No. ________

In The
Supreme Court of the United States

GLENN TIBBLE, et al.,

Petitioners,

v.

EDISON INTERNATIONAL, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA) imposes duties on retirement plan fiduciaries that are "the highest known to the law", and provides a six-year statute of limitations for plan participants to pursue an action for breach of those duties. Although Plaintiffs obtained a judgment that their 401(k) plan fiduciaries had breached their duties by selecting certain investment funds for their plan within six years of the complaint, the Ninth Circuit held that an identical claim as to other funds that were imprudent for the same reason, and continued to harm Plaintiffs at the time of their complaint, was time-barred because the funds were initially selected more than six years earlier. The Ninth Circuit also replaced ERISA's stringent fiduciary standard with the deferential standard of review that *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) adopted in §1132(a)(1)(B) actions challenging denials of benefits.

The questions presented are:

1. Notwithstanding the ongoing nature of ERISA's fiduciary duties, does the statute of limitations under 29 U.S.C. §1113(1) immunize 401(k) plan fiduciaries for retaining imprudent investments that continue to cause the plan losses if the funds were first included in the plan more than six years ago?

QUESTIONS PRESENTED – Continued

2. Does *Firestone* deference apply to fiduciary breach actions under 29 U.S.C. §1132(a)(2), where the fiduciary allegedly violated the terms of the governing plan document in a manner that favors the financial interests of the plan sponsor at the expense of plan participants?

LIST OF PARTIES TO THE PROCEEDING

Petitioners Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Suhadolc, and Hugh Tinman, Jr. were plaintiffs in the district court and appellants/cross-appellees in the court of appeals.

Respondents Edison International, The Edison International Benefits Committee, fka The Southern California Edison Benefits Committee, Edison International Trust Investment Committee, Secretary of the Edison International Benefits Committee, Southern California Edison's Vice President of Human Resources, and Manager of Southern California Edison's HR Service Center were defendants in the district court and appellees/cross-appellants in the court of appeals.

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Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Suhadolc, and Hugh Tinman Jr. respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the court of appeals is reported at ___ F.3d ___ (2013 U.S. App. LEXIS 16050), and reprinted at App. 1-64. The original opinion is reported at 711 F.3d 1061.

The district court's post-trial Findings of Fact and Conclusions of Law (unpublished, available at 2010 U.S. Dist. LEXIS 69119), is reprinted at App. 65-165. The district court's order granting summary judgment in part, is reported at 639 F. Supp. 2d 1074, and reprinted at App. 166-268.

JURISDICTION

The court of appeals issued its opinion and judgment on March 21, 2013. 711 F.3d 1061. The court of appeals issued an amended opinion and denied Petitioners' petition for rehearing on August 1, 2013. App. 3, 6, 12. The Court has jurisdiction to

issue a writ of certiorari in this case under 28 U.S.C. §1254(1) and Rule 13.3.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §1104(a)(1) [ERISA §404(a)(1)]:

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, 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;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter. . . .

29 U.S.C. §1109(a) [ERISA §409(a)]:

(a) Any 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 each 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, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. §1113 [ERISA §413]:

No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of –

(1) six years after

(A) the date of the last action which constituted a part of the breach or violation, or

(B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. §1132 [ERISA §502]:

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan;. . . .

STATEMENT OF THE CASE

"Defined contribution plans dominate the retirement plan scene today." *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255 (2008). This case presents important questions of the federal law governing these plans, which the court below decided in a way that conflicts with the decisions of other courts of appeals and the position of the United States Secretary of Labor. The resolution of these questions will greatly affect the retirement system throughout the United States.

The court below applied ERISA's statute of limitations to bar an action to redress fiduciary breaches in a way that destroys the protection of ERISA's stringent fiduciary duties and that conflicts with the Second and Seventh Circuits and the view of the Secretary of Labor. This Court has not addressed the statute of limitations.

The court below extended this Court's decisions in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and *Conkright v. Frommert*, 559 U.S. 506 (2010), beyond the scope to which the Court limited those decisions in a way that conflicts with the Second and Third Circuits and undermines ERISA's stringent fiduciary duties.

In light of this conflict in the Circuit Courts of Appeals, because the answers to the questions presented have profound consequences for the retirement security of over fifty million individuals throughout the United States whose retirement assets include a 401(k) plan,[1] and because the Ninth Circuit's answers so drastically undermine ERISA's fiduciary protections, the Court should issue its writ to address both questions presented.

A. Statutory Background.

Congress, aware of the critical importance of retirement plans to the American economy and American workers, passed ERISA to "assur[e] the equitable character of [employee benefit plans] and their financial soundness." *Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985). In enacting ERISA, "the crucible of congressional concern was misuse and mismanagement

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[1] Investment Company Institute, *Frequently Asked Questions About 401(k) Plans,* available at: http://www.ici.org/policy/retirement/plan/401k/faqs_401k.

of plan assets by plan administrators." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985). To address that concern, ERISA imposes strict fiduciary duties, "the highest known to the law." *Johnson v. Couturier*, 572 F.3d 1067, 1082 (9th Cir. 2009) (quoting *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996)); see also *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982) (Friendly, J.).

The fundamental fiduciary duties are stated in ERISA's "Prudent man standard of care" which in pertinent part states:

> 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; . . . and
> >
> > (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the

> provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. §1104(a)(1). ERISA also prohibits specific transactions *per se*, including self-dealing and conflicts of interest by fiduciaries. 29 U.S.C. §1106. "[T]he assets of a plan shall never inure to the benefit of any employer[.]" 29 U.S.C. §1103(c)(1).

A fiduciary in breach of its duty is

> personally liable to make good to such plan any losses to the plan resulting from each 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, including removal of such fiduciary[.]

29 U.S.C. §1109(a). ERISA authorizes any plan participant to bring an action to enforce the plan's right to relief under §1109(a). 29 U.S.C. §1132(a)(2). The time in which the participant must commence that action is stated in 29 U.S.C. §1113, which in pertinent part provides,

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after . . . –
>
> (1) six years after (A) the date of the last action which constituted a part

> of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation[.]

B. Factual Background.

Petitioners are participants in the Edison 401(k) Savings Plan ("the Plan"), an individual account, defined contribution plan under ERISA sponsored by Edison International ("Edison"). App. 13-14; see 29 U.S.C. §1002(2)-(3), (34). The Plan has 20,000 participants and holds approximately $3.8 billion in assets. App. 13. The Plan's multi-billion dollar size afforded it access to the institutional investment market, with concomitant lower fees compared to the retail market. App. 183-84; Doc. 186 at 11-12;[2] see *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 349-50 (2010).

Respondents are the fiduciaries to the Plan. App. 71-72; see 29 U.S.C. §1002(21)(A), §1102(a)(1). Respondents are responsible for the investments in the Plan into which participants could invest their retirement savings and are obligated to provide only prudent investments. App. 72; 29 U.S.C. §1104(a)(1)(A)-(B).

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[2] "Doc." refers to the ECF document number in the district court, No. 07-5359 (C.D.Cal.). All "Doc." page references are to the ECF header page.

The document governing the Plan provides in §19.02 that, "The cost of the administration of the Plan will be paid by the Company." App. 36;[3] see 29 U.S.C. §1102. In administering the Plan, Respondents were obligated to follow that requirement. 29 U.S.C. §1104(a)(1)(D). A significant cost of administration in a 401(k) plan is the recordkeeping of individual accounts. See United States Dep't of Labor, Employee Benefits Security Administration, *Understanding Retirement Plan Fees and Expenses* 3 (2011).[4] Until 1999, Edison paid those costs. App. 170.

In 1999 Respondents added mutual funds to the Plan. App. 36. Six of those mutual funds had two share classes: a retail share class and an institutional share class. App. 84. Both share classes invested identically in the same securities by the same managers. App. 61, 84, 92, 94, 95-97, 128-29. The sole difference was that the retail share class charged significantly higher fees. App. 61, 84, 92, 94-97, 128-29. A portion of those higher fees in the retail class shares was shared by the mutual funds with the Plan's recordkeeper, which in turn reduced the cost of administration of the Plan that Edison had to pay.

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[3] Section 19.20 was amended in 2006 to provide, "The cost of the administration of the Plan, net of any adjustments by service providers, will be paid by the Company." App. 37.

[4] Available at: http://www.dol.gov/ebsa/pdf/undrstndgrtrmnt.pdf.

App. 14, 36.[5] Edison thereby reduced its obligation to pay the costs of administration by $8 million, which costs were borne directly by participants through the higher fees deducted from their retail mutual fund investments. Doc. 186-2 at 8 (¶31); Doc. 205 at 29 (¶40).

Petitioners contend their fiduciaries breached their duties under 29 U.S.C. §1104(a)(1)(A) and (B) by selecting and continuing to invest in the significantly higher-cost retail share classes of these mutual funds when identical investments were available in the institutional share classes for lower fees, and breached their duties under 29 U.S.C. §1104(a)(1)(D) by causing participants to pay costs of Plan administration (recordkeeping) through revenue sharing, when Plan §19.02 obligated Edison to pay the Plan's administrative costs.[6]

C. Proceedings Below.

1. The District Court's summary judgment and trial judgment.

Petitioners commenced their action on behalf of the Plan under 29 U.S.C. §1132(a)(2) and (3) on August 16, 2007 in the United States District Court for the Central District of California. Doc. 1. That

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[5] This fee sharing arrangement is known as "revenue sharing." App. 14, 36.

[6] Other claims of fiduciary breach were asserted and adjudicated, but are not at issue in this petition.

court had jurisdiction under 29 U.S.C. §1132(e)(1) and (f) and 28 U.S.C. §1331. The district court certified all of Petitioners' claims as a class action on behalf of all participants in the Plan under Federal Rule of Civil Procedure 23(b)(1)(A). App. 14; Doc. 286; Doc. 308.

In granting summary judgment for the Respondents, the district court held that Petitioners' claims over the imprudent and disloyal mutual funds, including the failure to use institutional rather than retail share classes, was barred as to any mutual funds first included in the Plan more than six years before Petitioners commenced their action, even though the high priced retail mutual funds remained in the Plan year after year thereafter. App. 181, 247-48, 262-63. The court's ruling was made despite the fact that some class members first joined the 401(k) Plan within the six year period, yet will have no opportunity to bring an action for Respondents' fiduciary breach. The court also held that it must defer to Respondents' interpretation of Plan §19.02 to mean that Edison had to pay only the *net* cost of Plan administration after using revenue sharing paid by Plan participants in the mutual fund expense ratios. App. 211. Because the Plan did not "unambiguously prohibit revenue sharing from the mutual funds to be used to pay for . . . recordkeeping costs", the court found Respondents entitled to judgment as a matter of law on the §1104(a)(1)(D) claim. App. 218-19.

After a bench trial on the balance of Petitioners' claims, the district court found Respondents in fact

breached their fiduciary duties providing retail instead of institutional shares of three Plan mutual funds that were first included in the Plan after August 16, 2001, within six years before Petitioners commenced their action. App. 65, 69, 142, 164. Thus, the court found that the inclusion of funds which assessed unnecessary fees was substantively imprudent under ERISA, even though it had granted summary judgment as to other funds selected before that date that were imprudent for the same reason. The court entered judgment awarding the Plan $370,732 in damages and ordered Respondents to use institutional class shares of one of the retail mutual funds that remained in the Plan. Doc. 413; App. 15. Petitioners timely appealed and Respondents cross-appealed. App. 15.

2. The Circuit Court's affirmance and original opinion.

The United States Court of Appeals for the Ninth Circuit affirmed the district court in all respects. App. 1-64. Although the court agreed that it is a breach of duty to provide a plan higher-cost share classes of mutual funds when otherwise identical lower-cost shares were available, App. 60-64, it did not apply that principle to the three higher-cost mutual funds that had been in the Plan for more than six years, App. 16-19. The court held that §1113(1) barred any claim of fiduciary breach as to those mutual funds because plan fiduciaries have no duty to review and remove imprudent or disloyal investments from a

plan unless there are "changed circumstances" significant enough to warrant a "full due diligence review of the funds[.]" App. 18-19. The court reasoned that "[c]haracterizing the mere continued offering of a plan option, without more" as a continuing breach of duty would render the limitations period meaningless. App. 18.

The court also affirmed that the fiduciaries' interpretation of Plan §19.02 to mean "cost of administration" *net* of revenue sharing offsets was entitled to deference under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). App. 35-45. The court acknowledged that *Firestone* expressly limits its holding to "actions challenging denials of benefits" under 29 U.S.C. §1132(a)(1)(B), but held that the same deference should extend to fiduciary breach actions under 29 U.S.C. §1132(a)(2). App. 38, 41. According to the court's original opinion, it was joining the Third and Sixth Circuits in rejecting the Second Circuit's position that *Firestone* deference does not apply "in cases implicating ERISA § 404 fiduciary duties[.]" 711 F.3d at 1077-78 (citing *John Blair Communs., Inc. Profit Sharing Plan v. Telemundo Group., Inc. Profit Sharing Plan*, 26 F.3d 360, 369-70 (2d Cir. 1994); *Moench v. Robertson*, 62 F.3d 553, 565 (3d Cir. 1995); and *Hunter v. Caliber Sys.*, 220 F.3d 702, 711-12 (6th Cir. 2000)). While acknowledging that *Firestone* expressed "no view as to the appropriate standard of review for actions under other remedial provisions of ERISA," the court

had "little doubt" that *Firestone* deference applied to ERISA actions "globally", "across the board[.]" *Id*.

3. The Circuit Court's amended opinion.

Petitioners timely filed a petition for rehearing by the panel or the court en banc. App. 12. In denying that petition, the court amended its opinion regarding application of *Firestone* deference to this case. App. 6-12. In the amended opinion the court held that this case was distinguishable from *John Blair* because those fiduciaries attempted to use their interpretation of the plan as a means of avoiding liability for violating §1104(a)(1)(B). App. 7-9, 39-40. In contrast, the court held, Petitioners contended only that Respondents violated §1104(a)(1)(D), not §1104(a)(1)(B). App. 8-10, 40-41. Since §1104(a)(1)(D) concerns only a violation of plan documents, the court reasoned, fiduciaries were entitled to deference as to their interpretation of plan terms they allegedly breached. App. 8-10, 40-41.

Acknowledging that this Court has never applied *Firestone* deference outside of benefits claims under §1132(a)(1)(B), the court held that *Firestone* deference should nonetheless apply to fiduciary breach actions for three reasons. App. 10-12, 38, 41-43. First, the court believed the common law trust principles on which *Firestone* was based applied equally to fiduciary breach actions as well as to benefits claims appeals. App. 10-11, 41-42. Second, the court believed *Firestone* deference in fiduciary breach actions was

necessary to maintain uniformity of plan interpretation. App. 11, 42-43. And third, the court believed *Firestone* deference helps "keep administrative and litigation expenses under control[.]" App. 11-12, 43 (citing *Conkright*, 132 S.Ct. at 1646, 1649-50).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's application of §1113(1) and *Firestone* deference to this case conflicts with the decisions of other courts of appeals and the view of the Secretary of Labor, and severely undermines the protections ERISA provides to plan participants. It is wrong and should be corrected by the Court for these reasons.

I. The Ninth Circuit's application of §1113(1) disregards the text of the statute, obliterates a fiduciary's continuing duty to remove imprudent investments from a 401(k) plan, and conflicts with Second and Seventh Circuit precedent and the position of the Secretary of Labor.

A. The text of §1113(1) incorporates the concept of a fiduciary's continuing duty to provide only prudent investments in a plan regardless of when the investments were first selected.

Section 1113 differs from most limitations statutes in not starting the limitations period until the

"date of the last action which constituted a part of the breach" or in the case of breach by omission "the latest date on which the fiduciary could have cured the breach[.]" 29 U.S.C. §1113(1). It incorporates the concept that a plan fiduciary's duty is a continuing duty that does not expire and immunize fiduciaries after six years. For so long as a fiduciary continues to breach its duty by providing imprudent plan investments, the fiduciary remains liable for the plan's damages resulting from that breach within the six years preceding the filing of a fiduciary breach action. In that way, participants who only recently joined the plan would not be time-barred from enforcing their rights to prudent management merely because the investment options were first included more than six years earlier.

B. The Second and Seventh Circuits, and numerous District Courts, recognize the continuing nature of the fiduciary's duty to provide only prudent investments to a plan and apply §1113(1) accordingly.

The Seventh Circuit recognized the continuing nature of ERISA's fiduciary duties in *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078 (7th Cir. 1992). It there rejected an argument that if the initial breach occurred outside of the limitations period, then a claim for similar misconduct within the statutory period was time-barred. The Seventh Circuit explained that the flaw in this argument is that

> it ignores the continuing nature of a trustee's duty under ERISA to review plan investments and eliminate imprudent ones. *See* 29 U.S.C. § 1104(a)(1)(B); *Morrissey v. Curran*, 567 F.2d 546, 549 n. 9 (2d Cir. 1977). If knowledge of an ERISA violation barred claims based on similar future conduct, this continuing fiduciary duty would be severely weakened, and trustees would be left free to engage in repeated violations, so long as they have once been discovered but not sued. *Buccino v. Continental Assurance Co.*, 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983)

Id. at 1087-88. "[G]iven ERISA's imposition of a continuing fiduciary duty, past knowledge of a past violation generally should not be held to preclude a suit for a repeated or continued violation." *Id.* at 1089.[7] The Second Circuit in *Morrissey* noted that ERISA's prudent man standard incorporates the duty under the common law of trusts "to dispose of improper investments within a reasonable time[.]" *Id.* at 548-49 and n.9. *Morrissey* further noted that ERISA's "requirement that fiduciaries take remedial action upon discovery of breaches by co-fiduciaries" also is an express recognition of the ongoing nature of the obligation to review and eliminate improper investments from a plan. *Id.* at 549 n.9 (citing 29 U.S.C. §1105(a)(3)).

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[7] Here, numerous participants would be barred from making claims before they were ever in the Plan and could have had any such knowledge.

Numerous District Courts likewise have recognized the continuing nature of a fiduciary's duties under ERISA and applied §1113(1) accordingly, barring only those breaches that occurred outside of six years and not those that occurred within six years. E.g., *Leber v. Citigroup, Inc.*, No. 07-9329, 2011 U.S. Dist. LEXIS 129444 at *14-15 (S.D.N.Y. Nov. 8, 2011); *George v. Kraft Foods Global, Inc.*, 814 F. Supp. 2d 832, 852 (N.D. Ill. 2011); *Mahoney v. J.J. Weiser & Co.*, 564 F. Supp. 2d 248, 259 (S.D.N.Y. 2008); *Boeckman v. A.G. Edwards Inc.*, 461 F. Supp. 2d 801, 814 (S.D. Ill. 2006); *Meyer v. Berkshire Life Ins. Co.*, 250 F. Supp. 2d 544, 570 (D. Md. 2003); *Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 122 F. Supp. 2d 444, 463 (S.D.N.Y. 2000); *Reich v. Johnson*, 891 F. Supp. 208, 209 (D.N.J. 1995); *Dole v. Formica*, No. 87-2955, 1991 U.S. Dist. LEXIS 19743 at *20-21 (N.D. Ohio Sept. 30, 1991); *Howard Electric, Inc. v. American Bank & Trust Co.*, No. 88-20399, 1990 U.S. Dist. LEXIS 7704 at *19-21, 32-34 (N.D. Cal. Apr. 2, 1990); *Buccino v. Continental Assurance Co.*, 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983).

"In light of the continuing duty of prudence imposed on plan fiduciaries by ERISA, each failure to exercise prudence constitutes a new breach of duty, that is to say, a new claim." *Boeckman*, 461 F. Supp. 2d at 814. Fiduciaries are "under a continuing obligation to advise the Fund to divest itself of unlawful or imprudent investments" and failure to do so gives rise to a new cause of action for each loss the plan suffers. *Buccino*, 578 F. Supp. at 1521. To hold otherwise

> would recognize no obligation on the part of a plan fiduciary to dispose of unsound investments once he had been neglectful for six years, because only the initial failure to act, not subsequent failures, would give rise to a cause of action, and that action would be time barred.

Buccino, 578 F. Supp. at 1521. The same reasoning applies here. The court actually found at trial that it is a breach to use higher-cost retail mutual fund shares instead of institutional shares as plan investments. It follows without question that it is a continuing breach to keep those shares in the plan even after six years have elapsed. The Ninth Circuit has granted immunity *for all time* for these plan fiduciaries to continue conduct that has been found herein to be a fiduciary breach. Under the Ninth Circuit's decision, a participant could not even ask the court for injunctive relief to compel plan fiduciaries to switch the plan from the higher-cost to the lower-cost shares, since under the Ninth Circuit's reasoning that claim is barred under §1113(1) because the imprudently expensive shares have been in the plan more than six years. That completely distorts a limitation that expressly does not begin until the "last action constituting a part of the breach" and completely destroys any sense of the fiduciary having a continuing duty to provide participants only prudent investment options. The Ninth Circuit wholly ignored these contrary decisions, in a decision that will have profound consequences for the retirement system in America. App. 17-19.

C. The Secretary of Labor agrees with the Second and Seventh Circuits and the Petitioners.

The United States Secretary of Labor is charged with enforcing ERISA. 29 U.S.C. §§1131-1136. She filed an amicus curiae brief with the Ninth Circuit in this appeal to express her long-standing agreement with Petitioners' interpretation of §1113(1). Br. for Sec'y of Labor as Amicus Curiae In Support of Plaintiffs-Appellants at 12-19, *Tibble v. Edison Int'l*, No. 10-56406 (May 25, 2011). The Secretary holds that "plan fiduciaries owe a continuing, and not merely a one-time, duty to act prudently with regard to the management of the plan and the investment of plan assets." *Id.* at 14. In this case, "Plan fiduciaries had a continuing obligation to manage Plan investments and eliminate imprudent ones," and thus, could not forever "turn a blind eye" to the imprudence of higher-cost share classes of Plan mutual funds "merely because they had engaged in such conduct for more than six years." *Id.* at 7-8. This is the same interpretation of §1113(1) that the Secretary has asserted in numerous other ERISA appeals. Br. of Sec'y of Labor as Amicus Curiae, *Tussey v. ABB, Inc.*, No. 12-2056 (8th Cir. June 17, 2013); Br. of Acting Sec'y of Labor as Amicus Curiae in Support of Pet. for Reh'g En Banc or Panel Reh'g, *David v. Alphin*, 704 F.3d 327 (4th Cir. Feb. 28, 2013); Br. of Sec'y of Labor as Amicus Curiae in Support of Plaintiffs-Appellants Urging Reversal, *David v. Alphin*, 704 F.3d 327 (4th Cir. Dec. 28, 2011); Br. of Sec'y of Labor as Amicus

Curiae, *Kanawi v. Bechtel Corp.*, No. 09-16253 (9th Cir. Dec. 28, 2009). A contrary interpretation, the Secretary notes, fundamentally misinterprets ERISA because it gives fiduciaries a "*perpetual license to do nothing about the current imprudence of an investment option so long as no material change in circumstances intervenes*." *David* Reh'g Br. at 12-13 (emphasis added). That improperly would leave a fiduciary free from any enforceable duty to review and remove imprudent investments from a plan once the funds have been in the plan for six years. *Id*. at 13. That also improperly would bar new participants who had no previous opportunity to challenge the investment selections from ever enforcing their ERISA rights to prudent management. *Id*. at 15.

In sum, the Secretary has taken the consistent position that §1113(1) cannot bar claims of fiduciary breach that occur within six years of commencement merely because the breaches began more than six years before. That position represents "the agency's fair and considered judgment on the matter," and thus warrants deference from the courts. *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007). The Ninth Circuit, however, gave no deference to the Secretary's interpretation. App. 17-19.

D. The Ninth Circuit's reasoning is unfounded and conflicts with other Circuits.

For its application of §1113(1) to this case, the Ninth Circuit relied principally on two decisions: *David v. Alphin*, 817 F. Supp. 2d 764 (W.D.N.C. 2011), *aff'd*, 704 F.3d 327 (4th Cir. 2013), and *Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. 1991). App. 17-18. Those decisions are inapposite for the following reasons.

David is inapposite because the Fourth Circuit expressly held that, given the procedural posture of that appeal, it did not "decide whether ERISA fiduciaries have an ongoing duty to remove imprudent investment options in the absence of a material change in circumstances[.]" 704 F.3d at 341. *David* thus did not even address the Secretary of Labor's arguments or the cases cited above compelling an interpretation of §1113(1) consonant with a fiduciary's continuing duties. That is the question to be addressed in this appeal. The Ninth Circuit is the only appellate court to have rejected the continuing nature of ERISA's fiduciary duties and instead put a six-year expiration date on those duties with its resulting immunity for all time.

Phillips is inapposite because it concerned the three-year, actual knowledge limitation of 29 U.S.C. §1113(2). 944 F.2d at 520-21; App. 17. The Ninth Circuit extended the logic of *Phillips* to the six-year limitation, disregarding the fact that the three-year

limitation starts upon the *first* date that a plaintiff has actual knowledge of the breach, whereas the six-year limitation starts upon the *last* date of the fiduciary breach. 29 U.S.C. §1113(2). The court expressed two reasons for extending *Phillips*. First, it held that the continuing nature of a fiduciary's duty to maintain only prudent investments in a plan is incorporated only in §1113(1)(B) regarding breaches by omission and could not also be incorporated in §1113(1)(A) regarding breaches by commission without rendering §1113(1)(B) "surplusage." App. 18 (citing *Freeman v. Quicken Loans, Inc.*, 132 S.Ct. 2034, 2043 (2012)). But the Ninth Circuit's interpretation itself renders "last action which constituted a part of the breach" in §1113(1)(A) superfluous. Indeed, the court inverts that clause to start the limitation running from the *first* action which constituted a part of the breach (such as the initial selection of an imprudent fund). The canon of statutory construction on which the Ninth Circuit relied, see App. 18, "assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. ___, 131 S.Ct. 2238, 2248 (2011). The Ninth Circuit's interpretation deprives the "last action" clause of §1113(1)(A) of any effect, and thus provides no assistance in interpreting the statute. Moreover, Petitioners repeatedly informed the Ninth Circuit that they contended Respondents' breaches were both acts of commission and omission and thus within the scope of both parts (A) and (B) of §1113(1). First Br. at 16, 20; Third Br. at 29-30. Thus, the court's parsing of the distinction

between acts of commission or omission was irrelevant to this appeal.

The second reason why the Ninth Circuit extended *Phillips* to §1113(1) was its concern that the Secretary's and the Second and Seventh Circuits "continuing duty" interpretation of §1113 would render fiduciaries forever liable for "decisions which may have been made decades before and as to which institutional memory may no longer exist." App. 18 (quoting *David*, 817 F. Supp. 2d at 777).[8] That concern, of course, cannot trump the plain language of the statute, which does not start the limitations period until the "last action which constituted a part of the breach[.]" A fiduciary cognizant of its continuing duty to have only prudent investments in a plan will retain the documentation of the reasoning on which that continuing decision is based. Even if such institutional memory no longer exists decades after the initial decision, it does not follow that the fiduciaries currently responsible should be relieved of the obligation to determine whether investments remain prudent and fees competitive based on current market conditions. 29 U.S.C. §1104(a)(1)(B) (prudent man standard requires fiduciary to act with the requisite care and prudence "under the circumstances then prevailing . . . "). Indeed, if institutional memory had

[8] The court also cited *Larson v. Northrop Corp.*, 21 F.3d 1164 (D.C. Cir. 1994), App. 18-19, but that case is inapt because that plan terminated more than six years before the action commenced, after which the fiduciaries owed no further duties (and could not have breached any duties), 21 F.3d at 1169.

been lost, that would provide a *compelling* reason for the current fiduciaries to perform a due diligence review to ensure that the initial selection years earlier was not based on faulty reasoning and that continuing to retain the investments otherwise remained prudent for the current plan. Merely holding a fiduciary liable for the breaches that occurred within six years, but not for those that occurred past six years, see *Boeckman*, 461 F. Supp. 2d at 814, does not threaten a fiduciary with unlimited liability for its continuing breach of duty.[9]

None of the reasons expressed by the Ninth Circuit justify its contradiction of Second and Seventh Circuit precedent or its disregard of the Secretary of Labor's settled position on the proper application of §1113(1) to this case. The Court therefore should grant a writ of certiorari to review the first question presented in this petition.

II. The Ninth Circuit's application of *Firestone* deference to fiduciary breach claims conflicts with the Second and Third Circuits and misapplies this Court's decisions in *Firestone* and *Conkright*.

The Ninth Circuit relied on *Firestone* in holding that it must defer to Respondents' interpretation of

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[9] Even the Ninth Circuit recognized this principle in a §1113(2) case. *Meagher v. Int'l Ass'n of Machinists & Aerospace Workers' Pension Plan*, 856 F.2d 1418, 1423 (9th Cir. 1988).

Plan §19.02 as allowing them to shift some of the costs of administering the Plan to the participants through revenue sharing. App. 38-43. That holding conflicts with decisions of the Second and Third Circuits, and was erroneous because *Firestone* deference does not apply to ERISA fiduciary breach actions, particularly where the fiduciaries have acted contrary to the interest of Plan participants and for the benefit of the plan sponsor.

A. *Firestone* is expressly limited to benefits claims under §1132(a)(1)(B).

In *Firestone*, the Court held that fiduciary acts in deciding a claim for plan benefits are subject to de novo review, "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at 115. The Court expressly limited its holding to benefits claims under 29 U.S.C. §1132(a)(1)(B):

> The discussion which follows is limited to the appropriate standard of review in §1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations. We express no view as to the appropriate standard of review for actions under other remedial provisions of ERISA.

489 U.S. at 108. The Court has never applied *Firestone* deference to fiduciary breach actions under 29 U.S.C. §1132(a)(2). See *Metropolitan Life Ins. Co. v.*

Glenn, 554 U.S. 105 (2008); *Conkright v. Frommert*, 559 U.S. 506, 130 S.Ct. 1640 (2010).

B. For compelling reasons, the Second and Third Circuits reject *Firestone* deference in fiduciary breach actions where the fiduciaries sacrifice the interests of participants for non-beneficiaries.

The reason why *Firestone* deference does not apply to ERISA fiduciary breach actions was clearly articulated by the Second Circuit in *John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan*, 26 F.3d 360 (2d Cir. 1994). Applying *Firestone* deference to fiduciary conduct

> would allow plan administrators to grant themselves broad discretion over all matters concerning plan administration, thereby eviscerating ERISA's statutory command that fiduciary decisions be held to a strict standard.

Id. at 369. Unlike in benefits claim cases under §1132(a)(1)(B), actions under §1132(a)(2) seek to enforce statutorily defined fiduciary duties that are the "highest known to the law." *Johnson*, 572 F.3d at 1082. Granting deference to a fiduciary's interpretation of its own duties "eviscerate[s]" that strict standard. *John Blair*, 26 F.3d at 369.

