No. 15-1445

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN Re: Fidelity ERISA Float Litigation

TIMOTHY M. KELLEY, and all others similarly situated; JAMIE A. FINE, and all others similarly situated; COLUMBIA AIR SERVICES, INC., individually and on behalf of all others similarly situated; PATRICIA BOUDREAU, individually and on behalf of all others similarly situated; ALEX GRAY, individually and on behalf of all others similarly situated; BOBBY NEGRON, individually and on behalf of all others similarly situated; KORINE BROWN, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

FIDELITY MANAGEMENT TRUST COMPANY; FIDELITY MANAGEMENT & RESEARCH COMPANY; FIDELITY INVESTMENTS INSTITUTIONAL OPERATIONS COMPANY, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Massachusetts
Case Nos. 1:13-cv-10222, 1:13-cv-10524, 1:13-cv-10570, 1:13-cv-11011
The Honorable Denise Jefferson Casper, Judge

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellee Fidelity Management Trust Company ("FMTC") states that its parent corporation is FMR LLC. FMR LLC is not publicly held, and there is no publicly held corporation that owns 10% or more of FMTC.

Defendant-Appellee Fidelity Management & Research Company ("FMRC") states that its parent corporation is FMR LLC. FMR LLC is not publicly held, and there is no publicly held corporation that owns 10% or more of FMRC.

Defendant-Appellee Fidelity Investments Institutional Operations Company ("FIIOC") states that its parent corporation is FMR LLC. FMR LLC is not publicly held, and there is no publicly held corporation that owns 10% or more of FIIOC.

TABLE OF CONTENTS

Page

INTRODUCTION ...1

JURISDICTIONAL STATEMENT ...4

ISSUES PRESENTED...4

STATEMENT OF THE CASE...5

A. 401(k) Plans And "Float" ...6

B. Plaintiffs' Claims...11

C. The Decision Below ...14

SUMMARY OF ARGUMENT ...16

STANDARD OF REVIEW ...22

ARGUMENT ...22

I. ON THE FACTS ALLEGED, REDEMPTION FLOAT IS NOT A PLAN ASSET...22

A. Under Ordinary Property Law Principles, Cash Paid From Mutual Fund Assets To Withdrawing Participants Upon Redemption Of Their Shares Does Not Become A Plan Asset While In Transit...23

B. *Merrimon* And *Vander Luitgaren* Confirm That Redemption Float Is Not A Plan Asset ...33

C. The DOL Guidance Cited By Plaintiffs Does Not Establish That The Redemption Float At Issue Here Is A Plan Asset...37

D. Plaintiffs' Theory That ERISA Requires Plans To Treat Float As A Plan Asset Is Contrary To ERISA And Bad For Plan Participants ...40

II. FIDELITY DID NOT BREACH ANY FIDUCIARY DUTY CONCERNING USE OF FLOAT ...42

A. Fidelity Provided Participants With Immediate And Unfettered Access To Their Benefits As Required By This Court's Cases...43

B. Plaintiffs Misinterpret *Merrimon* And *Vander Luitgaren* ...46

C. In Any Event, Fidelity Did Not Benefit From Using Float Income To Pay Bank Account Fees And Remitting The Remainder To The Mutual Funds ...48

TABLE OF CONTENTS
(continued)

Page

III. THE DEPARTMENT OF LABOR'S SEPARATE DISCLOSURE-BASED ARGUMENT IS BOTH WAIVED AND WRONG....................51

A. Plaintiffs Have Never Raised DOL's Disclosure-Based Theory.......51

B. DOL's Position Contradicts *Merrimon* And *Vander Luitgaren* And Is Factually Baseless 55

CONCLUSION...57

TABLE OF AUTHORITIES

Page(s)

Cases

Alamo-Hornedo v. Puig,
745 F.3d 578 (1st Cir. 2014)....................53

Anschutz v. Comm'r of Internal Revenue,
664 F.3d 313 (10th Cir. 2011)....................30

Beddall v. State Street Bank,
137 F.3d 12 (1st Cir. 1998)....................22, 29

Boeckman v. A.G. Edwards, Inc.,
2007 WL 4225740 (S.D. Ill. Aug. 31, 2007)....................24

Butler v. Deutsche Bank Trust Co. Ams.,
748 F.3d 28 (1st Cir. 2014)....................22

Calloway v. Comm'r of IRS,
691 F.3d 1315 (11th Cir. 2012)....................23, 30

Christopher v. SmithKline Beecham Corp.,
132 S. Ct. 2156 (2012)....................56

Edmonson v. Lincoln Nat'l Life Ins. Co.,
725 F.3d 406 (3d Cir. 2013)....................43, 44

Faber v. Metro. Life Ins. Co.,
648 F.3d 98 (2d Cir. 2011)....................23, 34, 44, 48

Freede v. Comm'r of Internal Revenue,
864 F.2d 671 (10th Cir. 1988)....................24

Grande v. St. Paul Fire & Marine Ins. Co.,
436 F.3d 277 (1st Cir. 2006)....................23

Grenier v. Cyanamid Plastics, Inc.,
70 F.3d 667 (1st Cir. 1995)....................52

Janus Capital Grp., Inc. v. First Derivative Traders,
131 S. Ct. 2296 (2011)....................50

TABLE OF AUTHORITIES
(continued)

Page(s)

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510 U.S. 86 (1993)..24

Johnston v. Holiday Inns, Inc.,
595 F.2d 890 (1st Cir. 1979)..52

Leimkuehler v. Am. United Life Ins. Co.,
713 F.3d 905 (7th Cir. 2013) 8

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752 F. Supp. 2d 974 (S. D. Ind. 2010)..24

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845 F. Supp. 2d 310 (D. Mass. 2012)..36

Merrimon v. Unum Life Ins. Co. of Am.,
758 F.3d 46 (1st Cir. 2014)...*passim*

Mogel v. Unum Life Ins. Co. of Am.,
547 F.3d 23 (1st Cir. 2008)...14, 20, 47, 48

Nickey Gregory Co. v. AgriCap, LLC,
597 F.3d 591 (4th Cir. 2010) 23

Oster v. Barco of Cal. Emps.' Ret. Plan,
869 F.2d 1215 (9th Cir. 1988) 41

Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.,
632 F.3d 762 (1st Cir. 2011)..54, 55

In re Qualia Clinical Serv., Inc.,
441 B.R. 325 (B.A.P. 8th Cir. 2011) 23

Sollberger v. Comm'r of Internal Revenue,
691 F.3d 1119 (9th Cir. 2012) 23

Tussey v. ABB, Inc.,
2012 WL 1113291 (W.D. Mo. Mar. 31, 2012) 11, 13

TABLE OF AUTHORITIES
(continued)

Page(s)

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746 F.3d 327 (8th Cir. 2014) ....*passim*

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133 S. Ct. 1537 (2013)..41

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765 F.3d 59 (1st Cir. 2014)..*passim*

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934 F.2d 1452 (10th Cir. 1991) 41

Statutes

28 U.S.C. § 1291 4

28 U.S.C. § 1331 4

29 U.S.C. § 1002..6

29 U.S.C. § 1101 ....24, 25, 34, 35

29 U.S.C. § 1103..50

29 U.S.C. § 1104..13

29 U.S.C. § 1106..13, 38, 52

U.C.C. § 3-112 27

U.C.C. § 3-412 30

Rules

Rule 12(b)(6)...22

Other Authorities

Deloitte Annual 401(k) Benchmarking Survey 2015 ed., *available at*
http://www2.deloitte.com/content/dam/Deloitte/us/Documents/hu
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(continued)

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DOL Advisory Opinion No. 93-24A, September 13, 1993....................................37

Emily Glazer, *J.P. Morgan to Start Charging Big Clients Fees on Some Deposits*, Wall St. J., Feb. 24, 2015 29

Richard B. Hagedorn & Harry Baily, Brady on Bank Checks ¶ 4.05 (rev. ed. A.S. Pratt 2012) 27

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TABLE OF AUTHORITIES
(continued)

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United States Dep't of Labor, Form 5500/5500-SF Filing Search, *available at* https://www.efast.dol.gov/portal/app/disseminate?execution= e1s1 50

Regulations

17 C.F.R. § 270.22c-1 ....8, 36

29 C.F.R. § 2520.104b-1 56

29 C.F.R. § 2550.404a-5 56

INTRODUCTION

The district court correctly held that plaintiffs' complaint fails to state a claim against defendants Fidelity Management Trust Company et al. ("Fidelity," unless otherwise specified) for breach of duties under the Employee Retirement Income Security Act ("ERISA"). As the district court recognized, and as plaintiffs' own brief on appeal confirms, plaintiffs' fiduciary-breach theory misstates their own complaint and misapprehends settled law, including two 2014 decisions of this Court.

One especially glaring flaw in plaintiffs' analysis is the suggestion that Fidelity was taking "float" income that belonged to the plans and keeping that income for itself. In fact, plaintiffs' own complaint makes clear that Fidelity did not receive *any* of the float income. The complaint instead alleges that this income was used to pay bank fees charged on checking accounts used as part of the redemption and withdrawal process (as permitted by ERISA and by the contracts between the plans and Fidelity), and any money not consumed by those bank fees was remitted to the mutual funds whose shares had been redeemed. Plaintiffs' invective-laden rhetoric on appeal—accusing Fidelity of "conversion"—cannot change their actual allegations, which make clear that Fidelity *did not receive any of the income generated by the float*.

Moreover, plaintiffs' mislabeling of Fidelity's conduct as "conversion" assumes the conclusion that float was a plan asset, as one cannot be the victim of conversion as to an asset one does not own. But this cash was not a plan asset before the withdrawal, and it did not "transmogrify" into a plan asset during the withdrawal process. Plaintiffs concede that the cash at issue was owned by the mutual funds before the redemption. When the participant chose to withdraw from the plan, the cash was sent *from* the mutual fund *to* the withdrawing participant via an electronic transfer or check, and the checking accounts used to process those withdrawals did not belong to the plan, but were registered for the benefit of the mutual funds. The participant is the intended beneficiary of the redemption transaction, and the plan simply did not insert itself into that process. That eminently reasonable arrangement provided beneficiaries with immediate and unfettered access to their withdrawals, while also protecting the plan from the risk of loss and from bearing the costs of the accounts. There is no merit to plaintiffs' contention that the plan was entitled to the benefits of owning the checking accounts without bearing these corresponding risks and costs.

