claims on behalf of the Plan at all is a question of constitutional standing which turns on his personal injury. Whether relief may be had for a certain period of time is a separate question, and its answer turns on the cause of action Braden asserts.

At this stage in the litigation it is impossible to say when any particular claim “occurred” in the sense of when the action giving rise to it began or ended. We must assume for purposes of this appeal, however, that Braden's allegations are true. *Taxi Connection*, 513 F.3d at 825. On that standard Braden has made a sufficient showing of standing for the entire period embraced by his complaint. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (standing must be shown “with the manner and degree of evidence required at the successive stages of the litigation”).

Braden has satisfied the requirements of Article III because he has alleged actual injury to his own Plan account. That injury is fairly traceable to appellees' conduct because he has alleged a causal connection between their actions—even those taken before his participation in the Plan—and his injury.^{FN4} Finally, the injury is likely to be redressed by a favorable judgment. *See Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. Braden has thus “made out a ‘case or controversy’ between himself and [appellees] within the meaning of Art. III.” *Warth*, 422 U.S. at 498, 95 S.Ct. 2197.

FN4. It is true that Braden could not have

suffered injury before he began participating in the Plan, but that does not mean actions taken earlier cannot have caused his subsequent injury. For example, if appellees imprudently selected an investment option in 2002 which remained in place when Braden began participating, that earlier action would be causally linked to Braden's injury and would form a proper basis for his claims. If, as the record develops, it were to become apparent that there were breaches of duty entirely unrelated to Braden's injury, it could be appropriate to inquire into his standing to raise those separate claims. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 358, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996).

***593** The question whether recovery might be had for the period before Braden personally suffered injury is not one of constitutional standing, but turns instead on whether the “statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.” *Id.* at 500, 95 S.Ct. 2197. In this case, we must answer that question in the affirmative.

[6] 29 U.S.C. § 1132(a)(2) provides for a civil action “by a participant ... for appropriate relief under” 29 U.S.C. § 1109. It is undisputed that Braden is a “participant.” *See Adamson v. Armco, Inc.*, 44 F.3d 650, 654 (8th Cir.1995) (“A participant ... is defined in ERISA as someone ‘who is or may become eligible to receive a benefit of any type from an employee benefit plan.’”) (*quoting* 29 U.S.C. § 1002(7)). It is well settled, moreover, that suit under § 1132(a)(2) is “brought in a representative capacity on behalf of the plan as a whole” and that remedies under § 1109 “protect the entire plan.” *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 & n. 9, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 128 S.Ct. 1020, 1026, 169 L.Ed.2d 847 (2008) (section 1132(a)(2) “does not provide a remedy for individual injuries distinct from plan injuries.”).

Courts have recognized that a plaintiff with Article III standing may proceed under § 1132(a)(2) on behalf of the plan or other participants. *See, e.g., Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir.1998) (“[T]he standing-related provisions of ERISA were not intended to limit a claimant's right to

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proceed under Rule 23 on behalf of all individuals affected by the [fiduciary's] challenged conduct, regardless of the representative's lack of participation in all the ERISA-governed plans involved.”). Thus, a plaintiff may seek relief under § 1132(a)(2) that sweeps beyond his own injury. Since Braden has standing under Article III, we conclude that § 1132(a)(2) provides him a cause of action to seek relief for the entire Plan. The relief that may be appropriate, should Braden succeed, is not necessarily limited to the period in which he personally suffered injury.

Our decision in *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901 (8th Cir.2002), is not to the contrary. In *Harley* the plaintiffs were participants in a defined benefit plan who sued to recover losses caused to the plan by the fiduciary's allegedly imprudent investments. *Id.* at 905. Because the plan retained a surplus notwithstanding the losses, however, the plaintiffs' own benefits remained unchanged and they accordingly suffered no harm. *Id.* at 905-06. We concluded that “participants or beneficiaries who have suffered no injury in fact” do not have standing to sue on behalf of the plan under § 1132(a)(2). *Id.* at 906-07 (emphasis in original). This is not such a case as pled by Braden.

The present case is different for the simple reason that Braden has alleged injury in fact that is causally related to the conduct he seeks to challenge on behalf of the Plan. Unlike the *Harley* plaintiffs, Braden has a personal stake in the litigation. His own recovery will stand or fall with that of the Plan because § 1132(a)(2) “does not provide a remedy for individual injuries distinct from plan injuries.” *LaRue*, 128 S.Ct. at 1026. “At bottom, ‘the gist of the question of standing’ is whether [a plaintiff has] ‘such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.’” *Massachusetts v. EPA*, 549 U.S. 497, 517, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). This *594 central concern of Article III is satisfied here, and § 1132(a)(2) provides the appropriate vehicle for Braden to proceed on behalf of the Plan. We therefore conclude that the district court erred in dismissing Braden's claims for lack of standing.

III.

A.

[7][8][9] Federal Rule of Civil Procedure 8 requires that a complaint present “a short and plain statement of the claim showing that the pleader is entitled to relief.” In order to meet this standard, and survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, --- U.S. ---, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). The plausibility standard requires a plaintiff to show at the pleading stage that success on the merits is more than a “sheer possibility.” *Id.* It is not, however, a “probability requirement.” *Id.* Thus, “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and ‘that a recovery is very remote and unlikely.’” *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)).

[10] A complaint states a plausible claim for relief if its “factual content ... allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S.Ct. at 1949. Several principles guide us in determining whether a complaint meets this standard. First, the court must take the plaintiff's factual allegations as true. *Id.* at 1949-50. This tenet does not apply, however, to legal conclusions or “formulaic recitation of the elements of a cause of action”; such allegations may properly be set aside. *Id.* (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). In addition, some factual allegations may be so indeterminate that they require “further factual enhancement” in order to state a claim. *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955;) see also *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir.2009).

[11] Finally, the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible. See *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 285 (D.C.Cir.2009) (factual allegations should be “viewed in their totality”); cf. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23, 127 S.Ct. 2499, 168 L.Ed.2d

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179 (2007) (“The inquiry [under the Private Securities Litigation Reform Act] is whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard.”). Ultimately, evaluation of a complaint upon a motion to dismiss is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 129 S.Ct. at 1950.

[12][13] With these principles in mind, we turn to Braden's complaint. Count I alleges that appellees breached the fiduciary duties of prudence and loyalty imposed upon them by 29 U.S.C. § 1104. In order to state a claim under this provision, a plaintiff must make a prima facie showing that the defendant acted as a fiduciary, breached its fiduciary duties, and thereby caused a loss to the Plan. *Pegram v. Herdrich*, 530 U.S. 211, 225-26, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000); *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (8th *595 Cir.1994). Only the issue of breach is disputed here.

[14][15] ERISA imposes upon fiduciaries twin duties of loyalty and prudence, requiring them to act “solely in the interest of [plan] participants and beneficiaries” and to carry out their duties “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.” 29 U.S.C. § 1104(a)(1). The statute's “prudent person standard is an objective standard ... that focuses on the fiduciary's conduct preceding the challenged decision.” *Roth*, 16 F.3d at 917 (citing *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir.1984)). In evaluating whether a fiduciary has acted prudently, we therefore focus on the process by which it makes its decisions rather than the results of those decisions. *Id.* at 917-18; *Schaefer v. Ark. Med. Soc'y*, 853 F.2d 1487, 1492 (8th Cir.1988) (fiduciaries must “investigate all decisions that will affect the pension plan.”).

Focusing on this standard of liability, the district court found the complaint inadequate because it did not allege sufficient facts to show how appellees' decision making process was flawed. We conclude that the district court erred in its application of Rule 8. Accepting Braden's well pleaded factual allegations as true, he has stated a claim for breach of fiduciary duty.

[16] The district court erred in two ways. It ignored reasonable inferences supported by the facts alleged. It also drew inferences in appellees' favor, faulting Braden for failing to plead facts tending to contradict those inferences. Each of these errors violates the familiar axiom that on a motion to dismiss, inferences are to be drawn in favor of the non-moving party. *Northstar Indus. v. Merrill Lynch & Co.*, 576 F.3d 827, 832 (8th Cir.2009). *Twombly* and *Iqbal* did not change this fundamental tenet of Rule 12(b)(6) practice. See *Iqbal*, 129 S.Ct. at 1949; *Vila*, 570 F.3d at 285; *Justice v. Town of Cicero*, 577 F.3d 768, 771 (7th Cir.2009); *al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir.2009).

[17] The first of these errors stems from the mistaken assumption that Braden was required to describe directly the ways in which appellees breached their fiduciary duties. Thus, for example, the district court faulted the complaint for making “no allegations regarding the fiduciaries' conduct.” Rule 8 does not, however, require a plaintiff to plead “specific facts” explaining precisely how the defendant's conduct was unlawful. *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam). Rather, it is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior, so long as the facts pled “‘give the defendant fair notice of what the claim is and the grounds upon which it rests,’ ” *id.* (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955) (alteration omitted), and “allow [] the court to draw the reasonable inference” that the plaintiff is entitled to relief. *Iqbal*, 129 S.Ct. at 1949.

Braden has satisfied these requirements. The complaint alleges that the Plan comprises a very large pool of assets, that the 401(k) marketplace is highly competitive, and that retirement plans of such size consequently have the ability to obtain institutional class shares of mutual funds. Despite this ability, according to the allegations of the complaint, each of the ten funds included in the Plan offers only retail class shares, which charge significantly higher fees than institutional shares for the same return on investment.^{FNS} The complaint*596 also alleges that seven of the Plan's ten funds charge 12b-1 fees from which participants derive no benefit. The complaint states that appellees did not change the options included in the Plan despite the fact that most of them underperformed the market indices they were de-

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signed to track. Finally, it alleges that the funds included in the Plan made revenue sharing payments to the trustee, Merrill Lynch, and that these payments were not made in exchange for services rendered, but rather were a quid pro quo for inclusion in the Plan.

FN5. Braden makes more specific allegations about the relative cost of institutional and retail shares in the funds actually included in the Plan. For example, he alleges that in 2007 the Plan had over \$984 million invested in the PIMCO Total Return Fund. Notwithstanding this large investment, the Plan held Administrative Class shares subject to an expense ratio of .68%. Institutional class shares in the same fund had an expense ratio of .43%.

The district court correctly noted that none of these allegations directly addresses the process by which the Plan was managed. It is reasonable, however, to infer from what is alleged that the process was flawed. Taken as true, and considered as a whole, the complaint's allegations can be understood to assert that the Plan includes a relatively limited menu of funds ^{FN6} which were selected by Wal-Mart executives despite the ready availability of better options. The complaint alleges, moreover, that these options were chosen to benefit the trustee at the expense of the participants. If these allegations are substantiated, the process by which appellees selected and managed the funds in the Plan would have been tainted by failure of effort, competence, or loyalty. Thus the allegations state a claim for breach of fiduciary duty. *See Roth*, 16 F.3d at 918-19. ^{FN7}

FN6. Compare to *Hecker v. Deere & Co.*, which involved a fiduciary duty claim based on excessive fees where participants had access to over 2,500 mutual funds. 556 F.3d 575, 578 (7th Cir.2009). The district court in *Hecker* found it “untenable to suggest that all of the more than 2500 publicly available investment options had excessive expense ratios.” *Id.* at 581. The far narrower range of investment options available in this case makes more plausible the claim that this Plan was imprudently managed.

FN7. In concluding that Braden has stated a claim, we do not suggest that a claim is

stated by a bare allegation that cheaper alternative investments exist in the marketplace. It is clear that “nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund.” *Hecker*, 556 F.3d at 586. As discussed above, however, application of Rules 8 and 12(b)(6) is a “context-specific task,” *Iqbal*, 129 S.Ct. at 1950, and our ultimate conclusions rest on the totality of the specific allegations in this case.

These are of course only inferences, and there may well be lawful reasons appellees chose the challenged investment options. It is not Braden's responsibility to rebut these possibilities in his complaint, however. The district court erred by placing that burden on him, finding the complaint inadequate for failing to rule out potential lawful explanations for appellees' conduct. It stated that appellees “could have chosen funds with higher fees for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility.” That may be so, but Rule 8 does not require a plaintiff to plead facts tending to rebut all possible lawful explanations for a defendant's conduct.

To be sure, a plaintiff may need to rule out alternative explanations in some circumstances in order to survive a motion to dismiss. In *Iqbal*, for example, the Supreme Court concluded that the plaintiff failed to state a claim in light of “more likely explanations” for the defendants' conduct. *Iqbal*, 129 S.Ct. at 1951. *Iqbal* had alleged that in response to the terrorist attacks of September 11, 2001, the Attorney General and the FBI Director *597 adopted an unconstitutional policy of subjecting Arab Muslim men to harsh conditions of confinement solely on account of their race, religion, or national origin. *See id.* at 1942. The Court perceived an “obvious alternative explanation” for the disparate impact of the defendants' policies on Arab Muslims, however: “The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples.” *Id.* at 1951.

The Court assumed that any rational investigation of

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the September 11 attacks would thus have focused on Arab Muslims; a disparate impact on this group is exactly what one would expect from such an investigation. It is in this sort of situation—where there is a concrete, “obvious alternative explanation” for the defendant’s conduct—that a plaintiff may be required to plead additional facts tending to rule out the alternative. *Id.* (quoting *Twombly*, 550 U.S. at 567, 127 S.Ct. 1955); cf. *Twombly*, 550 U.S. at 566, 127 S.Ct. 1955 (plaintiff failed to state a claim where facts alleged described nothing more than defendants’ “natural,” lawful reaction to economic incentives). Such a requirement is neither a special rule nor a new one. It is simply a corollary of the basic plausibility requirement. An inference pressed by the plaintiff is not plausible if the facts he points to are precisely the result one would expect from lawful conduct in which the defendant is known to have engaged.

Not every potential lawful explanation for the defendant’s conduct renders the plaintiff’s theory implausible. Just as a plaintiff cannot proceed if his allegations are “‘merely consistent with’ a defendant’s liability,” *id.* at 1949 (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955), so a defendant is not entitled to dismissal if the facts are merely consistent with lawful conduct. And that is exactly the situation in this case. Certainly appellees could have chosen funds with higher fees for various reasons, but this speculation is far from the sort of concrete, obvious alternative explanation Braden would need to rebut in his complaint. Requiring a plaintiff to rule out every possible lawful explanation for the conduct he challenges would invert the principle that the “complaint is construed most favorably to the nonmoving party,” *Northstar Indus.*, 576 F.3d at 832, and would impose the sort of “probability requirement” at the pleading stage which *Iqbal* and *Twombly* explicitly reject. See *Iqbal*, 129 S.Ct. at 1949-50.

To recognize that the pleading standard established by Rule 8 applies uniformly in “all civil actions,” *id.* at 1953 (quoting Fed.R.Civ.P. 1), is not to ignore the significant costs of discovery in complex litigation and the attendant waste and expense that can be inflicted upon innocent parties by meritless claims. See *Twombly*, 550 U.S. at 558-60, 127 S.Ct. 1955. Here, however, we must be attendant to ERISA’s remedial purpose and evident intent to prevent through private civil litigation “misuse and mismanagement of plan assets.” *Russell*, 473 U.S. at 140 n. 8, 142 n. 9, 105

S.Ct. 3085.^{FN8}

FN8. The Secretary of Labor, who is charged with enforcing ERISA, see 29 U.S.C. § 1136(b), depends in part on private litigation to ensure compliance with the statute. To that end, the Secretary has expressed concern over the erection of “unnecessarily high pleading standards” in ERISA cases. Brief for the Secretary of Labor as Amicus Curiae Supporting Plaintiff-Appellant Braden and Requesting Reversal, at 2.

***598** Congress intended that private individuals would play an important role in enforcing ERISA’s fiduciary duties—duties which have been described as “the highest known to the law.” *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2d Cir.1982). In giving effect to this intent, we must be cognizant of the practical context of ERISA litigation. 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. Thus, while a plaintiff must offer sufficient factual allegations to show that he or she is not merely engaged in a fishing expedition or strike suit, we must also take account of their limited access to crucial information. If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer. These considerations counsel careful and holistic evaluation of an ERISA complaint’s factual allegations before concluding that they do not support a plausible inference that the plaintiff is entitled to relief.

The district court erred in dismissing Braden’s fiduciary duty claim because it misapplied the pleading standard of Rule 8, most fundamentally by failing to draw reasonable inferences in favor of the nonmoving party as is required. We conclude that Braden has pled sufficient facts to proceed with his claim for breach of fiduciary duty.

B.

ERISA and its associated regulations impose upon fiduciaries extensive and specific obligations of disclosure. See generally 29 U.S.C. §§ 1021 et seq.; 29 C.F.R. § 2520. These duties are supplemented by the

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general duty of loyalty under 29 U.S.C. § 1104(a)(1). Courts have interpreted this duty to impose additional obligations of communication and disclosure under certain circumstances. See *Kalda v. Sioux Valley Physician Partners, Inc.*, 481 F.3d 639, 644 (8th Cir.2007). Nevertheless, we are not quick to infer specific duties of disclosure under § 1104 because of the extent of the statutory and regulatory scheme. See *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 952 (8th Cir.1994); *Barrs v. Lockheed Martin Corp.*, 287 F.3d 202, 207 (1st Cir.2002).

[18] It is uncontroversial that the duty of loyalty requires fiduciaries to “deal fairly and honestly with all plan members,” *Shea v. Esensten*, 107 F.3d 625, 628 (8th Cir.1997), cert. denied, 522 U.S. 914, 118 S.Ct. 297, 139 L.Ed.2d 229 (1997), and it is a breach of this duty affirmatively to mislead a participant or beneficiary. See *Kalda*, 481 F.3d at 644; *Varity Corp. v. Howe*, 516 U.S. 489, 506, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996). Moreover, in some circumstances fiduciaries must on their own initiative “disclose any material information that could adversely affect a participant's interests.” *Kalda*, 481 F.3d at 644 (citing *Shea*, 107 F.3d at 628).

[19] Braden claims that appellees breached their duty of loyalty by failing to disclose to participants complete and accurate material information about the Plan funds and the process by which they were selected. His nondisclosure claims can be separated into two groups. One group relates to the performance of and fees charged by the Plan funds and the other to the revenue sharing payments to Merrill Lynch. With respect to the former, Braden alleges that appellees should have disclosed that (1) the funds charged higher fees than readily available alternatives designed to track the same market indices; (2) the funds underperformed readily available and more cost effective alternatives;*599 (3) all of the fees were paid from Plan assets and they consequently depleted participants' retirement savings; (4) all of the Plan funds offered retail shares despite the fact that Wal-Mart had access to institutional shares; (5) the 12b-1 fees charged by several of the funds did not benefit participants, and comparable alternatives charged no such fees; and (6) appellees did not select the Plan funds or continually evaluate them based on the reasonableness of the fees they charged. In connection with the revenue sharing payments, Braden alleges that appellees should have disclosed (1) the

amounts of the payments; (2) that they were retained by Merrill Lynch and not in turn paid to the Plan; and (3) that the payments were made in exchange for inclusion of certain funds in the Plan.

The district court dismissed these claims, concluding that ERISA does not require disclosure of revenue sharing arrangements and that the other information Braden sought was not material. We disagree.

[20] Information is material if there is a substantial likelihood that nondisclosure “would mislead a reasonable employee in the process of making an adequately informed decision regarding benefits to which she might be entitled.” *Kalda*, 481 F.3d at 644 (quoting *Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 551 (6th Cir.1999) (alteration omitted)). In the context of this case, materiality turns on the effect information would have on a reasonable participant's decisions about how to allocate his or her investments among the options in the Plan. See *Edgar v. Avaya, Inc.*, 503 F.3d 340, 350 (3d Cir.2007).

[21] Materiality is a fact intensive issue which can be decided as a matter of law only if no reasonable trier of fact could disagree. See *Pfahler v. Nat'l Latex Prods. Co.*, 517 F.3d 816, 830-31 (6th Cir.2007); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 443 (3d Cir.1996); cf. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976) (“The determination [of materiality under SEC Rule 14a-9] requires delicate assessments of the inferences a ‘reasonable shareholder’ would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact.”).

Braden's nondisclosure claim relating to fees parallels his claim for breach of fiduciary duty. He alleges, for example, that appellees had a duty to disclose to participants that Plan funds charged higher fees than comparable funds, that Wal-Mart had access to more cost effective institutional shares, and that appellees did not select or evaluate the funds on the basis of the fees they charged. A reasonable trier of fact could find that failure to disclose this information would mislead a reasonable participant in the process of making investment decisions under the Plan. See *Kalda*, 481 F.3d at 644. For example, participants might conclude in light of this information that Plan funds were not selected using appropriate criteria and

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might therefore direct their investments toward other options. Accordingly, Braden has stated a claim under § 1104. *See id.*; *Unisys*, 74 F.3d at 442-43 (finding triable issues of fact where plaintiffs alleged material misrepresentations and omissions regarding risks associated with certain investment options offered by plan).

By the same token, Braden's allegations are sufficient to state a claim that appellees breached their duty of loyalty by failing to disclose details about the revenue sharing payments. Braden alleges that those payments corrupted the fund selection process—that each fund was selected for inclusion in the Plan because it made payments to the trustee, and not because *600 it was a prudent investment. If true, this information could influence a reasonable participant in evaluating his or her options under the Plan. In *Shea v. Esensten*, we found an HMO had a duty to disclose financial incentives that would discourage doctors from making referrals for conditions covered under the HMO's plan. *See* 107 F.3d at 629. The context of that case was quite different, but the fundamental principle is applicable here. ERISA's duty of loyalty may require a fiduciary to disclose latent conflicts of interest which affect participants' ability to make informed decisions about their benefits.

The district court did not apply the materiality analysis laid out in *Shea* and *Kalda*. Instead, it simply concluded that there is no duty to disclose revenue sharing payments. While we agree that there may be no per se duty to disclose such payments, that conclusion is not dispositive here. As we have indicated, materiality is a fact and context sensitive inquiry. On this record, Braden's disclosure claims cannot be decided as a matter of law. For now, he has alleged sufficient facts to support an inference that nondisclosure of details about the fees charged by the Plan funds and the amounts of the revenue sharing payments would “mislead a reasonable [participant] in the process of making an adequately informed decision regarding” allocation of investments in the Plan. *Kalda*, 481 F.3d at 644. The district court therefore erred in dismissing Braden's nondisclosure claims.

C.

[22] Section 406(a)(1) of ERISA, 29 U.S.C. § 1106(a)(1), “supplements the fiduciary's general duty of loyalty to the plan's beneficiaries ... by categori-

cally barring certain transactions deemed ‘likely to injure the pension plan.’ ” *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 241-42, 120 S.Ct. 2180, 147 L.Ed.2d 187 (2000) (quoting *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160, 113 S.Ct. 2006, 124 L.Ed.2d 71 (1993)). Among the transactions barred by § 1106(a)(1) are those that “constitute[] a direct or indirect ... (C) furnishing of goods, services, or facilities between the plan and a party in interest; [or] (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan.” 29 U.S.C. § 1106(a)(1)(C), (D). These prohibitions are subject to a number of statutory exemptions. As relevant here, § 1106(a)(1) does not bar “[c]ontracting or making reasonable arrangements with a party in interest for ... services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefore.” 29 U.S.C. § 1108(b)(2).

Braden alleges that appellees violated these sections of the statute by causing the Plan to engage in prohibited transactions with the trustee, Merrill Lynch. As trustee and as an entity “providing services to” the Plan, Merrill Lynch was a “party in interest” within the meaning of § 1106. 29 U.S.C. § 1002(14). Braden alleges that the revenue sharing payments made by the Plan funds to Merrill Lynch were “kickbacks” in exchange for inclusion in the Plan, rather than reasonable compensation for actual services performed. Accordingly, he argues that these payments were prohibited by §§ 1106(a)(1)(C) and (D) and not exempted by § 1108(b)(2).

The district court did not directly address the application of § 1106(a)(1) to the revenue sharing payments. It concluded instead that Braden's claims failed because he had not pled facts raising a plausible inference that the payments were unreasonable in relation to the services provided by Merrill Lynch and thus had failed to show they were not exempted by § 1108. *601 This was wrong because the statutory exemptions established by § 1108 are defenses which must be proven by the defendant. *See Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir.1996), *cert. denied*, 520 U.S. 1237, 117 S.Ct. 1838, 137 L.Ed.2d 1042 (1997) (fiduciary engaging in transaction under § 1106(b) must prove applicability of exemption under § 1108(e)); *Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1215 (2d Cir.1987); *Donovan v. Cunningham*, 716 F.2d 1455, 1467-68 (5th Cir.1983),

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cert. denied, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984). Braden does not bear the burden of pleading facts showing that the revenue sharing payments were unreasonable in proportion to the services rendered and the district court erred in dismissing his claim on this basis.

[23] We conclude that Braden has stated a claim under § 1106(a)(1)(C). The complaint alleges that appellees caused the Plan to enter into an arrangement with Merrill Lynch, a party in interest, under which Merrill Lynch received undisclosed amounts of revenue sharing payments in exchange for services rendered to the Plan.^{FN9} This arrangement amounts to a “direct or indirect ... furnishing of services ... between the plan and a party in interest,” 29 U.S.C. § 1106(a)(1)(C). The facts alleged are sufficient to shift the burden to appellees to show that “no more than reasonable compensation [was] paid” for Merrill Lynch’s services. 29 U.S.C. § 1108(b)(2); *see N.Y. State Teamsters Council Health & Hosp. Fund v. Estate of DePerno*, 18 F.3d 179, 183 (2d Cir.1994) (proof of fiduciary’s employment of parties in interest “alone ... was sufficient to shift to the defendants the burden to show that the employment of [the parties in interest] was fair and reasonable under all of the circumstances”) (internal quotation marks and citation omitted); *see also Nieto v. Ecker*, 845 F.2d 868, 873-74 (9th Cir.1988).^{FN10}

FN9. We reject appellees’ argument that Braden pleaded himself out of court by alleging that Merrill Lynch performed literally no services in exchange for the revenue sharing payments. While the complaint makes such statements in some places, it also alleges that the value of Merrill Lynch’s services was “nominal.” Construing the complaint in Braden’s favor, we understand his allegation to be that the revenue sharing payments far exceeded the value of services actually performed.

FN10. Appellees argue that Braden’s allegations “put the exemption in play” and he therefore must plead sufficient facts to show that the payments were unreasonable. To the contrary, a plaintiff need not plead facts responsive to an affirmative defense before it is raised. *See, e.g., Goodman v. Praxair, Inc.*, 494 F.3d 458, 465-66 (4th Cir.2007).

Even if Braden’s allegation of unreasonableness were seen as raising the exemption for pleading purposes, that does not mean he thereby assumes the burden of proof on the issue. *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1276, at 624-25 (3d ed.2004).

[24] Appellees object that this construction of §§ 1106 and 1108 renders virtually any business between a covered plan and a service provider a prima facie “prohibited transaction.” They argue that unless a plaintiff is required to plead facts plausibly suggesting a transaction is not exempted under § 1108, ERISA fiduciaries will be forced to defend the reasonableness of every service provider transaction. Several considerations persuade us, however, that the burden properly lies with appellees to show that the revenue sharing payments were reasonable under § 1108.

[25] First, § 1106(a)(1) does not by its terms demand that a plaintiff make any allegation of unreasonableness. The exemption*602 for reasonable compensation is in a separate section of the statute, and it is a “general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.” *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45, 68 S.Ct. 822, 92 L.Ed. 1196 (1948); *cf. SEC v. Ralston Purina Co.*, 346 U.S. 119, 126, 73 S.Ct. 981, 97 L.Ed. 1494 (1953) (“Keeping in mind the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable.”). The language of the statute is plain, and it allocates the burdens of pleading and proof.

Second, our construction of the statute is in keeping with traditional principles of trust law, which inform our interpretation of ERISA. *Varity Corp.*, 516 U.S. at 496, 116 S.Ct. 1065. The transactions prohibited by § 1106 tend to be those in which “a fiduciary might be inclined to favor [a party in interest] at the expense of the plan’s beneficiaries.” *Harris Trust & Sav. Bank*, 530 U.S. at 242, 120 S.Ct. 2180. At common law, the fiduciary bears the burden of justifying such transactions. *See, e.g., Fulton Nat’l Bank v. Tate*, 363 F.2d 562, 571-72 (5th Cir.1966) (“[T]he beneficiary need only show that the fiduciary allowed him-

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self to be placed in a position where his personal interest *might* conflict with the interest of the beneficiary[, and] the law presumes that the fiduciary acted disloyally.”) (emphasis in original); *Matter of Estate of Snapp*, 502 N.W.2d 29, 34 (Iowa 1993); *Peyton v. William C. Peyton Corp.*, 7 A.2d 737, 747 (Del.1939). In short, “prohibited transactions [under § 1106(a)(1)] involve self-dealing [and the] settled law is that in such situations the burden of proof is always on the party to the self-dealing transaction to justify its fairness.” *Marshall v. Snyder*, 572 F.2d 894, 900 (2d Cir.1978).

Finally, we note that Braden could not possibly show at this stage in the litigation that the revenue sharing payments were unreasonable in proportion to the services rendered because the trust agreement between Wal-Mart and Merrill Lynch required the amounts of the payments to be kept secret. It would be perverse to require plaintiffs bringing prohibited transaction claims to plead facts that remain in the sole control of the parties who stand accused of wrongdoing. See *Lowen*, 829 F.2d at 1215 (“[B]ecause the fiduciary has a virtual monopoly of information concerning the transaction in question, it is in the best position to demonstrate the absence of self-dealing.”). Indeed, appellees maintain both that they have no duty to disclose the amounts of the revenue sharing payments and that Braden must nonetheless allege specific facts showing those amounts were unreasonable. In this context—where the ultimate issue involves “the highest [duties] known to the law,” *Donovan*, 680 F.2d at 272 n. 8—this position is untenable. We conclude, therefore, that Braden’s allegations are sufficient to state a claim under 29 U.S.C. § 1106(a)(1)(C).

Braden also alleges that the revenue sharing payments violated § 1106(a)(1)(D) because they amounted to an illicit “transfer to, or use by or for the benefit of a party in interest, of ... assets of the plan.” Up to now the parties’ arguments have focused on whether the revenue sharing payments in this case were “assets of the plan” within the meaning of § 1106(a)(1)(D). Braden contends for the first time in his reply brief, however, that regardless of whether the revenue payments themselves were plan assets, the arrangement with Merrill Lynch may constitute an “indirect ... transfer” of plan *603 assets. 29 U.S.C. § 1106(a)(1)(D). We decline to reach this question which has not been presented to the district

court and therefore remand for it to determine in the first instance whether Braden has stated a prima facie claim under § 1106(a)(1)(D).

D.

[26] The district court dismissed counts II and IV of Braden’s complaint, which respectively alleged monitoring and cofiduciary claims, because these claims were derivative of the direct claims which the court had already dismissed. It therefore did not analyze the derivative claims on their merits. The parties dispute on appeal whether the derivative claims fail regardless of the disposition of the other counts. Since “[o]rdinarily, we do not decide issues that the district court did not adjudicate,” *Daisy Mfg. Co. v. NCR Corp.*, 29 F.3d 389, 395 (8th Cir.1994), we decline to pass on the merits of the derivative claims here. We instead remand counts II and IV for the district court to consider whether those claims may proceed.

IV.

For the reasons discussed, we vacate the judgment of the district court and remand for further proceedings consistent with this opinion.

C.A.8 (Mo.),2009.

Braden v. Wal-Mart Stores, Inc.

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419 F.Supp.2d 156, 36 Employee Benefits Cas. 2953
(Cite as: 419 F.Supp.2d 156)

United States District Court,
D. Connecticut.
Lou HADDOCK, as trustee of the Flyte Tool & Dye
Company Inc. 401(k) Profit-Sharing Plan, et al.,
Plaintiffs,
v.
NATIONWIDE FINANCIAL SERVICES INC., et
al., Defendants.
No. CIV.A. 3:01CV1552(SRU).