For similar reasons, the Third Circuit recognizes that *Firestone* deference does not apply to fiduciary

breach actions. *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 154 (3d Cir. 1999) ("the duties of loyalty and prudence demanded by ERISA should not be reviewed through an 'arbitrary and capricious' lens"; citing *Struble v. N.J. Brewery Emps. Welfare Trust Fund*, 732 F.2d 325, 333-34 (3d Cir. 1984). *Struble* explains clearly why *Firestone* deference should be limited to benefits-claim cases, and not applied to fiduciary breach claims such as the one before the Ninth Circuit:

> The use of different standards in these cases is justified by the different challenge to fiduciary loyalty that each type of action presents. In actions by individual claimants challenging the trustees' denial of benefits, the issue is not whether the trustees have sacrificed the interests of the beneficiaries as a class in favor of some third party's interests, but whether the trustees have correctly balanced the interests of present claimants against the interests of future claimants. . . . In such circumstances it is appropriate to apply the more deferential "arbitrary and capricious" standard to the trustees' decisions. In the latter type of action, the gravamen of the plaintiff's complaint is not that the trustees have incorrectly balanced valid interests, but rather that they have sacrificed valid interests to advance the interests of non-beneficiaries.

Struble, 732 F.2d at 333-34.

Sacrificing valid interests to advance the interests of non-beneficiaries is precisely the claim here. The defendant-fiduciaries sacrificed the valid interests of Plan participants in having Edison pay all Plan administrative costs—as required by the plain language of §19.02—in favor of advancing Edison's interest in reducing its bill for administrative costs by construing §19.02 to allow shifting onto the participants administration costs through revenue sharing. The defendants did not resolve that ambiguity to "balance[ ] valid interests" among the participants, since no participant benefitted from shifting administrative costs from Edison onto the participants. Therefore, under Second and Third Circuit precedent, the defendants were not entitled to the *Firestone* deference that the Ninth Circuit gave them.

The Ninth Circuit believed that the Third Circuit retreated from *Struble* and "expressly disagree[d] with *John Blair*" in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995). *Tibble*, 711 F.3d at 1077-78. That was erroneous in both respects. First, *Moench* expressly agrees with *John Blair*'s holding that

> the arbitrary and capricious standard of review allowed in *Firestone* should not be applied mechanically to all ERISA claims, and that claims analogous to those addressed by *Struble* merit de novo review.

Id. at 565. Second, *Moench* expressly agrees with *Struble* in noting that "there exists a qualitative difference between a personal claim for benefits and a contention that an ERISA trustee failed to act in the

interest of the beneficiaries at all." *Id*. at 563. In actions concerning "a decision by an ERISA fiduciary to give a benefit to the employer rather than to the beneficiary", *Moench* holds, there can be no deferential review for the reasons given in *Struble*. *Id*. Only where there is no such conflict between beneficiaries and non-beneficiaries could *Firestone* deference even apply. *Id*. at 563-64.

Moench thus does not retreat from *Struble*; it reaffirms it. In the face of "a contention that an ERISA trustee failed to act in the interest of the beneficiaries at all", *Firestone* deference cannot apply. *Id*. at 563. That is precisely the contention in this appeal. The defendants' interpretation of Plan §19.02 to allow transferring of Plan administrative costs from Edison onto the participants certainly was not "act[ing] in the interest of the beneficiaries at all." *Moench*, 62 F.3d at 563.[10]

C. The Ninth Circuit's distinction of Second and Third Circuit precedent is not compelling and ignores the substance of that precedent.

In its amended opinion, the Ninth Circuit retreated from its attempt to distinguish *Moench* from

[10] While *Moench* does suggest *Firestone* deference could apply to non-conflicted fiduciary breach claims, *id.* at 565-66, it did not give deference to the fiduciaries in that case, *id.* at 567-68.

John Blair and *Struble*, and instead relied on a distinction that is irrelevant. The court held that this appeal concerned a claim under §1104(a)(1)(D), whereas *Struble*, *John Blair*, and *Moench* were claims under different subparts of §1104(a)(1). App. 7-10, 38-41. In contrast to cases such as *John Blair* in which the fiduciaries are relying on their interpretation of a plan document to defend themselves from a fiduciary breach claim, the court held, an action to enforce a plan document under §1104(a)(1)(D) somehow is substantively different and merits *Firestone* deference. *Id.* at 8-10, 40-41. That distinction is meaningless, however. Nothing in the text of §1104(a)(1) or ERISA generally supports enforcing subpart (D) with less rigor than subparts (A)-(C). On the contrary, §1104(a)(1) expressly commands that a fiduciary acting "in accordance with the documents and instruments governing the plan" do so "solely in the interest of the participants and beneficiaries[.]" That does not allow, as the Ninth Circuit does, for a fiduciary to interpret plan documents in favor of the interests of the employer and against the employee-participants and certainly does not compel judicial deference to such an interpretation.

Moreover, limiting de novo review to cases where the fiduciaries rely on plan terms as a defense to §1104(a)(1)(A)-(C) breaches is unnecessary because §1104(a)(1)(D) expressly precludes such a plan document defense. Section 1104(a)(1) specifies that a fiduciary may follow plan documents only if they "are consistent with the provisions of this subchapter

[§§1101-1113]". De novo review applies to all parts of §1104(a)(1) and no exceptional deferential review should apply to part (D). Whether the claim was based on §1104(a)(1)(D) or other parts of §1104(a)(1) was not the basis for the Second and Third Circuit's refusal to apply *Firestone* deference to conflicted cases such as this and provides no support for the Ninth Circuit's contrary decision.

The Ninth Circuit altogether disregards the actual reason why the Second and Third Circuits reject *Firestone* deference in this case: the fact that the fiduciaries are interpreting a plan document in a way that advances the interests of Edison contrary to the interests of Plan participants. Instead of addressing that real distinction, the Ninth Circuit focused on a specious distinction. The Ninth Circuit disregards the very warning *John Blair* makes about applying *Firestone* deference to fiduciary breach cases: to do so allows an employer to grant its officer-fiduciaries discretionary authority to interpret their way out of a §1104(a)(1)(D) violation. That way, an employer such as Edison who appoints its executives to be plan fiduciaries could ensure the plan is always interpreted in its favor against the participants, rendering the restrictions of plan documents illusory and §1104(a)(1)(D) ineffective.

D. The Ninth Circuit's policy reasons for applying *Firestone* deference are unfounded.

The Ninth Circuit's three considerations compelling application of *Firestone* deference in this appeal are unfounded. First, there is a meaningful distinction between benefits claims and fiduciary breach actions, such that trust law principles do not apply equally to both. App. 10-11, 41-42. *Struble* and *Unisys* expressly recognize those distinctions. *Struble*, 732 F.2d at 333-34; *Unisys*, 173 F.3d at 154. So does this Court. As stated in *Firestone*, while "ERISA does not set out the appropriate standard of review for actions under §1132(a)(1)(B) challenging benefit eligibility determinations", 489 U.S. at 109, ERISA sets explicit standards that govern fiduciary conduct, 29 U.S.C. §§1101-1114, which "codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts", 489 U.S. at 110 (quoting H.R. Rep. No. 93-533, p. 11 (1973)).

This distinction is made throughout the statute itself. ERISA treats §1132(a)(1)(B) benefits claims much more deferentially than it treats §1132(a)(2) fiduciary breach claims. It gives State courts concurrent jurisdiction over benefits claims, but gives Federal courts exclusive jurisdiction over fiduciary breach claims. 29 U.S.C. §1132(e). It provides no limitations period for benefits claims, but imposes a Federal limitations statute for fiduciary breach claims. See *Ruppert v. Alliant Energy Cash Balance Pension Plan*, 726 F.3d 936, 941 (7th Cir. 2013)

(borrowing State limitations statute); 29 U.S.C. §1113. Benefits claims are individual claims for individual benefits. 29 U.S.C. §1132(a)(1)(B); *Struble*, 732 F.2d at 333-34. Fiduciary breach claims are representative claims on behalf of *all* plan participants seeking to enforce duties and damages owed to the *plan*. 29 U.S.C. §1132(a)(2); *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009). Benefits claims are inherently administrative proceedings, requiring exhaustion of all administrative remedies provided in the plan as a condition precedent to filing suit under §1132(a)(1)(B). *Angevine v. Anheuser-Busch Cos. Pension Plan*, 646 F.3d 1034, 1037 (8th Cir. 2011). Fiduciary breach actions have no such condition precedent and are not administrative in nature. See, e.g., *Smith v. Sydnor*, 184 F.3d 356, 364-65 (4th Cir. 1999); *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1416 n.1 (9th Cir. 1991).[11] ERISA provides only minimal standards regarding the grant or denial of benefits claims, see 29 U.S.C. §1133, but imposes significant standards and judicial enforcement of ERISA's fiduciary duties and fiduciary liability, 29 U.S.C. §§1109(a), 1132(a)(2). Thus, fiduciary breach actions are significantly different from benefits-claim actions and ERISA expressly requires greater judicial involvement in the review of fiduciary breach claims.

[11] *Cf. Bickley v. Caremark Rx, Inc.*, 461 F.3d 1325, 1328 (11th Cir. 2006) (applying exhaustion requirement to fiduciary breach claim).

The Ninth Circuit erroneously believed that since there is no meaningful difference between benefits claims and fiduciary breach actions, the general principles of trust law recognized in *Firestone* and *Conkright* should apply equally to fiduciary breach actions. App. 10-11, 41-42. The court, however, disregarded an important principle of trust law quoted in *Firestone*:

> The extent of the duties and powers of a trustee is determined by the rules of law that are applicable to the situation, and not the rules that the trustee or his attorney believes to be applicable, and by the terms of the trust *as the court may interpret them*, and not as they may be interpreted by the trustee himself or by his attorney.

Firestone, 489 U.S. at 112 (quoting 3 W. Fratcher, Scott on Trusts § 201, at 221 (4th ed. 1988)). The Ninth Circuit, to the contrary, allows the trustees to interpret their own trust terms, contrary to this common law principle. Adopting the Ninth Circuit's reasoning impermissibly "would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone*, 489 U.S. at 113-14.

The Ninth Circuit also found compelling the policy considerations expressed in *Conkright* of the need for efficiency, predictability, and uniformity in the interpretation of plan benefit formulas. App. 11, 42-43 (citing *Conkright*, 130 S.Ct. at 1649-50). Those

policy considerations do not apply in this case. *Conkright* concerned Xerox Corporation's pension plan and how to calculate benefits for employees who had retired previously and received lump-sum benefits distributions. 130 S.Ct. at 1644-45. The Court found *Firestone* deference to promote efficiency, predictability, and uniformity in benefits claim decisions because it moved those decisions from the courts to internal administrative proceedings, removed the courts from deciding complicated benefits formulas that could have far-reaching unintended consequence (including plan insolvency), and ensured a single decision maker applied a uniform interpretation for all benefits claims instead of various courts applying conflicting interpretations in various individual benefits claims. *Id.*

None of those policy considerations apply here. As noted above, ERISA requires judicial review of fiduciary conduct in light of its strict fiduciary standards. Fiduciary breach actions are not administrative proceedings. Therefore, deference is not required to make administrative proceedings non-litigious and more efficient. Section 1132(a)(2) actions are actions on behalf of the Plan, not individual participants; this action was a class action on behalf of all Plan participants. The court's de novo interpretation of Plan §19.02 thus would apply to the Plan as a whole for all participants; there could be no conflicting interpretations of §19.02 by different courts. Moreover, interpretation of Plan §19.02 is a simple matter that did not affect what benefits other participants might

receive and did not have far-reaching consequences such as rendering the Plan insolvent. In contrast, the benefits determination in *Conkright* required actuarial expertise and could have affected the plan's solvency. *Id.* at 1649-50. Therefore, *Firestone* deference is not required in this case to provide for uniformity or predictability in fiduciary breach actions.

None of the reasons proffered by the Ninth Circuit justify its conflict with the Second and Third Circuits in applying *Firestone* deference to fiduciary breach actions, particularly where the fiduciaries interpret plan terms in favor of the employer's interests against the participants' interests. The Court therefore should grant certiorari on the second question presented to resolve this Circuit split and confirm that *Firestone* deference does not apply in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GLENN TIBBLE; WILLIAM BAUER; WILLIAM IZRAL; HENRY RUNOWIECKI; FREDERICK SUHADOLC; HUGH TINMAN, JR., as representatives of a class of similarly situated persons, and on behalf of the Plan,

Plaintiffs-Appellants,

v.

EDISON INTERNATIONAL; THE EDISON INTERNATIONAL BENEFITS COMMITTEE, FKA The Southern California Edison Benefits Committee; EDISON INTERNATIONAL TRUST INVESTMENT COMMITTEE; SECRETARY OF THE EDISON INTERNATIONAL BENEFITS COMMITTEE; SOUTHERN CALIFORNIA EDISON'S VICE PRESIDENT OF HUMAN RESOURCES; MANAGER OF SOUTHERN CALIFORNIA EDISON'S HR SERVICE CENTER,

Defendants-Appellees.

No. 10-56406

D.C. No. 2:07-cv-05359-SVW-AGR

GLENN TIBBLE; WILLIAM BAUER; WILLIAM IZRAL; HENRY RUNOWIECKI; FREDERICK SUHADOLC; HUGH TINMAN, JR., as representatives of a class of similarly situated persons, and on behalf of the Plan,

Plaintiffs-Appellees,

v.

EDISON INTERNATIONAL; THE SOUTHERN CALIFORNIA EDISON BENEFITS COMMITTEE, incorrectly named The Edison International Benefits Committee; EDISON INTERNATIONAL TRUST INVESTMENT COMMITTEE; SECRETARY OF THE SOUTHERN CALIFORNIA EDISON COMPANY BENEFITS COMMITTEE, incorrectly named Secretary of the Edison International Benefits Committee; SOUTHERN CALIFORNIA EDISON'S VICE PRESIDENT OF HUMAN RESOURCES; MANAGER OF SOUTHERN CALIFORNIA EDISON'S HR SERVICE CENTER,

Defendants-Appellants.

No. 10-56415

D.C. No. 2:07-cv-05359-SVW-AGR

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted
November 6, 2012 – Pasadena, California

Filed March 21, 2013
Amended August 1, 2013

Before: Alfred T. Goodwin, and
Diarmuid F. O'Scannlain, Circuit Judges, and
Jack Zouhary, District Judge.*

Order:
Opinion by Judge O'Scannlain

SUMMARY**

ERISA

The panel affirmed the district court's judgment in a class action brought under the Employee Retirement Income Security Act by beneficiaries who alleged that their pension plan was managed imprudently and in a self-interested fashion.

Rejecting a continuing violation theory, the panel held that under ERISA's six-year statute of limitations, the district court correctly measured the timeliness of claims alleging imprudence in plan design from when the decision to include those investments

* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

in the plan was initially made. The panel held that the beneficiaries did not have actual knowledge of conduct concerning retail-class mutual funds, and so the three-year statute of limitations set forth in ERISA § 413(2) did not apply.

The panel held that ERISA § 404(c), a safe harbor that can apply to a pension plan that "provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account," did not apply. Disagreeing with the Fifth Circuit, the panel applied *Chevron* deference to the Department of Labor's final rule interpreting § 404(c).

The panel declined to consider for the first time on appeal defendants' arguments concerning class certification.

The panel affirmed the district court's grant of summary judgment to defendants on the beneficiaries' claim that revenue sharing between mutual funds and the administrative service provider violated the pension plan's governing document and was a conflict of interest. Agreeing with the Third and Sixth Circuits, and disagreeing with the Second Circuit, the panel held that, as in cases challenging denials of benefits, and abuse of discretion standard of review applied in this fiduciary duty and conflict-of-interest suit because the plan granted interpretive authority to the administrator.

The panel held that the defendants did not violate their duty of prudence under ERISA by including in the plan menu mutual funds, a short-term

investment fund akin to a money market, and a unitized fund for employees' investment in the company's stock.

The panel affirmed the district court's holding, after a bench trial, that the defendants were imprudent in deciding to include retail-class shares of three specific mutual funds in the plan menu because they failed to investigate the possibility of institutional-share class of alternatives.

COUNSEL

Michael A. Wolff, Schlichter, Bogard & Denton, LLP, St. Louis, MO, argued the cause and filed the briefs for the plaintiffs-appellants. With him on the briefs were Jerome J. Schlichter, Nelson G. Wolff, and Jason P. Kelly, Schlichter, Bogard & Denton, LLP, St. Louis, MO.

Jonathan D. Hacker, O'Melveny & Myers LLP, Washington, DC, argued the cause and filed the briefs for the defendants-appellees/cross-appellants. With him on the briefs were Walter Dellinger, Robert N. Eccles, Gary S. Tell, O'Melveny & Myers LLP, Washington, D.C., as well as Matthew Eastus, and China Rosas, O'Melveny & Myers LLP, Los Angeles, CA.

Elizabeth Hopkins, U.S. Department of Labor, Washington, DC, argued the cause and filed the brief for the Secretary of Labor as amicus curiae in support of plaintiffs-appellants. With her on the brief were

Stacey E. Elias, M. Patricia Smith, and Timothy D. Hauser.

Jay E. Sushelsky, AARP Foundation Litigation, Washington, DC, filed the brief for the AARP as amicus curiae in support of plaintiffs-appellants. With him on the brief was Melvin Radowitz, AARP, Washington, D.C.

Nicole A. Diller, Alison B. Willard, and Abbey M. Glenn, Morgan, Lewis & Bockius LLP, San Francisco, CA, filed the brief for the California Employment Law Council as amicus curiae in support of defendants-appellees/cross-appellants.

Thomas L. Cubbage III, Covington & Burling LLP, Washington, DC, filed the brief for the Investment Company Institute as amicus curiae in support of defendants-appellees/ cross-appellants. With him on the brief was S. Michael Chittenden, Covington & Burling LLP, Washington, DC.

ORDER

I

The opinion filed March 21, 2013, and published at 711 F.3d 1061, is amended as follows:

Beginning on slip opinion page 28 delete the text from <At least one court has held that in cases implicating ERISA § 404 fiduciary duties,> through slip opinion 31 <difficulties with *John Blair* impel us to

apply *Firestone,* and so we do.>. In place of the deletion substitute the following:

<The Second Circuit has declined to apply the arbitrary and capricious standard from *Firestone* outside of the benefits context. *See John Blair Commc'ns, Inc. Profit Sharing Plan v. Telemundo Grp., Inc. Profit Sharing Plan,* 26 F.3d 360, 369-70 (2d Cir. 1994). Other circuits have read *Firestone* more broadly, stating that its deference can reach beyond ERISA actions that arise under section 1132(a)(1). *See, e.g., Hunter v. Caliber Sys., Inc.,* 220 F.3d 702, 711 (6th Cir. 2000) ("[W]e find no barrier to application of the arbitrary and capricious standard in a case such as this not involving a typical review of denial of benefits."); *Moench v. Robertson,* 62 F.3d 553, 565 (3d Cir. 1995) ("[W]e believe that after *Firestone,* trust law should guide the standard of review over claims, such as those here, not only under section 1132(a)(1)(B) but also over claims filed pursuant to 29 U.S.C. § 1132(a)(2) based on violations of the fiduciary duties set forth in [ERISA § 404].").

In relevant part, *John Blair* involved a challenge under ERISA § 404 to how assets had been allocated. 26 F.3d at 370. The plaintiffs argued that the defendant had breached its fiduciary duty by retaining surplus income generated by virtue of a lag between when plan members elected to move assets and the actual transfer of the funds. *Id.* at 362, 368. As a defense, the fiduciary argued that the terms of the Plan authorized it to allocate the assets as it had, and that because the Plan "gave the plan committee

discretion to interpret the provisions of the [P]lan" the court was bound to approve of its allocation unless it determined that the decision to do so had been "arbitrary and capricious" under *Firestone. Id.* at 369.

Rejecting that framework, the Second Circuit instead decided to evaluate the claim under the "prudent person standard articulated in § 404 of ERISA." *Id.* As support for this approach, the court cited a pre-*Firestone* authority from the Third Circuit and a pair of district court decisions from within the Second Circuit. *See Struble v. N.J. Brewery Emps. Welfare Trust Fund,* 732 F.2d 325, 333-34 (3d Cir. 1984); *Ches v. Archer,* 827 F. Supp. 159, 165-66 (W.D.N.Y. 1993); *Trapani v. Consol. Edison Emps.' Mut. Aid Soc'y, Inc.,* 693 F. Supp. 1509, 1515 (S.D.N.Y. 1988). Relying on *John Blair* and *Struble,* beneficiaries argue that their claim is similarly exempt from *Firestone.* We disagree.

As noted above, this specific challenge by beneficiaries has been brought under 29 U.S.C. § 1104(a)(1)(D), which is part of ERISA § 404. *See Tibble,* 639 F. Supp. 2d at 1096 (explaining that beneficiaries "move[d] for summary judgment on the basis that [Edison] violated the terms of the Plan by failing to pay the full extent of Hewitt's recordkeeping costs"). While subsection (a)(1)(B) codifies the statutory prudent-person standard, subsection (a)(1)(D) simply requires that actions be in line with the plan documents. *See* 29 U.S.C. § 1104(a)(1). *John Blair* was an attempt by a fiduciary to escape from otherwise applicable duties on the basis of a plan interpretation.

The Second Circuit declined to apply *Firestone* deference because of a concern about bootstrapping. *See John Blair,* 26 F.3d at 369. Similarly, the district court decisions it favorably cited were examples of fiduciaries trying to weaken or evade the statutory standard of prudence. *See Ches,* 827 F. Supp. at 165 (rejecting defendants' argument that "they cannot be found to have breached their fiduciary duties in the absence of an allegation and a showing that their determinations had been arbitrary and capricious"); *Trapani,* 693 F. Supp. at 1514 ("Defendants argue that the court must apply an arbitrary and capricious standard, rather than the prudent man standard specifically set forth in the statute.").[1]

Edison is not making any such argument here, as beneficiaries have not pursued this challenge as a violation of the prudent person standard; instead, their contention rises or falls exclusively on what

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[1] The *Struble* case is even farther afield; in relevant part, it did not concern an issue of plan interpretation at all. *See* 732 F.2d at 331-35. Arising during a period of lower court uncertainty about the proper standard(s) of review under ERISA, *see de Nobel v. Vitro Corp.,* 885 F.2d 1180, 1184-85 (4th Cir. 1989), *Struble* involved a claim that the employer trustee had breached its duties of care and loyalty by "failing to collect the amount of Employer contributions allegedly required by the Employers' respective bargaining agreements." 732 F.2d at 331. The Third Circuit decided to apply "the standards set forth explicitly in ERISA" rather than the arbitrary and capricious standard. *Id.* at 333.

Plan section 19.02 allows.[2] As to issues of plan interpretation that do not implicate ERISA's statutory duties, they are subject to *Firestone*.

At least three considerations prompt us to hold that the *Firestone* framework can govern issues of plan interpretation even when they arise outside the benefits context. First, while the *Firestone* case did not announce a holding beyond benefits, its rationale did *not* stem from an interpretive gloss on the welfare-benefits provision of ERISA. *See* 489 U.S. at 108, 109 ("ERISA does not set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations."). Instead, because "ERISA abounds with the language and terminology of trust law" and because of legislative history to that effect, that body of law – not a discrete provision – dictated "the appropriate standard of review." *Id.* at 110-11 ("Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers."). The law of trusts was the basis for the dual-track standard whereby, absent a contrary designation, de novo review applies. *See id.* at 111. The Supreme Court's most recent analysis of *Firestone* reenforces that the deference

[2] We thus leave for another day what judicial-review standard would apply in a case like *John Blair* where the Plan is said to authorize what the statutory duties codified in ERISA forbid. Next, in Part V.B of the opinion, we explain why these beneficiaries' claim that revenue sharing was a conflict of interest under ERISA § 406 fails.

underlying that case is a product of what trust law has to say about matters of interpretation. *See Conkright,* 130 S. Ct. at 1646 ("[U]nder trust law, the proper standard of review of a trustee's decision depends on the language of the instrument creating the trust. If the trust documents give the trustee power to construe disputed or doubtful terms, . . . the trustee's interpretation will not be disturbed if reasonable." (alterations in original) (internal citation and quotation marks omitted)).

Second, one reason the Court in *Conkright* rejected an exception the Second Circuit had carved out from *Firestone* deference was its potential to create "uniformity problems." 130 S. Ct. at 1650. The concern was that if de novo review sometimes applied, fiduciaries would be in the "impossible situation" of being subject to different plan interpretations by courts depending on the particular facts of the cases where the interpretive issue had arisen. *Id.* Not applying *Firestone* deference in this case would risk similar difficulties, as parts of a plan could be assigned one meaning when litigated under section 1132(a)(1)(B) and another meaning when litigated, like here, under section 1104(a)(1)(D).

Third, we observe that consistently applying *Firestone* to the question of what a plan means, "by permitting an employer to grant primary interpretive authority over an ERISA plan to the plan administrator," has the virtue of "preserv[ing] the 'careful balancing' on which ERISA is based." *Id.* at 1649. In particular, it helps keep administrative and litigation

expenses under control, which otherwise could "discourage employers from offering [ERISA] plans in the first place." *Id.* (alteration in original).>.

An amended opinion is filed concurrently with this order.

II

With these amendments, the panel has voted unanimously to deny the petition for rehearing. Judge O'Scannlain has voted to deny the petition for rehearing en banc, and Judges Goodwin and Zouhary have so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and petition for rehearing en banc is **DENIED**.

No further petitions for panel rehearing or for rehearing en banc will be entertained.

OPINION

O'SCANNLAIN, Circuit Judge:

Current and former beneficiaries sued their employer's benefit plan administrator under the Employee Retirement Income Security Act charging that their pension plan had been managed imprudently and in a self-interested fashion. We must decide, among other issues, whether the Act's limitations

period or its safe harbor provision are obstacles to their suit.

I

A

Edison International is a holding company for various electric utilities and other energy interests including Southern California Edison Company and the Edison Mission Group (collectively "Edison"), which itself consists of the Chicago-based Midwest Generation. Like most employer-organizations offering pensions today, Edison sponsors a 401(k) retirement plan for its workforce. During litigation, the total valuation of the "Edison 401(k) Savings Plan" was $3.8 billion, and it served approximately 20,000 employee-beneficiaries across the entire Edison International workforce. Unlike the guaranteed benefit pension plans of yesteryear, this kind of defined-contribution plan entitles retirees only to the value of their own individual investment accounts. *See* 29 U.S.C. § 1002(34). That value is a function of the inputs, here a portion of the employee's salary and a partial match by Edison, as well as of the market performance of the investments selected.

To assist their decision making, Edison employees are provided a menu of possible investment options. Originally they had six choices. In response to a study and union negotiations, in 1999 the Plan grew to contain ten institutional or commingled pools, forty mutual fund-type investments, and an indirect

investment in Edison stock known as a unitized fund. The mutual funds were similar to those offered to the general investing public, so-called retail-class mutual funds, which had higher administrative fees than alternatives available only to institutional investors. The addition of a wider array of mutual funds also introduced a practice known as revenue sharing into the mix. Under this, certain mutual funds collected fees out of fund assets and disbursed them to the Plan's service provider. Edison, in turn, received a credit on its invoices from that provider.

Past and present Midwest Generation employees Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Suhadolc, and Hugh Tinman, Jr. ("beneficiaries") sued under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.,* which governs the 401(k) Plan, and obtained certification as a class action representing the whole of Edison's eligible workforce.[1] Beneficiaries objected to the inclusion of the retail-class mutual funds, specifically claiming that their inclusion had been imprudent, and that the practice of revenue sharing had violated both the Plan document and a conflict-of-interest provision. Beneficiaries also claimed that offering a unitized stock fund, money market-style investments, and mutual funds, had been imprudent.

[1] As discussed *infra* Part IV, we express no opinion in this case on whether beneficiaries' suit was properly cognizable as a class action.

B

The district court granted summary judgment to Edison on virtually all these claims. *See Tibble v. Edison Int'l,* 639 F. Supp. 2d 1074 (C.D. Cal. 2009). The court also determined that ERISA's limitations period barred recovery for claims arising out of investments included in the Plan more than six years before beneficiaries had initiated suit. *Id.* at 1086; *see* 29 U.S.C. § 1113(1)(A).

Remaining for trial after these rulings was beneficiaries' claim that the inclusion of specific retail-class mutual funds had been imprudent. Without retreating from an earlier decision – at summary judgment – that retail mutual funds were not categorically imprudent, the court agreed with beneficiaries that Edison had been imprudent in failing to investigate the possibility of institutional-class alternatives. *See Tibble v. Edison Int'l,* No. CV 07-5359, 2010 WL 2757153, at *30 (C.D.Cal. July 8, 2010). It awarded damages of $370,000.

Beneficiaries timely appeal the district court's partial grant of summary judgment to Edison.[2] Edison timely cross appeals, chiefly contesting the post-trial judgment.

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[2] In a separately filed memorandum disposition, we addressed beneficiaries' appeal from the district court's decision not to award fees or costs to either party. *See Tibble, et al. v. Edison Int'l.,* No. 11-56628, 2013 WL 1150788 (9th Cir. Mar. 21, 2013).

II

Beneficiaries' first contention on appeal is that the district court incorrectly applied ERISA's six-year limitations period to bar certain of their claims. Edison argues for application of the shorter three-year period. We reject both parties' approaches to timeliness.

A

For claims of fiduciary breach, ERISA § 413 provides that no action may be commenced "after the earlier of":

> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113.

B

1

Beneficiaries argue that the court erred by measuring the timeliness under ERISA § 413(1) for claims alleging imprudence in plan design from when the decision to include those investments in the Plan was initially made. They are joined in this contention by the United States Department of Labor ("DOL"). Because fiduciary duties are ongoing, and because section 413(1)(A) speaks of the "*last* action" that constitutes the breach, these claims are said to be timely for as long as the underlying investments remain in the plan. Essentially, they argue that we should either equitably engraft onto, or discern from the text of section 413 a "continuing violation theory."

Beneficiaries' argument, though, would make hash out of ERISA's limitation period and lead to an unworkable result. We have previously declined to read the section 413(2) actual-knowledge provision as permitting the maintenance of the status-quo, absent a new breach, to restart the limitations period under the banner of a "continuing violation." *Phillips v. Alaska Hotel & Rest. Emps. Pension Fund,* 944 F.2d 509, 520 (9th Cir. 1991). In *Phillips,* the controlling opinion did not reach whether the same was true for section 413(1)(A). 944 F.2d at 520-21. Today we hold that the act of designating an investment for inclusion starts the six-year period under section 413(1)(A) for claims asserting imprudence in the design of the plan menu.