Nor is there merit to plaintiffs' assertion that ERISA *requires* plans to own the checking accounts used for 401(k) plan withdrawals. No such requirement exists. To the contrary, courts have consistently recognized that ERISA gives plan sponsors and service providers flexibility in structuring their own relationships. In

exercising that flexibility, a plan *can* be structured to have cash in transition reside in a plan-owned account, but again, that structure has costs and risks as well as benefits. No law requires that plans have the benefits of an account where they do not shoulder the corresponding risks.

Plaintiffs' theory also rests on the mistaken premise—independent of whether float is a plan asset—that Fidelity had continuing duties to a participant under ERISA even after it sent the participant a withdrawal check. In two recent decisions, this Court held that a fiduciary of an ERISA-governed benefit plan cannot be charged with breach of its fiduciary duty when it properly facilitates distribution of the promised benefit in its promised form. Here, once Fidelity sent the checks to the withdrawing participants, those participants had everything they were entitled to under the plans, and Fidelity's ERISA-governed duties were complete.

Finally, the Department of Labor's ("DOL's") distinct disclosure-based theory provides no basis for reversing the judgment. According to DOL, Fidelity could be held liable for allegedly failing to disclose its supposed receipt of float income to the extent it used that income to increase its compensation. But because plaintiffs themselves never raised this theory, it is waived. And, in any event, DOL's theory does not apply here because Fidelity indisputably did *not* receive float income, and thus did not use float income to increase its own compensation.

For these and other reasons elaborated in this brief, the judgment should be affirmed.

JURISDICTIONAL STATEMENT

Plaintiffs' statement of jurisdiction is correct. The district court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether plaintiffs' complaint fails to state a claim of fiduciary breach relating to the use of "float" created when plan withdrawals were processed, where

(a) the plan did not own the float under ordinary notions of property rights, including the risk of loss; and

(b) once Fidelity provided a check to a withdrawing participant, Fidelity fully discharged its fiduciary obligation to distribute promised benefits in their promised form.

2. Whether the judgment should be reversed on the basis of DOL's argument that a fiduciary may not receive float income to increase its compensation unless the receipt of float income is disclosed, where

(a) plaintiffs did not plead in their complaint the claim described by DOL, did not assert the argument in briefing the motion to dismiss, and do not assert the argument in their opening brief on appeal; and

(b) DOL's argument is inconsistent with this Court's prior precedent, and would not apply in this case in any event because Fidelity is *not* alleged to have received any float income.

STATEMENT OF THE CASE

Fidelity provides trust and administrative services to 401(k) plans pursuant to contracts referred to as "Trust Agreements" between Fidelity and the plan sponsors. A-21-22 (Compl. ¶¶ 21-25).[1] Plaintiffs do not allege that Fidelity violated any term of any such agreement. They instead allege that Fidelity breached fiduciary obligations under ERISA owed to the plans while providing the contracted-for services. The complaint asserts claims on behalf of a putative class comprising all ERISA-governed 401(k) benefit plans "for which Fidelity has

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[1] The Fidelity defendants are financial services companies affiliated with a single parent company, FMR LLC. Defendant Fidelity Management & Research Company ("FMRC") is an investment advisor that provides advisory and asset management services for Fidelity mutual funds. A-20 (Compl. ¶ 17). Defendant Fidelity Management Trust Company ("FMTC") is a trust company that holds assets for institutional clients, including 401(k) plans. *Id.* (Compl. ¶ 16). The Complaint alleges that Defendant Fidelity Investments Institutional Operations Company, Inc. ("FIIOC") serves as an agent of FMTC, providing trust services, recordkeeping, and information management services for 401(k) plans. *Id.* (Compl. ¶ 18). FIIOC also serves as a transfer agent for Fidelity mutual funds, responsible for, *inter alia*, "exchanges, closing out fund balances, . . . checkwriting, [and] wire transactions." *See, e.g.*, Statement of Additional Information, Fidelity Contrafund, (Feb. 28, 2015) [hereinafter "Contrafund SAI"] (explaining that "the fund has entered into a transfer agent agreement" with FIIOC), *available at* http://www.sec.gov/Archives/edgar/data/24238/000071858114000008/main.htm#cft302944.

served as trustee or service provider" ("the Plans")—a class that plaintiffs estimate includes "thousands" of plans nationwide. A-29 (Compl. ¶¶ 48-49).

A. 401(k) Plans And "Float"

1. 401(k) Basics: ERISA regulates "employee benefit plans," including both pension plans and employee welfare plans. ERISA § 3(3), 29 U.S.C. § 1002(3). A "plan" under ERISA constitutes a "practice or arrangement" that "confers benefits captured within the scope of pension or welfare benefits." Lee T. Polk, ERISA Practice and Litigation § 2:2 (2015).

A 401(k) plan is a vehicle commonly used by employers (plan sponsors) to facilitate their employees' efforts to save for retirement. Employees who participate in a 401(k) plan (plan participants) may contribute a portion of their pre-tax compensation for investment in one or more of several investment options they may select from a "menu" or "lineup" designated by their employer. For most 401(k) plans, the available options include mutual funds.[2] A mutual fund is a shareholder-owned investment company, registered with the Securities Exchange Commission, and overseen by a board of directors, the majority of whom are

[2] Deloitte Annual 401(k) Benchmarking Survey 2015 ed. at 34 (mutual funds are most common investment vehicle offered in 401(k) plans and are included in 82% of plans), *available at* http://www2.deloitte.com/content/dam/Deloitte/us/Documents/human-capital/us-hc-annual-defined-benchmarking-survey-2015.pdf. Unless otherwise specified, this brief will use the term "mutual fund" when referring to plan investment options.

independent. Mutual funds are managed by an adviser that is responsible for making fund investments. Fidelity entities serve as the investment advisors to the Fidelity family of mutual funds (which, of course, are not owned by Fidelity but by the millions of shareholders in those funds).

To facilitate participants' investments in the selected mutual funds, a 401(k) plan sponsor generally will retain a third-party service provider to operate as the plan's trustee and recordkeeper (a single entity often provides both functions). *See, e.g.*, A-20 (Compl. ¶ 18). The service provider's obligations include facilitating the purchase of mutual fund shares at the direction of participants, providing communications between mutual funds and participant-investors, and facilitating the transfer of payments from mutual funds to participants who withdraw from the plan and redeem their shares in exchange for cash. *See* A-21 (Compl. ¶ 21); *see generally* Department of Labor, Frequently Asked Questions About Retirement Plans and ERISA.[3]

2. Withdrawals and Redemptions: The operative complaint here involves the last function just described. The complaint's core theory is that Fidelity breached its fiduciary duties to the Plans during the process of redeeming mutual fund shares and distributing cash benefits to participants withdrawing from their 401(k) Plans.

[3] *Available at* http://www.dol.gov/ebsa/faqs/faq_consumer_pension.html.

Ownership of a mutual fund share includes the right to a cash payment based on the daily value of the fund's net assets. 17 C.F.R. § 270.22c-1. When a participant withdraws from a 401(k) plan and claims that right to payment, her mutual fund shares must be "redeemed." When shares are redeemed, the mutual fund pays cash from its own assets for distribution to the participant in an amount equivalent to the value of the participant's shares. *See infra* note 6. As used here, "float" refers to any cash in the process of being transferred by a mutual fund to a participant who has requested a withdrawal from her 401(k) plan. *See Tussey v. ABB, Inc.*, 746 F.3d 327, 332 & n.4 (8th Cir. 2014).

As the complaint states, the money used to pay the redemption comes from the mutual fund's own account. A-25 (Compl. ¶ 33(a)); *see infra* note 6. In an ordinary "retail" mutual fund transaction, the fund's own "transfer agent" facilitates the redemption and cash transfer process. *See* Investment Company Institute, Navigating Intermediary Relationships 13 (Sept. 2009).[4] When the mutual fund investment has been arranged through a 401(k) plan, the 401(k) plan's recordkeeper (or its affiliate) ordinarily acts as the transfer agent and assumes the obligation to facilitate the transfer of fund assets to the withdrawing participant. *See Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 909 (7th Cir. 2013).

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[4] *Available at* https://www.ici.org/pdf/ppr_09_nav_relationships.pdf.

As described in the complaint, the redemption process is as follows. When a participant withdraws from a Plan, the relevant mutual fund transfers the cash value of the shares from assets held in the fund's own bank account to another bank account registered to FIIOC (the transfer agent) on behalf of the mutual funds for which it is facilitating transfers. A-25 (Compl. ¶ 33(a)). Because the value of mutual fund shares is not established until the end of each trading day, a participant (just like a retail investor) cannot be paid the same day the redemption request is made, but instead generally is paid the next day (known as "T+1"). *See Tussey*, 746 F.3d at 332 & n.4.

In accordance with the Trust Agreements, the participant is paid either by check or electronic transfer, at the participant's election. A-25-26 (Compl. ¶ 33(f)-(g)); Supp-148 (Columba Air Serv. App'x D ¶ 1(c)). For participants requesting electronic transfer, the funds are transferred directly to the participant's bank account in accordance with the participant's transfer instructions. A-25 (Compl. ¶ 33(f)). For participants who request a check, the funds are transferred to a checking account that is also registered to FIIOC for the benefit of the mutual funds, and a check is written on that account to the participant. A-26 (Compl. ¶ 33(g)).[5] Like any ordinary check recipient, the participant does not receive

[5] The current version of the complaint alleges that the accounts used in the withdrawal process were registered to Fidelity's transfer agent entity, "Fidelity

interest that accumulates on funds held in the checking account before the check is cashed.

3. The Checking Accounts: The Trust Agreements provide for payment by check and thus necessarily presuppose the existence of checking accounts to support those checks. The complaint includes no suggestion that the Plans were led to believe they owned these accounts. In fact, the Trust Agreements here prohibited the Trust from holding *any* cash absent explicit directions from the Plan administrator. Supp-110 (Columbia Air Basic Plan Document § 20.04(c)). The only fair reading of the alleged facts, then, is that the Plans (or their sponsors or administrators) understood that checks were being written to participants on accounts that the Plans did not own.

4. How Float Income Was Used: The earnings on the checking accounts were used as follows. The income was used first to pay the bank fees associated with the accounts, as permitted by the agreements. *See infra* at 49-50. Any income remaining after payment of the bank fees was then remitted *pro rata* to the

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Operations" (*i.e.,* FIIOC), *see* A-25 (Compl. ¶ 33(a)). But as explained below, plaintiffs earlier made clear that the accounts were registered for the benefit of the mutual funds. *See infra* at 29-30.