March 7, 2006.

Background: Trustees of employer-sponsored profit-sharing retirement plans sued investment provider under Employee Retirement Income Security Act (ERISA), claiming its contractual arrangements with mutual funds or their affiliates and its retention of “revenue sharing payments” constituted breaches of its fiduciary duties and that its contracts with mutual funds and retention of revenue-sharing funds constituted prohibited transactions. Insurer moved for summary judgment.

Holdings: Amending and superseding its prior opinion, 2006 WL 463136, the District Court, Underhill, J., held that:

- (1) triable issue of fact existed with respect to investment provider's status as fiduciary;
- (2) triable issue of fact existed as to trustees' claim that challenged revenue-sharing payments constituted “plan assets” under a functional approach; and
- (3) triable issue of fact existed as to character of “service contracts” as prohibited transactions.

Motion denied.

***157** Antonio Ponvert, III, Neal A. Deyoung, Richard A. Bieder, Koskoff, Koskoff & Bieder, P.C., Bridgeport, CT, Gregory G. Jones, Grapevine, TX, Marc R. Stanley, ***158** Martin Woodward, Roger L. Mandel, Stanley, Mandel & Iola, Dallas, TX, Michael A. Stratton, Stratton Faxon, New Haven, CT, for Plaintiffs.

Brian O'Donnell, Dennis F. Kerrigan, Jr., Jessica A. Ballou, Leboeuf, Lamb, Greene & Macrae, Hartford, CT, Charles C. Platt, Wilmer, Cutler & Pickering,

New York, NY, Sam Broderick-Sokol, Wilmer Cutler Pickering Hale & Dorr, Washington, DC, for Defendants.

AMENDED MEMORANDUM OF DECISION

UNDERHILL, District Judge.

Lou Haddock, Peter Wiberg, Alan Gouse, Edward Kaplan, and Dennis Ferdon are trustees of employer-sponsored, profit-sharing retirement plans (collectively “Trustees”). The Trustees have sued Nationwide Financial Services Inc. and Nationwide Life Insurance Co. (collectively “Nationwide”) under the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1101 *et seq.*, seeking monetary damages and equitable relief. The plaintiffs claim that Nationwide's contractual arrangements with mutual funds or their affiliates (collectively “mutual funds”) and its retention of so-called revenue-sharing payments constitute breaches of Nationwide's fiduciary duties, in violation of 29 U.S.C. §§ 1104(a)(1)(A) and (B). The plaintiffs also claim that Nationwide's contracts with the mutual funds and retention of the revenue-sharing funds constitute prohibited transactions in violation of 29 U.S.C. §§ 1104 and 1106(b). Nationwide has moved for summary judgment on all claims. That motion is denied.

I. Procedural Background

The Trustees originally filed this suit in August 2001, and filed an amended complaint in September 2001. Shortly thereafter, the parties filed a Rule 26(f) Report in which they requested that the case be managed in phases. *See* Doc. # 13. The parties proposed that, during the first phase, they would pursue discovery on class certification, and the defendants would file any motions under Rule 12 or Rule 56 that were directed to the plaintiffs' individual claims. *Id.* Although the parties did not intend to conduct full merits discovery during that first phase, the plaintiffs contended that a certain amount of discovery necessary for class certification would overlap with discovery on the merits. *Id.* at 11. The parties proposed that the second phase of the case would begin after the court ruled on any Rule 12 or Rule 56 motions.

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Id. at 2.

District Judge Christopher F. Droney, to whom the case had been assigned, referred a number of pending motions to Magistrate Judge William I. Garfinkel. Judge Garfinkel conducted a conference with the parties and adopted their two-phased approach to managing discovery. In late March 2002, Judge Garfinkel denied without prejudice a motion in which Nationwide sought a limited stay of discovery. Doc. # 43. Judge Garfinkel noted that he recognized “the need for phased discovery” and directed plaintiffs’ counsel “to propound reasonable, specific further discovery tailored for preparation on the issue of class certification.” *Id.* On March 28, 2002, Judge Garfinkel ordered class certification discovery to be completed within six months of commencement. By that point, Nationwide had already filed a motion to dismiss the amended complaint (doc. # 14), and the Trustees had filed a motion for class certification (doc. # 20).

In August 2002, Judge Droney conducted a motion hearing regarding the motion to dismiss (doc. # 14) and the motion for class certification (doc. # 20). Shortly thereafter, the motion to dismiss was denied*159 without prejudice by endorsement order, but no decision was issued on the motion to certify a class.

The Trustees filed a second amended complaint in February 2003 (doc. # 64) to which Nationwide responded with an answer and counterclaims. The Trustees filed a motion to dismiss the defendants’ counterclaims in April 2003 (doc. # 85), which was later denied as moot. On May 9, 2003, Judge Droney granted a motion (doc. # 88) to extend the deadlines set forth in the operative scheduling order.

The Trustees filed a third amended complaint (doc. # 95) to which Nationwide filed an answer (doc. # 94) and asserted three counterclaims: contribution, indemnification, and breach of fiduciary duties. The Trustees filed a motion to dismiss the defendants’ counterclaims (doc. # 97).

In August 2003, Nationwide filed a motion for summary judgment (doc. # 116), challenging the legal validity of the Trustees’ theories of liability. In September 2003, the Trustees filed an amended motion for class certification (doc. # 128).

The Trustees moved to stay consideration of Nationwide’s motion for summary judgment, pending the court’s ruling on their motion for class certification. In October 2003, Nationwide moved for leave to conduct additional class certification discovery. Following a motion hearing, Judge Garfinkel denied both the Trustees’ motion to stay consideration of the summary judgment motion and Nationwide’s motion for leave to conduct additional class certification discovery.

In January 2004, the case was transferred to me. Shortly thereafter, Nationwide requested that I decide its summary judgment motion before ruling on class certification (doc. # 189). I granted that motion, and in June 2004, held oral arguments on the motion for summary judgment.

At that hearing, the Trustees’ theories regarding Nationwide’s liability differed from the theories put forth in their third amended complaint and the related briefing on the summary judgment motion. I ordered the plaintiffs to file a further amended complaint, setting forth their current theories of liability. Thereafter, the Trustees filed their fourth amended class complaint (doc. # 235), and the parties provided supplemental briefing addressed to that pleading. The operative arguments relating to Nationwide’s summary judgment motion are set forth in those three supplemental briefs. *See* Docs. # 239, 246 & 249. Additionally, in September 2005, the plaintiffs submitted a supplemental memorandum and the defendants a supplemental response in light of a recent Tenth Circuit decision. *See* Docs. # 253 & 256.

Nationwide also filed an answer to the fourth amended complaint (doc. # 242), again asserting three counterclaims: contribution, indemnification, and breach of fiduciary duties. The Trustees have requested that I treat their pending motion to dismiss as directed toward Nationwide’s most recent answer and counterclaims.

Currently pending are Nationwide’s motion for summary judgment, the Trustees’ motion to dismiss Nationwide’s counterclaims, and the Trustees’ motion for class certification. This decision addresses only the motion for summary judgment.

II. Standard of Review

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Summary judgment is appropriate when the evidence demonstrates that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). To present a “genuine” issue of material fact, there must be contradictory***160** evidence “such that a reasonable jury could return a verdict for the non-moving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In other words, summary judgment is only proper when reasonable minds could not differ regarding the import of the evidence. *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.), cert. denied, 502 U.S. 849, 112 S.Ct. 152, 116 L.Ed.2d 117 (1991).

[1] When ruling on a summary judgment motion, the court must construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the moving party. *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

In this case, as detailed above, the parties have principally conducted class certification discovery, not full merits discovery. Although the parties expected that Nationwide would file any motions under Rule 12 or Rule 56 during phase one, Rule 26(f) Report (doc. # 13), a motion for summary judgment may be premature when the parties have not conducted merits discovery.

[2] Nationwide's motion for summary judgment focuses almost exclusively on questions of law and essentially accepts the plaintiffs' version of the facts.^{FN1} The defendants do on occasion argue that the Trustees have failed to support essential elements of their claims with evidence in the record. Although such an absence would ordinarily be fatal at the summary judgment stage, because the parties have not yet conducted full discovery on the merits and because Nationwide's motion focuses largely on legal issues, rather than factual ones, I will not treat any gaps in the record as fatal to the Trustees' claims.^{FN2} Cf. *Lawrence v. Richman Group of Connecticut, LLC*, 407 F.Supp.2d 385 (D.Conn.2005) (treating defendants' motion as motion to dismiss-not motion for summary judgment-because of complicated procedural posture of the case); *Katz v. Molic*, 128

F.R.D. 35, 38 (S.D.N.Y.1989) (discussing authority of trial judge to convert a motion for summary judgment into a motion to dismiss for failure to state a claim, with or without notice to the parties).

FN1. I note that the defendants' earlier motion to dismiss (doc. # 14), in which they asserted similar legal arguments, was denied without prejudice.

FN2. Although the plaintiffs did not move for a continuance, I would have granted a Rule 56(f) motion. When a party requires additional discovery in order to oppose a motion for summary judgment, Rule 56(f) permits the court to deny or to continue the motion *sua sponte*. See *Rustin v. City of Seaside*, 1995 WL 492629, *2 (N.D.Cal. Aug.10, 1995).

III. Factual Background

Viewing the evidence in the light most favorable to the Trustees and drawing all reasonable inferences in their favor, a reasonable jury could find the following facts, which are largely undisputed.

A. Structure of Plan Investments

The plaintiffs are trustees of five employer-sponsored retirement plans (“Plans”). The Plans are participant-directed 401(k) retirement savings plans. The employers who sponsor the Plans used service providers to create the Plans and to provide the administrative services necessary to run them. Those service providers, sometimes known as Pension Plan Administrators or PPA's, persuaded the Plans to use Nationwide as their “investment providers.”

***161** Nationwide offers the Plans various investment options, including insurance products such as variable annuities. The variable annuities are fund vehicles that provide the Plans and their participants means for investing the retirement contributions.

The variable annuities include two types: group and individual. Pursuant to the group variable annuity contracts, Nationwide contracts with the Plans, while each participant holds an individual account. Pursuant to the individual variable annuity contracts, Na-

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tionwide contracts separately with each participant. The variable annuity contracts permit the Plans and participants to invest in a variety of mutual funds.

Nationwide plays a role in the selection of mutual funds that are available for investment by the Plans and participants. The process for selecting mutual funds available for investment has several steps. First, for group annuity contract-holders, Nationwide offers a selection of funds and the Plans choose a subset from among those funds to be available to their participants. The participants then make investment decisions, choosing from among that subset of funds. For individual annuity contract-holders, Nationwide offers a selection, and the participants choose to invest from among that selection.

In addition, Nationwide retains the authority to delete and substitute mutual funds from the list of available investment options “if, in the judgment of [Nationwide], further investment in the shares of a Fund should become inappropriate in view of the purposes of the Contract, [Nationwide] may substitute shares of another Fund or Fund shares already purchased or to be purchased in the future.” Nationwide Contract with the Trustee(s) of the Flyte Tool & Die Company, Inc. 401(k) Profiting-Sharing Plan Trust at ¶ 9.1, Ex. 1A to Aff. of Ronald Wyant. It appears that Nationwide’s authority at this stage may be limited to deleting and substituting mutual funds that have already been approved by the Plans (*i.e.*, the subset that the Plans have chosen) and specified in their agreements. *See id.* at ¶ 1.8 (defining the term “Fund” as “a registered investment management company (mutual fund), *specified in the Application*, in which assets of a Series will be invested”) (emphasis added).

The Plans and participants do not invest in the mutual funds directly. Rather, they invest their pension contributions and any employer-matching contributions in one of two Nationwide “variable accounts,” unit investment trusts that hold assets from multiple Plans and participants. Those variable accounts are, in turn, divided into numerous “sub-accounts.” Each sub-account corresponds to a particular investment option available under the group and individual annuity contracts. The investment options are largely mutual funds.

From among the selection of mutual funds offered by Nationwide, Plans and participants choose the mutual

funds in which to invest their pension contributions. Nationwide then allocates the funds to the appropriate sub-accounts. The sub-accounts receive allocations from multiple Plans and participants, and Nationwide purchases or sells a designated mutual fund to reflect the sub-accounts’ combined allocations by the Plans and their participants. When the mutual funds receive funds from the sub-accounts, those funds are pooled with funds from investors other than the plaintiffs.

To reflect the amounts contributed to a particular mutual fund, Nationwide allocates “accumulation units,” *i.e.*, shares, of the corresponding sub-account to the Plans and participants. The accumulation units reflect the total amount of money that the *162 Plans and participants have invested in the variable account or sub-account. The value of the accumulation units fluctuates according to the value of the mutual fund shares held within the sub-accounts.

Pursuant to the governing contractual provisions, Nationwide cancels the accumulation units as necessary to pay its fees and to pay taxes. Nationwide also transfers accumulation units for use as collateral for loans, and cancels them to purchase annuities and make cash payments at the request of Plans and participants.

B. Nationwide’s Arrangements with Mutual Funds

In the early to mid-1990’s, Nationwide was concerned about the competitiveness of its pricing of certain annuity contracts. Accordingly, Nationwide investigated and ultimately implemented a system under which mutual funds make payments to it based on a percentage of the assets that Plans and participants invested in the mutual funds through Nationwide. Nationwide now refers to that source of income as “service contract payments” or “competitive pricing,” although Nationwide previously used language similar to that adopted by the plaintiffs in this case: “mutual fund revenue” and “sharing.”

The mutual funds have contracted with various service providers for the latter to provide investment, administrative, and other services. Some of those service providers are affiliated with the mutual funds. Some of those mutual fund affiliates have in turn contracted with Nationwide. Nationwide’s contracts with the mutual funds are fashioned as “service con-

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tracts.”

Although Nationwide contends that it contracted with the mutual funds to provide services to the funds, a fact-finder viewing the evidence in the light most favorable to the Trustees could conclude that the contracts were a guise for making payments to Nationwide or that Nationwide provided only nominal services and that the payments were not in consideration for those services. Prior to the implementation of the so-called service contracts, Nationwide's internal documents do not refer to services or service contracts; rather, they discuss generating additional revenue from the mutual funds or encouraging the mutual funds to “share” their revenue with Nationwide. For example, in one internal memorandum, dated April 4, 1995, “discussion issues” for an upcoming meeting included:

1. Status of mutual fund negotiations

a) Funds that have agreed to share

b) Funds that have refused to share

c) Funds still in negotiation

2. What is the strategy for mutual funds that refuse to share?

a) Current funds

b) New Funds

Ex. O to Appendix to Am. Motion to Certify Class.

Although the contracts have been dubbed service contracts, a reasonable fact-finder could infer that Nationwide does not perform additional services in consideration for payments under the contracts. Rather, pursuant to the service contracts, Nationwide provides mutual funds the same services that it had historically provided to the Plans and PPA's as a necessary part of its business and in exchange for payment from the Plans and PPA's. The language of the contracts supports that inference. For example, the Service Agreement between Nationwide and the Janus Service Corporation provides in pertinent part:

WHEREAS, [Nationwide] provides administrative

services to the owners of certain variable annuity contracts (the “Contracts”) issued by Nationwide Life Insurance Company (“Nationwide”) *163 through certain Nationwide separate accounts (the “Variable Accounts”) ...; and

WHEREAS, the Funds will be included as underlying mutual fund options for the Contracts issued by Nationwide through the Variable Accounts pursuant to a Fund Participation Agreement ... between Janus, on behalf of the Funds, and Nationwide; and

WHEREAS, Janus recognizes substantial savings of administrative expenses as a result of [Nationwide] performing certain administrative services such as significant reductions is [sic] postage expense and participant communications and recordkeeping, by virtue of maintaining an unallocated account for the Plans rather than multiple accounts for individual Plan participants (the “Services”) on behalf of the Funds

Ex. 21 to Decl. of M. Bieter in Supp. of Def. Opp. to Pl. First Am. Motion to Certify Class.

The amounts of the payments to Nationwide were based on how much the Plans and participants invested in the mutual funds. Nationwide has disclosed to the Plans and participants the fact that it receives payments from mutual funds.

In sum, viewing the evidence in the light most favorable to the Trustees, a reasonable jury could find that the purported service contracts were a means for Nationwide to collect payments from mutual funds in exchange for offering the mutual funds as investment options to the Plans and participants.

IV. Discussion

The Trustees allege that Nationwide engaged in prohibited transactions in violation of 29 U.S.C. § 1106(b)^{FN3} and that the defendants' conduct breached the general fiduciary standards of loyalty and care due under ERISA, 29 U.S.C. §§ 1104(a)(1)(A) and (B).^{FN4}

FN3. 29 U.S.C. § 1106(b) provides in pertinent part:

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Transactions between plan and fiduciary. A fiduciary with respect to a plan shall not-(1) deal with the assets of the plan in his own interest or for his own account ... [or] (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

FN4. 29 U.S.C. §§ 1104(a)(1)(A) and (B) provide in pertinent part:

[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) 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.

The Trustees present two theories of liability to support their allegations. First, they propose a functional approach to defining ERISA “plan assets” and argue that, under that approach, the payments at issue constitute plan assets that are being retained by Nationwide in violation of ERISA. Second, the Trustees argue that Nationwide violates ERISA by “generat[ing] the revenue-sharing payments by agreeing with mutual fund families that it will offer their funds in its variable accounts and that, in return, the mutual fund families will pay to Nationwide a percentage of the Plans’ investments in their funds.” Pl. Supp. Response (doc. # 246) at 1. In other words, the Trustees contend that Nationwide engages in a *quid pro quo* arrangement with the mutual funds, agreeing to include their funds as investment *164 options for the Plans in exchange for the revenue-sharing payments.

Nationwide disputes the characterization of the challenged payments as “plan assets” and the extent, if any, of its fiduciary duties.

I conclude that the Trustees have raised triable issues of fact with respect to Nationwide’s status as a fiduciary, their claim that the challenged payments constitute “plan assets” under a functional approach, and the character of the so-called service contracts as prohibited transactions. Accordingly, I deny Nationwide’s motion for summary judgment.

A. Is Nationwide an ERISA Fiduciary with Respect to the Plans?

“In every case charging breach of ERISA fiduciary duty ... the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary’s interest, but whether the person was acting as a fiduciary (that is, was performing a fiduciary function).” *Pegram v. Herdrich*, 530 U.S. 211, 226, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000).

The Trustees’ claims hinge on whether Nationwide is an ERISA fiduciary with respect to the Plans, and if so, whether the challenged conduct was performed when Nationwide was acting as a fiduciary. Nationwide argues that it is not a fiduciary or, even if it were, that its fiduciary function is limited to its authority or control over the accumulation units. Def. Supp. Reply Memo. (doc. # 249) at 4-9. The parties agree that Nationwide is not a fiduciary for all purposes.

Under ERISA, to be a plan’s fiduciary, a person or entity must be acting in the capacity of the plan’s manager, financial advisor, or administrator. 29 U.S.C. § 1002(21)(A)(i)-(iii). *See also Pegram*, 530 U.S. at 222, 120 S.Ct. 2143. Specifically, the statute sets forth that a person is a fiduciary with respect to a plan *to the extent* that:

(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other

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property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A)(i)-(iii).

[3] Congress intended the term “fiduciary” to be “broadly construed.” *Blatt v. Marshall & Lassman*, 812 F.2d 810, 812 (2d Cir.1987) (citing Congressional Record). Formal titles are not dispositive of fiduciary status; rather, courts use a functional test in determining whether an individual or entity is an ERISA fiduciary, and if so, to what extent. *Id.* See also *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 262, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) (“ERISA ... defines ‘fiduciary’ not in terms of formal trusteeship, but in functional terms of control and authority over the plan.”). Under the functional approach, the court considers whether the entity has performed one or more of the roles described in 29 U.S.C. § 1002(21)(A). “[F]iduciary status exists with respect to any activity enumerated in the statute over which the entity exercises discretion or control.” *Blatt*, 812 F.2d at 812.

[4] Courts have focused on the differences between ERISA fiduciaries and common law trustees, emphasizing the limiting effect of the statutory phrase “to the extent.” See *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1259 *165 (2d Cir.1987) (“[A] person may be an ERISA fiduciary with respect to certain matters but not others, for he has that status only ‘to the extent’ that he has or exercises the described authority or responsibility.”). See also *Harris Trust and Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 302 F.3d 18, 28 (2d Cir.2002) (same). In short, courts construing ERISA have held that an entity can be a fiduciary with respect to a plan for some purposes, but not others. See, e.g., *Pegram*, 530 U.S. at 225, 120 S.Ct. 2143 (comparing a common law trustee, who may only wear his “fiduciary hat” when taking action that affects a beneficiary, with an ERISA fiduciary who “may wear different hats”).

[5] The Trustees have argued that once an entity's fiduciary status is established based on its conduct with respect to particular assets, all conduct related to those assets is subject to a fiduciary duty. Pl. Supp. Response (doc. # 246) at 13. Their argument is not grounded in the case law construing ERISA. Those

decisions hold consistently that fiduciary duties are linked to actions, not particular assets. “Fiduciary duty and prohibited transaction rules apply only to decisions by an [entity] acting in its fiduciary capacity.” *Flanigan v. General Elec. Co.*, 242 F.3d 78, 87 (2d Cir.2001). In *Flanigan*, the Second Circuit held that, although an employer was an ERISA fiduciary for some purposes, its decision to spin off a division along with the division's pension plan was a corporate business decision, not one of a plan administrator, and thus did not trigger general fiduciary duties. *Id.* at 88.

The Trustees have produced evidence that would permit a reasonable fact-finder to conclude that Nationwide is a fiduciary to the extent it exercises authority or control over the disposition of retirement contributions that are represented by the accumulation units (shares) in the variable accounts. Investment in mutual funds is one method of disposition of those plan assets, and Nationwide exercises some control over the selection and offering of particular mutual funds as investment options for the Plans and participants.^{FN5} Cf. *Harris Trust and Savings Bank*, 302 F.3d at 28 (concluding that “the ‘management or disposition’ language in ERISA refers to the common transaction in dealing with a pool of assets: selecting investments”).

FN5. Nationwide may not be a fiduciary with respect to the individual contract holders because it may not have authority to change their investment options. See Def. Memo. Supp. Motion to Dismiss (doc. # 15) at 12 (arguing that none of the individual annuity contracts contain the share substitution clause).

Although Nationwide's authority or control over the disposition of plan assets is indirect, the Second Circuit has considered other attenuated actions sufficient “control over plan assets” to deem the actor an ERISA fiduciary. See *Blatt*, 812 F.2d at 813 (holding that accounting firm was an ERISA fiduciary because its refusal to sign and deliver to a former employee a form required for him to receive a distribution from the plan was an exercise of actual control over the disposition of plan assets). Cf. *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir.1988) (holding that a high-ranking union representative who used his “considerable influence” over local unions to direct them

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to choose a particular dental plan was an ERISA fiduciary because of his exercise of authority or control over the disposition of plan assets); *Stanton v. Shearson/Lehman American Express, Inc.*, 631 F.Supp. 100, 105 (N.D.Ga.1986) (holding that a brokerage firm acts as an ERISA fiduciary “when it exercises authority or control over the broker assigned to the ERISA account; since *166 the broker's employment respects the disposition of ERISA assets, control over the broker is control respecting the disposition of those assets”). Furthermore, the Second Circuit has noted that “[a]n entity need not have absolute discretion with respect to a benefit plan in order to be considered a fiduciary.” *Blatt*, 812 F.2d at 812.

[6] Viewing the evidence in the light most favorable to the Trustees, a reasonable jury could conclude that Nationwide exercises authority or control respecting disposition of plan assets by controlling which mutual funds are available investment options for the Plans and participants. Although Nationwide does not invest the pension contributions in particular mutual funds, Nationwide does exercise some control over the selection of mutual funds that are available for the Plans' and participants' investments.^{FN6} Cf. Department of Labor (“DOL”) Advisory Opinion 97-16A, 1997 WL 277979 (“It is the view of the Department that a person would not be exercising discretionary authority or control over the management of a plan or its assets solely as a result of deleting or substituting a fund from a program of investment options and services offered to plans, *provided that the appropriate plan fiduciary in fact makes the decision to accept or reject the change.*”) (emphasis added); DOL Advisory Opinion 97-15A, 1997 WL 277980 (noting that bank serving as trustee to ERISA plans may be exercising discretionary authority or control to cause plans to invest in mutual funds because it reserved the right to add or remove mutual funds families available for plans' investment).

FN6. The fact that Nationwide's control may be limited to deleting and substituting mutual funds from a list of funds approved by the Plans does not defeat the plaintiffs' claims. For example, if Nationwide removed as investment options all mutual funds that refused to share revenue with it, only those mutual funds that had agreed to make revenue-sharing payments would be available to the Plans and participants. Under those cir-

cumstances, which are consistent with the allegations of the fourth amended class complaint, there is a genuine issue whether Nationwide was exercising control or authority over the disposition of plan assets even if its control or authority was limited to deleting and substituting funds that were initially approved by the Plans.

Accordingly, Nationwide may be a fiduciary to the extent that it exercises authority or control over plan assets by determining and altering which mutual funds are available for the Plans' and participants' investments.

The Trustees have argued that Nationwide is also a fiduciary because it exercises authority or control over the accumulation units by transferring them for use as collateral for loans and by canceling them to pay its fees, to pay taxes, to transfer investments from one mutual fund to another, to pay loans, to purchase annuities, and to make cash payments. Pl. Supp. Response (doc. # 246) at 4. The Trustees point to the language of 29 U.S.C. § 1002(21)(A)(i) and emphasize that an entity may be a fiduciary because it exercises *any* authority or control over the disposition of plan assets, regardless of whether such authority or control is *discretionary*. *Id.* at 6-11.

Nationwide's actions with respect to the transfer or cancellation of accumulation units are governed by specific contractual provisions or requests made by the Plans and participants. Thus, it appears that Nationwide's resulting ministerial acts and its custody of the accumulation units may not amount to “authority or control ... over plan assets.” See, e.g., *Beddall v. State Street Bank and Trust Co.*, 137 F.3d 12, 18 (1st Cir.1998) (reasoning that “the mere exercise of physical control or the *167 performance of mechanical administrative tasks generally is insufficient to confer fiduciary status”). The Trustees attempt to distinguish that decision on the ground that the court did not adequately consider the distinction between: (a) exercising *discretionary* authority or discretionary control respecting plan management, and (b) exercising *any* authority or control respecting management or disposition of plan assets, as set forth in section 1002(21)(A)(i). Several courts have glossed over that distinction and have considered only whether a defendant exercised discretionary control, not whether the defendant exercised any control over plan assets.

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Coldesina v. Estate of Simper, 407 F.3d 1126, 1132 n. 1 (10th Cir.2005) (noting that such an approach is unpersuasive and cannot be reconciled with the clear statutory language).

It is not necessary for me to decide, however, whether Nationwide's treatment of the accumulation units gives rise to functional fiduciary status under 29 U.S.C. § 1002(21)(A)(i). The Trustees' claims regarding the contractual arrangements with mutual funds do not relate to Nationwide's transfer or cancellation of accumulation units. As discussed above, an entity only owes a fiduciary duty to the extent that it exercises the control or authority described in section 1002(21)(A)(i). Because the conduct at issue in the present action does not relate to the treatment of accumulation units, whether Nationwide is a fiduciary to the extent that it transfers or cancels those units is irrelevant to the Trustees' claims.

B. Are the Revenue-Sharing Payments "Plan Assets"?

Because the Trustees have raised triable issues of fact concerning Nationwide's status as a fiduciary, it is necessary to consider whether they have also raised triable issues concerning whether Nationwide's conduct violates ERISA. ERISA prohibits plan fiduciaries from "deal[ing] with assets of the plan in [their] own interest or for [their] own account" or "receiving any consideration for [their] own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." 29 U.S.C. §§ 1106(b)(1) & (3). Consequently, if Nationwide is a fiduciary, the conduct at issue only violates section 1106(b) if it involves "assets of the plan."

The parties have focused their dispute in large part on defining ERISA "plan assets" and determining whether the payments made by mutual funds to Nationwide constitute plan assets. The Trustees argue that a functional approach should be used and, applying that approach, conclude that the revenue-sharing payments are plan assets retained by Nationwide in violation of ERISA.

ERISA provides no explicit definition of "plan assets." See *Acosta v. Pacific Enterprises*, 950 F.2d 611, 620 (9th Cir.1991). No regulation or case law provides a definition of "plan assets" that answers

whether fees, arguably received in exchange for services provided, that are paid to an ERISA fiduciary in connection with its fiduciary functions and that may be at the expense of a plan, constitute plan assets.

The statute does provide some guidance to courts considering whether investments are "the assets of [a] plan":

In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of such plan shall be deemed to include such security but shall not, solely by reason of such investment, be deemed to *168 include any assets of such investment company.

29 U.S.C. § 1101(b)(1).

With respect to participant contributions and plan investments in other entities, DOL regulations set forth rules for determining what constitutes "plan assets." The regulations provide that "the assets of the plan include amounts (other than union dues) that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his wages by an employer, for contribution to the plan" 29 C.F.R. § 2510.3-102(a). Concerning plan investments, "[g]enerally, when a plan invests in another entity, the plan's assets include its investment, but do not, solely by reason of such investment, include any of the underlying assets of the entity" 29 C.F.R. § 2510.3-101(a)(2).

When determining whether items not covered by the statute or regulations are "plan assets" under ERISA, courts have used two approaches: (1) a documentary test, focusing on the documents governing the plan and the relationships between the parties; and (2) a functional test, focusing on whether the item in question may be used to benefit the fiduciary at the expense of plan participants or beneficiaries. See *Metzler v. Solidarity of Labor Organizations Health & Welfare Fund*, 1998 WL 477964, *5 (S.D.N.Y. Aug.14, 1998), *aff'd sub nom. Herman v. Goldstein*, 224 F.3d 128 (2d Cir.2000).

The parties agree that the assets of the mutual funds from which the revenue-sharing payments are made do not constitute ERISA plan assets as a matter of law, 29 U.S.C. § 1101(b)(1), and there are no Plan

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documents that suggest that the mutual fund payments are plan assets. The Trustees, however, rely on cases that have used a functional approach to defining “plan assets” and propose a three-factor functional test for defining ERISA plan assets to argue that the payments to Nationwide constitute such assets.

In short, the Trustees argue that the revenue-sharing payments constitute ERISA plan assets under their functional approach because: (1) they would not have been made but for the Plans’ investments through Nationwide, (2) Nationwide did not contract with the Plan to receive the payments despite the opportunity to do so, and (3) the payments could be used for the benefit of the Plans and the participants. Pl. Memo. Opp. Summ. J. (doc # 205) at 15.^{FN7} The plaintiffs cite to no decision that proposes or uses such a test, and I decline to adopt it.

FN7. In their most recent memorandum in response to Nationwide’s motion for summary judgment, the plaintiffs cite to their earlier opposition brief, and appear to adhere to the formulation of the functional approach that is set forth there. See Pl. Supp. Response (doc. # 246) (citing Pl. Memo. Opp. Summ. J. (doc # 205)).

The plaintiffs appear to derive the proposed factors from *Acosta*, in which the Ninth Circuit discussed—but did not decide—whether a list of participants/shareholders should be treated as a plan asset under ERISA. In *Acosta*, the Ninth Circuit refused to cabin the term “assets of the plan” as encompassing only financial contributions received by the plan administrators, but did not set forth a three-part test. 950 F.2d at 620. The Ninth Circuit referred to the need for a more “functional approach,” and mentioned that in determining “whether a particular item constitutes an ‘asset of the plan,’ it is necessary to determine whether the item in question may be used to the benefit (financial or otherwise) of the fiduciary at the expense of plan participants or beneficiaries.” *Id.* The court ultimately held that it was not necessary to determine whether the list *169 constituted a plan asset and thus never applied the approach. *Id.*

The Trustees also cite *Patelco Credit Union v. Sahni*, 262 F.3d 897, 902 (9th Cir.2001), and *Bannistor v. Ullman*, 287 F.3d 394 (5th Cir.2002), in support of

their argument that the payments to Nationwide should be considered plan assets under a functional approach. Neither the reasoning nor the facts of those cases suggest the applicability of a three-part functional test for defining plan assets.