Preliminarily, we observe that in the case of omissions the statute already embodies what the beneficiaries urge for the last action. Section 413(1)(B) ties the limitations period to "the latest date on which the fiduciary could have cured the breach or violation." Importing the concept into (1)(A), then, would render (1)(B) surplusage. This must be avoided when, as here, distinct meanings can be discerned from statutory parts. *See Freeman v. Quicken Loans, Inc.,* 132 S. Ct. 2034, 2043 (2012).

Second, beneficiaries' logic "confuse[s] the failure to *remedy* the alleged breach of an obligation, with the commission of an alleged *second* breach, which, as an overt act of its own recommences the limitations period." *Phillips,* 944 F.2d at 523 (O'Scannlain, J., concurring). Characterizing the mere continued offering of a plan option, without more, as a subsequent breach would render section 413(1)(A) "meaningless and [could even] expose present Plan fiduciaries to liability for decisions made by their predecessors – decisions which may have been made decades before and as to which institutional memory may no longer exist." *David v. Alphin,* 817 F. Supp. 2d 764, 777 (W.D.N.C. 2011), *aff'd,* 704 F.3d 327, 342-43 (4th Cir. 2013). We decline to proceed down that path. As with the application of any statute of limitations, we recognize that injustices can be imagined, but section 413(1) "suggests a judgment by Congress that when six years has passed after a breach or violation, and no fraud or concealment occurs, the value of repose will trump other interests, such as a plaintiff's

right to seek a remedy." *Larson v. Northrop Corp.,* 21 F.3d 1164, 1172 (D.C. Cir. 1994).

Finally, we are unpersuaded by DOL's suggestion that our holding will give ERISA fiduciaries carte blanche to leave imprudent plan menus in place. The district court allowed beneficiaries to put on evidence that significant changes in conditions occurred within the limitations period that should have prompted "a full due diligence review of the funds, equivalent to the diligence review Defendants conduct when adding new funds to the Plan." These particular beneficiaries could not establish changed circumstances engendering a new breach, but the district court was entirely correct to have entertained that possibility. *See, e.g., Quan v. Computer Scis. Corp.,* 623 F.3d 870, 878-79 (9th Cir. 2010) (explaining that "fiduciaries are required to act 'prudently' when determining whether or not to invest, or continue to invest"). The potential for future beneficiaries to succeed in making that showing illustrates why our interpretation of section 413(1)(A) will not alter the duty of fiduciaries to exercise prudence on an ongoing basis.

2

For its part, Edison contends that beneficiaries had actual knowledge of conduct concerning retail-class mutual funds, triggering ERISA § 413(2), more

than three years before August 16, 2007, when the complaint was filed.[3]

In order to apply ERISA's limitation periods, the court "must first isolate and define the underlying violation." *Ziegler v. Conn. Gen. Life Ins. Co.,* 916 F.2d 548, 550-51 (9th Cir. 1990). Here, as we explore in greater detail below,[4] the crux of beneficiaries' successful theory of liability at trial was that alternatives to retail shares had not been investigated – not simply that their inclusion had been imprudent. Second, specific to section 413(2), the court must inquire as to when the plaintiffs had actual knowledge of that violation or breach. *Id.* at 552. Edison points to Summary Plan Descriptions provided to all participants, as well as to mutual fund prospectuses furnished to investors, claiming that these materials made the inclusion of retail shares known. Similar information was also furnished to the unions during negotiations.

But as the nature of the breach makes apparent, Edison is citing evidence of the wrong type of knowledge. When beneficiaries claim "the fiduciary made an *imprudent* investment, actual knowledge of the breach [will] usually require some knowledge of how

[3] We consider this argument only as it affects the post-trial verdict. This is so because, as Edison clarified in its reply brief, this is the extent of its contention, and because our decision to affirm the grant of summary judgment on beneficiaries' other claims makes a broader ruling unnecessary.

[4] *See infra* Part VII.

the fiduciary selected the investment." *Brown v. Am. Life Holdings, Inc.,* 190 F.3d 856, 859 (8th Cir. 1999). For example, in *Waller v. Blue Cross of California,* we explained that the three-year ERISA limitations period did not run from the time when the plaintiffs had purchased the subject annuities because their theory of breach was that the fiduciaries had "unlawfully employ[ed] an infirm bidding process" to acquire such annuities. 32 F.3d 1337, 1339, 1341 (9th Cir. 1994); *see also Frommert v. Conkright,* 433 F.3d 254, 272 (2d Cir. 2006) ("The flaw with the district court's conclusion [under section 413(2)] is that the plaintiffs' claim for breach of fiduciary duty is not premised solely on the defendants' adoption of the phantom account; rather, it is based on allegations that the defendants made ongoing misrepresentations about the origins of the phantom account in an effort to justify its usage.").

Therefore, because these beneficiaries' trial claims hinged on infirmities in the selection process for investments, we hold that mere notification that retail funds were in the Plan menu falls short of providing "actual knowledge of the breach or violation." § 413(2).

III

On its cross appeal, Edison claims that beneficiaries' entire case is proscribed by ERISA § 404(c), a safe harbor that can apply to a pension plan that "provides for individual accounts and permits a

participant or beneficiary to exercise control over the assets in his account." 29 U.S.C. § 1104(c)(1)(A).

As the Edison 401(k) is clearly such a plan we consider the terms of section 404(c). It provides that:

> [N]o 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.

Id. § 1104(c)(1)(A)(ii).

Edison reads this statutory language as insulating it from all of beneficiaries' claims because each challenged investment was a product of a "participant's or beneficiary's exercise of control," by virtue of his selection of it from the Plan menu. Disagreeing, the DOL directs us to its previously announced interpretations. In a 1992 regulation it stated that in order to fall within section 404's ambit, the breach or loss would need to be the "direct and necessary result" of the action by the beneficiary. 29 C.F.R. § 2550.404c-1(d)(2). A preamble that went through the notice-and-comment process and appeared in the agency's final rule, stated that "the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA section 404(c) plan is a fiduciary function which . . . is not a direct or necessary result of any participant direction." 57 Fed. Reg. 46,922, 46,924 n.27 (Oct. 13, 1992).

To "reiterate its long held position," 73 Fed. Reg. 43,014, 43,018 (July 23, 2008), DOL recently codified this guidance in the body of a new regulation so that it now appears in the Code of Federal Regulations, rather than in the preamble to a rule.[5] *See* 75 Fed. Reg. 64,910, 64,946 (Oct. 20, 2010) (codified at 29 C.F.R. pt. 2550) (Section 404(c) "does not serve to relieve a fiduciary from its duty to prudently select and monitor any service provider or designated investment alternative offered under the plan"). This amended regulation, however, was not in effect during the time period at issue in this case.[6] Our inquiry therefore centers on what appeared in the 1992 final rule.

As to these earlier materials, the parties and amici join issue on the status this court should accord them. Beneficiaries and DOL argue that they are entitled to the robust sort of administrative-law deference dictated by *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984). Edison claims that a preamble is not the type of material to which courts properly defer. In any event, the California Employment Law Council, as

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[5] Final rules are published in their entirety in the Federal Register but, by convention, their preambles are left out of the Code of Federal Regulations. *See Langbecker v. Elec. Data Sys. Corp.,* 476 F.3d 299, 310 n.22 (5th Cir. 2007).

[6] *See id.* at 64,910 ("Notwithstanding the effective date, the final rule and amendments will apply to individual account plans for plan years beginning on or after November 1, 2011.").

amicus for Edison, argues that DOL's interpretation is an impermissible construction of the statute. *See id.* ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Both Edison and the Employment Council rely on a divided opinion from the Fifth Circuit, and on an older case from the Third Circuit in which the alleged violations preceded the effective date of even the 1992 rule. *See Langbecker v. Elec. Data Sys. Corp.,* 476 F.3d 299, 310-12 (5th Cir. 2007); *In re Unisys Sav. Plan Litig.,* 74 F.3d 420, 444-48 & n.21 (3d Cir. 1996).

Several other circuits, by contrast, have accepted the position advocated by DOL. *See, e.g., Pfeil v. State St. Bank & Trust Co.,* 671 F.3d 585, 599-600 (6th Cir. 2012) (favoring DOL's position in its "amicus curiae brief in this appeal and with the preamble to the regulations implementing the safe harbor"), *cert. denied,* 133 S. Ct. 758 (2012); *Howell v. Motorola, Inc.,* 633 F.3d 552, 567 (7th Cir. 2011) (similar); *DiFelice v. U.S. Airways, Inc.,* 497 F.3d 410, 418 n.3 (4th Cir. 2007) (implicitly deferring to the 1992 rulemaking).

A

The *Chevron* framework can apply only if two initial conditions are met: (1) Congress has delegated the power to that agency to pronounce rules that carry the force of law and (2) the interpretation for which deference is sought was rendered pursuant to

that authority. *Price v. Stevedoring Servs. of Am., Inc.,* 697 F.3d 820, 833 (9th Cir. 2012) (en banc). That was the teaching of *United States v. Mead Corp.,* 533 U.S. 218, 226-27 (2001).

Congress gave the Secretary of Labor authority to promulgate binding regulations interpreting Title I of ERISA, which includes section 404(c). 29 U.S.C. § 1135. It also empowered the Secretary to bring civil enforcement actions. *Id.* § 1132(a)(2). These charges plainly satisfy the first requirement under *Mead. See, e.g., Gonzales v. Oregon,* 546 U.S. 243, 258 (2006) (explaining that "[i]n many cases authority is clear because the statute gives an agency broad power to enforce" its provisions). As for *Mead*'s second consideration, we do not view the fact that the interpretation appears in a final rule's preamble as disqualifying it from *Chevron* deference. Edison cites nothing authoritative for cabining that doctrine to materials destined for the pages of the Code of Federal Regulations. Though not a necessary condition, a notice-and-comment rule is virtually assured eligibility for *Chevron* deference. *See, e.g., Mead,* 533 U.S. at 230-31; *Renee v. Duncan,* 686 F.3d 1002, 1011 (9th Cir. 2012). Additionally, other factors significant to whether deference is owed are present here. DOL has expressed its position for two decades, ERISA is "an enormously complex and detailed statute," *Conkright v. Frommert,* 130 S. Ct. 1640, 1644 (2010), and this

question is of central import to its administration. *See Barnhart v. Walton,* 535 U.S. 212, 222 (2002).[7]

B

Because the 1992 interpretation clears the *Mead* threshold, we proceed to the well-trod *Chevron* inquiry.[8] This calls on the court to examine the plain meaning of the text and apply other relevant canons of statutory interpretation to ascertain whether Congress had a fixed "intention on the precise question at issue" that the agency must abide. *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.,* 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc).

If so, "that intention is the law and must be given effect." *Id.* If not, the court defers to the agency, provided that its interpretation is not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 1059; *see also Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 980 (2005) (explaining

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[7] *Cf. Stern v. IBM Corp.,* 326 F.3d 1367, 1371-72 (11th Cir. 2003) (commenting that the "views of the agency entrusted with interpreting and enforcing ERISA carry considerable weight").

[8] No party or amicus has invoked *Auer* deference, which governs agency interpretations of its "own ambiguous regulation." *Gonzales,* 546 U.S. at 255. To qualify for that, the DOL would need to show ambiguity and would need to demonstrate that its regulation, which added the modifier "direct or necessary," more than parroted or "paraphrase[d] the statutory language." *Id.* at 257; *see Langbecker,* 476 F.3d at 310 n.22 (questioning the presence of ambiguity in the 1992 regulation).

that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion"). These inquiries can be pursued in two steps, or all at once. *Compare Wilderness Soc'y,* 353 F.3d at 1059, *with Entergy Corp. v. Riverkeeper, Inc.,* 556 U.S. 208, 218 n.4 (2009) (embracing single-step analysis because "if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable").

In *Langbecker,* the Fifth Circuit concluded that the DOL's interpretation of section 404(c) could not receive *Chevron* deference "because it contradicts the governing statutory language." 476 F.3d at 311. Respectfully, we disagree. Section 404(c) speaks of "any breach, which results from" a participant's exercise of control. "Result from" means "[t]o arise as a consequence, effect, or outcome of some action." Oxford English Dictionary (3d ed. 2010); *see Wilderness Soc'y,* 353 F.3d at 1060 ("[A] fundamental canon of construction provides that unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (internal quotation marks omitted)).

Thus as cogently explained by DOL in its brief, "the selection of the particular funds to include and retain as investment options in a retirement plan is the responsibility of the plan's fiduciaries, and logically precedes (and thus cannot 'result[ ] from') a participant's decision to invest in any particular option." As previously noted, the DOL expressed the

same position in a notice-and-comment rule – albeit less succinctly. The preamble to the 1992 final rule states

> that the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan is a fiduciary function which, whether achieved through fiduciary designation or express plan language, is not a *direct or necessary* result of any participant direction of such plan. Thus, for example, in the case of look-through investment vehicles, the plan fiduciary has a fiduciary obligation to prudently select such vehicles, as well as a residual fiduciary obligation to periodically evaluate the performance of such vehicles to determine, based on that evaluation, whether the vehicles should continue to be available as participant investment options. Similar fiduciary obligations would exist in the case of an investment universe consisting of investment alternatives which are not look-through investment vehicles but which are specifically designated by plan fiduciaries.

57 Fed. Reg. at 46,924 n.27 (emphasis added). Although this rule invokes the regulatory terms "direct and necessary," 29 C.F.R. § 2550.404c-1(d)(2), the agency's ability to make the same point in its amicus brief and in the new 2010 rule without that terminology suggests that this gloss may not be essential. *See Langbecker,* 476 F.3d at 311. In our view, though,

this does not diminish the validity of its interpretation.

In an opinion that has been read by some to support the no-deference view, the Third Circuit keyed in on the fact that section 404(c) also speaks of "any loss" resulting from a participant's control. *In re Unisys,* 74 F.3d at 445.[9] For a 401(k) (or for any defined-contribution plan for that matter), it is admittedly the case that monetary damage flowing from a fiduciary's imprudent design of the investment menu passes through the participant, as intermediary. But is it proper to conclude that those losses, in the language of section 404(c), "result from" the participant's choice? This might seem an odd question given that, literally speaking, there can be no loss without the participant selecting an investment.

But, "[i]njuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc. v. McBride,* 131 S. Ct. 2630, 2637 (2011). Undoubtedly, in these situations, a fiduciary's decision to include an investment option on the plan menu also is a cause of any participant's loss. Confronted with this difficulty,

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[9] Since then, that court has indicated that it may, in the appropriate case, reconsider its decision in order to reflect the possibility that *Chevron* deference is now owed to the DOL's interpretation. *Renfro v. Unisys Corp.,* 671 F.3d 314, 328-29 (3d Cir. 2011); *see also Langbecker,* 476 F.3d at 322 (Reavley, J., dissenting) (suggesting that the earlier *Unisys* case may no longer be good law); *DiFelice v. U.S. Airways, Inc.,* 404 F. Supp. 2d 907, 909 (E.D. Va. 2005) (same).

DOL has effectively imported the tort-law notion of proximate cause to conclude that the *most salient cause* (as between the two) is the fiduciary's imprudence. *See id.* ("What we . . . mean by the word proximate, one noted jurist has explained, is simply this: Because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.") (omission in original) (internal quotation marks and alteration omitted).

We deem this "a reasonable interpretation of the statute." *Entergy Corp.,* 556 U.S. at 218. ERISA "allocates liability for plan-related misdeeds in reasonable proportion to the respective actors' power to control and prevent the misdeeds." *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 262 (1993). As compared to the beneficiary, the fiduciary is better situated to prevent the losses that would stem from the inclusion of unsound investment options. It can design a prudent menu of options. Second, *Chevron* deference is meant to foster "coherent and uniform construction of federal law." *Orthopaedic Hosp. v. Belshe,* 103 F.3d 1491, 1495 (9th Cir. 1997). Our acknowledgment of the flexibility inherent in the phrase "result from" promotes this, because DOL adopts a similar interpretation with regard to breaches that – unlike claims of imprudent plan design – *do* chronologically follow a participant's decision. Concluding that "a fiduciary is relieved of responsibility only for the direct and necessary consequences of a participant's exercise of control," 57 Fed. Reg. at 46,924, DOL takes the position that errors in carrying out the investment elections of

a beneficiary give rise to liability notwithstanding that any associated loss technically also "results from such participant's or beneficiary's exercise of control." 29 U.S.C. § 1104(c)(1)(A)(ii). These are just the sort of "difficult policy choices that agencies are better equipped to make than courts." *Brand X,* 545 U.S. at 980.

We also reject the argument raised by Edison and the Employment Law Council that DOL's interpretation renders section 404(c) a meaningless provision. When certain conditions are complied with,[10] the provision safeguards fiduciaries from being liable for participants' substantive investment decisions. 57 Fed. Reg. at 46,924. "The purpose of section 404(c) is to relieve the fiduciary of responsibility for choices made by someone beyond its control." *Howell,* 633 F.3d at 567. These include matters such as, hypothetically, "the participant's decision to invest 40% of her assets in Fund A and 60% in Fund B, rather than splitting assets somehow among four different funds, [or] emphasizing A rather than B." *Id.*

It is, indeed, the contrary view pressed by Edison that would render parts of the ERISA statute a nullity by making it nearly impossible for defined-contribution-plan beneficiaries to vindicate fiduciary imprudence. *Cf. LaRue v. DeWolff, Boberg & Assocs.,*

[10] Among these are that at least three investment options are offered, "which constitute a broad range of investment alternatives," and that participants have the power to direct their investments "no less frequently than once within any three month period." 29 C.F.R. § 2550.404c1(b)(2)(ii)(C)(1).

Inc., 552 U.S. 248, 256 (2008) (citing the DOL's regulations implementing section 404(c) in rejecting the converse interpretation); *see also Langbecker,* 476 F.3d at 321 (Reavley, J., dissenting) ("All commentators recognize that § 404(c) does not shift liability for a plan fiduciary's duty to ensure that each investment option is and continues to be a prudent one.").

Because DOL's interpretation of how the safe harbor functions is consistent with the statutory language, we conclude that the district court properly decided that section 404(c) did not preclude merits consideration of beneficiaries' claims. *See Tibble,* 639 F. Supp. 2d at 1121.

IV

Edison on its cross appeal raises another argument that could waylay our analysis of beneficiaries' substantive claims on their appeal. It contends that the district court improperly certified beneficiaries' case as a class action under Federal Rule of Civil Procedure 23.

Rule 23 sets out four prerequisites in subsection (a). A class must be "so numerous that joinder of all members is impracticable," (a)(1), there must be "questions of law or fact common to the class," (a)(2), "the claims or defenses of the representative parties" must be "typical of the claims or defenses of the class," (a)(3), and those representatives must "fairly and adequately protect the interests of the class," (a)(4). Classes must also comply with "at least one of the

requirements of Rule 23(b)." *Zinser v. Accufix Research Inst., Inc.,* 253 F.3d 1180, 1186 (9th Cir. 2001).

For the first time on its cross appeal and relying on out-of-circuit authority, Edison argues that this class action was improperly certified because the claims of the representative plaintiffs are not typical to the claims of the class at large. *See Spano v. Boeing Co.,* 633 F.3d 574, 586 (7th Cir. 2011) (expounding on Rule 23(a)(3)'s "typicality requirement"). In *Spano,* the court stated that "it seems that a class representative in a defined-contribution case would at a minimum need to have invested in the same funds as the class members." *Id.* Seizing on this statement, Edison contends that one of the three funds successfully litigated at trial was not held by any of the six named plaintiffs.[11] This violates Rule 23(a)(3), it claims, and requires that we reverse the class certification order.

Beneficiaries correctly argue that arguments not raised in the district court ordinarily will not be considered on appeal. *Dream Palace v. Cnty. of Maricopa,* 384 F.3d 990, 1005 (9th Cir. 2004). "This rule serves to ensure that legal arguments are considered with the benefit of a fully developed factual record, offers appellate courts the benefit of the district court's prior analysis, and prevents parties from sandbagging their opponents with new arguments on appeal." *Id.* In contrast to this typicality argument, Edison's

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[11] The MFS Total Return fund.

only Rule 23(a) arguments below were (i) a lack of commonality because the then-live misrepresentation claims would require individualized proof of reliance and (ii) a failure of adequacy. Edison concedes that it framed its argument strictly "as an adequacy issue below" but claims that because this inquiry *can overlap* with the typicality analysis, its presentation in the lower court suffices.

While we have indulged some liberality as to whether a particular Rule 23(a) subdivision has been pressed,[12] the presentation must have been "raised sufficiently for the trial court to rule on it." *In re Mercury Interactive Corp. Sec. Litig.,* 618 F.3d 988, 992 (9th Cir. 2010). Here, the district court found that "[d]efendants [did] not challenge whether the claims of the individual plaintiffs are typical to the class." As to adequacy, Edison's critique below centered on a "contention that the named plaintiffs [were] nothing more than 'window dressing or puppets for class counsel' " in that they were not knowledgeable about their legal claims – a far cry from its appellate contention about these beneficiaries' investments.[13] In

[12] *See, e.g., Dukes v. Wal-Mart Stores, Inc.,* 603 F.3d 571, 612-13 (9th Cir. 2010) (en banc), *rev'd on other grounds by Wal-Mart Stores Inc. v. Dukes,* 131 S. Ct. 2541 (2011).

[13] Although there are exceptions to waiver when "the issue is purely one of law, does not affect or rely upon the factual record developed by the parties, and will not prejudice the party against whom it is raised," these criteria are not satisfied. *Dream Palace,* 384 F.3d at 1005. Which funds the named plaintiffs invested in is a factual issue and the beneficiaries almost

(Continued on following page)

light of the failure to present the issue to the district court, we expressly reserve the question of whether the Ninth Circuit should adopt a rule akin to that articulated in *Spano,* or whether the circumstances of that case would be distinguishable from ours.[14]

V

We now turn to the merits of the main appeal. Beneficiaries argue that the district court erred in granting summary judgment to Edison on their claim that revenue sharing between mutual funds and the administrative service provider violated the Plan's governing document, as well as was a conflict of interest.

A

Because ERISA requires fiduciaries to discharge their duties "in accordance with the documents

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certainly would have tried their case differently (*i.e.,* chosen different representatives) had this issue been raised at the appropriate stage, thus demonstrating prejudice. *Janes v. Wal-Mart Stores, Inc.,* 279 F.3d 883, 888 n.4 (9th Cir. 2002). Given that Edison's Rule 23(a) argument on appeal is new and does not fall within the recognized, but narrow, exceptions to this form of waiver, we exercise our discretion to decline to decide it. *Dream Palace,* 384 F.3d at 1005.

[14] And since it has not even been raised on appeal, we also express no view about whether defined-contribution plans are properly certified under Rule 23(b)(1)(A), as the district court concluded.

and instruments governing the plan," 29 U.S.C. § 1104(a)(1)(D), violations of the written plan have been recognized as a basis for liability. *See, e.g., Cal. Ironworkers Field Pension Trust v. Loomis Sayles & Co.,* 259 F.3d 1036, 1042 (9th Cir. 2001).[15]

Since 1997, Plan section 19.02 has stated: "The cost of the administration of the Plan will be paid by the Company." Edison contracted with Hewitt Associates, LLC, for a variety of services, including the drafting of Plan updates and regulatory reports. Hewitt also maintained the system by which beneficiaries designate their contribution amounts and make their investment elections. The addition of a large menu of mutual funds in 1999 made the Plan more expensive to administer, so Edison availed itself of a practice known in the industry as revenue sharing. Under this arrangement, mutual funds transfer a portion of their fees to the Plan's service provider, Hewitt. That revenue reimburses Hewitt for its recordkeeping and other costs. In turn, Edison receives a credit on its bills from Hewitt.

Beneficiaries, while conceding this new practice of revenue sharing was disclosed during the negotiations to expand the Plan offerings, argue that the

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[15] *See also* 2 Ronald J. Cooke, ERISA Practice and Procedure § 6:10 (2012) ("Courts have consistently ruled that action inconsistent with plan documents constitutes a breach of fiduciary duty."). As in *California Ironworkers,* we simply assume, without deciding, that beneficiaries' theory is actionable. 259 F.3d at 1042.

arrangement violated the language of the Plan because it allowed Edison to escape from part of the obligation to pay. With a December 26, 2006 amendment this Plan language was revised to state that "[t]he cost of administration of the Plan, *net of any adjustments by service providers,* will be paid by the Company." (emphasis added). The parties agree that under the new language these offsets are perfectly appropriate. The issue that arises, however, is whether the district court correctly determined that no triable issue existed over whether the pre-amendment version of section 19.02 allowed offsets. *See* Fed. R. Civ. P. 56(a). At bottom, this is a simple interpretive matter, but like most issues arising under ERISA there are complications.

1

In addition to the pension plan at issue in this case, ERISA also governs "employee welfare benefit" plans such as those for health or disability. *See* 29 U.S.C. § 1002(1)-(2). "[T]he validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue." *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115 (1989). The Supreme Court has handed down a trio of opinions explaining the framework for review when those disputes reach the judiciary. *See Conkright,* 130 S. Ct. at 1646 (discussing the Court's two prior precedents, *Firestone* and *Metropolitan Life Insurance Co. v. Glenn*). The proper standard of review hinges, in part, on what the plan instrument

says about interpretation. When the plan is silent, judges review its terms de novo. But, when the plan grants interpretive authority to its administrator, as is usually the case, a deferential abuse of discretion standard applies to the administrator's determinations.

The Edison Plan has a provision that speaks to interpretation; it vests the company's Benefits Committee with the "full discretion to construe and interpret [its] terms and provisions." *See, e.g., Sandy v. Reliance Std. Life Ins. Co.,* 222 F.3d 1202, 1206-07 & n.6 (9th Cir. 2000). The Plan even purports to make interpretations by the Committee "final and binding on all parties." Taking stock of these principles, the district court applied the abuse of discretion standard and then concluded that Edison's view that the language did not foreclose revenue sharing had been reasonable.

Yet, as we noted at the outset, the Supreme Court expounded these interpretive principles in the context of "§ 1132(a)(1)(B) actions challenging denials of benefits." *Firestone,* 489 U.S. at 108. The Second Circuit has declined to apply the arbitrary and capricious standard from *Firestone* outside of the benefits context. *See John Blair Commc'ns, Inc. Profit Sharing Plan v. Telemundo Grp., Inc. Profit Sharing Plan,* 26 F.3d 360, 369-70 (2d Cir. 1994). Other circuits have read *Firestone* more broadly, stating that its deference can reach beyond ERISA actions that arise under section 1132(a)(1). *See, e.g., Hunter v. Caliber Sys., Inc.,* 220 F.3d 702, 711 (6th Cir. 2000) ("[W]e find

no barrier to application of the arbitrary and capricious standard in a case such as this not involving a typical review of denial of benefits."); *Moench v. Robertson,* 62 F.3d 553, 565 (3d Cir. 1995) ("[W]e believe that after *Firestone,* trust law should guide the standard of review over claims, such as those here, not only under section 1132(a)(1)(B) but also over claims filed pursuant to 29 U.S.C. § 1132(a)(2) based on violations of the fiduciary duties set forth in [ERISA § 404].").

In relevant part, *John Blair* involved a challenge under ERISA § 404 to how assets had been allocated. 26 F.3d at 370. The plaintiffs argued that the defendant had breached its fiduciary duty by retaining surplus income generated by virtue of a lag between when plan members elected to move assets and the actual transfer of the funds. *Id.* at 362, 368. As a defense, the fiduciary argued that the terms of the Plan authorized it to allocate the assets as it had, and that because the Plan "gave the plan committee discretion to interpret the provisions of the [P]lan" the court was bound to approve of its allocation unless it determined that the decision to do so had been "arbitrary and capricious" under *Firestone. Id.* at 369.

Rejecting that framework, the Second Circuit instead decided to evaluate the claim under the "prudent person standard articulated in § 404 of ERISA." *Id.* As support for this approach, the court cited a pre-*Firestone* authority from the Third Circuit and a pair of district court decisions from within the Second Circuit. *See Struble v. N.J. Brewery Emps. Welfare*

Trust Fund, 732 F.2d 325, 333-34 (3d Cir. 1984); *Ches v. Archer,* 827 F. Supp. 159, 165-66 (W.D.N.Y. 1993); *Trapani v. Consol. Edison Emps.' Mut. Aid Soc'y, Inc.,* 693 F. Supp. 1509, 1515 (S.D.N.Y. 1988). Relying on *John Blair* and *Struble,* beneficiaries argue that their claim is similarly exempt from *Firestone.* We disagree.

As noted above, this specific challenge by beneficiaries has been brought under 29 U.S.C. § 1104(a)(1)(D), which is part of ERISA § 404. *See Tibble,* 639 F. Supp. 2d at 1096 (explaining that beneficiaries "move[d] for summary judgment on the basis that [Edison] violated the terms of the Plan by failing to pay the full extent of Hewitt's recordkeeping costs"). While subsection (a)(1)(B) codifies the statutory prudent-person standard, subsection (a)(1)(D) simply requires that actions be in line with the plan documents. *See* 29 U.S.C. § 1104(a)(1). *John Blair* was an attempt by a fiduciary to escape from otherwise applicable duties on the basis of a plan interpretation. The Second Circuit declined to apply *Firestone* deference because of a concern about bootstrapping. *See John Blair,* 26 F.3d at 369. Similarly, the district court decisions it favorably cited were examples of fiduciaries trying to weaken or evade the statutory standard of prudence. *See Ches,* 827 F. Supp. at 165 (rejecting defendants' argument that "they cannot be found to have breached their fiduciary duties in the absence of an allegation and a showing that their determinations had been arbitrary and capricious"); *Trapani,* 693 F. Supp. at 1514 ("Defendants argue

that the court must apply an arbitrary and capricious standard, rather than the prudent man standard specifically set forth in the statute.").[16]

Edison is not making any such argument here, as beneficiaries have not pursued this challenge as a violation of the prudent person standard; instead, their contention rises or falls exclusively on what Plan section 19.02 allows.[17] As to issues of plan interpretation that do not implicate ERISA's statutory duties, they are subject to *Firestone.*

At least three considerations prompt us to hold that the *Firestone* framework can govern issues of plan interpretation even when they arise outside the benefits context. First, while the *Firestone* case

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[16] The *Struble* case is even farther afield; in relevant part, it did not concern an issue of plan interpretation at all. *See* 732 F.2d at 331-35. Arising during a period of lower court uncertainty about the proper standard(s) of review under ERISA, *see de Nobel v. Vitro Corp.,* 885 F.2d 1180, 1184-85 (4th Cir. 1989), *Struble* involved a claim that the employer trustee had breached its duties of care and loyalty by "failing to collect the amount of Employer contributions allegedly required by the Employers' respective bargaining agreements." 732 F.2d at 331. The Third Circuit decided to apply "the standards set forth explicitly in ERISA" rather than the arbitrary and capricious standard. *Id.* at 333.