Because both of the bank accounts are used to facilitate the withdrawal payments made by check as provided in the Trust Agreements, and because plaintiffs' claims focus on the period in which those withdrawal checks remain uncashed, for ease of reference this brief refers to these accounts as "the checking accounts."

mutual funds whose cash transfers were being facilitated through the checking accounts. A-26 (Compl. ¶ 38); *see Tussey*, 746 F.3d at 332. The complaint's actual allegations, in short, conclusively refute the assertion in plaintiffs' brief that Fidelity "keeps all the investment earnings." Pls.' Br. 5.

B. Plaintiffs' Claims

1. The Origin: *Tussey v. ABB*: This case began as a copycat of *Tussey v. ABB, Inc.* In *Tussey*, participants in two retirement plans for which Fidelity provided 401(k) services sued Fidelity and the plans' sponsor and administrator, ABB, Inc., in the Western District of Missouri. The district court in *Tussey* ruled that Fidelity's handling of float violated ERISA because, in the court's view, float was a "Plan asset[]." *Tussey v. ABB, Inc.*, 2012 WL 1113291, at *34 (W.D. Mo. Mar. 31, 2012). As such, the court concluded, Fidelity was required to deliver income earned from the checking accounts to the plan, and thus violated its fiduciary duties by instead using that income to pay the accounts' bank fees and remitting any remainder to other accounts for the mutual funds whose cash transfers generated the float. *Id.* at *34-35.

Plaintiffs filed these suits (subsequently consolidated) in the wake of the *Tussey* district court ruling, while it was still on appeal. Plaintiffs—who, again, seek to represent each of the "thousands" of plans Fidelity services—are six individuals who participate or have participated in seven different 401(k) plans and

one corporate employer that sponsors and administers an eighth plan. Their first consolidated complaint was explicitly based on *Tussey*. Plaintiffs incorporated by reference the *Tussey* court's findings of fact and conclusions of law, and alleged that Fidelity's depository and redemption float practices violated ERISA "in the same way" the *Tussey* court had described. Doc. 67 ¶ 6. Plaintiffs even contended that Fidelity should be "foreclosed … from re-litigating the liability and damages issues that were decided against it in *Tussey*." *Id.* ¶ 11. According to plaintiffs, *Tussey* controlled the issue of liability—all that remained to litigate, plaintiffs insisted, was damages. In other words, the initial complaints merely identified the practices that the *Tussey* district court found to have violated ERISA as to one plan, and claimed damages for those same practices on behalf of all plans for which Fidelity provided administrative services.

But in March 2014, the Eighth Circuit reversed the trial court's ruling in *Tussey*, holding that Fidelity's float-handling practices did *not* breach any fiduciary duty. *See* 746 F.3d at 340. According to the Eighth Circuit in *Tussey*, plaintiffs did not establish that "float was a Plan asset," and thus Fidelity acted lawfully "by paying the expenses on the float accounts and distributing the remaining float [income] to the investment options." *Id.* The mutual funds were the payors of redemption checks, the court explained, and "the payee of an uncashed check has no title in or right to interest on the account funds." *Id.*

Plaintiffs, suddenly less enamored of *Tussey*, responded not by voluntarily dismissing their complaint, but by twice amending it to narrow their theories. The currently operative Second Amended Consolidated Complaint challenges only Fidelity's redemption float practices, not its use of float income generated when processing contributions to 401(k) plans. But the allegations concerning Fidelity's redemption float practices still track the findings made by the *Tussey* district court, *compare* A-25-26 (Compl. ¶¶ 32-38), *with Tussey*, 2012 WL 1113291, at *32-34, and plaintiffs continue to advance the legal conclusions that the Eighth Circuit expressly rejected, A-25 (Compl. ¶ 32).

2. The Operative Complaint: The complaint asserts claims under ERISA § 406(b), which provides that a fiduciary may not "deal with the assets of the plan in his own interests or for his own account," 29 U.S.C. § 1106(b)(1), and under ERISA § 404(a), which requires that all fiduciaries "discharge [their] duties with respect to a plan solely in the interests of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1).

The complaint's core theory is that redemption float constituted a "Plan asset," and that Fidelity was required to use Plan assets solely for the benefit of the Plans. Fidelity thus allegedly breached its fiduciary duties by using float income to pay the checking account fees and remitting the remainder to the mutual funds that generated the redemption float, rather than paying the float income to the Plans.

See A-25 (Compl. ¶ 32). According to plaintiffs, from the moment of a redemption, the cash proceeds constitute Plan assets, and they remain Plan assets "'until the check to the beneficiary is actually presented to the plan for payment through the banking system.'" A-27 (Compl. ¶ 39) (quoting *Mogel v. Unum Life Ins. Co.*, 547 F.3d 23, 26 (1st Cir. 2008)). The crux of the complaint is that Fidelity "was obligated to deposit the cash into a trust account for the benefit of the Plans and Plan Participants." Pls.' Br. 28.

C. The Decision Below

Fidelity moved to dismiss the complaint, arguing, among other things, that float is not a Plan asset, and that Fidelity did not act as a fiduciary in handling float. On March 11, 2015, the district court agreed and dismissed the complaint.

According to the district court, "Plaintiffs' allegations rise and fall on the premise that float income is a Plan asset," Pls.' Br. Addendum 6 ("Add-6"), and plaintiffs failed to identify "any allegations" supporting that premise, Add-11. In particular, plaintiffs conceded "that the Plans do not own the underlying assets of a mutual fund in which they invest," and plaintiffs did not allege that the Plans owned the accounts on which participants' withdrawal checks were written. Add-7 (internal quotation marks omitted). In addition to *Tussey*, the court relied on this Court's recent decisions in *Merrimon v. Unum Life Insurance Co. of America*, 758 F.3d 46 (1st Cir. 2014), and *Vander Luitgaren v. Sun Life Assurance Co. of*

Canada, 765 F.3d 59 (1st Cir. 2014), in which ERISA-fiduciary insurance companies paid benefits to beneficiaries under ERISA-regulated life insurance policies in the form of checkbooks for accounts credited with the amount of the benefit. This Court held in both cases that the insurance company did not owe the plans or participants interest accrued on the money backing the accounts, because (1) these funds did not constitute plan assets, and, separately, (2) once the checkbook was provided, the insurer had discharged its fiduciary obligations under the governing plan documents. *Merrimon*, 758 F.3d at 57; *Vander Luitgaren*, 765 F.3d at 61-62.

As in *Merrimon* and *Vander Luitgaren*, the district court explained, "the Plan does not own the underlying [mutual fund] assets before they are withdrawn," and those assets are not "'transmogrified into plan assets when they are credited to a beneficiary's account.'" Add-9 (quoting *Merrimon*, 758 F.3d at 56); *see also* Add-12 ("Here as well, the underlying assets of the mutual funds belonged to the funds, not the Plans.").

The court alternatively held that even if float were a Plan asset, Fidelity lacked fiduciary obligations with respect to float. Add-14-15. Again relying on *Merrimon* and *Vander Luitgaren*, the court recognized that an ERISA fiduciary satisfies its duties in distributing plan benefits if it "complies with the requirements of the governing agreements" and "provides a beneficiary with 'immediate and

unfettered' access to the promised benefit." Add-14 (quotation omitted). The court concluded that Fidelity had disbursed benefits in the manner required by its Trust Agreements, which directed Fidelity to issue checks or electronic fund transfers to participants. Add-15. The court rejected plaintiffs' argument that Fidelity was instead required to hold the cash paid for mutual fund redemptions in trust for participants, noting, among other things, that the Plans' governing documents explicitly *forbade* Fidelity from retaining uninvested cash for the Plans absent express authorization from the Plan administrator. *Id.* Because Fidelity conveyed withdrawals as dictated by the Trust Agreements, the court concluded that "Fidelity was no longer acting as an ERISA fiduciary" once participants' checks were distributed. *Id.*

SUMMARY OF ARGUMENT

I. Plaintiffs' claims rest on the legal premise that redemption float is a Plan asset. That premise is incorrect, as both the district court and the Eighth Circuit have recognized. Redemptions are paid from mutual fund assets, and those assets do not transmogrify into plan assets when checks are written to withdrawing participants, as *Merrimon* and *Vander Luitgaren* confirm.

Whether a given asset belongs to a plan is determined by ordinary notions of property rights. While the Plans own mutual fund *shares* on behalf of participants, ERISA explicitly provides that the underlying mutual fund assets—including cash

used to pay redemptions—is not a Plan asset. But contrary to plaintiffs' submission, the mutual fund cash does not become a Plan asset upon redemption, while in transit from the mutual fund to the participant, as a matter of ordinary property law.

Under black-letter property-law rules, the seller of an asset does *not* assume ownership of the proceeds when the proceeds are directed to a third-party intended beneficiary. Here, when mutual fund shares are redeemed, the participant is the sole intended beneficiary of the redemption transaction. The cash paid in exchange for redemption is simply transferred from the mutual fund to the participant, with Fidelity facilitating the transfer as intermediary. Because the Plan is not involved in the process, the cash never becomes a Plan asset.

There is also no practical or logical reason why the Plan would assume ownership rights over cash paid solely to facilitate a withdrawal. After all, the entire purpose of the transaction is to *withdraw from the Plan*, not to create a benefit for the Plan or other participants. Asserting ownership during withdrawal also would impose risks and costs on the Plan, including the risk of account loss and the obligation to pay bank fees (which will often exceed float income in today's low interest environment). Indeed, the Trust Agreements here protected the Plan from those burdens by prohibiting the trusts from holding cash deposits absent contrary instructions from the Plan administrator. The transfer process

likewise protected Plans from the risk of loss during the withdrawal process: when a participant requests a withdrawal, the mutual fund transfers its cash into an account registered for the benefit of the mutual funds, not for the benefit of the Plans. Because the Plans did not incur the costs and risks of ownership, no notion of ordinary property rights entitles them to the benefits.

Merrimon and *Vander Luitgaren* confirm that analysis in the specific context of ERISA benefit-plan payments, on materially indistinguishable facts. The benefits in that case were paid in the form of checking accounts supported by assets belonging to the insurers—the assets never "transmogrified" into plan assets while checks awaited payment. Here the benefits were paid in the form of a check supported by mutual fund assets, and they likewise never transmogrified into plan assets while the check remained uncashed.

Plaintiffs' argument that float is a plan asset because Fidelity acted as trustee for the Plans is circular. A trustee under ERISA is necessarily a trustee *of plan assets*, but that function says nothing about whether a particular asset is or is not owned by the plan.