In *Patelco*, the Ninth Circuit relied on *Acosta*, including its instruction that “plan assets” as used in 29 U.S.C. § 1106(b) should be broadly construed. The court reasoned that benefits checks that may be used to benefit the fiduciary at the expense of plan participants constitute “assets of the plan.” *Patelco*, 262 F.3d at 908-09. In that case, the defendant—an ERISA fiduciary who managed a health and medical benefits plan—argued that an insurer’s checks for stop-loss benefits were not plan assets. The defendant relied on DOL Advisory Opinion 92-02A, 1992 WL 15175, for the proposition that a stop-loss policy was intended to protect the employer not its employees and thus could not be a plan asset. *Id.* at 908. The court rejected the argument, holding that the benefits checks were plan assets because “the stop-loss policy protects employees by ensuring that benefits will be available even in the case of catastrophic losses.” *Id.* at 908. The court held that the defendant, who received the two benefits checks directly from the insurer, deposited them, but failed to account for them, violated 29 U.S.C. § 1106(b)(1). *Id.* at 911.

In *Bannistor*, the Fifth Circuit noted that ERISA does not define “plan assets,” but relied on DOL regulations and related case law to hold that the term “plan assets” includes “employee contributions that are withheld from employees’ paychecks and for deposit into their benefit plans, even though the contributions have not actually been delivered to the benefit plan.” *Bannistor*, 287 F.3d at 402 (citing 29 C.F.R. § 2510.3-102).

[7] Because of Congress’ remedial concerns, the Second Circuit has held that section 1106(b) must be “broadly construed ... and that liability be imposed even where there is no taint of scandal, no hint of self-dealing, no trace of bad faith.” *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1213 (2d Cir.1987) (internal quotations and citations omitted). Following that guidance, I conclude that a functional approach to defining “plan assets” is appropriate. See *Metzler*, 1998 WL 477964 at *7 (concluding that fees retained by fiduciary were plan assets under a functional perspective). The three-part test proposed by

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the Trustees, however, is overly broad.

First, as discussed above, an entity that is a fiduciary under ERISA, 29 U.S.C. § 1002(21)(A)(i)-(iii), is not always subject to the statute's general fiduciary duties. *See, e.g., Pegram*, 530 U.S. at 225, 120 S.Ct. 2143. It is easy to conceive of payments that Nationwide would not receive but for a Plan's investments, yet not while wearing its "fiduciary hat." For example, if Nationwide offered term life insurance to all Plan participants, the insurance premiums paid to Nationwide by those accepting the offer would not have been made but for the Plans' investments through Nationwide. Such payments, however, would not implicate Nationwide's role as an ERISA fiduciary. A functional approach, thus, must take into account whether the entity receives payments as a result of its fiduciary function rather than whether payments would not be made but for a Plan's investment.

***170** Second, the question whether a fiduciary contracted with a Plan to receive benefits does not illuminate whether the benefits at issue are plan assets, although it may be relevant to whether the fiduciary is entitled to their receipt. Accordingly, it is not necessary to consider such a contract as part of a functional test for defining plan assets.

Third, courts that have referred to or applied a functional approach have considered whether the items in question could be used to benefit the fiduciary *at the expense of* plan participants or beneficiaries. *See Acosta*, 950 F.2d at 620; *Metzler*, 1998 WL 477964 at *7. The third prong of the plaintiffs' test, however, asks merely whether the payments could be used for the benefit of the Plans and the participants, not whether the payments are made at their expense. Theoretically, any money received by Nationwide could be used to benefit the Plans or participants, but an ERISA problem arises only if that money is received by Nationwide at the expense of the Plans or participants.

[8] Although I reject the Trustees' proposed three-part functional approach for defining plan assets, an alternative functional approach appears consistent with both the reasoning of decisions that embrace a broad interpretation of "plan assets," and Congress' remedial purposes in adopting ERISA. I conclude that "plan assets" include items a defendant holds or receives: (1) as a result of its status as a fiduciary or its

exercise of fiduciary discretion or authority, and (2) at the expense of plan participants or beneficiaries. This two-pronged test conforms to the approach outlined by the Ninth Circuit in *Acosta*, where the first prong (*i.e.*, the relationship between the item held and the entity's fiduciary status) was implied, and the second prong was explicit.

[9] Tested against this functional approach, the Trustees' claims survive Nationwide's motion for summary judgment. The plaintiffs have alleged that Nationwide receives payments from mutual funds in exchange for offering the funds as an investment option to the Plans and participants, *i.e.*, as a result of its fiduciary status or function. As discussed above, there is evidence in the record in support of that allegation.

In addition, the Trustees have alleged that the payments were made at the expense of the Plan participants or beneficiaries. Specifically, the fourth amended complaint alleges that the mutual funds set the fees they charged Plans and participants "to cover not only the fees they would have normally charged, but also the amount of the revenue-sharing payments they had to make to Nationwide." Fourth Am. Compl. (doc. # 235) at 8, ¶ 31.

The plaintiffs have not pointed to any record evidence to support that allegation—a requirement under the second prong of the functional approach set forth above. In Nationwide's class certification briefing, the defendants point to evidence that the mutual fund charges actually decreased after Nationwide entered into the service contracts with the funds. *See* Def. Opp. to Class Certif. (doc. # 179-1) (citing Ex. 20(B)). Ordinarily the absence of evidence supporting an essential element of plaintiffs' claim would be fatal at summary judgment. *See Celotex*, 477 U.S. at 333 n. 3, 106 S.Ct. 2548 (noting that "[o]nce the moving party has attacked whatever record evidence—if any—the nonmoving party purports to rely upon, the burden of production shifts to the nonmoving party, who must either (1) rehabilitate the evidence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit*171 an affidavit explaining why further discovery is necessary as provided in Rule 56(f)"). Nevertheless, because Nationwide's motion is almost entirely based on questions of law, and because I have adopted a

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functional approach different than that proposed by the Trustees, their claim that the revenue payments constitute plan assets survives the present motion.

Moreover, the Trustees' claims are not entirely dependent on their theory that the challenged payments are plan assets. If Nationwide is an ERISA fiduciary, it may not engage in prohibited transactions even if the payments Nationwide receives are not themselves plan assets.

C. Did Nationwide Engage in a Prohibited Transaction?

ERISA bars fiduciaries from engaging in certain transactions, prohibiting a fiduciary from receiving "any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving assets of the plan." 29 U.S.C. § 1106(b)(3).

Violations of section 1106(b)(3) must relate to transactions involving assets of the plan, although the consideration received by the fiduciary need not itself constitute plan assets. The transactions at issue here are Nationwide's contractual arrangements with the mutual funds. Those contracts involve the plaintiffs' shares in Nationwide variable accounts-indisputably plan assets-or their proxies, the so-called accumulation units, because they are premised on the offering of the mutual funds as investment options for those plan assets.

[10] Viewing the evidence in the light most favorable to the Trustees, a reasonable fact-finder could conclude that Nationwide received consideration (*i.e.*, the revenue-sharing payments) from a party dealing with the Plans (*i.e.*, the mutual funds whose shares are available for investment by the Plans and participants) in connection with a transaction (*i.e.*, the so-called service contracts) involving assets of the plan (*i.e.*, the shares of the variable accounts, represented by the accumulation units). Several DOL Advisory Opinions have addressed similar-though not identical-facts, and their conclusions lend support to the Trustees' claim. In Advisory Opinion 2003-09A, the DOL considered whether a trust company that provided trustee and non-fiduciary services to ERISA plans and received 12b-1 or subtransfer fees from mutual funds for services in connection with investment in the mutual funds by those plans was in viola-

tion of 29 U.S.C. §§ 1106(b)(1) or 1106(b)(3). The DOL concluded that it was not. The DOL specifically noted that the trustee company "has no role with respect to the selection of investment options beyond requiring ... that at least one Proprietary Fund is offered ... for investment" and assumed that the fees were, in fact, for services. Similarly, Advisory Opinions 97-15A and 97-16A assumed that the payments were in consideration, at least in part, for actual services. Here the Trustees have raised a triable issue concerning whether Nationwide in fact performed services in consideration for the payments.

The existence of genuine issues of fact preclude me from granting Nationwide's motion for summary judgment relating to the plaintiffs' claims that Nationwide's "service contracts" constitute prohibited transactions in violation of section 1106(b)(3).

V. Conclusion

A rational fact-finder, viewing the evidence in the light most favorable to the Trustees, could find that Nationwide's ability to select, remove, and replace the mutual funds available for the Plans' investment constituted discretionary authority or discretionary control respecting disposition *172 of plan assets, and thus that Nationwide is an ERISA fiduciary. The Trustees have also raised triable issues concerning whether the challenged payments constitute plan assets under a functional approach and whether, even if the revenue-sharing payments do not constitute plan assets, Nationwide's service contracts constitute prohibited transactions. Accordingly, Nationwide's motion for summary judgment (doc. # 116) is DENIED.

It is so ordered.

D.Conn.,2006.
Haddock v. Nationwide Financial Services, Inc.
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(Cite as: 556 F.3d 575)

United States Court of Appeals,
Seventh Circuit.
Dennis HECKER, et al., Plaintiffs-Appellants,
v.
DEERE & COMPANY, Fidelity Management Trust
Co., and Fidelity Management & Research Co., De-
fendants-Appellees.
Nos. 07-3605, 08-1224.

Argued Sept. 4, 2008.
Decided Feb. 12, 2009.

Background: Employees brought class action under Employee Retirement and Income Security Act (ERISA) against employer, trustee and investment advisor, alleging breach of fiduciary duties. The United States District Court for the Western District of Wisconsin, John C. Shabaz, Senior District Judge, 496 F.Supp.2d 967, dismissed action. Employees appealed.

Holdings: The Court of Appeals, Wood, Circuit Judge, held that:

- (1) district court did not improperly consider documents outside pleadings;
- (2) trustee and investment advisor were not “functional fiduciaries” of employees’ benefit plans;
- (3) employer did not improperly fail to disclose trustee’s receipt of funds from advisor;
- (4) employer did not select investment options with excessive fees;
- (5) safe harbor defense was applicable;
- (6) district court properly denied employees’ motion to alter or amend judgment; and
- (7) district court properly awarded costs to defendants.

Affirmed.

*577 Elizabeth J. Hubertz, Attorney, Washington University School of Law, Jerome J. Schlichter, Attorney (argued), Schlichter, Bogard & Denton, St. Louis, MO, Jennifer L. Amundsen, Attorney, Solheim, Billing & Grimmer, Madison, WI, for Plaintiffs-Appellants.

Charles C. Jackson, Attorney (argued), Sari M. Ala-

muddin, James E. Bayles, Jr., Morgan, Lewis & Bockius, Chicago, IL, Robert N. Eccles, Attorney, Walter E. Dellinger, Attorney (argued), O’Melveny & Meyers, Washington, DC, James Fleckner, Attorney Goodwin Proctor, Boston, MA, for Defendants-Appellees.

Thomas Leon Cubbage, III, Attorney, Covington & Burling, Washington, DC, Robin Springberg Parry, Attorney (argued), Dept. of Labor Washington, DC, Amicus Curiae.

Before MANION, WOOD, and TINDER, Circuit Judges.

WOOD, Circuit Judge.

Even before the stock market began its precipitous fall in early October 2008, litigation over alleged mismanagement of defined contribution pension plans was becoming common. This type of litigation received a boost when, in *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 128 S.Ct. 1020, 169 L.Ed.2d 847 (2008), the Supreme Court held that “a participant in a defined contribution pension plan [may] sue a fiduciary whose alleged misconduct impaired the value of plan assets in the participant’s individual account.” 128 S.Ct. at 1022. Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1132(a), provides the basis for such an action.

The present case requires us to look further into two questions: first, how *578 broadly does the concept of actionable misconduct sweep, and second, does someone who serves as the manager and investment advisor for a 401(k) plan, or for some of the plan’s investment options, owe fiduciary duties to the sponsor’s employees. These questions arise in a lawsuit brought by some employees of Deere & Company, which sponsors two 401(k) plans relevant to this case. Fidelity Management Trust Company (“Fidelity Trust”) is the directed and recordkeeper for the Deere plans; it also manages two of the investment vehicles available to plan participants. Fidelity Management & Research Company (“Fidelity Research”) is the investment advisor for the mutual funds offered as

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investment options under Deere's plans.

Named plaintiffs Dennis Hecker, Jonna Duane, and Janice Riggins (“the Hecker group”), seeking to sue both on their own behalf and for a class of plan participants, asserted in their second amended complaint (“Complaint”) that Deere violated its fiduciary duty under ERISA by providing investment options that required the payment of excessive fees and costs and by failing adequately to disclose the fee structure to plan participants. The Hecker group also sued Fidelity Trust and Fidelity Research on the theory that they were functional fiduciaries for the class and thus they too were liable under § 1132(a). All three defendants moved to dismiss for failure to state a claim, see FED.R.CIV.P. 12(b)(6). The district court concluded that the case could be resolved at that preliminary stage, granted the motions to dismiss without resolving the class certification motion, and entered judgment for the defendants. Later, the court also denied plaintiffs’ motion under Rule 59(e). We conclude that the district court correctly found that plaintiffs failed to state a claim against any of the defendants, and we therefore affirm the district court’s judgment.

I

A

In 1990, Deere engaged Fidelity Trust to serve as trustee of two of the 401(k) plans (“the Plans”) it offers to its employees. The Plans, everyone agrees, are subject to ERISA, and the three named plaintiffs are participants in them. Under its arrangement with Deere, Fidelity Trust was required to advise Deere on what investments to include in the Plans, to administer the participants’ accounts, and to keep records for the Plans.

Each Plan offered a generous choice of investment options for Plan participants: the menu included 23 different Fidelity mutual funds, two investment funds managed by Fidelity Trust, a fund devoted to Deere’s stock, and a Fidelity-operated facility called BrokerageLink, which gave participants access to some 2,500 additional funds managed by different companies. Fidelity Research advised the Fidelity mutual funds offered by the Plans. Each plan participant decided for herself where to put her 401(k) dollars; the only limitation was that the investment vehicle had to

be one offered by the Plan. Each fund included within the Plans charged a fee, calculated as a percentage of assets the investor placed with it. The Hecker group alleges that Fidelity Research shared its revenue, which it earned from the mutual fund fees, with Fidelity Trust. Fidelity Trust in turn compensated itself through those shared fees, rather than through a direct charge to Deere for its services as trustee. As the Hecker group sees it, this led to a serious-in fact, impermissible-lack of transparency in the fee structure, because the mutual fund fees were devoted not only to the (proper) cost of managing the funds, but also to the (improper) cost of administering Deere’s 401(k) plans.

***579** Distressed primarily by the fee levels, the Hecker group filed this suit individually and on behalf of a class against Deere, Fidelity Trust, and Fidelity Research, asserting that all three defendants had breached their duties under ERISA. The second amended complaint is the version on which the district court based its ruling. Paragraph 11 summarizes the plaintiffs’ theory as follows: “... the fees and expenses paid by the Plans, and thus borne by Plan participants, were and are unreasonable and excessive; not incurred solely for the benefit of the Plans and the Plans’ participants; and undisclosed to participants. By subjecting the Plans and the participants to these excessive fees and expenses, and by other conduct set forth below, the Defendants violated their fiduciary obligations under ERISA.”

As we have already noted, Deere appointed Fidelity Trust to be trustee of the Plans. Fidelity Trust also performed administrative tasks for the Plans and managed two of the investment options available to the participants. Deere and Fidelity Trust agreed that Deere would limit the selections available to Deere’s employees to Fidelity funds, with the exception of the Deere Common Stock Fund and some other minor guaranteed investment contracts. Fidelity Research served as the investment advisor for 23 out of the 26 investment options in the Plans. None of the Fidelity Research funds operated exclusively for Deere employees; all were available on the open market for the same fee. The Complaint alleges that Fidelity Research “maintains an active Revenue Sharing program, charging more for its services than it expects to keep in order to have additional monies with which to pay its affiliates and business partners.” Those charges, plaintiffs allege, were excessive and unrea-

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sonable. Deere, in their view, failed to monitor Fidelity Trust's actions properly and failed to keep the participants properly informed.

A few more details about the Plans themselves are helpful. One plan was called the Savings & Investment Plan, or SIP, and the other was the Tax Deferred Savings Plan, or TDS. For all practical purposes, they operated the same way. Qualified employees could contribute up to a certain amount of their pre-tax earnings, and Deere would match those contributions in varying percentages up to 6%. Deere also made profit-sharing contributions on behalf of some participants. All participants were fully vested from the start with respect to their own contributions and were vested after three years' service with respect to the Deere contribution. By the end of 2005, the SIP had more than \$2 billion in assets; more than \$1.3 billion of that was held in Fidelity retail mutual funds. The TDS had more than \$500 million in assets by that time, \$244 million of which were held in Fidelity retail mutual funds.

B

Almost twenty years ago, the Supreme Court observed that “ERISA abounds with the language and terminology of trust law.” *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). The Act's fiduciary responsibility provisions, found at 29 U.S.C. §§ 1101-14, are central to the Hecker group's case. Plaintiffs begin with § 1103(c)(1), which says that, except as provided in certain other parts of the statute, “the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.” Plan fiduciaries must discharge their *580 duties “solely in the interest of the participants and beneficiaries.” 29 U.S.C. § 1104(a)(1). Section 1104 recognizes an exception to that duty, however, for plans that delegate control over assets directly to the participant or beneficiary. The key language reads as follows:

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his

account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)-

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

29 U.S.C. § 1104(c)(1). Finally, the Hecker group relies on 29 U.S.C. § 1105(a), which provides that one fiduciary may be liable for breaches of fiduciary duty committed by another fiduciary under specified circumstances.

C

The district court disposed of the case on the pleadings, as we noted above. In evaluating the case, the court had to decide whether the Complaint included “enough facts to state a claim to relief that is plausible on its face.” *Khorrami v. Rolince*, 539 F.3d 782, 788 (7th Cir.2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007)); see *Davis v. Indiana State Police*, 541 F.3d 760, 763-64 (7th Cir.2008). Even after *Twombly*, courts must still approach motions under Rule 12(b)(6) by “constru[ing] the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in her favor.” *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir.2008).

Looking first at plaintiffs' claims against Deere, the district court found that the company had complied with all applicable disclosure requirements found in ERISA. It saw nothing in the statute or regulations that required Deere to disclose the fact that Fidelity Research was sharing part of the fees it received with its corporate affiliate, Fidelity Trust. Materials furnished to plan participants did disclose the expenses

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actually paid to the fund managers, as plaintiffs implicitly conceded by alleging that the same fees were charged to all retail fund customers. The district court found it unremarkable that those fees included some profit margin for Fidelity Research. It also thought it “unlikely” that the fund sponsor (Deere) would be able to control the way in which the fund manager distributed its profits, particularly among related corporations. The court also noted that there were proposals to amend the regulations so that revenue sharing arrangements would be disclosed. See Proposed Rules, Department of Labor, Employee Benefits Security Administration, 71 Fed.Reg. 41,392, 41,394 (July 21, 2006). This, it thought, made it apparent that the present rules imposed no such obligation. Finally, the court rejected the plaintiffs’ argument that disclosure was required as a general matter of ERISA law.

***581** The Hecker group also asserted that Deere and the Fidelity companies breached their fiduciary obligations by selecting for the Plans investment options with unreasonably high fees. ERISA, the court acknowledged, requires a fiduciary to discharge its duties “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.” 29 U.S.C. § 1104(a)(1)(B). But (as we already have observed) the statute also provides a “safe harbor” for plans that permit the participant to exercise control over his or her own assets. 29 U.S.C. § 1104(c). Assuming that the “safe harbor” provision establishes an affirmative defense, the court held that the defendants could take advantage of the defense only if the facts asserted in the Complaint established all of its necessary elements, as set forth in 29 C.F.R. § 2550.404c-1. It then concluded that the defendants had met that burden, explaining itself as follows:

Participants could choose to invest in twenty primary mutual funds and more than 2500 others through BrokerageLink. All of these funds were also offered to investors in the general public so expense ratios were necessarily set to attract investors in the marketplace. The expense ratios among the twenty primary funds ranges from just over 1% to as low as .07%. Unquestionably, participants were in a position to consider and adjust their investment strategy based in part on the relative cost

of investing in these funds. It is untenable to suggest that all of the more than 2500 publicly available investment options had excessive expense ratios. The only possible conclusion is that to the extent participants incurred excessive expenses, those losses were the result of participants exercising control over their investments within the meaning of the safe harbor provision.

Last, the district court held that since plaintiffs had failed to state a claim against Deere for breach of fiduciary duty either for failure to disclose or for the selection of investment options, Fidelity could not be held liable either. Moreover, it added, neither Fidelity defendant had fiduciary responsibilities with respect to either of the tasks plaintiffs targeted. Under the trust agreements, Deere had the sole responsibility for the selection of plan investment funds. Thus, even if the Fidelity defendants were fiduciaries for some purposes, they were not fiduciaries for the purpose of making plan investment decisions.

After the court dismissed their case, plaintiffs moved for reconsideration under FED.R.CIV.P. 59(e), asserting that they had new evidence that would establish (1) the defendants’ breach of duty in assessing fees and choosing investment options, (2) the fact that the defendants’ failure to provide information about revenue sharing was an independent violation of ERISA, and (3) the impropriety of the court’s evaluating the “safe harbor” defense on a motion to dismiss. Finding nothing new in their arguments or evidence, the court denied the motion. Later, it awarded costs in the amount of \$54,396.57 for Deere and \$163,814.43 for the two Fidelity defendants. This appeal followed. In addition to briefs from the parties, the court has had the benefit of *amicus curiae* briefs filed by the Secretary of Labor (supporting plaintiffs) and by a consortium composed of the ERISA Industry Committee, the National Association of Manufacturers, and the American Benefits Council (supporting defendants).

***582 II**

The Hecker group has offered numerous reasons for sending this case back to the district court. For convenience, we have organized the issues as follows: (1) did the district court commit a procedural error warranting reversal by considering documents outside the pleadings; (2) were the Fidelity defendants

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“functional” fiduciaries of the Plans with respect to the selection of investment options, the structure of the fees, or the provision of information regarding the fee structure; (3) did Deere or the Fidelity defendants breach any fiduciary duties toward plaintiffs, and if so, are they protected by the § 1104(c) affirmative defense; (4) did the district court abuse its discretion in denying plaintiffs' Rule 59(e) motion; and (5) did the court err in its costs award to the defendants, either by giving excessive costs or by including items that are not authorized by 28 U.S.C. § 1920?

1. Materials Outside Complaint

[1] Deere's motion to dismiss under Rule 12(b)(6) included a number of attached documents: seven Summary Plan Descriptions (“SPDs”), two SPD supplements, the Trust Agreement between Fidelity Trust and Deere, and three fund prospectuses that it had retrieved from Fidelity's website. According to plaintiffs, this amounted to some 900 pages of material. Fidelity's motion added two more trust agreements to the mix. Plaintiffs objected to the introduction of these documents, arguing that they were “matters outside the pleadings” within the meaning of Rule 12(d), and thus that the court should have converted the two motions into motions for summary judgment. The district court, however, found that these were all documents to which the Complaint had referred, that the documents were concededly authentic, and that they were central to the plaintiffs' claim. See *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir.2002). If the court erred in this respect, we would be able to dispense with most of the rest of this appeal, since it would be necessary to remand on this basis alone.

This court has been relatively liberal in its approach to the rule articulated in *Tierney* and other cases. See, e.g., *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1248 (7th Cir.1994) (upholding consideration of an agreement quoted in the complaint and central to the question whether a property interest existed for purposes of 42 U.S.C. § 1983); *Venture Associates v. Zenith Data Sys.*, 987 F.2d 429, 431 (7th Cir.1992) (admitting letters, to which the complaint referred, that established the parties' contractual relationship); *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 739 (7th Cir.1986) (permitting reference to a welfare plan referred to in the complaint in order to decide whether the plan qualifies under ERISA).

Plaintiffs see the case of *Travel Over the World v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir.1996), as a counterexample, but we do not read it that way. In *Travel Over the World*, the plaintiffs contested the authenticity of the document that defendants wanted to use; here, they do not. Although they argue that certain statements in the documents are untrue (such as the representation that Deere pays all administrative costs associated with the Plans), the district court took plaintiffs' point of view on all such disputes. Deere and the two Fidelity defendants offered the documents only to show what they disclosed to plaintiffs; nothing plaintiffs have argued explains why the documents could not be used in that limited way.

For the purpose to which they were put, the SPDs, the SPD supplements, and the Trust Agreement fit within the exception to Rule 12(d)'s general instruction. The *583 Complaint explicitly refers to the SPDs and the Trust Agreement, and both are central to plaintiffs' case: the SPDs reveal the disclosures that Deere made to the Plan participants, and the Trust Agreement throws light on the relationship between Fidelity Trust and Deere. The supplements to the SPDs, while not mentioned separately in the Complaint, serve much the same purpose as the originals. The Complaint did not mention the prospectuses, but these were publicly available documents and thus relevant to the question of disclosure. In a similar situation, the Second Circuit held that a court could take notice of a prospectus in a securities fraud case. See *I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co.*, 936 F.2d 759, 762 (2d Cir.1991); see also *Menominee Indian Tribe of Wisc. v. Thompson*, 161 F.3d 449, 456 (7th Cir.1998) (permitting consideration on a motion for judgment on the pleadings under Rule 12(c) of historical papers relating to negotiation of a treaty with Native American Tribe). Taking into account the limited purpose to which the prospectuses were put here, the district court acted within its discretion when it chose not to convert the defendants' motion under Rule 12(b)(6) to a motion for summary judgment.

2. Functional Fiduciaries

[2] Before we delve into the question whether any of the defendants breached a fiduciary duty, we must identify who owed such duties to plaintiffs with respect to the actions at issue here. Deere does not con-

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test the fact that it owed some fiduciary duties to the plan participants; it argues instead that plaintiffs have too expansive a concept of its fiduciary responsibilities and, in any event, that it did not breach any fiduciary duty. Fidelity Trust and Fidelity Research, in contrast, argue that they were not fiduciaries at all. The Hecker group appears to concede that neither Fidelity entity was a named fiduciary under the Trust Agreement. It argues, however, that one or both of the Fidelity entities functioned as a fiduciary under 29 U.S.C. § 1002(21)(A). In order to find that they were “functional fiduciaries,” we must look at whether either Fidelity Trust or Fidelity Research exercised discretionary authority or control over the management of the Plans, the disposition of the Plans' assets, or the administration of the Plans.

The Hecker group first argues that Fidelity Trust exercised the necessary control to confer fiduciary status by its act of limiting Deere's selection of funds through the Trust Agreement to those managed by Fidelity Research. But what if it did? Plaintiffs point to no authority that holds that limiting funds to a sister company automatically creates discretionary control sufficient for fiduciary status. To the contrary, as Fidelity points out, there are cases holding that a service provider does not act as a fiduciary with respect to the terms in the service agreement if it does not control the named fiduciary's negotiation and approval of those terms. *Chi. Dist. Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463 (7th Cir.2007); *Schulist v. Blue Cross of Iowa*, 717 F.2d 1127 (7th Cir.1983). In any event, the Trust Agreement gives Deere, not Fidelity Trust, the final say on which investment options will be included. The fact that Deere may have discussed this decision, or negotiated about it, with Fidelity Trust does not mean that Fidelity Trust had discretion to select the funds for the Plans.

Plaintiffs retort that, notwithstanding the language of the Trust Agreement, Fidelity Trust exercised *de facto* control over the selection of the funds and Deere rubber-stamped its recommendations. That is *584 not, however, what the Complaint alleges. It asserts instead that Fidelity Trust “played a role in the selection of investment options,” Complaint ¶ 21, and it concedes that Deere had “final authority,” *id.* Merely “playing a role” or furnishing professional advice is not enough to transform a company into a fiduciary. *Pappas v. Buck Consultants, Inc.*, 923 F.2d

531, 535 (7th Cir.1991); *Farm King Supply, Inc. Integrated Profit Sharing Plan & Trust v. Edward D. Jones & Co.*, 884 F.2d 288, 292 (7th Cir.1989). Many people help develop and manage benefit plans—lawyers and accountants, to name two groups—but despite the influence of these professionals we do not consider them to be Plan fiduciaries. This is not a case like *Johnson v. Georgia*, 19 F.3d 1184, 1189 (7th Cir.1994), on which plaintiffs rely, because in that case the fiduciary both managed a defined-benefits plan and had ultimate authority over the selection of funds. Nor do we find plaintiffs' reference to the district court's decision in *Haddock v. Nationwide Fin. Servs.*, 419 F.Supp.2d 156 (D.Conn.2006), helpful or persuasive, since the service provider in that case had the authority to delete and substitute mutual funds from the plan without seeking approval from the named fiduciary.

There is an important difference between an assertion that a firm exercised “final authority” over the choice of funds, on the one hand, and an assertion that a firm simply “played a role” in the process, on the other hand. The Complaint on which the Hecker group proceeded made the latter allegation, not the former. It gave no notice to the defendants that they would be required to defend on the former basis. For that reason, we reject plaintiffs' tardy effort to present the *de facto* fiduciary argument, and we make no comment on the possible scope of the “functional fiduciary” concept.

Plaintiffs also argue that Fidelity Research, and possibly Fidelity Trust, exercised discretion over the disposition of the Plans' assets by determining how much revenue Fidelity Research would share with Fidelity Trust. The Fidelity defendants (with the support in this instance of the Department of Labor) respond that the fees that Fidelity Research collected were not Plan assets under 29 U.S.C. § 1101(b)(1). The fees were drawn from the assets of the mutual funds in question, which, as the statute provides, are not assets of the Plans:

In the case of a plan which invests in any security issued by a [mutual fund], the assets of such plan shall be deemed to include such security but shall not, solely by reason of such investment, be deemed to include any assets of such [mutual fund].

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Id. Once the fees are collected from the mutual fund's assets and transferred to one of the Fidelity entities, they become Fidelity's assets-again, not the assets of the Plans. See also *Caremark*, 474 F.3d at 476 n. 6.

We conclude that the Complaint fails to state a claim against either Fidelity Trust or Fidelity Research based on the supposition that either one is a "functional fiduciary." Plaintiffs' effort to proceed against these companies thus fails at the threshold.

3. Fiduciary Duties and the Safe Harbor Defense

a. Violation of Fiduciary Duty

We are thus left with the claim against Deere. Plaintiffs' allegations can be distilled into two assertions: (1) Deere breached its fiduciary duty by not informing the participants that Fidelity Trust received money from the fees collected by Fidelity Research, and (2) Deere imprudently*585 agreed to limit the investment options to Fidelity Research funds and therefore offered only investment options with excessively high fees. We analyze each claim in turn, beginning with the fee distribution.

[3] Critical to plaintiffs' case is the proposition that Deere and Fidelity had a duty to disclose the revenue-sharing arrangements that existed between Fidelity Trust and Fidelity Research. They point to a number of facts in support of their theory. From 1991 through 2007, Deere and Fidelity Trust amended their agreement 27 times to add new Fidelity services and products and to adjust the administrative costs that Deere paid up front to Fidelity Trust. Those costs decreased over time, as Fidelity Trust shifted to a system whereby it recovered its costs from the Deere participants in the same way as it did from outside participants-that is, Fidelity Research would assess asset-based fees against the various mutual funds, and then transfer some of the money it collected to Fidelity Trust.