[17] We thus leave for another day what judicial-review standard would apply in a case like *John Blair* where the Plan is said to authorize what the statutory duties codified in ERISA forbid. Next, in Part V.B of the opinion, we explain why these beneficiaries' claim that revenue sharing was a conflict of interest under ERISA § 406 fails.

did not announce a holding beyond benefits, its rationale did *not* stem from an interpretive gloss on the welfare-benefits provision of ERISA. *See* 489 U.S. at 108, 109 ("ERISA does not set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations."). Instead, because "ERISA abounds with the language and terminology of trust law" and because of legislative history to that effect, that body of law – not a discrete provision – dictated "the appropriate standard of review." *Id.* at 110-11 ("Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers."). The law of trusts was the basis for the dual-track standard whereby, absent a contrary designation, de novo review applies. *See id.* at 111. The Supreme Court's most recent analysis of *Firestone* reenforces that the deference underlying that case is a product of what trust law has to say about matters of interpretation. *See Conkright,* 130 S. Ct. at 1646 ("[U]nder trust law, the proper standard of review of a trustee's decision depends on the language of the instrument creating the trust. If the trust documents give the trustee power to construe disputed or doubtful terms, . . . the trustee's interpretation will not be disturbed if reasonable." (alterations in original) (internal citation and quotation marks omitted)).

Second, one reason the Court in *Conkright* rejected an exception the Second Circuit had carved out from *Firestone* deference was its potential to create "uniformity problems." 130 S. Ct. at 1650. The

concern was that if de novo review sometimes applied, fiduciaries would be in the "impossible situation" of being subject to different plan interpretations by courts depending on the particular facts of the cases where the interpretive issue had arisen. *Id.* Not applying *Firestone* deference in this case would risk similar difficulties, as parts of a plan could be assigned one meaning when litigated under section 1132(a)(1)(B) and another meaning when litigated, such as here, under section 1104(a)(1)(D).

Third, we observe that consistently applying *Firestone* to the question of what a plan means, "by permitting an employer to grant primary interpretive authority over an ERISA plan to the plan administrator," has the virtue of "preserv[ing] the 'careful balancing' on which ERISA is based." *Id.* at 1649. In particular, it helps keep administrative and litigation expenses under control, which otherwise could "discourage employers from offering [ERISA] plans in the first place." *Id.* (alteration in original).

2

ERISA administrators abuse their discretion if they act without explanation or "construe provisions of the plan in a way that conflicts with the plain language of the plan." *Day v. AT & T Disability Income Plan,* 698 F.3d 1091, 1096 (9th Cir. 2012). We are instructed not to disturb those interpretations if they are reasonable. *See Conkright,* 130 S. Ct. at 1651.

To start with, we discern no explicit conflict with the plain language of the Plan. *See Day,* 698 F.3d at 1096. Section 19.02 required the company to pay the costs, and Edison did. Although beneficiaries argue that the "costs" are the expenses associated with Hewitt before the offsets, the more natural reading is that "costs" simply are whatever bills Hewitt presented Edison with. Under this commonsense reading, the Plan merely assigned Edison an affirmative obligation to pay. It did not, as beneficiaries would have it, prohibit "Hewitt's recordkeeping services from being paid by a third party such as mutual funds." That kind of interpretation, nonsensically, would also imply that if Hewitt had simply lowered its prices (maybe due to efficiency or market pressure) Edison would be somehow shirking its obligation under Plan § 19.02.

Beyond the text, in conducting abuse of discretion review, courts consider "various [other] criteria for determining the reasonableness of a fiduciary's discretionary decision." *Booth v. Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan,* 201 F.3d 335, 342 (4th Cir. 2000). Viewing the matter in terms of those considerations further establishes the soundness of Edison's position. Its view is most "consistent with the goals of the plan," as it facilitated the expansion of the Plan's mutual fund offerings. *Id.* We also note that section 19.02 has been applied consistently over time. Undisputed evidence showed that the union negotiators and Edison had "extensive discussions with regard to how revenue sharing from the mutual funds

would be used." Also, between 1999 when the process started, and 2006 when the language was modified, on at least seventeen occasions participants were specifically advised that mutual funds were being used to reduce the cost of retaining Hewitt. For example, one Summary Plan Description in evidence said: "the fees received by Edison's 401(k) plan recordkeeper are used to reduce the recordkeeping and communication expenses of the plan paid by the company." Another consideration under the abuse of discretion standard is "whether the challenged interpretation is at odds with the procedural and substantive requirements of ERISA itself." *de Nobel v. Vitro Corp.,* 885 F.2d 1180, 1188 (4th Cir. 1989) (citing *Blau v. Del Monte Corp.,* 748 F.2d 1348, 1353 (9th Cir. 1984)). Although we explain the reasoning behind this observation next, we are satisfied that revenue sharing as carried out by Edison does not violate ERISA.

B

Beneficiaries alternatively argue that the statute's conflicts provision, ERISA § 406(b)(3), prohibits the practice of revenue sharing. ERISA § 406 is similar to a duty-of-loyalty provision. *See Mass. Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 143 n.10 (1985). It prohibits the type of business deals "likely to injure the pension plan." *Wright v. Or. Metallurgical Corp.,* 360 F.3d 1090, 1100 (9th Cir. 2004).

1

ERISA § 406(b)(3) provides that:

> A fiduciary with respect to a plan shall not 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.

29 U.S.C. § 1106(b)(3). Beneficiaries' claim is that Edison's revenue sharing arrangement violated this provision because Edison received "consideration" in the form of discounts for administrative expenses from Hewitt, which was a "party dealing with" the Plan. The DOL, though, has issued several non binding advisory opinions staking out the position that a fiduciary does not violate section 406(b)(3) so long as "the decision to invest in such funds is made by a fiduciary who is independent" of the fiduciary receiving the fee. DOL Advisory Op. 2003-09A, 2003 WL 21514170 (June 25, 2003); *see also* DOL Advisory Op. 97-15A, 1997 WL 277980 (May 22, 1997) (fiduciary that "does not exercise any authority or control" to cause the suspect investment is not liable).

Relying on these concepts, the district court granted summary judgment to Edison. To do so, it conceived of "Edison," not as a unified corporate entity, but in terms of its constituent parts. In brief, the "fiduciaries" named in the Plan include the Southern California Edison Benefits Committee and its members, as well as the Edison International Trust Investment Committee and its members. The "Plan

Sponsor" is Southern California Edison, while its Benefits Committee is designated under ERISA as the "Plan Administrator." *See* 29 U.S.C. § 1002(16)(A)(i), (B).[18] Edison International's CEO appoints the Investment Committee and Southern California Edison's CEO handles appointments to the Benefits Committee.

In light of this diffusion of responsibility, the district court observed that, as the sole contracting party with Hewitt, only the subsidiary Southern California Edison had received the credit from administrative expenses. It then noted that it was the Investment Committee of the parent company, Edison International, which had selected the mutual funds that featured revenue sharing. From this, the court drew the conclusion that a different fiduciary had received the "consideration" than the fiduciary which had (in the DOL's parlance) exercised "authority or control" over the offending investment. Therefore, the mutual fund revenue sharing had not violated section 406(b)(3).

As amicus curiae, the DOL vigorously objects to the lower court's parsing of Edison International this way, and objects to what it considers an overly broad reading of its advisory opinions. DOL maintains that

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[18] To the extent a Plan Sponsor has or exercises discretionary authority in the administration or management of the Plan, ERISA deems that sponsor a fiduciary. *See Mathews v. Chevron Corp.*, 362 F.3d 1172, 1178 (9th Cir. 2004) (discussing 29 U.S.C. § 1002(21)(A)).

permitting "fiduciaries to make plan asset investment decisions that result in the company on which they serve as directors and officers receiving an economic benefit from a third party is precisely the kind of transaction – rife with the potential for abuse – that Congress intended to prohibit in section 406(b)(3)." In response, Edison argues that the separate legal identities of the committees and companies are meaningful, and calls to our attention the district court's finding that beneficiaries had not marshaled evidence that justified disregarding their putative separateness.

We review the district court's entry of summary judgment de novo, and we are empowered to affirm on any basis the record will support. *See Gordon v. Virtumundo, Inc.,* 575 F.3d 1040, 1047 (9th Cir. 2009). In light of that, we reserve for another case whether the lower court's control determinations are defensible and, instead, proceed to consider the basis for affirmance expressly advocated by the DOL.

2

The DOL directs our attention to its regulatory interpretation at 29 C.F.R. § 2550.408b-2(e)(3), which states that "[i]f a fiduciary provides services to a plan without the receipt of compensation or other consideration (other than reimbursement of direct expenses properly and actually incurred in the performance of such services . . .), the provision of such services does not, in and of itself, constitute an act described in

section 406(b) of the Act." Assuming that the Edison Plan permitted revenue sharing (as we concluded above), then as DOL explains, the discounts on its invoices from Hewitt "would not constitute the receipt of any 'consideration'" by Edison "within the meaning of the section 406(b)(3) prohibition." In further support, the agency cites one of its opinion letters that permitted, under the authority of section 2550.408b-2(e), a fiduciary to receive reimbursement from an unrelated mutual fund of direct expenses for which the plan would otherwise be liable. *See* DOL Advisory Op. 97-19A, 1997 WL 540069 (Aug. 28, 1997).

The district court intimated that our *Patelco Credit Union v. Sahni* decision might be to the contrary. 262 F.3d 897 (9th Cir. 2001). It is not, although we do not fault the district court for its misconception. It did not have the advantage, afforded us, of DOL's participation in tackling these regulatory intricacies. In *Patelco,* the fiduciary had wrongfully deposited ERISA Plan assets – two checks payable to the company – into his own account. *Id.* at 903, 908. This straightforwardly constituted "consideration for his own personal account" from a "party dealing with [the] plan," in violation of ERISA § 406(b)(3). *Id.* at 909-10. Confronted with that scenario, we vindicated DOL's pronouncement that when a fiduciary self-deals in violation of ERISA § 406(b), the "reasonable compensation exception" found in section 408(b)(2) cannot be used as a shield from liability. *Id.* at 910-11; *see also Dupree v. Prudential Ins. Co. of Am.,* No.

99-8337, 2007 WL 2263892, at *42 (S.D. Fla. Aug. 7, 2007) (explaining this).[19]

By contrast in our case, section 2550.408b-2(e)(3), as it is "routinely interpreted by the DOL," exempts revenue sharing payments from the very definition of consideration. *Dupree,* 2007 WL 2263892, at *42. The Department's position is that rather than constituting "consideration," "such payments may be considered 'reimbursement' within the meaning of regulation section 2550.408b-2(e)." DOL Advisory Op. 97-19A.[20] That means it is not a section 406(b)(3) violation at all.

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[19] ERISA § 408 grants exemptions from prohibited transactions. At issue in *Patelco* was the part of that section stating "[n]othing in section 1106 of this title shall be construed to prohibit any fiduciary from . . . (2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan. . . ."

[20] Lest there be any doubt about the distinction between the issue in *Patelco* and the issue that arises in this case, we point out that in this very same advisory opinion the DOL also discusses the interpretation we upheld in *Patelco* – thus demonstrating that the two interpretations are compatible. *Compare* Advisory Op. 97-19A ("Regulation 29 C.F.R. 2550.408b-2(a) indicates that ERISA section 408(b)(2) does not contain an exemption for an act described in section 406(b) even if such act occurs in connection with a provision of services which is exempt under section 408(b)(2)."), *with Patelco,* 262 F.3d at 910 (quoting section 2550.408b2(a) as stating "[h]owever, section 408(b)(2) does not contain an exemption from acts described in section 406(b)(1) of the Act . . . section 406(b)(2) of the Act . . . or section 406(b)(3) of the Act.).

Aside from citing *Patelco* as the lower court understood it, beneficiaries' only response is, in effect, that we ought to read DOL's regulations and opinion letters differently than DOL has counseled in its amicus brief. We decline to do so. Notably, courts are instructed to "defer to an agency's interpretation of its own regulation, advanced in a legal brief unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Chase Bank USA, N.A. v. McCoy,* 131 S. Ct. 871, 880 (2011) (discussing *Auer* deference). We mention this not because we resolve whether this view is permissible either under ERISA or the regulation, but simply to explain why beneficiaries have not convinced us to reject DOL's interpretation in this case.

VI

Beneficiaries next claim that Edison violated its duty of prudence under ERISA by including several investment vehicles in the Plan menu: (i) mutual funds, (ii) a short-term investment fund akin to a money market, and (iii) a unitized fund for employees' investment in Edison stock.

A

ERISA demands that fiduciaries act with the type of "care, skill, prudence, and diligence under the circumstances" not of a lay person, but of one experienced and knowledgeable with these matters. 29 U.S.C. § 1104(a)(1)(B). Fiduciaries also must act exclusively

in the interest of beneficiaries. *Id.* § 1104(a)(1). These obligations are more exacting than those associated with the business judgment rule so familiar to corporate practitioners, *Howard v. Shay,* 100 F.3d 1484, 1489 (9th Cir. 1996), a standard under which courts eschew any evaluation of "substantive due care." *Brehm v. Eisner,* 746 A.2d 244, 264 (Del. 2000), *cited in Pac. Nw. Generating Coop. v. Bonneville Power Admin.,* 596 F.3d 1065, 1077 (9th Cir. 2010). To enforce this duty of prudence, we consider the merits of the transaction and "the thoroughness of the *investigation* into the merits of the transaction." *Howard,* 100 F.3d at 1488 (emphasis added). Courts are in broad accord that engaging consultants, even well-qualified and impartial ones, will not alone satisfy the duty of prudence. *See George v. Kraft Foods Global, Inc.,* 641 F.3d 786, 799-800 (7th Cir. 2011) (collecting cases from the Second, Fifth, Seventh, and Ninth Circuits).

Under the common law of trusts, which helps inform ERISA, a fiduciary "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 [Plan] and the amount and regularity of the income to be derived.'" *In re Unisys.,* 74 F.3d at 434 (quoting Restatement (Second) of Trusts § 227 (1959)) (first alternation in original).

B

1

A mutual fund is a pool of assets, chiefly a portfolio of securities bought with the capital contributions of the fund's shareholders. *Jones v. Harris Assocs. L.P.,* 130 S. Ct. 1418, 1422 (2010). Joined by the AARP as an amicus, beneficiaries seek a ruling that including mutual funds of the sort available to the investing public at large ("retail" or "brand-name" funds) is categorically imprudent. Their position is that under ERISA, fiduciaries must offer institutional investment alternatives such as "commingled pools" or "separate accounts."

Mutual funds, however, have a variety of unique regulatory and transparency features that make it an apples-to-oranges comparison to judge them against AARP and beneficiaries' suggested options. As Chief Judge Easterbook, writing for the Seventh Circuit, has usefully summarized:

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

> and any error in valuation can hurt other investors.

Loomis v. Exelon Corp., 658 F.3d 667, 671-72 (7th Cir. 2011). As beneficiaries admit in their briefing, brand-name mutual funds are generally easy to track via newspaper or internet sources. This, in fact, was a stated goal of the report issued by the Joint Study Group of human resource managers and employee union representatives empaneled to expand the Plan menu. Relatedly, as other courts have recognized, non-mutual fund alternatives such as commingled pools are not subject to the same "reporting, governance, and transparency requirements" as mutual funds, which are governed by the Securities Act of 1933 and the Investment Company Act of 1940. *See Renfro v. Unisys Corp.,* 671 F.3d 314, 318 (3d Cir. 2011); *Harris Assocs.,* 130 S. Ct. at 1422.

Further, the undisputed evidence was that during collective bargaining the union requested "forty name-brand retail mutual funds for inclusion in the Plan." While conceding this, the beneficiaries claim that the union did not know what was in its members' best interest. Because participant choice is the centerpiece of what ERISA envisions for defined-contribution plans, these sorts of paternalistic arguments have had little traction in the courts. *See, e.g., Loomis,* 658 F.3d at 673; *Renfro,* 671 F.3d at 327-28 (observing that imprudence is less plausible "in light of an ERISA defined-contribution 401(k) plan having a reasonable range of investment options with a variety of risk profiles and fee rates").

2

Also before us under the mutual fund umbrella is beneficiaries' claim that the particular mutual funds Edison selected charged excessive fees, which rendered their inclusion imprudent. Part of this challenge is a broadside against retail-class mutual funds, which do generally have higher expense ratios than their institutional-class counterparts. As the district court explained in its post-trial findings of fact, this is because with institutional-class mutual funds "the amount of assets invested is far greater than [that associated with] the typical individual investor." The Seventh Circuit has repeatedly rejected the argument that a fiduciary "should have offered only 'wholesale' or 'institutional' funds." *See Loomis,* 658 F.3d at 671; *Hecker,* 556 F.3d at 586 ("[N]othing in ERISA requires [a] fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)."). We agree. There are simply too many relevant considerations for a fiduciary, for that type of bright-line approach to prudence to be tenable. *Cf. Braden v. Wal-Mart Stores, Inc.,* 588 F.3d 585, 596 (8th Cir. 2009) (acknowledging that a fiduciary might "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").

Nor is the particular expense ratio range out of the ordinary enough to make the funds imprudent. In *Hecker,* the court upheld the dismissal of a similar excessive fee claim where the range of expenses varied

from .07 to 1% across a pool of twenty mutual funds. 556 F.3d at 586. Here, the summary-judgment facts showed that the expense ratio varied from .03 to 2%, and there were roughly forty mutual funds to choose from.

3

Before we leave the topic of mutual funds we find it necessary to make one last observation. Much time at oral argument and ink in the briefs were devoted to debating the question of whether the revenue sharing typically associated with mutual funds adversely impacts plan beneficiaries. Today we have held that the practice here did not violate the terms of the Edison Plan or violate ERISA § 406(b)(3).

Mutual funds generate this revenue by charging what is known as a Rule 12b-1 fee to all investors participating in the fund.[21] Edison takes the position that because that fee applies to Plan beneficiaries and all other fund investors alike, the allocation of a portion of that total 12b-1 fee to Hewitt is irrelevant. As it put the matter at oral argument: "the mutual

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[21] *See Meyer v. Oppenheimer Mgmt. Corp.,* 895 F.2d 861, 863 (2d Cir. 1990) ("Promulgated in 1980, [U.S. Securities and Exchange Commission] Rule 12b-1 permits an open-end investment company to use fund assets to cover sale and distribution expenses pursuant to a written plan approved by a majority of the fund's board of directors . . . and a majority of the fund's outstanding voting shares. . . . Prior to this Rule, brokers had to bear these expenses themselves.").

fund advisor can do whatever it wants with the fees; sometimes they share costs with service providers who assist them in providing service and sometimes they don't." This benign-effect, of course, assumes that the "cost" of revenue sharing is not driving up the fund's total 12b-1 fee and, in turn, its overall expense ratio. It also assumes that fiduciaries are not being driven to select funds because they offer them the financial benefit of revenue sharing. The former was not explored in this case and the evidence did not bear out the latter,[22] but we do not wish to be understood as ruling out the possibility that liability might – on a different record – attach on either of these bases.

C

The next contention can be addressed briefly. Beneficiaries argue that it was imprudent for Edison to include a short-term investment fund (or "STIF") rather than a stable value fund. Both types of investments are conservative in that they emphasize capital preservation rather than the maximization of returns. A stable value fund generally consists of short-to-medium duration bonds paired with insurance contracts that guard against interest rate volatility, and the record here indicates that beneficiaries

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[22] In fact, the district court found that "in 33 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."

are correct that they typically outperform money market funds. A STIF is similar to a traditional money market fund, which invests in what might be loosely termed "money," instruments such as "short-term securities of the United States Government or its agencies, bank certificates of deposit, and commercial paper." *Harris Assocs.,* 130 S. Ct. at 1426 n.6. The regulatory regime is different for the two instruments however: registered money markets must comply with the Investment Company Act, whereas banking regulations set the rules of the road for STIFs.

When applying the prudence rule in section 1104(a)(1)(B), "the primary question is whether the fiduciaries, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." *Cal. Ironworkers,* 259 F.3d at 1043 (internal quotation marks omitted). Thus, fatal to beneficiaries is uncontroverted evidence that there were discussions about the pros and cons of a stable-value alternative. Furthermore, an investment staffer testified at his deposition that in 1999 his team determined that a short-duration bond fund already on the menu filled the same investment niche as would have a stable value fund.

D

Beneficiaries also charge that the inclusion of the unitized stock investment was imprudent, despite it

being an industry standard for large 401(k)'s. Their main contention is that during the class period a roughly 77% gain in Edison's stock price yielded Plan investors only around a 67% return. But hindsight is the wrong metric for evaluating fiduciary duty. *See Roth v. Sawyer-Cleator Lumber Co.,* 16 F.3d 915, 918 (8th Cir. 1994); *DiFelice,* 497 F.3d at 424.

This dilution, or "investment drag," that occurs when stock prices rise as compared to a direct stock investment is a well-recognized characteristic of unitized funds. The reason they are called "unitized" is that participants own units of a fund that invests primarily in company stock, but also in "cash and other similar highly liquid investments." *George,* 641 F.3d at 792. These non-stock portions of the unitized fund generate lower rates of return than does the stock. Why use the device then? The advantages are twofold. The cashbuffer gives investors increased liquidity. *See id.* at 793 (explaining that money can be dispersed without delay because sales of units are paid out from the cash). Also, "in a market in which the relevant stock is declining, the presence of cash in the fund would be a good thing" because it functions as a hedge. *Id.*

Citing *George,* beneficiaries correctly note that, there, the court withheld summary judgment because there was a genuine issue of material fact as to whether the fiduciary had considered "implementing changes to the [fund] in order to reduce or eliminate investment and transactional drag." *Id.* at 796 n.8. Yet, by contrast, the district court here

found vigilance on the part of the Edison Investment Committee to minimize this phenomenon. "For example, in July 2004, the issue of how much cash should be held in the Edison Stock Fund was raised." Because active trading had decreased, the decision was made to reduce the cash target. *See Taylor v. United Techs. Corp.,* No. 3:06-CV-1494, 2009 WL 535779, at *9 (D. Conn. 2009) ("The evidence indicates that UTC's evaluation of the merits of retaining cash to provide transactional liquidity satisfies the prudent person standard."). Because the choice to include unitization was objectively reasonable as well as informed, and because the evidence establishes that Edison oversaw the fund as conditions changed, we agree that summary judgment was proper.

VII

Continuing with our application of the prudence standard, we confront the final issue in the case: Edison's argument on cross appeal that the district court erred in concluding – after a three-day bench trial and months of post-trial evidence and briefing – that the company had been imprudent in deciding to include retail-class shares of three specific mutual funds in the Plan menu.[23] The basis of liability was

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[23] They were the William Blair Small Cap Growth Fund, the PIMCO (Allianz) RCM Global Technology Fund, and the MFS Total Return Fund. As mentioned earlier, other retail funds for which the initial decision to invest was time-barred were litigated (unsuccessfully) under a theory that Edison breached its

(Continued on following page)

not the mere inclusion of retail-class shares, as the court had rejected that claim on summary judgment. Instead, beneficiaries prevailed on a theory that Edison has failed to investigate the possibility of institutional-share class alternatives.

A

In reviewing a judgment after a bench trial, we evaluate the district court's factual findings "for clear error and its legal conclusions de novo." *Lee v. W. Coast Life Ins. Co.,* 688 F.3d 1004, 1009 (9th Cir. 2012).

Here, the lower court's unchallenged findings are that during the relevant time period (i) all three funds offered institutional options in which the Edison 401(k) Savings Plan almost certainly could have participated,[24] (ii) those options were in the range of 24 to 40 basis points cheaper than the retail class options the Plan did include, and – crucially – (iii) between the class profiles, there were no salient differences in the investment quality or management.

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duties by not converting them into institutional shares upon the occurrence of "triggering events" after August 16, 2001.

[24] Although the funds advertised investment minimums, the district court amply documented that it is common knowledge in the financial industry that these will be waived for "large 401(k) plans with over a billion dollars in total assets, such as Edison's." In fact, defendants' own expert witness had "personally obtained such waivers for plans as small as $50 million in total assests [sic] – *i.e,* 5 percent the size of the Edison plan."

B

Since at least 1999, Edison has contracted with Hewitt Financial Services ("HFS")[25] for investment consulting advice. It argued below, and re-urges here, that it reasonably depended on HFS for advice about which mutual fund share classes should be selected for the Plan.

HFS frequently engages with the Investment Committee staff at Edison to help design and manage the Plan menu. It applies the investment staff's criteria: (1) fund stability/management, (2) diversification, (3) performance relative to benchmarks, (4) expense ratio relative to the peer group, and (5) the accessibility of public information on the fund. HFS then approaches the Committee with options and discusses their respective merit with its members. And to keep Edison abreast of developments, it provides the Committee with monthly, quarterly, and annual investment reports. We offer this background to illustrate a point, which, though it should be unmistakable, seems to have eluded Edison in its briefing. HFS is its consultant, not the fiduciary. "As Judge Friendly has explained, independent expert advice is not a 'whitewash.'" *Shay,* 100 F.3d at 1489 (quoting *Donovan v. Bierwirth,* 680 F.2d 263, 272 (2d Cir. 1982)). Our *Shay* factors recognize this by not simply requiring that the fiduciary (1) probe the expert's

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[25] HFS is an affiliate of the Plan's services provider, Hewitt Associates. Their respective roles are separate and distinct.

qualifications, and (2) furnish the expert with reliable and complete information, but also requiring it to "(3) make certain that reliance on the expert's advice is reasonably justified under the circumstances." *Id.*[26]

Applying *Shay,* the district court found that Edison failed to satisfy element (3) – reasonable reliance. We agree. Just as fiduciaries cannot blindly rely on counsel, *Donovan v. Mazzola,* 716 F.2d 1226, 1234 (9th Cir. 1983), or on credit rating agencies, *Bussian,* 223 F.3d at 301, a firm in Edison's position cannot reflexively and uncritically adopt investment recommendations. *See In re Unisys,* 74 F.3d at 435-36 ("[W]e believe that ERISA's duty to investigate requires fiduciaries to review the data a consultant gathers, to assess its significance and to supplement it where necessary."); *Shay,* 100 F.3d at 1490 (fiduciaries should "make an honest, objective effort" to grapple with the advice given and, if need be, "question the methods and assumptions that do not make sense"). The trial evidence – from both beneficiaries' and Edison's own experts – shows that an experienced investor would have reviewed all available share classes and the relative costs of each when selecting a mutual fund. The district court found an utter absence of evidence that Edison considered the possibility of institutional classes for the funds

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[26] This framework has been followed by our sister circuits. *See, e.g., Bussian v. RJR Nabisco, Inc.,* 223 F.3d 286, 301 (5th Cir. 2000); *Hightshue v. AIG Life Ins. Co.,* 135 F.3d 1144, 1148 (7th Cir. 1998).

litigated – a startling fact considering that supposedly the "expense ratio" was a core investment criterion.

However, because the "goal is not to duplicate the expert's analysis," had Edison made a showing that HFS engaged in a prudent process in considering share classes this might have been a different case. *Bussian,* 223 F.3d at 301. But despite having ample opportunities, Edison "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 institutional share classes" or what questions or "steps the Investments Staff [pursued] to evaluate HFS' recommendations."

On this record we have little difficulty agreeing with the district court that Edison did not exercise the "care, skill, prudence, and diligence under the circumstances" that ERISA demands in the selection of these retail mutual funds. 29 U.S.C. § 1104(a)(1)(B). Its cross appeal thus fails.

VIII

For the foregoing reasons, the judgment of the district court is **AFFIRMED**. The parties shall bear their own costs on appeal.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GLENN TIBBLE, et al. Plaintiffs, v. EDISON INTERNATIONAL, et al. Defendants.	))))))))	CV 07-5359 SVW (AGRx) FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Jul. 8, 2010)

I. INTRODUCTION AND PROCEDURAL BACKGROUND

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 Suhadolc 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 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 Plaintiff's claims was six years, which runs back to August 16, 2001.[1] (July 16, 2009 Order at 12-14 [Docket No. 295].)

After the ruling on the summary judgment motions, two issues remained for trial: (1) whether

[1] As stated above, Plaintiffs' initial Complaint was filed on August 16, 2007.

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 throughly [sic] 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

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) 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.[2]

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.[3] 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").

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

[3] 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.

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 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 line-up, such as adding or terminating investment 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.

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 online sources to track the options' performance. The Investments Staff, in conjunction with HFS and Russell (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.

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.[4] 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).[5] 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

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[4] 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 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.

[5] 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.

other fees, such as management fees.[6] These fees are deducted from the mutual fund assets before any returns are paid out to the investors.

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.

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

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[6] *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.

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.[7] 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.

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 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

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

during 2003 do not evidence a desire to increase revenue sharing.

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.

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 exceed [sic] 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 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.

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 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.

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.[8]

[8] Plaintiffs introduced a document at trial dated December 31, 2008, which demonstrated 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 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

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 information 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.

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.[9] 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.

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

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[9] 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 connection with the April 2005 rebranding.[10] Defendants did not switch share classes 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

[10] 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.

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.

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 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").[11] SSgA is a division of State Street Bank and Trust Company ("State Street"), which is also the Plan's Trustee. In 1999, State Street, though [sic] 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.

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

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[11] 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)

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.[12] State Street was ultimately selected as the Trustee in 1999, and the

[12] 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.

Plan decided to invest in the money market fund managed by SsgA.

2. Monitoring of the Money Market Fund

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 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.

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.[13] 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

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[13] 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.

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.

In response to Hess's information, Tong contacted the SCE Benefits Accounting staff, and together they negotiated with State Street a [sic] 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 October 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.*

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 (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 draftsman 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 (1985)); *Kanawi v. Bechtel Corp.,* 254 F.R.D. 102, 110 (C.D. Cal. 2008) ("The complaint [alleging breach of fiduciary duties] is 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.[14]

[14] 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 (1992). As explained below, Plaintiffs have shown that the Plan suffered a loss and that Defendants' conduct was
(Continued on following page)

C. Legal Standard: Breach of Fiduciary Duty

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 (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 (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

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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.

(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 (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 fiduciary 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 (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 (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.).

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). 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 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)).

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. Bierwith* [sic], 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.

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."[15]

- 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

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

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 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 [sic] ever told Ertel or anyone on the Investments Staff to consider funds that would increase revenue sharing.

It is also undisputed that the SCE Human Resources Department has no authority over which funds are recommended or selected for the Plan's lineup. 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.[16] Ertel also testified that revenue sharing was

[16] 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 Resources Department. She has no authority to recommend or select mutual fund

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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.

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

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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.

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.[17] This pattern is strong evidence that the Plan fiduciaries were not motivated by a revenue-sharing when making mutual fund selections. *See Bussian v.*

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[17] 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.

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).

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.[18] 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.

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.[19]

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[18] 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.

[19] 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.

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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

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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 [sic] those of the beneficiaries. *See Pilkington PLC v. Perelman,* 72 F.3d 1396, 1401-02 (9th Cir. 1995) (triable 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 decisions 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.")

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.

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 challenge 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.