The DOL guidance cited by plaintiffs also does not establish that float is a Plan asset. DOL itself explicitly states that plaintiffs misconstrue that guidance, DOL Br. 19-20, which addresses only the very different situation where a fiduciary actually receives float income (to increase its compensation). Finally, the

necessary implication of plaintiffs' argument—which their brief makes explicit—is that ERISA *requires* that the cash in transition be deposited "into a trust account for the benefit of the Plans and Plan Participants." Pls.' Br. 28; *see id.* at 3, 4 (depositing redemption cash into Plan account was "required by law"). But ERISA does not mandate particular financial arrangements for facilitating mutual fund share redemptions. ERISA simply holds parties to their agreements. While Fidelity and the Plans surely *could have* contracted for the mutual funds to pay redemption cash to the Plans, no such provision is found in these agreements. And, as already noted, account ownership has both costs and benefits, and there are entirely legitimate reasons why plans might prefer the arrangement alleged in the complaint over the arrangement plaintiffs suggest was required.

II. Even if float constitutes a Plan asset while in transit, Fidelity satisfied its fiduciary duties in handling it. *Merrimon* and *Vander Luitgaren* establish that a fiduciary delivering benefits is required only to provide "immediate and unfettered" access to the promised benefit in a manner permitted by the parties' agreement. Plaintiffs do not allege that the manner of disbursement violated the Plan agreements, and Fidelity's delivery of benefits here was no less "immediate and unfettered" than in *Merrimon* and *Vander Luitgaren*. Once Fidelity discharged its duties in accordance with the agreements, the relationship between it (and the mutual funds) and the participants was governed only by state law.

Plaintiffs' contrary arguments lack merit. They first focus on the fact that float generated income during the brief, unavoidable processing period before checks were sent to participants. But in *Merrimon* and *Vander Luitgaren*, this Court held that beneficiaries had "immediate and unfettered" access to their benefits even though they of course had to wait for their checkbooks to arrive in the mail. What matters is that Fidelity processed benefits in a manner permitted by the Plan agreements without diminishing their value. And, of course, plaintiffs' damages are premised not on the single overnight processing period, but on the longer period when Plan participants left checks in their wallets or on their kitchen tables before cashing them. Plaintiffs' second argument relies on *Mogel*, which found a fiduciary breach only because the fiduciary delivered plan benefits in a manner *not* permitted by the plan documents. *Mogel* is as irrelevant here as it was in *Merrimon* and *Vander Luitgaren*.

Moreover, even if, contrary to *Merrimon* and *Vander Luitgaren*, Fidelity's fiduciary duties prohibited it from benefitting from the float process, Fidelity did not do so here. As plaintiffs' own complaint makes clear, Fidelity did not receive any float income. Fidelity first used float income to pay to the bank the account fees incurred in processing withdrawals, and then remitted any excess income to the mutual funds whose funds were being transferred. The complaint, plan documents, and ERISA itself all make clear that Fidelity was authorized to pay the

account fees with float income, even if that income was a plan asset. And it was the mutual funds' shareholders, not Fidelity, that benefitted from any float income in excess of the account fees.

III. DOL's amicus brief asserts an argument distinct from the arguments asserted by plaintiffs. DOL argues that, regardless of whether or not float is a Plan asset on the facts of this case, Fidelity was required to disclose that it was using float income to benefit itself.

At the threshold, any such disclosure-based argument is thrice-waived—plaintiffs did not plead such a claim, pursue such a claim in the district court, or raise it in their opening brief. DOL's argument is also wrong on both the law and the facts. This Court sanctioned the practices in *Merrimon* and *Vander Luitgaren* even though there was no hint that the fiduciaries in those cases disclosed that they were receiving excess income on the assets supporting the beneficiaries' accounts. And on the facts, DOL's theory is explicitly limited to situations where the fiduciary fails to disclose that it is *receiving* float income itself, which is not the case here. Further, regardless of whether disclosure was made in the manner preferred by DOL, the Plans necessarily knew that checks were being written on a checking account and that they never received any income from that account.

STANDARD OF REVIEW

This Court reviews a Rule 12(b)(6) dismissal de novo. *Butler v. Deutsche Bank Trust Co. Ams.*, 748 F.3d 28, 32 (1st Cir. 2014). Though the Court must accept "all facts pled, as well as all reasonable inferences to be drawn therefrom, in the light most favorable to the non-movant," it may disregard "bald assertions" and "unsupportable conclusions." *Id.* (quotation omitted). A complaint must be dismissed if the properly pled facts "fail to state a claim for which relief may be granted." *Id.* The Court may consider facts established by documents that are incorporated by reference into the complaint and matters of public record. *See Beddall v. State Street Bank*, 137 F.3d 12, 17 (1st Cir. 1998).

ARGUMENT

Plaintiffs' brief acknowledges (*e.g.*, Pls.' Br. 17) that their ERISA claims require them to establish (a) that redemption float was a Plan asset, and (b) that Fidelity was acting as a fiduciary in its handling of float income. As the district court properly held, the complaint fails to allege facts sufficient to establish either essential point.

I. ON THE FACTS ALLEGED, REDEMPTION FLOAT IS NOT A PLAN ASSET

In *Tussey*, the Eighth Circuit addressed the same facts alleged here and concluded that, under ordinary notions of property rights, redemption float is not a Plan asset, for the simple reason that withdrawal and redemption involve the

transfer of the mutual fund's own assets to the withdrawing participant. Cash paid in exchange for share redemptions was not a Plan asset when the cash was in the mutual fund's accounts, and it does not somehow become a Plan asset when the mutual fund sends the cash to a withdrawing participant. At no point during the transfer did the Plan insert itself as owner of the funds in transit, and *Merrimon* and *Vander Luitgaren*, like *Tussey*, reject the notion that ERISA somehow transmogrifies assets owned by another party into plan assets.

A. Under Ordinary Property Law Principles, Cash Paid From Mutual Fund Assets To Withdrawing Participants Upon Redemption Of Their Shares Does Not Become A Plan Asset While In Transit

There is no ERISA-specific definition of plan assets. Instead, "'the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law.'" *Merrimon*, 758 F.3d at 56 (quoting U.S. Dep't of Labor, Advisory Op. No. 93-14A, at *4 (May 5, 1993)); *accord Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 105-06 (2d Cir. 2011). Under ordinary property law principles, the most significant indicator of ownership is whether the party is assigned to bear the risk of loss. *See Grande v. St. Paul Fire & Marine Ins. Co.*, 436 F.3d 277, 282 (1st Cir. 2006); *Calloway v. Comm'r of IRS*, 691 F.3d 1315, 1329-30 (11th Cir. 2012); *Sollberger v. Comm'r of Internal Revenue*, 691 F.3d 1119, 1124 (9th Cir. 2012); *In re Qualia Clinical Serv., Inc.*, 441 B.R. 325, 330-31 (B.A.P. 8th Cir. 2011); *Nickey Gregory Co. v. AgriCap, LLC*, 597 F.3d 591, 602

(4th Cir. 2010); *Freede v. Comm'r of Internal Revenue*, 864 F.2d 671, 676 (10th Cir. 1988).

As the district court concluded here, and as the Eighth Circuit held in *Tussey*, ordinary notions of property rights make clear that the cash a mutual fund pays to a withdrawing participant for redemption of her shares does not become a Plan asset while it is in transit from the mutual fund to the withdrawing participant.

All agree, and ERISA explicitly provides, that while mutual fund *shares* held by the plan on its participants' behalf constitute assets of the plan, the cash and other assets owned by the mutual fund itself are *not* assets of the plan, any more than Apple's Cupertino headquarters constitute an asset of a plan that owns Apple stock. *See* 29 U.S.C. § 1101(b)(1) ("In the case of a plan which invests in any security issued by a [mutual fund], the assets of such plan shall be deemed to include such security, but shall not, solely by reason of such investment, be deemed to include any assets of such [mutual fund]."); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 96 (1993) (§ 1101(b)(1) excludes "without qualification" "any assets" of mutual fund); *Boeckman v. A.G. Edwards, Inc.*, 2007 WL 4225740, at *2 (S.D. Ill. Aug. 31, 2007) ("when a plan invests in a mutual fund, the plan assets include the fund shares, but do not include the underlying assets of the fund"); *Leimkuehler v. Am. United Life Ins. Co.*, 752 F. Supp. 2d 974, 980 (S. D. Ind. 2010) ("the expense-ratio fees were collected from

the assets of the mutual funds which, as provided in ERISA, 29 U.S.C. § 1101(b)(1), are not assets of the plans"). Accordingly, it is undisputed that, prior to the redemption, the cash at issue was an asset of the mutual funds, not the Plans.

When mutual fund shares are redeemed on a participant's behalf, the cash paid for the redemption comes directly from the mutual fund's own assets. A-25 (Compl. ¶ 33(a)).[6] As the district court recognized, the question here is whether that cash—which was a mutual fund asset the moment before redemption—turns into a Plan asset upon redemption, while it is being transferred from the mutual fund to the participant. As a matter of ordinary notions of property rights and First Circuit authority, the answer is no.

Plaintiffs say the answer is yes—the cash paid by the mutual fund becomes a Plan asset at the precise moment shares are redeemed. Their sole theory is simple but profoundly flawed: because the shares themselves are Plan assets, plaintiffs

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[6] Plaintiffs' brief could be read to suggest that mutual funds do not pay for redemptions out of their own cash, or even that mutual funds do not own cash at all, but only stocks or bonds, which they must sell to pay redemptions. Pls.' Br. 23-25. That suggestion is incorrect. Cash obviously goes in and out of mutual funds every day. Shareholders make purchases of additional shares, and funds sell securities that the portfolio managers no longer wish the fund to own. And that cash is available and used for making redemptions. *See, e.g.*, Contrafund SAI, *supra* note 1 (disclosing that "fund may hold uninvested cash"); Investment Company Institute, *Frequently Asked Questions About Mutual Fund Liquidity* ("managers must stand ready to meet … redemption requests" because a "defining feature of mutual funds is their daily redeemability," and "[i]n practice, redemption proceeds are usually paid within one or two days of the redemption request"), *available at* https://www.ici.org/faqs/faq/mfs/ci.faqs_mf_liquidity.print.

simply *assume* that the cash paid out upon their redemption necessarily transforms from an asset of the mutual fund to an asset of the Plan. That single assumption underlies plaintiffs' entire plan asset argument, *see* Pls.' Br. 21-24, yet plaintiffs cite nothing to support it. They merely insist, repeatedly, that it is "illogical" to "state that the cash received in redemption of those shares is not also a plan asset." Pls.' Br. 22; *see id.* at 23 ("Logically, then, it follows that once the Plan ceases to be the owner of the shares, because they have been sold, it becomes the owner of the proceeds of that sale, until such time as the proceeds are distributed to participants."); *id.* at 35 ("it is axiomatic that when the owner of an asset sells it for cash, the owner continues to own the cash").