The Hecker group's case depends on the proposition that there is something wrong, for ERISA purposes, in that arrangement. The district court found, to the contrary, that such an arrangement (assuming at this stage that the Complaint accurately described it) violates no statute or regulation. We agree with the district court. Plaintiffs feel misled because the SPD supplements left them with the impression that Deere

was paying the administrative costs of the Plans, even though in reality the participants were paying through the revenue sharing system we have described. But, as Deere and Fidelity both point out and the Complaint acknowledges, the participants were told about the total fees imposed by the various funds, and the participants were free to direct their dollars to lower-cost funds if that was what they wished to do. The SPD supplements told participants to look to the fund prospectuses for detailed information on fund-level expenses, and the prospectuses in fact furnished that information. In its brief, Deere points to the Magellan Fund Prospectus as an example. That prospectus broke down the Fund's total annual operating expenses paid from fund assets (0.59%) as follows: management fee, 0.39%; distribution or service fees, none; other expenses, 0.20%.

The fact that there were no *additional* fees borne by Deere is immaterial. While Deere may not have been behaving admirably by creating the impression that it was generously subsidizing its employees' investments by paying something to Fidelity Trust when it was doing no such thing, the Complaint does not allege any particular dollar amount that was fraudulently stated. How Fidelity Research decided to allocate the monies it collected (and about which the participants were fully informed) was not, at the time of the events here, something that had to be disclosed. It follows, therefore, that the Hecker group failed to state a claim against Deere based on the revenue-sharing arrangement and the lack of disclosure about it.

These conclusions go a long way toward disposing of plaintiffs' claims that the non-disclosure of the revenue-sharing breached the general fiduciary duty imposed on Deere by 29 U.S.C. § 1104(a)(1). Before such a violation can be found, there must be either an intentionally misleading statement, see *Varity Corp. v. Howe*, 516 U.S. 489, 505, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), or a material omission, see *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986, 992 (7th Cir.1993). The Complaint does not allege that the representation in the SPD supplement-that Deere paid the administration expenses for the Plans-was an intentional misrepresentation.*586 To the contrary, plaintiffs have since submitted evidence with their Rule 59(e) motion showing that Deere believed that Fidelity Trust's services were free.

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The only question is thus whether the omission of information about the revenue-sharing arrangement is material. Deere disclosed to the participants the total fees for the funds and directed the participants to the fund prospectuses for information about the fund-level expenses. This was enough. The total fee, not the internal, post-collection distribution of the fee, is the critical figure for someone interested in the cost of including a certain investment in her portfolio and the net value of that investment. Plaintiffs argue that some investors may have expected better management from a fund with a higher fee, but, as the Magellan Fund Prospectus illustrates, participants had access to information about management expenses as a percentage of fund assets. The later distribution of the fees by Fidelity Research is not information the participants needed to know to keep from acting to their detriment. See *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 589-91 (7th Cir.2000). The information is thus not material, and its omission is not a breach of Deere's fiduciary duty.

[4] We turn next to plaintiffs' contention that Deere violated its fiduciary duty by selecting investment options with excessive fees. In our view, the undisputed facts leave no room for doubt that the Deere Plans offered a sufficient mix of investments for their participants. Thus, even if, as plaintiffs urge, there is a fiduciary duty on the part of a company offering a plan to furnish an acceptable array of investment vehicles, no rational trier of fact could find, on the basis of the facts alleged in this Complaint, that Deere failed to satisfy that duty. As the district court pointed out, there was a wide range of expense ratios among the twenty Fidelity mutual funds and the 2,500 other funds available through BrokerageLink. At the low end, the expense ratio was .07%; at the high end, it was just over 1%. Importantly, all of these funds were also offered to investors in the general public, and so the expense ratios necessarily were set against the backdrop of market competition. The fact that it is possible that some other funds might have had even lower ratios is beside the point; nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems).

As for the allegation that Deere improperly limited the investment options to Fidelity mutual funds, we find no statute or regulation prohibiting a fiduciary

from selecting funds from one management company. A fiduciary must behave like a prudent investor under similar circumstances; many prudent investors limit themselves to funds offered by one company and diversify within the available investment options. As we have noted several times already, the Plans here directly offered 26 investment options, including 23 retail mutual funds, and offered through BrokerageLink 2,500 non-Fidelity funds. We see nothing in the statute that requires plan fiduciaries to include any particular mix of investment vehicles in their plan. That is an issue, it seems to us, that bears more resemblance to the basic structuring of a Plan than to its day-to-day management. Compare *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996). We therefore question whether Deere's decision to restrict the direct investment choices in its Plans to Fidelity Research funds is even a decision within Deere's fiduciary responsibilities.*587 On the assumption that it is, however, we nonetheless conclude that taking the allegations in the Complaint in the light most favorable to plaintiffs, no breach of a fiduciary duty on Deere's part has been described.

b. Safe Harbor Defense

[5] Even if we have underestimated the fiduciary duties that Deere had to its plan participants, the district court's judgment in favor of the defendants must stand if that court correctly decided that the safe harbor provided in 29 U.S.C. § 1104(c) is available to them. This was the ground on which the district court primarily relied. If the defense is available, it provides an alternate ground for affirmance.

Although ERISA normally imposes a fiduciary duty on plan managers, the statute modifies that rule for plans that provide for individual accounts and allow a participant or beneficiary "to exercise control over the assets in his account." 29 U.S.C. § 1104(c)(1). First, the participant must have the right to exercise independent control over the assets in her account and in fact exercise such control. Next, the participant must be able to choose "from a broad range of investment alternatives," 29 C.F.R. § 2550.404c-1(b)(1)(ii). As we noted in *Jenkins v. Yager*, 444 F.3d 916 (7th Cir.2006), "prominent among [the conditions a plan must meet] is that it must provide at least

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three investment options and it must permit the participants to give instructions to the plan with respect to those options at least once every three months. 29 C.F.R. § 2550.404c-1(b)(2)(c).” 444 F.3d at 923. Third, the participant must be given or have the opportunity to obtain “sufficient information to make informed decisions with regard to investment alternatives available under the plan.” 29 C.F.R. § 2550.404c-1(b)(2)(i)(B). The regulation sets forth nine criteria that must be met before the participant may be considered to have sufficient investment information. *Id.* Those criteria call for such things as clear labeling of the plan as § 1104(c) instrument, a description of the investment alternatives available, identification of designated investment managers, explanation of how to give investment instructions, a description of “any transaction fees and expenses which affect the participant’s ... balance in connection with purchases or sales of interests,” *id.* § 2550.404c-1(b)(2)(i)(B)(1)(v), relevant names and addresses of plan fiduciaries, special rules for employer securities, special rules for investment alternatives subject to the Securities Act of 1933, and materials related to voting, tender, or other rights incidental to the holdings in the account. Other parts of the regulation emphasize that the fiduciary must furnish extensive information on the operating expenses of the investment alternatives, copies of relevant financial information, and other similar materials. *Id.* § 2550.404c-1(b)(2)(i)(B)(2).

The regulation does not require plans to offer only cost-free investment vehicles. It recognizes that a plan “does not fail to provide an opportunity for a participant or beneficiary to exercise control over his individual account merely because it ... imposes charges for reasonable expenses.” *Id.* § 2550.404c-1(b)(2)(ii)(A). Procedures must be in place, however, to inform participants of the actual expenses incurred with respect to their individual accounts. *Id.* Other parts of the regulation address the required frequency of investment instructions. Finally (for our purposes), the regulation provides that independent control will not be found if a plan fiduciary has concealed material non-public facts regarding the investment from the participant or beneficiary. *Id.* § 2550.404c1(c)(2)(ii).

***588** The regulation sums up the effect of a finding of independent exercise of control, from the perspective of a plan fiduciary, as follows:

If a participant or beneficiary of an ERISA section 404(c) plan exercises independent control over assets in his individual account in the manner described in paragraph (c), then no other person who is a fiduciary with respect to such plan shall be liable for any loss, or with respect to any breach of part 4 of title I of the Act, that is the direct and necessary result of that participant’s or beneficiary’s exercise of control.

Id. § 2550.404c-1(d)(2)(i). The safe harbor provided by § 1104(c) is an affirmative defense to a claim for breach of fiduciary duty under ERISA. *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 446 (3d Cir.1996).

Although normally a district court should not base a dismissal under Rule 12(b)(6) on its assessment of an affirmative defense, see *U.S. Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623, 626 (7th Cir.2003), that rule does not apply when a party has included in its complaint “facts that establish an impenetrable defense to its claims.” *Tamayo v. Blagojevich*, 526 F.3d 1074, 1086 (7th Cir.2008). In *Tamayo*, we went on to explain that “[a] plaintiff pleads himself out of court when it would be necessary to contradict the complaint in order to prevail on the merits.... If the plaintiff voluntarily provides unnecessary facts in her complaint, the defendant may use those facts to demonstrate that she is not entitled to relief.” *Id.* (internal citations and quotation marks omitted).

Plaintiffs here chose to anticipate the § 1104(c) defense in their Complaint explicitly and thus put it in play. Paragraph 58 begins by noting that “ERISA § 404(c) provides to Plan fiduciaries a ‘Safe Harbor’ from liability for losses that a participant suffers in his or her 401(k) accounts to the extent that the participant exercises control over the assets in his or her 401(k) accounts.” Paragraphs 58 through 61 describe the information that Deere, as a plan fiduciary, was required to furnish. Later, the Complaint has a section entitled “Defendants’ Non-Compliance with § 404(c)’s Safe Harbor Requirements and Concealment of Its Fiduciary Breaches.” Paragraphs 91 through 101 specify exactly what Deere and Fidelity allegedly failed to do. For example, paragraphs 91 and 100(c) and (e) accuse them of failing to disclose that Fidelity was engaged in revenue sharing among its different entities. Paragraphs 93 and 100(b) assert that Plan participants did not have complete knowledge of the

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fees and expenses that were being charged to the Plans and that were reducing their account balances. Paragraphs 95 and 101(i) charge, among other things, that Deere and Fidelity failed to disclose their agreement that Deere would offer only Fidelity-related funds for the Plans. The district court concluded that the Complaint so thoroughly anticipated the safe-harbor defense that it could reach that issue; we agree with it, bearing in mind that we must still consider any factual allegations in the light most favorable to plaintiffs.

The Hecker group argues that even if the Complaint anticipated the safe-harbor defense, further proceedings are needed because the Complaint did not address all of the 25 or so different requirements that must be met in order to establish it definitively. Deere implies that this overstates the number of requirements, but its primary point is that plaintiffs have waived the right to complain about the Plans' compliance with all but two criteria—the obligation to disclose fund-level fees and the level of expenses (see 29 C.F.R. §§ 2550.404c-1(b)(2)(i)(B)(1)(v) and (B)(2)(i)). In some instances, it is inappropriate*589 to jump to the conclusion that a point has been waived when a case is being decided on the pleadings, but this is not such a case. Plaintiffs chose to discuss § 1104(c) extensively in the Complaint and to specify the ways in which the Plans fell short for purposes of the defense. To shift grounds now would undermine the notice that defendants gleaned from the Complaint, to their prejudice.

Restricting our analysis to the challenges in the Complaint, we see no plausible allegation that the Plans do not comply with § 1104(c). Plaintiffs have focused on matters that are not helpful to them in the end, namely, the defendants' failure to disclose non-public material information, their revenue-sharing arrangements, and their decision to offer only Fidelity Research mutual funds. As we have already noted, however, the regulations implementing the safe-harbor defense describe in detail the expenses and fees that must be disclosed. The fee distribution by the management company post-collection is not one of those fees. See 29 C.F.R. §§ 2550.404c1(b)(2)(i)(B)(1)(v), (2)(i). And, as we have already explained, the revenue-sharing arrangement between the Fidelity defendants is not material information for a participant's investment decision. The central question is thus whether the alleged miscon-

duct—the imprudent selection of mutual funds with excessively high fees—falls within the safe harbor.

Plaintiffs begin with a broadside attack, asserting that the defense has no application to a fiduciary's “assembling an imprudent menu [of investment options] in the first instance.” *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n. 3 (4th Cir.2007). Deere and Fidelity respond that there are no exceptions to § 1104(c)'s safe harbor, which in terms applies to “any” breach committed by someone “who is otherwise a fiduciary.” Pinning their hopes on a footnote to the preamble to the implementing regulations, see 57 Fed.Reg. 46906-01, 46, 924 n. 27 (Oct. 13, 1992), plaintiffs argue that the Secretary has carved out the activity of designating investment options from the safe harbor. Fidelity and Deere respond that this type of informal commentary, which was never embodied in the final regulations, cannot override the language of the statute and regulations.

Plaintiffs would like us to decide whether the safe harbor applies to the selection of investment options for a plan, but in the end we conclude that this abstract question need not be resolved to decide this case. Even if § 1104(c) does not always shield a fiduciary from an imprudent selection of funds under every circumstance that can be imagined, it does protect a fiduciary that satisfies the criteria of § 1104(c) and includes a sufficient range of options so that the participants have control over the risk of loss. *Cf. Langbecker v. Electronic Data Sys. Corp.*, 476 F.3d 299, 310-11 (5th Cir.2007); and *Unisys*, 74 F.3d at 445 (holding that a fiduciary that committed a breach of duty in making an investment decision for a Plan may nevertheless take advantage of the § 1104(c) defense); but see *DiFelice*, 497 F.3d at 418 n. 3. The regulation addresses the investment options by stipulating that the § 1104(c) defense is available only if the plan offers “a broad range of investment alternatives.” 29 C.F.R. § 2550.404c-1(b)(3). The necessary broad range exists “only if the available investment alternatives are sufficient to provide the participant or beneficiary with a reasonable opportunity to” accomplish three goals: the ability materially to affect potential return and degree of risk in the investor's portfolio; a choice from at least three investment alternatives each of which is diversified and has materially different risk and return characteristics; and the ability to diversify sufficiently so as to minimize the*590 risk of large losses. *Id.* §§

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2550.404c1(b)(3)(i)(A)-(C).

Interestingly, in light of the inclusion of the BrokerageLink facility in the plans available to the Deere participants, the regulation also notes that “[w]here look-through investment vehicles are available as investment alternatives to participants and beneficiaries, the underlying investments of the look-through investment vehicles shall be considered in determining whether the plan satisfies the requirements of [the regulation].” *Id.* § 2550.404c-1(b)(3)(ii). The 2,500 mutual funds available through BrokerageLink had fees ranging from .07% to 1%. Any allegation that these options did not provide the participants with a reasonable opportunity to accomplish the three goals outlined in the regulation, or control the risk of loss from fees, is implausible, to use the terminology of *Twombly*. Plaintiffs complain that non-Fidelity funds were available only through BrokerageLink, but that is immaterial under this regulation. If particular participants lost money or did not earn as much as they would have liked, that disappointing outcome was attributable to their individual choices. Given the numerous investment options, varied in type and fee, neither Deere nor Fidelity (assuming for the sake of argument that it somehow had fiduciary duties in this respect) can be held responsible for those choices.

4. Rule 59(e) Motion to Alter or Amend

[6] After the district court entered judgment, the Hecker group filed a timely motion under FED.R.CIV.P. 59(e) in which it argued that newly discovered evidence supported relief in the group's favor. This evidence, plaintiffs asserted, revealed that Deere did turn over all relevant decisionmaking power to Fidelity and allowed Fidelity to decide such critical matters as what funds to include in the Plans, how much to pay Fidelity Trust (as Trustee), what administrative fees were being assessed against the Plans or charged to participants, and how to allocate the float from interest on Plan assets. The district court denied the motion, finding that it was really an untimely request to amend the Complaint, that plaintiffs had not proffered an amended complaint, and that they had not shown how the new evidence altered any of the court's legal conclusions.

At the outset, it is not even clear that the proffered evidence is new. Fidelity argues that it is not, because plaintiffs possessed the evidence before the district

court ruled on the motion to dismiss. Plaintiffs concede that point, but they assert that it is “new” in the sense that they received it only after the due date for briefs on the motion. That may be so, but if this evidence was so important to their case, plaintiffs should have alerted the district court to their discovery and asked for some appropriate way to bring it to the court's attention. There was no reason to sit on potentially relevant evidence and allow the court to go forward with its decision, and then turn around and criticize the court for ruling without the benefit of that same evidence.

That is why this court has held that the assessment of newness turns on the date of the court's dispositive order, not on the date when the motions or briefs are filed. *In re Prince*, 85 F.3d 314, 324 (7th Cir.1996). Plaintiffs admit that their experts analyzed the evidence, and the expert reports were exchanged on June 6, 2007; the district court did not rule until June 21, 2007.

Plaintiffs also argue that the district court should not have penalized them for failing to proffer an amended complaint, on the theory that a plaintiff can amend a complaint only after the court grants the *591 Rule 59(e) motion. The last point may be true, but it does not address the question whether plaintiffs must *show* the district court what they propose to do. Once judgment has been entered, there is a presumption that the case is finished, and the burden is on the party who wants to upset that judgment to show the court that there is good reason to set it aside. Thus, in *Twohy v. First Nat'l Bank*, 758 F.2d 1185 (7th Cir.1985), this court upheld the rejection of a Rule 59(e) motion because the plaintiff did not attach an amended complaint and did not indicate the “exact nature of the amendments proposed.” *Id.* at 1189; see also *Vicom, Inc. v. Harbridge Merchant Servs.*, 20 F.3d 771, 785 (7th Cir.1994) (faulting plaintiff for not attaching a proposed complaint or specifically informing the court how it would cure deficiencies in the earlier complaint). We see no abuse of discretion in this aspect of the district court's decision.

Finally, the new evidence would not have changed the case against Deere, as the district court observed. The court had already approached the case on the assumption that Deere had been imprudent in its selection of investment options. Although the new evidence can be read to disclaim the admission that

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Deere had the final word on those selections and to give notice that the plaintiffs' theory was that Fidelity was the true actor (and thus the functional fiduciary), the district court was within its discretion to reject this late shift in focus—a shift that would have been highly prejudicial to the defendants.

5. Costs Award

[7] We can be brief with respect to the costs order. The district court awarded costs to both Deere and Fidelity, and plaintiffs challenge both awards. First, we address Deere's costs. Deere requested \$74,335.52 in costs, and the court awarded it \$54,396.57. Plaintiffs quibble about such matters as the number of copies the district court thought reimbursable and the documentation for those copies, but we see no abuse of discretion in the district court's evaluation of those matters. The only potential problem lies with the copies that Deere admits were made for its own records. We have held that the cost of copies made by an attorney for his or her own records is not recoverable. *McIlveen v. Stone Container Corp.*, 910 F.2d 1581, 1584 (7th Cir.1990). On the other hand, we have also upheld a cost award to a party for copies made “for its attorneys.” *Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co.*, 924 F.2d 633, 643 (7th Cir.1991). This is not an argument, however, that plaintiffs have made, and we are reluctant in the face of apparently conflicting decisions from this court to reach out and decide it on our own. Because of the plaintiffs' forfeiture of this potential legal argument and the lack of merit in plaintiffs' other challenges to the Deere costs order, we affirm that order. (We take no position on the issue we have flagged; there will be time enough in a case in which it is properly presented to resolve it.)

Fidelity asked for \$186,488.95 in costs, and the court awarded it \$164,814.43. While this is a substantial amount, we see no abuse of discretion in the district court's decision. Plaintiffs' principal complaint is that it was improper to award Fidelity its costs for document selection, as opposed to document processing. Fidelity responds that the costs were for converting computer data into a readable format in response to plaintiffs' discovery requests; such costs are recoverable under 28 U.S.C. § 1920. The record supports Fidelity's characterization of the costs, and so we will not disturb the district court's order.

***592 * * ***

The judgment of the district court is AFFIRMED.

C.A.7 (Wis.),2009.

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END OF DOCUMENT

Not Reported in F.Supp.2d, 2007 WL 3124733 (D.Conn.), 41 Employee Benefits Cas. 2864
(Cite as: 2007 WL 3124733 (D.Conn.))

United States District Court,
D. Connecticut.
PHONES PLUS, INC., Plaintiff,
v.

THE HARTFORD FINANCIAL SERVICES
GROUP, INC.; Hartford Life Insurance Company;
and Neuberger Berman Management, Inc., Defen-
dants.

Civil No. 3:06CV01835(AVC).

Oct. 23, 2007.

Douglas P. Dehler, Shepherd Finkelman Miller & Shah LLC, Milwaukee, WI, James E. Miller, Karen M. Leser, Patrick A. Klingman, Sheperd Finkelman Miller & Shah, Chester, CT, Randall J. Sunshine, Robert M. Shore, Liner Yankelevitz Sunshine & Regenstreif, LLP, Los Angeles, CA, Ronald S. Kravitz, Liner Yankelevitz Sunshine & Regenstraif LLP, San Francisco, CA, for Plaintiff.

Christopher G. Barnes, Michael A. Valerio, Jorden Burt, Simsbury, CT, James F. Jorden, Jorden Burt, Washington, DC, David Anthony Debassio, John F. Droney, Jr., Levy & Droney, P.C., Farmington, CT, for Defendants.

***RULING ON THE DEFENDANTS' MOTIONS TO
DISMISS THE AMENDED COMPLAINT***

ALFRED V. COVELLO, United States District Judge.

*1 This is an action for damages and equitable relief. It is brought pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* The plaintiff, Phones Plus, Inc. ("Phones Plus"), alleges that the defendants, Hartford Financial Services Group, Inc. ("HFSG"), Hartford Life Insurance Company ("Hartford Life") (HFSG and Hartford Life, collectively, "Hartford"), and Neuberger Berman Management, Inc. ("Neuberger"), are liable to Phones Plus under ERISA, in light of various revenue sharing agreements that Hartford entered into with several mutual fund companies, in connection with the plaintiff's 401(k) retirement plan ("Plan").

Count I of the amended complaint alleges "violat[ions of] fiduciary duties under ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B)" by all defendants. Count II alleges "prohibited transactions in violation of ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1), by dealing with the assets of the Plans in their own interest or for their own account," by Hartford. Count III poses three alternative theories of liability: first, that HFSG has direct liability as a fiduciary of the Plan for the same violations alleged in Counts I and II; second, in the alternative, that HFSG "is jointly and severally liable to the Plans as a co-fiduciary for Hartford Life's breaches of fiduciary duty"; and third, that "to the extent that any of the Defendants are not deemed fiduciaries or co-fiduciaries under ERISA, each of the Defendants is liable to the Class ... as non-fiduciaries that knowingly participated in a breach of trust." Phones Plus purports to bring this action individually, and on behalf of all similarly situated individuals.

Hartford now moves for dismissal of the amended complaint "in its entirety pursuant to Fed.R.Civ.P. 12(b)(6)," for "fail[ing] to state any legally cognizable claim." Neuberger, separately, also moves for dismissal pursuant to Rule 12(b)(6).

FACTS:

An examination of the amended complaint reveals the following allegations:

The plaintiff, Phones Plus, is the Plan Administrator of a 401(k) retirement plan. Hartford Life and its parent HFSG provide retirement products and services to the Plan and to similarly situated retirement plans. Neuberger is an investment advisor retained by Hartford to review and evaluate investment options offered by Hartford to the Plan and to provide investment advisory services to the Plan and to similarly situated retirement plans. Hartford Life, HFSG, and Neuberger are fiduciaries of the Plan under ERISA.

Hartford provides the Plan with a menu of investment options, including certain mutual funds. From this menu, the Plan selects a subset of investment options

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to offer to the Plan's participants. Neuberger has selected this subset for the Plan, as part of the services it provides to the Plan. Hartford has the authority to change the menu of funds it makes available to the Plan by adding or removing mutual funds to or from the menu.

*2 Hartford receives revenue sharing payments from various of the mutual funds, based on a percentage of the Plan's assets invested in those mutual funds. These revenue sharing payments are in addition to the service fees paid to Hartford by the Plan. Hartford's receipt and retention of the revenue sharing payments constitutes a breach of its enumerated fiduciary duties under ERISA, 29 U.S.C. §§ 1104(a)(1)(A), (B). Neuberger failed to properly advise the Plan in light of these revenue sharing payments. Hartford engaged in transactions that are prohibited under ERISA, in that receiving the revenue sharing payments constituted "dealing with the assets of the Plan in their own interest." 29 U.S.C. §§ 1106(b)(1), (3).

HFSG controlled and directed Hartford Life in engaging in the above conduct, and is thus a fiduciary of the Plan with respect to the revenue sharing payments. In the alternative, HFSG is a co-fiduciary who is thus liable for Hartford Life's breaches of fiduciary duty, pursuant to 29 U.S.C. § 1105(a). In the alternative, to the extent that any defendant is not a fiduciary or co-fiduciary of the Plan, each is as a non-fiduciary that knowingly participated in a fiduciary's breach of trust.

STANDARD OF REVIEW:

When ruling on a motion to dismiss, the court must presume that the well-pleaded facts alleged in the complaint are true and draw all reasonable inferences from those facts in favor of the plaintiff. *Sykes v. James*, 13 F.3d 515, 519 (2d Cir.1993). In its review of a 12(b)(6) motion to dismiss, the court may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." *Samuels v. Air Transp. Local 504*, 992 F.2d 12, 15 (2d Cir.1993). In order to survive a motion to dismiss, the factual allegations must "raise a right of relief above the speculative level" and "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct.

1955, 1965, 1974 (2007).

DISCUSSION:

I. Hartford's Motion to Dismiss Counts I and II

With respect to Counts I and II, Hartford argues that Hartford Life (and presumably by extension, HFSG) is not a fiduciary of the Plan under ERISA, and thus can not have violated any fiduciary duties. Specifically, Hartford argues that it provides only non-discretionary, ministerial services to the Plan, and that Hartford Life's power to add, delete, or substitute mutual funds to or from the menu of funds does not cause it to be a Plan fiduciary, because the Plan has the "ultimate authority to accept or reject any proposed [changes]." In support, Hartford relies primarily upon: 1) a Department of Labor advisory opinion, which is predicated on facts similar to those in this case, that concluded that a service provider would not be considered a fiduciary of an ERISA plan solely as a result of the provider's authority to delete or substitute investment options offered to the plan; and 2) case law holding that a service provider that retains some discretion to change an ERISA plan is not considered a fiduciary of the plan so long as the plan administrator makes the final decision about any changes. Hartford also argues that it is not a fiduciary with respect to the revenue sharing payments because such payments "are not Plan assets."

*3 Phones Plus argues that the conduct alleged in the amended complaint, if proven, renders Hartford a fiduciary. Specifically, Phones Plus argues that the determination of "fiduciary" status under ERISA is made on a case-by-case basis by assessing the conduct of the party; that Hartford's ability, at its own discretion, to unilaterally change the menu of investment options available to the Plan renders it a fiduciary of the Plan within ERISA's meaning; and that the Department of Labor advisory opinion that Hartford relies on is not applicable. Further, Phones Plus argues that although "plan assets" is a term that is not defined within ERISA, it should be construed broadly, and that when so construed the revenue sharing payments at issue fall within its meaning.

In stating an ERISA claim based on a breach of fiduciary duty, "the threshold question is ... whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action

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subject to complaint.” *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). ERISA states that one is a plan fiduciary

to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). In keeping with Congress's intent that the term be broadly construed, “fiduciary” is defined “in functional terms of control and authority over the plan.” *Martens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993) (emphasis in original); see also *Blatt v. Marshall and Lassman*, 812 F.2d 810, 812 (2d Cir.1987). As such, the question of fiduciary status is “inherently factual and will depend on the particular actions or functions [performed] on behalf of the [retirement] Plans.” Dep’t of Labor Advisory Opinion 97-16A, 1997 WL 277979; see *LoPresti v. Terwilliger*, 126 F.3d 34, 39-40 (2d Cir.1997) (reviewing the issue of fiduciary status as a mixed question of fact and law).

Advisory Opinion 97-16A states the Department of Labor's opinion that, on facts in many ways similar to those of this case,

a person would not be exercising discretionary authority or control over the management of a plan or its assets *solely* as a result of deleting or substituting a fund from a program of investment options and services offered to plans, provided that the appropriate plan fiduciary in fact makes the decision to accept or reject the change. In this regard, the fiduciary must be provided advance notice of the change, including any changes in the fees received, and afforded a reasonable period of time within which to decide whether to accept or reject the change, and in the event of a rejection, secure a new service provider.

*4 Dep’t of Labor Advisory Opinion 97-16A, 1997 WL 277979 (emphasis added). An agency advisory opinion “lack[s] the force of law.” *Christensen v.*

Harris County, 529 U.S. 576, 587 (2000). Agency regulations, which are the product of “a formal adjudication or notice-and-comment rulemaking,” are entitled to deference when they contain a “reasonable interpretation of an ambiguous statute.” *Id.* In contrast, an advisory opinion is issued in response to “a specific factual situation, ... applies only to the situation described,” and may be relied on “[o]nly [by] the parties described in the request for opinion ... [and] only to the extent that ... the situation conforms to the situation described in the request.” ERISA Procedure 76-1 (Advisory Opinion Procedure) §§ 3, 10, 41 Fed.Reg. 36281 (Aug. 27, 1976). Thus, the interpretations of an advisory opinion “are ‘entitled to respect’ ..., but only to the extent that those interpretations have the ‘power to persuade.’” *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Here, the facts of the advisory opinion differ from those alleged by Phones Plus. Specifically, the advisory opinion assumes that the fees collected from mutual funds by the service provider are “for record-keeping and other services,” that the fees are “fully disclosed,” that an extensive notification-of-change procedure will be observed, that the notice will contain certain specific information, and that the plan will be given 120 days or more to reject the proposed changes and terminate the service contract. In contrast, Phones Plus alleges that the fees collected from mutual funds by Hartford are not merely service fees but “excessive” and redundant fees collected as a result of revenue sharing, and that Hartford's disclosure of such fees was misleading. Further, the Group Annuity Contract, incorporated by reference into the amended complaint for purposes of this motion, indicates that Hartford may make changes to the contract with only 30 days advance notice. The contract does not indicate the notification procedure, the contents of the notification, or the length of additional time, if any, that the Plan will be given to secure a new service provider in the event it rejects a proposed change to the menu of funds.

The court concludes that these factual differences render moot whatever persuasive power the advisory opinion might have carried. Phones Plus has specifically alleged that each of the defendants is a fiduciary of the Plan and has alleged a detailed set of facts in support. On a motion to dismiss, the court presumes that the facts alleged in the amended complaint are

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true. Given the factual aspect of the issue of fiduciary status, the court concludes that Phones Plus has stated a plausible claim for relief.

Certain case law suggests that a service provider can retain the power to make changes to an ERISA plan contract, without being deemed an ERISA fiduciary, if the plan sponsor makes the “ultimate decision” about changes to the plan. *See, e.g., Chicago Dist. Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463, 477 (7th Cir.2007) (holding that the defendant did not have sufficient discretion to be considered an ERISA fiduciary where the plaintiff retained the authority to make the “final decision” regarding changes to a drug formulary). The court concludes that this principle is inapplicable to this motion to dismiss. Specifically, the plan sponsor's power over the ultimate decision is only one factor to be considered; it is not by itself dispositive of the question of a service provider's fiduciary status. Regardless of whether Phones Plus has the power to make the “ultimate decision” about Hartford's changes to the fund menu, a reasonable fact finder could still conclude, for example, that the change notification procedures are inadequate or that the time provided in which to make such a decision is unreasonably short, and that as a result Hartford is an ERISA fiduciary.

***5** The question of whether a given item constitutes “plan assets” is also, like the question of fiduciary status, a mixed question of fact and law. *See, e.g., Liss v. Smith*, 991 F.Supp. 278, 294, 314 (S.D.N.Y.1998) (finding summary judgment inappropriate where questions of fact remain over whether the money in question constituted “plan assets”). The plaintiff alleges that the revenue sharing payments are plan assets, and alleges a detailed set of facts in support. These allegations are presumed true for the purpose of resolving this motion.

For the reasons stated above, Hartford's assertion that it is not an ERISA fiduciary of the plaintiff's Plan is not sufficient to warrant dismissal of Counts I and II of the amended complaint. The motion to dismiss Counts I and II is DENIED.