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 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.[20]

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[20] 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

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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* [sic], 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

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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 [sic] the fees charged to participants; thus, both share classes would have met the Investment Criteria.

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 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.[21] 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.

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

[21] 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.

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 July 2002 the institutional share classes of each of these three funds required a minimum investment that the Plan did not meet, the unrebutted 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.

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 opportunity, 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.

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, 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.[22]

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[22] 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.[23]

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[23] 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

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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

The Berger (Janus) Small Cap Fund ("Janus Fund"), the PIMCO (Allianz) CCM Capital Appreciation Fund ("Allianz Fund") and the Franklin Small

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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.*

(-Mid) Cap Growth Fund ("Franklin Fund")[24] were all added to the Plan in March 1999. Plaintiffs do not 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.

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

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[24] 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.

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.[25] 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 structure would have changed. Further, the Plan fiduciaries did undertake a closer review of the organization and management structure of Janus Fund in April 2003, which is evidenced by the fact that the Janus Fund was placed on the Watch List at the June 2003 meeting of the Investment Committees due to "organizational issues." Plaintiffs have not presented evidence that the duty of care required anything more under the circumstances.[26]

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[25] 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.

[26] 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.

ii. Allianz Fund

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.[27]

As is the case with the Janus Fund, Defendants presented unrebutted evidence that the ownership of the Allianz Fund did not change in April 2005, and

[27] 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.

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 result 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.

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 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.

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 unsupported by the evidence. Pomerantz based his argument on his review of a Vanguard prospectus which was not produced to the Court[28] 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.[29] Thus, contrary to Pomerantz's assertions, the Vanguard money market fund actually charged fees in excess of 9 basis points from 1999-2003.

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

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[28] 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.

[29] Plaintiffs do not dispute the accuracy of the 2004 Vanguard Registration Statement.

are only one part of the analysis; a fiduciary must look to the fund's performance as well.[30] *See Taylor v. United Technologies Corp.,* No. 3:06cv1494 (WWE), 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.

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.[31] Assuming the

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[30] The Court accepts this testimony; it is both logical and unrebutted by Plaintiffs.

[31] Further, given that Pomerantz was incorrect about the amount of fees charged by the Vanguard fund over time, the

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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.

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

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Court is skeptical of Pomerantz's conclusion regarding the performance of the Vanguard Fund in the absence of any documentary evidence.

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.

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 [sic] 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.

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.[32]

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[32] Plaintiffs' shortcomings in this respect 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

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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

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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 requiremetns [sic]. 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.

SCE could have received a fee of 9 basis points prior to 2007.[33]

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

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[33] 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 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.

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 conducted an extensive review of the Money Market Fund.

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 [sic]. 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 mandatory 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.[34]

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

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[34] 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.

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.[35] Third, Plaintiffs should multiply (a) the difference between the fees charged for the retail share classes actually offered in the Plan and the fees

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[35] 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.

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.

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.[36] 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 forward.

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[36] 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 [sic] 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.

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.

DATED: 07/08/10 /s/ Stephen V. Wilson

STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA.

GLENN TIBBLE, et al., Plaintiffs, v. EDISON INTERNATIONAL, et al., Defendants.	))))))))))	CV 07-5359 SVW (AGRx) ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN PART [143] [145] [146] [147] [156] [186] [188]

I. INTRODUCTION

Plaintiffs filed this Motion for Partial Summary Judgment seeking a judgment in their favor with regard to certain alleged prohibited transactions and alleged violations of the Plan documents. In response, Defendants have moved for Summary Judgment as to all of Plaintiffs' claims. For the reasons stated below, Plaintiffs' Motion is DENIED, and Defendants' Motion is GRANTED with regard to several claims. The Court finds that triable issues remain with regard to whether certain fiduciaries breached their duty of loyalty by choosing mutual funds in order to maximize the amount of revenue sharing for SCE's benefit, instead of for the benefit of the Plan participants. In addition, because Plaintiffs have not adequately described their prohibited transaction claims arising

out of State Street's retention of float, the Court ORDERS further briefing on those issues.

II. FACTS

Plaintiffs Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Sohadolc, and Hugh Tinman, Jr. ("Plaintiffs") are current or former employees and participants in the Edison 401(k) Savings Plan (the "Plan"). The Plan is a "defined contribution plan" within the meaning of 29 U.S.C. § 1102(34). (Def.'s Statement of Uncontroverted Facts ("SUF") ¶ 1.) As of 2007, the Plan held $3.8 billion in assets for the benefit of approximately 20,000 participants. (Pl.'s Statement of Uncontroverted Facts ("PSUF") ¶ 7.)

Plaintiffs have named as defendants in this action several different entities and individuals, all of whom are alleged to have been Plan fiduciaries during the relevant time period. Defendant Edison International ("Edison") is the parent corporation of Defendant Southern California Edison ("SCE"). (SUF ¶ 5.) Plaintiffs allege that Edison and SCE are the Plan sponsors. (Second Am. Compl. ("SAC") ¶ 12.) Another Defendant is the SCE Benefits Committee ("Benefits Committee"), which is a named fiduciary under the Plan, the Plan Administrator, and comprised of individuals appointed by SCE's Chief Executive Officer ("CEO"). (*Id.* ¶ 15.) Also named as a Defendant is the Edison International Trust Investment Committee ("TIC"), which is a named fiduciary

under the Plan and is comprised of individuals also appointed by SCE's CEO. (*Id.* ¶ 16.) The Secretary of the Benefits Committee, who as of 2005 was Aaron Whitely, is a named defendant. (*Id.* ¶ 17.) Plaintiffs also name SCE's Vice President of Human Resources as a defendant. (*Id.* ¶ 18.) Finally, Plaintiffs name SCE's Manager of the Human Resource Service Center as a defendant given her position as a named fiduciary of the Plan. (*Id.* ¶ 19.)

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. (*Id.* ¶ 12.) Before these changes occurred, the Plan offered employees the following six investment options: (1) Bond Fund, (2) Balanced Fund, (3) Global Stock Fund, (4) Money Market Fund, (5) Common Stock Fund, and (6) the Edison Stock Fund. (*Id.* ¶ 6.) After the negotiations were completed, however, and changes were made to the Plan, it offered a much broader array of up to fifty investment options including the following: (1) Edison Stock Fund; (2) Conservative Growth Fund; (3) Balanced Moderate Growth Fund; (4) Aggressive Growth Fund; (5) Money Market Fund; (6) Bond Fund; (7) U.S. Stock Index Fund; (8) U.S. Large Company Stock Fund; (9) International Stock Fund; and (10) the Mutual Fund Menu, which included approximately forty "retail" mutual funds. (Decker Decl., Ex. N.)

The Conservative Growth Fund, the Balanced Moderate Growth Fund, and the Aggressive Growth

Fund were "pre-mixed" portfolios consisting of a combination of stocks and bonds, which allow the participants to diversify within one investment option. (SUF ¶ 24.) The U.S. Stock Index Fund, U.S. Large Company Stock Fund, and International Stock Fund were low-cost index funds provided by the Frank Russell Trust Company ("Russell"). (*See* Niden Rep., Ex. C.) The Mutual Fund Menu consisted of so-called "retail" mutual funds – that is, mutual funds that were also available to the general public – such as Vanguard, T. Rowe Price, and Fidelity. (*Id.*)

In February 2000, as a result of the collective bargaining process, the Plan was amended to reflect the agreement reached between the parties. (Decker Decl., Ex. K.) One component of this amendment was that SCE agreed to provide a "[b]roader range of investment options," including "a mutual fund window with access to 40 additional funds." (*Id.*) The amendment also provided that SCE would allow for "[m]ore frequent and timely transactions," including the ability to make daily fund transfers. (*Id.*)

The Benefits Committee and TIC perform defined roles with respect to the Plan. The Benefits Committee is responsible for overseeing how the Plan is operated and administered, and is responsible for adopting Plan amendments. (SUF ¶¶ 41-42.) The TIC is responsible for establishing investment guidelines and for making other investment decisions for the Plan. (*Id.* ¶ 45.) The TIC has also delegated certain investment responsibilities to the TIC Chairman's Subcommittee ("Sub-TIC"), which focuses on the

selection of specific investment options. (*Id.* ¶ 47.) The Sub-TIC also receives advice on investment options and their performance from the Investments Staff. (*Id.* ¶ 49.)

A. Hewitt

Even before the changes to the Plan in 1999, the Plan's recordkeeping services had been provided by Hewitt Associates LLC ("Hewitt"). (PSUF ¶ 14.) Beginning in at least 1997, the Plan stated that SCE would pay "the cost of the administration of the Plan." (*See* Pl.'s, Ex. 1, at 48.) This language remained in the Plan until 2006, when the Plan was amended to state that SCE would pay "the cost of the administration of the Plan, *net of any adjustments* by service providers." (Decker Decl., Ex. MM, at 33 (emphasis added).)

Before the addition of the mutual funds in 1999, SCE paid the entire cost of Hewitt's recordkeeping services. With the addition of the retail mutual funds to the Plan, however, certain "revenue sharing" was made available that could be used in order to pay for part of Hewitt's recordkeeping 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 that the mutual funds would otherwise provide themselves.

(*See* Niden Rep. ¶ 18.)[1] 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). 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. Other fees included under the umbrella of revenue sharing are "sub-transfer agency" fees. These fees are similar in many respects to 12b-1 fees but are paid to third parties in order to track the accounts of individual participants. (Niden Rep. ¶ 18.)

Each type of fee is collected out of the mutual fund assets, and is included as a part of the mutual

[1] 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 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.

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.[2] The expense ratio is essentially a flat fee, which has a component for 12b-1 or sub-transfer agency fees, as well as other aspects such as a management fee, which is essentially the fee investors pay for the manager's expertise. (Pomerantz Rep. ¶ 2.) These fees are deducted from the mutual fund assets before any returns are paid out to the investors.

In 1999, when retail mutual funds were added to the Plan, Hewitt already had contracts with certain mutual fund companies, whereby Hewitt received a portion of the revenue sharing to pay for Hewitt's recordkeeping services. As a result, when the retail mutual funds were added to the Plan, some of the revenue sharing was used to pay for Hewitt's record-keeping costs. (SUF ¶ 30.) Hewitt then billed SCE for Hewitt's services after having deducted the amount received from the mutual funds from revenue sharing. (*See* Pl.'s Ex. BB.) Hewitt did not have preexisting relationships with certain mutual funds, however, and as a result, contracts were entered into so that the revenue sharing could be captured from the mutual funds and be directed to offset the cost of Hewitt's services. (*See* Pl.'s Ex. P.) Oftentimes, these

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[2] *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.

contracts provided that an increasing percentage of revenue sharing would be paid to Hewitt, if the Plan invested increasing assets in mutual funds provided by that specific company. (*Id.*)

The use of revenue sharing to offset Hewitt's recordkeeping costs was discussed during the collective bargaining with the employee unions. (SUF ¶ 38.) Furthermore, this arrangement was disclosed to the Plan participants on approximately seventeen occasions after the practice began in 1999. (*See id.* ¶ 32.)

B. State Street

State Street Bank ("State Street") became the Plan trustee in 1999. (SUF ¶ 85.) The "Trust Agreement" entered into between State Street and SCE provided that State Street would be compensated at a flat rate of $150,000 per year for its services. (*Id.* ¶ 89.) As part of its duties, State Street was responsible for making disbursements to the Plan participants when they sought to remove assets from the Plan. (*See* Ertel Decl., Ex. J, at 6.) In the time between when the cash was sent to State Street for disbursement, and when the Plan participant actually deposited the check, State Street earned interest on the cash in its possession. (SUF ¶ 91.) This interest is referred to as "float." The Trust Agreement did not expressly address who should receive the benefit of such float. (*See* Ertel Decl., Ex. J.) In 2006 alone,

State Street retained $383,637 from float on cash from the Plan.

III. ANALYSIS

A. Legal Standard

Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1263 (9th Cir. 1997).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). That burden may be met by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. *See id.* at 323-34; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact." *Addisu v. Fred Meyer*, 198 F.3d 1130, 1134 (9th Cir. 2000). Only genuine disputes – where the evidence is such that a reasonable jury could return a verdict for the nonmoving party – over facts that

might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *See Anderson*, 477 U.S. at 248; *Aprin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) (the nonmoving party must identify specific evidence from which a reasonable jury could return a verdict in its favor).

B. ERISA's Fiduciary Duties

Plaintiffs bring this action pursuant to § 502(a) of ERISA, which allows "a participant, beneficiary or fiduciary" to bring an action for breach of fiduciary duty.[3] 29 U.S.C. § 1132(a)(2). Specifically, the statute provides:

> Any 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 each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets by the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the

[3] Plaintiffs also allege a claim pursuant to 29 U.S.C. § 1132(a)(3), which allows a participant to bring an action to enjoin any act that violates the terms of the plan, to enforce the terms of the plan, or to obtain other appropriate equitable relief.

> court may deem appropriate, including removal of such fiduciary.

Id. § 1109(a).

ERISA details the general duty of loyalty and care owed by a plan fiduciary to its participants. *See* 29 U.S.C. § 1104. The statute requires a plan fiduciary to discharge his duties solely in the interest of the plan participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries, and defraying reasonable expenses of administering the plan. *Id.* § 1104(a)(1)(A). The fiduciary shall use the amount of "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." *Id.* § 1104(a)(1)(B). Furthermore, a plan fiduciary must discharge his duties "in accordance with the documents and instruments governing the plan." *Id.* § 1104(a)(1)(D).

ERISA also lists a number of "prohibited transactions," which are pre [sic] se prohibited. *See id.* § 1106. The statute provides:

(a) Except as provided in section 1108 of this title:

> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he or she knows or should know such transaction constitutes a direct or indirect –

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest:

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or . . .

(b) 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,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, 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.

Id. § 1106(a)-(b).

A "party in interest" is defined broadly to include "any fiduciary, a person providing services to the

plan, an employer whose employees are covered by the plan, and certain shareholders and relatives." *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 424 (6th Cir. 2002); *Kanawi v. Bechtel Corp.*, 590 F. Supp. 2d 1213, 1222 (N.D. Cal. 2008) (Citing *Hall*). Section 1106(b) "creates a per se ERISA violation; even the absence of bad faith, or in the presence of a fair and reasonable transaction, [§ 1106(b)] establishes a blanket prohibition of certain acts, easily applied, in order to facilitate Congress' remedial interest in protecting employee benefit plans." *Patelco Credit Union v. Sahni*, 262 F.3d 897, 911 (9th Cir. 2001).

With regard to certain prohibited transactions, ERISA includes a number of different exemptions from liability, which are found at § 1108(b). *See id.* These exemptions include one for "reasonable arrangements with a party in interest" for "services necessary for the establishment or operation of the plan" so long as "no more than reasonable compensation is paid therefor." 29 U.S.C. § 1108(b)(2).

C. Statute of Limitations

A brief discussion of the statute of limitations is necessary as a preliminary matter because it is relevant to many of Plaintiffs' claims. For claims alleging breach of fiduciary duty, ERISA provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation

> under this part, or with respect to a violation of this part, after the earlier of –
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
> >
> > (2) three years after the earliest date on which the plaintiff had actual knowledge of a breach or violation; except that in the case of fraud or concealment, such action may be commenced no later than six years after the date of discovery for such breach or violation.

29 U.S.C. § 1113.

Under this framework, the default statute of limitations is six years. In order to extend the statute of limitations beyond six years, the plaintiff must prove that the defendant "made knowingly false misrepresentations with the intent to defraud the plaintiffs," or took "affirmative steps" to conceal its own alleged breaches. *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1401 (9th Cir. 1995) (per curiam). On the other hand, in order to shorten the statute of limitations to three years, the defendant has to prove that the plaintiff had "actual knowledge" of the violation. Under this actual knowledge standard, "[t]he statute of limitations is triggered by defendants' knowledge of the transaction that constituted

the alleged violation, not by their knowledge of the law." *Blanton v. Anzalone*, 760 F.2d 989, 992 (9th Cir. 1985).

There is no "continuing violation" theory to claims subject to ERISA's statute of limitations. *Phillips v. Alaska Hotel & Rest. Employees Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991). In *Phillips*, the court rejected the notion that after the first alleged breach of fiduciary duty, that any failure to rectify the breach constituted another discrete breach. *Id.* The court said that although the trustee's conduct could be viewed as a series of breaches, the statute of limitations did not begin anew because each breach was "of the same character." *Id.*

Here, neither party has satisfied its burden to alter the statute of limitations from the standard six year time limit. Plaintiffs have not shown that Defendants made any misstatements or actively concealed any breaches of fiduciary duty, which would toll the statute beyond six years. In fact, the evidence shows that Defendants disclosed the existence of the revenue sharing with Plaintiffs on several occasions. (*See* SUF ¶ 32.) With regard to Plaintiffs' claims for breach of the duty of loyalty, Plaintiffs have not presented evidence that Defendants actively concealed such breaches. *See Kanawi*, 590 F. Supp. 2d at 1226 ("The failure of a fiduciary to disclose a self-interest in transactions that were allegedly harmful to a plan 'does not rise to the level of active concealment, which is more than merely a failure to disclose.'")

(quoting *Schaefer v. Arkansas Med. Soc.*, 853 F.2d 1487, 1491 (8th Cir. 1988)).

Defendants have similarly failed to present undisputed evidence that Plaintiffs had actual knowledge of the alleged breaches of fiduciary duty. As a result, for the most part, Plaintiffs' claims will be limited to those that accrued within six years of the filing of this suit, which was August 16, 2001. In the context of a prohibited transactions, the statute of limitations typically begins when the "transaction" takes place. *See Martin*, 828 F. Supp. at 1431. The Court will address statute of limitations issues as they arise in the following analysis of Plaintiffs' claims.

D. Prohibited Transactions – Hewitt

Plaintiffs argue that Defendants' fee arrangement with Hewitt amounted to a prohibited transaction under § 1106(b) in two ways. First, Plaintiffs argue that Defendants violated § 1106(b)(3) by receiving consideration on Defendants' personal account from a party dealing with such plan in connection with a transaction involving the assets of the Plan. Second, Plaintiffs argue that Defendants violated § 1106(b)(2) by acting in a transaction involving the Plan on behalf of a party whose interests are adverse to the interests of the plan.

1. § 1106(b)(3)

The statute makes it per se illegal for any fiduciary to "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." 29 U.S.C. § 1106(b)(3). Plaintiffs contend that SCE, as a fiduciary, was receiving consideration from the mutual funds in the form of a credit to SCE's monthly account with Hewitt. In the language of the statute therefore, Plaintiffs allege that SCE (the "fiduciary") was receiving revenue sharing offsets ("consideration") from the mutual funds ("party dealing with such plan"). With regard to the "transaction" involving assets of the plan, Plaintiffs propose two possible transactions: (1) the contracts between the Plan and the mutual funds directing the mutual funds to pay revenue sharing to Hewitt, or (2) the transactions whereby the mutual funds were added as investment options in the Plan.

Plaintiff's theory fails, however, because in order to be liable for a violation of § 1106(b)(3), the fiduciary receiving the "consideration" must have had control over the "transaction" in question. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996) (noting that in order for there to be a violation of § 1106, "a plaintiff must show that a fiduciary caused the plan to engage in the allegedly unlawful transaction"); *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1101 (9th Cir. 2005) (citing *Spink* and rejecting prohibited transaction claim because the defendant's

actions did "not constitute those of a fiduciary or even a de facto fiduciary").

For example, in *Martin v. National Bank of Alaska*, 828 F. Supp. 1427 (D. Alaska 1992), the plaintiff alleged that the defendant fiduciary, a bank, was receiving loan origination fees from loans to third parties made out of the plan assets. *Id.* at 1437. The court had little trouble finding that the loans were transactions involving assets of the plan because the fiduciary bank was making the loans out of the plan assets. *Id.* at 1438. Moreover, the fiduciary bank was receiving consideration – the loan origination fees – in connection with making the loans out of the plan assets to the third parties. *Id.* Since there was no applicable exemption, the court found that the fiduciary bank had violated § 1106(b)(3). *Id.*

Similarly, in *Stuart Park Associates L.P. v. Ameritech Pension Trust*, 846 F. Supp. 701 (N.D. Ill. 1994), the issue was whether the plan fiduciary, Thompson, was personally receiving fees from Bennett in exchange for Thompson's influencing the plan to invest in a real estate project promoted by Bennett. *Id.* at 706. The court found that there was "an illegal kickback scheme" whereby Thompson exercised his influence to get the plan to invest in transactions involving Bennett and, in exchange, Bennett paid Thompson approximately $40,000. *Id.* Thus, the court found that Thompson had violated § 1106(b)(3) by

receiving consideration for his influence from a party dealing with the plan. *Id.*[4]

Martin and *Stuart Park* are classic examples of a fiduciary exercising his control over the assets of the plan, and, as a direct result, receiving consideration from a third party. These cases fall squarely within the scope of the statute, which prohibits fiduciaries from "receiv[ing] 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." 29 U.S.C. § 1106(b)(3). Indeed, such a self-dealing transaction is precisely the type of transaction that § 1106(b)(3) was designed to prevent. *See Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1212 (2d Cir. 1987); *Patelco*, 262 F.3d at 909.

Here, however, unlike the defendants in both *Martin* and *Stuart Park*, the party receiving the benefit from the transaction was SCE.[5] Yet SCE was not the party engaging in the transactions that resulted in the "consideration" (revenue sharing) being generated. Plaintiffs have presented no evidence

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[4] The district court's decision was affirmed on appeal without much discussion of this issue. *See Stuart Park Assocs. Ltd. P'ship v. Ameritech Pension Trust*, 51 F.3d 1319, 1325 (7th Cir. 1995).

[5] The alleged "consideration" according to Plaintiffs was a "credit to [the] monthly service account with Hewitt." (Mot., at 16.) The only party to contract with Hewitt was SCE. (*See* Pl.'s Ex. L1.) Plaintiffs have not presented any evidence that any other fiduciary received "consideration" from these mutual fund revenue sharing offsets.

that SCE made the decisions that resulted in the generation of revenue sharing from the mutual funds. There is no evidence, for example, that SCE itself influenced whether to enter into the service contracts with the mutual funds or whether certain mutual funds would become investment options for the fund. Rather, the evidence presented indicates that these decisions were made by the TIC or the Benefits Committee, both of which were independent committees whose purpose was to provide prudent and wise investment options for the exclusive benefit of the Plan participants. (*See* Pl.'s Exs. N & P; SUF ¶ 45.)[6] Thus, because Plaintiffs have not presented any evidence that SCE made the decisions that brought about the revenue sharing, Plaintiffs are not entitled to summary judgment on this claim.

Both *Martin* and *Stuart Park* relied on an earlier Second Circuit opinion *Lowen*, 829 F.2d 1209. There, the court found that a group of related companies (Tower Asset, Tower Capital, and Tower Securities (collectively, the "Tower entities")), along with their principals, had engaged in numerous prohibited transactions in violation of § 1106(b)(3). *Id.* at 1213. Tower Asset was a fiduciary to the plan and provided the plan with investment advice. *Id.* at 1219. The

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[6] The contracts with the mutual funds were entered into by the Benefits Committee on behalf of the Plan. (*See* Pl.'s Ex. N & P.) The contracts with Fidelity and T. Rowe Price were both signed by A. Lou Whitely as Secretary of the Benefits Committee. (*Id.*)

prohibited transactions typically involved one of the sister companies, either Tower Capital or Tower Securities, which entered into a contract with new company to advise the company and to provide the start-up capital that the company needed. *Id.* at 1214. These new companies were typically also owned either in whole or in part by the principals of the Tower entities. *Id.* Tower Capital or Tower Securities then arranged for Tower Assets to invest the assets of the plan in the start-up company, thereby generating fees and commissions for Tower Capital and Tower Securities. *Id.* The court declined to decide whether Tower Asset's sister companies were fiduciaries of the plan, because the court simply disregarded the corporate form of the separate companies. *Id.* at 1220-21. The court found that "[t]he record demonstrates beyond dispute extensive intermixing of assets among the corporations, and among the corporations and individual defendants, without observing the appropriate formalities." *Id.* at 1221. Thus, the court found that all of the defendants were effectively liable for breach of § 1106(b)(3) because they all received consideration in the form of fees, commissions, and stock from the companies who were using the plan assets as start-up capital. *See id.*

Much like the defendants in *Martin* and *Stuart Park*, in *Lowen*, the defendants who received the benefits from the transactions involving the plan were also the entities that were exerting influence on the plan to enter into those transactions. Although Tower Capital and Tower Securities were typically

the entities orchestrating the transaction, Tower Asset was deeply involved as well. Furthermore, the court disregarded the distinctions between the different entities and essentially consolidated the entities into one by virtue of the complete overlap between them and the fact that the individual defendants "personally and actively dominated those firms." As a result, the court found that the Tower entities were collectively engaging in the transactions with the plan assets, while at the same time benefitting from those transactions.

Lowen supports a finding that SCE is not liable for violating § 1106(b)(3) because, on the evidence presented by Plaintiffs, SCE was simply a recipient of the benefit from the revenue sharing, but it was the Benefits Committee and the TIC that caused the Plan to transact with the mutual funds. Plaintiffs have not pointed to any evidence similar to that in *Lowen* that would justify disregarding the separate legal structures of SCE, the TIC, the Sub-TIC, and/or the Benefits Committee. *See Collins v. Pension & Ins. Comm. of S. Cal. Rock Prods. & Ready Mixed Concrete Ass'ns*, 144 F.3d 1279, 1282 (9th Cir. 1998) ("The existence of an alter ego relationship . . . is not presumed without proof of specific facts to support these theories.").

The requirement that the fiduciary receiving the benefit from the transaction also be the fiduciary exercising control over the transaction is also

supported by Department of Labor ("DOL") Advisory Opinions interpreting the scope of § 1106(b)(3).[7] The DOL issued two Advisory Opinions in 1997 involving the question of whether a fiduciary receiving revenue sharing from mutual funds violated § 1106(b)(3). In the first, the party seeking advice was a company called ALIAC, which provided recordkeeping services for pension plans that received 12b-1 fees from the mutual funds that ALIAC made available to the plan participants for investment. *See* DOL Advisory Opinion 97-16A (May 22, 1997). ALIAC represented that the plan fiduciaries were completely independent from ALIAC, and that the plan fiduciaries made the ultimate decisions regarding what mutual funds would be made available to the plan participants. *Id.* The Secretary noted that the first question that must be answered is whether ALIAC was a fiduciary. *Id.* The Secretary said that "whether a person is a fiduciary with respect to a plan requires an analysis of the types of functions performed and the actions taken by the person on behalf of the plan to determine whether particular functions or actions are fiduciary in nature and therefore subject to ERISA's fiduciary responsibility provisions." *Id.* As a result, whether a person is a "fiduciary" is "inherently factual and will depend on

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[7] Advisory Opinions from the DOL are not binding on the Court. *See Patelco*, 262 F.3d at 908 (citing ERISA treatise which states that "[o]nly the parties described in the request for opinion may rely on the opinion"). Nonetheless, the Court finds the DOL Advisory Opinions helpful to understand the scope of § 1106(b)(3).

the particular actions or functions ALIAC performs on behalf of the Plans." *Id.* The Secretary opined that ALIAC would not be a fiduciary with respect to the selection of the mutual funds "provided that the appropriate plan fiduciary in fact makes the decision to accept or reject the change." *Id.*

In another Advisory Opinion, the Secretary opined that a similar arrangement did not violate § 1106(b)(3). *See* DOL Advisory Opinion 97-15A (May 22, 1997). The party requesting advice was a trustee company named Frost, which provided various administrative services to pension plan clients. *Id.* Frost had also entered into arrangements with mutual funds whereby Frost made the mutual funds available to the plans, and, in return, received 12b-1 fees. *Id.* The Secretary said that so long as the trustee "does not exercise any authority or control to cause a plan to invest in a mutual fund, the mere receipt by the trustee of a fee or other compensation from a mutual fund in connection with such investment would not in and of itself violate section 406(b)(3)." *Id.* However, because Frost had some ability to add or remove mutual funds from the plan lineup, the Secretary was unable to conclude that it "would not exercise any discretionary authority or control to cause the Plans to invest in mutual funds that pay a fee or other compensation to Frost." *Id.* Nonetheless, because Frost's trustee agreements were structured so that the 12b-1 fees were used to offset the costs that the plans would be obligated to pay for Frost's services, the Secretary opined that Frost was not

receiving payments for its own personal account in violation of § 1106(b)(3). *Id.*

Finally, in a 2003 Advisory Opinion, the Secretary again addressed whether a trust company violated § 1106(b)(3) by offering bundled services which included certain mutual funds. *See* DOL Advisory Opinion 2003-09A (June 25, 2003). The trust company involved was called AATSC that provided "bundled service" arrangement to its clients, which included trustee service, recordkeeping, tax compliance, and participant communications. *Id.* AATSC stated that it made certain mutual funds available to the plan participants and that those mutual funds then paid AATSC a portion of the 12b-1 fees that were generated from the plan participants' investments in those funds. *Id.* Consistent with its earlier opinions, the Secretary wrote that AATSC's receipt of 12b-1 fees from the mutual funds would not violate § 1106(b)(3) "when the decision to invest in such funds is made by a fiduciary who is independent of AATSC and its affiliates, or by participants of such employee benefit plans." *Id.*

All three Advisory Opinions suggest that SCE should not be liable merely for receiving some benefit from revenue sharing from the mutual funds, because Plaintiffs have not presented evidence that SCE made the decisions to invest in those mutual funds. These Advisory Opinions emphasize that it is permissible for an entity to receive some compensation in the form of revenue sharing so long as that entity is not the one deciding whether to add or delete certain

mutual funds. Here, the evidence reveals that the decisions to invest in the mutual funds were made by fiduciaries other than SCE. Thus, SCE cannot be liable for violating § 1106(b)(3).[8]

The fact that a fiduciary must be involved in the transaction in order to be liable under § 1106(b)(3) stems from the fundamental question here, which is whether SCE is in fact a fiduciary with respect to the transactions that generated the revenue sharing. As courts have repeatedly recognized, just because a person is a fiduciary in one respect, does not mean that the person is a fiduciary in all respects. *See Acosta v. Pacific Enters.*, 950 F.2d 611, 618 (9th Cir. 1991) ("[A] person's actions, not the official designation of his role, determine whether he enjoys fiduciary status."). ERISA "does not make a person who is a fiduciary for one purpose a fiduciary for every purpose." *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994). The statute provides:

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[8] This interpretation of § 1106(b)(3) is also consistent with *Haddock v. Nationwide Financial Services Inc.*, 419 F. Supp. 2d 156 (D. Conn. 2006). The allegation in *Haddock* was 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." *Id.* at 170. Thus, it was clear in that case that the fiduciary who was alleged to have received the revenue sharing payments from the mutual funds had control over which mutual funds were included among the options to the plan participants.