Plaintiffs' assumption is, however, quite incorrect, in multiple respects. To start, under ordinary common-law property rules, it is decidedly *not* true that an asset owner who sells the asset necessarily owns the sale proceeds. Rather, a property owner can sell property and direct the transfer of proceeds to a third party—an "intended beneficiary"—without the seller itself assuming an ownership interest in the proceeds. *See* Restatement (Second) of Contracts § 302, ill. 8. For example, if the owner of a car sells it for cash, and directs the buyer to pay the cash directly to a third party, the seller does not assume title to the cash while it is in transit. The same is true here, where the cash is moving from the mutual fund's account to the withdrawing Plan participant. The Plan's direction, like the car-

owner's, is that the cash paid upon redemption be transferred directly to someone else. Neither the car's original owner nor the Plan assumes an ownership interest in the cash during the transfer.

Plaintiffs fail to recognize this fundamental principle, no doubt because their entire argument elides the point that the transaction is being conducted to facilitate a participant's *withdrawal* from the Plan. Add-12 ("Plaintiffs' argument appear[s] to ignore that the assets at issue were in fact withdrawn from the plan."). The transfer accordingly is from mutual fund to withdrawing participant; there is no logical or practical reason the Plan should obtain a benefit from a transaction intended solely to withdraw from the Plan—especially a benefit that even the withdrawing participant concededly cannot claim. It is settled that the payee of a check is not entitled to interest while it remains uncashed. *See Tussey*, 746 F.3d at 340; U.C.C. § 3-112(a); Richard B. Hagedorn & Henry Baily, Brady on Bank Checks ¶ 4.05 (rev. ed. A.S. Pratt 2012); *see*, *e.g.*, Prospectus for Fidelity Contrafund (Feb. 20, 2015) ("You will not receive interest on amounts represented by uncashed redemption checks.").[7] Plaintiffs themselves recognize that rule and expressly admit that a withdrawing participant has no right to interest for the period the check remains uncashed. Pls.' Br. 17, 39. Plaintiffs' theory instead is

[7] *Available at* http://www.sec.gov/Archives/edgar/data/24238/000002423815000006/main.htm.

that interest on cash being transferred to a withdrawing participant must be used to benefit *other* participants in the Plan—everyone, that is, *but* the party whose own transaction generated the interest. Pls.' Br. 10 ("Day 10" graphic). Nothing in ordinary property law or ERISA supports that nonsensical result.

There are also very good reasons a plan may not want to assert the ownership rights that would entail the interest benefit. As noted above, with ownership comes the risk of loss—specifically, the risk that cash paid for redemption could be lost while being processed and transferred through banking intermediaries. This risk is more than hypothetical—during the class period, which includes the financial crisis, over 500 commercial banks failed, *see* Fed. Deposit Ins. Bank Corp., Failed Bank List,[8] and major financial intermediaries such as Lehman Brothers and Bear Stearns collapsed. Notably, Fidelity's mutual fund disclosures explicitly provide, in a section entitled "Transfer Agent Bank Accounts," that "a fund faces the risk of loss of these balances if the bank becomes insolvent." *See, e.g.*, Contrafund SAI, *supra* note 1. The owner of any bank account also bears the risk that income on the account will not be enough to cover the bank fees. In today's low interest rate environment, that is a reality for many accountholders, who must still pay the bank its fees even though those fees may far exceed the amount they are earning in interest. *See* Juliet Chung & Sarah Krouse,

[8] *Available at* www.fdic.gov/bank/individual/failed/banklist.html.

Big Banks to America's Firms: We Don't Want Your Cash, Wall St. J., Oct. 18, 2015; Emily Glazer, *J.P. Morgan to Start Charging Big Clients Fees on Some Deposits*, Wall St. J., Feb. 24, 2015.

The Trust Agreement here affirmatively prevented the Plan from assuming that kind of risk by prohibiting the Trust from holding *any* cash, absent specific directions from the Plan administrator. The Trust Agreement "establishes a trust to hold the assets of the Plan that are invested in Permissible Investments." Supp-109 (Columbia Air Basic Plan Document § 20.01); *see also* Supp-109 (*id.* § 20.02) (requiring the "trust fund" to "be fully invested . . . in fund shares"). Fidelity was authorized "to retain uninvested [] cash" only if expressly directed to do so by the Plan administrator. Supp-110 (*id.* § 20.04(c)).[9] By disabling the Trust from holding cash, the Plan avoided responsibility for the loss of funds being transferred from a mutual fund to a withdrawing participant.

The transfer process itself further confirms the lack of any Plan ownership interest. Upon redemption of shares, the mutual fund transfers its cash into an account registered to FIIOC (the transfer agent entity), *on behalf of the mutual funds that were transferring the cash*. Plaintiffs correctly alleged the true

[9] Plaintiffs suggest that Fidelity *was* authorized to hold uninvested cash for the Plans (Pls.' Br. 42-43), but the general provisions they cite do not trump the provisions specifically dealing with uninvested cash, and this Court need not credit assertions that misconstrue a document referenced in the complaint. *See Beddall*, 137 F.3d at 17.

beneficial ownership of the account in prior iterations of their complaint, *see* Doc. 67 ¶ 44(a), and conceded the point in briefing below, Doc. 130 at 5 (FIIOC "registered the Deposit Accounts in its own name for the benefit of itself *and the mutual funds*" (emphasis added)). And in *Tussey*, the case from which plaintiffs drew their factual allegations and legal theories, the appellate court correctly observed that the account was registered to FIIOC "for the benefit of the investment options." *Tussey*, 746 F.3d at 340. That registration protected the Plan from risk of loss in the account funds, for if the bank holding the redemption funds failed, the mutual fund would be responsible for making good on the participant's check. *See*, *e.g.*, U.C.C. § 3-412 (issuer of check liable for amount of instrument). Because the *mutual funds* bore the risk of loss during transfer, the *mutual funds* were entitled to, and received, any net income generated during the transfer process. *See Anschutz v. Comm'r of Internal Revenue*, 664 F.3d 313, 324 (10th Cir. 2011) (which party "receives the profits" from property, and more generally "how the parties treat the transaction," are indicators of ownership); *Calloway*, 691 F.3d at 1320 (same).

Fidelity thus simply facilitates the mutual funds' payment to the participant. All mutual funds, whether operating in the 401(k) context or not, have transfer agents to serve this function. *See supra* at 8; *see also* FDIC Trust Examination

Manual § 11 - Role of the Transfer Agent.[10] And FIIOC—the entity to whom the accounts were registered—functions as transfer agent for the mutual funds. *See* Contrafund SAI, *supra* note 1 (disclosing transfer agent agreement); Uniform Form for Registration as a Transfer Agent and for Amendment to Registration Pursuant to Section 17A of the Securities Exchange Act of 1934, Fidelity Investments Institutional Operations Company, Inc. (Sept. 16, 2015).[11] The fact that a transfer is facilitated by a transfer agent does not alter ownership rights in the cash during transition, and it certainly did not confer on the Plans ownership rights in the accounts FIIOC employed to facilitate the transition.[12]

Plaintiffs also repeatedly note that Fidelity acted as trustee of Plan assets. *See, e.g.*, Pls.' Br. 15-16. But trustee status does not determine which assets were owned by the Plans. As trustee, Fidelity was authorized to hold, on the Plans' behalf, only those assets owned by the Plans, *id.* at 16, which says nothing about

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[10] *Available at* https://www.fdic.gov/regulations/examinations/trustmanual/section_11/rta_manualroleoftransferagent.html.

[11] *Available at* http://www.sec.gov/Archives/edgar/data/862124/000086212415000015/xslFTAX01/primary_doc.xml.

[12] Plaintiffs fail to acknowledge their prior concession that these accounts were registered to the mutual funds. *See supra* at 29-30. But any attempt to distance themselves from that concession (even if it were permitted) cannot change the outcome, because it is undisputed that *the Plans* did not own the accounts. And because the Plans did not incur the costs and risks associated with owning the accounts, they cannot now claim a right to the corresponding benefits (i.e., interest).

whether the float assets at issue here were or were not owned by the Plans. Indeed, the Fidelity entity that acted as trustee of Plan assets (FMTC) is separate from the transfer agent entity that facilitated the withdrawal transaction and handled the float (FIIOC).

Plaintiffs also rely (Pls.' Br. 22-23) on *Tussey*'s observation, made in the context of "depository" float transactions, that one cannot typically have simultaneous ownership of both an asset and the cash exchanged for that asset. 746 F.3d at 339-40. But in transactions involving *payment by check*, simultaneous ownership is the norm—the buyer generally will own both the asset and the money backing his check until the check is cashed.

To be sure, Fidelity and the Plans could have contracted for the arrangement that plaintiffs want to impose on them—one in which a mutual fund would pay redemption cash *to the Plans*, which would then assume ownership of the cash while in transit to the withdrawing participant. In that event, the Plans' trust documents would have authorized the holding of uninvested cash, the checking accounts would have been registered on behalf of the Plans, the Plans would have owed the banking fees on that account when they exceeded the interest earned, and the Plans would have carried the risk of account loss. None of that happened here, because the Plans did not possess an ownership interest in the redemption cash.

B. *Merrimon* And *Vander Luitgaren* Confirm That Redemption Float Is Not A Plan Asset

This Court's recent decisions in *Merrimon* and *Vander Luitgaren* confirm that float is not a Plan asset. Those cases involved ERISA-governed plans that held life insurance policies for the benefit of plan participants and their beneficiaries. When a claim under the life insurance policy was approved, the insurer—an ERISA fiduciary—would provide the beneficiary her benefit in the form of a checking account (called a "retained asset account") that was credited with the full value of the claim, and would send the beneficiary a checkbook that she could use to draw on the account at her discretion. *Merrimon*, 758 F.3d at 51. The insurer also paid the beneficiary a small amount of interest on the account, but all income in excess of that small amount was retained by the insurer for itself. *Id.*

The beneficiaries sued, claiming that the insurer was a plan fiduciary and that the assets supporting their accounts were plan assets, and thus beneficiaries were entitled to *all* of the income earned from investment of those assets. This Court rejected that claim, holding that, even though the life insurance policies under which benefits were paid were plan assets, and even though the insurer acted as an ERISA fiduciary in setting up the account and providing the checkbook, the assets supporting the account thereafter were *not* plan assets. *Id.* at 56. The Court's analysis started from the premise that although the *policies* were plan assets, the "funds held in the insurer's general account [were] not plan assets"

because, under ERISA, "the assets of such plan shall be deemed to include such [life insurance] policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer." *Id.* (quoting 29 U.S.C. § 1101(b)(2)). When the insurer established a retained asset account, the Court explained, the insurer simply credited the account with the value of the insurance benefit and supported the account with *its own* underlying assets—the assets never became part of the plan: "There is no basis, either in the case law or in common sense, for the proposition that funds held in an insurer's general account are somehow transmogrified into plan assets when they are credited to a beneficiary's account." *Id.* Put differently, the insurer's payment of a life insurance benefit represented a transfer from the insurer to the beneficiary—at no point in that transition did "the plan itself" possess any "ownership interest in the assets backing the RAA." *Id.*; *see Vander Luitgaren*, 765 F.3d at 61 (adopting *Merrimon*'s analysis and result); *Faber*, 648 F.3d at 106 ("'retained assets' are not 'plan assets' because the Plans do not have an ownership interest—beneficial or otherwise—in them").

This case is on all fours. Like the insurance company in *Merrimon*, Fidelity is a fiduciary. Here, as in *Merrimon*, the Plan owned a legal instrument that entitled the beneficiary to payment upon the satisfaction of a condition—in *Merrimon*, a life insurance contract requiring payment to the beneficiary upon a

participant's death; here, a mutual fund share requiring payment to the participant upon the participant's withdrawal and share redemption. Here, as in *Merrimon*, the payment that the relevant Plan-owned instrument required was to be made from funds that were not themselves Plan assets—in *Merrimon*, a payment from an insurer's general accounts, which are not plan assets under 29 U.S.C. § 1101(b)(2); here, a payment from a mutual fund's assets, which are not plan assets under the parallel § 1101(b)(1). And here, as in *Merrimon*, the payment was made from the payor to the beneficiary—in *Merrimon*, the beneficiary received a check*book*; here, the beneficiary receives a check. In neither case did the plan take ownership of the cash during the process. It follows that here, as in *Merrimon*, the mutual funds' assets "are [not] somehow transmogrified into plan assets when they are credited to a beneficiary[]." 758 F.3d at 56. Rather, as in *Merrimon*, it "is the beneficiary, not the plan itself, who has acquired an ownership interest in the assets backing the" benefit while those assets are in transit. *Id.* And as this Court explained there, "a beneficiary's assets are not plan assets," "[u]nless the plan documents clearly evidence a contrary intent." *Id.*

Merrimon and *Vander Luitgaren* did not turn on any principles unique to the life insurance context, and their analysis applies equally in the context of a trust. *Merrimon* explicitly acknowledged that its analysis was "informed by the common law of trusts," and it considered on the merits many arguments that relied on

"general trust principles." *Id.* at 53, 59. This Court's analysis in those cases governs here.

Plaintiffs' effort to distinguish *Merrimon* and *Vander Luitgaren* is unpersuasive. They argue that Fidelity's role here is different from the insurers' in those cases, because, unlike the insurers, Fidelity bore no risk and had no obligation to pay anything to Plan participants. Pls.' Br. 27-28. That is true but irrelevant. It is the *mutual funds* here that are in the same position as the insurers in *Merrimon* and *Vander Luitgaren*—it is the mutual funds that were obligated to pay the redemption. 17 C.F.R. § 270.22c-1. And the mutual funds were required to fund redemptions using mutual fund assets, not Plan assets.[13] Further, it is the mutual funds' assets that are transferred to beneficiaries when shares are redeemed, just as it was the insurers' assets that were transferred to beneficiaries when life insurance policies were redeemed. *Merrimon v. Unum Life Ins. Co. of Am.*, 845 F. Supp. 2d 310, 317 (D. Mass. 2012) (defining the "critical question" as "whether the proceeds due to beneficiaries *become* plan assets"). In neither instance did the

[13] For example, if a mutual fund lacks sufficient liquid assets to pay the amount owed on redemption, it has various options—recited in the prospectus—for resolving that situation, but the mutual fund could never reach into the 401(k) Plan's own assets to satisfy the fund's redemption obligations. *See, e.g.*, Contrafund SAI, *supra* note 1 (during periods of high redemption activity, fund may be required to "sell securities or to invest cash at a time when it may not otherwise desire to do so").

plans ever intercede to claim an ownership interest in those assets during the transfer.

Ultimately, while plaintiffs insist that the clear "lesson" of *Merrimon* and *Vander Luitgaren* is that the party obligated to pay the benefit may receive float income (Pls.' Br. 28), they cite nothing in either case supporting that interpretation, as opposed to the more fundamental rule that ordinary notions of property rights determine asset ownership—a principle that compels dismissal of the complaint here.

C. The DOL Guidance Cited By Plaintiffs Does Not Establish That The Redemption Float At Issue Here Is A Plan Asset

Plaintiffs also assert that DOL statements dating back to 1993 support their position that float is necessarily a Plan asset. Pls.' Br. 29-33. The statements say no such thing, as DOL itself confirms. DOL Br. 19-20. Rather, the DOL statements merely establish that a plan trustee cannot use float income *to unilaterally increase the trustee's compensation*, which did not happen here, as plaintiffs' own complaint establishes. *See infra* at 49-50.

Plaintiffs rely primarily on DOL Advisory Opinion No. 93-24A, issued on September 13, 1993. In the facts addressed in that opinion, the assets in question—"pooled fund assets"—were plan assets at the outset. Add-52. When the assets had to be liquidated to pay benefits, the trustee, exercising discretion conferred on it by the plan, took the proceeds into its own account and wrote the

beneficiary a check, while continuing to earn income on the funds in its own account before the beneficiary cashed her check. Add-51. On those facts, DOL advised that by using "the 'float' on benefit checks" to generate income for itself, the trustee was dealing in plan assets for its own benefit, in violation of ERISA § 406(b)(1). Add-52.

Advisory Opinion 93-24A thus focused on the trustee's use of float income to increase its own compensation without disclosure to the plan, *not* on whether or why the float income on those facts constituted a plan asset. As DOL itself later described the opinion, "the Department expressed the view that a trustee's *exercise of discretion to earn income for its own account* from the float attributable to outstanding benefit checks constitutes prohibited fiduciary self-dealing under section 406(b)(1) of ERISA." Add-60 (DOL Field Assistance Bulletin 2002-03) (emphasis added). Nothing about Advisory Opinion 93-24A even speaks to the question of how to define plan assets, much less resolves it, as the district court recognized. Add-11.

The same point is underscored by DOL's follow-up 1994 Information Letter, also cited by plaintiffs. Add-58. That letter, which responds to an American Bankers Association editorial concerning Advisory Opinion 93-24A, reiterates the opinion's central message that a plan fiduciary may not "handle plan assets in such a way as to benefit itself." *Id.* This letter, like the Advisory Opinion it was

clarifying, thus did not address what is and is not a plan asset, but only what use could be made of those assets that are plan assets. The letter also clarified that a fiduciary *may* receive float income, so long as it discloses the practice, because then the "use of the float would not be self-dealing." Add- 59.

The third document on which plaintiffs rely, DOL Field Assistance Bulletin 2002-3, is the most specific of all—its whole point is to describe the circumstances under which "a service provider may *receive compensation* in the form of float." Add-60 (emphasis added). Again, DOL's sole concern was to ensure that the arrangement does "not permit the service provider to affect the amount of its compensation" through the unilateral exercise of discretion in handling float. *Id.* Nothing about the Bulletin decides or analyzes plan asset status. To the contrary, the Bulletin emphasizes that self-dealing concerns arise from a service provider's unilateral use of float income to increase its compensation "*without regard* to the status of the funds after they are placed in a disbursement or other account." Add-61 (emphasis added).

Finally, DOL's amicus brief in this very matter provides the conclusive answer: plaintiffs "erroneously state," DOL observes, "that the DOL guidance has consistently taken the position that float income derived from plan distributions is a plan asset." DOL Br. 19-20. As DOL explains, its position on this issue "does *not* depend on whether the float income is a plan asset." *Id.* at 16. DOL expresses

a different concern, which is addressed below, *infra* at 51-57, but the point for present purposes is that DOL itself confirms that none of its guidance documents addressing float takes the position that float necessarily is a plan asset.

D. Plaintiffs' Theory That ERISA *Requires* Plans To Treat Float As A Plan Asset Is Contrary To ERISA And Bad For Plan Participants

Plaintiffs' theory that float necessarily must be treated as a plan asset—regardless of the actual arrangement between the plan sponsor and service provider—also cannot be reconciled with ERISA's fundamental premises and objectives. Plaintiffs argue that 401(k) plans are *required* to act as intermediaries in processing participant withdrawals. According to plaintiffs, because the "true payor" when a participant withdraws from a plan and redeems her mutual fund shares must be "the Plan itself," Pls.' Br. 17, Fidelity is legally required to deposit redemption proceeds "into an account … held in trust for the benefit of the Plans or Plan Participants." Pls.' Br. 23; *see id.* at 3 (checking account must be in plan's name "as required by law"); *id.* at 28 ("Fidelity . . . was obligated to deposit the cash into a trust account for the benefit of the Plans and Plan participant."). In other words, plaintiffs argue that when a participant withdraws and directs redemption of shares held on her behalf, the mutual fund must first pay cash to *the Plan*, which must assume ownership of the cash while forwarding it on to the participant.

Plaintiffs' theory is fundamentally inconsistent with the basic operation of ERISA. As this Court and the Supreme Court have observed, ERISA was enacted not to mandate particular benefits or plan structures, but to hold employers to the contractual arrangements they made in establishing employee benefit plans. *See Vander Luitgaren*, 765 F.3d at 64 ("'ERISA's principal function [is] to protect [] contractually defined benefits.'" (quoting *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1548 (2013)); *Merrimon*, 758 F.3d at 59 (fiduciary duties "connected to the distribution of plan benefits . . . relate principally to ensuring that monies owed to beneficiaries are disbursed in accordance with the terms" of plan documents). ERISA thus does not dictate or fine-tune private business practices—to the contrary, the voluntarily negotiated governing documents are "at the center of ERISA." *McCutchen*, 133 S. Ct. at 1548.

In particular, "'ERISA does not mandate any specific mode of payment for retirement benefits.'" *Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452, 1457 (10th Cir. 1991) (quoting *Oster v. Barco of Cal. Emps.' Ret. Plan*, 869 F.2d 1215, 1218 (9th Cir. 1988)). Rather, "sponsors of ERISA plans have considerable latitude" in determining the "methods for paying benefits." *Merrimon*, 758 F.3d at 58-59. It would defeat this foundational premise of the statute to hold that float must be treated as a plan asset, regardless of trust document terms and risk of loss.

The problem of risk of loss is especially acute here. As noted above, hundreds of banks failed during the class period. Plaintiffs would compel plans to bear that risk, in exchange for income on short-term investments that is currently negligible to nonexistent—likely often not even enough to cover the costs of the checking accounts themselves. No principle of property law, and certainly nothing in ERISA, required the Plans here to bear those risks and burdens. Plaintiffs suggest that the Plans actually could have it both ways—i.e., they could avoid account ownership and its concomitant risks and burdens, yet still claim the benefits of ownership (i.e., interest). Pls.' Br. 39, 44. But ERISA plan assets are defined according to ordinary notions of property rights, and plaintiffs cite no ordinary property-rights principle under which a party can obtain all the benefits of ownership without bearing any of the costs.

II. FIDELITY DID NOT BREACH ANY FIDUCIARY DUTY CONCERNING USE OF FLOAT

As the district court recognized, there is a second, independent reason Fidelity did not breach its fiduciary duties handling float, even if float is considered a Plan asset: once Fidelity properly complied with its contractual obligation to provide a withdrawing participant with a check for the full amount of her benefits, Fidelity's fiduciary duties were discharged, and Fidelity thus had no additional duty to earn and pay interest on the funds supporting participants'

checks. That rule follows directly from this Court's decisions in *Merrimon* and *Vander Luitgaren*, which plaintiffs try but fail to distinguish.

A. Fidelity Provided Participants With Immediate And Unfettered Access To Their Benefits As Required By This Court's Cases

Merrimon and *Vander Luitgaren* both hold that, once a fiduciary complies with the delivery requirements of the plan documents and provides a beneficiary with "immediate and unfettered" access to the promised benefit, it has discharged its fiduciary duties concerning the benefit. In both cases, the plan agreements either required or permitted the defendant to pay the death benefit by "mak[ing] available to the beneficiary a retained asset account." *Merrimon*, 758 F.3d at 59 (emphasis omitted); *see Vander Luitgaren*, 765 F.3d at 64. This Court explained that once the defendants fulfilled that obligation by establishing the retained asset accounts and crediting the accounts with the full amount owed, their "duties as an ERISA fiduciary ceased," and they no longer had any duties to breach in their handling of the funds in the retained asset accounts. *Merrimon*, 758 F.3d at 59. Any further connection the defendants "had to the beneficiaries constituted a straightforward creditor-debtor relationship," one "governed not by ERISA but by state law." *Id.*

Once a fiduciary does what the plan agreements require with respect to plan assets, it has discharged its ERISA-fiduciary responsibilities concerning those assets. *See Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 425-26 (3d Cir.

2013) ("Nothing in the [plans], or in the complaint, provides any indication that after the [retained asset accounts] were established either [party] contemplated an indefinite fiduciary relationship" (quoting *Faber*, 648 F.3d at 105)); *id.* at 426 ("Lincoln was not managing or administering the plan when it invested the retained assets"). Once the defendants in *Merrimon* and *Vander Luitgaren* created the retained asset account and gave beneficiaries access to their benefits, their work—and status—as fiduciaries was complete. They accordingly did not have a continuing fiduciary obligation to invest funds underlying the account, earn income, and provide that income to participants.

The same logic applies here. The governing documents provide that Fidelity's obligation was to "process all approved withdrawals and mail distribution checks, or remit distributions as direct deposits to Participants." Supp-148 (Columbia Air Serv. App'x D ¶ 1(c)). Plaintiffs do not allege that Fidelity failed to comply with those requirements. And Fidelity clearly provided "immediate and unfettered access to the promised benefit" by providing either an electronic disbursement or a check. *Vander Luitgaren*, 765 F.3d at 65. *Vander Luitgaren* holds that a check*book* constitutes "immediate and unfettered access" to promised benefits; an actual lump-sum *check* for the full benefit provides even more immediate access. As in *Merrimon* and *Vander Luitgaren*, Fidelity delivered benefits in a method permitted by the Plan documents, and it complied with its

fiduciary duties by providing participants with unfettered access to their benefits. Fidelity thus had no further obligation to pay interest to the Plans on funds supporting the checks while they remained uncashed.

This is not to say, of course, that Fidelity had *no* fiduciary duties with respect to the delivery of checks and supervision of the assets supporting them. The Plan documents required Fidelity to "process all approved withdrawals and mail distribution checks." Supp-148 (Columbia Air Serv. App'x D ¶ 1(c)). Fidelity thus was obliged to ensure that checks were prepared and delivered in a prompt and commercially reasonable manner and were supported by accounts in legitimate, accredited financial institutions. Fidelity could not provide checks written on an account in a facially unreliable bank, or delay unreasonably in the transmission of the checks. As *Vander Luitgaren* put it, a fiduciary's delivery of a benefit may "not unfairly diminish, impair, restrict or burden the beneficiary's rights." 765 F.3d at 65. A failure to ensure prompt and safe delivery of benefits thus might give rise to a claim for breach of fiduciary duty under ERISA, but a claim of that nature would not establish that redemption proceeds were Plan assets, or that Fidelity would have ERISA-governed duties concerning those proceeds once Fidelity provided a safe and timely check for withdrawal benefits. As *Merrimon* and *Vander Luitgaren* make clear, the relevant relationship at that point

is only "in the nature of a debtor-creditor relationship, governed not by ERISA but by state law." *Merrimon*, 758 F.3d at 58.

The similarity between this case and *Merrimon* and *Vander Luitgaren* is fundamental. In each of these cases, the fiduciary did exactly what it contracted to do—it ensured the payment of benefits by delivery of a written check or checkbook. The plaintiffs then sought to use an ERISA lawsuit to impose additional, extra-contractual requirements with regard to the period while the checks remained uncashed—requirements that the parties themselves had not chosen to negotiate. As this Court stated in *Vander Luitgaren*, so long as the beneficiaries' right to the money is immediate and unfettered, ERISA does not permit a court to rewrite a contract to create additional terms.

B. Plaintiffs Misinterpret *Merrimon* And *Vander Luitgaren*

Plaintiffs seek to distinguish the *Merrimon*/*Vander Luitgaren* rule that a fiduciary's duties with respect to the processing of withdrawals are discharged (as relevant here) upon completion of its contractual duties to provide benefits in their promised form. Their efforts are unpersuasive. First, plaintiffs argue that part of the float income here was generated during the overnight processing period before Fidelity "issued any distribution checks or electronic payments to plan participants." Pls.' Br. 41. Plaintiffs' singular focus on that pre-check period essentially concedes that the *Merrimon/Vander Luitgaren* rule does apply to the

(typically much longer) period after a check is written, but before it is cashed. And that post-check period is where plaintiffs (unsurprisingly) focus their damages claim. *See* A-26 (Compl. ¶ 34) (defining float to include both amounts).

Further, the brief processing period that plaintiffs now emphasize is required to redeem mutual fund shares—like many other financial instruments—for cash no matter what delivery method is employed. Indeed, in *Merrimon* and *Vander Luitgaren*, this Court regarded the beneficiaries there as having "immediate and unfettered access" to their benefits even though they had to wait (while the funds supporting their account were earning interest) at least until they received their mailed checkbooks to actually access their accounts. *Merrimon*, 758 F.3d at 51. In short, the short period before writing a check cannot be the difference between this case and *Merrimon* and *Vander Luitgaren*, because it is no difference at all—similar delay necessarily existed in those cases as well.

Second, plaintiffs assert that float income, if treated as a Plan asset, would be "subject to Fidelity's fiduciary obligations under this Court's decision in *Mogel v. UNUM Life Ins. Co. of Am.*, 547 F.3d 23, 26 (2008)." Pls.' Br. 41. *Mogel* did hold that the insurer there breached its fiduciary duties in handling float, but only because the insurer *violated the payment method mandated by the governing plan documents*—the plan documents required a lump sum payment, and the insurer instead used retained asset accounts. *See Merrimon*, 758 F.3d at 56-57. As the

Court explained in *Merrimon*, *Mogel* turned entirely on the fiduciary's failure to provide a lump sum payment as required by the plan. "As has been widely recognized, this particularized policy provision [requiring lump sum payments] explains the court's holding that the insurer [in *Mogel*], which had not paid the policy proceeds in a manner permitted by the plan documents, had violated its fiduciary duties." *Id.* at 57; *see Faber*, 648 F.3d at 106-07 ("We agree with the DOL and the district court that *Mogel* is better understood as predicated on the fact, not present here, that the insurer failed to abide by plan terms requiring it to distribute benefits in lump sums."); *accord Vander Luitgaren*, 765 F.3d at 65 n.5. Because it is undisputed that Fidelity fulfilled its contractual obligations strictly and without fail, *Mogel* has no application here.

C. In Any Event, Fidelity Did Not Benefit From Using Float Income To Pay Bank Account Fees And Remitting The Remainder To The Mutual Funds

Even if ERISA barred Fidelity from benefiting from the use of float even after providing participants with full access to their benefits, *but see Merrimon* and *Vander Luitgaren* (discussed *infra* at 55), Fidelity did not use float for its own benefit here. Contrary to plaintiffs' assertion (Pls.' Br. 44), and *unlike* the fiduciaries in *Merrimon* and *Vander Luitgaren*, Fidelity *did not receive any income* from the cash as it was processed and distributed. As the complaint itself states, Fidelity used float income first to pay account fees incurred to process the transfer

of redemption proceeds from the mutual funds to the withdrawing participants, and then any excess float income was remitted to other accounts for the mutual funds whose payments were being transferred. A-23, 25-26 (Compl. ¶¶ 28, 32, 35-36, 38). Put differently, the mutual funds received any remaining float income after fees on the accounts that generated that income—accounts registered for the benefit of the mutual funds—were paid. To repeat: Fidelity did not receive any of the float income.

Plaintiffs do not actually disagree. They instead assert that Fidelity indirectly *benefited* from use of the float income, because (they say) Fidelity was required to bear the bank-account fees itself, and paying those fees with the float income relieved Fidelity of that burden. Pls.' Br. 45; A-25-26 (Compl. ¶¶ 32, 37). But Fidelity was not required to bear those fees. To the contrary, by asserting that float income is a Plan asset, plaintiffs are conceding that Fidelity was entitled to use it to pay Plan expenses. The complaint itself acknowledges that the trust agreements specifically authorized Fidelity to use Plan assets to "defray[] reasonable plan expenses," A-22 (Compl. ¶ 25); *see* Supp-109 (Columbia Air Basic Plan Document § 20.03) (authorizing Fidelity to use plan assets to "defray[] the reasonable expenses of administering the Plan"). The exemplary agreement here further states, in the section titled "Compensation and Expenses of Trustee," that "any and all expenses … reasonably incurred by the Trustee [i.e., Fidelity] in

connection with its duties and responsibilities hereunder shall … be paid from the Trust." Supp-112 (Columbia Air Basic Plan Document § 20.12). ERISA, too, expressly permits a fiduciary to use the "assets of a plan" for the purpose of "defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1). Any conception of "reasonable" Plan expenses necessarily would encompass fees for checking accounts that plaintiffs themselves insist were "integral" to the withdrawal/redemption services Fidelity was facilitating. A-26 (Compl. ¶ 35). Thus, even if the float had been placed in Plan accounts, Fidelity was authorized to defray the costs of those accounts using Plan assets.

Nor is there merit to plaintiffs' implicit suggestion that Fidelity gained some form of personal benefit when it returned excess float income to the mutual funds on whose behalf the checking accounts were registered. A mutual fund is not owned by its investment advisor—it is owned by its public shareholders. *See Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2299 (2011). Even as to Fidelity-advised funds, Fidelity itself did not benefit personally—the fund's shareholders did. What is more, Fidelity did not return excess float income only to Fidelity-advised funds—it also returned float income to non-Fidelity funds that the Plan sponsors selected for their lineup. *See Tussey*, 746 F.3d at 332.[14] To

[14] *See also, e.g.*, United States Dep't of Labor, Form 5500/5500-SF Filing Search, *available at* https://www.efast.dol.gov/portal/app/disseminate?execution=

say that Fidelity received some personal benefit by returning excess float income to non-Fidelity mutual funds is to drain the concept of "personal benefit" of any meaning.

Of course, the issue of Fidelity's use of float income to pay the checking account fees, and whether it benefited more generally, is wholly irrelevant under plaintiffs' argument if float is not a Plan asset, as the Plans have no legitimate interest in how assets are utilized if those assets belong to others.

III. THE DEPARTMENT OF LABOR'S SEPARATE DISCLOSURE-BASED ARGUMENT IS BOTH WAIVED AND WRONG

DOL's amicus brief raises a theory of fiduciary breach different from anything plaintiffs have ever asserted in this case. DOL argues that, irrespective of whether float was a Plan asset, Fidelity possessed and breached a duty *to disclose* to the Plans the manner in which it was handling and disposing of float income. That argument has been waived by plaintiffs, and it is both legally and factually incorrect in any event.

A. Plaintiffs Have Never Raised DOL's Disclosure-Based Theory

Plaintiffs themselves have never raised anything resembling DOL's disclosure argument, and it is therefore waived. Both counts in plaintiffs'

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e1s1 (search for Hewlett-Packard Company, EIN No. 941081436, PN no. 004, Form Year 2009, p.60 (listing only two Fidelity funds among the 25 mutual funds offered to participants)).

complaint turn on the assertion that float and float income are Plan assets. A-32-34 (Compl. ¶¶ 57, 68-70). The complaint raises no free-standing claim that, even if float is *not* a Plan asset, Fidelity breached a fiduciary obligation in failing to disclose how it used float income.[15] In opposing Fidelity's motion to dismiss in the district court, the closest plaintiffs came to a disclosure claim was to assert that "Fidelity cannot use *plan assets* to pay bank fees without explicit disclosure to and agreement by the Plans." Doc. 130 at 16 (emphasis added). Thus, as the district court recognized, "[p]laintiffs' allegations rise and fall on the premise that float income is a Plan asset." Add-6. This Court's cases are clear "that an issue not presented to the trial court cannot be raised for the first time on appeal." *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995) (quoting *Johnston v. Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1979)). Indeed, plaintiffs do not even attempt to belatedly argue on appeal that any failure to disclose Fidelity's

[15] Though the complaint discusses DOL guidance that addresses disclosure of float practices, the complaint makes clear that plaintiffs raise this only as a qualifier on their § 406(b)(1) claim that Fidelity dealt with Plan assets for its own interest or account. A-24, 34 (Compl. ¶¶ 31, 72). Plaintiffs similarly imply at one point in their opening brief that a Plan might avoid account ownership if certain disclosures were made (Pls.' Br. 32), but that argument is again founded on the premise that the accounts hold Plan assets, and the failure to provide such disclosures is not the basis of this complaint.

practices could give rise to liability even if redemption float is not a plan asset. Pls.' Br. 14-18 (summary of argument).[16]

DOL acknowledges that its disclosure-based argument is fundamentally different from the argument plaintiffs have pursued, observing that "plaintiffs incorrectly assert that the case turns on the float accounts and income being plan assets." DOL Br. 19. DOL even expressly recognizes the possibility that "plaintiffs have waived any argument that Fidelity violated its duties even if the float itself is not a plan asset." DOL Br. 20 n.7. Plaintiffs' waiver is more than just a possibility—it is a fact.

Plaintiffs' omission of a disclosure-based claim was not the result of mere negligence or oversight. If plaintiffs had asserted such a claim, they would have been required to establish that Fidelity failed to disclose float practices adequately to each of the thousands of putative class member Plans. That showing would undermine their bid for class certification and potentially defeat class standing. This Court has held that named plaintiffs have constitutional standing to bring claims on behalf of a class only if there is an "identity of issues" such that "the claims of the named plaintiffs necessarily give them—not just their lawyers—

[16] Nor could Plaintiffs now seek to assert DOL's argument in their reply brief. *See Alamo-Hornedo v. Puig*, 745 F.3d 578, 582 (1st Cir. 2014) ("[I]n the absence of exceptional circumstances, arguments presented for the first time in an appellant's reply brief are deemed waived.").

essentially the same incentive to litigate the counterpart claims of the class members." *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 770 (1st Cir. 2011). This requirement is satisfied only when "establishment of the named plaintiffs' claims necessarily establishes those of other class members." *Id.*

The claims plaintiffs have actually pled and pursued already face prohibitive obstacles to class standing (*see* Doc. 126 at 20), but a disclosure-based claim would be even more plainly unsuited to class adjudication. As DOL describes it, such a claim would require plaintiffs to show that "the parties did not negotiate or come to an agreement concerning float income, the trust agreements did not authorize [Fidelity's] retention or diversion of float income, and [Fidelity] did not provide the plans with sufficient information to understand this float income." DOL Br. 12. Thus, for each of the "thousands" of Plans at issue, a disclosure-based claim would necessarily depend on the particular negotiating history of each agreement, the varying language of each agreement, and other factors that might indicate who knew what and when regarding Fidelity's float practices.[17] Thus, even assuming that the named plaintiffs' Plans did not receive adequate disclosure

[17] In fact, plaintiffs concede that the documents differ for each Plan, and also that Fidelity's role differs across the class, as plaintiffs define the proposed class to include all plans "for which Fidelity has served as trustee *or* service provider." A-13 (Compl. ¶ 48) (emphasis added).

of Fidelity's float practices, the named plaintiffs would "have no stake in establishing" that other class members were treated similarly. *Nomura*, 632 F.3d at 771. It is therefore no surprise that plaintiffs have not sought to raise such a claim here.

B. DOL's Position Contradicts *Merrimon* And *Vander Luitgaren* And Is Factually Baseless

DOL's position is meritless in any event. The essence of DOL's position is that an ERISA fiduciary may never "retain[] float income generated from its administration of the plans and distribut[e] such income to non-plan entities" without disclosing the existence of float income and where it was sent or securing an explicit agreement in the trust agreements that it could do so. DOL Br. 8-9. That contention is incorrect in multiple respects.

First, and most importantly, DOL's argument is flatly contrary to *Merrimon* and *Vander Luitgaren*. As discussed above, this Court found no fiduciary breach in those cases, even though the fiduciary insurers retained income earned on the assets supporting the beneficiaries' retained asset accounts. *See supra* at 33, 43. DOL says the cases fit within its disclosure rule because "plan participants were sufficiently informed at the outset" that they could be paid through retained asset accounts. DOL Br. 23. But there is no suggestion that the insurers disclosed *their intent to retain excess income on those accounts* (or anything about the anticipated amount of that income), which is the disclosure that would matter under DOL's

theory. Indeed, the participants did receive a small amount of interest on their accounts but had no reason to know that they were not receiving *additional* income being derived from assets supporting those accounts. By contrast, participants and the Plans here received *no* interest—a fact of which they obviously had to be aware. If the facts of *Merrimon* and *Vander Luitgaren* establish disclosure sufficient to avoid a fiduciary-breach finding, as DOL insists, then the facts alleged here preclude any such finding as well.

Second, DOL's position is not supported by any relevant regulatory authority. DOL has issued *extensive* regulations governing the types of disclosures ERISA fiduciaries must make and how those disclosures should be made, including requirements specifically for fiduciaries of participant-directed benefit plans. *E.g.* 29 C.F.R. § 2520.104b-1; *id.* § 2550.404a-5. Yet DOL cites no disclosure regulation that mentions float or float income. The Court should not condone DOL's attempt to fill that gaping regulatory omission by amicus brief, rather than by affording Fidelity and other service providers notice of potential regulatory action and the opportunity to comment on a proposed disclosure regime. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012)

(rejecting deference to DOL amicus brief asserting position not supported by prior regulations).[18]

Finally, DOL's disclosure rule is not even implicated by the facts of this case. DOL draws its rule from the same float guidance documents discussed above, which all require disclosure only when the fiduciary "*retains* float income," thereby increasing its compensation. DOL Br. 13 (emphasis added); *see supra* at 37-39. As already discussed, plaintiffs do not and could not allege that Fidelity receives any float income—its compensation was not increased in any way. Accordingly, Fidelity had no duty to disclose what everyone already knew, i.e., that the Plans and participants were not receiving any income from the redemption float accounts.

CONCLUSION

The judgment below should be affirmed.

Dated: December 21, 2015

Respectfully submitted,

/s/ Jonathan D. Hacker
JONATHAN D. HACKER

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[18] Not only has DOL avoided any regulatory action on float disclosure, but when it had the opportunity to address *exactly* these facts in is amicus brief in *Tussey*, DOL chose not to argue that Fidelity's float practices breached any duty, disclosure or otherwise.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 13,736 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Jonathan D. Hacker
Jonathan D. Hacker

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2015, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the appellate CM/ECF system. Those parties and counsel of record that are CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on December 21, 2015, I served a copy of the foregoing on the following counsel who are not registered CM/ECF users, by first class mail:

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