II. Hartford's Motion to Dismiss Count III

With respect to Count III, for liability as a non-fiduciary for knowing participation in a breach of

trust, Hartford argues that the claim is without merit “because the Fees are not Plan assets and their receipt and retention by Hartford Life is not only not unlawful but was specifically disclosed to and acknowledged by the Plan in advance.”

Phones Plus responds that a broad, functional approach to defining “plan assets” should be used, and that the amended complaint sufficiently alleges facts to establish that the revenue-sharing fees are plan assets. Further, Phones Plus argues that the amended complaint sufficiently alleges facts to establish Neuberger's breach of trust and Hartford's knowledge of the breach.

A non-fiduciary “who knowingly participates in an ERISA fiduciary's breach of duty is jointly and severally liable with the fiduciary ... under ERISA.” *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 281 (2d Cir.1992). The elements for such a claim are “1) breach by a fiduciary of a duty owed to plaintiff, 2) defendant's knowing participation in the breach, and 3) damages.” *Id.* at 281-82. The Supreme Court has narrowed the range of permissible claims under ERISA against a non-fiduciary to those seeking equitable forms of relief. *Martens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993).

The court concludes that the plaintiff's allegations are sufficient to support a plausible claim to relief for a nonfiduciary's knowing participation in a breach of trust by an ERISA fiduciary.^{FN1} Phones Plus has sufficiently alleged a breach of fiduciary duty by Neuberger, as discussed in more detail below. Phones Plus has also specifically alleged that Hartford “knowingly participated” in Neuberger's breach, and that damages resulted. These allegations raise a plausible claim for relief. Therefore, the motion to dismiss Count III is DENIED.

FN1. The question of whether the revenue sharing payments are Plan assets is addressed above, as is the question of Hartford's disclosure of these payments. The issue of whether retention of the fees is unlawful is a mixed question of fact and law that is entangled with the more basic question of whether the fees are, in whole or in part, “plan assets” under ERISA, as discussed above.

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III. *Hartford's Motion to Dismiss the Claims Against HFSG*

Hartford also argues that the claims against HFSG should be dismissed because HFSG is a “holding company” that is not a party to any contract with Phones Plus,^{FN2} and the compliant “has failed to allege any facts to justify [piercing the corporate veil].”

FN2. Hartford urges judicial notice of HFSG's Form 10-K as proof that HFSG is “merely a holding company that conducts no business as an insurer or provider of ‘products’ to 401K plans or anyone else.” Although the 10-K form does assert that HFSG is a “holding company that ... has no significant business operations of its own,” it also asserts that “[HFSG] (together with its subsidiaries, ‘The Hartford’ or the ‘Company’) ... is among the largest *providers of investment products* ... [and various] insurance products in the United States” (emphasis added). Thus, the Form 10-K is, at best, unclear on its own terms. Regardless, the plaintiff has alleged actual conduct by HFSG at odds with its asserted status as a mere holding company. Phone Plus has alleged conduct that could, if proven, render HFSG a fiduciary of the Plan, notwithstanding the statements made in its Form 10-K.

*6 Phones Plus alleges that HFSG “is a fiduciary of the plan within the meaning of ERISA,” that HFSG breached its fiduciary duties, and that HFSG “controlled and directed Hartford Life.”

As stated above, fiduciary status is determined functionally, not on the basis of formal relationships. Thus, even if not a party to the contract, HFSG could still be shown to be a Plan fiduciary on the basis of the particular actions or functions it performed, if any, on behalf of the Plan. Thus, the allegations in the amended complaint are sufficient to raise plausible claims to relief against HFSG. Therefore, the motion to dismiss as to HFSG is DENIED.

IV. *Neuberger's Motion to Dismiss*

Neuberger argues that it is not a proper party to this action. Specifically, Neuberger argues that the scope of its fiduciary duties to Phones Plus was limited by

the terms of its advisory agreement, and that “investigat[ing] and advis[ing] Phones Plus with respect to the fees that The Hartford charges or any revenue sharing payments that The Hartford receives” is outside the scope of those duties. As such, Neuberger is not an ERISA fiduciary to the Plan with respect to such matters. Neuberger further argues that Phones Plus's own broad fiduciary duty to the plan was not delegated to Neuberger. Finally, Neuberger argues that it did not know of and did not receive “any of the revenue sharing payments [allegedly] received or excessive fees [allegedly] charged by The Hartford.”

Phones Plus argues that the amended complaint “has properly alleged that Neuberger was a fiduciary at all pertinent times.” Specifically, the amended complaint avers that “Neuberger is an investment advisor to the Plan and an ERISA fiduciary within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A),” for its “provision of investment advice for a fee.” Phones Plus agrees that Neuberger's fiduciary duties are limited to those functions it was retained to perform, and argues that, as an investment advisor, those duties include the responsibility to review, evaluate, research, select, and monitor the Plan's investment choices. As such, Phones Plus argues, Neuberger had an obligation to investigate, discover, and inform Phones Plus of the allegedly unlawful or excessive fees. Further, Phones Plus argues that its non-delegation of its broad fiduciary duties to Neuberger is not relevant, because Neuberger breached its narrower duties as investment advisor.

The court concludes that Phones Plus has sufficiently alleged that Neuberger is an ERISA fiduciary with respect to the alleged wrongful conduct, and that Neuberger has not shown that, as a matter of law, it should not be considered as such for purposes of this motion. As discussed above, questions of fiduciary status, responsibilities, and breaches involve questions of fact. Likewise, the question of the scope of Neuberger's fiduciary duties under its advisory agreement is a matter subject to the interpretation of the terms of that agreement. Such interpretation also presents questions of fact. Phones Plus has alleged facts which, taken as true, articulate a plausible claim for relief against Neuberger. Therefore, Neuberger's motion to dismiss is DENIED.

*7 In sum, Hartford's motion to dismiss the amended complaint (**document no. 28**) and Neuberger's mo-

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tion to dismiss the amended complaint **(document no. 42)** are DENIED.

It is SO ORDERED.

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(Cite as: **2010 WL 2757153 (C.D.Cal.)**)

Only the Westlaw citation is currently available.

United States District Court,
C.D. California.
Glenn TIBBLE, et al., Plaintiffs,
v.
EDISON INTERNATIONAL, et al., Defendants.
No. CV 07-5359 SVW (AGRx).

July 8, 2010.

Jason P. Kelly, Jerome J. Schlichter, Nelson G. Wolff, Sean E. Soyars, Thomas E. Clark, Troy A. Doles, Schlichter Bogard & Denton LLP, St. Louis, MO, G. Cresswell Templeton, III, William A. White, Hill Farrer & Burrill, Los Angeles, CA, for Plaintiffs.

Brian David Boyle, Christopher D. Catalano, Gary S. Tell, O'Melveny & Myers LLP, Washington, DC, for Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STEPHEN V. WILSON, District Judge.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

***1** Named Plaintiffs Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Sohadolc, and Hugh Tinman, Jr. (collectively "Plaintiffs") filed this class action on August 16, 2007 on behalf of the Edison 401(k) Savings Plan ("the Plan") and all similarly-situated participants and beneficiaries of the Plan, against Defendants Edison International ("Edison"), Southern California Edison Company ("SCE"), the Southern California Edison Company Benefits Committee ("Benefits Committee"), the Edison International Trust Investment Committee ("TIC"), the Secretary of the SCE Benefits Committee, SCE's Vice President of Human Resources, and the Manager of SCE's Human Resources Service Center (collectively, "Defendants"). Plaintiffs sought to recover damages pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a), for alleged financial losses suffered by the

Plan, in addition to injunctive and other equitable relief based on alleged breaches of Defendants' fiduciary duties. 29 U.S.C. §§ 1104, 1106.

On June 30, 2009, the Court granted Plaintiffs' motion for class certification and appointed Plaintiffs Bauer, Tibble, and Sohadolc as class representatives. The class is defined as: "All persons, excluding the Defendants and other individuals who are or may be liable for the conduct described in this Complaint, who were or are participants or beneficiaries of the Plan and who were, are, or may have been affected by the conduct set forth in the Second Amended Complaint." (Order at 21 [Docket No. 286].) In August 2009, the Court granted Plaintiffs' request to amend the class certification order so as to name Plaintiffs Izral, Runowiecki, and Tinman as class representatives. (Order [Docket No. 308].)

In May 2009, both parties filed motions for summary judgment or partial summary judgment. (Docket Nos. 146, 186.) The Court issued its rulings on the summary judgment motions on July 16, 2009 and July 31, 2009. The Court granted partial summary judgment in Defendant's favor as to the majority of Plaintiff's claims. Specifically, the Court granted summary judgment in Defendants' favor on the following claims asserted by Plaintiffs: (1) whether Defendants breached their fiduciary duty by selecting mutual funds for the Plan that did not perform as well as the Frank Russell Trust Company low-cost index funds; (2) whether SCE's receipt of revenue sharing from certain mutual funds which offset SCE's payments to its record-keeper, Hewitt Associates, constituted a prohibited transaction under 29 U.S.C. § 1106(b)(2) or 29 U.S.C. § 1106(b)(3); (3) whether Defendants violated the specific Plan Document under 29 U.S.C. § 1104(a)(1)(D) by allowing some of the fees paid to Hewitt Associates to come from revenue-sharing arrangements; (4) whether Defendants violated the Plan documents by allowing some of the compensation for the Plan Trustee, State Street, to be paid from float; (5) whether allowing State Street to retain float constituted a prohibited transaction under 29 U.S.C. § 1106(a)(1)(D); (6) whether Defendants violated their duties of prudence and loyalty under § 1104(a)(1)(B) by doing any of the following: (a) selecting sector funds, especially the poorly-performing T. Rowe

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Price Science & Technology Fund, for inclusion in the Plan in 1999; (b) including a money market fund in the Plan rather than a stable value fund; and (c) structuring the Edison stock fund as a unitized fund instead of a direct ownership fund. The claims listed above were all dismissed against Defendants. (Orders, Docket Nos. 295, 303.) The Court also ruled that the applicable statute of limitations for Plaintiffs' claims was six years, which runs back to August 16, 2001.^{FN1} (July 16, 2009 Order at 12-14 [Docket No. 295].)

FN1. As stated above, Plaintiffs' initial Complaint was filed on August 16, 2007.

***2** After the ruling on the summary judgment motions, two issues remained for trial: (1) whether the Defendants violated their duty of loyalty by selecting for the Plan certain retail mutual funds that provided for favorable revenue-sharing arrangements but charged higher fees to Plan participants than other funds; and (2) whether the Defendants violated their duty of prudence by selecting for the Plan a money market fund that allegedly charged excessive management fees. In preparing for (and during) trial, the Plaintiffs amended their first theory of liability to conform to proof. Specifically, as to the mutual funds, Plaintiffs argued that Defendants violated both their duty of loyalty and their duty of prudence by investing in the retail share classes of six mutual funds instead of the institutional share classes of those same funds. The retail share classes of the six mutual funds offered more favorable revenue-sharing arrangements to SCE but charged the Plan participants higher fees than the institutional share classes. Three of the mutual funds at issue were chosen after the statute of limitations period; thus, Plaintiffs challenged Defendants' initial investment decisions with regard to those funds. The other three funds were added to the Plan before the statute of limitations period; thus, Plaintiffs challenged the failure to switch to an institutional share class upon the occurrence of certain significant events within the limitations period. Plaintiffs continued to assert the second theory of liability regarding the Money Market Fund.

A bench trial in this action was held on October 20-22, 2009. Additionally, the parties were permitted to file supplemental briefs, affidavits, and other evidence in response to Plaintiffs' assertion at trial of a new legal theory regarding the selection of retail

share classes rather than institutional share classes of certain mutual funds. The parties each submitted extensive post-trial briefing and additional evidence from November 2009 to April 2010. A post-trial hearing regarding the supplemental evidence was held on April 26, 2010.

Having thoroughly examined the evidence, considered the arguments of both sides, and made the following factual findings, the Court concludes that Defendants violated their duty of prudence under 29 U.S.C. § 1104(a) by choosing to invest in the retail share class rather than the institutional share class of the William Blair Small Cap Growth Fund, the MFS Total Return Fund, and the PIMCO (Allianz) RCM Global Tech Fund. The Court awards damages accordingly, as set forth below.

The Court concludes that Defendants did not breach their fiduciary duties of loyalty or prudence by failing to switch into the institutional share classes of the Berger (Janus) Small Cap Value Fund, the Allianz CCM Capital Appreciation Fund, and the Franklin Small-Mid Cap Value Fund upon the occurrence of certain events within the limitations period.

Finally, the Court finds that Defendants did not breach their fiduciary duty of prudence by investing in the Money Market Fund managed by State Street Global Advisors or by failing to negotiate a lower management fee.

II. FINDINGS OF FACT

A. Background

***3** Plaintiffs Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Sohadolc, and Hugh Tinman, Jr. (collectively "Plaintiffs") are current or former employees of Midwest Generation, LLC. Midwest Generation, LLC is an indirect subsidiary of Edison Mission Group, Inc., which in turn, is a subsidiary of Defendant Edison International ("Edison International").

Defendant Edison International is the parent company of Southern California Edison ("SCE") (both entities referred to collectively as, "Edison"). SCE is a utility that provides electricity to retail customers in California. SCE is the sponsor of the Edison 401(k)

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Savings Plan (“the Plan”), formerly named the Stock Savings Plus Plan (“SSPP”). The Plan is a defined contribution plan, as defined by the Employee Retirement Income Security Act of 1974 as amended (“ERISA”) § 3(34), 29 U.S.C. § 1002(34), and is an “eligible individual account plan.” The Plan was created in 1982 and is maintained for all employees of Edison-affiliated companies. Edison employees may contribute from 1% to 85% of their eligible earnings to the Plan on a pre-tax basis, up to annual limits of the Internal Revenue Code, and Edison may match some contributions to the Plan. The Plaintiffs have been participants in the Plan during the relevant time period.

Defendant SCE Benefits Committee (“Benefits Committee”) and its members are among the named fiduciaries of the Plan. The Benefits Committee is the Plan Administrator and is responsible for the overall structure of the Plan. Members of the Benefits Committee are chosen by the SCE Chief Executive Officer and are required to report to the SCE Board of Directors. The Secretary of the SCE Benefits Committee, a Defendant in this action, was a named fiduciary of the Plan during the relevant time period.^{FN2}

FN2. This named fiduciary status started in 2001. In 2005, Aaron L. Whitely was the Secretary of the SCE Benefits Committee.

Additionally, pursuant to the 2001 and 2006 Plan documents, SCE's Vice President of Human Resources and the Manager of SCE's Human Resources Service Center (now called “Benefits Administration”), both Defendants in this action, were named fiduciaries of the Plan during the relevant time period.^{FN3} The Benefits Administration staff is responsible for implementing administrative changes to the Plan, overseeing the budget for Plan administration costs, and monitoring the ongoing performance of the Plan's recordkeeper, Hewitt Associates, LLC (“Hewitt Associates”).

FN3. The named fiduciary status for these positions started in 2001. At different times, Diane Featherstone, Lillian R. Gorman, John H. Kelly, Frederick J. Grigsby, Jr., and J. Michael Mendez have served as SCE's Vice President of Human Resources or Senior Vice President of Human Resources.

Hewitt Associates has served as the third-party recordkeeper for the Plan since at least 1996. Hewitt Associates is responsible for preparing reports regarding the Plan to be sent to the Plan participants and regulators, and maintaining a system that participants can access to make changes to their contributions and investment elections.

The SCE and Edison International Board of Directors delegates the authority to select and monitor the Plan's investment options to the Edison International Trust Investment Committee (the “TIC”), a Defendant in this action. The TIC has delegated certain investment responsibilities to the TIC Chairman's Subcommittee (the “Sub-TIC”), which focuses on the selection of specific investment options. The TIC and the Sub-TIC (collectively referred to as “the Investment Committees”) were Plan fiduciaries during the relevant time period. No members of the Investment Committees were simultaneously members of either the SCE or Edison International Board of Directors while serving on an Investment Committee.

*4 To some extent and with certain exceptions, SCE indemnifies Defendants and SCE directors and employees for conduct when they may be acting as Plan fiduciaries.

B. Structure of the Plan

Before 1999, the Plan contained six investment options: (1) a Bond Fund invested in the Frank Russell Short Term Bond Fund; (2) a Balanced Fund invested in five Frank Russell Trust Company funds; (3) a Global Stock Fund invested in three Frank Russell Trust Company funds; (4) a Money Market Fund invested in the Wells Fargo Short-Term Income Fund; (5) a Common Stock Fund invested in the Barclay's Global Investor's Equity Index T-Fund; and (6) the Edison International Stock Fund (“EIX Stock Fund”).

In 1998, SCE and the unions representing SCE employees began collective bargaining negotiations. (SUF ¶ 10.) As a result of these negotiations, the investment options included in the Plan were altered significantly. After the negotiations were completed, the Plan offered a broad array of up to fifty investment options including ten “core” options and a mutual fund window, which included approximately forty mutual funds. In March 1999 and February

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2000, the Plan was amended to provide for this structure of investment options for union and non-union employees of Edison and its affiliates. Since these changes, Plan participants have been allowed to select from a variety of investment options with different risk levels, including pre-mixed portfolios, a money market fund, bond and equity funds, the EIX Stock Fund, and dozens of mutual funds.

As of December 31, 2003, the Plan included 41 retail mutual funds. As of December 31, 2004, the Plan included 39 retail mutual funds. As of December 31, 2005, the Plan included 38 retail mutual funds.

The Plan had \$2,128,870,558 in assets as of December 31, 2003; \$2,655,515,479 in assets as of December 31, 2004; and \$3,172,539,477 in assets as of December 31, 2005.

C. Investment Selection Process

As stated above, the TIC and the Sub-TIC (collectively, “the Investment Committees”) have the authority to decide whether to select, maintain or replace the investment options in the Plan, so long as such choices are consistent with the overall structure of the Plan as described above. SCE's Investments Staff provides information and recommendations to the Investment Committees regarding which investment options to maintain or replace. The Investments Staff includes David Ertel, Marvin Tong, Greg Henry, Linda Macias, and Darleen Loose. This group is responsible for monitoring and evaluating the investments for the Plan, as well as the investments for other trusts monitored by Edison.

The Investments Staff does not have any authority over the administration of the Plan, the selection of the Plan's third-party service providers, or the selection of the Plan's investment options. Rather, the Investments Staff's role is limited to monitoring the Plan's investment options and, when needed, recommending to the Investment Committees that changes be made to the Plan's investment option line-up. On a quarterly basis, the Investments Staff attends the meetings of the Investment Committees and gives presentations regarding the Plan's overall performance. When advisable, the Investments Staff presents information regarding the performance of specific investment options and recommends changes to the Plan's lineup, such as adding or terminating invest-

ment options. The Investment Committees have discretion to accept or reject the recommendations of the Investments Staff. In most instances, however, the Investment Committees accept the recommendations of the Investments Staff.

***5** The Investments Staff uses the following criteria to evaluate the investment options in the Plan: (1) the stability of the fund's overall organization; (2) the fund's investment process; (3) the fund's performance; (4) the fund's total expense ratio (including fees and revenue-sharing); and (5) with respect to mutual funds, the availability of public information regarding the fund (collectively, the “Investment Criteria”). In applying the Investment Criteria, the Investments Staff evaluates fund performance on a net-of-fee basis to ensure that relative performance comparisons among funds may be made on a consistent basis.

The Investment Staff relies on a variety of sources to monitor the funds' performance and fees. Specifically, Hewitt Financial Services (“HFS”), an affiliate of the Plan's record-keeper Hewitt Associates, provides investment advice to the Investments Staff. HFS provides the Investment Staff with written reports regarding the performance of the Plan's investment options on a monthly, quarterly, and annual basis. The reports include short-and long-term performance, annualized performance, risk, and performance of peer groups and benchmarks. The Investments Staff confers with HFS representatives to review the contents of the report on a quarterly basis, has an annual meeting with HFS to undergo a more in-depth analysis, and confers with HFS on an as-needed basis to discuss specific investment options.

Additionally, the Investments Staff confers with the Frank Russell Trust Company (“Russell”) regarding fund performance. Russell is the investment consultant for Edison's Pension Fund, and at times has information regarding specific investment managers associated with the funds in the Plan's line-up or funds that are being considered by the Investments Staff.

The Investments Staff also conducts its own independent analysis regarding the performance of the investment options. This research includes using data from Morningstar, Financial Engines, and other on-line sources to track the options' performance. The Investments Staff, in conjunction with HFS and Rus-

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sell (for the funds managed by Russell) also selects benchmarks for each investment option to determine if the investment options are meeting the Investment Criteria.

If an investment option's performance or a change in management or deterioration in financial condition suggests that the option may cease to meet the Investment Criteria in the future, the Investments Staff places the fund on a "Watch List" for closer monitoring. If an option on the Watch List fails to meet the Investment Criteria, the Investments Staff will recommend to the Investment Committees that the option be removed from the Plan line-up. In these instances, the Investments Staff often recommends adding a new option to the Plan in the place of the terminated option.

When a new option needs to be added to the Plan, the Investments Staff requests that HFS identify a small number of investment funds that would meet the Plan's needs. Additionally, the Investments Staff conducts independent research to choose a new option to recommend to the Investment Committees. Generally, however, the Investments Staff does not recommend that the Investment Committees make changes (either additions and deletions) to the Plan line-up unless there are significant issues with a particular Plan investment option such that it no longer meets the Investment Criteria.

*6 After the recommendations are made to the Investment Committees during the quarterly meetings, the Investment Committees may ask questions about the recommendations. Ultimately, the Investment Committees decide whether to accept or reject the Investments Staff's recommendations in their discretion.

Changes to the Plan's investment line-up are generally only made once or twice per year. Between August 2001 and the end of 2005, changes to the Plan's investment lineup occurred on: July 2002, October 2003, December 2003, October 2004, January 2005, and October 2005.

D. Mutual Funds

As stated above, the Plan began offering a mutual fund window to Plan participants in March 1999 in response to collective bargaining negotiations. At any

given time, the Plan's mutual fund window consisted of approximately 40 retail mutual funds for participants to choose from.

1. Revenue Sharing

Before the addition of the mutual funds to the Plan in 1999, SCE paid the entire cost of Hewitt Associates' record-keeping services. These services include things such as mailing prospectuses, maintaining individual account balances, providing participant statements, operating a website accessible by Plan participants that allows participants to conduct transactions and obtain information about the Plan's investment options, and answering inquiries from Plan participants regarding their investment options. The fees for these services were paid by SCE, not the Plan participants.

With the addition of the mutual funds to the Plan, however, certain "revenue sharing" was made available to SCE that could be used to offset the cost of Hewitt Associates' record-keeping expenses. "Revenue sharing" is a general term that refers to the practice by which mutual funds collect fees from mutual fund assets and distribute them to service providers, such as recordkeepers and trustees-services the mutual funds would otherwise provide themselves.^{FN4} Revenue sharing comes from so-called "12b-1" fees, which are fees that mutual fund investment managers charge to investors in order to pay for distribution expenses and shareholder service expenses. See *Meyer v. Oppenheimer Mgmt. Corp.*, 895 F.2d 861, 863 (2d Cir.1990).^{FN5} Each type of fee is collected out of the mutual fund assets, and is included as a part of the mutual fund's overall expense ratio. (See Pomerantz Rep. ¶ 2.) The expense ratio is the overall fee that the mutual fund charges to investors for investing in that particular fund, which includes 12b-1 fees as well as other fees, such as management fees.^{FN6} These fees are deducted from the mutual fund assets before any returns are paid out to the investors.

FN4. In a recent report from the Department of Labor ("DOL"), the Working Group noted that "in the employee benefit community, the term 'revenue sharing' is used loosely to describe virtually any payment that a plan service provider receives from a party other than the plan." Report of the

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Working Group on Fiduciary Responsibilities & Revenue Sharing Practices, Department of Labor (June 18, 2009), *available at*, <http://www.dol.gov/ebsa/publications/AC-1107b.html>.

FN5. 12b-1 fees receive their name from SEC Rule 12b-1, which was promulgated pursuant to the Investment Company Act of 1940 ("ICA"). *See* 17 C.F.R. § 270.12b-1(b). The ICA generally bans the use of fund assets to pay the costs of fund distribution. In 1980, however, the SEC adopted Rule 12b-1 which specifies certain conditions that must be met in order for mutual fund advisers to be able to make payments from fund assets for the costs of marketing and distributing fund shares. *See Meyer*, 895 F.2d at 863.

FN6. *See* Fact Sheet: Report on Mutual Fund Fees & Expenses, Securities & Exchange Commission (January 10, 2001), *available at* <http://www.sec.gov/news/extra/mfeefaq.htm>.

In 1999, when retail mutual funds were added to the Plan, some of the mutual funds offered revenue sharing which was used to pay for part of Hewitt Associates' record-keeping costs. Hewitt Associates then billed SCE for its services after having deducted the amount received from the mutual funds from revenue sharing. In short, revenue sharing offsets some of the fees SCE would otherwise pay to Hewitt Associates.

*7 The use of revenue sharing to offset Hewitt Associates' record-keeping costs was discussed with the employee unions during the 1998-99 negotiations. Specifically, the unions were advised that revenue sharing fees would result in some of the administrative costs of the Plan being partially offset from mutual funds' revenue sharing payments to Hewitt Associates. Additionally, this arrangement was disclosed to Plan participants on approximately seventeen occasions after the practice began in 1999.

The SCE Human Resources Department, also called "Benefits Administration," is responsible for the overall administration budget for the Plan, including the expenses associated with Hewitt Associate's record-keeping costs. The amount of revenue sharing

affects the overall budget for the Plan. The Human Resources Department has no authority to determine which funds are selected for the Plan line-up, but needs to know what revenue sharing arrangements exist so as to budget accordingly.

2. Investment Decisions Were Not Motivated by a Desire to Increase Revenue Sharing

a. Overall trend toward reduced revenue sharing

From July 2002 to October 2008, the investment selections for the Plan demonstrate a general trend toward selecting mutual funds with **reduced** revenue sharing. During this period, Defendants made 39 additions or replacements to the mutual funds in the Plan's investment line-up. In 18 out of 39 instances, Defendants chose to replace an existing mutual fund that offered revenue sharing with a mutual fund that provided **less** revenue sharing or **no** revenue sharing at all. In 11 instances, Defendants made mutual fund replacements that resulted in no net change to the revenue sharing received by SCE. In 4 instances, Defendants added additional funds that did not replace existing funds; thus, there is no comparison to be made with regard to revenue sharing.^{FN7} In sum, in 33 out of 39 instances, the changes to the mutual funds in the Plan evidenced either a decrease or no net change in the revenue sharing received by the Plan. These changes could not have been motivated by a desire to capture revenue sharing. In contrast, in only 6 instances out of 39, Defendants made mutual fund replacements that increased the revenue sharing received by SCE. This overall pattern is not consistent with a motive to increase revenue sharing.

FN7. Of these four additions, however, two of the mutual funds did not offer any revenue sharing, while the other two did offer revenue sharing.

b. Plan changes in 2003 were not motivated by a desire to capture more revenue sharing

Between March and June 2003, members of the Investments Staff were considering changes to the Plan's mutual fund line-up. Members of the Investment Staff, such as Marvin Tong and David Ertel, had email conversations with advisors from HFS and members of the SCE Human Resources Department in which they discussed the revenue sharing that SCE

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could expect to receive from the fund changes the Investments Staff was considering. These email conversations indicate that the Investments Staff was certainly aware of the benefits of revenue sharing; however, the actual changes made to the Plan line-up during 2003 do not evidence a desire to increase revenue sharing.

*8 On June 30, 2003 and again on July 16, 2003, the Investments Staff attended meetings with the Investment Committees regarding the recommended changes to the Plan's investment line-up. During those meetings, the Investments Staff did not make any recommendations to the Investment Committees regarding revenue sharing. In fact, the Investment Staff recommenced adding six mutual funds to the Plan at the 2003 meetings. Each of the six funds had both a retail share class and an institutional share class with different expense ratios and different revenue sharing benefits. With regard to each of those six funds added to the Plan, the Investment Committees selected the share class with the lowest expense ratio and the lowest revenue sharing, with the exception of one fund which offered no revenue sharing in either share class. In sum, the 2003 changes were not motivated by a desire to capture revenue sharing.

Additionally, there is no evidence that Defendants were motivated by revenue sharing when deciding to add or retain the six specific mutual fund share classes at issue in this case, as discussed further below.

3. Mutual Fund Share Classes

Certain mutual funds offer their investors retail and institutional share classes. Institutional share classes are available to institutional investors, such as 401(k) plans, and may require a certain minimum investment. Institutional share classes often charge lower fees (i.e., a lower expense ratio) because the amount of assets invested is far greater than the typical individual investor. The investment management of all share classes within a single mutual fund is identical, and managed within the same pool of assets. In other words, with the exception of the expense ratio (including revenue sharing), the retail share class and the institutional share class are managed in identical fashion.

4. The Six Mutual Funds At Issue

Plaintiffs contend that Defendants violated their fiduciary duties of loyalty and prudence by investing in the retail share classes rather than the institutional share classes of the following six mutual funds: (1) Janus Small Cap Value Fund ("Janus Fund"); (2) Allianz CCM Capital Appreciation Fund ("Allianz Fund"); (3) Franklin Small-Mid Cap Growth Fund ("Franklin Fund"); (4) William Blair Small Growth Fund ("William Blair Fund"); (5) PIMCO RCM Global Tech Fund ("PIMCO Fund"); and (6) MFS Total Return A Fund ("MFS Total Return Fund"). The retail share classes of each of these funds had higher expense ratios than the institutional share classes; the higher fees were directly related to the fact that the retail share classes offered more revenue sharing.

a. William Blair Small Cap Growth Fund

The William Blair Small Cap Growth Fund ("William Blair Fund") was initially added to the Plan in July 2002. Defendants chose to invest in a retail share class of the fund, although an institutional share class was available at that time. There is no evidence that Defendants considered the institutional share class in July 2002 or that the Investments Staff presented information about the institutional share class to the Investment Committees in 2002. From 2002 to 2009, the fees for the retail share class of the William Blair Fund were 24-29 basis points higher than the fees for the institutional share class. The higher fee is attributable to 12b-1 fees that served as a source of revenue sharing to SCE.

*9 The Plan's initial investment in the William Blair Fund was \$0. The minimum required investment for the institutional share class was \$500,000. Nonetheless, the \$500,000 investment minimum for the institutional share class would not have precluded Defendants from investing in the institutional share class. The William Blair Fund will waive the investment minimum in certain circumstances—for example, where a plan can commit to meet the investment minimum within a specified time frame. Here, the Plan's investment in the William Blair Fund met or exceeded the \$500,000 minimum investment criteria by August 2002, within a month of its initial investment.

For large 401(k) plans with over a billion dollars in total assets, such as Edison's, mutual funds will often

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waive an investment minimum for institutional share classes. It is also common for investment advisors representing large 401(k) plans to call mutual funds and request waivers of the investment minimums so as to secure the institutional shares. Defendants' expert, Daniel J. Esch, has personally obtained such waivers for plans as small as \$50 million in total assets-i.e., 5 percent the size of the Edison Plan.

The only way a fiduciary can obtain a waiver of the investment minimum is to call and ask for one. Yet none of the Edison fiduciaries nor anyone acting on their behalf (including HFS) ever requested that the William Blair Fund waive the minimum investment so that the Plan could invest in the institutional share class. Had someone called on behalf of the Plan and requested a waiver of the investment minimum, the William Blair Fund almost certainly would have granted the waiver.

The William Blair Fund remains in the Plan to the present day; assets continue to be invested in the retail share class.

b. PIMCO RCM Global Technology Fund

The PIMCO RCM Global Technology Fund ("PIMCO Fund") was added to the Plan in July 2002. Defendants initially chose to invest in the retail share class, although an institutional share class existed at that time. From 2002 to 2003, the fees for the retail share class were 34-40 basis points higher than the fees for the institutional share class. The higher fee is attributable to 12b-1 fees that served as a source of revenue sharing to SCE.