> [A] person is a fiduciary with respect to a plan *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. § 1103(21)(A) (emphasis added). The key part of this statutory provision is the phrase "to the extent." The inclusion of this phrase "means that a party is a fiduciary only as to the activities which bring the person within the definition." *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 61 (4th Cir. 1992). "The statutory language plainly indicates that the fiduciary function is not an indivisible one. In other words, a court must ask whether a person is a fiduciary with respect to the particular activity at issue." *Id.*; *see also Landry v. Airline Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 418 (5th Cir. 1990) ("[F]iduciary status is to be determined by looking at the actual authority or power demonstrated, as well as the formal title and duties of the party at issue.").

Here, Plaintiffs have not presented evidence that SCE had control over the decisions that resulted in the generation of the revenue sharing. Instead, the evidence presented by the Plaintiffs shows that

different fiduciaries, the TIC or Benefits Committee, conducted the transactions in question. Plaintiffs have not pointed to evidence showing that these committees were somehow controlled by SCE. In fact, the evidence shows that the TIC and Benefits Committee were separate entities who performed their fiduciary function independently from SCE. (*See* Decker Decl., Exs. M & DD.) Without the necessary control, SCE cannot be a fiduciary with respect to those decisions, and therefore, cannot be liable for simply receiving the consideration from those transactions.

Plaintiffs mention that the individual members of the TIC and Benefits Committee are appointed by the SCE CEO. However, merely appointing individuals to be members of the Committees is insufficient evidence to show that SCE exercised the requisite control over specific transactions involved in the alleged prohibited transactions.

For example, in *Kanawi v. Bechtel Corp.*, 590 F. Supp. 2d 1213 (N.D. Cal. 2008), the analogous company to SCE here, Bechtel, argued that it was not a fiduciary with respect to the specific investment decisions that were made on behalf of the plan. *Id.* at 1224. The court noted that "[f]iduciaries can be held liable only for claims arising out of the exercise of their fiduciary duties." *Id.* (citing *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1325 (9th Cir. 1985)). The court found no evidence that Bechtel had placed people on the investment committee who would serve Bechtel's interest. *Id.* "Furthermore, the evidence

does not suggest that Bechtel *itself* exercised power over the investment decisions related to the Plan." *Id.* (emphasis added). Thus, the court found that Bechtel could only be liable on a theory of co-fiduciary liability under § 1105(a).[9]

Much like *Kanawi*, here, there is no evidence that SCE placed people on the Benefits Committee or TIC in order to serve SCE's interests. Nor is there evidence that SCE itself exercised power over the investment decisions. In light of the absence of evidence that SCE had any control over the transactions that generated the revenue sharing, SCE cannot be liable for violating § 1106(b)(3). Plaintiffs' motion for summary judgment on this claim is therefore denied.

The Court will also enter judgment in favor of Defendants on this claim because the undisputed evidence shows that the transactions in question were executed by the Benefits Committee or the TIC, yet neither received consideration as a result of those transactions. As discussed *infra*, while there may be some ambiguity with regard to the role that the Investments Staff played in the decisions of which mutual funds to add as options in the Plan, Plaintiffs have not sustained their burden of producing evidence

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[9] Plaintiffs also cite to the unpublished case *Chao v. Linder*, 2007 WL 1655254 (N.D. Ill. 2007). Even in that case, however, the defendants were alleged to have violated § 1106(b)(3) by receiving motorcycles "because of their actions, decisions and other duties relating to the questions and matters concerning their respective plans." *Id.* at *5.

that the actions of the Investments Staff can be attributed to SCE generally. Furthermore, even if the Investments Staff had significant control over those decisions, Plaintiffs have identified no evidence that the Investments Staff, either collectively or individually, received consideration in exchange for the decisions they made. Without some evidence that the relevant fiduciaries received consideration for decisions made with respect to the Plan, there can be no violation of § 1106(b)(3). Thus, summary judgment will be granted for Defendants on this claim.

As an independent basis, Plaintiffs' claim for violation of § 1106(b)(3) is barred, at least in part, by the statute of limitations. To some extent, Plaintiffs' claim is premised on the contracts between the Plan and the mutual funds, which were entered into before August 16, 2001. (*See* Pl.'s Exs. N & P.) By contrast, however, some of the transactions whereby the mutual funds were selected for inclusion in the Plan occurred after August 16, 2001. Thus, to the extent that these transactions occurred before August 16, 2001, Plaintiffs' claim [sic] are barred by the statute of limitations.

2. § 1106(b)(2)

Plaintiffs move for summary judgment on the basis that SCE's arrangement with Hewitt was a prohibited transaction pursuant to § 1106(b)(2). This section states that a fiduciary shall not "act in any transaction involving the plan on behalf of a party (or

represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." *Id.*

Specifically with regard to this allegation, Plaintiffs contend that the TIC, a named Plan fiduciary, was also acting on behalf of SCE when deciding which mutual funds to include among the menu of options for the Plan. Plaintiffs argue that SCE's interests were directly adverse to the Plan's interests because the amount of money that SCE was obligated to pay for Hewitt's recordkeeping service depended on how much revenue sharing was received from the mutual funds. Under the language of the statute therefore, Plaintiffs' theory is that the TIC ("a fiduciary") was choosing mutual funds that generated revenue sharing for inclusion in the investment menu ("act[ing] in any transaction involving the plan") for the benefit of the parent corporation SCE ("on behalf of a party (or represent a party)") who stood to benefit from the revenue sharing that originally came from the assets of the plan ("whose interests are adverse to the interests of the plan").

The operative transactions that Plaintiffs identify are the decisions whereby the TIC selected the mutual funds for inclusion as an investment option for the Plan participants. These transactions involved the TIC (on behalf of the Plan) on one side, and the mutual funds on the other side of the transaction. However, there is no allegation that the TIC represented the mutual funds in those transactions; that is, there is no allegation that the fiduciary was acting

on both sides of the transaction. In fact, the adverse party which the TIC was alleged to have represented – SCE – was not involved in those transactions at all. Rather, Plaintiffs' theory appears to be that although the TIC was acting in the transactions with the mutual funds purportedly on the Plan's behalf, in reality (and secretly), the TIC was acting on behalf of SCE. This, however, is not a prohibited transaction under § 1106(b)(2), but more accurately characterized as a claim for breach of the duty of loyalty under § 1104(a)(1)(A).

Section 1106(b)(2) is commonly understood to "prohibit[ ] a fiduciary from engaging in a self-dealing transaction." *Wilson v. Perry*, 470 F. Supp. 2d 610, 623 (E.D. Va. 2007). Indeed, in each of the cases Plaintiffs cite where a violation of § 1106(b)(2) was found, the defendant fiduciary was acting on behalf of a party standing on the other side of the transaction. In *Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir. 1983), for example, there were two funds, the Convalescent Fund and the Pension Fund, both of which shared the same trustees. *Id.* at 1237. The plaintiffs alleged that the trustees had engaged in a prohibited transaction under § 1106(b)(2) by making loans between the two funds. *Id.* The Ninth Circuit found a violation of § 1106(b)(2) because "'[f]iduciaries acting on both sides of a loan transaction cannot negotiate the best terms for either plan. . . . Each plan must be represented by trustees who are free to exert the maximum economic power manifested by their fund whenever they are negotiating a commercial transaction.'" *Id.*

at 1238 (quoting *Cutaiar v. Marshall*, 590 F.2d 523 (3rd Cir. 1979)).

Similarly, in *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629 (W.D. Wis. 1979), the court found that fiduciaries for the plan had engaged in a prohibited transaction by loaning money from the plan to the sponsoring companies, where the fiduciaries were members of the top management of the sponsoring companies. *Id.* at 638. The court said that "because the interests of a lender and a borrower are, by definition, adverse, a fiduciary cannot act in a loan transaction on behalf of a party borrowing from the plan without violating § [1106(b)(2)]." *Id.* at 637-38. In making the loans from the pension plan to the companies, the plan documents required the trustees to approve the transaction, resulting in the trustees acting on behalf of the plan in the transaction. *Id.* at 638. Furthermore, the evidence showed that certain trustees were also members of the top management of the sponsor companies, and those trustees had been involved in the approval process for the transaction on behalf of the companies. *Id.* Thus, the court found that the trustees had "in effect, represented both sides of the transaction," and therefore violated § 1106(b)(2). *Id.*

In *Parker v. Bain*, 68 F.3d 1131 (9th Cir. 1995), the court found that Parker, the vice president of the sponsoring company Pac Ship, was a fiduciary of the company pension plan because he exercised "discretionary authority" over plan assets. *Id.* at 1139. During a period of financial difficulty for Pac Ship,

Parker transferred money from the funds of the pension plan to the company's general account. *Id.* at 1140. The court found a prohibited transaction in violation of § 1106(b)(2) because "[i]n transferring those funds into Pac Ship's account, Parker acted on behalf of Pac Ship in a transaction in which Pac Ship's interests were clearly adverse to the interests of the Plan." *Id.*

Unlike these cases, here, Plaintiffs do not allege that the TIC stood on both sides of the transaction by representing the mutual funds in connection with the transactions whereby the mutual funds became investment options for the Plan participants. Instead, Plaintiffs allege that TIC represented SCE – yet SCE was not engaged in any of the transactions between the Plan and the mutual funds. Although SCE may have had an interest adverse to the Plan in connection with those transactions,[10] SCE was not a party to those transactions.

In *Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir. 1982), the Second Circuit declined to apply

[10] "An 'adverse party' is one whose interests conflict with those of the plan and its members." *Donovan v. Walton*, 609 F. Supp. 1221, 1246 (S.D. Fla. 1985). "[T]he interests need not directly conflict but must be sufficiently different." *Int'l Bhd. of Painters & Allied Trades Union & Indus. Pension Fund v. Duval*, 925 F. Supp. 815, 825 (D.D.C. 1996). Here, the interests of SCE could have conflicted with the interests of the plan Participants, if SCE had an interest in choosing mutual funds that offered revenue sharing, if those mutual funds were of poorer quality than others available in the market.

§ 1106(b)(2) in a case similar to ours. There, a company made a tender offer in an attempt to buy out the plan sponsor, a company named Grumman. *Id.* at 266. The plan trustees voted not to tender the plan's Grumman shares and, in fact, even decided to purchase more Grumman stock in the face of the tender offer. *Id.* at 268-69. The plaintiffs alleged that the trustees of the Grumman pension plan had engaged in a § 1106(b)(2) prohibited transaction in connection with these decisions because the trustees had acted on Grumman's behalf in an effort to defeat the tender offer in connection with the additional purchase of stock. *Id.* at 270. The Second Circuit found § 1106(b)(2) inapplicable, however, stating that "[w]e read this section of the statute as requiring a transaction between the plan and a party having an adverse interest." *Id.* Thus, presumably, since the transactions at issue – the purchase of stock – were between the plan and an individual stockholder, not the plan and Grumman, whom the trustees were alleged to have been representing, there was no § 1106(b)(2) violation. *See id.* The court further noted that the cases cited by the plaintiff involved "self-dealing clearly prohibited" by the statute. *Id.* Thus, the court declined to extend § 1106(b)(2) to the facts of the case "particularly in light of the inclusion of the sweeping requirements of prudence and loyalty contained in [§ 1104]." *Id.*

Similarly, here, the transactions at issue do not involve a transaction between the Plan and SCE, on who's behalf the TIC is alleged to have been acting.

Thus, § 1106(b)(2) does not apply. As recognized by the Second Circuit in *Bierwirth*, Plaintiffs' claim is one for breach of the duty of loyalty under § 1104(a)(1)(A), but is not a per se prohibited transaction. As discussed *infra*, to the extent there is evidence to suggest that the TIC chose mutual funds depending on the amount of revenue sharing that they offered, Plaintiffs may have a claim for breaching their duty of loyalty by not acting exclusively in the interests of the Plan participants.

Plaintiffs' § 1106(b)(2) claim fails for an additional reason as well. As part of their claim, Plaintiffs would have to prove that the TIC acted "on behalf of" or "represented" SCE in connection with the mutual fund transactions. *See id.* In each of the cases applying § 1106(b)(2), the required relationship between the fiduciary and the adverse party has been more than a secret loyalty to the adverse party, but rather, has consisted of a formal employer-employee or agency-type relationship. In *Mazzola*, the fiduciaries were also trustees of a different pension plan, 716 F.2d at 1237; in *Freund*, the fiduciaries were upper-level managers at the adverse company, 485 F. Supp. at 638; and in *Parker*, the fiduciary was the vice president of the adverse company, 68 F.3d at 1139. Each of these fiduciaries held an official position with the adverse party, which allowed each court to find that the fiduciary was acting "on behalf of" or "representing" the adverse party. Here, however, Plaintiffs have identified no evidence that the TIC had a similar formal role with SCE. Plaintiffs mention that

some of the members of the TIC were appointed by SCE's CEO, but Plaintiffs do not point to evidence that would support a formal relationship similar to those present in the cases cited above.

Furthermore, even in those cases where the fiduciary held an official position in an adverse party, the plaintiff was required to prove that the fiduciary was actually acting on behalf of the adverse party in connection with that transaction. For example, in *Reich v. Compton*, 57 F.3d 270 (3rd Cir. 1995), the Third Circuit remanded the case to the district court to determine whether certain plan fiduciaries who also had positions in the adverse parties to a loan transaction "acted on behalf of or represented" the adverse parties in connection with that transaction. *Id.* at 290. The court noted that the fiduciaries could have acted on behalf of the adverse parties because the fiduciaries were also officers in the adverse parties, they did not recuse themselves when the transaction was being considered by the adverse parties, and they actually participated in the discussions among officers of the adverse parties with respect to the transactions. *Id.* The court suggested that these facts in themselves may have actually been sufficient to justify summary judgment for the plaintiffs, but remanded to the district court to determine whether, during the adverse parties' deliberations concerning the transactions, the "trustees took any action" in their capacities as officers for the adverse parties. *Id.* "If they did, then they took actions in this transaction on behalf of . . . parties with interests adverse to the

Plan, and they therefore violated section [1106(b)(2)]." *Id.*

Here, Plaintiffs have not produced sufficient evidence that the TIC actually acted on SCE's behalf in selecting the mutual funds. Plaintiffs point to no evidence, for example, that the members of the TIC were also officers of SCE, or that they played any role on behalf of SCE in connection with the mutual fund selection process. Thus, for this separate reason, Plaintiffs' [sic] are not entitled to summary judgment on this claim.

The plaintiff in *Compton* advanced a theory that is nearly identical to the theory advance [sic] by Plaintiffs' [sic] in this case. The court noted that the plaintiff argued that the trustees had violated § 1106(b)(2) because, "while acting in their capacities as plan trustees during the consideration of the [transaction], they were actually serving the interests of the [adverse parties]." *Id.* at 290 n.29. In essence, the plaintiff in *Compton* argued the exact same "secret loyalty" theory that Plaintiffs advance here – that even though the fiduciaries were purportedly acting on behalf of the Plan when selecting the mutual funds for inclusion as investment options, in reality they were acting on behalf of a party with an adverse interest. The Third Circuit noted that "[t]his theory, although based on section [1106(b)(2)], seems to resemble the [plaintiff's] claim against all the trustees under section [1104(a)(1)(A)]," for breach of the duty of loyalty. *Id.* Thus, the court declined to address

such a theory within the context of the § 1106(b)(2) framework. *Id.*

Similarly, here, as the Third Circuit noted in *Compton*, while Plaintiffs' theory based on a secret loyalty to SCE in connection with the selection of the mutual funds could be considered a claim for breach of the duty of loyalty under § 1104(a)(1)(A), such a theory does not form the basis for a per se prohibited transaction. Thus, the Court finds Plaintiffs' § 1106(b)(2) theory inapplicable as a matter of law and grants summary judgment for Defendants on this claim.[11]

E. Violation of the Plan Document – § 1104(a)(1)(D)

Plaintiffs move for summary judgment on the basis that SCE violated the terms of the Plan by failing to pay the full extent of Hewitt's recordkeeping costs, and instead, allowed revenue sharing to be used to offset the costs of Hewitt's recordkeeping service. The statute requires a fiduciary to "discharge his duties with respect to a plan . . . in accordance

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[11] In light of the Court's conclusion that Defendants are entitled to summary judgment for violation of § 1106(b)(2) and (b)(3), the Court need not resolve Defendants' argument that the safe harbor provision of § 1108(c)(2) applies. The Court notes, however, that § 1108(c)(2) appears not to apply to such violations in light of the Ninth Circuit's decision in *Patelco Credit Union v. Sahni*, 262 F.3d 897, 911 (9th Cir. 2001) ("§ 1108(c)(2) does not provide a safe harbor to fiduciaries who self-deal.").

with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D).

Before addressing the merits of Plaintiffs' claim, a brief recap of the relevant facts may be helpful. The Master Plan document provided that "[t]he cost of the administration of the Plan will be paid by [SCE]." (Decker Decl., Ex. GG, at 48.) Plaintiffs contend, however, that SCE did not pay the costs of administering the Plan because some of Hewitt's recordkeeping costs were offset with fees that Hewitt received directly from certain mutual funds. When retail mutual funds were added to the Plan in 1999, Hewitt already had preexisting contractual relationships with certain retail mutual funds whereby, if one of Hewitt's pension plan clients invested in those mutual funds, then Hewitt would receive a proportion of the revenue sharing that was generated as a result of those investments. To the extent that Hewitt received revenue sharing as a result of the Plan investing in those retail mutual funds, Hewitt used at least 80% of those fees to offset the amount that SCE owed Hewitt for Hewitt's recordkeeping services. Hewitt did not have revenue sharing arrangements with all retail mutual funds however, and as a result, contractual arrangements were made whereby the revenue sharing that was generated as a result of Plan assets being invested in those mutual funds was to be passed along to Hewitt, and used to offset the amount that SCE owed Hewitt for Hewitt's recordkeeping service.

One important fact, however, is that the amount of fees actually charged to the Plan participants in connection with their investment in the retail mutual funds was not connected to the proportion of the revenue sharing that was paid to Hewitt. Rather, the mutual funds charged individual investors a fee, which was characterized as the overall expense ratio for the mutual fund. The expense ratio was charged to all investors that invested in the mutual fund and was deducted before any returns were actually paid to the investor. As a result, even if Hewitt had not received any portion of the fees from the mutual funds, the individual Plan participant would have been charged the same fee for investing with that mutual fund. If a portion of that fee had not gone to Hewitt for its recordkeeping services, then presumably it would have gone somewhere else, but there is no indication that the mutual funds would have refunded the fee back to the Plan participants. The result therefore is that even though SCE may not have paid the full cost of Hewitt's services due to the offsets from revenue sharing, even if SCE had paid the full amount of Hewitt's recordkeeping services before the revenue sharing offsets, the Plan participants would not have realized any savings.

In light of this factual summary, the Court must decide whether Defendants violated the Plan documents by using revenue sharing from the mutual funds to offset Hewitt's recordkeeping costs. At first blush, it seems somewhat peculiar that Plaintiffs would be able to bring this claim given that the Plan

has suffered no economic loss simply because revenue sharing was used to pay for the cost of Hewitt's recordkeeping service. Courts, however, have allowed plaintiffs to bring suits for violation of the plan documents by a fiduciary even in the absence of damage to the plan. In *LaScala v. Scrufari*, 479 F.3d 213 (2d Cir. 2007), the Second Circuit reversed the district court's decision that there could be no § 1104(a)(1)(D) violation because the plan suffered no loss. *Id.* at 221. The defendant fiduciary had violated the terms of the plan by giving his son a raise without the proper approval from the other plan trustees. *Id.* The court said that "[t]he fact that the Funds may not have suffered any loss as a result of Russell's salary increases may bear on the question of damages, but has no bearing on whether [the defendant] breached his fiduciary duties in the first place." *Id.* Thus, the court held that a claim for violation of § 1104(a)(1)(D) can be brought even in the absence of a loss to the plan.

Furthermore, the statute provides that injunctive relief may be an appropriate remedy for such a breach of fiduciary duty. 29 U.S.C. § 1109(a) provides that "[a]ny person who is a fiduciary with respect to the plan who breaches any of the responsibilities, obligations, or duties imposed by this subchapter shall be . . . subject to *such other equitable or remedial relief* as the court may deem appropriate, including removal of such fiduciary." *Id.* (emphasis added). Similarly, § 1132(a)(3) allows a participant to bring an action "to enjoin any act or practice which violates

any provision of this subchapter or the terms of the plan, or . . . to obtain other appropriate equitable relief (i) to redress such violations or (ii) to *enforce any . . . terms of the plan.*" *Id.* (emphasis added). These provisions contemplate that declaratory or injunctive relief may be appropriate even in the absence of any economic loss to the plan.

Indeed, the Ninth Circuit has rejected the argument that there must be a loss to the plan in order to bring an action for breach of fiduciary duty seeking injunctive relief. *See Shaver v. Operating Eng'r Local 428 Pension Trust Fund*, 332 F.3d 1198, 1203 (9th Cir. 2003). In *Shaver*, the Ninth Circuit noted that some courts have required the plaintiff to show a loss to the plan. *Id.* The Ninth Circuit, however, limited the loss requirement to cases where the plaintiff was seeking monetary relief. *Id.* (citing *Friend v. Sanwa Bank of California*, 35 F.3d 466, 469 (9th Cir. 1994)). The court noted that the plaintiff was seeking injunctive relief in the form of enjoining future misconduct or having the trustees removed. *Id.* The court concluded:

> Requiring a showing of loss in such a case would be to say that the fiduciaries are free to ignore their duties so long as they do no tangible harm, and that the beneficiaries are powerless to rein in the fiduciaries' imprudent behavior until some actual damage has been done. This result is not supported by the language of ERISA, the common law, or common sense.

Id.

Here, Plaintiffs seek injunctive relief for the alleged violations of the Plan documents. Thus, in light of *Shaver*, the Court finds that Plaintiffs are not barred from pursuing their claim for breach of the Plan documents even in the absence of some loss to the Plan.

A fiduciary's failure to discharge its duties in accordance with the plan documents is an independent basis for finding a breach of fiduciary duty under § 1104(a)(1). *See Dardaganis v. Grace Capital Inc.*, 889 F.2d 1237, 1241 (2d Cir. 1989). Indeed, "[a] fiduciary's failure to meet the[ ] specific requirements of section 1104(a)(1) is not merely evidence of imprudent action but may, in itself, be a basis for liability under section 1109." *Id.*

Although a fiduciary has an obligation to act in accordance with the terms of the plan document, ERISA "does not require . . . that a fiduciary resolve every issue of interpretation in favor of the plan beneficiaries." *O'Neil v. Ret. Plan for Salaried Employees of RKO Gen., Inc.*, 37 F.3d 55, 61 (2d Cir. 1994); *see also Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1100 (9th Cir. 2004) (quoting *O'Neil*); *Collins*, 144 F.3d at 1282 (same). In fact, when a plan explicitly grants a fiduciary the authority to interpret the language of the plan, the fiduciary's interpretation is entitled to deference. *See O'Neil*, 37 F.3d at 61.

In *O'Neil*, the plan "explicitly granted the [fiduciary] the authority to interpret the plan terms." *Id.* at 59. As a result, the court applied an "arbitrary and

capricious standard" of review. *Id.* Other courts have similarly applied a deferential standard of review to a fiduciary's interpretation of the plan documents under § 1104(a)(1)(D) when the Plan explicitly provides for such discretion. *See*, *e.g.*, *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 711-12 (6th Cir. 2000) (applying the arbitrary and capricious standard to breach of fiduciary duty claims); *Moench v. Robertson*, 62 F.3d 553, 565 (3rd Cir. 1995) ("[W]e believe that after *Firestone*, trust law should guide the standard of review over claims, such as those here, . . . filed pursuant to 29 U.S.C. § 1132(a)(2) based on violations of the fiduciary duties set forth in section 1104(a)."); *but see In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1206 (S.D. Tex. 1991) ("When a plaintiff sues to enforce an express statutory fiduciary duty under § 406(a)(1)(D) and to challenge acts of the employer, as a fiduciary, that advance the employer's own economic interest, the abuse of discretion standard does not apply.") (citing *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 333 (3rd Cir. 1984)).

Even in the absence of express discretionary language, courts have not applied a standard of strict liability such that any technical violation of the plan constitutes a per se violation of § 1104(a)(1)(D). *See LaScala*, 479 F.3d at 221. In *LaScala*, the court found that the defendant had breached his fiduciary duty by failing to comply with the terms of the plan documents because "[a] prudent person in Scrufari's position, bound by the highest duty known to law,

would have known that he could not raise his compensation without a majority vote of the trustees." *Id.* This language from *LaScala* reveals that in order to be liable for a violation under § 1104(a)(1)(D), the plan document must put a reasonable fiduciary on notice that the conduct in question is prohibited. It makes sense for some inquiry to be made as to the reasonableness of the fiduciary's interpretation of the plan before a fiduciary can be held liable for breaching his fiduciary duties pursuant to § 1104(a)(1)(D). Section 1104(a) by its very nature outlines standards of fiduciary conduct that are not necessarily per se violations – per se violations are found at § 1106.

Here, beginning on November 29, 2001, the Master Plan document gave the Benefits Committee "full discretion to construe and interpret the terms and provisions of this Plan, which interpretation and construction shall be final and binding on all parties, including but not limited to the Company and any Participant or Beneficiary." (Decker Decl., Ex. AA, at 31.) This language from the Master Plan document is of obvious importance because it unambiguously gives the Benefits Committee discretion to interpret the language of the Plan. Thus, any such interpretations are subject to a more deferential standard of review.

The threshold question in the analysis is whether there is any ambiguity in the Plan documents with respect to whether revenue sharing could be used to defray the costs of Hewitt's recordkeeping service. *See O'Neil*, 37 F.3d at 58. Indeed, summary judgment

may be appropriate if the Plan documents unambiguously proscribe certain conduct, yet the fiduciary pursues such conduct. *See Dardaganis*, 889 F.2d at 1241. Even under a deferential standard of review, it is an abuse of discretion to interpret the language of plan in a way that conflicts with its unambiguous plain language. *See Boyd v. Bert Bell/Pete Rozelle NFL Players Retirement Plan*, 410 F.3d 1173, 1178 (9th Cir. 2005) ("An ERISA administrator abuses its discretion only if it (1) renders a decision without explanation, (2) *construes provisions of the plan in a way that conflicts with the plain language of the plan*, or (3) relies on clearly erroneous findings of fact." (emphasis added)).

Summary judgment for the plaintiff, however, is only appropriate in cases where the plan documents make it clear that the conduct in question is unambiguously prohibited. *See O'Neil*, 37 F.3d at 58. For example, in *O'Neil*, the plaintiffs argued that the fiduciary had violated the plan document by failing to classify certain "SICP payments" as "earnings" within the meaning of the plan document. *Id.* The court said that "[s]ummary judgment would have been proper *only if* the [Plan] unambiguously included SICP payments as 'Earnings.'" *Id.* (emphasis added). Looking to the four corners of the plan alone, the court noted that the "core definition" of "earnings" was the regular salary paid to a participant during the calendar year. *Id.* However, the SICP payments had deferred vesting periods and contingent valuations, which the court found made it "not clear that

such payments were regular salary." *Id.* Furthermore, the court noted that certain terms were capitalized, which implied that they were defined terms. *Id.*

Applying the reasoning from *O'Neil* here, summary judgment would be properly granted in Plaintiffs' favor only if the Plan documents unambiguously prohibited the use of revenue sharing from the mutual funds to offset Hewitt's recordkeeping costs. The operative language from the Master Plan document states that "[t]he cost of administration of the Plan will be paid by the Company." (*See* Decker Decl., Ex. GG, at 48.) The Plan document does not define the term "cost." Presumably, however, Hewitt's services as the Plan recordkeeper would be considered part of the "cost of administration of the Plan." Even so, there is nothing in the Master Plan document that prohibits Hewitt's recordkeeping services from being paid by a third party such as the mutual funds. Plaintiffs have not identified any specific language from the Master Plan document that would have put members of the Benefits Committee on notice that the use of revenue sharing from the mutual funds to offset the costs of Hewitt's recordkeeping was prohibited. Thus, in the absence of any unambiguous language prohibiting such an arrangement, the Court finds that Plaintiffs are not entitled to summary judgment for breach of the Plan document.

In the absence of a breach of an unambiguous plan provision, it is necessary to go beyond the four corners of the Plan document and evaluate the interpretation given to the Plan by Defendants. As noted

above, beginning in November 29, 2001, the Plan documents gave the Benefits Committee "full discretion to construe and interpret the terms and provisions of this Plan." In light of this language, the Benefits Committee's interpretation from November 29, 2001 forward should be reviewed under an abuse of discretion standard. *See O'Neil*, 37 F.3d at 59.

There is a brief period of time, however, just before the Plan was restated in November 29, 2001, where there does not appear to have been any such express discretionary language in the Plan. The statute of limitations began on August 16, 2001. This period of time, therefore, amounts to only about three and half months. Nevertheless, during this time, there was no express discretion given to Defendants to interpret the Plan.

Without the discretionary language, the Benefits Committee's interpretation should be reviewed under a de novo standard of review. *See O'Neil*, 37 F.3d at 59. Under such review, the Court must render its own independent judgment as to whether Defendants' interpretation of the Plan was correct. *See Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1125 (9th Cir. 2002). Because the Plan does not expressly prohibit the conduct in question, the Court may consider extrinsic evidence and determine the intent of the parties. *See O'Neil*, 37 F.3d at 61. Specifically, the question here is whether Defendants were correct to interpret the Plan to allow the use of the revenue sharing from the mutual funds to offset Hewitt's recordkeeping costs.

Applying a de novo standard of review, the Court finds that Defendants were correct to interpret the Plan as allowing the use of revenue sharing to offset Hewitt's recordkeeping costs. First, the undisputed facts show that during the course of the collective bargaining with the unions in 1998 and 1999, there were extensive discussions with regard to how revenue sharing from the mutual funds would be used to offset the costs of Hewitt's recordkeeping services. (SUF ¶ 38.) The undisputed evidence shows that Ms. Decker personally walked the union representatives through the process by which the revenue sharing was generated, and how the revenue sharing from the mutual funds would be used to pay for Hewitt's recordkeeping services. (*Id.*) The union representatives had no objection to this arrangement. (*Id.* ¶ 39.) Thus, not only did the Plan not prohibit the use of revenue sharing to pay for Hewitt's services, but in fact, Defendants had a reasonable belief that the Plan participant consented to the use of revenue sharing to pay for Hewitt's services.

Second, between 1999 and 2006, Defendants informed the Plan participants at least seventeen times either through Summary Plan Descriptions or other benefits brochures that fees from the mutual funds were being used to reduce Hewitt's recordkeeping costs. (*Id.* ¶ 32.) One such SPD states: "Mutual funds pay fees to recordkeepers that provide the above administrative services to 401(k) plan participants. Most of the fees received by Edison's 401(k) plan recordkeeper are used to reduce the recordkeeping

and communication expenses of the plan paid by the company." (Decker Decl., Ex. A, at 50). Defendants received no objection to this arrangement despite the numerous disclosures.