In July 2002, the minimum investment for the institutional share class of the PIMCO Fund was \$5 million. The Plan did not meet this minimum investment until July 2003, when the assets in the fund totaled \$5.3 million.

Nonetheless, the \$5 million investment minimum for the institutional share class would not have precluded Defendants from investing in the institutional share class. The PIMCO Series Prospectus filed on December 28, 2001 indicates that the PIMCO Fund will waive investment minimums for the institutional share class in its sole discretion. As stated above, it is common for investment advisors representing large 401(k) plans to call mutual funds and request waivers

of the investment minimums so as to secure the institutional shares. Defendants' expert has personally obtained such waivers for plans as small as \$50 million in total assets-i.e., 5 percent the size of the Edison Plan. Additionally, Defendants' expert has personally obtained waivers for plans like Edison's from the PIMCO Fund in the past.

***10** None of the Edison fiduciaries nor anyone acting on their behalf (including HFS) ever requested that the PIMCO Fund waive the minimum investment so that the Plan could invest in the institutional share class in July 2002. Had someone called on behalf of the Plan in July 2002 and requested a waiver of the investment minimum, the PIMCO Fund almost certainly would have granted the waiver.

In October 2003, Defendants converted the shares in the retail class of the PIMCO Fund to the institutional share class. The following background is relevant to the decision to switch share classes: In 2002, when Defendants first considered adding the PIMCO RCM Fund to the Plan, it was called the Dresdner RCM Global Technology Fund (the "Dresdner Fund"). The retail share class of the Dresdner Fund had a performance history and a Morningstar rating. However, in the time between when the Investments Staff first recommended the Dresdner Fund to the Investment Committees, and when the fund was added to the Plan in July 2002, there was merger of the Dresdner Fund into the PIMCO RCM Global Technology Fund. At that point, the assets automatically transferred from the retail share class of Dresdner Fund into the retail share class of the PIMCO RCM Global Technology Fund. The retail share class of PIMCO Fund did not have a Morningstar rating or a performance history.

In early 2003, Edison began considering the elimination of a separate fund, the T. Rowe Price Science Fund, from the Plan. The T. Rowe Price Science Fund had over \$40 million in assets invested in it; Defendants considered mapping these assets into the PIMCO Fund upon the termination of the T. Rowe Price Science Fund. In connection with that decision, Defendants reviewed the different share classes of the PIMCO Fund in July 2003. Defendants learned that the retail share class of the PIMCO Fund (in which the Plan was invested) did not have a performance history or a Morningstar rating, but the institutional share class did have a performance history and a

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Morningstar rating. One of the Investment Criteria used to select mutual funds is the availability of public information, such as a sufficient performance history and Morningstar rating. Thus, the Edison fiduciaries determined that it would be more prudent to invest in the institutional share class of the PIMCO Fund.

In October 2003, when the Edison fiduciaries eliminated the T. Rowe Price Science Fund from the Plan, they mapped the \$40 million in assets from that fund into the PIMCO Fund and simultaneously converted all of the PIMCO Fund retail shares to institutional shares, thereby securing the lower fee rate. Since October 2003, the shares have been invested in the institutional share class.

c. MFS Total Return Fund

The MFS Total Return Fund was added to the Plan in July 2002. The fund was added as a replacement for the Invesco Total Return Fund. Assets in the amount of \$500,000 were mapped from the Invesco Total Return Fund into the MFS Total Return Fund when the fund was first added to the Plan. Defendants chose to invest in the retail share class of the fund, although a cheaper institutional share class was available in July 2002. From 2002 to 2008, the fees for the retail share class were 24-25 basis points higher than the fees for the institutional share class. The higher fee is attributable to 12b-1 fees that served as a source of revenue sharing to SCE.

***11** David Ertel admitted that the Investment Staff did not present any information to the Sub-TIC about the institutional share class of the MFS Total Return Fund at the time it was added to the Plan.

In July 2002, to invest in the institutional share class of the MFS Total Return Fund, a retirement plan had to: (1) have aggregate assets of at least \$100 million, and (2) invest at least \$10 million either in institutional shares of the MFS Total Return Fund alone or in combination with investments in institutional shares of other MFS funds. There is no evidence as to what the applicable minimum investment for the institutional share class was in 2003, 2004, 2005, 2006, or 2007.^{FN8}

FN8. Plaintiffs introduced a document at trial dated December 31, 2008, which dem-

onstrated that, as of that date, the mandatory minimum investment for the institutional share class of the MFS Total Return Fund was \$0. (Trial Exh. 1742.) However, this exhibit has no probative value because it does not indicate what the investment minimum was at the time Edison fiduciaries added the Fund to the Plan line-up, or at any time when Edison was invested in the fund.

The Plan met the first criteria for investment in the institutional share class-aggregate assets of at least \$100 million-at the time of its initial investment in July 2002. As to the second criteria, the Plan never had a total of \$10 million in assets invested in the MFS Total Return Fund alone. However, as of April 2005, the Plan met the minimum investment requirement through a combination of assets in various MFS funds which exceeded \$10 million.

The \$10 million investment minimum for the institutional share class would not have precluded Defendants from investing in the institutional share class of the MFS Total Return Fund. The January 2002 MFS Series Prospectus states that MFS Total Return Fund will waive the investment minimum in its discretion when it determines that the entity's aggregate assets were likely to equal or exceed \$100 million or that such entity would make additional investments in MFS funds so as to meet the \$10 million aggregate minimum within a reasonable time.

For large 401(k) plans with over a billion dollars in total assets, such as Edison's, mutual funds will often waive an investment minimum for institutional share classes. It is therefore common for investment advisors representing large 401(k) plans to call mutual funds and request waivers of the investment minimums so as to secure the institutional shares. Defendants' expert has personally obtained such waivers for plans as small as \$50 million in total assets-i.e., 5 percent the size of the Edison Plan.

The only way a Plan fiduciary can obtain a waiver of an investment minimum for the institutional share class is to call the fund and ask for one. Yet none of the Edison fiduciaries nor anyone acting on their behalf (including HFS) ever requested that the MFS Total Return Fund waive the minimum investment so that the Plan could invest in the institutional share class. Had someone called on behalf of the Plan and

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requested a waiver of the investment minimum in July 2002, the MFS Total Return Fund almost certainly would have granted the waiver.

The MFS Total Return Fund was eliminated from the Plan's menu of investment options in October 2008, and its assets were mapped into the Russell Balanced Moderate Growth portfolio at that time.

d. Janus Small Cap Value Fund

***12** The Berger Small Cap Value Fund was added to the Plan in March 1999, which is outside the statute of limitations period in this action. Defendants chose to invest in the retail share class although an institutional share class was also available. Defendants do not offer any reason why they initially chose to invest in the retail share class. From 2003 to 2007, the fees for the retail share class were between 18 and 33 basis points higher than the fees charged for the institutional share class. The higher fee is attributable to 12b-1 fees that served as a source of revenue sharing to SCE.

Effective in April 2003, Stilwell Financial, which owned both the Janus and Berger families of mutual funds reorganized several of Berger's funds into Janus. As part of this reorganization, the name of the Berger Small Cap Value Fund was changed to Janus Small Cap Value Fund (the "Janus Fund"). David Ertel, the Manager of Investments for SCE and the head of the Investments Staff, admitted that the April 2003 rebranding did not prompt Edison to review the share class in which the Plan assets were invested in.

The management team of the Janus Fund remained the same both before and after the 2003 reorganization. Specifically, the Janus Fund was managed by a sub-advisor company called Perkins, Wolfe, and McDonald ("PWM") both before and after the acquisition. The same two managers from PWM, Robert Perkins and Thomas Perkins, continued to manage the fund after the acquisition. During the acquisition, however, Janus purchased a minority interest of 30 percent in PWM.

The investment style of the Janus Fund remained essentially the same both before and after the 2003 reorganization, and the benchmark that the fund used, the Russell 2000 Value Index, did not change. Further, Morningstar, which is a trusted source for in-

formation on mutual funds, did not change its categorization of the Janus Fund nor did it change the benchmarks it used to evaluate the Janus Fund. In sum, the changes to the Janus Fund in April 2003 were nothing more than a rebranding. The fund's management, investment style, and performance benchmarks did not change.

On June 30, 2003, the Trust Investment Committee/Chairman's Subcommittee ("Sub-TIC") held a meeting in which they reviewed the funds for the Plan, including the Janus Fund. The meeting minutes/overview for the June 30, 2003 meeting reflect that, as of that date, the Janus Fund was placed on a "low priority" Watch List due to "Organizational issues/Manager turnover." Thus, Defendants conducted a closer review of the Janus Fund as a result of the April 2003 reorganization. Defendants did not switch share classes in 2003.

In October 2007, the Janus Fund was eliminated from the Plan's line-up of investment options and its assets were mapped into the Artisan Small Cap Value Fund.

e. Allianz CCM Capital Appreciation Fund

The PIMCO CCM Capital Appreciation Fund was added to the Plan in March 1999, which is outside the statute of limitations period for this action. Defendants chose to invest in a retail ("Administration") share class of the fund, although an institutional ("I") share class was available and continues to remain available. Defendants do not offer any reason why they initially chose to invest in the retail share class. From 2005 to 2009, fees for the retail share class were 25 basis points higher than fees for the institutional share class. The higher fee is attributable to 12b-1 fees that served as a source of revenue sharing to SCE.

***13** In 2000, Allianz bought a controlling interest in PIMCO. Five years later, in April 2005, Allianz rebranded several of the PIMCO funds. The PIMCO RCM Capital Appreciation Fund was renamed the Allianz CCM Capital Appreciation Fund (the "Allianz Fund") at that time. There was no change in the management of the Allianz Fund as a result of the rebranding.^{FN9} Additionally, the fund's investment strategy remained the same, and Morningstar did not reclassify the Allianz fund or change its benchmarks after the April 2005 rebranding.

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FN9. Plaintiffs point out that, as a result of the April 2005 rebranding, Allianz removed one of PIMCO's "star" fund managers, William Gross, from several of their funds. (Pl. Response to Def.'s Supp. Br. at 17.) However, William Gross did not manage the PIMCO CCM Capital Appreciation Fund at any relevant time. Moreover, Gross was a fixed-income manager, while the Allianz Fund is an equity fund. Thus, Gross's departure from the management of some of PIMCO's funds is not material to whether Defendants should have conducted a due diligence review of the Allianz Fund in 2005.

In June 2005, the Sub-TIC held a meeting in which they reviewed the funds for the Plan, including the Allianz Fund. The meeting minutes from the June 2005 meeting indicate that the Allianz Fund was placed on a "low priority" Watch List due to "manager turnover" and "performance issues." Thus, Defendants performed a closer review of the Allianz Fund in connection with the April 2005 rebranding.^{FN10} Defendants did not switch share classes in April 2005.

FN10. It should be noted that the PIMCO CCM Capital Appreciation Fund had been placed on a medium-low priority Watch List as of March 2003 due to "performance issues." The record is not clear whether the fund simply remained on the Watch List throughout 2003-2005, or if the fund had been removed from the Watch List only to return in April 2005.

The Allianz Fund remains in the Plan to the present day; assets continue to be invested in the retail share class.

f. The Franklin Small-Mid Cap Growth Fund

The Franklin Small Cap Growth Fund was added to the Plan in March 1999, which is outside the statute of limitations period for this action. Defendants chose to invest in a retail ("A") share class although an institutional ("Advisor") share class was available at that time and continues to remain available. Defendants chose to invest in the retail share class in 1999

because the institutional share class had an inception date of 1997 and did not have a Morningstar rating or three years of performance history. Conversely, the retail share class had a Morningstar rating and significant performance history. Given that the availability of public information for mutual funds, including a Morningstar rating and significant performance history, is one of the five Investment Criteria, Defendants chose to invest in the retail share class rather than the institutional share class so as to capture the Morningstar rating and the performance history.

From 2001 to 2007, the fees for the retail share class of the Franklin Fund were 25 basis points higher than the fees for the institutional share class. The higher fee is attributable to 12b-1 fees that served as a source of revenue sharing to SCE.

On September 1, 2001, there was a change in the investment criteria of the Franklin Fund. Prior to that time, the Franklin Fund invested in growth companies with market capitalizations up to 1.5 billion except for companies in the fund's Russell 2000 benchmark. After September 2001, the Franklin Fund could invest in companies with market capitalizations up to \$8.5 billion. The fund also expanded its main investment strategy, so that it could invest up to 80% of its net assets in small capitalization and mid capitalization growth companies. In short, the fund changed from a small-cap fund to a small-mid-cap fund. As a result of this change, in September 2001, the retail shares that Edison previously held in the Franklin Small Cap Growth Fund were automatically converted into retail shares of the Franklin Small-Mid Cap Growth Fund.

***14** The initial managers of the Franklin Fund before the September 2001 change—Edward Jamieson, Michael McCarthy, and Aidan O'Connell—remained as the core management of the fund after the change. Two additional managers were added to the fund's management team in 2002. Morningstar did not reclassify the Franklin Fund after the change in investment strategy.

The SCE Investments Staff, in consultation with HFS, reviewed the Franklin Fund after the September 2001 change and concluded that the fund still satisfied the Investment Criteria. The Investments Staff recommended that the Franklin Fund be reclassified as a mid-cap growth fund for the Plan's purposes. On

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January 28, 2002, at the meeting of the Sub-TIC, the Investments Staff recommended reclassifying the fund as a mid-cap fund and adding the William Blair Small Cap Fund so as to have a small-cap fund in the mix of options for the Plan participants. The recommendations were adopted. Edison also changed its participant communications to advise the Plan participants that the Franklin Small-Cap Growth Fund would now be categorized as a "Medium U.S. Stock Fund." The Franklin Fund was not put on the Watch List as a result of the September 2001 change. No new shares were added to the Franklin Fund as a result of the change, nor did Defendants switch share classes.

The Franklin Fund was eliminated from the Plan in October 2007 and its assets were mapped into the T. Rowe Price Mid-Cap Growth Fund.

E. Money Market Fund

One of the funds in the Plan is a short-term investment fund (the "Money Market Fund") which, since 1999, has been managed by State Street Global Advisors ("SSgA").^{FN11} SSgA is a division of State Street Bank and Trust Company ("State Street"), which is also the Plan's Trustee. In 1999, State Street, through its SSgA division, was awarded the money market business as part of the Plan's decision to hire State Street as the Trustee for the Plan. At that time, State Street charged 18 basis points (0.18%) in management fees for the Money Market Fund.

FN11. In general, a money market fund is a conservative investment vehicle that often invests in short-term money market securities, such as short-term securities of the United States Government or its agencies, bank certificates of deposit, and commercial paper. *See Jones v. Harris Associates L.P.*, Slip opinion, Case No. 08-586, at 9 n. 6 (S.C. Mar. 30, 2010)

Management fees for the Money Market Fund are not paid by SCE; rather, management fees are charged against Plan participants' fund assets as part of the expense ratio.

1. Selection of the State Street Money Market Fund

Prior to hiring State Street and selecting the Money Market Fund, David Ertel ("Ertel") of the Investments Committee reviewed four other money market funds sometime in 1998. Each of the four funds charged management fees ranging from 15 to 20 basis points. On or about the same time, SCE sent out a Request for Proposal ("RFP") to select a Trustee for the Plan. Ertel recommended that SCE hold off on selecting a money market fund until such time as the results from the RFP were received, as many of the RFP candidates also offered short-term investment funds.

As a result of the RFP, SCE received seven responses from various candidates for the Trustee position. SCE formed an Oversight Group consisting of members from SCE's Human Resources Department, the Treasurer Department, Controllers, and the outside record keeper, Hewitt Associates, to review the responses to the RFP and narrow the options to the top three candidates. Ertel was part of the Oversight Group. The top three candidates for the Trustee position were Wells Fargo Bank, the Northern Trust Co., and State Street Bank, all of which provided short-term investment funds which they managed. Each of the three top candidates charged management fees for their money market funds ranging from 15 to 20 basis points. Specifically, Wells Fargo Bank charged fees of 20 basis points, North Trust Co. charged 15 basis points, and State Street charged fees of 18 basis points.^{FN12} State Street was ultimately selected as the Trustee in 1999, and the Plan decided to invest in the money market fund managed by SSgA.

FN12. Additionally, the Trustee candidates that were not chosen as the top three candidates also charged management fees ranging from 15 to 20 basis points for their short-term investment funds. Specifically, the Bank of New York and the Mellon Trust both charged fees of 20 basis points for short-term investment funds they managed, while Wachovia Bank charged fees of 15 basis points.

2. Monitoring of the Money Market Fund

***15** The Investments Staff consistently monitors the performance of all the funds in the Plan, including the Money Market Fund. As part of this process, the

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Investments Staff receives monthly, quarterly, and annual reports from HFS discussing the Money Market Fund's performance. The Investment Staff evaluates the Money Market Fund on the same Investment Criteria with which it evaluates other funds, which include: (1) the stability of the fund's overall organization; (2) the fund's investment process; (3) the fund's performance compared to benchmarks and peer groups; and (4) the fund's total expense ratio (fees). The most important criterion is the Money Market Fund's performance net of fees as compared to peers and benchmarks.

At the time the Money Market Fund was chosen, Ertel evaluated the performance of the fund, including SsgA's fees, and found that the 18 basis-point fee was reasonable.

In January 2003, Marvin Tong ("Tong") joined the Investments Staff at SCE. He reports directly to Ertel and is one of the persons responsible for monitoring the investment options in the Plan. Tong spends approximately 50% of his time working on the Plan. Prior to working at SCE, Tong had worked in the investment consulting field, consulting 401(k) plans and pension plans. When he started at SCE, he reviewed the fees of all the options in the Plan, including the Money Market Fund. Based on his experience, Tong believed that the 18 basis-point fee for the Money Market Fund was reasonable at that time.

In late 2004, Pamela Hess ("Hess") joined the team at HFS that provides investment support services to SCE. Prior to that time, Hess worked as a Senior Investment Consultant at HFS from 2000 to 2005, and an Investment Analyst at HFS from 1999-2000. In 2004, when she began working with SCE, Hess believed that the 18 basis-point fee for the Money Market Fund was reasonable in light of the size of the Plan's investment in the fund and the services rendered by State Street to the Plan.

Hess often reviewed the fees for the Money Market Fund and alerted the SCE Investment Staff of opportunities to seek lower fees when they arose. In 2005, Hess had a conversation with Tong regarding the management fees of the Money Market Fund. Hess told Tong that she had reviewed the fees for the Money Market Fund and believed that the Plan had an opportunity to negotiate a lower fee, in light of the fact that the Plan's assets in the fund had grown.

Tong, in turn, discussed Hess's suggestion with Ertel. Ertel authorized Tong to discuss the issue with SCE's Benefits Accounting Staff to attempt to negotiate the Money Market Fund fees with State Street.

There is no evidence in the record that Tong actually discussed the matter with the Benefits Accounting staff or that persons from the Benefits Accounting Department contacted State Street in 2005 regarding lowering the fees for the Money Market Fund. Nonetheless, in September 2005, SSgA dropped its fees from 18 basis points to 12 basis points. It is unclear whether SSgA or SCE initiated the reduction in fees.

***16** In April 2007, Tong again discussed the reasonableness of the fees for the Money Market Fund with Hess. Hess told Tong that she had reviewed the fees for the Money Market fund, and that because the assets in the fund had grown to \$440 million, she believed SCE could negotiate a lower management fee with SSgA. Hess stated that "true pricing" would lie somewhere between 8 to 9 basis points, and that Barclays Global Investments offered a "collective version" money market fund for 9 basis points.^{FN13} Hess also pointed out that she believed Vanguard had "low cost vehicles" at 9 basis points. Hess also stated that she did not believe SCE was overpaying with SSgA; rather, she felt that because two years had gone by since the last reduction in fees, and SCE's assets continued to grow, SCE might be in a position to negotiate lower fees. At that time, Hess was aware of a number of other comparable 401(k) plans that offered their participants money market funds with fees of 12 basis points or higher. In other words, the 12 basis-point fee charged by SSgA was comparable to what other 401(k) plans were paying at the time, in Hess's experience.

FN13. Hess described a "collective version" as similar to a private mutual fund. A collective money market fund is not publicly traded; rather, it is available only to ERISA-qualified investors and other 401(k) investors.

In response to Hess's information, Tong contacted the SCE Benefits Accounting staff, and together they negotiated with State Street for a reduction in the investment management fee. Consequently, in July 2007, SSgA reduced the fees for the Money Market Fund from 12 basis points to 10 basis points. In Oc-

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tober 2007, the management fees for the Money Market Fund were further reduced to 8 basis points. Currently, fees for the Money Market Fund remain at 8 basis points.

From 1999 to the present, the SCE Investment Staff has regularly monitored the performance, net of fees, of the Money Market Fund. Throughout this period, the Money Market Fund has consistently exceeded its performance benchmarks, net of fees, in a statistically significant manner.

Despite the Money Market Fund's consistently good performance, in 2008, in response to the global financial crisis, the Investment Committees requested that the Investments Staff conduct an extensive review of the Money Market Fund. The goal of the review was to ensure that the Investment Committees were comfortable with the Money Market Fund's management and credit risk. During this review, members of the Investments Staff had discussions with SSgA and HFS regarding the performance of the Money Market Fund. Based on the results of the investigation, in early 2009, the Investment Committees took no action regarding the Money Market Fund, as it continued to meet the Investment Criteria and outperform its benchmarks. Further, HFS found that the management fee of 8 basis points was reasonable and competitive when compared with similar funds; in fact, it was one of the lowest fees offered for that type of fund in the market.

III. CONCLUSIONS OF LAW

A. Jurisdiction

The Court has federal question subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). The Plan, formerly named the SSPP, is a “defined contribution plan,” and an “eligible individual account plan” as defined by ERISA § 3(34), 29 U.S.C. § 1002(34). Each of the named Plaintiffs were participants in the Plan at the time the action was commenced and remain participants in the Plan within the meaning of ERISA §§ 3(7) and (8), 29 U.S.C. §§ 1002(7) and (8). The Plan is covered by and subject to the provisions of part 4 of Title I of ERISA, § 401 *et seq.*, 29 U.S.C. § 1101 *et seq.*

*17 Venue is proper in this Court pursuant to 29

U.S.C. § 1132(e)(2) because the Plan is administered in this District and the Defendants may be found in this District.

B. Standing

ERISA §§ 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a)(2) and (a)(3), provide standing for any participant to assert, on behalf of the Plan, a breach of fiduciary duty claim under ERISA § 409, 29 U.S.C. § 1109. *Concha v. London*, 62 F.3d 1493, 1499 (9th Cir.1995). Defendants do not challenge the named Plaintiffs' status as participants of the Plan within the meaning of 29 U.S.C. §§ 1132(a)(2) or (a)(3). *See also* 29 U.S.C. § 1002(7) and (8) (definition of participant); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) (“participant” means either employees currently in covered employment or “former employees who ‘have ... a reasonable expectation of returning to covered employment’ or who have a ‘colorable claim’ to vested benefits”) (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.1986)).

ERISA § 409(a) provides that, “[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate” 29 U.S.C. § 1109(a). Claims under ERISA § 409 are brought in a representative capacity on behalf of the plan as a whole. *See In re First American Corp. ERISA Litig.*, 258 F.R.D. 610, 615 (C.D.Cal.2009) (“[T]he text of § 409(a) characterizes the relevant fiduciary relationship as one ‘with respect to a plan,’ and repeatedly identifies the ‘plan’ as the victim of any fiduciary breach.... ‘A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than the rights of an individual beneficiary.’”) (quoting *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985)); *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 110 (C.D.Cal.2008) (“The complaint [alleging breach of fiduciary duties] is

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based on allegations and recovery that address the Plan as a whole, not individual claimants. If recovery is received and paid to the Plan, it is the responsibility of the Plan fiduciaries to determine the manner in which such recovery will be applied.”) Here, as in *In re First American* and *Kanawi*, the Plaintiffs’ claims assert harm to the Plan as a whole, not to their individual accounts. As participants in the Plan, Plaintiffs may challenge the alleged breaches of duty on behalf of the Plan. 29 U.S.C. § 1132(a)(2) and (a)(3); see *Concha*, 62 F.3d at 1500.^{FN14}

FN14. Plaintiffs also have Article III standing to challenge Defendants’ alleged breaches of duty. Article III standing requires Plaintiffs to show: (1) an injury in fact; (2) a causal connection between the injury and the actions complained of; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). As explained below, Plaintiffs have shown that the Plan suffered a loss and that Defendants’ conduct was the cause thereof. Specifically, the Plan’s assets were reduced through the payment of excessive fees for mutual fund investments. This loss was caused by Defendants’ imprudent decision to invest in more expensive, but otherwise identical, retail share classes when cheaper institutional share classes were available. Had Defendants exercised their duty of prudence, the Plan would not have paid excessive fees. See *In re First American Corp. ERISA Litig.*, 258 F.R.D. at 617. These losses are redressable under ERISA § 409, 29 U.S.C. § 1109.

C. Legal Standard: Breach of Fiduciary Duty

*18 ERISA is intended to “promote the interests of employees and their beneficiaries in employee benefit plans.” *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). In enacting ERISA, “the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators.” *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n. 8, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985) (citations omitted). To effectuate this concern, Congress imposed a number of detailed duties on plan fiduciaries. *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 417 (4th Cir.2007). ERISA § 404,

29 U.S.C. § 1104, codifies the duties of loyalty and care owed by a plan fiduciary:

(a) (1) ... [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-

(A) for the exclusive purpose of:

(I) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) 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;

...

29 U.S.C. § 1104(a)(1)(A) and (B). Subsection (a)(1)(A) codifies the duty of loyalty, while subsection (a)(1)(B) articulates the duty of prudence. These duties are “the highest known to the law.” *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 751 (9th Cir.2005).

1. Duty of Loyalty

The duty of loyalty requires a fiduciary to “discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.” 29 U.S.C. § 1104(a)(1)(A). A fiduciary must “act with complete and undivided loyalty to the beneficiaries of the trust,” and must make any decisions in a fiduciary capacity “with an eye single to the interests of the participants and beneficiaries.” *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir.1984) (quotations omitted); see *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2d Cir.1982); *DiFelice*, 497 F.3d at 418-19. These responsibilities have their source in the common law of trusts. *Pegram v. Herdrich*, 530 U.S. 211, 224, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000). As Judge Cardozo famously stated: “Many forms of conduct permissible in a workaday world for those acting at arm’s length are forbidden to those bound by fiduci-

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ary ties. A trustee is held to something stricter than the morals of the marketplace. Not honestly alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.” *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545 (Ct.App.1928).

Although ERISA's duty of loyalty gains definition from the law of trusts, there is an important distinction provided for by the statute's provisions. See *Variety Corp. v. Howe*, 516 U.S. 489, 497, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996) (“We also recognize ... that trust law does not tell the entire story.”); *DiFelice*, 497 F.3d at 417 (“The common law of trusts, therefore, ‘will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties.’”) (quoting *Variety Corp.*, 516 U.S. at 497). Under ERISA, “a fiduciary may have financial interests adverse to beneficiaries, but under trust law a trustee is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries.” *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 295 (5th Cir.2000). Thus, unlike in trust law, ERISA contemplates that in many circumstances a plan fiduciary will “wear two hats,” and may have conflicting loyalties. *Id.*; see *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1432 (9th Cir.1986) (citing *Amato v. Western Union Int'l, Inc.*, 596 F.Supp. 963, 968 (S.D.N.Y.1984); *Friend v. Sanwa Bank of California*, 35 F.3d 466, 469 (9th Cir.1994). Under ERISA, a conflict of interest alone is not a per se breach: “nowhere in the statute does ERISA explicitly prohibit a trustee from holding positions of dual loyalties.” *Friend*, 35 F.3d at 468-69. Instead, to prove a violation of the duty of loyalty, the plaintiff must show “actual disloyal conduct.” *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F.Supp.2d 812, 834-35 (N.D.Cal.2005) (ERISA fiduciaries do not breach their duty of loyalty simply by “placing themselves in a position” where they might act disloyally.).

***19** Consistent with this rule, a fiduciary does not breach his duty of loyalty by pursuing a course of conduct which serves the interests of the plan's beneficiaries while at the same time “incidentally benefitting” the plan sponsor or even the fiduciary himself. See *Morse v. Stanley*, 732 F.2d 1139, 1146 (2d Cir.1984); *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir.1982); *Siskind v. Sperry Ret. Program, Unisys*, 47 F.3d 498, 506 (2d Cir.1995). The benefit, however, must be *incidental* to a decision that is in

the best interests of the plan participants. As the Second Circuit explained: “Although officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants ... simply because it incidentally benefits the corporation ... their decisions must be made with an eye single to the interests of the participants and beneficiaries.” *Bierwirth*, 680 F.2d at 271; see *Bussian*, 223 F.3d at 295 (“Despite the ability of an ERISA fiduciary to wear two hats, ‘ERISA does require ... that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions.’”) (quoting *Pegram*, 530 U.S. 211, 120 S.Ct. 2143, 147 L.Ed.2d 164). In sum, an investment decision that happens to benefit the plan sponsor or the fiduciary himself does not constitute a breach of the duty of loyalty, so long as that decision was made solely in the best interests of the plan participants and the beneficiaries. See, e.g., *Morse v. Stanley*, 732 F.2d at 1146 (fiduciary's decision to deny accelerated payments to departing employees maintained the fiscal integrity of the Plan while also benefitting the company); *Siskind*, 47 F.3d at 506 (“Where the employer is viewed as a participant in the single employer plan, it shares with its employees an interest in having the pension plan contribute to business profitability along with its principal task of ensuring future benefits to employees ...”).

2. Duty of Prudence

ERISA requires that a fiduciary act with the “care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” 29 U.S.C. § 1104(a)(1)(B) (2006). Like the duty of loyalty, the duty of prudence is “the highest known to the law.” *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir.1996) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2d Cir.1982)).

“Prudence is measured according to the objective ‘prudent person’ standard developed in the common law of trusts.” *Whitfield v. Cohen*, 682 F.Supp. 188, 194 (S.D.N.Y.1988) (citing *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir.1983) and S. Rep. N. 93-127, 93d Cong., 2nd Sess., reprinted in 1974

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U.S.Code Cong. & Ad. News 4639, 4838, 4865). Under the common law of trusts, a trustee is “duty-bound to make such investments and only such investments as a prudent [person] would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived....” *In re Unisys Savings Plan Litig.*, 74 F.3d 420, 434 (3d Cir.1996) (quoting Restatement (Second) of Trusts § 227 (1959)).

***20** The prudence standard is not that of a prudent lay person, but rather that of a prudent fiduciary with experience dealing with a similar enterprise. *Whitfield*, 682 F.Supp. at 194 (citing *Mazzola*, 716 F.2d at 1231-21). To determine whether the fiduciary has met the prudence standard, “the court focuses not only on the merits of the transaction, but also on the thoroughness of the investigation into the merits of the transaction.” *Howard*, 100 F.3d at 1488. The question is whether, “at the time they engaged in the challenged transactions, [the fiduciaries] employed the appropriate methods to investigate the merits of the investment and to structure the investment.” *Mazzola*, 716 F.2d at 1232; *Fink v. National Savings and Trust Co.*, 772 F.2d 951, 957 (D.C.Cir.1985) (“A fiduciary’s independent investigation of the merits of a particular investment is at the heart of the prudent person standard.”). The prudence test focuses on the conduct of the fiduciaries when making the investment decision and not on the resulting performance of the investment. *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir.1983). (“The focus of the inquiry is how the fiduciary acted in his selection of the investment, and not whether his investments succeeded or failed.”) (quoting 19B *Business Organizations*, S. Young, *Pension and Profit-Sharing Plans* § 17.02[3] at 17-29).

A fiduciary may secure independent advice from counsel or a financial advisor when making investment decisions, and indeed must do so where he lacks the requisite education, experience, and skill. *Donovan v. Bierwirth*, 680 F.2d 263, 272-73 (2d Cir.1982) (Friendly, J.). However, while securing independent advice is evidence of a thorough investigation, it does not act as a complete defense to a charge of imprudence. *Howard*, 100 F.3d at 1489; *Bierwirth*, 680 F.2d at 272 (independent advice of counsel does not operate as a “complete whitewash which, without more, satisfies ERISA’s prudence requirement.”) The fiduciary must investigate the

expert’s qualifications, provide accurate information to the expert, and ensure that reliance on the expert’s advice is reasonably justified under the circumstances. *Howard*, 100 F.3d at 1489; *Mazzola*, 716 F.2d at 1234. Ultimately, the fiduciary has a duty to exercise his own judgment in light of the information and advice he receives. *Crowhurst v. Cal. Institute of Tech.*, No. CV 9605433 RAP (Shx), 1999 WL 1027033, at *19 (C.D.Cal., July 1, 1999) (citing *Mazzola*, 716 F.2d at 1231).

The failure to investigate and evaluate a particular investment decision is a breach of fiduciary duty that may warrant an injunction against or the removal of the trustee (and perhaps the recovery of trustees fees paid for investigative services that went unperformed). *Fink*, 772 F.2d at 962. However, the failure to investigate alone cannot sustain an action for damages where the investment decision nonetheless was objectively prudent. *Id.* (“I know of no case in which a trustee who has happened-through prayer, astrology or just blind luck-to make (or hold) objectively prudent investments ... has been liable for losses from those investments because of his failure to investigate and evaluate beforehand.”) (Scalia, J., concurring); *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 919 (8th Cir.1994); *Whitfield*, 682 F.Supp. at 195. Thus, having found that the fiduciary failed to investigate a particular investment adequately, the court must then examine whether, in light of the facts that an adequate and thorough investigation would have revealed, the investment was objectively imprudent. *Whitfield*, 682 F.Supp. at 195; *see, e.g., Mazzola*, 716 F.2d at 1232 (finding a breach of duty where a reasonable investigation would have revealed that the loan the Plan made to a convalescent home was far below prevailing interest rates and “presented an unreasonable risk of not being timely and fully paid.”); *Katsaros v. Cody*, 744 F.2d 270, 279-80 (2d Cir.1984) (had the trustees engaged in an adequate investigation they would have discovered that “the loan was a loser from its inception”); *In re Unisys Savings Plan Litig.*, 74 F.3d at 436 (denying summary judgment to fiduciaries where plaintiffs presented evidence that a thorough investigation (which was not done) would have revealed serious problems with the investment). The prudence of the challenged decision is judged at the time it was made, rather than with the benefit of hindsight. *Roth*, 16 F.3d at 917-18; *DiFelice*, 497 F.3d at 424.

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*21 In sum, if the investment decision is one that a prudent person would make at the time it was made, there is no liability for loss to the Plan participants. *In re Unisys. Savings Plan Litig.*, 74 F.3d at 434; *Roth*, 16 F.3d at 919 (“Even if a trustee failed to conduct an investigation before making a decision, he is insulated from liability if a hypothetical prudent fiduciary would have made the same decision anyway.”); see *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F.Supp.2d 812, 835 (N.D.Cal.2005) (“Because it was not imprudent to refuse to sell company stock, [defendant’s] alleged conflict could not have harmed plaintiff.”)

D. Challenged Conduct by the Plan Fiduciaries

1. Mutual Fund Investments

Plaintiffs contend that Defendants violated both their duty of loyalty and their duty of prudence when they invested in the retail share classes rather than the institutional share classes of the following six mutual funds: (1) Janus Small Cap Value Fund (“Janus Fund”); (2) Allianz CCM Capital Appreciation Fund (“Allianz Fund”); (3) Franklin Small-Mid Cap Growth Fund (“Franklin Fund”); (4) William Blair Small Cap Growth Fund (“William Blair Fund”); (5) PIMCO RCM Global Tech Fund (“PIMCO Fund”); and (6) MFS Total Return Fund.

a. Duty of Loyalty

As to the duty of loyalty, Plaintiffs contend that, when deciding to invest in the retail share classes rather than the cheaper institutional share classes of these funds, Defendants were improperly motivated by a desire to capture more revenue sharing for SCE even though doing so increased the fees charged to Plan participants. Plaintiffs contend that Defendants put the interests of SCE in offsetting the record-keeping costs to Hewitt Associates above the interests of the Plan participants in paying lower fees.

Plaintiffs rely primarily on a series of emails, generally between members of the Investments Staff and members of the SCE Human Resources Department, to support their claim that the Plan fiduciaries were improperly motivated by a desire to capture revenue sharing. Specifically, Plaintiffs point to the following evidence:

- On March 11, 2003, David Ertel, head of the Investments Staff, emailed George Grana, an employee of SCE’s Human Resources Department and copied on the email other members of the Human Resources Department and Marvin Tong, a member of the Investments Staff. In the email, Ertel told Grana that the Investments Staff and HFS were researching 5 new funds for the Plan. Ertel asked Grana, “We are having them [Hewitt Financial Services] look at fund share classes with lower expense ratios (even if there is no revenue sharing). Question: if we delete funds that have high revenue sharing with one that has none, is that still acceptable on an incremental basis?”

- On March 17, 2003, Barbara Decker and George Grana, both of the Human Resources Department, discussed via email the availability of revenue sharing from mutual funds. In the email communication Grana told Decker that Ertel was asking for clarification “about fund selection and 12b1 fee offsets.” Grana proposes to tell Ertel that when a fund manager offers the same fund with different share classes but one has more favorable revenue sharing, if all else is equal, “we should continue to use a share class which offers a reasonable revenue sharing arrangement.”^{FN15}

FN15. There is no evidence that this message was delivered or communicated to Ertel or anyone on the Investments Staff or Investment Committees.

- *22 • On June 24, 2003, Josh Cohen of HFS wrote an email to Marvin Tong which, among other things, provided the revenue sharing available in the share classes of several mutual funds that the Investments Staff was considering adding to the Plan. Cohen noted that one of the funds, the Templeton Developing Markets Fund, had “revenue sharing issues.” Cohen wrote, “While I don’t think this would have a bearing on your decision to add a Franklin fund, you may want to let Diane know your intentions to do so.” (Diane refers to Diane Kobashigawa, who at the time was the Manager of Benefits Administration in the SCE Human Resources Department.)

- On June 25, 2003, Lorie Padilla of the Human Resources Department emailed other members of

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the Human Resources Department as well as David Ertel and Marvin Tong and attached an estimate of “how the 12b-1 income [revenue-sharing] may change with the suggested fund changes.”

- Also on June 25, 2003, David Ertel responded to the email sent by Lorrie Padilla. Ertel modified the worksheet to reflect a proposed change to the PIMCO RCM Global Technology Fund. Ertel noted that the Investments Staff was considering recommending that the Investment Committees convert the retail share of the PIMCO Fund to institutional shares, and that if they adopted that recommendation, “we would pick up a Morningstar rating, and historical information, and would lose \$105,000 in 12b-1 fees [revenue sharing].” Ertel asked the email recipients, “What does everyone think of the tradeoff?”

While these emails certainly indicate that members of the Investments Staff were *aware* of the benefits of revenue-sharing, there is no evidence that members of the Investments Staff were motivated by revenue sharing when making fund recommendations to the Investment Committees. David Ertel testified that the reason he discussed revenue sharing with members of the SCE Human Resources Department in 2003 is because the Human Resources Department is responsible for overseeing the administration of the Plan and the budget/expenses related thereto. Ertel wanted to notify the Human Resources Department of what offsets would potentially be available to SCE to satisfy their obligations to the record-keeper, Hewitt Associates. Ertel testified that these communications were strictly for the purpose of having the Human Resources Department deal with budgetary matters and did not influence the selection of any mutual funds for the Plan. Having observed the witness during trial, the Court finds this testimony credible.

Furthermore, Ertel's testimony is supported by the contents of the emails themselves. For example, in the June 24, 2003 email, when Josh Cohen indicated to Ertel that a mutual fund had revenue sharing issues, Cohen stated, “I don't think this would have a bearing on your decision to add a Franklin fund,” but suggested that Ertel let the Human Resources department know about the change. Similarly, in the June 25, 2003 emails, Lorrie Padilla of the Human Resources Department attempts to estimate the effect of certain fund changes on the administrative budget

through 12b-1 fees, and communicates with Ertel and the Investments Staff for that purpose. However, there is no evidence that Lorrie Padilla or any other employee from Human Resources employee ever told Ertel or anyone on the Investments Staff to consider funds that would increase revenue sharing.

***23** It is also undisputed that the SCE Human Resources Department has no authority over which funds are recommended or selected for the Plan's line-up. Plaintiffs did not present any evidence that the Human Resources staff ever discussed revenue sharing with the Investment Committee members who had the authority to select the funds for the Plan.

David Ertel and Marvin Tong both testified that the Investments Staff never considered revenue sharing when making recommendations to the Investment Committees to add or replace mutual funds.^{FN16} Ertel also testified that revenue sharing was never discussed at any of the meetings with the Investment Committees. Further, Ertel testified that no one ever instructed him to consider revenue sharing in his analysis of whether or not to recommend a certain fund. Having observed Ertel and Tong, the Court finds this testimony credible. Thus, the Court concludes that these emails do not demonstrate that the Plan fiduciaries were motivated by revenue sharing when selecting mutual funds for the Plan.

FN16. Plaintiffs attempted to rebut this testimony by introducing Trial Exhibit 78, an email purportedly from David Ertel to Josh Cohen at HFS. The email is dated 06/24/2003 and states: “Criteria for selecting mutual funds per discussion with DFW and Dave Ertel ... Between Classes: 2. Morningstar rating is available, 3. Works in 3 main tracking sites ... 4. Revenue sharing is favorable.” Plaintiffs argue that this email demonstrates that Ertel believed favorable-revenue sharing was a relevant criteria when recommending mutual fund share classes.

In response, however, Ertel testified that he did not write this email. Barbara Decker (“Decker”) testified under oath that she wrote the email reflected at the top of Trial Exhibit 78 as a note to herself, and it was not sent to anyone. Decker is the director of benefits in SCE's Human

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Resources Department. She has no authority to recommend or select mutual fund investments for the Plan line-up. Decker also testified under oath that she had never advised nor suggested to any members of the Investments Staff or the Investments Committee that a mutual fund should be selected or retained because of the availability of revenue sharing. The Court finds the testimony credible and therefore concludes that Trial Exhibit 78 does not reflect that Ertel believed revenue sharing should be considered when recommending a mutual fund share class to the Investment Committees.

More importantly, the actual fund selections made by the Investment Committees in mid-2003 belie any argument that the Plan fiduciaries were motivated by a desire to capture revenue sharing. Each of the purportedly damaging emails discussed above relate to the fund recommendations that the Investments Staff was considering for the June and July 2003 meetings of the Investment Committees. At those 2003 meetings, the Investments Staff recommended adding six new mutual funds to the Plan, and the Investments Committees adopted those recommendations. With regard to each of the six funds added to the Plan in 2003, the Investment Committees chose to invest in the fund share class with the **lowest expense ratio and the lowest revenue sharing**, with the exception of one fund, the Vanguard Mid-Cap Index Fund, which had no revenue sharing in either share class. Thus, the decisions made by the fiduciaries at the 2003 meetings clearly were not motivated by a desire to increase revenue sharing.

The mutual fund selections from 2002 to 2008 evidence a pattern that is flatly inconsistent with a desire to capture more favorable revenue sharing arrangements. From 2002 to 2008, the Plan fiduciaries made 39 additions or replacements to the mutual fund in the Plan's investment line-up. In 18 out of 39 instances, Defendants chose to replace an existing mutual fund with one offering less revenue sharing or no revenue sharing at all; and in 11 instances, the changes resulted in no net change in the amount of revenue sharing received by SCE. In only 6 instances out of 39 did the Plan fiduciaries select a replacement fund that offered a higher amount of revenue sharing.

^{FN17} This pattern is strong evidence that the Plan fidu-

ciaries were not motivated by a revenue-sharing when making mutual fund selections. *See Bussian v. RJR Nabisco, Inc.*, 223 F.2d 286, 289 (5th Cir.2000) (When analyzing a duty of loyalty claim, "the proper inquiry has as its central concern the extent to which the fiduciary's conduct reflects a subordination of beneficiaries' and participants' interests to those of a third party."); *compare Leigh v. Engle*, 727 F.2d 113, 126 (7th Cir.1984) (breach of duty of loyalty found where "the trust's use of its assets at **all relevant times** tracked the best interests of [third parties]; "the extent and duration of ... actions congruent with the interests of another party" were relevant in deciding whether defendants breached their duty of loyalty.) (emphasis added).

FN17. The six mutual fund replacements that resulted in a net increase in revenue sharing occurred sporadically throughout the years—one replacement was made in 2002, one in 2003, two in 2004, one in 2007, and one in 2008. The sporadic nature of these decisions is not consistent with a conscious effort to increase revenue sharing at any given time.

***24** Finally, there is no evidence that any of the Plan fiduciaries considered revenue-sharing when selecting or deciding to retain *the six mutual funds at issue* in this case. As stated above, the emails and documents that Plaintiffs rely on to support their breach of loyalty claim relate to the fund selections that the Plan fiduciaries made in 2003. However, all six of the funds at issue in this case were added to the Plan prior to 2003, long before these emails were written. Of the six funds relevant to this case, only one was even involved in the 2003 changes—the PIMCO RCM Global Technology Fund. With regard to the PIMCO Fund, however, the change that Defendants actually made in 2003 was to transfer all the assets from the retail share class into an institutional share class which had a lower expense ratio and offered less revenue sharing.^{FN18} This change, like the other fund selections made in 2003, could not have been motivated by a desire to capture revenue sharing. Plaintiffs did not introduce any evidence that the Plan fiduciaries discussed revenue sharing in connection with the selection of the Janus Fund or the Franklin Fund in March 1999, or in connection with the selection of the MFS Total Return Fund, the William Blair Fund or the PIMCO Fund in July 2002.

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FN18. With regard to the PIMCO Fund, Plaintiffs do not claim any damages after October 2003, when the assets in the fund were transferred from the retail share class to the institutional share class.

In sum, the Court concludes that there is no evidence that the Plan fiduciaries engaged in actual disloyal conduct. The Plan fiduciaries did not make fund selections with an eye toward increasing revenue sharing and did not put the interests of SCE above those of the Plan participants. For these reasons, Plaintiffs' duty of loyalty claim fails.^{FN19}

FN19. During the trial and at post-trial hearings, the Court and the parties engaged in extensive discussion regarding whether a breach of the duty of loyalty requires that the fiduciary act *with intent* to advantage himself or third-parties over the plan beneficiaries, or whether the simple fact that the fiduciary made certain investment decisions that were not in the beneficiaries' best interests suffices to show a breach of the duty of loyalty. Ultimately, the Court does not need to reach this issue, as Plaintiffs have alleged both duty of loyalty and duty of prudence claims based on the same investment decisions, and the latter does not require intent.

Nonetheless, in reviewing the relevant authorities, the Court concludes that the duty of loyalty is primarily concerned with conflicts of interest; thus, a breach of that duty requires some showing that the fiduciaries' decisions were *motivated by* a desire to serve the interests of over those of the beneficiaries. *See Pilkington PLC v. Perelman*, 72 F.3d 1396, 1401-02 (9th Cir.1995) (trial issue existed as to defendant's breach of the duty of loyalty where there was strong evidence that the trustees were attempting to maximize the amount of funds reverted to the company at the beneficiaries' expense); *Cooke v. Lynn Sand & Stone Co.*, 673 F.Supp. 14, 24 (D.Mass.1986) (same); *Leigh v. Engle*, 858 F.2d 361, 364 (7th Cir.1988) ("[T]he administrators breached their duties [of loyalty] when they made investment deci-

sions out of personal motivations, without making adequate provisions that the trust's best interests would be served."); *Wright v. Nimmons*, 641 F.Supp. 1391, 1402 (S.D.Tex.1986) (the duty of loyalty requires that "the fiduciary must not abuse his position of trust in order to advance his own selfish interests"); George Gleason Bogert et al., *Bogert's Trusts and Trustees* § 255 (2d ed.2009) (the duty of loyalty requires that the fiduciary act "solely in the interest of the plan's participants without balancing those interests with the interests of the company.")

b. Duty of Prudence

Plaintiffs' duty of prudence argument is simple: Plaintiffs contend that, even if the Plan fiduciaries were not improperly motivated by revenue-sharing benefits, it was objectively imprudent for the Plan fiduciaries to decide to invest (or to continue to invest) in retail share classes of the six mutual funds where identical investments were available in the institutional share classes for lower fees. In other words, a prudent person managing his own funds would invest in the cheaper share class, all else being equal, because doing so saves money.

With regard to the six specific mutual funds at issue here, Plaintiffs make different arguments about the prudence of Defendants' investment decisions depending upon when the mutual funds were added to the Plan. Three of the mutual funds—the William Blair Fund, the PIMCO Fund, and the MFS Total Return Fund—were added to the Plan after August 2001, within the statute of limitations period. Plaintiffs therefore argue that the **initial decision to invest** in the retail share classes rather than the institutional share classes of these funds constituted a breach of the duty of prudence. Plaintiffs seek damages representing the difference in fees in the retail versus institutional share classes and lost investment opportunity from the time in which the William Blair, PIMCO, and MFS Total Return funds were first added to the Plan to the present.

***25** The remaining three funds—Janus, Allianz, and Franklin—were added to the Plan before August 16, 2001, which is outside the statute of limitations period for this action. Plaintiffs therefore do not chal-

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lenge Defendants' initial decisions to invest in the retail share classes when the funds were first added to the Plan. Rather, Plaintiffs argue that the Janus Fund, the Allianz Fund, and the Franklin Fund all underwent significant changes during the statute of limitations period that should have triggered Defendants to conduct a full due diligence review of the funds, equivalent to the diligence review Defendants conduct when adding new funds to the Plan. Plaintiffs contend that had this due diligence been done, Defendants would have realized that the Plan was paying excessive fees by investing in the retail rather than the institutional share classes, and would have changed share classes. Plaintiffs contend that Defendants' failure to conduct a due diligence review of the fees charged for the funds at the time of these significant events and the decision to retain the retail share class after these events constituted a breach of the duty of prudence. Plaintiffs seek damages representing the difference in fees in the retail versus institutional share classes for the Janus, Allianz, and Franklin funds and lost investment opportunity from the time in which the funds underwent these significant changes to the present.

The Court addresses each of these arguments in turn.

i. Funds Added to the Plan After August 17, 2001

The William Blair Small Cap Growth Fund ("William Blair Fund"), the PIMCO RCM Global Technology Fund ("PIMCO Fund") and the MFS Total Return A Fund ("MFS Total Return Fund") were all added to the Plan in July 2002. At that time, both retail share classes and institutional share classes were available for all three funds. The only difference between the retail share classes and the institutional share classes was that the retail share classes charged higher fees to the Plan participants. Otherwise, the investments were identical. Defendants chose to invest in the retail share classes of all three of these funds.

To determine whether the decision to invest in retail share classes constitutes a breach of the duty of prudence, the Court must examine whether the fiduciaries engaged in a thorough investigation of the merits of the investment at the time the funds were added to the Plan. *See Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir.1996); *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir.1983). Defendants assert that one of the

five Investment Criteria they use to evaluate a mutual fund is the expense ratio of the fund-i.e., the fees charged to Plan participants. Further, both Plaintiffs' expert, Dr. Steven Pomerantz, and Defendants' expert, Daniel Esch, testified that a prudent fiduciary commonly would review all available share classes and the relative costs for each when selecting a mutual fund for a 401(k) Plan. Here, however, there is **no evidence** that Defendants even considered or evaluated the different share classes for the William Blair Fund, the PIMCO Fund, or the MFS Total Return Fund when the funds were added to the Plan. Not a single witness testified regarding any discussion or evaluation of the institutional versus retail share classes for these funds prior to July 2002. Indeed, Ertel admitted that when the Investments Staff made their presentation to the Sub-TIC (the committee with the ultimate authority for selecting funds for the Plan) regarding the merits of adding the MFS Total Return Fund to the Plan in 2002, they did not present the Sub-TIC with any information about the institutional share class. The same appears to be true regarding the William Blair Fund and the PIMCO Fund. The presentation materials that the Investment Staff prepared for the January 28, 2002 meeting of the Sub-TIC-the meeting during which the Investments Staff recommended adding these three funds to the Plan-contains **no information** about the institutional share classes of the William Blair, PIMCO or MFS Total Return funds. The Investments Staff simply recommended adding the retail share classes of these three funds without any consideration of whether the institutional share classes offered greater benefits to the Plan participants. Thus, the Plan fiduciaries responsible for selecting the mutual funds (the Investment Committees) were not informed about the institutional share classes and did not conduct a thorough investigation.

***26** Moreover, had the Investments Staff and the Investment Committees considered the institutional share classes when adding these funds in 2002 and weighed the relative merits of the institutional share classes against the retail share classes, they would have realized that the institutional share classes offered the exact same investment at a lower cost to the Plan participants. Thus, Defendants would have known that investment in the retail share classes would cost the Plan participants wholly unnecessary fees. *See, e.g., Mazzola*, 716 F.2d at 1232 (finding a breach of duty where a reasonable investigation would have revealed that the loan the Plan made to a

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convalescent home was far below prevailing interest rates and “presented an unreasonable risk of not being timely and fully paid.”); *Katsaros v. Cody*, 744 F.2d 270, 279-80 (2d Cir.1984) (had the trustees engaged in an adequate investigation they would have discovered that “the loan was a loser from its inception”); *In re Unisys. Savings Plan Litig.*, 74 F.3d at 436 (denying summary judgment to fiduciaries where plaintiffs presented evidence that a thorough investigation (which was not done) would have revealed serious problems with the investment).

In fact, in 2003, a year after these funds were added to the Plan, the Investments Staff did review the merits of the institutional share class of the PIMCO Fund versus the retail share class. At that time, the Investments Staff reviewed the available share classes for the PIMCO Fund because they were considering mapping a large amount of assets from another fund into the PIMCO Fund. In the course of that review, Ertel realized that the institutional share class of the PIMCO Fund had a significant performance history and a Morningstar rating, whereas the retail share class did not. Ertel also realized that the institutional share class charged less 12b-1 fees to the Plan participants. Thus, the Investments Staff recommended, and the Investment Committees adopted the recommendation, that the retail shares of the PIMCO Fund should be transferred into the institutional share class. These facts are very telling: In the one instance in which the Plan fiduciaries actually reviewed the different share classes of one of these three funds, the fiduciaries realized that it would be prudent to invest in the institutional share class rather than the retail share class. Had they done this diligence earlier, the same conclusion would have been apparent with regard to all three funds, and the Plan participants would have saved thousands of dollars in fees.

On the basis of the evidence outlined above, Plaintiffs have met their burden of demonstrating that the Plan fiduciaries did not act with the care, skill, and diligence of a prudent man acting in a like capacity when deciding to invest in the retail share classes of the William Blair, PIMCO, and MFS Total Return funds.

Defendants nonetheless contend that their investment selection process in 2002 was reasonable and thorough because they relied on Hewitt Financial Services (“HFS”) for advice regarding which mutual fund

share classes should be selected for the Plan. Defendants' expert, Esch, opines that in 2002 plan fiduciaries did not have access to information about different share classes, and therefore, reliance on HFS's advice was reasonable.^{FN20}

FN20. Ertel and Tong testified that when selecting mutual funds to recommend for the Plan from 2003 forward, the Investments Staff always selected the most inexpensive share class that met the Plan's Investment Criteria. The process for selecting mutual funds after 2003, however, is not relevant to the investment selections made in July 2002. Further, it is clear that the Investments Staff did not follow that framework with regard to the William Blair, PIMCO, and MFS Total Return funds. With regard to those funds, both the retail share class and the institutional share class were equal in all respects other than the fees charged to participants; thus, both share classes would have met the Investment Criteria.

***27** While securing independent advice from HFS is some evidence of a thorough investigation, it is not a complete defense to a charge of imprudence. See *Howard*, 100 F.3d at 1489. At the very least, the Plan fiduciaries must “make certain that reliance on the expert's advice is reasonably justified.” *Id.*; *Donovan v. Bierwith*, 680 F.2d 263, 272-73 (2d Cir.1982) (Friendly, J.) (independent advice from counsel does not act as a “complete whitewash which, without more, satisfies ERISA's prudence requirement.”). Here, the Court cannot conclude that reliance on HFS's advice (whatever that advice may have been, which is unclear) was reasonable. Defendants have not presented any evidence regarding the review and evaluation HFS did in connection with the William Blair, PIMCO, and MFS Total Return funds. Defendants did not present evidence of: the specific recommendations HFS made to the Investments Staff regarding those funds, what the scope of HFS's review was, whether HFS considered both the retail and the institutional share classes, whether HFS provided information to the Investments Staff about the different share classes, what questions were asked regarding the recommendations, and what steps the Investments Staff took to evaluate HFS's recommendations. Thus, while reliance on HFS's recommendations may be justified in some circumstances, in the

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absence of any evidence about the thoroughness and scope of HFS's review as to these three particular funds, the Court cannot conclude that such reliance was prudent. *See Howard*, 100 F.3d at 1489 (finding a breach of the duty of prudence where fiduciaries relied solely on a valuation provided by Arthur Young when selling stock and did not ask any questions about the valuation despite the fact that Arthur Young provided no empirical support for several of the assumptions.).

At trial, Defendants could not offer any credible reason why the Plan fiduciaries chose the retail share classes of the William Blair, PIMCO and MFS Total Return funds. Defendants' witnesses offered three *possible* reasons why the Investments Staff might recommend investment in a retail share class rather than a cheaper institutional share class: *First*, Ertel testified that one of the Investment Criteria for selecting a fund is the availability of public information about the fund, including a Morningstar rating and performance history. Thus, *if* the retail share class of a certain mutual fund had significant performance history and a Morningstar rating, but the institutional share class did not, the Investments Staff would recommend investment in the retail share class. *Second*, Tong testified that frequent changes to the Plan cause confusion among the Plan participants.^{FN21} Thus, to avoid frequent changes to the Plan, if the Plan had previously chosen to invest in the retail share class, the Investments Staff would not recommend changing to the institutional share class so long as the investment was meeting the Investment Criteria. *Third*, Ertel testified that certain minimum investment requirements might preclude the Plan from investing in the institutional share classes.

FN21. Barbara Decker, the Director of Benefits in SCE's Human Resources Department testified that she had received complaints from the employees' unions regarding changes to the Plan's investment options.

***28** None of these explanations is supported by the facts in this case. As to the first explanation, Defendants presented no evidence that the retail share classes of the William Blair, PIMCO, and MFS Total Return funds had more significant track records or provided any greater information to the Plan participants than the institutional share classes. In fact, Ertel

testified that *none* of the mutual funds at issue in this case presented a situation where the retail share class had a performance history and a Morningstar rating but the institutional share class did not. The exact opposite is true regarding two of the funds. When Defendants chose to invest in the retail share class of the William Blair Fund, the retail class did *not* have a Morningstar rating. Similarly, when Defendants added the PIMCO Fund to the Plan in July 2002, the retail share class did *not* have a Morningstar rating or significant performance history, while the institutional share class did have those features. If Defendants had investigated the different share classes for the William Blair Fund and the PIMCO Fund in July 2002, by Defendants' own Investment Criteria they would have realized that the institutional share classes were superior to the retail share classes—that is, the institutional classes were both less expensive (lower expense ratio) and provided more publicly available information.

Similarly, the argument that the Investments Staff refrained from making changes to certain investments because of possible participant confusion is not supported by the facts. Defendants did not produce any documents or other evidence indicating that the reason the Plan fiduciaries chose the retail share classes of the William Blair Fund, the PIMCO Fund, and the MFS Total Return Fund was to mitigate participant confusion. Indeed, such an argument is illogical with respect to these funds because all three of the funds were added to the Plan as new investment options. In other words, the Plan fiduciaries had already decided to add an additional investment option to the Plan; adding an institutional retail share class would not cause any greater confusion than adding a retail share class. Furthermore, although Defendants did produce evidence that Unions representing Edison employees had complained about past fund changes, these complaints resulted from changes to the funds as a whole—i.e., eliminating and/or adding a fund to the Plan—not as a result of changes from one share class to another. No evidence was produced that Plan participants had complained in the past about changes from one share class to another.

Finally, Defendants' argument that mandatory investment minimums precluded Defendants from investing in the institutional share classes of the William Blair Fund, the PIMCO Fund, and the MFS Total Return Fund is not credible. While it is true that in

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July 2002 the institutional share classes of each of these three funds required a minimum investment that the Plan did not meet, the un rebutted evidence establishes that a prudent fiduciary managing a 401(k) plan the size of the Edison Plan could have (and would have) obtained a waiver of the investment minimums.

***29** As the findings of fact indicate, the minimum investment requirements for the William Blair, PIMCO and MFS Total Return funds were not set in stone. The Prospectuses filed with the SEC in late 2001 and early 2002 for each of these three funds all indicate that the funds will consider a waiver of the investment minimums for certain investors.

Plaintiffs' expert, Dr. Steven Pomerantz ("Pomerantz") opined that the William Blair Fund, the PIMCO Fund, and the MFS Total Return Fund would have waived the investment minimums for the Plan had anyone from Edison asked them to do so. Pomerantz offered several examples from his personal experience to support this conclusion: From 1994 to 2000, Pomerantz worked for a registered investment advisor offering several mutual funds. The advisor made a business decision to eliminate all investment minimums on the funds. Additionally, Pomerantz consults to an investment advisor that has a stated minimum investment of \$1 million for its funds. Pomerantz testified that the advisor has been approached dozens of times over the past 12 years and asked to waive the minimum. In every instance, the advisor did so. Pomerantz also consults with an insurance company and helps the company manage its one-billion-dollar general reserve fund. The company purchases all of its mutual funds through a broker called Northwestern Mutual and currently is invested in approximately 30 mutual funds. With regard to each of those funds, the insurance company is permitted to invest in the cheapest institutional share class *regardless of the stated minimums*. In other words, even where the company's investment would not meet the minimum, Northwestern Mutual obtains a waiver from the mutual fund.

Based on this (and other) experience, Pomerantz opines that a 401(k) Plan like Edison's, with assets over \$1 billion dollars, presents a large opportunity for investment advisors. That is, a relationship with the Edison Plan could lead to millions in assets under management for the advisor. In light of that opportu-

nity, investment advisors generally are willing to waive investment minimums for investors like the Edison Plan and would have done so in this case.

The testimony of Defendants' expert, Daniel Esch, is largely consistent with Pomerantz's opinions. Since 1994, Esch has served as the Chief Executive Officer and Managing Director of Defined Contribution Advisors, Inc., a firm that is a registered investment advisor and provides investment advisory services to corporations and plan fiduciaries regarding (among other things) investment selection and monitoring. Importantly, Esch never testified that the Edison fiduciaries could not have obtained waivers of the investment minimums for the institutional share classes of the William Blair Fund, the PIMCO Fund, or the MFS Total Return Fund. Instead, Esch stated that the waiver decision is made on a case-by-case basis and waivers are more likely granted when the advisor can expect a large influx of assets.

***30** Esch testified that the only way that a fiduciary can obtain a waiver of the minimum investment criteria is if the fiduciary, or a consulting firm acting on his or her behalf, calls the fund to request a waiver. Specifically with regard to the William Blair, PIMCO, and MFS Total Return funds, Esch testified that these funds do not have any "absolute cut-offs" at which they would not consider waiving the stated investment minimums. Esch testified that his firm "automatically" calls these funds on behalf of its clients and asks if the funds will waive the investment minimums so that the clients can invest in the institutional share classes. These waiver requests are such a "standard" part of Esch's work that Esch typically will request a waiver even without asking his client first. Further, Esch testifies that he frequently requests waivers on behalf of his clients even if they are not close to meeting the stated investment minimum. Esch has personally received waivers of investment minimums for plans as small as \$50 million in total assets-i.e., 5 percent the size of the Edison Plan-and has personally obtained waivers of the minimums for clients investing in the PIMCO Fund.

While there is evidence that the PIMCO Fund and other similar mutual funds have granted waivers to large investors like the Edison Plan, there is no evidence that the funds have ever denied a request for a waiver on behalf of the Edison Plan or any other similarly-sized 401(k) Plan. Even more troubling,

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there is no evidence that the Plan fiduciaries, Hewitt Financial Services, or anyone else acting on behalf of the Plan *ever even inquired* as to whether the funds would waive the investment minimums for the institutional share classes. Finally, there is *no* evidence that, at the time the investments in these funds were made, the Plan fiduciaries discussed the investment minimums for the institutional share classes or that such minimums influenced their decision to invest in the retail share classes in any way.^{FN22}

FN22. Ertel admitted at trial that there is no record of any discussion about these three mutual funds which indicates that the Plan fiduciaries decided not to invest in the institutional share classes because the Plan did not meet the required minimums.

Based on the testimony of Pomerantz and Esch, which the Court finds credible, the Court concludes that had the Plan fiduciaries requested a waiver of the minimum investments for the institutional share classes of the William Blair, PIMCO and MFS Total Return funds, the mutual funds would have waived the minimum investment requirement. At the very least, the evidence establishes that a prudent fiduciary managing a 401(k) Plan with like characteristics and aims would have inquired as to whether the mutual funds would waive the investment minimums. Defendants' failure to do so constitutes a breach of the duty of prudence.^{FN23}

FN23. Defendants made one additional argument in support of their decision to invest in the retail share classes of the William Blair, PIMCO, and MFS Total Return Fund. Defendants' expert presented evidence that other 401(k) plans were invested in retail share classes of mutual funds. Specifically, Esch presented various surveys indicating that in 2001, 44% of mutual fund assets in 401(k) plans were invested in retail share classes, while 20% were invested in institutional shares; in 2008, 41% of mutual fund assets in 401(k) plans were in retail shares, while 29% were in institutional shares. Finally, Defendants' expert presented survey evidence indicating that in 2007, 60% of large 401(k) plans containing between \$1 and \$5 billion of assets (like the Edison Plan) invested in retail classes of funds, and

79% of such plans invested in institutional share classes. Defendants contend that this evidence establishes that Defendants' decision to include retail share classes in the Plan was well within the mainstream of share class decisions made by other 401(k) Plan fiduciaries.

Defendants' argument misses the point. Plaintiffs are not contending, and the Court has not found, that the mere inclusion of some retail share classes in the Plan constituted a violation of the duty of prudence. The only issue here is whether it was a breach of the duty of prudence to select retail shares rather than institutional shares *of the same mutual fund* where the only difference between the two share classes was that the retail share class charged a higher fee. Defendants' survey evidence is not relevant to this issue because it does not show that similarly-situated 401(k) Plan fiduciaries invest in retail share classes *where otherwise identical cheaper institutional share classes of the same funds are available*.

In sum, the Plan fiduciaries simply failed to consider the cheaper institutional share classes when they chose to invest in the retail share classes of the William Blair, PIMCO, and MFS Total Return funds. Defendants have not offered any credible explanation for why the retail share classes were selected instead of the institutional share classes. In light of the fact that the institutional share classes offered the exact same investment at a lower fee, a prudent fiduciary acting in a like capacity would have invested in the institutional share classes. Defendants violated their duty of prudence when selecting the retail share classes of the William Blair Fund, the PIMCO Fund, and the MFS Total Return Fund. Damages resulting from the breach are discussed *infra* at Section IV.

c. Funds Added to the Plan Before August 17, 2001

*31 The Berger (Janus) Small Cap Fund ("Janus Fund"), the PIMCO (Allianz) CCM Capital Appreciation Fund ("Allianz Fund") and the Franklin Small (-Mid) Cap Growth Fund ("Franklin Fund")^{FN24} were all added to the Plan in March 1999. Plaintiffs do not

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challenge Defendants' initial decision to invest in the retail share classes of these funds, but rather challenge Defendants' failure to convert the retail shares to institutional shares upon the occurrence of certain "triggering events" after August 2001.

FN24. As explained below, each of these funds underwent a name change after August 2001. The Court refers here to the original name of the fund, with the later name change indicated in parenthesis.

i. Janus Fund

Plaintiffs contend that the Plan fiduciaries should have converted to the institutional shares of the Janus Fund in April 2003. As the findings of fact indicate, in April 2003, Stilwell Financial, which owned both the Janus and Berger families of mutual funds, reorganized several of the Berger funds into Janus and renamed the Berger Small Cap Fund to the Janus Small Cap Fund ("Janus Fund"). Plaintiffs' expert, Pomerantz, opined that with this type of name change, there could be a *potential* change in management or investment style of the fund. Pomerantz opined that, upon this name change in April 2003, a prudent fiduciary would have reviewed the fund just as if it were a new fund being added to the Plan, including a review of the fee structure and the available share classes for the fund. Pomerantz concludes that had the Plan fiduciaries done this type of review, they would have discovered that the cheaper institutional share class was available and would have transitioned the existing retail shares into the institutional class.

Defendants' experts disagree. Defendants' experts, John Peavy and Daniel Esch, produced undisputed evidence that although the name of the fund changed in April 2003, there were no associated changes in the fund's ownership, the management team, the investment strategy, or the market benchmarks used to evaluate the fund. The only significant change that occurred in April 2003 was that Janus acquired a 30 percent ownership in the sub-advisor of the fund, PWM. Esch testified that this type of name change would have triggered some review of whether the portfolio managers remained the same, and he certainly would have asked why the name of the fund had changed. However, because no material factor regarding investment management or strategy had in fact changed, Esch opined that there was no reason

for the Plan fiduciaries to analyze the Janus Fund as if it were being added to the Plan for the first time or conduct a review of the available share classes.

The Court finds Defendants' arguments more reasonable under these facts. While it seems logical that the April 2003 name change would have triggered a duty to review whether the fund's ownership or management had changed, Plaintiffs have not explained why the April 2003 would have triggered a review of the fund's share classes or fee structure.^{FN25} Notably, no new assets were being mapped into the fund at that time, no new share classes were added to the fund, and there appears to be no reason for Defendants to believe that the fee. Further, the Plan fiduciaries did the organization and management structure which is evidenced by the fact that the Watch List at the June 2003 meeting of the "organizational issues." Plaintiffs have not presented evidence that the duty of care required anything more under the circumstances.^{FN26}

FN25. Indeed, Pomerantz testified in his Supplemental Trial Declaration that: "[A] prudent financial expert should scrutinize an investment when there is any type of significant change to the fund, such as a potential change in portfolio management or a change in fund ownership. *In particular, a prudent financial expert should be concerned whether, under new ownership, a continuity of the underlying investment team and process will remain.*" Pomerantz does not indicate whether, and why, a prudent expert would also be concerned about the fees charged for the fund or the available share classes.

FN26. Esch testified that, for his clients, he does not consider fees as part of the criteria for placing a fund on a watch list. The watch list criteria consists of "return and levels of risk a manager takes." The Plan's fiduciaries do consider the expense ratio as one of five Investment Criteria when evaluating and reviewing all funds, including those on the Watch List. However, where a fund is placed on the Watch List in connection with this type of change—where a common owner is rebranding some of its fund—Plaintiffs have not explained why a closer review of the fund's fee structure would be required.

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ii. Allianz Fund

*32 Plaintiffs make a similar argument with regard to the Allianz Fund. The fund was initially named the PIMCO CCM Capital Appreciation Fund, but was renamed the Allianz CCM Capital Appreciation Fund in April 2005. Plaintiffs' expert initially testified that the April 2005 change was the result of a change in ownership in the fund, but later admitted that, in fact, the ownership change had occurred five years earlier in 2000. Pomerantz also testified that he was not sure if there was a change in investment strategy or management of the Allianz Fund in April 2005. Nonetheless, Pomerantz opined that the name change raised *the possibility* that the fund's management or strategy would have changed, and therefore, a full diligence review of the fund was required.^{FN27}

FN27. Plaintiffs also presented evidence that in April 2005, Allianz removed one of PIMCO's "star" fund managers, William Gross, from several of their funds. This fact is irrelevant, however, because William Gross never managed the Allianz CCM Capital Appreciation Fund. Gross was a fixed-income manager, whereas the Allianz Fund is an equity fund. Defendants' expert, Esch, opined that "it would not be a logical conclusion ... that if Bill Gross is leaving management of a fixed income fund, why that would impact the equity side of the house." As Plaintiffs have offered no contrary explanation as to why Gross's departure would affect the Allianz Fund, the Court accepts Esch's conclusion.

As is the case with the Janus Fund, Defendants presented un rebutted evidence that the ownership of the Allianz Fund did not change in April 2005, and the management team, investment style, and market benchmarks of the fund all remained the same after April 2005. Defendants' experts opined that the change to the fund was cosmetic only and did not require a full due diligence review equivalent to that performed for a newly-added fund.

The Court accepts the conclusions of Defendants' experts. Here too, Plaintiffs' expert does not explain *why* it would be prudent to review the available share classes and fee structure of the Allianz Fund as a re-

sult of the April 2005 rebranding. Plaintiffs have presented no evidence that the April 2005 name change had any connection to a possible change in available share classes, minimum investment requirements, or the fees associated with different share classes. As with the Janus Fund, Defendants were not considering mapping any assets to the Allianz Fund in April 2005 or taking any other action that would require a review of the available share classes. Further, the Plan fiduciaries did perform a closer review of the management structure and performance of Allianz Fund after the name change, which is evidenced by the fact that the fund was placed on a Watch List in June 2005. This level of diligence appears appropriate under the circumstances.

iii. Franklin Fund

In September 2001, the Franklin Small Cap Growth Fund changed its investment strategy. In essence, the fund changed from a small-cap growth fund, which was limited to investments in growth companies with market capitalizations not greater than \$1.5 billion, to a small-midcap growth fund that could invest in growth companies with market capitalizations up to \$8.5 billion. As a result of this change, the shares that the Edison Plan previously held in the Franklin Small Cap Growth Fund were automatically converted by Franklin into retail shares of the Franklin Small-Mid Cap Growth Fund.

Plaintiffs' expert opines that a change in the mandate of the fund is "quite significant" and should have triggered the Edison fiduciaries to investigate the change and do a full due diligence review of the Franklin Fund just as if the fund were being added to the Plan in the first instance. In so doing, Pomerantz contends that the Plan fiduciaries would have noted the significantly lower fees of the institutional share class and converted the retail shares at that time.

*33 It is undisputed that the Plan fiduciaries did conduct a diligence review of the Franklin Fund as a result of the 2001 change in investment strategy. David Ertel testified that the Investments Staff reviewed the Franklin Fund in September 2001 and concluded that it still satisfied the Investment Criteria. The Investments Staff determined that the Franklin Fund should be reclassified as a mid-cap growth fund for the Plan's purposes, and also recommended adding the William Blair Small Cap Fund to the

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Plan's investment line-up so as to provide participants with a small-cap investment option. The Investment Committees accepted these recommendations. Defendants also changed the communications to Plan participants to indicate that the Franklin Fund would be categorized as a "Medium U.S. Stock Fund." No new shares were added to the Franklin Fund as a result of the September 2001, and the ownership and core management of the fund remained the same. Defendants' experts opine that, given the nature of the 2001 change, no further review of the Franklin Fund was necessary under the circumstances.

The Court concludes that Plaintiffs have failed to show that this type of diligence review fell short of the standard of prudence. The fiduciaries' review of the Franklin Fund was directed toward the type of issues raised by the fund's change in investment strategy—such as whether the Plan participants should be provided with an alternative small-cap investment option. As with the Janus and Allianz funds, Plaintiffs have not explained why the Franklin Fund's September 2001 strategy change would have put Defendants on notice that they should review their original share class selection and the fees associated therewith. While Defendants' original share class selection may have been imprudent, Plaintiffs have not challenged that decision.

In sum, Plaintiffs have not met their burden of showing that a prudent fiduciary would have reviewed the available share classes and associated fees for the Janus, Allianz, and Franklin funds as a result of the events described above. Thus, Plaintiffs' prudence claim fails with respect to these three funds.

2. Fees of the Money Market Fund

Plaintiffs' final argument is that Defendants breached their duty of prudence by requiring Plan participants to pay excessive investment management fees for the Money Market Fund. Plaintiffs contend that Defendants either: (1) should have negotiated lower fees with the investment manager of the Money Market Mutual Fund, State Street Global Advisers ("SSgA"), and that had they done so, Defendants could have secured lower fees, or (2) Defendants should have invested in a similar money market fund with another investment manager that charged lower fees. Plaintiffs contend that Defendants' failure to take either of these actions resulted in the Plan participants paying

fees that were, at times, twice the amount of a reasonable fee.

As stated above, the fees charged by SSgA for the Money Market Fund were as follows: From the Plan's initial investment in the Money Market Fund in 1999 until September 2005, SSgA charged 18 basis points. In September 2005, the fees were reduced to 12 basis points and remained at 12 basis points through July 2007. From July 2007 to October 2007, SSgA charged a management fee of 10 basis points. Finally, in October 2007, the management fee was reduced to 8 basis points, where it remained as of the trial in this action.

***34** Plaintiffs rely principally on the opinion of Dr. Pomerantz in arguing that these fees were excessive. Pomerantz opined that Defendants could have invested in a comparable money market fund that charged only 9 basis points for the entire period from 1999 to 2007. He also opined that Defendants could have secured a fee of 9 basis points from SSgA in 1999 had they inquired earlier about a reduced fee rate.

Pomerantz's opinions are not supported by the record. First, Pomerantz did not perform any type of a survey of comparable money market funds or a benchmark exercise to support his conclusion that lower fees were available from other funds. There is no evidence that the fees charged by State Street from 1999 to 2007 exceeded the **reasonable range of fees** charged by other comparable funds. In fact, the evidence is to the contrary. In late 1998 when SCE was first considering selecting a Money Market Fund for the Plan, Ertel researched four different funds, each of which charged fees between 15 to 20 basis points. Similarly, when the Plan sent out a Request for Proposal for the Trustee business, all of the candidates that responded and that offered a short-term investment fund charged fees between 15 and 20 basis points. This evidence demonstrates that the fees charged by State Street at the time of the Plan's initial investment in the Money Market Fund were well within the reasonable range of fees charged by other short-term investment funds.

Pomerantz testified that he believed that Vanguard offered a comparable money market fund that Defendants could have invested in, which charged a fee of 9 basis points from 1999 to 2007, and 8 basis points from 2007 to the present. But this conclusion is also

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unsupported by the evidence. Pomerantz based his argument on his review of a Vanguard prospectus which was not produced to the Court^{FN28} or introduced at trial. In fact, the Vanguard Registration Statement from December 24, 2004, demonstrates that Vanguard's prime money market fund charged a management fee of 15 basis points in 1999 and 2000, 13 basis points in 2001, 11 basis points in 2002, 10 basis points in 2003, and 9 basis points in 2004.^{FN29} Thus, contrary to Pomerantz's assertions, the Vanguard money market fund actually charged fees in excess of 9 basis points from 1999-2003.

FN28. It may be that the document was produced among the thousands of trial exhibits submitted, but it has not been identified, nor was it discussed at trial.

FN29. Plaintiffs do not dispute the accuracy of the 2004 Vanguard Registration Statement.

Additionally, Plaintiffs have not presented evidence that the Vanguard money market fund ("Vanguard Fund") performed as well as the Money Market Fund net of fees throughout the relevant time period. Several witnesses-Ertel, Tong, and Hess-testified that when monitoring the Money Market Fund, the most important criteria is the fund's performance net of fees. Thus, while fees are certainly important, they are only one part of the analysis; a fiduciary must look to the fund's performance as well.^{FN30} See *Taylor v. United Technologies Corp.*, No. 3:06cv1494 (WVE), 2009 WL 535779, at *10 (D.Conn., Mar. 3, 2009) (process by which fiduciaries monitored and selected mutual funds was prudent where fiduciaries reviewed the returns of the mutual fund net of its management fee). In the case of the Money Market Fund, the evidence is undisputed that the fund performed consistently well (net of fees) throughout 1999 to 2008. In fact, the Money Market Fund was the only fund in the Edison Plan that outperformed its benchmark on a statistically significant basis from the second quarter of 1999 through the second quarter of 2008.

FN30. The Court accepts this testimony; it is both logical and unrebutted by Plaintiffs

*35 Pomerantz opined that the Vanguard Fund had comparable or better performance as the Money

Market Fund. (Trial Exh. 341 ¶ 53 [Pomerantz Expert Report dated April 30, 2009].) However, Pomerantz based this conclusion on information obtained from the Morningstar Principia 2007 data base, which was not produced to the Court. It is not clear whether Pomerantz's opinion or the Morningstar Principia 2007 information is based on historical information-i.e. from 1999 to 2007-or is limited to 2007 performance figures.^{FN31} Assuming the information relates only to 2007 performance figures, there appears to be little difference between the Vanguard Fund and the Money Market Fund. Notably, by mid-2007, the Money Market Fund charged fees of 10 basis points, which dropped to 8 basis points at the end of 2007. Thus, the Money Market Fund fees were comparable to the fees charged by the Vanguard Fund in 2007. If fees and performance of the two funds were comparable in 2007, it cannot be said that Defendants acted imprudently when selecting the Money Market Fund and not the Vanguard Fund.

FN31. Further, given that Pomerantz was incorrect about the amount of fees charged by the Vanguard fund over time, the Court is skeptical of Pomerantz's conclusion regarding the performance of the Vanguard Fund in the absence of any documentary evidence.

Plaintiffs also point to trial exhibit 1207 in support of their argument that the Plan should have invested in a money market fund that charged lower fees. Exhibit 1207 is an internal SCE report, likely created by the Investments Staff, dated April 16, 1998, which outlines potential changes to Plan's fund line-up. The report provides information regarding four separate "SSPP Money Market Funds" managed by Frank Russell, Barclays, Vanguard, and Wells Fargo. Plaintiffs note that, according to the report, Barclays offered a money market fund at 10 basis points in 1998. What Plaintiffs fail to consider is that the other three candidates all offered money market funds charging fees from 15 to 20 basis points. Moreover, the same report indicates that the Donoghue Money Market Index listed fees at 30 basis points. Thus, even considering exhibit 1207, the 18 basis-point fee charged by State Street in 1998-99 appears to be well within the range of competitive, reasonable money market fund fees. Finally, although Barclays did charge lower fees in 1998, Plaintiffs have presented no evidence regarding the performance of the Barclays fund.

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Moreover, even if Plaintiffs had established that the Vanguard Fund or the Barclays fund performed comparably to the Money Market Fund (which they did not), the fact that another money market fund charged lower fees (albeit not as low as Plaintiff contends) does not mean that investment in the Money Market Fund was imprudent. As the Court in *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir.2009), explained: “The fact that it is possible that some other funds might have had even lower [expense] ratios is beside the point; nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems).” *Id.* at 586; *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 n. 7 (8th Cir.2009) (“[W]e do not suggest that a claim is stated by a bare allegation that cheaper alternative investments exist in the marketplace.”). ERISA does not require the a plan fiduciary select the cheapest fund available; “[r]ather, a plan fiduciary need only ... select funds with the care, skill, prudence and diligence of a prudent person acting in a similar role.” *Renfro v. Unisys Corp.*, No. 07-2098, 2010 WL 1688540, at *5 (E.D.Pa., Apr.26, 2010). Where the undisputed evidence establishes that the Money Market Fund significantly outperformed its market benchmarks net of fees for 9 years, and Plaintiffs can only present evidence that, at most, two money market funds charged lower fees than the Money Market Fund at some point from 1999 to 2007 while several others charged comparable or even higher fees during the same period, Plaintiffs cannot meet their burden of showing that investment in the Money Market Fund was imprudent.

*36 Next, Plaintiffs argue that Defendants could have gotten lower fees from SSgA itself had Defendants attempted to negotiate a lower fee prior to 2005. This argument, however, is based on pure speculation. Plaintiffs did not present any witnesses from SSgA to testify as to how SSgA would have responded to a request by SCE for lower fees prior to 2005. Nor did Plaintiffs present any evidence from SSgA or any other money market fund manager regarding fee negotiations with large 401(k) plan investors during the relevant time period. Similarly, there is no evidence that SSgA charged other 401(k) plans fees lower than 18 basis points between 1999 to 2005.^{FN32}

FN32. Plaintiffs' shortcomings in this re-

spect are easily contrasted with the type of evidence Plaintiffs presented regarding the mutual funds' willingness to waive minimum investment requirements for the institutional share classes. With regard to that issue, the Court was presented with the Prospectuses of the specific mutual funds at issue, which stated that the funds would consider waiving investment minimums for institutional investors. Further, both Plaintiffs' expert and Defendants' expert testified about specific instances in which the mutual funds at issue and others like them had waived minimums for investors like the Edison Plan, and about the common practice of requesting waivers of minimum investment requirements. Here, in contrast, Plaintiffs have not presented any specific evidence of fee negotiations between SSgA (or other money market fund managers) and investors like the Edison Plan.

Moreover, the fact that SSgA was amenable to a fee reduction in 2005 and again in 2007 does not mean that it would have responded likewise in the years prior. The Plan's assets in the Money Market Fund increased over time, from approximately \$250 million in 2001 to approximately \$650 million in 2008. As Pamela Hess testified, the rise in assets put Defendants in a better position to try and negotiate lower fees in the later years. Additionally, the market changed significantly over this time period. Defendants' expert testified that, as a general matter, management fees for money market funds have steadily decreased across the board from 1999 to 2007. Plaintiff does not dispute this trend. In light of these facts, it is equally likely (if not more so) that SSgA reduced their management fees in 2005 because the Plan continued to invest a larger number of assets in the fund and/or because the market conditions in 2005 dictated a lower fee. There is simply nothing in the record to support the assumption that SCE could have received a fee of 9 basis points prior to 2007.^{FN33}

FN33. Plaintiffs in large part rely upon the email from Pam Hess to Marvin Tong dated April 27, 2007 (Trial Exh. 278) for the proposition that SSgA would have lowered its management fees prior to 2007 had SCE asked them to do so. However, Hess's email does not support Plaintiff's position. In the

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email, Hess speaks only in the present tense, and does not discuss historical fee rates for the Money Market Fund. Thus, while Hess suggests that, as of April 2007, SCE possibly could negotiate a fee of 8-9 basis points, she does not suggest that such a fee would have been available at an earlier time. To the contrary, Hess testified that when she first started advising SCE in late 2004, she thought the fees for the Money Market Fund—then at 18 basis points—were reasonable and competitive.

Finally, Plaintiffs contend that the Plan fiduciaries failed to monitor the fees of the Money Market Fund during the relevant time period. Plaintiffs argue that there are no documents indicating that the Plan fiduciaries conducted any review of the Money Market Fund's fees prior to 2007. Plaintiffs' expert opines that a prudent fiduciary in Defendants' position would have negotiated a sliding fee scale agreement with SSgA, such that the management fee for the fund would automatically reduce at scheduled breakpoints as the Plan's assets in the fund grew.

These arguments lack merit. First, as the findings of fact indicate, Defendants did periodically review the reasonableness of the fees for the Money Market Fund. When the Money Market Fund was first chosen in 1999, Ertel had reviewed and compared the fees of four comparable money market funds. The Plan fiduciaries also reviewed the comparable money market funds (including fees) of seven candidates that responded to a Request For Proposal for the trustee business. The Money Market Fund fees charged by SSgA were comparable to those of the RFP candidates. Thereafter, the Investments Staff consistently monitored the Money Market Fund's performance net of fees on a monthly, quarterly, and annual basis. In January 2003, when Marvin Tong joined the Investments Staff, he reviewed the fees of the Money Market Fund, and based on his prior experience in the investment consulting field, he concluded that the fees were reasonable. Thereafter, in 2005 and 2007, Tong had discussions with Pamela Hess from HFS in which Hess indicated that she had reviewed the Money Market Fund fees and thought a lower fee could be negotiated. In each of those instances, the Money Market Fund fee was reduced, first to 12 basis points in 2005, and then to 10 and 8 basis points in 2007. Finally, in 2008, the Investments Staff con-

ducted an extensive review of the Money Market Fund.

***37** As to Plaintiffs' contention that Defendants should have negotiated a sliding fee arrangement, Hess testified that not all managers allow for such an arrangement. Plaintiffs have presented no evidence that SSgA would have agreed to such an arrangement or that SSgA had negotiated sliding fee agreements with other 401(k) plan. Furthermore, it is undisputed that the management fee was periodically reduced as the Plan's assets in the Money Market Fund increased. Thus, while Defendants may not have had an agreement for lock-step reductions in the fee as the assets grew, the actual fee reductions are roughly consistent with such a pattern.

However, even if Defendants' process for monitoring and negotiating the fees for the Money Market Fund was somehow deficient, Plaintiffs' claim for damages fails if a hypothetical prudent fiduciary would have made the same investment decision. *Howard v. Shay*, 100 F.3d 1484, 1489 (9th Cir.1996); *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 919 (8th Cir.1994); *Fink v. National Savings and Trust Co.*, 772 F.2d 951, 962 (D.C.Cir.1985) (Scalia, J., concurring). For the reasons stated above, Plaintiffs cannot show that the fees for the Money Market Fund exceeded the reasonable range of fees for comparably performing money market funds or that the decision to select and maintain the Money Market Fund was otherwise objectively imprudence. Thus, Plaintiffs' prudence claim fails with regard to the Money Market Fund.

IV. DAMAGES AND OTHER RELIEF

Defendants' decisions to invest in the retail share classes rather than the institutional share classes of the William Blair Fund, the PIMCO Fund, and the MFS Total Return Fund caused the Plan participants substantial damages. However, due to certain errors in the Plaintiffs' damages calculations and the fact that Defendants did not present damage calculations for these funds from July 2002 forward, the Court cannot calculate with accuracy the exact amount of damages at this time. Thus, the Court will allow Plaintiffs to submit revised damage calculations in accordance with the following guidelines.

The Court concludes that, despite the stated manda-

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tory minimum investments for the institutional share classes, Defendants could have invested in the institutional share classes of the William Blair, PIMCO, and MFS Total Return funds at the time the funds were first added to the Plan. Thus, for each of the three funds, damages should run from the date the Plan initially invested in the funds, July 2002, to the present.^{FN34}

FN34. To the extent that Plaintiffs need additional information from Defendants to calculate damages from January 2010 forward, Defendants shall cooperate with Plaintiffs and provide such information forthwith.

Plaintiffs and Defendants in most respects do not differ in the methodology that should be used to calculate damages. To the extent such differences exist, the Court will address them below. The following methodology should be used for each of the three funds: First, Plaintiffs should identify and measure the difference in investment fees between the retail share classes included in the Plan and the less expensive institutional share classes that were available but not selected for the Plan. Second, Plaintiffs should calculate the average asset levels for each year that the Plan was invested in the funds. Rather than using the average year-end asset balance to calculate the average annual asset level, Plaintiffs should use the *monthly asset balances* for the months of the year in which the Plan was invested in the retail share classes to calculate an average annual asset level for that year.^{FN35} Third, Plaintiffs should multiply (a) the difference between the fees charged for the retail share classes actually offered in the Plan and the fees charged for the less expensive institutional share classes by (b) the average annual fund assets, to determine the actual damages attributable to the higher fees.

FN35. The Court adopts this method, which was put forth by Defendants, so as to resolve an overstatement in Plaintiffs' calculations for the PIMCO RCM Global Tech Fund ("the PIMCO Fund"). Plaintiffs calculated the average annual assets for each fund by taking the average of the year-end assets and the previous-year-end assets. With regard to the PIMCO Fund, however, the year-end asset level for 2003 was \$43.9 million, the bulk of which was due to the mapping of

approximately \$40 million in assets from the T. Rowe Price Science & Technology Fund into the PIMCO Fund. That \$40 million influx of assets from the T. Rowe Price Fund, however, was never invested in the retail share class of the PIMCO Fund. At the time of the mapping in October 2003, the Plan fiduciaries converted all the shares in the PIMCO Fund to institutional shares. Thus, because the \$40 million dollars in assets from the T. Rowe Price Fund were never invested in retail shares, they should not be used as a basis for calculating damages due to Defendants' imprudence in selecting the retail share class. Plaintiffs must exclude the amount of assets in the PIMCO Fund in 2003 that were only invested in institutional shares (the approximately \$40 million in funds mapped from the T. Rowe Price Fund) when calculating the average asset level.

The Court believes that by using the average monthly asset levels for the months of the year during which the Plan was invested in the retail share classes of the funds, this will provide a more accurate level of damages attributable to the imprudent investment in retail shares.

*38 Finally, damages should account for the fact that had the Plan fiduciaries not invested in the more expensive retail share classes, the Plan participants would have had more money invested and therefore would have earned more money over the course of time, so called "lost investment opportunity." In calculating lost investment opportunity, Plaintiffs should use the returns of the funds in which the assets actually are (and have been) invested.^{FN36} For example, the MFS Total Return Fund was removed from the Plan in October 2008 and replaced by the Russell Balanced Moderate Growth Portfolio. The assets for the MFS Total Return Fund were mapped into the Russell Balanced Moderate Growth Portfolio in October 2008; thus, Plaintiffs should use the Russell Balanced Moderate Growth Portfolio returns to calculate lost investment opportunity from October 2008 forward. Similarly, because the Plan switched the assets in the PIMCO Fund from retail shares to institutional shares in October 2003, Plaintiffs should use the institutional share class returns when calculating lost investment opportunity from October 2003 for-

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ward.

FN36. This approach was adopted by Defendants in their proposed calculations, but not by Plaintiffs. The Court finds that this is a more accurate way of calculating actual lost investment opportunity.

Plaintiffs shall provide updated damage calculations in accordance with these principles within 20 days of the date of this Order.

Finally, to the extent any of the three funds at issue continue to be invested in retail share classes and cheaper but otherwise identical investments are available in the institutional share classes of those same funds, Defendants shall take steps to remedy the situation consistent with this Order so as to eliminate future damage to the Plan participants.

V. CONCLUSION

For the reasons stated above, the Court rules as follows:

Defendants did not breach their duty of loyalty under ERISA by investing in retail share classes rather than institutional share classes of the William Blair Small Growth Fund, the PIMCO RCM Global Tech Fund, the MFS Total Return A Fund, the Franklin Small Mid-Cap Growth Fund, the Janus Small Cap Investors Fund, and the Allianz CCM Capital Appreciation Fund.

Defendants breached their duty of prudence under ERISA by investing in retail share classes rather than institutional share classes of the William Blair Fund, the PIMCO Fund, and the MFS Total Return Fund. Plaintiffs shall have 20 days from the date of this Order to submit updated damage calculations reflecting the amount of damages resulting from the excess fees incurred in connection with investment in the institutional share classes of these funds, including lost investment opportunity, from July 2002 to the present.

Defendants did not breach their duty of prudence in failing to review the available share classes and failing to switch to the institutional share classes of the Janus Small Cap Investors Fund in April 2003, the

Allianz CCM Capital Appreciation Fund in April 2005, or the Franklin Small-Mid Cap Growth Fund in September 2001.

Finally, Defendants did not breach their duty of prudence by investing in the Money Market Fund managed by SSgA or by failing to negotiate a different management fee for the Money Market Fund at any point from 1999 to the present.

***39** Plaintiffs shall submit a proposed judgment consistent with this Order (and the updated damage calculations), and consistent with the Court's prior rulings on Defendants' motion for summary judgment issued on July 16, 2009 and July 31, 2009, within 20 days of the date of this Order.

IT IS SO ORDERED.

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