Finally, the accuracy of the Benefits Committee's interpretation is further bolstered by the fact that the use of revenue sharing to offset Hewitt's recordkeeping costs did not directly harm the Plan participants. The mutual funds charged the Plan participants the standard expense ratio for investing in the retail mutual funds; this expense ratio was charged to all investors (SCE employees or otherwise) in the mutual funds. If the revenue sharing that was generated as a result had not been used to pay Hewitt's recordkeeping costs, there is no indication that those fees would have been returned to the Plan participants. In light of the fact that the Plan participants would have been charged the same fee regardless, Defendants were correct to interpret the Plan to allow those fees to be used to pay for the Plan's recordkeeping costs, even if such an arrangement did inure to SCE's benefit.

Plaintiffs may argue that such an interpretation did harm the Plan participants because it created a conflict of interest, whereby SCE had an interest in selecting mutual funds with higher revenue sharing, which could have motivated the Plan fiduciaries to choose poorer performing mutual funds for inclusion in the Plan. Such alleged harm, however, does not stem from the interpretation given to the Plan, but from the subsequent events of the fiduciaries. It was entirely possible for the Plan fiduciaries to operate

under such a conflict of interest without having ever taken action to harm the Plan. Indeed, it may in fact be the case that the Plan fiduciaries chose high quality mutual funds for inclusion in the Plan despite this potential conflict of interest. Thus, the Court rejects any argument that by simply giving the Plan an interpretation that created the *potential* for a fiduciary to make a conflicted decision, that the original interpretation of the Plan was incorrect.

Thus, when applying a de novo review to Defendants' interpretation of the Plan documents, the Court finds that the interpretation was correct and did not constitute a violation of § 1104(a)(1)(D). Summary judgment will be granted in favor of Defendants on this claim.[12]

Plaintiffs cite to the Ninth Circuit case *Bergt v. Retirement Plan for Pilots Employed by Markair, Inc.*, 293 F.3d 1139 (9th Cir. 2002), in support of their argument that the defendant fiduciaries failed to execute their duties in accordance with the Plan

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[12] Applying a more deferential standard of review, the Court would reach the same conclusion. Furthermore, even if the Court was somehow mistaken with respect to its de novo review of Defendants' interpretation, it is unlikely that significant damages would be at issue because there was no loss to the Plan. In addition, to the extent that the Court's decision would be upheld on an abuse of discretion review, the brief three and half month time period would not justify any significant equitable relief given that the Plan now contains the operative discretionary language and will presumably continue to do so going forward.

documents. In *Bergt*, the Ninth Circuit held that if a plan master document unambiguously qualifies an employee for benefits, but a summary plan document ("SPD") unambiguously disqualifies an employee for benefits, then the court does not consider extrinsic evidence to interpret the intent of the parties, but rather, the more favorable plan master document controls. *Id.* at 1146. *Bergt* was a benefits denial case brought under § 1132(a)(1)(B), not a breach of fiduciary duty case brought under § 1132(a)(2), and therefore, *Bergt* is distinguishable in an important way.

Nonetheless, even applying the rule from *Bergt* here, it would not change the analysis. By analogy to the fiduciary duty context, *Bergt* would hold that if the plan master document unambiguously prohibits a given course of conduct, and the SPD unambiguously allows a given course of conduct, then a fiduciary is required to pursue the course of conduct that is more favorable to the plan participants. Here, however, the plan master document does not unambiguously prohibit the use of revenue sharing from the mutual funds to offset Hewitt's recordkeeping costs. Thus, even on the assumption that *Bergt* applies in the fiduciary duty context, it would not alter the outcome in this case.

In sum, the Court finds that the Plan documents do not unambiguously prohibit revenue sharing from the mutual funds to be used to pay for Hewitt's recordkeeping costs. Furthermore, Defendants' interpretation of the Plan allowing such an arrangement was correct when applying a de novo standard of

review. Thus, Defendants' Motion for Summary Judgment is granted on this claim.

F. State Street Bank

Plaintiffs also bring a number claims for breach of fiduciary duty arising out of the fact that State Street retained interest, or "float," that was earned on cash before the cash was distributed to the Plan participants. SCE paid State Street a flat fee of $150,000 per year for its trustee services rendered to the Plan. State Street also retained the interest on the money it held pending distribution to the Plan participants. Plaintiffs alleged that, on average, cash was held in State Street's possession for twelve days before it was actually paid out to Plan participants, and as a result, State Street retained substantial sums of money through the float.

1. § 1104(a)(1)(D)

Plaintiffs contend that Defendants failed to discharge their duties in accordance with the Plan documents because Defendants allowed State Street to retain float as part of State Street's compensation. Section 1104(a)(1)(D) requires a fiduciary to "discharge his duties . . . in accordance with the documents and instruments governing the plan." Plaintiffs contend that the Master Plan document, as discussed earlier, required SCE to pay the costs of administering the Plan, and that Defendants violated

the Plan documents by allowing some of State Street's compensation to be paid from float.

Plaintiffs' claim in this regard is similar to Plaintiffs' claim with regard to the use of revenue sharing from the mutual funds to offset costs of Hewitt's recordkeeping service. As a result, the analysis is quite similar, and the first question is whether there was anything in the Master Plan document that unambiguously prohibited Defendants from permitting State Street to retain float. *See O'Neil*, 37 F.3d at 58. Again, Plaintiffs point to the provision in the Master Plan document that says "[t]he cost of the administration of the Plan will be paid by [SCE]." (*See* Decker Decl., Ex. GG, at 48.) Again, the term "cost" is not a defined term in the contract, but State Street's trustee service would presumably be considered a "cost of the administration of the Plan." Nevertheless, Plaintiffs have not identified anything in the Master Plan document that unambiguously prohibits State Street from receiving float. Thus, the Court finds that Plaintiffs are not entitled to summary judgment on this claim.

Furthermore, the Court finds that any decision by Defendants decision to allow State Street to retain float was an accurate interpretation of the Plan under a de novo standard of review. Much like the revenue sharing from the mutual funds, the fact that State Street retained the float did not necessarily inure to the detriment of the Plan participants; State Street simply earned interest on the cash it held until the Plan participant cashed its check. Plaintiffs have

presented no evidence that State Street unreasonably delayed issuing the checks so that it could further capitalize on the float. Furthermore, Plaintiffs have not identified any evidence that State Street's retention of float was inconsistent with the accepted practice in the industry at the time. Thus, in light of the fact that there is no evidence of loss to the Plan participants, any decision by Defendants to allow State Street to retain float was not a violation of the Plan documents.[13]

2. § 1106(a)(1)(D)

Plaintiffs also contend that by permitting State Street to retain the float, SCE entered into a prohibited transaction under § 1106(a). Specifically, the statute prohibits a fiduciary from "caus[ing] the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." *Id.* § 1106(a)(1)(D). Plaintiffs contend that by retaining State Street as the Plan's trustee, and allowing State Street to retain float, Defendants allowed State Street to use assets of the Plan for State Street's own benefit.

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[13] Again, if the Court were to apply an abuse of discretion standard to Defendants' interpretation, the Court would reach the same conclusion.

First, the parties do not dispute that State Street is a party in interest. A "party in interest" is defined broadly to include "any fiduciary, a person providing services to the plan, an employer whose employees are covered by the plan, and certain shareholders and relatives." *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 424 (6th Cir. 2002). Under this definition, as the Plan trustee, State Street would qualify as a party in interest.

It is unclear, however, what transaction Plaintiffs challenge, and which fiduciary Plaintiffs claim caused the plan to engage in such transaction. It appears that Plaintiffs challenge the overall relationship between SCE and State Street. The only relevant transaction identified in this regard, however, would be the Trust Agreement entered into between SCE and State Street. If this is the relevant transaction, then Plaintiffs' claim would appear to be barred by the six year statute of limitations because the Trust Agreement was signed in 1999. In claims for prohibited transactions, the statute of limitations typically begins when the transaction in question occurs. *See Martin*, 828 F. Supp. at 1431. Thus, Plaintiffs' claim for violation of § 1106(a)(1)(D) would appear to be barred.

Plaintiffs may allege that there was some subsequent transaction involved here. Depending on which transaction Plaintiffs identify, however, there could be questions of whether the fiduciary caused the Plan to engage in that transaction. Thus, the Court invites further briefing on this claim. Plaintiffs should identify

which specific transaction or transactions they challenge, and which specific fiduciary caused the Plan to engage in those transactions.

In addition to these issues, there are also issues with regard to Defendants' affirmative defense. Defendants contend that they have an absolute defense to a violation under § 1106(a)(1)(D) because they are protected by the safe harbor in § 1108(b)(2). Section 1108(b)(2) provides an exemption for "[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." *Id.* Defendants contend that because float was part of State Street's compensation, allowing State Street to retain float was a "reasonable arrangement . . . for . . . services necessary for the . . . operation of the plan," and that "no more than reasonable compensation [was] paid therefor." *See id.*

In order for the safe harbor to apply, however, the defendant must have actually "contracted" or made "reasonable arrangements" for services necessary for the operation of the plan. *See F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1258 (2d Cir. 1987); *Whitfield v. Tomasso*, 682 F. Supp. 1287, 1303 (E.D.N.Y. 1988). Here, however, there is a conspicuous lack of evidence that float was ever considered as part of State Street's compensation. The Trust Agreement, which was the contract that defined the compensation State Street would receive

for its services, did not mention float at all. The only evidence in support of Defendants' claim that float was considered is the testimony of Mr. Ertel, who said it was his "understanding" that State Street was allowed to retain the float. There is an email, however, from an employee at State Street, which suggests that State Street did not even record how much float it earned until 2002. (Pl.'s Ex. X1.) Thus, there may be a triable issue as to whether Defendants ever actually "contracted" or "made reasonable arrangements" for State Street's services to include float.

Defendants point to a portion in the contract which states that State Street shall be "paid such reasonable compensation as shall be from time to time agreed upon by the Sponsor and the Trustee." (Pl.'s Ex. U, at 27.) It would appear therefore, that the Trust Agreement leaves open the possibility that future agreements could be reached regarding additional compensation. Whether any such further agreement was reached addressing float as part of compensation, however, is unclear on the current record.

In addition, there is a dispute as to whether the amount of float State Street retained was "reasonable compensation" for the services State Street rendered. Defendants argue that the amount of compensation that State Street earned from float was reasonable because it was consistent with the other offers SCE received and never exceeded .03% of the total assets of the Plan. The significance and source of the .03% number, however, is unclear on the current record. In

response, Plaintiffs contend that the amount of float retained could not be reasonable because in 2006 alone, State Street retained $383,000 in float, which was more than twice the rate for State Street's annual services under the Trust Agreement. Neither party appears to have offered any expert opinion on this issue. As a result, the Court will accept further briefing on this issues [sic]. The parties should cite with specificity to evidence already in the record.

3. § 1106(b)(1)

Plaintiffs allege that by allowing State Street to retain float, Defendants violated § 1106(b)(1), which prohibits a fiduciary from "deal[ing] with the assets of the plan in his own interest or for his own account." *Id.* Plaintiffs appear to argue that SCE dealt with the assets of the Plan by entering into a Trust Agreement with State Street, whereby SCE paid State Street a flat fee of $150,000, which was artificially low on account of the fact that State Street would be able to keep the float. In light of the fact that SCE was otherwise obligated to pay the cost of State Street's trustee service, by negotiating an artificially low price, one might be able to conclude that SCE dealt with assets of the Plan for SCE's own interest or account.

If it is the Trust Agreement that Plaintiffs challenge, however, then this claim would appear to be barred by the six year statute of limitations, given that the Trust Agreement was signed in 1999. Plaintiffs

may have other conduct in mind, however, which could constitute a fiduciary dealing with the assets of the plan in his own interest or for his own account. Thus, the Court will invite Plaintiffs to more fully brief this issue in order to clearly identify what conduct is at issue and which specific fiduciaries Plaintiffs believe are responsible.

The Court also notes that if the theory identified is an accurate representation of Plaintiffs' claim, then the same question of fact identified in the preceding section could be relevant. That is, whether float was ever even considered as part of State Street's compensation in 1999, or any time thereafter, could be relevant to whether any fiduciary dealt with the assets of the Plan in his or her own interest.

Even assuming, however, that float was considered part of State Street's compensation, Plaintiffs will have to "demonstrate that [the fiduciary] *actually used* its power to deal with the assets of the plan for its own benefit or account." *Acosta v. Pacific Enters.*, 950 F.2d 611, 621 (9th Cir. 1991) (emphasis added). Thus, Plaintiffs would have to prove that if float was part of State Street's compensation, that SCE actually obtained an artificially lowered annual rate for State Street's services.[14]

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[14] As mentioned *supra*, the Court is inclined to find that the reasonable compensation exception in § 1108 does not apply to alleged violations of § 1106(b). *See Patelco*, 262 F.3d at 910.

G. Breach of Fiduciary Duty

Section 1104(a) imposes on fiduciaries both a duty of loyalty and a duty of care. First, fiduciaries must discharge their duties with respect to the plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants. 29 U.S.C. § 1104(a)(1)(A). Second, fiduciaries must 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 with like aims. *Id.* § 1104(a)(1)(B).

1. Duty of Loyalty – § 1104(a)(1)(A)

Plaintiffs contend that the fiduciaries in charge of selecting which mutual funds became investment options for the Plan participants, failed to discharge those duties solely in the interest of the participants. Plaintiffs contend that instead of choosing mutual funds that were the best investment options for the Plan participants, the fiduciaries chose mutual funds based on the amount of revenue sharing that was generated and to offset the amount that SCE owed for Hewitt's recordkeeping services. Under Plaintiffs' theory, certain Plan fiduciaries sacrificed the quality of the investment options made available to the Plan participants in order to maximize the benefit to SCE.

ERISA provides that a "fiduciary must discharge is obligations solely in the interests of the participants and beneficiaries." *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1432 (9th Cir. 1986). In other words, a fiduciary must "act with complete and undivided loyalty to the beneficiaries of the trust, and with an eye single to the interest of the participants and beneficiaries." *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984) (quotations omitted). This principle comes from the common law of trusts and has been called the "exclusive benefit" rule. *See*, *e.g.*, *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F. Supp. 257, 259 (D.D.C.1983); DANIEL FISCHEL & JOHN H. LANGBEIN, ERISA'S FUNDAMENTAL CONTRADICTION: THE EXCLUSIVE BENEFIT RULE, 55 U. CHI. L. REV. 1105, 1128 (1988) [hereinafter THE EXCLUSIVE BENEFIT RULE] ("ERISA's exclusive benefit rule . . . imports into pension fiduciary law one of the most fundamental and distinctive principles of trust law, the duty of loyalty.").

Despite the rule's apparent absolute nature, however, courts have recognized that a fiduciary does not necessarily violate the rule by pursuing a course of action that "incidentally benefits" the plan sponsor. *See*, *e.g.*, *Morse v. Stanley*, 732 F.2d 1139, 1139 (2d Cir. 1984) ("It is no violation of a fiduciary's duties to take a course of action which reasonably best promotes the interest of the plan participants simply because it incidentally also benefits the corporation."); *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982); *Lynch v. J.P. Stevens & Co., Inc.*, 758

F. Supp. 976, 999 (D.N.J. 1991) (quoting *Morse*). In one prominent case, the Second Circuit stated that "[a]lthough 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 and beneficiaries simply because it *incidentally benefits* the corporation or, indeed, themselves, their decisions must be made with an eye single to the interests of the participants and beneficiaries." *Bierwirth*, 680 F.2d at 271 (emphasis added). Thus, it is not necessarily a breach of fiduciary duty to act in the best interests of both the plan participants and the plan sponsor. *See Siskind v. Sperry Ret. Program, Unisys*, 47 F.3d 498, 506 (2d Cir. 1995) (noting that it is not a breach of fiduciary duty to act "in the interest of both the plan's participants and the employer"); *Donovan v. Walton*, 609 F. Supp. 1221, 1246 (S.D. Fla. 1985) (finding no violation because the decisions were made to "primarily benefit" the participants despite the fact that the union benefitted as well and there was no evidence that the fiduciaries "intended to benefit the Union at the expense of the Fund members").

Indeed, in many circumstances, ERISA contemplates the fact that a fiduciary will "wear two hats," and may have conflicting loyalties. *See Cunha*, 804 F.2d at 1433 (citing *Amato v. Western Union Int'l, Inc.*, 596 F. Supp. 963, 968 (S.D.N.Y. 1984)); *Friend v. Sanwa Bank California*, 35 F.3d 466, 469 (9th Cir. 1994). However, a conflict of interest 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 469; *see also In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 812, 834 (N.D. Cal. 2005).[15] Instead, in order to prove a violation of the duty of loyalty, the plaintiff must go further and show "actual disloyal conduct." *McKesson*, 391 F. Supp. 2d at 834-35.

Here, there is evidence in the record from which it may be possible to infer that certain fiduciaries chose mutual funds as investment options in order to maximize the pecuniary benefit to SCE, to the detriment of Plan participants. Plaintiffs have identified certain internal documents, which suggest that those involved in the decisions of which mutual funds to

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[15] In *Bierwirth*, the court suggested that there may be circumstances where a conflict of interest is so pronounced that it would be impossible for the fiduciary to act in the best interests of the plan participants. *See* 680 F.2d at 272. There, the court said that, "[l]ooking at the matter realistically, we find it almost impossible to see how [the trustees] . . . could have voted to tender or even sell the Plan's stock, no matter how compelling the evidence for one or the other of those courses might have been." *Id.* Nonetheless, the court did not find that there was a per se breach, but rather that the trustees had acted imprudently in considering the correct course of action. *See id.* at 273; *see also Leigh v. Engle*, 727 F.2d 113, 125 (7th Cir. 1984) ("Where the potential for conflicts is substantial, it may be virtually impossible for fiduciaries to discharge their duties with an 'eye single' to the interests of the beneficiaries, and the fiduciaries may need to step aside, at least temporarily, from the management of assets where they face potentially conflicting interests."). Such is not the case here however.

select as investment options were aware of the effect of the revenue sharing on the amount Hewitt billed SCE for its recordkeeping services, and may have even improperly considered the revenue sharing when deciding whether to select certain mutual funds. For example, in one email David Ertel, a member of the Investments Staff, wrote to George Grana, to inform Mr. Grana that he was having Hewitt "look at fund share classes with lower expense ratios (even if there is no revenue sharing)." (Pl.'s Ex. 58.) Mr. Ertel further wrote: "if we delete funds that have a high revenue sharing with one that has none, is that still acceptable on an incremental basis?" (*Id.*) This email reveals that the existence and amount of revenue sharing offered by the mutual funds was taken into consideration when deciding what funds to add to the menu of investment options made available to Plan participants. When viewed in the light most favorable to Plaintiffs, this email could be interpreted to indicate that there was some hesitancy on the part of the fiduciaries to select mutual funds with lower expense ratios (and lower cost to the Plan participants) because the funds with lower expense ratios may not have offered revenue sharing.

In another email, an employee from Hewitt wrote to another member of the Investments Staff, Marvin Tong, regarding a number of investment options that could be made available to the Plan participants. (Pl.'s Ex. 56.) The employee from Hewitt, Josh Cohen, mentioned that he had "included the expense ratio and revenue sharing for several of the share classes

that you will want to consider based on your needs." (*Id.*) Mr. Cohen further noted that there had been some "revenue sharing issues related to the Templeton Developing Markets Fund," and that Diane Kobashingwa "has been working with Franklin Templeton to resolve the issue." (*Id.*) Mr. Cohen further added that "[w]hile I don't think this will have a bearing on your decision to add a Franklin fund, you may want to let Diane know your intentions to do so." (*Id.*) Later in the email thread, Mr. Cohen wrote to Mr. Ertel to recap the "[c]riteria for selecting mutual funds per discussion with DFW and Mr. Ertel." (*Id.*) That criteria included: (1) "[e]xpense ratio is reasonable [b]etween classes," (2) "Morningstar rating is available," (3) "[w]orks in 3 main tracking sites (money.com; yahoo.com; moneycentral.com)," and (4) "[r]evenue sharing is favorable." (*Id.*) Again, this email suggests that the amount of revenue sharing was a consideration when deciding whether to add a given mutual fund to the Plan's menu of options. Viewing the evidence in the light most favorable to the Plaintiffs, a factfinder might even draw the inference that revenue sharing was more important than the expense ratio because the expense ratio was required to be "reasonable," whereas the revenue sharing was required to be "favorable."

In addition to these two emails, another fact supporting Plaintiffs' theory is the arrangement between the Plan, the mutual funds, and SCE, which created a structural conflict of interest, such that

SCE had an interest in maximizing the amount of revenue sharing from the mutual funds. This structural conflict of interest is revealed in the contract that the SCE Benefits Committee entered into with Fidelity Investments Institutional Services Company, Inc. ("FIRSCO"). (*See* Pl.'s Ex. P.) This contract, the "Plan Expense Reimbursement Agreement" ("Reimbursement Agreement"), memorializes an arrangement whereby a portion of the revenue sharing generated from Fidelity mutual funds was directed to pay for Hewitt's recordkeeping services. (*Id.*) The Reimbursement Agreement recites that the Plan fiduciary had selected Fidelity mutual funds for inclusion in the Plan, and provides that some of the revenue sharing from the mutual funds would be used to pay for recordkeeping services to the Plan. (*Id.*) The Reimbursement Agreement then sets forth a compensation schedule whereby the percentage of the revenue sharing paid to Hewitt increased in direct proportion to the amount of Plan assets that were invested in Fidelity mutual funds. (*Id.*) If the Plan invested $10 to $100 million with Fidelity mutual funds, Hewitt was paid .15% of the average daily balance; if the Plan invested $100 to $200 million with Fidelity, Hewitt was paid .20% of the average daily balance; and if more than $200 million was invested with Fidelity, then Hewitt was paid .25% of the average daily balance. (*Id.*)

This Reimbursement Agreement creates a structural arrangement whereby the amount of revenue sharing generated to offset Hewitt's recordkeeping

expenses was directly linked to the type of mutual funds that were chosen for inclusion as Plan investment options. Indeed, the amount of revenue sharing that SCE received actually increased depending on the amount that Plan participants invested in Fidelity mutual funds. This structural arrangement gave SCE a financial interest in seeing that the amount of Plan assets invested in Fidelity mutual funds would increase, such that SCE could obtain a larger offset to what it would otherwise owe Hewitt.

When viewing the emails identified above in combination with the incentive that SCE had to maximize the amount of revenue sharing from certain mutual funds, a rational trier of fact might be able to conclude that certain fiduciaries elevated the interests of SCE above those of the Plan participants when deciding which mutual funds to offer as options to the Plan participants. One might be able conclude that those responsible for choosing mutual funds for inclusion in the Plan were acting to maximize the amount of revenue sharing instead of fulfilling their duty to provide the Plan participants with the best investment options.

While there may be a triable issue in this regard, the Court notes that a breach of the duty of loyalty is not a necessary conclusion from this evidence. Indeed, there may be a perfectly innocent explanation for some of the evidence, which could lead to the conclusion that the fiduciaries actually were discharging their duties in the best interests of both the Plan participants and SCE. One internal email

communication reveals such a potentially innocent explanation. (*See* Pl.'s Ex. 50.) In that email Mr. Grana wrote to Barbara Decker, the Manager of Benefits for SCE, asking for her input on a draft response to a question posed by Mr. Ertel. (*Id.*) Mr. Grana noted that Mr. Ertel was "asking for clarification about fund selection and 12b1 fee offsets." (*Id.*) In a draft response, Mr. Grana wrote that "revenue sharing arrangements are only considered for fund selection when competing funds are otherwise comparable – similar strategies, objectives, performance expectations, expense loading, etc. (i.e. all other things being equal)." (*Id.*) Mr. Grana concluded by noting that SCE already factors the revenue sharing into SCE's administrative and communication budgets and that this information is fully disclosed to the Plan participants. (*Id.*) Thus, Mr. Grana wrote that "[w]e should continue to use a share class which offers a reasonable revenue sharing arrangement." (*Id.*)

Mr. Grana's email appears to convey a theory that revenue sharing could be considered in the mutual fund selection process only when all other relevant investment factors were perfectly equal. That is, there could be no sacrifice in the quality of the investment options, but that if two investment options were perfectly equivalent, then it was permissible to choose the one that generated revenue sharing, which could then be used to offset recordkeeping expenses. As discussed above, there is nothing wrong with a fiduciary taking an action that incidentally

benefits the sponsor company, so long as the fiduciary does not benefit the company at the expense of the plan participants. *See Morse*, 732 F.2d at 1139; *Bierwirth*, 680 F.2d at 271. If the method outlined by Mr. Grana was in fact how the relevant fiduciaries actually discharged their duties, then the Court would be reluctant to find that a breach of the duty of loyalty occurred.

Plaintiffs contend that further evidence of a breach of the duty of loyalty can be found in the fact that the retail mutual funds selected for inclusion as options for the Plan participants performed worse than the low-cost Russell funds that were previously included in the Plan. Plaintiffs' expert Mr. Pomerantz opines that if the Plan assets had been invested into low-cost Russell funds, the Plan would have saved $11.4 million to $14 million in fees and would have gained an additional $192 million in retirement savings. (Pomerantz Rep. ¶¶ 31, 43.) Plaintiffs contend that this poor performance shows that the fiduciaries were choosing retail mutual funds in order to maximize the amount of revenue sharing and, at the same time, sacrificing the investment quality.

The Court is not convinced, however, that a comparison between the performance of retail mutual funds actually chosen on the one hand, and the Russell funds that had previously been included in the Plan on the other, is the relevant comparison for these purposes. This is because there is undisputed evidence that during the course of the 1998 negotiations with the unions, the union representatives (on

behalf of the employees) requested that retail mutual funds be made available to Plan participants. (*See* Decker Decl., Ex. K, at 1.) Ms. Decker testified at her deposition that the unions sought name-brand mutual funds, instead of the Russell funds that had previously been included in the Plan. (*See* SUF ¶¶ 17-20.) Mr. Ertel initially presented the unions with a selection of twenty retail mutual funds, but the unions wanted more, and the parties agreed to a selection of forty different retail mutual funds. (*Id.* ¶¶ 18, 20.) Ms. Decker states that she explained the differences between the low-cost Russell funds, and the retail funds, which charged higher fees to the investors. (Decker Decl. ¶ 9.) Despite these apparent disadvantages with the retail mutual funds, the union representatives requested that retail mutual funds be included as an investment option for the Plan participants. (*Id.*)

In light of the fact that the Plan participants requested retail mutual funds as an investment options [sic], and this was an integral part of the 1998-1999 collective bargaining agreement, there could be no disloyal conduct simply because the Russell funds that had been included previously outperformed the retail mutual funds that were added. In fact, in light of these demands from the Plan participants, it could be said that by including retail mutual funds, the Plan fiduciaries were actually fulfilling their duty to act with complete loyalty to their constituents. The Plan participants made their desires known through

their union bargaining representatives, and the Plan fiduciaries executed on those desires.

Particularly relevant to the issue of whether Defendants breached their duty of loyalty here is an article addressing the exclusive benefit rule written by Professors Daniel Fischel and John Langbein, and published in the University of Chicago Law Review. *See* THE EXCLUSIVE BENEFIT RULE, 55 U. CHI. L. REV. 1105 (1988). In the article, the authors express their view that the exclusive benefit rule is essentially a misnomer because it "misdescribes the reality of the modern pension and employee benefit trust" by oversimplifying the many relationships between the parties in interest. *Id.* at 1107. They write that the analogy to a simple trust model is not necessarily accurate because:

> In the employee benefit situation, the settlor's welfare is also maximized if the beneficiaries capture the benefits resulting from the trust. The difference is that employers and employees act in both capacities. The trust exists to maximize the joint welfare of both. Moreover, because the employer and the employees continually monitor the performance of the trustee of an employee benefit plan, there may be less need for strict fiduciary duties that limit the discretion of the trustee to engage in conduct that may be mutually beneficial to both groups.

Id. at 1119.

In order to deal with some of the tension between the exclusive benefit rule and the fact that, under ERISA, the relevant fiduciaries often have interest in the outcome of the plan, the authors propose that the duty of loyalty be analyzed from an ex ante, rather than purely from an ex post perspective. *Id.* at 1127. They note that when an fiduciary's action is examined from the ex post perspective, "a rule allowing the employer's representative to make decisions on behalf of the trust appears to be inconsistent with the exclusive benefit rule," because oftentimes, it appears that the action taken in fact benefitted the employer. *Id.* If, however, the same action is viewed from the ex ante perspective, and the question is posed in terms of what the parties would have agreed to had they bargained beforehand, the authors argue that this apparent inconsistency abates. *Id.*

Analyzing the Second Circuit's decision in *Bierwirth*, the authors argue that Judge Friendly "attempted to reconcile the exclusive benefit rule with the nonneutral fiduciary [principle] by downplaying the conflict," and by characterizing the benefit to the employer as "incidental." *Id.* The authors write:

> The device of characterizing the benefit to the employer as "incidental" misses the point by confusing the ex ante and ex post perspectives. The relevant question is not whether the trustee's conduct creates only an "incidental" benefit to the employer ex post, a difficult and ultimately futile inquiry. Rather, the relevant question is whether the trustee's

> conduct is consistent with the understanding that the employees and the employer would have reached had they bargained over the issue ex ante.

Id. at 1128.

The authors do not fault Judge Friendly for the resulting doctrinal confusion: "That so distinguished a jurist as Judge Friendly could find no better rationale for self-interested behavior by nonneutral fiduciaries than to call it incidental is a measure of the power of the exclusive benefit rule to mislead courts about the reality of pension and benefit plans." *Id.* Thus, the authors argue that by shifting perspective from the ex post analysis to the ex ante analysis, much of the confusion with regard to the meaning of the exclusive benefit rule can be avoided. *Id.*

This thesis is especially relevant here because when applying the ex ante perspective, instead of asking whether SCE incidentally benefitted from the inclusion of retail mutual funds, the question is whether the parties would have agreed beforehand to include retail mutual funds that generated revenue sharing. Indeed, not only is there evidence that the parties *would have* agreed to the inclusion of retail mutual funds, but that they *actually* agreed to their inclusion. Thus, under this rubric, the fiduciaries should not be liable for including retail mutual funds because the Plan participants actually wanted retail mutual funds.

This is consistent with Ninth Circuit law in this area, which states that "ERISA does not create an exclusive duty to maximize pecuniary benefits" to the Plan participants. *See Collins*, 144 F.3d at 1282. The Court is not aware of any rule under ERISA that says a Plan fiduciary must disregard Plan participants' wishes for certain investment options simply because better investment options may be available. So long as the participants' requests are reasonable, a Plan fiduciary should not be liable for breach of fiduciary duty simply by offering an investment option that the Plan participants desire.[16]

Thus, the relevant inquiry does not appear to be the quality of the Russell funds versus the retail mutual funds that were included in the Plan. Rather, it appears that the relevant inquiry is between the quality of the retail mutual funds that were included in the Plan, versus other comparable retail mutual funds that were available and that did not offer revenue sharing. The evidence in this regard is not entirely clear on the current record.

Another particularly relevant indicator that appears to be missing is a comparison between the expense ratios of the mutual funds that were included in the Plan versus the expense ratios of other mutual

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[16] There could be circumstances where an investment option requested by the participants is so clearly imprudent that to include it in the plan would constitute a breach of fiduciary duty. Including an array of commonly used retail mutual funds, however, is not such a situation.

funds. Especially relevant in this regard would be whether the funds that did not offer revenue sharing had lower expense ratios than those included in the Plan. Although the Plan participants may have asked for retail mutual funds, it is unlikely that they specifically asked for retail mutual funds that generated revenue sharing. Thus, if it were to turn out that the mutual funds that offered revenue sharing had higher expense ratios, and those funds were chosen for selection over funds that did not offer revenue sharing and had lower expense ratios, then this could be evidence that investment selections were being made to maximize the benefit to SCE instead of to the Plan participants.

Even if the retail mutual funds that were included in the Plan performed more poorly than other mutual funds or had higher expense ratios, these facts alone would not be sufficient to show a breach of the duty of loyalty. Plaintiffs will have to go further and show that the Defendant fiduciaries chose a weaker retail mutual fund over a stronger retail mutual fund, *because of* the fact that the weaker retail mutual fund offered revenue sharing and the stronger retail mutual fund did not. *See McKesson*, 391 F. Supp. 2d at 834 (noting that a breach of the duty of loyalty requires "actual disloyal conduct"). In the Court's view, it is only under such circumstances that a breach of the duty of loyalty would be shown.

Whether Defendants disclosed the revenue sharing arrangement to the Plan participants may also be circumstantial evidence of whether the fiduciaries

acted in the best interests of the Plan participants. The Ninth Circuit has said that one component of a fiduciary's "core obligation" under § 1104(a)(1)(A) is "the duty not to make affirmative material misrepresentations to plan participants." *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004). To the extent that a fiduciary does not disclose what he or she is doing with the plan assets, or actively conceals such information, the inference may be drawn that the fiduciary is not acting in exclusively in the plan participants' best interests. *See id.* at 1182.

The undisputed evidence on this score, however, shows that Defendants disclosed the fact that revenue sharing from the mutual funds was being used in order to offset Hewitt's recordkeeping costs. During the collective bargaining process with the unions, Ms. Decker personally walked the union representatives through the process by which revenue sharing would be used to pay for recordkeeping expenses. (SUF ¶ 38.) Indeed, on approximately seventeen different occasions since 1999, Defendants disclosed to the Plan participants through SPDs and other informational documents that revenue sharing from the mutual funds was being used to offset Hewitt's recordkeeping expenses. (*Id.* ¶ 32.) In light of these undisputed facts, Plaintiffs are unlikely to gain much traction by arguing that the revenue sharing was concealed.

There is one final reason why the evidence in the record suggesting that revenue sharing was considered in choosing mutual funds does not necessarily

lead to the conclusion that the fiduciaries breached their duty of loyalty. Nearly all of the internal emails identified above involved members of the Investments Staff. The Investments Staff, however, did not have final say over whether a certain mutual fund was approved for inclusion in the Plan – those decisions were made by the TIC or Sub-TIC. (*See* Pl.'s Supp. Brief, at 1.) It is unclear to what extent and how members of the TIC or Sub-TIC considered revenue sharing when making their final decisions. Furthermore, it is possible that the Investments Staff played such a predominant role in the mutual fund selection process, that by the time the options were presented to the TIC or Sub-TIC, they were only presented with mutual fund options that offered revenue sharing. It is unclear whether the TIC or Sub-TIC ever considered investment options that were not put forth by the Investments Staff or whether the options presented by the Investments Staff included mutual funds with no revenue sharing.[17]

In sum, the Court finds that certain internal communications, when viewed in the light most favorable to Plaintiffs, could be interpreted as revealing that individuals involved in the mutual fund selection process were impermissibly considering revenue sharing when deciding which mutual funds would become investment options for the Plan participants. These emails in combination with the existing

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[17] There may also be an issue with regard to whether the Investments Staff was a fiduciary depending on how much control it had over the investment selection process.

structural conflict of interest, whereby SCE directly benefitted from the selection of mutual funds that offered revenue sharing, create a triable issue as to whether certain fiduciaries acted disloyally when choosing certain mutual funds. On the other hand, however, the evidence does not necessarily lead to the conclusion that there was a breach of the duty of loyalty. Indeed, some of this evidence suggests that the fiduciaries were selecting funds for the permissible purpose of benefitting both the Plan participants and SCE. Thus, it will be necessary to receive further evidence and to hear testimony from the relevant fiduciaries in order to determine whether they actually acted disloyally when making investment decisions for the Plan.

Defendants contend that the Seventh Circuit's decision in *Hecker* involved similar facts to our case, and there the court dismissed the plaintiff's case at the pleading stage. *See* 556 F.3d at 597. Indeed, in *Hecker* there was some mention of an arrangement whereby the plan sponsor, Deere & Company, used revenue sharing from the mutual funds in order to pay for certain administrative costs. *Id.* The court noted that the amount that Deere paid for administrative costs "decreased over time," as the plan administrator recovered most of its costs from the plan participants apparently through revenue sharing. *Id.* The court summarily dismissed any notion that such an arrangement could form the basis for a breach of fiduciary duty, stating that the plaintiffs' "case depends on the proposition that there is something wrong, for ERISA purposes, in that arrangement." *Id.*

The Seventh Circuit agreed with the district court, however, and found that "such an arrangement (assuming at this stage that the Complaint accurately described it) violates no statute or regulation." *Id.* The court then went on to analyze the allegations in the complaint under a misrepresentation or failure to disclose theory of breach of fiduciary duty. *Id.* The court noted that the 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." *Id.* The court found that the revenue sharing arrangement had been fully disclosed and that, while Deere may not have been behaving admirably by creating the impression that it was paying the administrative costs, the complaint did "not allege any particular dollar amount that was fraudulently stated." *Id.* Thus, the court found that there had been no intentionally misleading statement or material omission that could have formed the basis for liability. *Id.*

The Court's decision in this case is consistent with the Seventh Circuit's opinion in *Hecker*. The Court agrees with the Seventh Circuit that there is nothing inherently wrong with using revenue sharing from mutual funds in order to offset some of the administrative costs that might otherwise be borne by the plan sponsor. The problem occurs only when the relevant fiduciaries make investment decisions not because they are in the best interest of the Plan

participants, but in order to maximize the amount of revenue sharing that is generated for the benefit of the plan sponsor. Apparently no such allegation was made in *Hecker* because the court analyzed the case purely under a failure to disclose theory. This case, however, is not simply about whether a conflict of interest was disclosed or not. Rather, the issue is whether the relevant fiduciaries were actually acting in the best interests of the Plan participants. As discussed above, there is evidence in this case that could reasonably be interpreted as demonstrating that such a breach of the duty of loyalty actually took place. Thus, while this case is consistent with *Hecker*, at the same time it includes an additional allegation of disloyal conduct (arguably supported by some evidence) that was not addressed in *Hecker*.[18]

Furthermore, Plaintiffs' claims for breach of the duty of loyalty appear not to be barred in full by the statute of limitations because there was an independent breach each time a fiduciary chose a mutual fund for inclusion in the Plan in order to maximize

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[18] This case is also distinguishable as well from *Taylor v. United Technologies Corp.*, 2009 WL 535779 (D. Conn. 2009). There, the court granted summary judgment for the defendant in part because "plaintiffs['] evidence fails to evince that defendant was motivated by a potential discount to its recordkeeping fee when it selected three Fidelity mutual funds." *Id.* at *10. By contrast, here, there is some evidence that could be interpreted to reveal that the fiduciaries were motivated by the discount to the recordkeeping fee.

revenue sharing to the detriment of the Plan participants. Thus, to the extent that such decisions were made after August 16, 2001, these claims would not be barred by the statute of limitations.

2. § 1104(a)(1)(B)

Plaintiffs contend that many of the investments options given to Plan participants were imprudently selected and/or imprudently managed. Section 1104(a)(1)(B) provides that a fiduciary must 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." *Id.*

"When applying the prudence rule, the primary question is whether the fiduciaries, 'at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment.'" *California Ironworkers Field Pension Trust v. Loomis Sayles & Co.*, 259 F.3d 1036, 1043 (9th Cir. 2001) (quoting *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983)); *see also Wright*, 360 F.3d at 1097 (quoting *Mazzola*). Whether a fiduciary acted prudently cannot be measured solely from the perspective of hindsight; rather, the question is whether the fiduciary conducted himself in the appropriate manner and considered the appropriate factors when making his decisions. *See DiFelice v. U.S. Airways,*

Inc., 497 F.3d 410, 424 (4th Cir. 2007); *Kanawi v. Bechtel Corp.*, 590 F. Supp. 2d 1213, 1230 (N.D. Cal. 2008) ("Of course, the test of prudence is one of conduct and not performance. . . . It is easy to opine in retrospect that the Plan's managers should have made different decisions, but such 20/20 hindsight musings are not sufficient to maintain a cause of action alleging a breach of fiduciary duty.").

The DOL has issued regulations outlining what factors a fiduciary should consider in order to make a prudent investment decision. The regulation states that a fiduciary discharges his fiduciary duties if the fiduciary:

> Has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in the portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and . . . has acted accordingly.

29 C.F.R. § 2550.404a-1(b)(1).

The regulation goes on to state that "appropriate consideration" shall include, but is not necessarily limited to:

> (i) A determination by the fiduciary that the particular investment or investment

> course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action, and
>
> (ii) Consideration of the following factors as they relate to such portion of the portfolio:
>
> > (A) The composition of the portfolio with regard to diversification;
> >
> > (B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and
> >
> > (C) The projected return of the portfolio relative to the funding objectives of the plan.

Id. § 2550.404a-1(b)(2).

Plaintiffs challenge the following investment decisions: (1) the decision to include retail mutual funds as an investment option; (2) the decision to include certain sector-specific mutual funds, and failure to remove them once they began to underperform; (3) the decision to include a money market fund rather than a stable value fund; and (4) the allegedly poor management of the Edison stock fund.

a. Retail Mutual Funds

Plaintiffs contend that Defendants breached their fiduciary duties by including retail mutual funds as investment options for the Plan participants. Plaintiffs contend that the decision to include retail mutual funds is nearly per se imprudent, because retail mutual funds deduct more fees and expenses from the investment assets than other low-cost alternatives.

Plaintiffs' critique of the mutual funds, however, is largely based on an ex post examination of how they performed in comparison to the Russell funds that had previously been included in the Plan. For example, Plaintiffs' expert opines that the comparable Russell funds outperformed the retail mutual funds by $187.2 million during the relevant time period. (Pomerantz Rep. ¶ 43.)

First, the reliability of this expert opinion is questionable because Mr. Pomerantz does not explain how he determined what were "comparable" Russell funds for the purpose of determining the mutual funds' underperformance. (*See* Def.'s Mot. to Exclude Pomerantz Rep., at 10.) Even assuming the reliability of Mr. Pomerantz's methodology, however, the Court finds that the relevant comparison here is not to the Russell funds that were previously included in the Plan. As discussed earlier, the primary reason for including the retail mutual funds was the fact that the Plan participants expressed a desire to have such options during the collective bargaining process. The

undisputed evidence reveals that union representatives requested a total of forty name-brand retail mutual funds for inclusion in the Plan. (SUF ¶¶ 17-20.) Plaintiffs suggest that it was imprudent for Defendants to have complied with the union's demands, and should have denied the request for retail mutual funds. There is nothing wrong, however, with a fiduciary giving Plan participants the reasonable investment options that they seek.[19] Indeed, there is no requirement that fiduciaries override the wishes of the participants, especially under circumstances such as this, where retail mutual funds are common investment options available to the public at large. *See Collins*, 144 F.3d at 1282 ("ERISA does not create an exclusive duty to maximize pecuniary benefits.").

Given that the Plan participants requested the inclusion of retail mutual funds, in order to prove underperformance, Plaintiffs would have to show that the retail mutual funds that were actually chosen for inclusion in the Plan underperformed as compared to other retail mutual funds that were available on the market. Plaintiffs have not identified any evidence in this regard. Indeed, Mr. Pomerantz's report focuses exclusively on a comparison of the retail mutual funds to "comparable" Russell funds. (Pomerantz Rep. ¶ 43.) Mr. Pomerantz does not explain whether, at the time the retail mutual funds were chosen for selection in the Plan, Russell funds had historically outperformed

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[19] *See supra* note 16.

retail mutual funds, and if so, to what extent. Thus, Plaintiffs have not met their burden to create a triable issue as to underperformance.

Even assuming that the retail funds underperformed, however, underperformance alone is insufficient to show a breach of the duty of prudence. In *Kanawi*, the court rejected the plaintiff's claim that the inclusion of certain mutual funds were imprudent based in part on evidence that certain funds had underperformed. 590 F. Supp. 2d at 1229. The court noted that despite the underperformance, the plan offered six different investment options at various levels of risk, the plan's structure was comparable to other defined contribution plans, the fiduciaries regularly reviewed the investment options and considered alternatives, and the overall performance of the mutual funds were competitive with the industry standard. *Id.* at 1230.

The evidence shows that these same factors are present here. The Plan offered a wide variety of investment options including the forty retail mutual funds, along with three pre-mixed portfolios, commingled funds (including stock index funds), the Edison stock fund, and a money market fund. (*See* SUF ¶¶ 24-26.) Furthermore, the evidence reveals that the Plan was comparable to other defined contribution plans, which also regularly include retail mutual funds. (*See* Peavy Rep., Ex. 5.) The undisputed evidence also reveals that the fiduciaries regularly reviewed the mutual funds included in the Plan, and in fact removed certain funds when their performance

was in question. (*See* SUF ¶¶ 54-59, 61-68.) Finally, the overall performance of the mutual funds compared favorably to other benchmarks. (Peavy Rep. ¶¶ 79-87.) Thus, Plaintiffs' claim that it was generally imprudent to include retail mutual funds as investment options is rejected.

Furthermore, the evidence shows that certain low-cost Russell funds were retained as part of the investment options given to Plan participants during the relevant time period. Even after the retail mutual funds were added to the Plan, the various Russell index funds were included in the Plan, which gave the participants a low-cost alternative to the retail mutual funds. (*See* Niden Rep., Ex. C.) Thus, Plan participants had the option of investing in a low-cost Russell fund if they wished, and certainly were not compelled to invest in the retail mutual funds.

Plaintiffs also challenge the decision to include retail mutual funds because of the amount of fees that the retail mutual funds charged. Plaintiffs contend that the Plan could have saved anywhere from $11 million to $15 million in fees alone by investing in a lower cost investment option. (*See* Pomerantz Rep. ¶ 31.) Again, Mr. Pomerantz focuses solely on an examination of the retail mutual funds as compared to the Russell funds. (*Id.*) As explained earlier, however, this is not the relevant comparison. Plaintiffs have not identified any evidence comparing the fees charged by the retail mutual funds actually included in the Plan, with other retail mutual funds in the market.

Furthermore, in *Hecker*, the Seventh Circuit rejected a similar argument noting that the mutual funds selected for inclusion had a "wide range of expense ratios," from .07% at the low end, to 1% at the high end. 556 F.3d at 586. The court also noted that all of the funds were offered to investors in the general public, and so the expense ratios were set against the backdrop of market competition. *Id.* The court concluded that "[t]he 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)." *Id.*

Here, the funds included as options for the Plan participants had expense ratios from .03% at the low end, to 2% at the high end. (*See* Niden Rep., Ex. C.) In light of this broad range of expense ratios, the fact that funds with lower expense ratios could have been chosen, is not especially persuasive. Thus, Plaintiffs' claim that it was imprudent to select funds with such high fees is rejected.

Thus, Defendant's Motion for Summary Judgment is granted with regard to Plaintiffs' claim that it was imprudent to include retail mutual funds as investment options.

b. Sector Funds

Plaintiffs argue that it was generally imprudent for Defendants to add sector funds in 1999, and also

that one fund in particular, the T. Rowe Price Science & Technology Fund, was an imprudent investment decision. As to the first, the evidence shows that sector funds are a common component of many defined contribution plans. (*See* Peavy Rep. ¶ 28 (noting that 30% of 401(k) plans offer sector-specific funds).) Furthermore, the evidence reveals that the Plan participants demanded sector funds during the 1999 collective bargaining process. (SUF ¶ 20.) Thus, it is not imprudent under these circumstances to include sector funds as options for the Plan participants.

Plaintiffs are highly critical of the T. Rowe Price Science & Technology Fund. Plaintiffs argue that it performed poorly for the three years before it was selected for inclusion in 1999, and that during the time that it was included as an investment option, its Morningstar rating dropped from four to two stars. The evidence reveals, however, that although the Science & Technology Fund had experienced subpar returns in recent years, its ten-year performance rating was strong at the time it was selected. (SUF ¶ 71.) Indeed, the Investments Staff appropriately relied on its four-star Morningstar rating when making its decision to offer the fund as an investment option. (*See id.*)

As to the fund's subsequent performance, the evidence shows that once the Science & Technology Fund's performance began to deteriorate, it was placed on a watch list, participants were no longer allowed to invest new money into the fund, and it was ultimately removed from the Plan in 2003. (*See id.*

¶¶ 73, 74.) These management decisions reveal that the relevant fiduciaries chose and then managed the Science & Technology Fund in a prudent manner.

Plaintiffs argue that it took too long to remove the Science & Technology Fund from the Plan, and the reason for the delay was the fact that SCE was receiving revenue sharing from T. Rowe Price in connection to this fund. Plaintiffs, however, have not presented any evidence to support this theory that retaining the fund was due to a conflict of interest. None of the evidence cited earlier with regard to the possible selection of funds based on revenue sharing pertained specifically to this fund. Therefore, Defendants' Motion for Summary Judgment is granted with respect to the claim for imprudent selection and management of the Science & Technology Fund.

c. Money Market

Plaintiffs contend that it was imprudent for Defendants to include a money market fund rather than a "stable value fund." A "stable value fund" is a fund that seeks to provide income while at the same time preventing price fluctuations. (*See* Peavy Rep. ¶ 53.) Most often, these funds consist of a diversified portfolio of bonds. (*Id.*) Plaintiffs argue that a stable value fund would have saved the Plan $2.1 million in fees and would have provided greater return to the Plan participants.

The undisputed evidence, however, reveals that Defendants considered the possibility of including a

stable value fund, but instead decided on a money market because the money market fund would provide more consistent returns and have lower risk. (Eastus Decl., Ex. E, at 126-28.) Indeed, Defendants' expert states that in 2005 and 2006, 58% of defined contribution plans offered a money market fund. (Peavy Rep. ¶ 50.) A 2008 survey shows that 40% of funds offer only a money market fund, and no stable value fund. (*Id.*)

Plaintiffs argue that there is a question of fact as to whether Mr. Ertel ever actually considered including a stable value fund. Plaintiffs cite to an email from Pam Hess at Hewitt from 2007, in which Ms. Hess writes: "Now, I still want to make a plea for stable value!" (Pl.'s Ex. 87.) This email, however, actually supports Defendants' position because it suggests that there had been discussions between Ms. Hess and Mr. Ertel regarding the inclusion of a stable value fund. Plaintiffs also claim that there was no evidence that the possibility of including a stable value fund was ever brought to the attention of the TIC or Sub-TIC. Simply because the issue was not raised before the committees, however, does not create a triable issue of fact as to whether Mr. Ertel considered a stable value fund as an investment option. Rather, the undisputed evidence reveals that Mr. Ertel did consider such an option, and based on the risk and return involved with such a stable value fund, he decided that a money market fund would be a better option. Indeed, the evidence shows that the money market fund performed satisfactorily over the

relevant time period. (SUF ¶ 101.) Thus, Defendants' Motion for Summary Judgment with regard to the prudence of the money market fund is granted.

d. Edison Stock Fund

Plaintiffs also challenge the decision to structure the Edison stock fund as a unitized fund instead of a direct ownership fund, which allegedly resulted in the Edison stock fund holding too much cash. The sale of a share of common stock typically does not settle until three days after the sale. (*See id.* ¶ 110.) With a unitized stock fund, however, the Plan participants are allowed to essentially settle their stock trades within one business day, but as a result, the fund has to carry cash in order to cover those sales. (*See id.* ¶ 109.) Holding a certain level of cash in the fund instead of investing it in stock, typically leads to some loss in return to the participants. Plaintiffs rely on the expert opinion of Ross Miller, who opines that structuring the Edison stock fund as a unitized fund resulted in a loss of approximately $118 million in underperformance. (Miller Rep., at 1.)

Here, the undisputed evidence reveals that the Plan participants wanted the ability to execute faster trades in Edison stock. (SUF ¶ 11.) Indeed, offering faster trades was expressly included as one of the additional terms to the Plan as a result of the collective bargaining process. (Decker Decl., Ex. K.) Moreover, the Plan fiduciaries monitored the amount of

cash that was being held in the Edison stock fund and made needed adjustments accordingly. (SUF ¶ 111.)

Two recent cases are relevant to this analysis. First, in *Taylor v. United Technologies Corp.*, 2009 WL 535779 (D. Conn. 2009), the court rejected the plaintiffs' challenge to cash held in a unitized stock fund. The court found that the decision to provide a unitized stock fund was not imprudent because "[a]lthough an expert may have proposed a better alternative to UTC's unitized stock plan, UTC was not obligated to proceed with that alternative since its decision to proceed with the extant unitized stock plan was prudent." *Id.* at *9. The court further found that the defendants had evaluated and monitored the amount of cash necessary to cover the sales of stock without having a significantly adverse impact on the fund's returns. *Id.* The court noted as an example one instance where, when faced with concerns of a large stock sell-off the fiduciaries increased the amount of cash, only to reduce the level of cash in the fund. *Id.* The court concluded that "[t]he fact that plaintiffs may have been able to enjoy a greater Fund performance without a cash retention is not sufficient to support a claim of fiduciary breach where a defendant has engaged in prudent analysis of its decision." *Id.*

Similarly, here, the evidence shows that the Edison Stock Fund was structured as a unitized fund in order to give the Plan participants the ability to make faster trades. Furthermore, the relevant fiduciaries monitored the amount of cash in the Edison Stock Fund in order to make sure that it was not

holding more than was required at any given time. For example, in July 2004, the issue of how much cash should be held in the Edison Stock Fund was raised at a Sub-TIC meeting. (Ertel Decl., Ex. N.) In light of the fact that there had been decreased levels of active trading in the Edison Stock Fund, the Sub-TIC reduced the cash target within the fund to four percent. (*Id.*) Thus, the evidence reveals that Defendants prudently managed the amount of cash that was in the Edison Stock Fund.

In *Abbott v. Lockheed Martin Corp.*, 2009 WL 839099 (S.D. Ill. 2009), the court found a triable issue of fact as to whether the amount of cash held in the plan's unitized stock fund was prudent. There was evidence that the amount of cash held in the fund "actually exceeded the 10% ceiling" that had previously been established in order to minimize the amount of cash in the fund. *Id.* at *12.

Unlike *Abbott*, however, Plaintiffs have not identified any comparable evidence that the fiduciaries held more cash than was permitted under the Plan. Instead, the evidence shows that the fiduciaries monitored the amount of cash and made adjustments when needed in order to accommodate the trading needs of the Plan participants.

Defendants' expert, Mr. Peavy, makes another point with regard to the benefits of having a unitized stock fund that carries some cash. (Peavy Rep. ¶ 57.) A unitized stock fund only underperforms if the value of the stock is increasing at a rate greater than the

rate of return of the money market fund in which the cash is being held. (*Id.*) If, however, the value of the stock is on the decline or increasing at a slower rate that [sic] the money market fund, the unitized stock fund will actually outperform the Edison stock. (*Id.*) Thus, when deciding whether to include a unitized stock fund, the fiduciaries could not be sure that including a unitized fund would either benefit or harm the Plan participants. In fact, the inclusion of the unitized stock fund could be considered a more conservative, and therefore prudent, decision because having some cash component can actually decrease the volatility of the fund. (*Id.*)

Thus, Defendants' Motion for Summary Judgment with regard to the prudence of the Edison Stock Fund is granted.

3. Statute of Limitations

As an independent basis, Plaintiffs' claims for breach of the duty of prudence are barred in many respects by the six year statute of limitations, which began on August 16, 2001. For example, it is undisputed that the initial decision to add retail mutual funds, including the sector funds, as an option in the Plan was made in 1999 and 2000. (*See* Decker Decl., Ex. K.) Mr. Ertel made the decision to maintain the Money Market Fund instead of use [sic] a stable value fund in 1999. (Eastus Decl., Ex. E, at 127.) Furthermore, the Edison Stock Fund was established as a unitized stock fund as early as January 25, 2001. (*See*

Peavy Rep. ¶ 60.) Thus, the prudence claims arising out of these decisions are barred by the statute of limitations.

4. Safe Harbor – § 1104(c)

Defendants contend that Plaintiffs' claims for breach of fiduciary duty pursuant to § 1104(a) are barred by the safe harbor provision found at § 1104(c). The safe harbor provides as follows:

> (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 . . . –
>
> . . .
>
> (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. . . .

29 U.S.C. § 1104(c)(1)(A).

"The safe harbor provided by § 1104(c) is an affirmative defense to a claim for breach of fiduciary duty under ERISA." *Hecker*, 556 F.3d at 588. In order for the safe harbor defense to apply, several different factors must be present. First, the participant must have the right to exercise independent control over the assets in his or her account and must in fact

exercise such control. 29 C.F.R. § 2550.404c-1(b)(1). Next, the participant must be able to choose from a broad range of investment alternatives, which requires at least three investment options and the plan must permit the participant to give instructions to the plan with respect to those options once every three months. *Id.* § 2550.404c-1(b)(2). 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. *Id.* Nine criteria must be met before the participant will be considered to have sufficient investment information. *Id.* These include (1) clear labeling of the plan as a § 1104(c) instrument, (2) a description of the investment alternatives available, (3) identification of designated investment managers, (4) explanation of how to give investment instructions, (5) a description of any transaction fees and expenses that affect the participant's balance in connection with purchases of sales of interests, (6) relevant names and addresses of plan fiduciaries, (7) special rules for employer securities, (8) special rules for investment alternatives subject to the Securities Act of 1933, and (9) material related to voting, tender, or other rights incidental to the holdings in the account. *Id.*

Even if all of these conditions are satisfied, there has been some dispute as to whether this safe harbor protects a fiduciary from his or her own imprudent or disloyal actions in connection with a plan. The DOL has taken the position that § 1104(c) does not shield a

fiduciary from liability for claims of imprudent or disloyal selection of investment options. *See Kanawi*, 590 F. Supp. 2d at 1232. Several courts have followed the DOL's lead and refused to apply the § 1104(c) safe harbor under such circumstances. *See, e.g.*, *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n.3 (4th Cir. 2007); *id.* In *Kanawi*, the court followed the DOL's interpretation noting that it comports with commonsense because "[w]here the options available to participants are tainted by conflicts of interest or imprudent management, a party should not be able to avoid liability simply by providing participants the opportunity to exercise control over their accounts." 590 F. Supp. 2d at 1232.

In *Hecker*, however, the Seventh Circuit suggested that in some circumstances, it may be appropriate for the § 1104(c) safe harbor to completely shield fiduciaries from liability, even in the face of imprudent and/or disloyal management. 556 F.3d at 589. There, the plan participants were offered a menu of 26 different investment options, which included 23 mutual funds. *Id.* at 578. In addition, the plan also provided a "mutual fund window" that made available 2,500 additional mutual funds to the participants. *Id.* In considering the § 1104(c) safe harbor, the court said that "[e]ven 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." *Id.* at 589. Thus, because the plan included the mutual fund window that made 2,500 additional mutual funds available, the court found that "[a]ny 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." *Id.*

In the Seventh Circuit's decision denying the petition for rehearing en banc, the court appeared to limit somewhat the breadth of its earlier ruling. *See Hecker v. Deere & Co.*, ___ F.3d ___, 2009 WL 1797441, at *1 (7th Cir. 2009). The court noted the DOL's concern that "our opinion could be read as a sweeping statement that any Plan fiduciary can insulate itself from liability by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among them." *Id.* at *2. The Seventh Circuit disavowed any endorsement of such a result, which could lead to approval of obvious and reckless imprudence in the selection of investments. *Id.* Instead, the court noted that in the complaint, the plaintiffs never alleged that any of the 26 options in the plan, or the 2,500 options offered through the mutual fund window, were unsound or reckless. *Id.* Thus, the court concluded that "*this* complaint, alleging that Deere chose *this* package of funds to offer for its 401(k) Plan participants, with this much variety and this much variation in associated fees, failed to state a claim

upon which relief can be granted." *Id.* (emphasis in original).

As the court made clear in *Hecker*, especially in its order denying rehearing en banc, the facts of that case were quite unique because the plan offered the participants a choice of 2,500 mutual fund options with a wide range of fees. By contrast, however, here the Plan included only forty different mutual funds. Thus, this case does not justify the same broad application of the safe harbor provision as the Seventh Circuit used in *Hecker.*

Instead, because this case involves a possible breach of the duty of loyalty, the better view is that expressed by other courts, and supported by the DOL, that the fiduciaries should not be shielded from liability for offering the participants investment options that are the result of a conflict of interest. *See DiFelice*, 497 F.3d at 418 n.3; *Kanawi*, 590 F. Supp. 2d at 1232. Thus, under these circumstances, the Court finds that the § 1104(c) safe harbor does not apply.

IV. CONCLUSION

For the reasons stated above, Plaintiffs' Motion for Partial Summary Judgment is DENIED. Defendants' Motion for Summary Judgment is GRANTED with regard to all claims except (1) Plaintiffs' prohibited transaction claims arising out of State Street's retention of float, and (2) whether the Defendant fiduciaries breached their duty of loyalty by choosing retail mutual funds in order to maximize the amount

of revenue sharing at the expense of the Plan participants. Plaintiffs are ORDERED to file a supplemental brief further detailing their prohibited transaction claims based on State Street's retention of float. Plaintiffs shall identify with specificity the transactions at issue and which fiduciary was allegedly responsible for such conduct. Plaintiffs' supplemental brief shall not exceed seven (7) pages and shall be filed by noon on July 24, 2009. Defendants shall file a seven page (7) response brief by July 29, 2009. The parties shall not submit any additional evidence but must cite with specificity to the record already before the Court.

IT IS SO ORDERED.

DATED: July 16, 2009 /s/ Stephen V. Wilson

STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE