United States Court of Appeals
For the First Circuit

No. 15-1445

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

FIDELITY INVESTMENTS; JOHN DOES 1-25
Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSSETS

BRIEF FOR PLAINTIFFS - APPELLANTS TIMOTHY M. KELLEY, JAMIE A. FINE, COLUMBIA AIR SERVICES, INC., PARTICIA BOUDREAU, ALEX GRAY, BOBBY NEGRON AND KORINE BROWN

TODD M. SCHNEIDER
JOSHUA G. KONECKY
MARK T. JOHNSON
SCHNEIDER WALLACE COTTRELL
KONECKY WOTKYNS LLP
2000 Powell Street, Suite 1400
Emeryville, CA 94680
T: 415-421-7100

(*Additional counsel listed on the inside cover*)

GARRETT W. WOTKYNS
MICHAEL C. MCKAY
SCHNEIDER WALLACE
COTTRELL KONECKY
WOTKYNS LLP
8501 North Scottsdale Road, #270
Scottsdale, AZ 85253
T: 480-428-0142

JOSEPH C. PEIFFER
DANIEL J. CARR
PEIFFER ROSCA ABDULLAH
& CARR
201 St. Charles Avenue, #4610
New Orleans, LA 70170
T: 504-523-2434

GREGORY Y. PORTER
Bailey & Glasser LLP
1054 31 Street NW, Suite 230
Washington, DC 20007
T: 202-463-2101

SUYASH AGRAWAL
JEANNIE Y. EVANS
AGRAWAL EVANS LLP
308 W. Erie Street, Suite 502
Chicago, IL 60654
T: 312-448-8800

BRANFORD S. BABBITT
CRAIG A. RABBE
ELIZABETH R. LEONG
DANIELLE ANDREWS LONG
ROBINSON & COLE LLP
One Boston Place, Suite 2500
Boston, MA 02108-4404

ROBERT A. IZARD, JR.
MARK P. KINDALL
IZARD NOBLE LLP
29 S. Main Street
West Harvard, CT 06107

PETER J. MOUGEY
LAURA DUNNING
LEVIN, PAPANTONIO, THOMAS,
MITCHELL, RAFFERTY &
PROCTOR, PA
316 S. Baylen Street, Suite 600
Pensacola, FL 32502
T: 854-435-7000

RICHARD S. FRANKOWSKI
THE FRANKOWSKI FIRM,
231 22nd Street South, Suite 203
Birmingham, AL 35233
T: 205-390-0399

THOMAS G. SHAPIRO
MICHELLE H. BLAUNER
SHAPIRO HABER & URMY LLP
Seaport East
2 Seaport Lane
Boston, MA 02210
T: 617-439-3939

JOHN J. RODDY
ELIZABETH A. RYAN
BAILEY & GLASSER LLP
99 High Street, Suite 304
Boston, MA 02110
T: 617-439-6730

Corporate Disclosure Statement

Pursuant to F.R.A.P. 26.1, Appellant Columbia Air Services, Inc. hereby states that it is a stand-alone domestic Subchapter "S" corporation that has no parent corporation and that no publicly held corporations own 10% or more of its stock.

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JURISDICTIONAL STATEMENT

(A) The U.S. District Court for the District of Massachusetts had subject matter jurisdiction over this case pursuant to 28 U.S.C. §1331, which grants district courts original jurisdiction over all civil actions arising under the laws of the United States; and under 29 U.S.C §1132(e)(1), which provides that district courts of the United States shall have jurisdiction over civil actions brought under the Employment Retirement Income Security Act, ("ERISA"), 29 U.S.C. §§1001, *et seq.* Plaintiffs' Second Amended Consolidated Complaint on which the District Court entered Judgment in favor of Defendants asserts three Claims for Relief, each of which alleges violations of ERISA.

(B) This Court has jurisdiction over the Plaintiffs-Appellants' appeal pursuant to 28 U.S.C. §1291, which vests in the Court of Appeals all final decisions of the district courts of the United States except where a direct review may be had in the Supreme Court.

(C) On March 11, 2015, the District Court granted Defendants' Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint and issued Judgment for Defendants (ECF No. 41, 142). Plaintiffs filed a timely Appeal on April 9, 2015. (ECF No. 143).

(D) The Judgment of the District Court from which this Appeal is brought is a final judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES PRESENTED

(1) Pursuant to ERISA §401(b)(1), 29 U.S.C. 1101(b) (1), the assets of a 401(k) defined contribution plan include the shares of any mutual funds in which the plan invests. When mutual fund shares invested in by a plan are sold by the plan trustee in response to a plan participant's distribution request, do the proceeds of the sale of such shares lose their status as plan assets and become the property of the trustee, giving it the right, without authority under the trust agreement, to deposit the funds to its own account, invest the funds in other accounts, and earn and retain interest on the funds until the distribution is received by the plan participant?

(2) As trustee of the trust funds established under Plaintiffs' ERISA retirement plans (the "Plans"), Defendant Fidelity Management Trust Company ("Fidelity")[1] was obligated as a fiduciary to hold plan assets in trust for the

[1] The Defendants in this case actually include three affiliated Fidelity entities: (1) Fidelity Management Trust Company ("FMTC"), (2) Fidelity Management and Research Company ("FMR"), and (3) Fidelity Investments Institutional Operations Company, Inc. ("FIIOC"). While each of these entities have different roles and responsibilities with respect to the administration and servicing of the Plans and the Plans' assets, Plaintiffs/Appellants allege in the Second Amended Consolidated Complaint that each owed fiduciary duties to the Plans and Plan participants and that they breached those duties and engaged in prohibited transactions with respect to the Plans. Appendix on Appeal (hereafter "App.") 23-24. For simplicity, and in accordance with the District Court's treatment of them collectively, Appellants here use the term "Fidelity" to include all three entities unless otherwise stated.

exclusive benefit of plan participants and was prohibited from dealing with the assets of a plan it its own interest or for its own account. Plaintiffs' complaint alleged that, in the process of disbursing retirement benefits to Plan Participants, Fidelity redeemed mutual fund shares that were assets of the Plans, received the cash proceeds from the redemption as Trustee for the Plans but deposited those cash proceeds into various interest-bearing accounts owned or controlled by Fidelity or its affiliates (the "Deposit Accounts") rather than an account in the Plans' trusts as required by law and the applicable trust agreements, and retained all of the investment earnings ("float") attributable to those cash proceeds. Do these factual allegations, taken as true, support a claim that Fidelity breached its fiduciary duty to Plaintiffs under ERISA § 404 and engaged in prohibited transactions under ERISA §406?

(3) In its capacity as trustee, Fidelity held the proceeds of the sales of Plan mutual fund shares in Deposit Accounts and earned interest on the funds in those accounts both before and after issuing checks or electronic payments to Plan participants in the course of fulfilling its obligation to process and effectuate Plan distributions. Did Fidelity's fiduciary obligations with respect these funds terminate prior to participants actual receipt of the funds? Did they terminate prior to the issuance of distribution checks or electronic payments?

STATEMENT OF THE CASE

The facts of this appeal present a simple case of conversion. An agent sold property belonging to the principal and rather than turn over the cash proceeds of that sale to the principal when the cash was received the following day, the agent deposited the cash in its own account, invested that cash, and kept the earnings. Moreover, this was no ordinary agency relationship. The agent in this case, Fidelity, was found by the district court to be a fiduciary to the tax-qualified retirement Plans that are the principals, and was obligated by law to perform its duties solely in the best interest of those Plans.

The putative class in this case is a group of tax-qualified retirement plans and the individual participants in those Plans. Fidelity serves as the trustee for those Plans and in its role as trustee holds all the assets of the Plaintiff Plans, including shares of mutual funds, for the benefit of the plan participants. When a participant elects to receive a distribution of all or a portion of his or her account, Fidelity, as Trustee for the Plans, redeems the mutual fund shares allocated to the participant's account. The registered investment company that issued the mutual fund shares will deliver the cash redemption price the following day to Fidelity *as the Trustee of the Plan*. Rather than depositing that cash plan asset into the Plan's trust account, as required by law, however, Fidelity deposits the cash into accounts owned and controlled by it, thereby converting a Plan asset into an asset of

Fidelity. During the time that the funds are in its possession, Fidelity invests that cash and keeps all the investment earnings.

The complaint in this case alleges that by taking cash that is clearly a plan asset and depositing that cash into an account owned by Fidelity, and by retaining all of the investment earnings attributable to the investment of that cash, Fidelity breached its fiduciary duties under ERISA § 404 (a)(1). App. 24-27, 32-33. The complaint further alleges that Fidelity engaged in prohibited transactions in violation of ERISA § 406(a)(1) and (b)(1) by failing to hold plan assets in trust, by intentionally causing the Plans to transfer plan assets to itself or an affiliate (parties-in-interest to the Plans) for the purposes of benefitting from the investment of those assets, and by dealing with assets of the Plans in its own interests or for its own account. App. 24-27, 33-35.

I. Statement of Facts

a. The 401(k) Plans and Their Investment in Fidelity Mutual Funds

Plaintiffs are participants in, and an administrator of, certain 401(k) defined contribution retirement plans ("the Plans"). *In re Fidelity ERISA Float Litig.*, 2015WL1061497 at *1 (D. Mass. Mar. 11, 2015); Addendum (hereafter "Add.") 2.[2] The Plans are governed by the requirements and limitations of the Employee

[2] For the Court's convenience, citation to the relevant pages of the District Court's decision are provided throughout this brief both for the Westlaw version and for the slip opinion as filed, which appears in the Addendum at 1-16.

Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1010, *et seq.* Defendant Fidelity Management Trust Company is the trustee for the Plans and, therefore, a fiduciary of the Plans under ERISA. *In re Fidelity ERISA Float Litig.*, 2015WL1061497 at *1, 2; Add. 2,3.

Pursuant to the terms of the Plans, as represented by the Columbia Group Companies 401(k) Plan documents[3], cash contributions are made to the Plans by ERISA Plan participants and their employers. Those cash contributions are used to invest in mutual funds. The shares of mutual funds purchased with contributions to the Plan *are* Plan assets. 29 U.S.C. § 1101(b)(1). These assets are held in trust with Fidelity serving as the trustee. As such, it is bound to "discharge its duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." ERISA § 404(a)(1). It is also prohibited from dealing with assets of a plan for its own interest or account. ERISA § 406(b)(1).

[3] The Plans' trust agreements are all substantially the same in all material respects. App. 22; *In re Fidelity ERISA Float Litig.*, 2015WL 1061497 at *1. The Columbia Group of 401(k) Plan Adoption Agreement, Defined Contribution Plan and the Plan Service Agreement between Columbia Air Services, Inc. and Fidelity were filed under seal with the District Court as Exhibits 1 and 2 to the Declaration of Abigail K. Hemani (ECF No. 127), and are provided in the Supplemental Appendix of Documents Filed Under Seal in the District Court (Hereafter, "Supp.") at 1, 37 and 131, respectively. The Adoption Agreement, Defined Contribution Plan (which includes the trust agreement) and the Service Agreement are collectively referred to as the "Plan Documents."

Fidelity's trust agreements further provide that it would charge only three types of fees to the Plans: (1) an asset-based fee based on a percentage of Plan assets held in a particular Plan investment; (2) a fixed administrative fee per Plan Participant; and (3) fees for individual participant services. *In re Fidelity ERISA Float Litig.,* 2015WL1061497 at *1; Add. 2. Nothing in the Plan Documents authorized Fidelity to use float income earned on Plan assets for purposes other than to benefit Plan participants or beneficiaries. Nor did the Plan Documents include any disclosure of Fidelity's retention or appropriation of float income. In fact, nothing in the Plan Documents even authorized Fidelity to place Plan assets, including the proceeds of the sale of Plan mutual fund shares, into a non-trust account or an account owned or controlled by Fidelity or its affiliates.

b. Fidelity's Process for Redeeming Participant Mutual Fund Shares

When a Plan participant retired or otherwise requested a distribution from his or her 401(k) account, Fidelity was responsible under the Plan Documents for processing the distribution request and making the distribution. Supp. 111, 148. Fidelity carried out this obligation through a multi-step process which included the following sequence of events:

- One day after withdrawals are requested and the investments were sold, the proceeds of the sale were placed in a redemption bank account registered to FIIOC.
- On the same day, after payment of any taxes due to the IRS, the balances were transferred to an account known as the "REPO Account," then immediately

to another account known as the FICASH account, an interest bearing account controlled by Defendants.

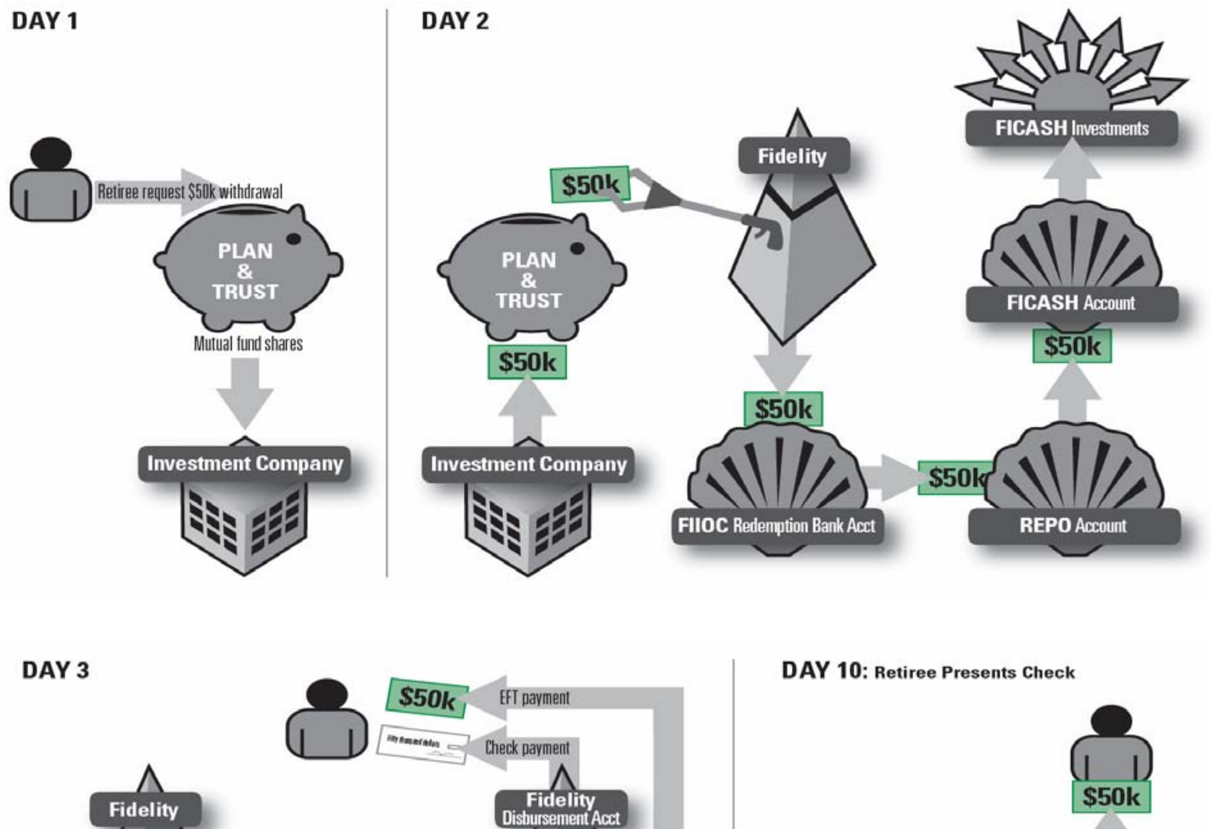
- The following day, the principal of the funds was transferred back to the redemption account. The interest earned on the FICASH account investments is retained by Fidelity or its affiliates and applied to purposes that do not benefit those participants who made the redemptions or their respective plans, including the payment of bank fees for which Fidelity was responsible.

- On or after the date on which the redemption account receives the funds, less investment earnings, from the FICASH account, disbursements are made electronically to participants able to receive them in that manner.

- Funds designated for participants not receiving electronic disbursements are transferred to another interest bearing disbursement account owned and controlled by Fidelity or its affiliates. A check is then issued from the disbursement account to participants, who receive the funds after they cash or deposit the checks.[4]

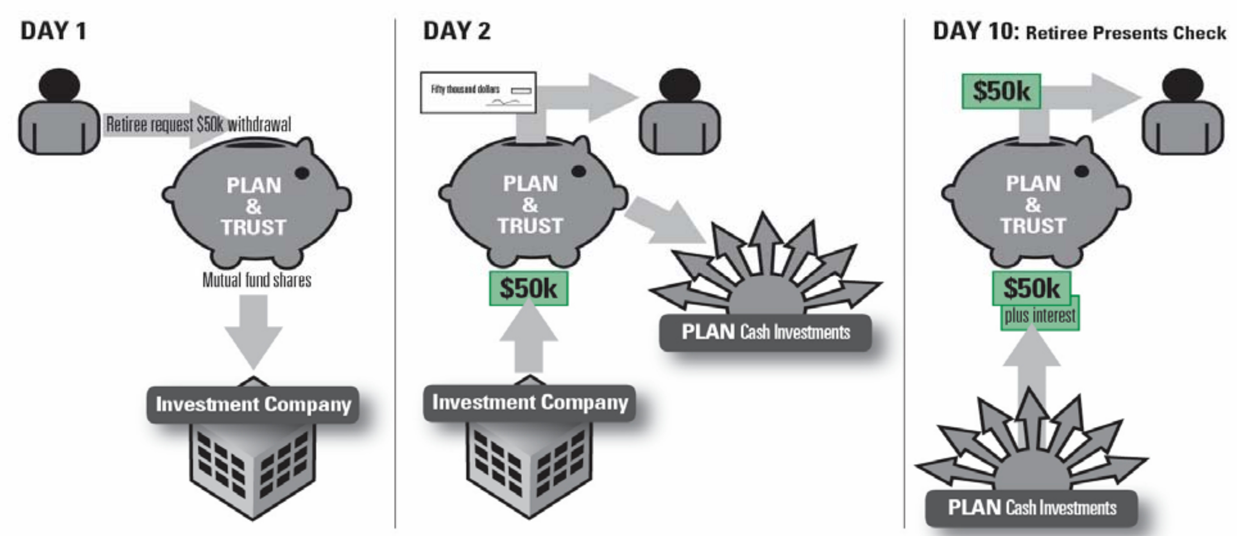
App. 25-26. This process is graphically represented as follows:

[4] For ease of reference, the various deposit accounts used by Fidelity in the disbursement process are collectively referred to as the "Deposit Accounts," except where necessary to distinguish among them.



None of the earnings on the proceeds of the sale of the mutual fund shares owned by the Plan during this process were received by participants or the Plans. Fidelity either retained that interest for itself and used it to pay expenses for which it alone was responsible or put it to some other use that provided no benefit to the Plans or Plan Participants. App. 26-27.

Had Fidelity complied with its fiduciary obligations and retained the proceeds of the sale of the Plans' mutual fund shares in a trust account for the benefit of the Plans, the Plans would have received the investment earnings on those funds pending distribution, as illustrated below:



II. Procedural History

Plaintiffs Timothy Kelley and Jamie Fine, participants in employer-sponsored 401(k) retirement plans with investments in Fidelity Funds, filed the first of these consolidated actions, *Kelley v. Fidelity Management and Trust Company, et al.* Civil Action No. 13-10222, on February 5, 2013. ECF. No. 1. The complaint alleged, on behalf of Plaintiffs and a class of similarly situated persons, that Fidelity breached its fiduciary duties to the Plans under ERISA Section 404 and engaged in prohibited transactions under ERISA Section 406 by exercising control over and utilizing the interest income from Plan contributions and redemptions for purposes other than to

benefit the Plans and their participants or beneficiaries.

On December 27, 2013, the District Court consolidated this case with three similar cases, 13-cv-10524 (Boudreau), 13-cv-10570 (Columbia Air Services), 13-cv-11011 and 13-cv-11011 (Brown) and re-captioned the case to "In re Fidelity ERISA Float Litigation." ECF Nos. 61, 62. Plaintiffs in the consolidated action filed their Consolidated Complaint on February 7, 2014. ECF No. 67.

On March 7, 2014, Fidelity moved to dismiss the Consolidated Complaint on the grounds that Plaintiffs' claims were time barred and that Plaintiffs "lack standing to pursue their claims on behalf of Plans with which they have no affiliation." ECF Nos. 82, 83. The motion to dismiss was fully briefed and argued but not decided by the District Court.

On June 30, 2014, following the Eighth Circuit's decision in *Tussey v. ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014) (hereafter, "*Tussey*"), Fidelity filed a Supplemental Motion to Dismiss for Failure to State a Claim, arguing that "float" is not a plan asset on the facts of this case. ECF No. 103, 104.

On July 21, 2014, Plaintiffs filed a first amended consolidated complaint. ECF No. 114. Thereafter, on September 24, 2014, following an unopposed motion and leave of the District Court to amend the complaint, Plaintiffs filed the Second Amended Consolidated Complaint. ECF No. 122, App. 17-39. Plaintiffs' Second Amended Consolidated Complaint included three claims for relief: (1) Breach of

Fiduciary Duty under ERISA Section 404; (2) Prohibited Transaction Under ERISA Section 406(a) and 406(b)(1); and (3) Violation of ERISA Section 404 by knowing participation in, failing to remedy, and enabling a breach of fiduciary duty by a co-fiduciary. App. 32-36.

On October 3, 2014, Fidelity moved to dismiss the Second Amended Consolidated Complaint pursuant to Rule 12(b)(1) and 12(b)(6). ECF Nos. 125, 126. As a basis for its motion, Fidelity asserted that Plaintiffs' claims fail as a matter of law because float is not a Plan asset and Fidelity is not a fiduciary as to float.[5] The motion to dismiss was fully briefed and was argued before the District Court on January 21, 2015, after which the Court took the matter under submission.

III. The District Court's Decision

The Court granted Defendant's Motion to Dismiss in a ruling issued on March 11, 2015. *In re Fidelity ERISA Float Litig.,* 2015WL1061497 (D. Mass. 2015); Add. 1-16. The Court based its decision on its conclusion that cash received in redemption of mutual fund shares owned by the Plans is not a plan asset and, therefore, the float income earned with respect to that cash is also not a Plan asset. In support of this finding, the Court relied on the fact that the accounts into which Fidelity transferred

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[5] Fidelity also argued that: (1) even if float is a Plan asset, it was entitled to expend such assets on Plan expenses, (2) Plaintiffs' claims are time barred, and (3) Plaintiffs lack standing to pursue their class claims. The District Court did not make any ruling with respect to these additional arguments.

the proceeds of the sale of mutual fund shares owned by the Plan were "registered to Fidelity" and "owned and controlled by Fidelity." *Id.* at *4, 6, 8; Add. 7, 10, 3.

The Court further found that the facts of this case were not distinguishable from those in the cases relied on by the Defendant, *Merrimon v. Unum Life Ins. Co. of Am.,* 758 F.3d46 (1st Cir. 2014) (hereafter, "*Merrimon*") and *Vander Luitgaren v. Sun Life Assurance Co. of Canada,* 765 F.3d 59 (1st Cir. 2014) (hereafter, "*Vander Luitgaren*"), in which this Court found that payments made by an insurance company fiduciary into a "retained assets account" ("RAA") pursuant to an ERISA-governed life insurance policy were not Plan assets. *In re Fidelity ERISA Float Litig.,* 2015WL1061497 at *5-6; Add. 8-9. It also based its ruling on the Eighth Circuit's decision in *Tussey*, which held, as did the District Court here, that funds deposited to Fidelity's redemption account were not Plan assets because the Funds were controlled by Fidelity and were not in the name of the Plan or for the benefit of the Plan. *In re Fidelity ERISA Float Litig.,* 2015WL1061497 at *4, 6, 8 (citing *Tussey,* 746 F.3d. at 339-340); Add. 7,10,13.

In section V.B. of its decision, the District Court held that Fidelity is not an ERISA fiduciary as to float even if float were a Plan asset. *In re Fidelity ERISA Float Litig.*, 2015WL1061497 at *9; Add. 14-15. Relying again on *Merrimon* and *Vander Luitgaren*, the District Court held that Fidelity fulfilled its fiduciary duties by cutting checks or providing electronic payments to participants and ceased to be a fiduciary

at that point. *In re Fidelity ERISA Float Litig.* 2015WL1061497 at *10; Add. 15 The District Court further held that Fidelity was not acting as a fiduciary with respect to the float because it was required by the Plan documents to invest Plan assets in fund shares, not cash, so its fiduciary duties ended when the mutual fund shares were converted to cash. *Id*. Finally, the District Court cited the fact that the Plans had not contracted for an agreement that the Plans own the Deposit Accounts in which the float was held. *In re Fidelity ERISA Float Litig.* 2015WL1061497 at *10; Add. 16.

Having held that the cash received in redemption of mutual fund shares owned by the Plans and the float income earned by the investment of that cash were not Plan assets, and having further found that Fidelity was not a fiduciary with respect to float, the Court did not reach Defendants' other arguments in support of its motion to dismiss and denied Fidelity's earlier motions to dismiss (ECF Nos. 82, 103) as moot.

SUMMARY OF ARGUMENT

The mutual fund shares in which the Plan invested were plan assets. This is legally established by 29 U.S.C. 1101(b)(1) and was undisputed by Fidelity. It follows logically and legally that the cash proceeds resulting from the sale of such plan assets are themselves Plan assets. It can scarcely be disputed that cash from the sale of property belongs to the owner of the property being sold. This is no less true when the sale is conducted by an agent of the owner, acting at the direction of

and on behalf of the owner, as Fidelity was here in its capacity as Plan trustee.

Since the cash received from the sale of plan assets is clearly a plan asset, if that cash is then invested, ordinary notions of property rights surely dictate that any investment earnings, such as the float income at issue here, belong to the owner of the cash. That is the sum and substance of this case.

Advisory Opinions and other guidance from the Department of Labor have consistently stated that float income derived from funds held for outstanding Plan distributions are plan assets. The District Court erroneously dismissed these opinions on the mistaken ground that they assumed, without determining, that the funds at issue were plan assets.

In concluding that the cash paid to the Plans in redemption of mutual fund shares owned by the Plans was not a plan asset, the District Court appears to have concluded that such cash represented the underlying assets of the investment companies issuing the mutual fund shares, and, therefore, was not an asset of the Plans. This was a misreading of the statute defining the assets of a plan that invests in mutual funds, and was error. The District Court also erroneously looked to the ownership and control of the accounts into which the funds were deposited pending distribution to plan participants, rather than the source of the funds. But Fidelity received the cash in the first instance as Trustee and fiduciary to the Plans in exchange for the sale of a plan asset. ERISA and trust law require that all plan assets

be held in trust for the benefit of the Plans. The District Court's conclusion that the ownership of the cash somehow changed simply because Fidelity deposited the cash in an account owned or controlled by Fidelity would permit a fiduciary to legally convert plan assets to its own simply by failing to abide by its obligation to retain those assets in trust. Cash received in exchange for plan assets must be held in trust, and no provision of the Plan Documents permitted Fidelity to transfer plan assets to itself or an affiliate. To the contrary, the Plan Documents specifically state that "the Trustee shall hold the assets of the Trust Fund for the exclusive purpose of providing benefits to Participants and Beneficiaries and defraying the reasonable expenses of administering the Plan." Supp. 109. Fidelity's position that it became the owner of the Plans' assets by depositing those assets to its own accounts is nothing less than an admission of its breach of its fiduciary obligations to the Plans.

The District Court also erroneously relied on *Merrimon* and *Vander Luitgaren* to support its conclusion. The facts in *Merrimon* and *Vander Luitgaren* are highly distinguishable and the holdings, in fact, support the Plaintiffs' positon and not Fidelity's. The insurance companies in *Merrimon* and *Vander Luitgaren* were obligated to pay policy benefits from their own assets; assets that "were not, and never became, plan assets" *Merrimon,* 758 F.3d at 57, *Vander Luitgaren* at 63. In contrast, Fidelity was not *itself* responsible for paying Plan benefits: the *Plans* were solely obligated to pay benefits from plan assets. Fidelity's only obligation was

to write a check from an account that was funded with Plan assets. Those assets, having been derived from plan contributions by participants and the investment earnings on those contributions, were always plan assets and never lost their status as plan assets.

The District Court's reliance on *Tussey* was likewise misplaced. The Eighth Circuit's decision in that case was based, in the first instance, on a failure of proof at trial by the *Tussey* Plaintiffs. Beyond that, it was based entirely on the concept that the payee of an uncashed check is not entitled to interest on the funds held in the payor's account. While that concept may be true, its application by Eighth Circuit to these circumstances overlooked the fact that the true payor of Plan distributions is the Plan itself, regardless of whose name is on the account on which distribution checks are drawn or any interim accounts in which the funds are held.

The District Court also wrongly held, in the alternative, that, even if float were a plan asset, Fidelity was not a fiduciary as to float because (it contends) it fully discharged its fiduciary duties by "processing the withdrawals and mailing distribution checks for the full amount owed or remitting the payments electronically." *In re Fidelity Float Litig.* 2015 WL1061497, at *9; Add. 14-15. This conclusion completely ignores the fact that at least some part of the float income retained by Fidelity on the funds generated by the sale of Plan mutual fund shares was acquired before distribution checks were made or electronic payments

were made and, in fact, even before the funds made their way to the redemption account on which those payments were drawn.

Likewise, the District Court's conclusion that Fidelity's role as a fiduciary ended when the mutual funds were converted to cash because cash was not an authorized investment under the Plan is without merit. The fact that investments must be exchanged for cash in order to effectuate plan distributions cannot reasonably be the basis for concluding that the trustee has no fiduciary duty with respect to such cash or that it is not obligated to hold such cash in trust.

Finally, the District Court concludes that the Plans could have, but did not, contract for agreements dictating that the Plans would own the deposit accounts and bear the risk that the fees on the account would exceed the interest on those accounts. This ignores Fidelity's obligation to hold plan assets in trust in the absence of an agreement, openly negotiated and fully disclosed, allowing it to receive a portion of such assets as fees for services. It also ignores Fidelity's obligation to pay the expenses associated with carrying out its record keeping responsibilities, including the fees associated with plan distributions, in exchange for specifically enumerated fees for such services.

ARGUMENT AND CITATION OF AUTHORITY

I. Standard of Review

In reviewing a district court's allowance of a motion to dismiss for failure to

state a claim, the Court of Appeals applies a *de novo* standard of review, construing the facts in a light most favorable to the non-moving party. *Lorenzana v. S. Am. Restaurants Corp.*, No. 14-1698, 2015 WL 4979373, at *1 (1st Cir. Aug. 21, 2015). The Court is required to assume the truth of all well-pleaded factual allegations in the complaint, draw all reasonable inferences in the plaintiff's favor, and determine whether the complaint, so read, sets forth facts sufficient to justify recovery. *Carter's of New Bedford, Inc. v. Nike, Inc.*, 790 F.3d 289, 291 (1st Cir. 2015).

II. ERISA's Fiduciary Obligations and Prohibited Transactions Framework

In enacting ERISA, one of Congress's primary purposes was to safeguard employee interests by reducing the threat of abuse or mismanagement of funds that had been accumulated to finance employee benefits, *Demars v. CIGNA Corp.*, 173 F.3d 443, 446 (1st Cir. 1999), *citing Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987). Indeed, as this Court has noted, the Supreme Court has explained that the protection of contractually defined employee benefits is the principal function of ERISA. *Vander Luitgaren*, 765 F.3d at 64 (*citing US Airways, Inc. v. McCutchen*, 569 U.S. ——, 133 S.Ct. 1537, 1548 (2013)). To that end, ERISA imposes certain fiduciary duties on persons or entities that exercise "any discretionary authority or control respecting management of such plan or exercising any authority or control respecting management or disposition of its

assets." ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i). Among these fiduciary duties is the duty of loyalty, by which "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." ERISA § 404, 29 U.S.C. § 1104(a)(1)(A).

In addition, ERISA § 406, 29 U.S.C. § 1106, expressly prohibits a fiduciary from engaging in certain enumerated transactions. A fiduciary cannot "deal with the assets of the plan in his own interests or for his own account." Nor can a fiduciary "cause the plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." 29 U.S.C. 1106 (a) (1)(D). ERISA defines a "party in interest" to include "any fiduciary (including, but not limited to, any . . . trustee . . .)." ERISA §3(14)(A), 29 U.S.C. §1002(14)(A).

As the District Court below and other courts have noted, ERISA does not provide a comprehensive definition of what constitutes a plan asset. There is no question, however, that participant contributions to a plan are plan assets. *See,* 29 CFR §2510.3-102(a)(1), providing that a participant's 401(k) contributions become plan assets as soon as the amounts deducted from the participant's paycheck can reasonably be segregated from the general assets of the employer. Likewise, it can

hardly be disputed that investments purchased with participant contributions are plan assets. In particular, when a plan invests in securities issued by a mutual fund, *i.e.* an investment company registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.* "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 investment company." 29 U.S.C. 1101(b). Thus, the *shares* of mutual funds purchased with participant contributions are plan assets. *Boeckman v. A.G. Edwards, Inc.*, No. CIV. 05-658-GPM, 2007 WL 4225740, at *2 (S.D. Ill. Aug. 31, 2007) ("[W]hen a plan invests in a mutual fund, the plan assets include the fund shares, but do not include the underlying assets of the fund...").

III. The Cash Proceeds Paid to A Plan in Exchange for the Redemption of Mutual Fund Shares Are Plan Assets.

As the District Court itself recognized, the "relevant inquiry . . . is whether cash proceeds from the sale of the mutual fund shares are Plan assets once the shares are sold." *In re Fidelity Float Litig.,* 2015WL1061497 at 7; Add. 12. In granting Fidelity's motion to dismiss, the District Court effectively answered this question in the negative, accepting Fidelity's argument that the sale of the Plans' mutual fund shares and the depositing of the cash proceeds of the sale into an account owned and controlled by Fidelity somehow converted the Plans' assets to Fidelity's assets. This is clearly inconsistent with ERISA, with Fidelity's own trust agreement and with common sense.

As noted above, ERISA § 401(b)(1), 29 U.S.C. 1101(b)(1), provides explicitly that "[i]n the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of such plan shall be deemed to include such security . . . ." There is no dispute in this case that the mutual fund shares owned by the Plans were plan assets. It is an illogical proposition to state that the cash received in redemption of those shares is not also a plan asset. The Plan has simply exchanged its shares for cash. Moreover, it did so through Fidelity, whose only authority to redeem the Plans' mutual funds shares was as trustee for the Plans, for the benefit of the Plans' participants.

The conclusion that the Plans became the owners of the cash value of the mutual fund shares when those shares were sold actually finds support in the logic of a portion of the Eighth Circuit's decision in *Tussey*. In addition to challenging Fidelity's practice of retaining interest income from redemption accounts, the *Tussey* plaintiffs also challenged Fidelity's practice of retaining float income from depository accounts — the accounts containing participant contributions before those contributions are invested in the mutual funds. With respect to these accounts, the Court stated:

> [T]he record evidence indicates that when a contribution was made, Fidelity credited the participant's Plan account and the Plan became the owner of the shares of the selected investment option—typically shares of a mutual fund—the same day the contribution was received. The Plan received the full benefit of ownership—including any capital gains or dividends from the purchased shares—as of the purchase date.

Based on this evidence, the Court agreed with Fidelity's argument, unrebutted by the plaintiffs, that "[o]nce the Plan became the owner of the shares, it was no longer also owner of the money used to purchase them." *Tussey*, 746 F.3d, at 339-340. 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. Specifically, when the shares of a mutual fund or other investments are sold in response to a distribution request made by a participant, the Plan immediately surrenders "the full benefit of ownership—including any capital gains or dividends from the purchased shares" and instead has a property interest in the cash proceeds of the sale. With that interest in the cash proceeds comes the "full benefit of ownership," including ownership of float income earned on those proceeds, which remain Plan assets. There is no reason in the law or common sense why Fidelity, rather than the Plans, would become the owner of those funds, and no reason why it would be permitted to deposit those funds into an account not held in trust for the benefit of the Plans or Plan Participants and collect interest on that account for its own benefit.

One possible explanation for the District Court's conclusion that the Plans' assets in the form of mutual fund shares lost their status as plan assets when the shares were sold is that the Court mistakenly believed that the proceeds of the sale of such shares represent the "underlying assets" of the mutual fund, as that term is

used in 29 U.S.C. § 1101(b). This interpretation was urged on the District Court by Fidelity in its briefing in support of its motion to dismiss. Specifically, in an attempt to liken the facts of this case to those in *Merrimon* and *Vander Luitgaren,* Fidelity argued to the District Court that the Plans do not get to "look through its investment and also claim ownership of the underlying assets," and that "just like in *Merrimon* and *Vander Luitgaren,* the plans do not own the relevant funds before the withdrawal and they do not own them afterward." These arguments suggest that the proceeds of the sale of mutual fund shares owned by the Plans are underlying assets of the mutual funds. *See* ECF No. 126 at 13-14. This of course, is incorrect. The underlying assets of the mutual fund are the stocks, bonds and other securities or investments owned by the registered investment company that issued the mutual fund shares, not the cash value or the proceeds of the sale of the mutual fund shares in which the Plans invested.

The District Court seems to have accepted this misinterpretation of the statute urged on it by Fidelity, emphasizing throughout its opinion the fact that the Plans do not have an interest in the underlying assets of the mutual funds in which they invested. *See, In re Fidelity ERISA Float Litig.*, 2015WL1061497 at *4, Add. 7 ("Plaintiffs concede that the Plans do not 'own the underlying assets of a mutual fund in which they invest'.") (*citation omitted*); *Id.* at *5; Add. 8 ("Plaintiffs acknowledge that they do not "own the underlying assets of a mutual fund in which

they invest'.") (*citation omitted*); *Id.* at *7, Add. 12 ("Here as well, the underlying assets of the mutual funds belonged to the funds, not the Plans"). But the language of ERISA § 401(b) clearly distinguishes between the mutual fund shares owned by a plan and the underlying assets of the mutual fund, and does not in any way suggest that the plan assets held in the form of plan-owned mutual fund shares become the "underlying assets of the investment company when redeemed and converted to cash:

> For purposes of this part: In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 *et seq*], 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 investment company." 29 U.S.C. § 1101(b).

The float income at issue here was derived only from the proceeds of the sale of the mutual fund shares owned by the Plans, not the underlying assets of the mutual funds. Accordingly, the fact that the Plans did not own any underlying assets of the mutual funds in which they purchased shares, a fact that was relied on heavily by the District Court in the analysis on which it based its dismissal of this action, is completely irrelevant.

IV. This Court's Holdings in *Merrimon v. Unum Life Ins. Co, of Am.* and *Vander Luitgaren v. Sun Life Assurance Co. of Canada* Are Distinguishable and Contradict, Rather than Support, the Conclusions of the District Court.

In dismissing Plaintiffs' complaint, the District Court concluded that the

Plaintiffs' allegations were indistinguishable from those in *Merrimon* and *Van Luitgaren.* Accordingly, the District Court found that those decisions were controlling on the issue of whether the funds deposited by Fidelity into the Deposit Accounts were assets of the Plans. But *Merrimon* and *Van Luitgaren* are highly distinguishable and, if anything, compel the opposite conclusion.

Merrimon and *Vander Luitgaren* involved the payment of death benefits under life insurance policies issued by the defendant insurance companies. In those cases, the Court addressed whether those death benefit payments from the insurance companies' own assets were "plan assets" under ERISA.

In the insurance context, this Court's analysis of the parties' respective rights and obligations made perfect sense. The employee benefit plan owned the life insurance policy. That *policy* was the plan's asset. The employee benefit plan was obligated to pay premiums. The insurance company was required to pay death benefits under those policies. Critically, though, the insurance company was obligated to pay those benefits *from its own assets*—not from plan assets. The plan's asset was comprised only of the policy itself—*i.e.*, the insurer's contractual obligation to pay a claim for benefits under the policy's terms.

In other words, the plan transferred the risk of paying the life insurance benefits to the insurance company, in exchange for the payment of a premium. *See, e.g. Marks v. Independence Blue Cross*, 71 F.Supp. 2d 432, 435 (E.D. Pa. 1999).

(Explaining that insurance premiums paid by a plan to an insurance company are consideration for transferring the risk of loss from the plan to the insurance company, and are not plan assets). To illustrate, if a plan participant died after only a month of participation in the plan, the insurance company would remain obligated to pay the entire death benefit from its own assets even though it had collected only one month's premium. The assets used to pay benefits were the insurance company's. They did not start as plans assets and *never* became plan assets. That is the fundamental nature of life insurance.

In significant contrast, Fidelity's role as trustee of 401(k) plans is nothing like that of the insurance companies in *Merrimon* and *Vander Luitgaren*. Fidelity bore no such risk and assumed no such contractual obligation to pay anything to any plan participant from its own assets. The *Plans* were obligated to pay Plan benefits based on contributions to the Plans made by participants and/or their employers and the earnings on investments purchased with those contributions. Those benefits, in the form of distributions, necessarily come from assets held in the Plans' trusts.[6] Fidelity

[6] If it were true, as Fidelity contends, that the assets used to pay plan benefits were not plan assets but Fidelity's assets, that fact would have serious implications from a plan administration perspective. The tax benefits attributable to qualified plan benefits depend on the distribution being made from the plan trust. For example, an "eligible rollover distribution" is defined under Internal Revenue Code Section 402(c)(4) as "any distribution to an employee of all or a portion of the balance to the credit of the employee in a qualified trust." 26 U.S.C. § 402. A payment from Fidelity out of its own assets is not a distribution from a qualified trust. And, conversely, if the distribution is from a qualified trust, as it must be, the assets do

was merely the trustee of those assets. Its duty was to process distribution payments to the plan participants from the Plan's assets.

Fidelity, having received the cash proceeds of the sale of Plans' mutual fund shares as Trustee, was obligated to deposit the cash into a trust account for the benefit of the Plans and Plan participants. It could have done so and issued distribution checks or electronic payments directly from such trust account. Instead, it deposited the cash into its own account to be invested for its own benefit.

The lesson of *Merrimon* and *Vander Luitgaren* is clear. The determination of whether the assets used to make a benefit payment are "plan assets" depends on the identity of the party obligated to pay. If the insurance company is obligated to pay the benefit, then the insurance company's assets used to pay that benefit do not magically become plan assets. The only plan asset in that case is the insurance policy. Conversely, if the plan is obligated to pay, which is quintessentially the obligation of a 401(k) plan, then, to paraphrase the Court's statement in *Merrimon,* there is no basis, either in law or common sense, for the proposition that these funds would somehow be transmogrified from plan assets into Fidelity's assets when they are deposited to an account controlled by Fidelity. *See, Patelco Credit Union v. Sahni*, 262 F.3d 897 (9th Cir. 2001)(Cash payments from a stop-loss insurance policy

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not belong to Fidelity. This is the essence of the distinction between this case and the *Merrimon* and *Vander Luitgaren* cases.

paid to a healthcare plan, where the plan was obligated to pay claims, were plan assets.); *Marks v. Independence Blue Cross*, 71 F. Supp. 2d at 435 (noting the difference between self-funded plans, where the plan assumes the risk, and a fully-insured plan, where the risk is transferred to an insurance company in exchange for premiums and, consequently, the funds involved are assets of the insurer, not plan assets.)

V. Earnings Derived From the Investment of Plan Assets are Plan Assets Under Department of Labor Advisory Opinions and other DOL Guidance.

The DOL has made its position clear that the "float" earned when a benefit check is issued to a participant is a plan asset. *See* DOL Adv. Op. 93–24A (Sept. 13, 1993); ("[W]here a fiduciary (e.g. Trust Company) exercises discretion with regard to plan assets, its receipt of income from the 'float' on benefit checks under a repurchase agreement with a national bank in connection with the investment of such plan assets would result in a transaction described in ERISA section 406(b)(1).") Add. 52; DOL Field Assistance Bulletin 2002-3 (Nov. 5, 2002) (confirming the DOL's 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 self-dealing under section 406(b)(1) of ERISA," and setting forth the criteria under which the retention of float income may be allowed based on open negotiation and full and fair disclosure of the retention of float as part of the

fiduciary's fee). Add. 60-61.

The District Court rebuffed this guidance from the DOL based on the conclusion that they "presume . . . the answer to the question at issue here – whether the funds in the Fidelity account are, in fact, 'plan assets.'" *In re Fidelity ERISA Float Litig.,* 2015WL1061497 at *11; Add. 11. But a close examination of this DOL guidance reveals no such assumption and establishes that it is directly on point.

DOL Advisory Opinion 93-24 involved facts that are, in all material respects, identical to those here. In fact, that Advisory Opinion *did* raise the question of whether the funds transferred from plan investments to an account controlled by the trustee or service provider were plan assets:

> You indicate that a company (Trust Company), which is chartered under Tennessee law as a non-depository bank limited to trust powers, acts as an agent or trustee for various employee benefit plans. It also offers various collective investment funds in which plans invest. A national bank (National Bank) located in Tennessee serves as custodian for some of these plans.
>
> In connection with the administration of the plans, Trust Company maintains accounts at National Bank, including a "General Account" and a "Disbursement Account." When Trust Company is directed to liquidate pooled fund assets to pay benefits, unless it is specifically directed to wire the funds to the participant, *it transfers the funds to the General Account and simultaneously issues a check payable to the participant from the Disbursement Account. When checks are presented for payment, funds are wired from the General to the Disbursement Account. In the interim, Trust Company earns income on such funds for its own account, pursuant to a retail repurchase agreement with National Bank.*

Add. 51. (emphasis added).

On these facts the DOL held that the float held in the General Account and the Disbursement Account, having been transferred to those accounts from the plan's pooled investment accounts, were plan assets. The DOL also expressly rejected the Trust Company's argument that once a check was written to a participant, corresponding amounts in the General Account cease to be plan assets." Add. 51-52.

Likewise, DOL Field Assistance Bulletin 2002-3 involved the practice of maintaining general or "omnibus" accounts to facilitate transactions of employee benefit plans. The bank or trust company maintaining these accounts earned interest on the funds in such accounts, including contributions and other assets pending investment instructions from plan fiduciaries. "In addition, fiduciaries transfer funds to a general account of the financial institution in connection with the issuance of a check to make a plan distribution or other disbursement. Funds are then held in the account earning interest until checks are presented for payment." Add. 60. The DOL, reaffirming its earlier Advisory Opinion 93-24A, confirmed that the retention of interest on the float attributable to outstanding benefit checks constituted a prohibited transaction under ERISA. *Id.* This was so notwithstanding the fact that the funds on which the interest was earned had been deposited to an omnibus or general account controlled by the bank or trust company. *Id.* The

DOL proceeded to outline the circumstances under which a fiduciary, through open negotiation and full disclosure, could authorize a service provider to receive compensation in the form of float:

> [T]he plan fiduciary must have an adequate understanding of how the service provider will earn float, and how it contributes to the service provider's compensation. The service provider must make disclosures sufficient to permit the fiduciary to make an informed decision regarding the proposed float arrangement. In addition, to avoid having the arrangement give rise to self-dealing violations of section 406(b), both parties must avoid giving the service provider discretion to affect the amount of compensation it receives from float.

Add. 61.

None of these criteria were satisfied here. The plan documents do not mention float at all. The fees to which Fidelity was entitled for its services are expressly enumerated and do not include float. Supp. 112, 136; App. 21 (Second Amended Consolidated Complaint ¶24); *In re Fidelity ERISA Float Litig.* 2015 WL 1061497 at *1; Add. 2. None of the Plan Documents included any language that includes float income among permissible fees or otherwise authorizes Fidelity to appropriate float income for their own expenses or any other purposes. App. 6.

The DOL has steadfastly adhered to the analysis described above. In a DOL information letter dated August 11, 1994 to the American Bankers Association ("ABA"), referenced in DOL Field Assistance Bulletin 2002-3, the agency responded to an ABA editorial asserting that Advisory Opinion

Letter 93-24A was limited to the facts presented there and would not apply to the situation where benefit checks were drawn on a disbursement account within the same institution. The DOL rejected this position, stating that

> "without regard to the status of the funds after they are placed in a disbursement or other account, a bank fiduciary's unilateral decision to handle plan assets in such a way as to benefit itself constitutes prohibited self-dealing."

DOL Information Letter to Judith A. McCormick, Federal Counsel, American Bankers Assn. (August 11, 1994). Add. 58.

Thus, the DOL has unequivocally affirmed that cash obtained from the liquidation of plan assets for distributions to participants, such as the sale of mutual fund shares involved in this case, and any interest earned on such amounts, may not be used by a trustee or other fiduciary to benefit itself. The District Court's attempt to distinguish this guidance because it assumes the answer to the question presented is unsustainable.

The District Court also rejected the DOL Advisory Opinion and Field Assistance Bulletin on the ground that they have been in place for years and pre-date *Merrimon* and *Vander Luitgaren* and *Tussey*. As discussed above, however, the lessons of *Merrimon* and *Vander Luitgaren* were misapplied by the District Court and, as discussed below, in section VII, the Eighth Circuit's ruling regarding float in *Tussey* is both distinguishable and wrong.

VI. The Application of Ordinary Principals of Property Rights to the

Determination of Whether the Proceeds of the Sale of Plan Mutual Funds Are Plan Assets Requires a Finding in Favor of Appellant

In concluding that float income derived from the proceeds of the sale of plan mutual fund shares was not a plan asset, the District Court relied on the principle that the identification of plan assets under ERISA is to be based on ordinary notions of property rights under non-ERISA law.[7] *In re Fidelity ERISA Float Litig.*, 2015WL1061497 at *4-5; Add. 7-8. While this principle is sound, the District Court's application of the principle to this case was flawed.

First, as discussed above, the District Court need not have resorted to ordinary notions of property rights under non-ERISA law to identify the funds at issue as plan assets. The mutual fund shares were purchased with Plan contributions and were indisputably plan assets under 29 U.S.C. 1101(b) and 29 CFR § 2510.3-101(a)(2), and it follows that both the proceeds of the sale of those shares and the earnings on the investment of those proceeds (*i.e.* the float income) are plan assets. *See* discussion at Section III, *supra*. DOL advisory opinions and other guidance support

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[7] Where plan assets cannot be identified by reference to the statute, regulations or specific guidance from the DOL, the DOL has stated that they are to be identified based on ordinary notions of property rights under non-ERISA law. *See, e.g*. DOL Advisory Op. No. 93-14A. ("[I]n situations outside the scope of the plan assets-plan investments regulation (29 C.F.R. 2510.3-101), the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law.") Add. 48; DOL Advisory Opinion 94-31A; Add. 55. This Court has adopted that view. *See, e.g. Merrimon,* 758 F.3d at 56 (quoting DOL Advisory Op. No. 93-14A, 1993 WL 188437, at *4 (May 5, 1993).

this conclusion. *See* Section V, *supra*.

Second, even under ordinary notions of property rights, it is axiomatic that when the owner of an asset sells it for cash, the owner continues to own the cash. Likewise, when the owner's agent sells the asset on behalf of the owner, the cash received by the agent from the sale is held by the agent on behalf of the owner and the agent does not own the cash. *E.g.,* 76 Am. Jur. 2d Trusts § 272 (1992) ("Where property entrusted to an agent, and impressed by law with a trust in favor of the principal, is wrongfully diverted by the agent, such trust follows the property in the hands of a third person and the principal is ordinarily entitled to pursue and recover it so long as the property can be traced and identified and no superior equities have intervened").

The District Court, though, started at the wrong point for its analysis. Rather than recognizing that the mutual fund shares that were sold for cash were plan assets, the District Court began its analysis at the point where the cash proceeds from the sale of plan assets had already been deposited into a Fidelity account. Thus, the District Court accepted Fidelity's argument that, because the cash proceeds were in Fidelity's own account, they belonged to Fidelity. The fact that the cash proceeds from the sale of plan assets were held in a Fidelity account does not establish Fidelity's ownership of the assets, it establishes Fidelity's wrongful conversion of plan assets for its own benefit.

Having started its analysis at the wrong point, the District Court then fails to recognize the distinction between insurance benefits paid from an insurer's general account and Fidelity's distribution of retirement plan benefits. Fidelity does not stand in the same shoes as the insurance companies. It has not made any contractual commitment to participants to pay benefits from its own assets. Quite the contrary, it has an obligation as Plan trustee to ensure that benefits are paid by the Plans using plan assets. The point made by this Court in *Merrimon* and *Vander Luitgaren* is that funds that are not Plan assets don't become Plan assets solely because they are deposited to another account. It follows that the reverse is also true. Assets that begin as Plan assets because they are derived from Participant contributions do not lose their status as plan assets simply because they are sold and the cash proceeds deposited to another account. Trust law principles on which ERISA is based support this conclusion. For example, a trustee of real or personal property cannot convert those trust assets to his own property simply by selling the assets and pocketing the cash proceeds. The proceeds of the sale retain their status as property of the trust and must be treated as such. See, *e.g.* 76 Am. Jur. 2d Trusts § 272 (1992)

Finally, quoting a clever-sounding but simplistic turn of phrase from Fidelity's briefing on the motion, the District Court adopted Defendant's argument that the assets consisting of the cash proceeds of the sale of Plan mutual fund shares cannot be plan assets because they "were in fact withdrawn from the Plan." *In re*

Fidelity ERISA Float Litig., 2015WL1061497 at *8; Add. 12. Of course, from a trust law perspective, it is not the case that plan assets are withdrawn from the plan in any legal sense, or lose their status as plan assets for ERISA purposes, simply because they are converted from one form (shares of mutual funds) to another (cash). When a Plan participant requests a disbursement from his 401(k) account, she is merely triggering a process which ultimately results in her receipt of her retirement benefits under the plan. Until such time as she receives the disbursement, the proceeds of the sale of the plan investment retain their status as plan assets. Nothing in the law or the Plan Documents entitles Fidelity to convert those assets to its own use.

VII. The Eighth Circuit's Decision in *Tussey* is Distinguishable and, to the Extent that it Holds that Plan Assets Are Determined Based Solely on Account Ownership, Erroneous and Should Not be Followed.

The District Court also relied on the Eighth Circuit's decision in *Tussey v. ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014), which involved the same float practices and sought relief on behalf of a single Plan. *In re Fidelity ERISA Float Litig.*, 2015WL1061497 at *4, 7; Add. 6, 11-12.

Although the *Tussey* Court held that the funds in the redemption accounts were not Plan assets and ruled in favor of Fidelity on that point, it based that ruling on the adequacy of the *Tussey* plaintiffs' proof at trial. Specifically, the Court held only that "the participants do not cite any record evidence establishing the Plan as the 'funder of the check' or the owner of the funds in the redemption account. Absent

proof of any ownership rights to the funds in the redemption account, the Plan had no right to float income from that account." *Tussey v. ABB, Inc.* at 340. Without such proof, the Court looked to the owner or beneficiary of the account to determine the "funder of the check" and ownership of the funds in the account. *Id*.

Whatever the record in *Tussey* established or failed to establish, the allegations in this case are clear. The funds deposited into the redemption account and other interest-bearing deposit accounts controlled by Fidelity were the proceeds of the sale of Plan investments. App. 17, 25-26. Plaintiffs have clearly alleged that the Plans had an ownership interest in the shares of mutual funds in which Plan Participants invested. On a motion to dismiss, these clearly-alleged facts must be accepted as true. Neither Fidelity nor the District Court explain why, when those Plan shares were sold, the proceeds of the sale of the shares became Fidelity's property, or under what authority, whether legal or contractual, Fidelity was empowered to assert ownership rights over those proceeds rather than hold them in trust for the benefit of the Plans and Plan participants. Certainly, Fidelity's unilateral and unauthorized act of depositing the funds into an account that it controlled did not convert them into Fidelity's property. If that were the case, any fiduciary could convert plan assets to its own simply by ignoring its obligation to hold them in trust and transferring them to its own account.

As the District Court noted, the Eighth Circuit's conclusion that the plaintiff-

participants in *Tussey* failed to establish that the Plan had any rights in the redemption account was also based on its consideration of the fact that "[a]s a matter of black-letter commercial law, the payee of an uncashed check has no title in or right to interest on the account funds." *In re Fidelity ERISA Float Litig.*, 2015WL1061497 at *4 (citing *Tussey*); Add. 6. But that principle, while perhaps obvious when examining the rights of the "payee" (in this case, the plan participant), has no place in the analysis here. When a payor writes a check to a payee, then the payee receives the face amount of the check. But who retains interest earned on the account from which the check is drawn? The payor, of course. Fidelity put itself in the shoes of the payor—the account holder—*only* because it elected to channel the funds that came from the sale of the *Plans'* mutual fund shares into *its own account*—rather than to a Plan trust account. Fidelity's role here was not as the true payor of the check; it was merely a trustee processing the distributions from the Plans. Its decision to divert the funds into its own account—and then appropriate the resulting earnings—did not empower it to treat the funds as the true payor and did not entitle it to earn interest on funds in the account.

Finally, to the extent that *Tussey* can be read to hold that ownership of the account is the controlling factor in determining whether funds in that account are plan assets, regardless of the source of the funds, it should not be followed by this Court. While decisions from other circuits are commonly followed by this Court and

district courts within the First Circuit when the reasoning is persuasive, they are not controlling. *See, e.g. United States v. Mitchell,* 432 F.2d 354, 356 (1st Cir.1970); *Henriquez v. Astrue*, 482 F. Supp. 2d 50, 60 (D. Mass. 2007). *Tussey* provides no rationale for finding that the ownership of an account is the controlling factor in determining whether funds in the account are Plan assets. In this case, therefore, where there are clear allegations that the funds in the accounts at issue are the proceeds of the sale of Plan assets, this Court should not follow such a rule.

VIII. Fidelity Does Not Lose its Fiduciary Status By Selling the Plans' Mutual Fund Shares and Holding the Proceeds as Cash in the Deposit Accounts.

As an alternative basis for granting Fidelity's motion to dismiss, The District Court held that "even if float were a Plan asset, it is also the case that Fidelity is not an ERISA fiduciary as to float. *In re Fidelity ERISA Float Litig.,* 2015WL1061497 at *9; Add. 14. Relying again on *Merrimon* and *Vander Luitgaren,* the Court reasoned that Fidelity's fiduciary status ends once it (1) complies with the requirements of the governing agreements, and (2) provides a beneficiary with "immediate and unfettered" access to the promised benefit." *Id.* the Court then cites Fidelity's own contention that it fully complied with its duties under the governing agreement (by processing the withdrawals and mailing distribution checks for the full amount owned or remitting the payments electronically) as the basis for concluding that Fidelity met these requirement and fully discharged its fiduciary duties. *In re Fidelity ERISA Float Litig.,* 2015WL1061497 at *9; Add. 15.

The Court's analysis on this point is flawed for at least two reasons. First, it ignores the fact that at least part of the float income appropriated by Fidelity was earned and retained by it even before it issued any distribution checks or electronic payments to plan participants. Specifically, as alleged in the complaint, the funds at issue were invested in the FICASH account, an overnight interest bearing account, before being transferred back to the redemption account on which distribution checks and electronic payments were drawn. App. 25. The interest earned from the FICASH investment was not transferred back to the redemption account and was used by Fidelity to pay its own operating expenses. App. 25-26. Since these transactions occurred before Fidelity could possibly be said to have provided beneficiaries with "immediate and unfettered" access to the promised benefit," it was acting as a fiduciary at the time with respect to the plan assets in the Deposit Accounts.

Second, given the District Court's assumption that the funds in the Deposit Accounts were plan assets, any interest earned on the funds in the redemption account would also be a plan asset and subject to Fidelity's fiduciary obligations under this Court's decision in *Mogel v. UNUM Life Ins. Co. of America,* 547 F3d. 23, 26 (2008). In *Mogel,* the Court held that UNUM acted as an ERISA fiduciary when it retained and invested death benefits due to beneficiaries under the plan and earned interest on the funds until they were withdrawn by the beneficiaries. Quoting

from *Commonweath Edison Co. v. Vega,* 174 F.3d 870, 872-73 (7th Cir. 1999), the Court held that "until the check to the beneficiary is actually presented to the plan for payment through the banking system, and paid, the money due to the beneficiary is an asset of the plan" and "subject to UNUM's fiduciary obligations until actual payment." *Mogel* at 26. So here, the funds in the redemption account, and the interest earned thereon, were plan assets until plan participants actually cashed their checks or received an electronic payment.

The District Court also concluded that Fidelity had no fiduciary duty with respect to the float because it was held as cash, and Fidelity was "not authorized to retain uninvested cash unless expressly directed to do so by the plan administrator." *In re Fidelity ERISA Float Litig.,* 2015WL1061497 at *9; Add. 15.[8] This misstates the relevant provision of the Plan Documents, which does not include the word "expressly" and simply states, affirmatively, that Fidelity is empowered "to retain uninvested such cash as the Named Fiduciary or Administrator may, from time to time, direct". Supp. 110. Certainly Fidelity was authorized, expressly or implicitly, to retain such uninvested cash as was necessary to accomplish plan distributions.

[8] The District Court cites "D-128-2 at 23-24" in support of this statement and others that appear to be referring to the trust documents, but there is no such docket entry, and the only trust documents in the record were the Plan Documents filed under seal as ECF Nos. 127-1 and 127-2, which are included in the Supplemental Appendix at Supp. 1 through 153. It is presumably a provision within those documents to which the District Court was referring.

Indeed, the allegations of the Second Amended Consolidated Complaint, which are to be taken as true, with all inferences favoring plaintiffs, include the retention of uninvested cash among a long list of broad discretionary powers assigned to Fidelity as trustee, including "generally to exercise any of the powers of an owner with respect to any part of the Trust Fund." App. 23.

Further, it is simply not true that the float was held as cash when it was under Fidelity's control. To the contrary, Fidelity was earning interest on it, so it was necessarily held in some type of investment. The problem of course, is that it was earning interest for Fidelity rather than the Plans.

By the Court's reasoning, Fidelity can escape its fiduciary obligations with respect to plan assets simply by failing to invest participant contributions in authorized investments or by selling plan investments and retaining the proceeds. The Court cites no authority for the position that plan assets are determined by the form in which they are held. Nor is there any legal or logical reason why Fidelity would be entitled to retain the proceeds of the sale of Plan assets and the interest earned on those funds simply because they are temporarily held as cash during the distribution process.

Finally, the District Court erroneously shifts the burden to the Plans to contract for an agreement with Fidelity "dictating that the Plans would own the bank accounts and, consequently, pay the fees, bearing the risk of loss if the account fees

exceeded the interest earned." *In re Fidelity ERISA Float Litig.*, 2015WL1061497 at *10; Add. 15. In the absence of such an agreement, the Court holds, Fidelity is free to establish such accounts in its own name or in the name of the investment options and collect or divert the interest on the proceeds of the sale of plan assets. This is contrary to ERISA's mandate that plan assets be used exclusively for the benefit of plan participants and beneficiaries and its requirement that the use of plan assets, including float, as compensation for services rendered to the Plan be reasonable and openly negotiated and agreed to by the Plan. Absent an agreement to the contrary, Fidelity is ***not*** entitled to establish accounts holding Plan assets in its own name or benefit from the use of those assets. Here, nothing in the Plan Documents authorized Fidelity to establish such accounts, let alone collect interest on plan assets deposited to those accounts. Further, the issue is not about ownership of the accounts, it is about who is entitled to the income earned on plan assets in the accounts. Because the accounts contain the proceeds of the sale of Plan assets, the funds in those accounts are Plan assets and the income from those funds are likewise Plan assets. Even though the accounts were not held in the name of the Plan or in trust for the Plan, as they should have been, Fidelity was obligated to treat those funds, and the income generated by those funds, as Plan assets, not as its own property.

Likewise, the issue is not who bears the risk that the account fees might exceed the interest earned on the account. Under the terms of the Plan Documents, Fidelity's

responsibilities include processing the distributions of Plan assets to Plan participants. Supp. 111. Fidelity bears the costs of undertaking those responsibilities, including any bank fees for any deposit accounts used in the process. App. 26. Such fees are a part of Fidelity's ordinary operating expenses for recordkeeping and administering the Plan, and covered by the fees negotiated by the parties and described in the Plan Documents. *Id.* Thus, even if the accounts were held in the name of the Plans, or in a trust account for the Plans, as should have been the case, Fidelity would be responsible for any account fees, and the Plans would be entitled to the income earned on the Plan assets in the accounts.

CONCLUSION

For the reasons described above, this Court should reverse the District Court's dismissal of Plaintiffs' Second Amended Complaint and remand the case for further proceedings.

Respectfully Submitted,

Date: September 3, 2015 By: *Mark T. Johnson*

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that Plaintiffs-Appellants' Brief complies with the type and word limitations in Rule 32(a) of the Federal Rules of Appellate Procedure. This

brief consists of 11,398 words.

/s/ Mark T. Johnson
Mark T. Johnson

CERTIFICATE OF SERVICE

I, Mark Johnson, hereby certify that on September 3, 2015, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the parties or their counsel of record that are registered as ECF Filers will be served by CM/ECF:

I further certify that on September 3, 2015, I served a copy of the foregoing document on the following parties or their counsel of record by first class mail postage prepaid who are not served through the CM/ECF system:

Suyash Agrawal and Jeannie Y. Evans Agrawal Evans LLP 308 W. Erie Street, Suite 502 Chicago, IL 60654	Richard S. Frankowski The Frankowski Firm 231 22nd Street South, Suite 203 Birmingham, AL 35233
Joseph Peiffer and Daniel Carr Peiffer Rosca Wolf Abdullah Carr & Kane 201 St. Charles Avenue, Suite 4610 New Orleans, LA 70170	

/s/ *Mark T. Johnson*
Mark T. Johnson

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE FIDELITY ERISA FLOAT LITIGATION	)	**Civil Action No. 13-10222-DJC**

MEMORANDUM AND ORDER

CASPER, J. **March 11, 2015**

I. Introduction

Plaintiffs bring this purported class action on behalf of the retirement plans (the "Plans") in which they have been participants or an administrator alleging that Defendants FMR LLC, Fidelity Management Trust Company ("FMTC"), Fidelity Management and Research Company ("FMRC"), and Fidelity Investments Institutional Operations Company, Inc. ("FIIOC") (collectively, "Fidelity") have violated the Employee Retirement Income Securities Act ("ERISA"), 29 U.S.C. § 1001 *et seq*. Fidelity has moved to dismiss. D. 125. For the reasons stated below, the Court ALLOWS the motion.

II. Standard of Review

In considering a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), the Court must determine if the facts alleged "plausibly narrate a claim for relief." Schatz v. Republican State Leadership Comm., 669 F.3d 50, 55 (1st Cir. 2012). This determination requires a two-step inquiry. García-Catalán v. United States, 734 F.3d 100, 103 (1st Cir. 2013). First, the Court must distinguish the factual allegations from the conclusory legal allegations in the complaint. Id. Second, taking the Plaintiff's

allegations as true, the Court should be able to draw "the reasonable inference that the defendant is liable for the misconduct alleged." Id. (quoting Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011)).

When deciding a motion to dismiss, the First Circuit has "emphasize[d] that the complaint must be read as a whole." García-Catalán, 734 F.3d at 103. Overall, a claim must contain sufficient factual matter that, accepted as true, would allow the Court to draw "the reasonable inference that the defendant is liable for the misconduct alleged." Id. (quoting Haley, 657 F.3d at 46). However, "[i]n determining whether a [pleading] crosses the plausibility threshold, 'the reviewing court [must] draw on its judicial experience and common sense." Id. (internal citations omitted).

III. Factual Background

Unless otherwise noted, the Court relies on the facts as alleged in the operative complaint, the second amended consolidated complaint, D 122.

Plaintiffs include participants in retirement plans and an administrator for a retirement plan that entered into trust agreements with Fidelity to establish trusts to hold Plan assets. Id. ¶¶ 9-15, 22. The Plans' Trust Agreements are substantially the same in all material respects. Id. ¶ 25. Under the agreements, Defendant FMTC agreed to open and maintain trust accounts for each plan and participant, including in Deposit Accounts, holding the assets of the trust funds for the benefit of the plan participants and beneficiaries. Id. ¶¶ 23, 25. Fidelity's trust agreements would generally provide that FMTC would charge only three types of fees to the Plans: (1) an asset-based fee based on a percentage of Plan assets held in a particular Plan investment; (2) a fixed administrative fee per Plan participant; and (3) fees for individual participant services. Id. ¶ 24.

In light of its authority to manage or dispose Plan assets, FMTC is a fiduciary of the Plans. Id. ¶ 27. Defendant FIIOC is also a fiduciary of the Plans by virtue of it being an agent for FMTC and in this role managing its Depository Account and Redemption Account. Id. ¶ 28. Defendant FMRC is also a fiduciary by virtue of its discretionary management and control over plan assets transferred to the "FICASH" program. Id. ¶ 29.

Plaintiffs allege that Fidelity's ERISA violations arise from "(1) their practice of appropriating float earned on Plan assets to pay banking fees that Fidelity was required to pay, and (2) their practice of misappropriating float income for the use of clients other than the participants in the Plans." Id. ¶ 32. According to the operative complaint, when Plan participants withdrew funds from the Plan a lump-sum disbursement was triggered (unless the Plan participant had entered retirement and was receiving regular retirement payments). Id. ¶ 33. Fidelity's disbursement process occurred in multiple steps. When Fidelity received a withdrawal request, it sold the mutual fund shares and moved the funds from the relevant investment option account to a redemption bank account. Id. ¶ 33a. Electronic disbursements were paid to plan participants from the redemption bank account. Id. ¶ 33f-g. Overnight, Fidelity would transfer the funds into an interest bearing account owned and controlled by Fidelity and the principal of the funds would be transferred back to the redemption bank account the following day. Id. ¶ 33b-d. Any interest earned overnight was not transferred to the redemption bank account. Id. ¶ 33d. This interest is generally referred to as "float." Id. ¶ 3. For participants who did not elect to receive an electronic disbursement, the withdrawn funds were transferred from the redemption bank account to an interest bearing disbursement bank account, which issued a check to the participant in the amount of the withdrawn funds, but not including interest. Id. ¶ 33g. Participants received the funds after they cashed or deposited the check. Id. Fidelity would

retain some portion of the float income generated during the disbursement process and the remainder was credited to mutual funds. Id. ¶ 33h.

Although all of the accounts described above incurred bank expenses, these expenses were part of Fidelity's ordinary operating expenses for recordkeeping and administering the Plans. Id. ¶ 35. Thus, Fidelity used float income – which Plaintiffs allege belong to them – to pay these recordkeeping and administrative expenses. Id. ¶¶ 36-37. Plaintiffs allege that these expenses were outside the scope of the agreed-upon fees they would pay Fidelity and, therefore, Fidelity's practice amounted to a violation of Fidelity's fiduciary duties. Id. ¶¶ 24, 59-60.

IV. Procedural History

Plaintiffs instituted this action on February 5, 2013. D. 1. The Court consolidated this case with three other cases (13-cv-10570-DJC; 13-cv-10524-DJC; and 13-cv-11011-DJC) on December 27, 2013. D. 62. On February 7, 2014, Plaintiffs – six plan participants and a plan administrator – filed an amended consolidated complaint, D. 67, which Fidelity moved to dismiss on March 7, 2014, D. 82. In its motion to dismiss, Fidelity argued that ERISA's six-year statute of repose barred Plaintiffs' claims, D. 83 at 16, that ERISA's three-year statute of limitations barred Plaintiffs' claims, id. at 26, that Plaintiffs lacked constitutional standing to bring this class action, id. at 30, and that Plaintiffs failed to state a claim against FMR because the complaint did not allege that FMR is a fiduciary to the Plans, id. at 35. The Court heard the parties on the motion on June 18, 2014 and took those matters under advisement. D. 100.

The amended consolidated complaint alleged that the fiduciary breaches described were of the same nature of those which had garnered certain plaintiffs a victory against Fidelity in another litigation and the complaint expressly incorporated the findings of fact and conclusions of law of that action. D. 67 ¶ 6 (citing Tussey v. ABB, Inc., No. 06-04305-CV-NKL, 2012 WL

1113291 (W.D. Mo. Mar. 31, 2012)). On March 19, 2014, after Fidelity had filed its motion to dismiss, D. 82, the Eighth Circuit reversed relevant portions of the district court's decision in Tussey. Tussey v. ABB, Inc., 746 F.3d 327 (8th Cir. 2014), cert. denied, 135 S. Ct. 477 (2014). In light of the Eighth Circuit decision, Fidelity filed a supplemental motion to dismiss on June 30, 2014, after the hearing on the previously filed motion, arguing that Plaintiffs' allegations failed as a matter of law. D. 103. In response, Plaintiffs filed a first amended consolidated complaint on July 21, 2014, D. 114, and on September 24, 2014, Plaintiffs filed a consented-to second amended consolidated complaint alleging violations of ERISA §§ 404 and 406 and Department of Labor Regulations ("DOL"), 29 C.F.R. § 2550, D. 122 ¶ 4.[1] Fidelity has now moved to dismiss the operative complaint, the second amended consolidated complaint, arguing that Plaintiffs' allegations fail as a matter of law and reiterating, in part, its previous procedural arguments. D. 125. The Court heard the parties on Fidelity's motion to dismiss Plaintiffs' second consolidated complaint on January 21, 2015 and took those matters under advisement. D. 138.

V. Discussion

Plaintiffs allege that Fidelity has violated its fiduciary duties "by using the float income for themselves to defray their own expenses" and "by giving float belonging to the Plans to other Fidelity clients." D. 122 ¶¶ 59, 60. Plaintiffs further allege that Fidelity engaged in prohibited transactions by "dealing with the assets of a plan for its own interest or account." Id. ¶ 69. Fidelity asserts that Plaintiffs' claims fail as a matter of law because float is not a Plan asset and because Fidelity is not an ERISA fiduciary as to float. D. 126 at 13.

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[1] In light of the filing of Plaintiffs' second amended consolidated complaint, the Court DENIES the Defendant's prior motions to dismiss, D. 82, 103, as moot.

A. Plaintiffs Have Not Plausibly Alleged that Float Income Is a Plan Asset

At base, Plaintiffs' allegations rise and fall on the premise that float income is a Plan asset. Although the Court may rely upon the allegations in the operative complaint, the Court notes that there is little debate among the parties about the factual allegations as the parties' dispute focus upon whether the float at issue is, or is not, a plan asset. Fidelity asserts that float is not a plan asset and, therefore, the Plans have no right to any income earned on the float. D. 126 at 16. Fidelity points to the Tussey defendants' success on appeal as evidence of the propriety of Fidelity's retention of float here. Id. at 6, 16. Fidelity further points to two recent First Circuit decisions to support its argument: Merrimon v. Unum Life Ins. Co. of Am., 758 F.3d 46 (1st Cir. 2014); and Vander Luitgaren v. Sun Life Assurance Co. of Canada, 765 F.3d 59 (1st Cir. 2014). D. 126 at 2.

The Tussey case concerned the same float practices challenged by the Plaintiffs in this action. The district court held, in relevant part, that Fidelity had breached its fiduciary duties by failing to distribute float income for the interest of the Plan. Tussey, 2012 WL 1113291, at *2. On appeal, the Eighth Circuit reversed, holding that Fidelity had not breached its fiduciary duties by failing to pay float income to the Plan because "the participants failed to adduce any evidence the Plan had any property rights in the float or float income." Tussey, 746 F.3d at 339. With regard to the redemption float – the type of float at issue in this action – the Eighth Circuit held that the plaintiff-participants had failed "to establish the Plan had any rights in the redemption account balance." Id. at 340. To reach this conclusion, the Eighth Circuit considered that "[a]s a matter of black-letter commercial law, the payee of an uncashed check has no title in or right to interest on the account funds." Id. (citation omitted). Although the Tussey plaintiffs, like the plaintiffs here, argued that the Plan owned the funds and, therefore, the float income was a Plan

asset, the Eighth Circuit held that the plaintiffs "failed to show the float was a Plan asset under the circumstances of th[e] case" since the participants did not cite to any evidence that the Plan was "the funder of the check or the owner of the funds in the redemption account." Id. (quotation mark omitted). As the circumstances of that case are nearly identical to the circumstances of this action, Fidelity argues that the Plaintiffs have necessarily failed to state a claim. D. 126 at 6.

Here, Plaintiffs allege that Fidelity "owned and controlled" the relevant bank accounts that funded the checks, D. 122 ¶ 33a, c, g, and as a result, there is no allegation that the Plans owned the accounts. Furthermore, Plaintiffs concede that the Plans do not "own the underlying assets of a mutual fund in which they invest." D. 130 at 8. Rather, the Plaintiffs allege that the Plans owned the shares of the mutual funds and, therefore, the Plans were the "beneficial owners" of the accounts and owned the cash proceeds from the sale of those mutual fund shares (i.e. that the cash proceeds were Plan assets). Id. at 8, 14.

"ERISA nowhere contains a comprehensive definition of what constitutes 'plan assets.'" Merrimon, 758 F.3d at 56 (citing John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 89 (1993)). The DOL, however, has consistently stated that plan assets "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, 1993 WL 188473, at *4 (May 5, 1993)); see also Tussey, 746 F.3d at 339 (noting that "[a]lthough 'ERISA does not exhaustively define the term 'plan assets,' . . . [t]he Secretary of Labor has repeatedly defined 'plan assets' consistently with ordinary notions of property rights") (quoting Kalda v. Sioux Valley Physician Partners, Inc., 481 F.3d 639, 647 (8th Cir. 2007)).

In Merrimon, 758 F.3d 46, and Vander Luitgaren, 765 F.3d 59, cases upon which Fidelity also relies, the First Circuit considered whether a life insurer's use of retained asset accounts violated the same ERISA provisions alleged here. In both cases, the insurer redeemed the claims by establishing accounts for the beneficiaries, crediting to the beneficiaries' accounts the full amount of benefits owed and mailing a book of drafts to the beneficiary that could be used to draw down the credited funds. Merrimon, 758 F.3d at 51; Vander Luitgaren, 765 F.3d at 61. While the funds remained unliquidated, however, the insurer retained the funds in its general account and selected an interest rate to pay the beneficiary, keeping the rest of the interest earned for its own benefit. Id. Although the Merrimon and Vander Luitgaren plaintiffs acknowledged that the underlying funds held in the insurers' accounts were not plan assets, they argued that when the benefits accrued and were redeemed that the redeemed funds became plan assets until the account was fully liquidated. Merrimon, 758 F.3d at 56-57; Vander Luitgaren, 765 F.3d at 63. The First Circuit disagreed and held "that the funds backing the plaintiffs' [retained asset accounts] were not, and never became, plan assets." Merrimon, 758 F.3d at 57; see also Vander Luitgaren, 765 F.3d at 63 (same). These holdings were grounded on "ordinary notions of property rights," Merrimon, 758 F.3d at 56, and "on the principle that the assets of a policy-issuing insurer are not plan assets and are not transformed into plan assets by the establishment of an [retained asset account]." Vander Luitgaren, 765 F.3d at 63 (internal citation omitted) (citing Merrimon, 758 F.3d at 56). The Court agrees with Fidelity that a similar reasoning applies here.

As noted above, Plaintiffs acknowledge that the Plans do not "own the underlying assets of a mutual fund in which they invest." D. 130 at 8. Rather, before a participant withdraws from the retirement plan, the Plan only "has a property interest in the shares of the mutual fund in

which the participant has invested; but the plan does not have a property interest in the mutual funds' underlying assets." D. 126 at 17 (emphasis in original) (citing 29 U.S.C. § 1101(b)(1)); see also Tussey, 746 F.3d at 340 (noting that "[o]nce the Plan became the owner of the shares, it was no longer also owner of the money used to purchase them"). When a withdrawal request is made, the mutual funds shares are redeemed and the proceeds are transferred to accounts "registered to Fidelity" and "owned and controlled by Fidelity." D. 122 ¶ 33a-g. Fidelity concedes that Plaintiffs are entitled to the money withdrawn from the Plan, D. 126 at 14, however, as in Merrimon and Vander Luitgaren, the Plan does not own the underlying assets before they are withdrawn, and the assets are not "transmogrified into plan assets when they are credited to a beneficiary's account." Merrimon, 758 F.3d at 56.

Plaintiffs have not pointed the Court to any factual allegations that distinguish this case from the relevant cases discussed above. Rather, Plaintiffs cite Mogel v. UNUM Life Insurance Co. of Am., 547 F.3d 23, 26 (1st Cir. 2008) and Commonwealth Edison Co. v. Vega, 174 F.3d 870 (7th Cir. 1999), a case on which Mogel relied, "for the proposition that where payments in connection with an ERISA plan are to be paid in a lump sum, . . . as the arrangements between the Plans and Fidelity require with respect to redemptions, the cash is a plan asset until the money is fully transferred to the participant, that is, until the check is actually cashed." D. 130 at 11. The Mogel decision, rested, however, on the fact that the insurer ignored a specific directive to pay beneficiaries in one lump sum and instead issued a checkbook which they could draw down. Mogel, 547 F.3d at 26 (quoting Mogel v. UNUM Life Ins. Co. of Am., 540 F. Supp. 2d 258, 262 (D. Mass. 2008)) (noting that "[t]he difference between delivery of a check and a checkbook . . . is the difference between [the insurer] retaining or [the insurer] divesting possession of Plaintiffs' funds"). The First Circuit held in Mogel only that the insurer, who had

not paid the policy proceeds in a manner permitted by the plan documents, had violated its fiduciary duties and, therefore, "the sums due plaintiffs remain[ed] plan assets subject to [the insurer's] fiduciary obligations until actual payment." Id.; see also Merrimon, 758 F.3d at 56-57 (noting that "neither the holding in Mogel nor its broadly cast language" are "at odds with the conclusion that the monies retained by the insurer are not plan assets"); Edmonson v. Lincoln Nat. Life Ins. Co., 725 F.3d 406, 428 (3d Cir. 2013) cert. denied, 134 S. Ct. 2291 (2014) (explaining that "[t]he Mogel court, however, did not mention that plan assets are to be determined based on the ordinary notions of property rights, nor did it consider the definition of plan assets"). Here, as discussed further below, Fidelity's fiduciary obligations were discharged after it "process[ed] all approved withdrawals and mail[ed] distribution checks, or remit[ted] distributions as direct deposits to Participants." D. 126 at 20 (quoting D. 128-4 at 18).

The Commonwealth Edison Co. case is also distinguishable. In that case, under the terms of the pension plan, when benefits were due to a participant, the plan itself wrote the check. Commonwealth Edison, 174 F.3d at 872. When the participant cashed the check it was "paid by the plan," but until that time the money "remain[ed] in the plan's coffers." Id. Commonwealth Edison only acknowledged, then, that as a factual matter the funds in that case remained plan assets until cashed, but it did not address whether, as a matter of law, such funds are always plan assets. Id. As noted above, Plaintiffs here have alleged that Fidelity "owned and controlled" the relevant bank accounts that funded the checks. D. 122 ¶ 33a, c, g. So, unlike in Commonwealth Edison, the checks here were funded not from the "plan's coffers" but from Fidelity's.

Plaintiffs also rely on guidance from the DOL to argue that a fiduciary's undisclosed use of float income is a prohibited transaction under ERISA. D. 130 at 8. Plaintiffs allege that "[t]he Department of Labor has indicated, in both Advisory Opinion 93-24A and in Field Assistance

Bulletin 2002-3, that a trustee's use of float income for its own benefit constitutes a prohibited transaction unless the trustee (1) disclosed the float to the independent plan fiduciary at the time the trustee was retained, (2) openly negotiated with the independent plan fiduciary to retain float income as part of its overall compensation, and (3) was not in a position to affect the amount of its float compensation, as it would, for example, if it had 'broad discretion over the duration of the float.'" D. 122 ¶ 31 (citing DOL Adv. Op. 93-24A (Sept. 13, 1993) and DOL Field Assistance Bulletin 2002-3 (Nov. 5, 2002)). The DOL Field Assistance Bulletin, relied upon by Plaintiffs, concerns "the obligations of plan fiduciaries' and service providers" when retaining the earnings that result from holding plan assets. DOL Field Assistance Bulletin 2002-3. Meanwhile, the Advisory Opinion considers "whether a plan has an interest in an administrative account when plan assets are transferred to the account in support of an outstanding benefit check." DOL Adv. Op. 93-24A. These questions presume, however, the answer to the question at issue here – whether the funds in the Fidelity account are, in fact, "plan assets." Because the DOL guidance assumes that plan assets have been transferred into the trust accounts and that the plan assets are the source of the float income, the decisions do not squarely address how to determine whether the underlying funds are in fact plan assets when that issue is disputed. Moreover, the Court notes that this guidance – approximately twenty-one and twelve years old, respectively – pre-dates the First Circuit decisions in Merrimon, 758 F.3d 46, and Vander Luitgaren, 765 F.3d 59, and pre-dates the Eighth Circuit decision in Tussey, 746 F.3d 327, which addresses the float practices challenged here.

In sum, Plaintiffs have not pointed the Court to any allegations that establish that the float was a Plan asset. In Plaintiffs' own briefing, they summarize their allegations as follows:

> Plaintiffs clearly allege that: (1) Fidelity was the trustee for all of the Plans' assets; (2) the Plans had an ownership interest in the shares of mutual funds in

> which the Plans invested; (3) those shares were "sold" when withdrawals were requested by Participants; [and] (4) the proceeds of the sale of such plan assets were deposited in the Deposit Accounts established and controlled by Fidelity.

D. 130 at 14 (citing D. 122 ¶¶ 22, 23, 25, 27, 33). None of these allegations support the inference that the funds backing the Plans' assets ever became Plan assets. Plaintiffs further allege that "Fidelity held those funds, which retained their status as Plan assets, in trust for the benefit of the Plans," id., however, the complaint alleges no particularized facts to support the conclusion that those funds retained their status as Plan assets. Rather, Plaintiffs appear to argue that the cash proceeds from the mutual fund sales must be a Plan asset because "the Plans own all of their assets, whether invested in shares or cash." D. 130 at 7. On this point, Plaintiffs attempt to distinguish Merrimon and Vander Luitgaren, arguing that in those cases the underlying assets belonged to the insurer, not the plans, and that the benefits were contingent, backed only by the insurer's general accounts. D. 130 at 9-10. Here as well, the underlying assets of the mutual funds belonged to the funds, not the Plans, D. 130 at 8, but Plaintiffs argue that because the shares of the mutual fund were sold to pay the benefits that this case is distinct and the cash proceeds necessarily remained Plan assets, id. at 9-10. The relevant inquiry, however, is whether cash proceeds from the sale of the mutual fund shares are Plan assets once the shares are sold. Tussey, 746 F.3d at 340 (holding that "[b]ecause the participants have failed to show the float was a Plan asset under the circumstances of this case, the district court erred in finding Fidelity breached its fiduciary duty").

As Fidelity points out, Plaintiffs' argument appear to ignore that the assets at issue were in fact withdrawn from the Plan. D. 131 at 4-5 (noting that "[t]his case is about whether assets that have been withdrawn from a 401(k) plan nonetheless belong to the plan" and arguing that "[o]ne would think that simply to ask that question is to answer it"). In Merrimon, the First

Circuit addressed a similar argument that death benefit funds remain plan assets until the beneficiary account is completely liquidated and concluded that under "ordinary notions of property rights . . . [i]t is the beneficiary, not the plan itself, who has acquired an ownership interest in the assets backing the [retained asset account]." Merrimon, 758 F.3d at 56. Once the Plan assets – the mutual fund shares – are sold, therefore, "[u]nless the plan documents clearly evince a contrary intent . . . a beneficiary's assets are not plan assets," id., and "[a]ny further obligation that [Fidelity] had to the beneficiaries 'constituted a straightforward creditor-debtor relationship.'" Id. at 59 (quoting Faber v. Metro. Life Ins. Co., 648 F.3d 98, 105 (2d Cir. 2011)); see Edmonson, 725 F.3d at 428 (noting that "ordinary notions of property rights determine whether an asset is a plan asset, and that [courts] should look to the plan and the plan documents in making this determination"); Vander Luitgaren, 765 F.3d at 64 (citation omitted) (noting that "[t]he Supreme Court has explained that 'ERISA's principal function [is] to protect [those] contractually defined benefits").

Here, the Plaintiffs did not contract for an alternative arrangement, for example, specifying that beneficiaries would be paid from accounts owned by the Plan. As a result, Fidelity owned the relevant bank accounts, was responsible for the account fees associated with those accounts and was, therefore, free to pay those fees using the float income. See D. 131 at 9 & n.8 (pointing out that the Parties "could have contracted for the arrangement that the named Plaintiffs consider preferable—one in which the plans owned the Bank Accounts, paid the account fees when those fees exceeded the interest earned . . . and bore the risk of account loss" and noting that "[d]uring the putative class period, which includes the financial crisis, over 500 banks failed"). As in Tussey, then, "when a participant chose to receive a check rather than an electronic disbursement, the relevant Plan investment options retained all rights to the

redemption float until the disbursement check was cashed." Tussey, 746 F.3d at 340. Accordingly, in the absence of allegations suggesting special circumstances, as with any other mutual fund sale, the investor is not entitled to earn interest while their check remains uncashed. See id. (noting that "the funder of the check owns the funds in the checking account until the check is presented, and thus is entitled to any interest earned on that float").

B. Fidelity is Not an ERISA Fiduciary as to Float

Alternatively, even if float were a Plan asset, it is also the case that Fidelity is not an ERISA fiduciary as to float. Fidelity again relies on Merrimon and Vander Luitgaren to argue that it is not an ERISA fiduciary as to float, D. 126, because in the context of distribution of plan benefits "once a fiduciary (1) complies with the requirements of the governing agreements, and (2) provides a beneficiary with 'immediate and unfettered' access to the promised benefit, it has complied with its fiduciary duties, and its job as a fiduciary is done." D. 131 at 6 (quoting Vander Luitgaren, 765 F.3d at 64). In Merrimon and Vander Luitgaren, the First Circuit rejected plaintiffs' argument that when insurers set up the retained asset accounts they breached their fiduciary duties by not acting solely for the benefit of the participants and beneficiaries. See Vander Luitgaren, 765 F.3d at 63-64. Noting that "plan sponsors have considerable latitude to set the terms of a plan, including terms that spell out how benefits are to be paid," the First Circuit held that "a fiduciary must act in accordance with the documents and instruments governing the plan." Id. at 64 (citations and internal quotation marks omitted). Moreover, in Vander Luitgaren, the First Circuit held that the insurers could discharge their fiduciary duties "through any one of a range of recognized payment modalities" as long as "the chosen modality does not unfairly diminish, impair, restrict, or burden the beneficiary's rights." Id. at 64. The focus then is on how the method of payment affects the beneficiary, not the fiduciary. See id.

Accordingly, the First Circuit held that there was no breach by an insurer as long as the insurer complies with "the language of the Plan" and as long as it gives the beneficiary "immediate and unfettered access to the promised benefit in its entirety." Id. at 64-65.

Here, the trust documents governing the Plans, and Fidelity's fiduciary duties and obligations with respect to the Plans, direct Fidelity in regard to the processing of approved withdrawals and mailing of distribution checks or remitting distributions as direct deposits to the Participants. D. 128-4 at 18. Fidelity contends that it fully complied with its duties under the governing agreement, processing the withdrawals and mailing distribution checks for the full amount owed or remitting the payments electronically. D. 131 at 7 (citing D. 122 ¶ 33f-g). Plaintiffs counter that the trust documents further required Fidelity "to hold Plan assets," arguing that Fidelity's duties were not discharged simply by cutting a check. D. 130 at 11. The trust documents indicate, however, that Fidelity must only hold Plan assets in certain investments, D. 128-2 at 23, and that Fidelity was not authorized to retain uninvested cash unless expressly directed to do so by the plan administrator. Id. at 23-24. The complaint does not allege that the plan administrators expressly directed Fidelity to hold cash assets; therefore, "the scope of Fidelity's authority as trustee was limited to holding investments in fund shares." D. 131 at 10. As a result, Fidelity was no longer acting as an ERISA fiduciary.

As noted above, the Plans could have contracted for an agreement dictating that the Plans would own the bank accounts and, consequently, pay the fees, bearing the risk of loss if the account fees exceeded the interest earned. Since the governing agreements do not provide for such an obligation, however, and since the Plaintiffs have not alleged that Fidelity did not process withdrawals, mail distribution checks or remit distributions, see generally, D. 122, Plaintiffs have not sufficiently alleged a fiduciary breach.

C. Fidelity's Remaining Arguments

Fidelity has also raised a number of arguments arguing for dismissal of this action. See e.g., D. 126 at 9. In light of the Court's rulings discussed above, however, the Court need not reach Fidelity's remaining arguments.

VI. Conclusion

For the foregoing reasons, the Court ALLOWS Fidelity's motion to dismiss, D. 125. In light of this ruling, the Court also DENIES the Defendant's prior motions to dismiss, D. 82, 103, as moot.

So Ordered.

/s/ Denise J. Casper
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

IN RE FIDELITY ERISA FLOAT LITIGATION

CIVIL ACTION NO. 13-10222-DJC

ORDER OF DISMISSAL

CASPER, D.J.

In accordance with the Memorandum and Order dated March 11, 2015, the Court Orders that Defendants' Motion to Dismiss is Allowed and the above-entitled action be and hereby is DISMISSED.

March 11, 2015

/s/ Lisa M. Hourihan
Deputy Clerk

United States Code Annotated
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program (Refs & Annos)
Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)
Subtitle B. Regulatory Provisions
Part 4. Fiduciary Responsibility (Refs & Annos)

29 U.S.C.A. § 1101

§ 1101. Coverage

Effective: August 20, 1996
Currentness

(a) Scope of coverage

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title), other than--

(1) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees; or

(2) any agreement described in section 736 of Title 26, which provides payments to a retired partner or deceased partner or a deceased partner's successor in interest.

(b) Securities or policies deemed to be included in plan assets

For purposes of this part:

(1) In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.], 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 investment company.

(2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:

(A) The term "insurer" means an insurance company, insurance service, or insurance organization, qualified to do business in a State.

(B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

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(c) Clarification of application of ERISA to insurance company general accounts

(1)(A) Not later than June 30, 1997, the Secretary shall issue proposed regulations to provide guidance for the purpose of determining, in cases where an insurer issues 1 or more policies to or for the benefit of an employee benefit plan (and such policies are supported by assets of such insurer's general account), which assets held by the insurer (other than plan assets held in its separate accounts) constitute assets of the plan for purposes of this part and section 4975 of Title 26 and to provide guidance with respect to the application of this subchapter to the general account assets of insurers.

(B) The proposed regulations under subparagraph (A) shall be subject to public notice and comment until September 30, 1997.

(C) The Secretary shall issue final regulations providing the guidance described in subparagraph (A) not later than December 31, 1997.

(D) Such regulations shall only apply with respect to policies which are issued by an insurer on or before December 31, 1998, to or for the benefit of an employee benefit plan which is supported by assets of such insurer's general account. With respect to policies issued on or before December 31, 1998, such regulations shall take effect at the end of the 18-month period following the date on which such regulations become final.

(2) The Secretary shall ensure that the regulations issued under paragraph (1)--

(A) are administratively feasible, and

(B) protect the interests and rights of the plan and of its participants and beneficiaries (including meeting the requirements of paragraph (3)).

(3) The regulations prescribed by the Secretary pursuant to paragraph (1) shall require, in connection with any policy issued by an insurer to or for the benefit of an employee benefit plan to the extent that the policy is not a guaranteed benefit policy (as defined in subsection (b)(2)(B) of this section)--

(A) that a plan fiduciary totally independent of the insurer authorize the purchase of such policy (unless such purchase is a transaction exempt under section 1108(b)(5) of this title),

(B) that the insurer describe (in such form and manner as shall be prescribed in such regulations), in annual reports and in policies issued to the policyholder after the date on which such regulations are issued in final form pursuant to paragraph (1)(C)--

(i) a description of the method by which any income and expenses of the insurer's general account are allocated to the policy during the term of the policy and upon the termination of the policy, and

(ii) for each report, the actual return to the plan under the policy and such other financial information as the Secretary may deem appropriate for the period covered by each such annual report,

(C) that the insurer disclose to the plan fiduciary the extent to which alternative arrangements supported by assets of separate accounts of the insurer (which generally hold plan assets) are available, whether there is a right under the policy to transfer funds to a separate account and the terms governing any such right, and the extent to which support by assets of the insurer's general account and support by assets of separate accounts of the insurer might pose differing risks to the plan, and

(D) that the insurer manage those assets of the insurer which are assets of such insurer's general account (irrespective of whether any such assets are plan assets) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, taking into account all obligations supported by such enterprise.

(4) Compliance by the insurer with all requirements of the regulations issued by the Secretary pursuant to paragraph (1) shall be deemed compliance by such insurer with sections 1104, 1106, and 1107 of this title with respect to those assets of the insurer's general account which support a policy described in paragraph (3).

(5)(A) Subject to subparagraph (B), any regulations issued under paragraph (1) shall not take effect before the date on which such regulations become final.

(B) No person shall be subject to liability under this part or section 4975 of Title 26 for conduct which occurred before the date which is 18 months following the date described in subparagraph (A) on the basis of a claim that the assets of an insurer (other than plan assets held in a separate account) constitute assets of the plan, except--

(i) as otherwise provided by the Secretary in regulations intended to prevent avoidance of the regulations issued under paragraph (1), or

(ii) as provided in an action brought by the Secretary pursuant to paragraph (2) or (5) of section 1132(a) of this title for a breach of fiduciary responsibilities which would also constitute a violation of Federal or State criminal law.

The Secretary shall bring a cause of action described in clause (ii) if a participant, beneficiary, or fiduciary demonstrates to the satisfaction of the Secretary that a breach described in clause (ii) has occurred.

(6) Nothing in this subsection shall preclude the application of any Federal criminal law.

(7) For purposes of this subsection, the term "policy" includes a contract.

CREDIT(S)

(Pub.L. 93-406, Title I, § 401, Sept. 2, 1974, 88 Stat. 874; Pub.L. 101-239, Title VII, § 7891(a)(1), Dec. 19, 1989, 103 Stat. 2445; Pub.L. 104-188, Title I, § 1460(a), Aug. 20, 1996, 110 Stat. 1820.)

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Notes of Decisions (28)

29 U.S.C.A. § 1101, 29 USCA § 1101
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United States Code Annotated
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program (Refs & Annos)
Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)
Subtitle B. Regulatory Provisions
Part 4. Fiduciary Responsibility (Refs & Annos)

29 U.S.C.A. § 1104

§ 1104. Fiduciary duties

Currentness

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

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

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

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

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

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

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Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)--

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

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

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of--

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon--

(A) the earlier of--

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which--

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if--

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) Default investment arrangements

(A) In general

For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) Notice requirements

(i) In general

The requirements of this subparagraph are met if each participant or beneficiary--

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) Form of notice

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of Title 26 shall apply with respect to the notices described in this subparagraph.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement--

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement--

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection--

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

CREDIT(S)

(Pub.L. 93-406, Title I, § 404, Sept. 2, 1974, 88 Stat. 877; Pub.L. 96-364, Title III, § 309, Sept. 26, 1980, 94 Stat. 1296; Pub.L. 101-508, Title XII, § 12002(b)(1), (2)(A), Nov. 5, 1990, 104 Stat. 1388-565, 1388-566; Pub.L. 104-188, Title I, § 1421(d)(2), Aug. 20, 1996, 110 Stat. 1799; Pub.L. 107-16, Title VI, § 657(c)(1), June 7, 2001, 115 Stat. 136; Pub.L. 107-147, Title IV, § 411(t), Mar. 9, 2002, 116 Stat. 51; Pub.L. 109-280, Title VI, §§ 621(a), 624(a), Aug. 17, 2006, 120 Stat. 978, 980; Pub.L. 110-458, Title I, § 106(d), Dec. 23, 2008, 122 Stat. 5107.)

Notes of Decisions (986)

29 U.S.C.A. § 1104, 29 USCA § 1104
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United States Code Annotated
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program (Refs & Annos)
Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)
Subtitle B. Regulatory Provisions
Part 4. Fiduciary Responsibility (Refs & Annos)

29 U.S.C.A. § 1106

§ 1106. Prohibited transactions

Currentness

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

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

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

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

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

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

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not--

(1) deal with the assets of the plan in his own interest or for his own account,

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

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

CREDIT(S)

(Pub.L. 93-406, Title I, § 406, Sept. 2, 1974, 88 Stat. 879.)

Notes of Decisions (185)

29 U.S.C.A. § 1106, 29 USCA § 1106
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Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)
Subtitle B. Regulatory Provisions
Part 4. Fiduciary Responsibility (Refs & Annos)

29 U.S.C.A. § 1109

§ 1109. Liability for breach of fiduciary duty

Currentness

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

CREDIT(S)

(Pub.L. 93-406, Title I, § 409, Sept. 2, 1974, 88 Stat. 886.)

Notes of Decisions (535)

29 U.S.C.A. § 1109, 29 USCA § 1109
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Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter XXV. Employee Benefits Security Administration, Department of Labor (Refs & Annos)
Subchapter B. Definitions and Coverage Under the Employee Retirement Income Security Act of 1974
Part 2510. Definition of Terms Used in Subchapters C, D, E, F, G, and L of this Chapter (Refs & Annos)

29 C.F.R. § 2510.3–101

§ 2510.3–101 Definition of "plan assets"—plan investments.

Currentness

(a) In general.

(1) This section describes what constitute assets of a plan with respect to a plan's investment in another entity for purposes of subtitle A, and parts 1 and 4 of subtitle B, of title I of the Act and section 4975 of the Internal Revenue Code. Paragraph (a)(2) of this section contains a general rule relating to plan investments. Paragraphs (b) through (f) of this section define certain terms that are used in the application of the general rule. Paragraph (g) of this section describes how the rules in this section are to be applied when a plan owns property jointly with others or where it acquires an equity interest whose value relates solely to identified assets of an issuer. Paragraph (h) of this section contains special rules relating to particular kinds of plan investments. Paragraph (i) describes the assets that a plan acquires when it purchases certain guaranteed mortgage certificates. Paragraph (j) of this section contains examples illustrating the operation of this section. The effective date of this section is set forth in paragraph (k) of this section.

(2) Generally, when a plan invests in another entity, the plan's assets include its investment, but do not, solely by reason of such investment, include any of the underlying assets of the entity. However, in the case of a plan's investment in an equity interest of an entity that is neither a publicly-offered security nor a security issued by an investment company registered under the Investment Company Act of 1940 its assets include both the equity interest and an undivided interest in each of the underlying assets of the entity, unless it is established that—

(i) The entity is an operating company, or

(ii) Equity participation in the entity by benefit plan investors is not significant.

Therefore, any person who exercises authority or control respecting the management or disposition of such underlying assets, and any person who provides investment advice with respect to such assets for a fee (direct or indirect), is a fiduciary of the investing plan.

(b) Equity interests and publicly-offered securities.

(1) The term equity interest means any interest in an entity other than an instrument that is treated as indebtedness under applicable local law and which has no substantial equity features. A profits interest in a partnership, an undivided ownership interest in property and a beneficial interest in a trust are equity interests.

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(2) A publicly-offered security is a security that is freely transferable, part of a class of securities that is widely held and either—

(i) Part of a class of securities registered under section 12(b) or 12(g) of the Securities Exchange Act of 1934, or

(ii) Sold to the plan as part of an offering of securities to the public pursuant to an effective registration statement under the Securities Act of 1933 and the class of securities of which such security is a part is registered under the Securities Exchange Act of 1934 within 120 days (or such later time as may be allowed by the Securities and Exchange Commission) after the end of the fiscal year of the issuer during which the offering of such securities to the public occurred.

(3) For purposes of paragraph (b)(2) of this section, a class of securities is "widely-held" only if it is a class of securities that is owned by 100 or more investors independent of the issuer and of one another. A class of securities will not fail to be widely-held solely because subsequent to the initial offering the number of independent investors falls below 100 as a result of events beyond the control of the issuer.

(4) For purposes of paragraph (b)(2) of this section, whether a security is "freely transferable" is a factual question to be determined on the basis of all relevant facts and circumstances. If a security is part of an offering in which the minimum investment is $10,000 or less, however, the following factors ordinarily will not, alone or in combination, affect a finding that such securities are freely transferable:

(i) Any requirement that not less than a minimum number of shares or units of such security be transferred or assigned by any investor, provided that such requirement does not prevent transfer of all of the then remaining shares or units held by an investor;

(ii) Any prohibition against transfer or assignment of such security or rights in respect thereof to an ineligible or unsuitable investor;

(iii) Any restriction on, or prohibition against, any transfer or assignment which would either result in a termination or reclassification of the entity for Federal or state tax purposes or which would violate any state or Federal statute, regulation, court order, judicial decree, or rule of law;

(iv) Any requirement that reasonable transfer or administrative fees be paid in connection with a transfer or assignment;

(v) Any requirement that advance notice of a transfer or assignment be given to the entity and any requirement regarding execution of documentation evidencing such transfer or assignment (including documentation setting forth representations from either or both of the transferor or transferee as to compliance with any restriction or requirement described in this paragraph (b)(4) of this section or requiring compliance with the entity's governing instruments);

(vi) Any restriction on substitution of an assignee as a limited partner of a partnership, including a general partner consent requirement, provided that the economic benefits of ownership of the assignor may be transferred or assigned without

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regard to such restriction or consent (other than compliance with any other restriction described in this paragraph (b)(4)) of this section;

(vii) Any administrative procedure which establishes an effective date, or an event, such as the completion of the offering, prior to which a transfer or assignment will not be effective; and

(viii) Any limitation or restriction on transfer or assignment which is not created or imposed by the issuer or any person acting for or on behalf of such issuer.

(c) Operating company.

(1) An "operating company" is an entity that is primarily engaged, directly or through a majority owned subsidiary or subsidiaries, in the production or sale of a product or service other than the investment of capital. The term "operating company" includes an entity which is not described in the preceding sentence, but which is a "venture capital operating company" described in paragraph (d) or a "real estate operating company" described in paragraph (e).

(2) [Reserved]

(d) Venture capital operating company.

(1) An entity is a "venture capital operating company" for the period beginning on an initial valuation date described in paragraph (d)(5)(i) and ending on the last day of the first "annual valuation period" described in paragraph (d)(5)(ii) (in the case of an entity that is not a venture capital operating company immediately before the determination) or for the 12 month period following the expiration of an "annual valuation period" described in paragraph (d)(5)(ii) (in the case of an entity that is a venture capital operating company immediately before the determination) if—

(i) On such initial valuation date, or at any time within such annual valuation period, at least 50 percent of its assets (other than short-term investments pending long-term commitment or distribution to investors), valued at cost, are invested in venture capital investments described in paragraph (d)(3)(i) or derivative investments described in paragraph (d)(4); and

(ii) During such 12 month period (or during the period beginning on the initial valuation date and ending on the last day of the first annual valuation period), the entity, in the ordinary course of its business, actually exercises management rights of the kind described in paragraph (d)(3)(ii) with respect to one or more of the operating companies in which it invests.

(2)(i) A venture capital operating company described in paragraph (d)(1) shall continue to be treated as a venture capital operating company during the "distribution period" described in paragraph (d)(2)(ii). An entity shall not be treated as a venture capital operating company at any time after the end of the distribution period.

(ii) The "distribution period" referred to in paragraph (d)(2)(i) begins on a date established by a venture capital operating company that occurs after the first date on which the venture capital operating company has distributed to investors the proceeds of at least 50 percent of the highest amount of its investments (other than short-term investments made

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pending long-term commitment or distribution to investors) outstanding at any time from the date it commenced business (determined on the basis of the cost of such investments) and ends on the earlier of—

(A) The date on which the company makes a “new portfolio investment”, or

(B) The expiration of 10 years from the beginning of the distribution period.

(iii) For purposes of paragraph (d)(2)(ii)(A), a “new portfolio investment” is an investment other than—

(A) An investment in an entity in which the venture capital operating company had an outstanding venture capital investment at the beginning of the distribution period which has continued to be outstanding at all times during the distribution period, or

(B) A short-term investment pending long-term commitment or distribution to investors.

(3)(i) For purposes of this paragraph (d) a “venture capital investment” is an investment in an operating company (other than a venture capital operating company) as to which the investor has or obtains management rights.

(ii) The term “management rights” means contractual rights directly between the investor and an operating company to substantially participate in, or substantially influence the conduct of, the management of the operating company.

(4)(i) An investment is a “derivative investment” for purposes of this paragraph (d) if it is—

(A) A venture capital investment as to which the investor's management rights have ceased in connection with a public offering of securities of the operating company to which the investment relates, or

(B) An investment that is acquired by a venture capital operating company in the ordinary course of its business in exchange for an existing venture capital investment in connection with:

(1) A public offering of securities of the operating company to which the existing venture capital investment relates, or

(2) A merger or reorganization of the operating company to which the existing venture capital investment relates, provided that such merger or reorganization is made for independent business reasons unrelated to extinguishing management rights.

(ii) An investment ceases to be a derivative investment on the later of:

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(A) 10 years from the date of the acquisition of the original venture capital investment to which the derivative investment relates, or

(B) 30 months from the date on which the investment becomes a derivative investment.

(5) For purposes of this paragraph (d) and paragraph (e)—

(i) An “initial valuation date” is the later of—

(A) Any date designated by the company within the 12 month period ending with the effective date of this section, or

(B) The first date on which an entity makes an investment that is not a short-term investment of funds pending long-term commitment.

(ii) An “annual valuation period” is a preestablished annual period, not exceeding 90 days in duration, which begins no later than the anniversary of an entity's initial valuation date. An annual valuation period, once established may not be changed except for good cause unrelated to a determination under this paragraph (d) or paragraph (e).

(e) Real estate operating company. An entity is a “real estate operating company” for the period beginning on an initial valuation date described in paragraph (d)(5)(i) and ending on the last day of the first “annual valuation period” described in paragraph (d)(5)(ii) (in the case of an entity that is not a real estate operating company immediately before the determination) or for the 12 month period following the expiration of an annual valuation period described in paragraph (d)(5)(ii) (in the case of an entity that is a real estate operating company immediately before the determination) if:

(1) On such initial valuation date, or on any date within such annual valuation period, at least 50 percent of its assets, valued at cost (other than short-term investments pending long-term commitment or distribution to investors), are invested in real estate which is managed or developed and with respect to which such entity has the right to substantially participate directly in the management or development activities; and

(2) During such 12 month period (or during the period beginning on the initial valuation date and ending on the last day of the first annual valuation period) such entity in the ordinary course of its business is engaged directly in real estate management or development activities.

(f) Participation by benefit plan investors.

(1) Equity participation in an entity by benefit plan investors is “significant” on any date if, immediately after the most recent acquisition of any equity interest in the entity, 25 percent or more of the value of any class of equity interests in the entity is held by benefit plan investors (as defined in paragraph (f)(2)). For purposes of determinations pursuant to this paragraph (f), the value of any equity interests held by a person (other than a benefit plan investor) who has discretionary authority or control with respect to the assets of the entity or any person who provides investment advice for a fee (direct or indirect) with respect to such assets, or any affiliate of such a person, shall be disregarded.

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(2) A "benefit plan investor" is any of the following—

(i) Any employee benefit plan (as defined in section 3(3) of the Act), whether or not it is subject to the provisions of title I of the Act,

(ii) Any plan described in section 4975(e)(1) of the Internal Revenue Code,

(iii) Any entity whose underlying assets include plan assets by reason of a plan's investment in the entity.

(3) An "affiliate" of a person includes any person, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person. For purposes of this paragraph (f)(3), "control", with respect to a person other than an individual, means the power to exercise a controlling influence over the management or policies of such person.

(g) Joint ownership. For purposes of this section, where a plan jointly owns property with others, or where the value of a plan's equity interest in an entity relates solely to identified property of the entity, such property shall be treated as the sole property of a separate entity.

(h) Specific rules relating to plan investments. Notwithstanding any other provision of this section—

(1) Except where the entity is an investment company registered under the Investment Company Act of 1940, when a plan acquires or holds an interest in any of the following entities its assets include its investment and an undivided interest in each of the underlying assets of the entity:

(i) A group trust which is exempt from taxation under section 501(a) of the Internal Revenue Code pursuant to the principles of Rev. Rul. 81–100, 1981–1 C.B. 326,

(ii) A common or collective trust fund of a bank,

(iii) A separate account of an insurance company, other than a separate account that is maintained solely in connection with fixed contractual obligations of the insurance company under which the amounts payable, or credited, to the plan and to any participant or beneficiary of the plan (including an annuitant) are not affected in any manner by the investment performance of the separate account.

(2) When a plan acquires or holds an interest in any entity (other than an insurance company licensed to do business in a State) which is established or maintained for the purpose of offering or providing any benefit described in section 3(1) or section 3(2) of the Act to participants or beneficiaries of the investing plan, its assets will include its investment and an undivided interest in the underlying assets of that entity.

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(3) When a plan or a related group of plans owns all of the outstanding equity interests (other than director's qualifying shares) in an entity, its assets include those equity interests and all of the underlying assets of the entity. This paragraph (h)(3) does not apply, however, where all of the outstanding equity interests in an entity are qualifying employer securities described in section 407(d)(5) of the Act, owned by one or more eligible individual account plan(s) (as defined in section 407(d)(3) of the Act) maintained by the same employer, provided that substantially all of the participants in the plan(s) are, or have been, employed by the issuer of such securities or by members of a group of affiliated corporations (as determined under section 407(d)(7) of the Act) of which the issuer is a member.

(4) For purposes of paragraph (h)(3), a "related group" of employee benefit plans consists of every group of two or more employee benefit plans—

(i) Each of which receives 10 percent or more of its aggregate contributions from the same employer or from members of the same controlled group of corporations (as determined under section 1563(a) of the Internal Revenue Code, without regard to section 1563(a)(4) thereof); or

(ii) Each of which is either maintained by, or maintained pursuant to a collective bargaining agreement negotiated by, the same employee organization or affiliated employee organizations. For purposes of this paragraph, an "affiliate" of an employee organization means any person controlling, controlled by, or under common control with such organization, and includes any organization chartered by the same parent body, or governed by the same constitution and bylaws, or having the relation of parent and subordinate.

(i) Governmental mortgage pools.

(1) Where a plan acquires a guaranteed governmental mortgage pool certificate, as defined in paragraph (i)(2), the plan's assets include the certificate and all of its rights with respect to such certificate under applicable law, but do not, solely by reason of the plan's holding of such certificate, include any of the mortgages underlying such certificate.

(2) A "guaranteed governmental mortgage pool certificate" is a certificate backed by, or evidencing an interest in, specified mortgages or participation interests therein and with respect to which interest and principal payable pursuant to the certificate is guaranteed by the United States or an agency or instrumentality thereof. The term "guaranteed governmental mortgage pool certificate" includes a mortgage pool certificate with respect to which interest and principal payable pursuant to the certificate is guaranteed by:

(i) The Government National Mortgage Association;

(ii) The Federal Home Loan Mortgage Corporation; or

(iii) The Federal National Mortgage Association.

(j) Examples. The principles of this section are illustrated by the following examples:

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(1) A plan, P, acquires debentures issued by a corporation, T, pursuant to a private offering. T is engaged primarily in investing and reinvesting in precious metals on behalf of its shareholders, all of which are benefit plan investors. By its terms, the debenture is convertible to common stock of T at P's option. At the time of P's acquisition of the debentures, the conversion feature is incidental to T's obligation to pay interest and principal. Although T is not an operating company, P's assets do not include an interest in the underlying assets of T because P has not acquired an equity interest in T. However, if P exercises its option to convert the debentures to common stock, it will have acquired an equity interest in T at that time and (assuming that the common stock is not a publicly-offered security and that there has been no change in the composition of the other equity investors in T) P's assets would then include an undivided interest in the underlying assets of T.

(2) A plan, P, acquires a limited partnership interest in a limited partnership, U, which is established and maintained by A, a general partner in U. U has only one class of limited partnership interests. U is engaged in the business of investing and reinvesting in securities. Limited partnership interests in U are offered privately pursuant to an exemption from the registration requirements of the Securities Act of 1933. P acquires 15 percent of the value of all the outstanding limited partnership interests in U, and, at the time of P's investment, a governmental plan owns 15 percent of the value of those interests. U is not an operating company because it is engaged primarily in the investment of capital. In addition, equity participation by benefit plan investors is significant because immediately after P's investment such investors hold more than 25 percent of the limited partnership interests in U. Accordingly, P's assets include an undivided interest in the underlying assets of U, and A is a fiduciary of P with respect to such assets by reason of its discretionary authority and control over U's assets. Although the governmental plan's investment is taken into account for purposes of determining whether equity participation by benefit plan investors is significant, nothing in this section imposes fiduciary obligations on A with respect to that plan.

(3) Assume the same facts as in paragraph (j)(2), except that P acquires only 5 percent of the value of all the outstanding limited partnership interests in U, and that benefit plan investors in the aggregate hold only 10 percent of the value of the limited partnership interests in U. Under these facts, there is no significant equity participation by benefit plan investors in U, and, accordingly, P's assets include its limited partnership interest in U, but do not include any of the underlying assets of U. Thus, A would not be a fiduciary of P by reason of P's investment.

(4) Assume the same facts as in paragraph (j)(3) and that the aggregate value of the outstanding limited partnership interests in U is $10,000 (and that the value of the interests held by benefit plan investors is thus $1000). Also assume that an affiliate of A owns limited partnership interests in U having a value of $6500. The value of the limited partnership interests held by A's affiliate are disregarded for purposes of determining whether there is significant equity participation in U by benefit plan investors. Thus, the percentage of the aggregate value of the limited partnership interests held by benefit plan investors in U for purposes of such a determination is approximately 28.6% ($1000/$3500). Therefore there is significant benefit plan investment in T.

(5) A plan, P, invests in a limited partnership, V, pursuant to a private offering. There is significant equity participation by benefit plan investors in V. V acquires equity positions in the companies in which it invests, and, in connection with these investments, V negotiates terms that give it the right to participate in or influence the management of those companies. Some of these investments are in publicly-offered securities and some are in securities acquired in private offerings. During its most recent valuation period, more than 50 percent of V's assets, valued at cost, consisted of investments with respect to which V obtained management rights of the kind described above. V's managers routinely consult informally with, and advise, the management of only one portfolio company with respect to which it has management rights, although it devotes substantial resources to its consultations with that company. With respect to the other portfolio companies, V relies on the managers of other entities to consult with and advise the companies' management. V is a venture capital operating company and therefore P has acquired its limited partnership investment, but has not acquired an interest in any of the

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underlying assets of V. Thus, none of the managers of V would be fiduciaries with respect to P solely by reason of its investment. In this situation, the mere fact that V does not participate in or influence the management of all its portfolio companies does not affect its characterization as a venture capital operating company.

(6) Assume the same facts as in paragraph (j)(5) and the following additional facts: V invests in debt securities as well as equity securities of its portfolio companies. In some cases V makes debt investments in companies in which it also has an equity investment; in other cases V only invests in debt instruments of the portfolio company. V's debt investments are acquired pursuant to private offerings and V negotiates covenants that give it the right to substantially participate in or to substantially influence the conduct of the management of the companies issuing the obligations. These covenants give V more significant rights with respect to the portfolio companies' management than the covenants ordinarily found in debt instruments of established, creditworthy companies that are purchased privately by institutional investors. V routinely consults with and advises the management of its portfolio companies. The mere fact that V's investments in portfolio companies are debt, rather than equity, will not cause V to fail to be a venture capital operating company, provided it actually obtains the right to substantially participate in or influence the conduct of the management of its portfolio companies and provided that in the ordinary course of its business it actually exercises those rights.

(7) A plan, P, invests (pursuant to a private offering) in a limited partnership, W, that is engaged primarily in investing and reinvesting assets in equity positions in real property. The properties acquired by W are subject to long-term leases under which substantially all management and maintenance activities with respect to the property are the responsibility of the lessee. W is not engaged in the management or development of real estate merely because it assumes the risks of ownership of income-producing real property, and W is not a real estate operating company. If there is significant equity participation in W by benefit plan investors, P will be considered to have acquired an undivided interest in each of the underlying assets of W.

(8) Assume the same facts as in paragraph (j)(7) except that W owns several shopping centers in which individual stores are leased for relatively short periods to various merchants (rather than owning properties subject to long-term leases under which substantially all management and maintenance activities are the responsibility of the lessee). W retains independent contractors to manage the shopping center properties. These independent contractors negotiate individual leases, maintain the common areas and conduct maintenance activities with respect to the properties. W has the responsibility to supervise and the authority to terminate the independent contractors. During its most recent valuation period more than 50 percent of W's assets, valued at cost, are invested in such properties. W is a real estate operating company. The fact that W does not have its own employees who engage in day-to-day management and development activities is only one factor in determining whether it is actively managing or developing real estate. Thus, P's assets include its interest in W, but do not include any of the underlying assets of W.

(9) A plan, P, acquires a limited partnership interest in X pursuant to a private offering. There is significant equity participation in X by benefit plan investors. X is engaged in the business of making "convertible loans" which are structured as follows: X lends a specified percentage of the cost of acquiring real property to a borrower who provides the remaining capital needed to make the acquisition. This loan is secured by a mortgage on the property. Under the terms of the loan, X is entitled to receive a fixed rate of interest payable out of the initial cash flow from the property and is also entitled to that portion of any additional cash flow which is equal to the percentage of the acquisition cost that is financed by its loan. Simultaneously with the making of the loan, the borrower also gives X an option to purchase an interest in the property for the original principal amount of the loan at the expiration of its initial term. X's percentage interest in the property, if it exercises this option, would be equal to the percentage of the acquisition cost of the property which is financed by its loan. The parties to the transaction contemplate that the option ordinarily will be exercised at the expiration of the loan term if the property has appreciated in value. X and the borrower also agree that, if the option is exercised,

they will form a limited partnership to hold the property. X negotiates loan terms which give it rights to substantially influence, or to substantially participate in, the management of the property which is acquired with the proceeds of the loan. These loan terms give X significantly greater rights to participate in the management of the property than it would obtain under a conventional mortgage loan. In addition, under the terms of the loan, X and the borrower ratably share any capital expenditures relating to the property. During its most recent valuation period, more than 50 percent of the value of X's assets valued at cost consisted of real estate investments of the kind described above. X, in the ordinary course of its business, routinely exercises its management rights and frequently consults with and advises the borrower and the property manager. Under these facts, X is a real estate operating company. Thus, P's assets include its interest in X, but do not include any of the underlying assets of X.

(10) In a private transaction, a plan, P, acquires a 30 percent participation in a debt instrument that is held by a bank. Since the value of the participation certificate relates solely to the debt instrument, that debt instrument is, under paragraph (g), treated as the sole asset of a separate entity. Equity participation in that entity by benefit plan investors is significant since the value of the plan's participation exceeds 25 percent of the value of the instrument. In addition, the hypothetical entity is not an operating company because it is primarily engaged in the investment of capital (i.e., holding the debt instrument). Thus, P's assets include the participation and an undivided interest in the debt instrument, and the bank is a fiduciary of P to the extent it has discretionary authority or control over the debt instrument.

(11) In a private transaction, a plan, P, acquires 30% of the value of a class of equity securities issued by an operating company, Y. These securities provide that dividends shall be paid solely out of earnings attributable to certain tracts of undeveloped land that are held by Y for investment. Under paragraph (g), the property is treated as the sole asset of a separate entity. Thus, even though Y is an operating company, the hypothetical entity whose sole assets are the undeveloped tracts of land is not an operating company. Accordingly, P is considered to have acquired an undivided interest in the tracts of land held by Y. Thus, Y would be a fiduciary of P to the extent it exercises discretionary authority or control over such property.

(12) A medical benefit plan, P, acquires a beneficial interest in a trust, Z, that is not an insurance company licensed to do business in a State. Under this arrangement, Z will provide the benefits to the participants and beneficiaries of P that are promised under the terms of the plan. Under paragraph (h)(2), P's assets include its beneficial interest in Z and an undivided interest in each of its underlying assets. Thus, persons with discretionary authority or control over the assets of Z would be fiduciaries of P.

(k) Effective date and transitional rules.

(1) In general, this section is effective for purposes of identifying the assets of a plan on or after March 13, 1987. Except as a defense, this section shall not apply to investments in an entity in existence on March 13, 1987, if no plan subject to title I of the Act or plan described in section 4975(e)(1) of the Code (other than a plan described in section 4975(g)(2) or (3)) acquires an interest in the entity from an issuer or underwriter at any time on or after March 13, 1987 except pursuant to a contract binding on the plan in effect on March 13, 1987 with an issuer or underwriter to acquire an interest in the entity.

(2) Notwithstanding paragraph (k)(1), this section shall not, except as a defense, apply to a real estate entity described in section 11018(a) of Pub.L. 99–272.

Credits
[51 FR 41280, Nov. 13, 1986; 51 FR 47226, Dec. 31, 1986]

SOURCE: 40 FR 34530, Aug. 15, 1975; 51 FR 41280, Nov. 13, 1986; 53 FR 17630, May 17, 1988; 68 FR 16400, April 3, 2003; 68 FR 17480, April 9, 2003; 69 FR 52125, Aug. 24, 2004; 78 FR 39894, July 2, 2013; 79 FR 51099, Aug. 27, 2014; 80 FR 41344, July 14, 2015, unless otherwise noted.

AUTHORITY: 29 U.S.C. 1002(2), 1002(16), 1002(21),1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor's Order 1–2011, 77 FR 1088 (Jan. 9, 2012); Sec. 2510.3–101 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 43 FR 47713, 3 CFR, 1978 Comp., p. 332 and E.O. 12108, 44 FR 1065, 3 CFR, 1978 Comp., p. 275, and 29 U.S.C. 1135 note. Sec. 2510.3–102 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 43 FR 47713, 3 CFR, 1978 Comp., p. 332 and E.O. 12108, 44 FR 1065, 3 CFR, 1978 Comp., p. 275. Sec. 2510.3–38 is also issued under sec. 1, Pub.L. 105–72, 111 Stat. 1457.

Notes of Decisions (19)

Current through August 18, 2015; 80 FR 50187.

End of Document

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Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter XXV. Employee Benefits Security Administration, Department of Labor (Refs & Annos)
Subchapter B. Definitions and Coverage Under the Employee Retirement Income Security Act of 1974
Part 2510. Definition of Terms Used in Subchapters C, D, E, F, G, and L of this Chapter (Refs & Annos)

29 C.F.R. § 2510.3–102

§ 2510.3–102 Definition of “plan assets”—participant contributions.

Effective: January 14, 2010
Currentness

(a)(1) General rule. For purposes of subtitle A and parts 1 and 4 of subtitle B of title I of ERISA and section 4975 of the Internal Revenue Code only (but without any implication for and may not be relied upon to bar criminal prosecutions under 18 U.S.C. 664), the assets of the plan include amounts (other than union dues) that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his wages by an employer, for contribution or repayment of a participant loan to the plan, as of the earliest date on which such contributions or repayments can reasonably be segregated from the employer's general assets.

(2) Safe harbor.

(i) For purposes of paragraph (a)(1) of this section, in the case of a plan with fewer than 100 participants at the beginning of the plan year, any amount deposited with such plan not later than the 7th business day following the day on which such amount is received by the employer (in the case of amounts that a participant or beneficiary pays to an employer), or the 7th business day following the day on which such amount would otherwise have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages), shall be deemed to be contributed or repaid to such plan on the earliest date on which such contributions or participant loan repayments can reasonably be segregated from the employer's general assets.

(ii) This paragraph (a)(2) sets forth an optional alternative method of compliance with the rule set forth in paragraph (a)(1) of this section. This paragraph (a)(2) does not establish the exclusive means by which participant contribution or participant loan repayment amounts shall be considered to be contributed or repaid to a plan by the earliest date on which such contributions or repayments can reasonably be segregated from the employer's general assets.

(b) Maximum time period for pension benefit plans.

(1) Except as provided in paragraph (b)(2) of this section, with respect to an employee pension benefit plan as defined in section 3(2) of ERISA, in no event shall the date determined pursuant to paragraph (a)(1) of this section occur later than the 15th business day of the month following the month in which the participant contribution or participant loan repayment amounts are received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or the 15th business day of the month following the month in which such amounts would otherwise have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages).

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(2) With respect to a SIMPLE plan that involves SIMPLE IRAs (i.e., Simple Retirement Accounts, as described in section 408(p) of the Internal Revenue Code), in no event shall the date determined pursuant to paragraph (a)(1) of this section occur later than the 30th calendar day following the month in which the participant contribution amounts would otherwise have been payable to the participant in cash.

(c) Maximum time period for welfare benefit plans. With respect to an employee welfare benefit plan as defined in section 3(1) of ERISA, in no event shall the date determined pursuant to paragraph (a)(1) of this section occur later than 90 days from the date on which the participant contribution amounts are received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or the date on which such amounts would otherwise have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages).

(d) Extension of maximum time period for pension plans.

(1) With respect to participant contributions received or withheld by the employer in a single month, the maximum time period provided under paragraph (b) of this section shall be extended for an additional 10 business days for an employer who—

(i) Provides a true and accurate written notice, distributed in a manner reasonably designed to reach all the plan participants within 5 business days after the end of such extension period, stating—

(A) That the employer elected to take such extension for that month;

(B) That the affected contributions have been transmitted to the plan; and

(C) With particularity, the reasons why the employer cannot reasonably segregate the participant contributions within the time period described in paragraph (b) of this section;

(ii) Prior to such extension period, obtains a performance bond or irrevocable letter of credit in favor of the plan and in an amount of not less than the total amount of participant contributions received or withheld by the employer in the previous month; and

(iii) Within 5 business days after the end of such extension period, provides a copy of the notice required under paragraph (d)(1)(i) of this section to the Secretary, along with a certification that such notice was provided to the participants and that the bond or letter of credit required under paragraph (d)(1)(ii) of this section was obtained.

(2) The performance bond or irrevocable letter of credit required in paragraph (d)(1)(ii) of this section shall be guaranteed by a bank or similar institution that is supervised by the Federal government or a State government and shall remain in effect for 3 months after the month in which the extension expires.

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(3)(i) An employer may not elect an extension under this paragraph (d) more than twice in any plan year unless the employer pays to the plan an amount representing interest on the participant contributions that were subject to all the extensions within such plan year.

(ii) The amount representing interest in paragraph (d)(3)(i) of this section shall be the greater of—

(A) The amount that otherwise would have been earned on the participant contributions from the date on which such contributions were paid to, or withheld by, the employer until such money is transmitted to the plan had such contributions been invested during such period in the investment alternative available under plan which had the highest rate of return; or

(B) Interest at a rate equal to the underpayment rate defined in section 6621(a)(2) of the Internal Revenue Code from the date on which such contributions were paid to, or withheld by, the employer until such money is fully restored to the plan.

(e) Definition. For purposes of this section, the term business day means any day other than a Saturday, Sunday or any day designated as a holiday by the Federal Government.

(f) Examples. The requirements of this section are illustrated by the following examples:

(1) Employer A sponsors a 401(k) plan. There are 30 participants in the 401(k) plan. A has one payroll period for its employees and uses an outside payroll processing service to pay employee wages and process deductions. A has established a system under which the payroll processing service provides payroll deduction information to A within 1 business day after the issuance of paychecks. A checks this information for accuracy within 5 business days and then forwards the withheld employee contributions to the plan. The amount of the total withheld employee contributions is deposited with the trust that is maintained under the plan on the 7th business day following the date on which the employees are paid. Under the safe harbor in paragraph (a)(2) of this section, when the participant contributions are deposited with the plan on the 7th business day following a pay date, the participant contributions are deemed to be contributed to the plan on the earliest date on which such contributions can reasonably be segregated from A's general assets.

(2) Employer B is a large national corporation which sponsors a 401(k) plan with 600 participants. B has several payroll centers and uses an outside payroll processing service to pay employee wages and process deductions. Each payroll center has a different pay period. Each center maintains separate accounts on its books for purposes of accounting for that center's payroll deductions and provides the outside payroll processor the data necessary to prepare employee paychecks and process deductions. The payroll processing service issues the employees' paychecks and deducts all payroll taxes and elective employee deductions. The payroll processing service forwards the employee payroll deduction data to B on the date of issuance of paychecks. B checks this data for accuracy and transmits this data along with the employee 401(k) deferral funds to the plan's investment firm within 3 business days. The plan's investment firm deposits the employee 401(k) deferral funds into the plan on the day received from B. The assets of B's 401(k) plan would include the participant contributions no later than 3 business days after the issuance of paychecks.

(3) Employer C sponsors a self-insured contributory group health plan with 90 participants. Several former employees have elected, pursuant to the provisions of ERISA section 602, 29 U.S.C. 1162, to pay C for continuation of their coverage

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under the plan. These checks arrive at various times during the month and are deposited in the employer's general account at bank Z. Under paragraphs (a) and (c) of this section, the assets of the plan include the former employees' payments as soon after the checks have cleared the bank as C could reasonably be expected to segregate the payments from its general assets, but in no event later than 90 days after the date on which the former employees' participant contributions are received by C. If, however, C deposits the former employees' payments with the plan no later than the 7th business day following the day on which they are received by C, the former employees' participant contributions will be deemed to be contributed to the plan on the earliest date on which such contributions can reasonably be segregated from C's general assets.

(g) Effective date. This section is effective February 3, 1997.

(h) Applicability date for collectively-bargained plans.

(1) Paragraph (b) of this section applies to collectively bargained plans no sooner than the later of—

(i) February 3, 1997; or

(ii) The first day of the plan year that begins after the expiration of the last to expire of any applicable bargaining agreement in effect on August 7, 1996.

(2) Until paragraph (b) of this section applies to a collectively bargained plan, paragraph (c) of this section shall apply to such plan as if such plan were an employee welfare benefit plan.

(i) Optional postponement of applicability.

(1) The application of paragraph (b) of this section shall be postponed for up to an additional 90 days beyond the effective date described in paragraph (g) of this section for an employer who, prior to February 3, 1997—

(i) Provides a true and accurate written notice, distributed in a manner designed to reach all the plan participants before the end of February 3, 1997, stating—

(A) That the employer elected to postpone such applicability;

(B) The date that the postponement will expire; and

(C) With particularity the reasons why the employer cannot reasonably segregate the participant contributions within the time period described in paragraph (b) of this section, by February 3, 1997;

(ii) Obtains a performance bond or irrevocable letter of credit in favor of the plan and in an amount of not less than the total amount of participant contributions received or withheld by the employer in the previous 3 months;

(iii) Provides a copy of the notice required under paragraph (i)(1)(i) of this section to the Secretary, along with a certification that such notice was provided to the participants and that the bond or letter of credit required under paragraph (i)(1)(ii) of this section was obtained; and

(iv) For each month during which such postponement is in effect, provides a true and accurate written notice to the plan participants indicating the date on which the participant contributions received or withheld by the employer during such month were transmitted to the plan.

(2) The notice required in paragraph (i)(1)(iv) of this section shall be distributed in a manner reasonably designed to reach all the plan participants within 10 days after transmission of the affected participant contributions.

(3) The bond or letter of credit required under paragraph (i)(1)(ii) shall be guaranteed by a bank or similar institution that is supervised by the Federal government or a State government and shall remain in effect for 3 months after the month in which the postponement expires.

(4) During the period of any postponement of applicability with respect to a plan under this paragraph (i), paragraph (c) of this section shall apply to such plan as if such plan were an employee welfare benefit plan.

Credits
[61 FR 41233, Aug. 7, 1996; 62 FR 62936, Nov. 25, 1997; 75 FR 2076, Jan. 14, 2010]

SOURCE: 40 FR 34530, Aug. 15, 1975; 51 FR 41280, Nov. 13, 1986; 53 FR 17630, May 17, 1988; 68 FR 16400, April 3, 2003; 68 FR 17480, April 9, 2003; 69 FR 52125, Aug. 24, 2004; 78 FR 39894, July 2, 2013; 79 FR 51099, Aug. 27, 2014; 80 FR 41344, July 14, 2015, unless otherwise noted.

AUTHORITY: 29 U.S.C. 1002(2), 1002(16), 1002(21),1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor's Order 1–2011, 77 FR 1088 (Jan. 9, 2012); Sec. 2510.3–101 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 43 FR 47713, 3 CFR, 1978 Comp., p. 332 and E.O. 12108, 44 FR 1065, 3 CFR, 1978 Comp., p. 275, and 29 U.S.C. 1135 note. Sec. 2510.3–102 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 43 FR 47713, 3 CFR, 1978 Comp., p. 332 and E.O. 12108, 44 FR 1065, 3 CFR, 1978 Comp., p. 275. Sec. 2510.3–38 is also issued under sec. 1, Pub.L. 105–72, 111 Stat. 1457.

Notes of Decisions (31)

Current through August 18, 2015; 80 FR 50187.

End of Document

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PWBA Office of Regulations and Interpretations

Advisory Opinion

May 5, 1993

93-14A
ERISA SECTION
2510.3-101

Mr. John Vine
Covington & Burling
1201 Pennsylvania Ave., N.W.
P. O. Box 7566
Washington, D.C. 20044

Dear Mr. Vine:

This is in response to your request for an advisory opinion regarding the definition of plan assets under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you inquire whether, under the circumstances presented, the assets of a trust established by an employer as a potential source of premium payments for health insurance held by an ERISA plan would constitute assets of the plan.

According to your representations, the Occidental Petroleum Corporation (the Corporation) has maintained a comprehensive medical plan for a number of years to provide group health coverage to the Corporation's salaried employees and retirees and to their dependents. The comprehensive medical plan is a self-insured arrangement that covers most of the cost of prescribed medical care and treatment for more than 36,000 individuals. Active employees who participate in the comprehensive medical plan are also covered under a dental plan maintained by the Corporation.

You represent that the Corporation pays medical and dental benefits for active employees from its general assets. However, the Corporation has determined that it is desirable to fund in advance the medical benefits that it provides to retired employees. Accordingly, the Corporation has amended its retirement plan to include a medical benefits account, as described in section 401(h) of the Internal Revenue Code of 1986 (the Code).

You state that approximately 50 of the employees covered by the comprehensive medical plan and the dental plan are "key employees" of the Corporation within the meaning of section 416(i) of the Code. You represent that the Corporation does not wish to fund medical benefits for its key employees through the medical benefits account in the retirement plan since the Code provides that contributions to this account on behalf of these employees will reduce their retirement benefits. Accordingly, the Corporation wishes to establish an arrangement (the Arrangement) in order to set aside a portion of its general assets to facilitate the payment of key employees' medical benefits.

According to your representations, the Arrangement will consist of four elements: 1) The Executive Medical Plan (the Plan), an insured plan offering medical and dental benefits to the Corporation's active and retired key employees and their dependents; 2) the Group Insurance Policy (the Group Policy), a policy providing for the payment of benefits under the Plan; 3) the Medical Benefits Policy Trust (the Policy Trust), a trust established pursuant to the Plan which will be exempt from the claims of the Corporation's general creditors; and 4) the Medical Benefits Premium Trust (the

Premium Trust), a revocable trust established by the Corporation which will be subject to the claims of the Corporation's general creditors.

You describe the Plan as providing medical and dental benefits that match, as closely as possible, the benefits provided under the Corporation's broad-based group health plan for salaried employees. Because the Plan is fully insured, it will provide a few additional medical benefits that are mandated by state insurance law. The Corporation will establish the Plan as an employee welfare benefit plan within the meaning of section 3(1) of ERISA. Accordingly, the Plan will include provisions that will satisfy the applicable provisions of ERISA.

The Corporation, you state, will obtain the Group Policy from a commercial insurance company. Pursuant to the Group Policy, the insurer will process claims under the Plan, and will pay any medical benefits to which employees, retired employees, or their dependents are entitled. The Group Policy will be an experience-rated policy. If the incurred claims and other charges for a particular policy year are less than the expected charges reflected in the premium for that year, the insurer may declare a retrospective rate credit. Any retrospective rate credit declared under the Group Policy may be allocated to a premium stabilization reserve, where it will be used to offset extraordinary charges incurred under the Group Policy in subsequent policy years. To the extent that any retrospective rate credit exceeds the amount that may be credited to a reasonable premium stabilization reserve, it will be refunded to the holder of the Group Policy. Any amounts credited to the premium stabilization reserve when the Group Policy is terminated will be used to reduce outstanding liabilities, deficits, and other expenses in accordance with the insurer's standard termination accounting practices; the remaining amounts will be refunded to the holder of the Group Policy.

The Policy Trust, according to your representations, will be established pursuant to a trust agreement entered into by the Corporation with a commercial bank. The Corporation will transfer the Group Policy (including any premium stabilization reserve under the Group Policy) to the Policy Trust. In addition, the Corporation will initially contribute a base amount to cover trustee's fees and other administrative expenses of the Policy Trust. The Policy Trust will include provisions that are intended to satisfy the applicable requirements of ERISA. The Policy Trust assets will be held for the exclusive purpose of providing group medical insurance coverage to participants in the Plan, and will not be available to satisfy the claims of general creditors of the Corporation.

Both the Plan and the Policy Trust agreement will require the Corporation to contribute to the Policy Trust such amounts as are necessary to maintain the base amount and to provide for the payment of any Group Policy premium that has not been paid in full by the due date for such premium. The Trustee of the Policy Trust (Policy Trustee) will present the Corporation with a demand for payment of Group Policy premiums as they become due. If the Corporation pays a Group Policy premium to the insurer, its obligation to contribute to the Policy Trust will be reduced by the amount of the premium payment. If the Corporation fails to make any premium payment by its due date, the Policy Trustee will pay the premium from the assets of the Policy Trust. The Policy Trustee will demand an additional contribution from the Corporation if the available assets of the Policy Trust are not sufficient to pay the premium then due. In addition, a special contribution requirement will be triggered if a "Special Circumstance," such as a change in corporate control, occurs.[1] After a "Special Circumstance" occurs, the Corporation will be required to make annual contributions that are sufficient, when aggregated with the assets already held in the Policy Trust and any reserves maintained under the Group Policy, to fund the actuarially-determined present value of all future premiums that are expected to become due under the Group Policy.

You further represent that both the Plan and the Policy Trust agreement will require the Policy Trustee to make systematic, reasonable and diligent efforts to collect the required contributions. If the Corporation fails to make a contribution that is required under the Plan and the Policy Trust, the Policy Trustee will bring an action pursuant to section 502 of ERISA to enforce the contribution obligation. The Plan and the Policy Trust agreement will provide that the Policy Trustee where such action is taken may seek interest on the unpaid contribution, liquidated damages, and attorney's fees and costs.

The Policy Trust will terminate when the Executive Medical Plan terminates, or when the Corporation purchases single-premium individual medical insurance policies to provide benefits to individuals covered under the Executive Medical Plan. If surplus assets remain in the Policy Trust upon termination of the Plan, after all benefits under the Executive Medical Plan have been paid or insured through individual policies, the surplus assets will be returned to the

Corporation.

You represent that the Corporation will also establish the Premium Trust pursuant to an agreement with a commercial bank to permit it to set aside a portion of its general assets to pay premiums on the Group Policy as they become due. Contributions to the Premium Trust will be made solely by the Corporation at its discretion, except that the Corporation must keep sufficient funds in the Premium Trust to discharge the fees of the Trustee of the Premium Trust (Premium Trustee) and other administrative expenses. The Premium Trust will be revocable by the Corpora- tion's Board of Directors at any time before a "Special Circumstance" occurs. After a "Special Circumstance" occurs, the assets of the Premium Trust will be transferred to the Policy Trust and the Premium Trust will be terminated automatically, unless the Corporation is insolvent when the "Special Circumstance" occurs.[2]

In operation, the Premium Trust will serve as a discretionary source of funds for the Corporation to pay premiums on the Group Policy. As the premiums become due under the Group Policy, the Policy Trustee will notify the Corporation and any other person or entity designated by the Corporation. The Corporation may pay group policy premiums directly or may provide a written direction for payments to be made from the Trust. Neither the Policy Trust nor the Premium Trust will include any provision that would require the Trustee of the Premium Trust to automatically pay, or that would permit the Policy Trustee to demand the Premium Trustee to pay premiums on the Group Policy as they become due. The Premium Trust agreement will provide that premium payments will be made from the Trust only at the written direction of the Corporation. The Corporation may provide the necessary direction in one of two ways: it may direct the Trustee of the Premium Trust separately with respect to each premium payment, or it may provide the Trustee of the Premium Trust with a single direction, valid until further notice, to pay each premium as it becomes due.

The Corporation will inform the participants in the Plan that the Corporation has discretion to revoke the Premium Trust, and that the assets of the Trust are available to satisfy the claims of the Corporation's general creditors in the event of the Corporation's insolvency. The Corporation will advise participants that they should not look to the assets of the Premium Trust as a source of funding for their benefits under the Plan and that the assets of the Premium Trust will not be used exclusively to pay premiums on the Group Policy.

You request an advisory opinion as to whether: 1) the assets in the Premium Trust will be considered "plan assets" for the purposes of Title I of ERISA; 2) the Corporation's obligation to contribute to the Policy Trust will be deemed a Prohibited Transaction within the meaning of section 406 of Title I of ERISA; and 3) the Corporation's right to recover surplus assets upon termination of the Plan will be a breach of fiduciary duty or a prohibited transaction under ERISA.

With respect to your first question, it is the position of the Department of Labor (the Department) that, in situations outside the scope of the plan assets-plan investments regulation (29 C.F.R. 2510.3-101), the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law. In general, the assets of a welfare plan would include any property, tangible or intangible, in which the plan has a beneficial ownership interest. The identification of plan assets would therefore include consideration of any contract or other legal instrument involving the plan, as well as the actions and representations of the parties involved.[3]

Plan assets manifestly include any property held in trust on behalf of the plan. The Plan's assets would thus encompass all property held in the Policy Trust established on behalf of the Plan. This would include any contributions to the Policy Trust, any earnings on the contributions, the Group Policy itself, any reserves under the Group Policy, and any retrospective rate credits declared under the Group Policy.

With respect to the Premium Trust, you have represented that unless and until there is a change in control of the Corporation or other "Special Circumstance" that triggers a transfer of Premium Trust assets to the Policy Trust: (i) there will be no representation to any participant or beneficiary that the assets of the Premium Trust will be used only to pay premiums on the Group Policy; (ii) the Corporation will retain all rights of ownership of the Premium Trust assets, which will be available to pay premiums on the Group Policy at the Corporation's direction, or, in the event of the Corporation's insolvency, to pay the claims of the Corporation's general creditors; (iii) neither the Plan nor its participants and beneficiaries will have any preferential claim against or any beneficial interest in the assets of the Premium Trust; (iv) the Corporation will advise participants that they should not look to the assets of the Trust as a

source of funding for their benefits under the Plan; (v) the benefits of the Plan will not be limited or governed in any way by the amount of contributions to the Premium Trust; and (vi) no contributions from any participant will be made to the Premium Trust. In addition, you have represented that the Corporation will not treat the assets of the Premium Trust as plan assets under Statement of Financial Accounting Standards No. 106 or otherwise use such assets to offset the Corporation's benefit obligations for purposes of financial reporting.

Based on the facts and circumstances submitted in your request, it is the Department's opinion that if the Corporation establishes and uses the Trust as you have represented, the assets of the Plan would not include the assets of the Premium Trust unless and until a "Special Circumstance" occurs that triggers a transfer of Premium Trust Assets to the Policy Trust.

With respect to your second and third questions, the Department expresses no opinion as to whether the proposed arrangements comply with the fiduciary provisions of ERISA.[4] The following discussion is provided for informational purposes only.

Regarding your inquiry whether the Corporation's obligation to contribute to the Policy Trust constitutes a prohibited transaction, the Department notes that while Title I of ERISA does not impose funding requirements or standards on employee welfare benefit plans, there is nothing in ERISA which precludes the establishment and implementation of a separate funding policy. Section 406(a)(1)(B) of ERISA provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction if he or she knows or should know that such transaction constitutes a direct or indirect lending of money or other extension of credit between the plan and a party in interest. The mere existence of a funding policy would not in the Department's view constitute a prohibited extension of credit under section 406(a)(1)(B). However, as the Department explained in Prohibited Transaction Exemption 76-1, 41 Fed. Reg. 12740 (March 26, 1976), if a plan does not make systematic, reasonable and diligent efforts to collect delinquent contributions, or if the failure to collect is the result of an arrangement, agreement, or understanding, express or implied, between the plan and a delinquent contributing employer, such failure to collect a delinquent employer contribution may be deemed to be a prohibited transaction.

Regarding your third question, section 403(c)(1) of ERISA provides in part that, except as provided in subsection (d) of section 403, the assets of a plan shall never inure to the benefit of any employer. Section 403(d)(2) provides that the assets of an employee welfare benefit plan which terminates shall be distributed in accordance with the terms of the plan, except as otherwise provided in regulations of the Secretary of Labor. Although no regulations have been issued under section 403(d)(2), Conference Report No. 93-1280, 93rd Congress, 2d Session, at page 303, states in part that it is intended that the terms of the welfare plan will govern distribution or transfer of assets upon termination of the plan, except to the extent that implementation of the terms of the plan or agreement would unduly impair the accrued benefits of the plan participants.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,

ROBERT J. DOYLE
Director of Regulations and
Interpretations

ORI/DFI/SAS:BAW:04/15/93/F-4531A

[1] You represent that a "Special Circumstance" will occur if (i) the Corporation is dissolved or liquidated; (ii) as a result of a reorganization, merger, or consolidation that is not approved by a majority of the Corporation's Board of Directors, the Corporation's common stock is converted into cash or property, or into securities not issued by the Corporation; (iii) a person acquires substantially all of the Corporation's property or at least 35% of the voting power of the Corporation's outstanding stock; (iv) directors who were nominated for election by the Nominating Committee of the Corporation's Board of Directors cease to constitute a majority of the Corporation's directors; (v) the

Corporation's stockholders receive a proxy statement seeking stockholder approval of an event described in clause (ii); or (vi) an action is announced that is intended to result in an event described in clause (iii) or (iv). However, a majority of the Corporation's Board of Directors (or, if an event described in clause (iv) has occurred, a majority of individuals who constituted the Board of Directors immediately before the event) may approve any of the foregoing events and determine that the event is not a "Special Circumstance."

[2] You represent that during any period in which the Corporation is insolvent, and during any period in which the Premium Trustee is determining whether the Corporation is insolvent, the specific trust provisions that apply to the assets of the Premium Trust after a "Special Circumstance" will not be effective. During any such period, the Premium Trust will suspend all premium payments and all transfers of assets otherwise called for by the trust agreement, even if the Premium Trustee has previously received written direction from the Corporation to make such premium payments or asset transfers, and the assets of the Premium Trust will be held and disbursed for the exclusive benefit of the Corporation's general creditors.

[3] We note in this regard that section 402(b)(1) of ERISA requires that the plan document specify the procedure for establishing and carrying out a funding policy and method. In addition, section 102(b) of ERISA and the regulations thereunder require that the Summary Plan Description describe sources of contributions to the plan and identify any funding medium for the accumulation of assets.

[4] Pursuant to section 5.04 of ERISA Procedure 76-1, 41 Fed. Reg. 36281 (Aug. 27, 1976), the Department ordinarily will not issue opinions on the form or effect in operation of a plan, fund, or program (or a particular provision or provisions thereof) subject to Title I of ERISA.

---DISCLAIMER---

U.S. DOL

PWBA Office of Regulations and Interpretations

Advisory Opinion

September13, 1993

Roger W. Thomas	**93-24A**
Staff Attorney	**ERISA SEC.**
Department of Financial Institutions	**406(b)(1),**
Fourth Floor, The John Sevier Building	**406(b)(3)**
500 Charlotte Avenue	
Nashville, TN 37243-0705	

Dear Mr. Thomas:

This is in response to your inquiry whether certain transactions engaged in by a Tennessee bank are consistent with the Employee Retirement Income Security Act of 1974 (ERISA). In particular, you call attention to an asserted "common industry practice" whereby banks acting as agents or trustees for employee benefit plans earn interest for their own accounts from the "float" when a benefit check is written to a participant until the check is presented for payment.

You indicate that a company (Trust Company), which is chartered under Tennessee law as a non-depository bank limited to trust powers, acts as an agent or trustee for various employee benefit plans. It also offers various collective investment funds in which plans invest. A national bank (National Bank) located in Tennessee serves as custodian for some of these plans.

In connection with the administration of the plans, Trust Company maintains accounts at National Bank, including a "General Account" and a "Disbursement Account." When Trust Company is directed to liquidate pooled fund assets to pay benefits, unless it is specifically directed to wire the funds to the participant, it transfers the funds to the General Account and simultaneously issues a check payable to the participant from the Disbursement Account. When checks are presented for payment, funds are wired from the General to the Disbursement Account. In the interim, Trust Company earns income on such funds for its own account, pursuant to a retail repurchase agreement with National Bank.

You question whether the payment of this income to Trust Company is a prohibited receipt by a fiduciary of consideration from a party dealing with the plan in connection with a transaction involving the assets of the plan under section 406(b)(3) of ERISA. You also express concern that the Trust Company may be violating ERISA by dealing with National Bank, given National Bank's relationship to the plans.

Trust Company, through its attorney, contends that once a check is written to a participant, corresponding amounts in the General Account cease to be plan assets. In support of this argument Trust Company relies upon the first example of the participant contribution regulation in 29 C.F.R. 2510.3-102, which addresses when amounts that an employer withholds from a participant's pay for contribution

to a plan can reasonably be segregated from the employer's general assets, and thus become assets of the plan for certain purposes. These special rules concerning segregation of participant contributions from an employer's general assets, however, have no application to the question of whether a plan has an interest in an administrative account when plan assets are transferred to the account in support of an outstanding benefit check.[1]

Turning to an analysis of the issues presented, section 406(b)(1) of ERISA states that a fiduciary with respect to a plan shall not deal with the assets of the plan in his or her own interest or for his or her own account. Section 3(21)(A) of ERISA defines a fiduciary, in part, as one who exercises any discretionary authority with respect to the assets of a plan. As explained in 29 C.F.R. 2509.75-8, persons serving as plan trustees (and certain other plan officials) will be fiduciaries due to the very nature of their positions. Other persons will be fiduciaries to the extent that they perform any of the functions described in section 3(21)(A) of ERISA.

Accordingly, it is the view of the Department that, based on the facts described above, where a fiduciary (e.g. Trust Company) exercises discretion with regard to plan assets, its receipt of income from the "float" on benefit checks under a repurchase agreement with a national bank in connection with the investment of such plan assets would result in a transaction described in ERISA section 406(b)(1).[2]

Moreover, even if all income earned under the repurchase agreements were allocated to the plans, the repurchase agreements themselves may be prohibited where the national bank is a party in interest with respect to the plans. Section 406(a)(1)(A) and (B) of ERISA, in part, prohibit sales or extensions of credit between plans and parties in interest. The term "party in interest" is defined in section 3(14) of ERISA to include a person providing services to a plan. From the information provided, it appears that National Bank, as the custodian of plan assets for some of the plans, is a service provider to such plans.

As we understand it, repurchase agreements essentially involve debt transactions structured as sales of securities. Therefore, absent exemptive relief, it appears that the repurchase agreements in question would involve prohibited extensions of credit, as well as prohibited sales between National Bank and plans that it serves. The Department has issued an administrative exemption, Prohibited Transaction Exemption 81-8 (copy enclosed), which provides conditional relief for investments in repurchase agreements, by or on behalf of an employee benefit plan. Whether this class exemption would grant relief to the parties involved in the subject retail repurchase agreement cannot be determined from the information provided.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretations

Enclosure

[1] It is commonly understood that a check does not of itself operate as an assignment of any funds in the hands of the drawee bank available for its payment and the bank is not liable on the instrument until it accepts it. U.C.C. §3-409(1). A bank which properly pays checks drawn on it extinguishes its liability to

the depositor to the extent of the amount so paid, so that it may charge the depositor's account with the amount of such payment.

9 C.J.S. Banks and Banking § 353 (1938).

[2] Although you asked if this arrangement would be prohibited under section 406(b)(3), due to the limited information provided we are unable to conclude that the arrangement described herein gives rise to a violation of this section. Specifically, we are unable to conclude that the bank knew, or should have known, the circumstances under which plan assets were invested pursuant to the repurchase agreements. Thus, we are restricting our analysis to the potential violation of section 406(b)(1).

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PWBA Office of Regulations and Interpretations

Advisory Opinion

September 9, 1994

94-31A
ERISA SECTION
401(b)

Mr. Thomas Veal
Deloitte & Touche
Suite 350N
1001 Pennsylvania Ave., NW
Washington, D.C. 20004-2594

Dear Mr. Veal:

This is in response to your request for an advisory opinion concerning the application of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to a purported grantor trust (the Trust) designed to offset liability for post-retirement benefits in accordance with Financial Accounting Standards Board Statement 106 (FAS 106). Specifically, you inquire whether assets contributed to the Trust would constitute plan assets under Title I of ERISA.

According to your representations, your client, an employer, proposes to establish the Trust to accumulate funds to help satisfy its obligation to provide post-retirement medical benefits to its employees.[1] The Trust will be irrevocable, and, to the extent permitted under local law, its assets will be exempt from the claims of the employer's creditors. The Trust will reimburse the employer for amounts paid from the employer's general assets. No other use of Trust assets will be permitted, and they will not be available to pay other corporate expenses.

You state that employer contributions to the Trust will be discretionary as to both time and amount. No employee contributions will be required or permitted. Contributions will be invested primarily in employer stock and warrants to purchase employer stock. You further state that no reference to the Trust will appear in the summary plan description, and the employer will not represent to the employees that the Trust assets provide additional security for medical benefits.

You further represent that the employer intends to create the Trust as an asset that may be used to offset the employer's liability for post-retirement medical benefits under FAS 106. FAS 106 requires that employers recognize all liabilities for post-retirement medical benefits on its financial statements. FAS 106 provides, however, that certain "plan assets," including stocks, bonds and other investments, that have been segregated and restricted (usually in a trust) for the payment of post-retirement benefits, may be used to offset the accumulated post-retirement benefit obligations of an employer. In this regard, FAS 106 requires the employer to make certain disclosures, including the nature of the plan, the employee groups covered, types of benefits provided and the funding policy. Additionally, FAS 106 requires that the employer separately disclose, among other things, the fair value of plan assets; the accumulated post-retirement benefit obligation; and the amount of the net post-retirement benefit asset or liability recognized in the employer's statement of financial position.

You request an advisory opinion as to whether, under the circumstances outlined above, the assets of the Trust would

constitute assets of an employee welfare benefit plan for purposes of Title I of ERISA.

Title I of ERISA does not expressly define the types of property that will be regarded as "assets" of an employee benefit plan. The Department of Labor (the Department) has promulgated regulations identifying plan assets when a plan invests in other entities (29 C.F.R. 2510.3-101) or when a participant pays or has amounts withheld by an employer for contribution to a plan (29 C.F.R. 2510.3-102). In other situations, the Department has indicated that the assets of an employee benefit plan generally are to be identified on the basis of ordinary notions of property rights.

The provisions of Title I of ERISA do not impose funding standards on employee welfare benefit plans. Accordingly, the Department has acknowledged that an employer sponsor of a welfare plan may maintain such a plan without identifiable plan assets by paying plan benefits exclusively from the general assets of the employer. This would be true even if the employer set aside some of its general assets in a segregated employer account for the purposes of providing benefits under the plan. However, if an employer takes steps that cause the plan to gain a beneficial interest in particular assets, under ordinary notions of property rights, such assets would become plan assets.

In the Department's view, a plan obtains a beneficial interest in particular property if, under common law principles, the property is held in trust for the benefit of the plan or its participants and beneficiaries or the plan otherwise has an interest in such property on the basis of ordinary notions of property rights.[2] The identification of plan assets therefore requires consideration of any contract or other legal instrument involving the plan, as well as the actions and representations of the parties involved. As the Department explained in Advisory Opinion 92-24A (Nov. 6, 1992), a welfare plan generally will have a beneficial interest in particular assets if the employer establishes a trust on behalf of a plan, sets up a separate account with a bank or with a third party in the name of the plan, or specifically indicates in the plan documents or instruments that separately maintained funds belong to the plan. See also, Advisory Opinion 84-10 (Feb. 22, 1984) (finding plan assets where a plan document obligated the employer to deposit in a plan account monies which, when combined with participant contributions, would be sufficient to pay benefits and expenses of the plan).

On the other hand, the mere segregation of employer funds to facilitate administration of the plan would not in itself demonstrate an intent to create a beneficial interest in those assets on behalf of the plan. As explained in Advisory Opinion 92-24A, in the absence of any other actions or representations which would manifest an intent to contribute assets to a welfare plan, the mere establishment of an account in the name of the employer to be used exclusively in administering the plan would not create a beneficial interest in the plan. Similarly, in Advisory Opinion 92-02A (Jan. 17, 1992), the Department determined that, under the particular circumstances involved in that case, a stop-loss insurance policy purchased by a single employer plan sponsor to meet the employer's liabilities under a medical benefit plan did not constitute plan assets. That determination was based, among other things, on the fact that there was no representation to any participant or beneficiary that the policy would be used to provide benefits or that it in any way represented security for the payment of benefits. The employer, and not the plan, retained all rights of ownership under the policy. The employer was named as the beneficiary of the policy; neither the plan nor any participant or beneficiary had any preferred claim against the policy or any beneficial ownership interest in the policy; the plan benefits were not limited or governed in any way by the amount of the insurance proceeds; and employee contributions were not expended toward the purchase of the policy.

In the Department's view, whether a plan acquires a beneficial interest in definable assets depends, largely, on whether the plan sponsor expresses an intent to grant such a beneficial interest or has acted or made representations sufficient to lead participants and beneficiaries of the plan to reasonably believe that such funds separately secure the promised benefits or are otherwise plan assets.

In this case, you state that for purposes of financial reporting under FAS 106, the employer intends to offset its benefit obligations by the amount of assets in the Trust. This treatment or use of the Trust's assets for employer financial reporting purposes would be tantamount to a representation that such assets separately secure the benefits promised under the plan. Under these circumstances, it is the view of the Department that the plan would have a beneficial interest in the assets of the Trust and, accordingly, such assets would constitute plan assets for purposes of Title I of ERISA.

We wish to point out that, in the Department's view, the Employer's establishment and funding of the Trust for the express purpose of offsetting its benefit obligations under an employee welfare plan for purposes of FAS 106 would also constitute funding of the plan for purposes of Title I of ERISA. In this regard, the Department has taken the position that an employee welfare benefit plan which is funded must provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan, as required by section 402(b)(1) of ERISA. See Advisory Opinion 78-10A (Mar. 31, 1978). Section 102(b) of ERISA and the implementing regulations (29 C.F. R. 2520.102-3(p),(q)) also require that the Summary Plan Description describe sources of contributions to the plan and identify any funding medium for the accumulation of assets through which benefits are provided.[3]

To the extent that there are assets of a plan subject to Title I of ERISA, those assets must be held in accordance with the fiduciary responsibility and prohibited transaction provisions of Part 4 of Title I. In this regard, section 403 of ERISA generally requires that all assets of an employee benefit plan be held in trust for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan. Further, section 406 of ERISA prohibits fiduciary self-dealing as well as transactions between a plan and certain parties in interest to the plan.[4]

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,

ROBERT J. DOYLE
Director of Regulations
and Interpretations

[1] Although you have not provided specific information regarding the employer or the nature of its commitment to provide benefits, we assume for purposes of this opinion that the employer's obligation to provide post-retirement medical benefits to its employees arises pursuant to an employee welfare benefit plan that is covered by Title I of ERISA.

<2> This is consistent with Congressional intent under ERISA to foster the development of a body of federal common law that encompasses traditional trust law principles, applied in light of the special nature and purpose of employee benefit plans. See 120 Cong. Rec. 29,942 (1974), reprinted in Leg. Hist. Vol. III, p.4771 (remarks of Senator Javits); H.R. Rep. 93-533, pp. 11-13 (1973), Leg. Hist., Vol. II pp. 2358-2360.

[3] These provisions regarding a plan's funding policy or medium apply to those welfare plans, as discussed above, for which separate assets have been identified. The analysis discussed above, however, would not apply to so-called "top hat" and "excess benefit" plans, as defined in sections 4(b)(5), 201(2), 301(a)(3) and 401(a)(1) of ERISA. Given the special nature of "top hat" and "excess benefit" plans and the ability of employees who participate in such plans to affect or substantially influence the design and operation of their deferred compensation plans, and in light of current rulings of the Internal Revenue Service regarding the tax consequences of so-called "rabbi trusts" established in connection with these types of deferred compensation plans, the Department has determined that the analysis outlined above for identifying plan assets is not relevant to such plans.

[4] In particular we note that section 406 of ERISA imposes prohibitions on a plan's acquisition or holding of any employer security in violation of section 407(a) of ERISA. Section 407(a) of ERISA specifically precludes a plan from acquiring or holding any employer security which is not a "qualifying employer security" as defined in section 407(d)(5). In the Department's view, warrants to purchase employer securities generally would not constitute "qualifying employer securities" under section 407(d)(5) of ERISA since they are neither stock nor marketable obligations.

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U.S. DOL PWBA Office of Regulations and Interpretations

August 11, 1994

Ms. Judith A. McCormick
Federal Counsel
American Bankers Association
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Ms. McCormick:

Thank you for the invitation to respond to an editorial entitled "Special Analysis, Perspectives on the `Float' Issue," which appeared in the American Banker's Association January 1994 edition of the Trust Letter. We appreciate this opportunity to clear up an apparent misunderstanding in the editorial regarding prohibited self-dealing by banks that serve as fiduciaries to employee benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA).

The focus of the editorial is an ERISA advisory opinion,A.O. 93-24A (Sept. 13, 1993), which concluded that a bank trustee's unilateral exercise of discretion to earn income for its own account from the "float" attributable to outstanding benefit checks constitutes prohibited fiduciary self-dealing under ERISA. The editorial questions whether the analysis in A.O. 93-24 is limited to its facts -- which involved the use of accounts and repurchase agreements with a third-party national bank to earn income for the bank trustee during the period of the float -- or whether the opinion has broader implications for the procedures banks commonly utilize in issuing benefit checks. Although advisory opinions apply only to the specific factual situations that they describe, (ERISA Procedure 76-1, § 10, 41 Fed. Reg. 36281, 36282 (Aug. 27, 1976)), the essential analysis of A.O. 93-24 is not unique to its facts.

The editorial notes that, in contrast to the facts presented in A.O. 93-24, banks commonly issue benefit checks drawn on a disbursement account within the same institution. The editorial points out that, as a technical matter depending upon the type of account used, the actual amounts in such disbursement accounts may no longer be considered plan assets. From this, the editorial concludes, in our view erroneously, that "[i]f these balances are no longer plan assets once transferred to such an account, then no prohibited transaction occurs." This conclusion misses the fundamental principle of A.O. 93-24 that, without regard to the status of the funds after they are placed in a disbursement or other account, a bank fiduciary's unilateral decision to handle plan assets in such a way as to benefit itself constitutes prohibited self-dealing.

We also take issue with the suggestion in the editorial that section 408(b)(6) of ERISA exempts such fiduciary self-dealing. That section affords conditional relief from the prohibitions on self-dealing for the providing of "ancillary" services by a bank to a plan for which it is a fiduciary if, among other requirements, the services are provided for no more than reasonable compensation. The legislative

history of this section indicates that "in determining whether a plan pays more than reasonable compensation for its checking account services, the interest available on an alternate use of the funds is to be considered." H.R. Conf. Rept. No. 93-1280, 93d Cong., 2d Sess. (1974) at 315. Given the widespread technological advances in cash management during the twenty years since ERISA was enacted, it is by now generally recognized that banks have the capability of investing daily all but small amounts of cash in trust-quality investment vehicles at competitive market rates. (See Board of Governors of the Federal Reserve System letter to Stephen R. Steinbrink, Deputy Comptroller, Office of Comptroller of the Currency dated May 17, 1991). Accordingly, section 408(b)(6) does not provide relief for a bank trustee who maintains cash balances in a zero-interest disbursing account within the same institution to the extent that it is reasonably possible to earn net returns for the plan on those monies. Nor would such an exercise of discretion that is intended to benefit the bank at the expense of the plan's interests comport with the requirements of section 404(a)(1)(A) of ERISA that fiduciaries act prudently and solely in the interest of participants and beneficiaries.

Of course, if a bank fiduciary has openly negotiated with an independent plan fiduciary to retain earnings on the float attributable to outstanding benefit checks as part of its overall compensation, then the bank's use of the float would not be self-dealing because the bank would not be exercising its fiduciary authority or control for its own benefit. Therefore, to avoid problems, banks should, as part of their fee negotiations, provide full and fair disclosure regarding the use of float on outstanding benefit checks.

Again, thank you for opening a dialogue on this important matter. We hope that this exchange will help to clarify any misunderstanding concerning the "float" issue.

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretations

---DISCLAIMER---

United States Department of Labor
Employee Benefits Security Administration
Field Assistance Bulletin 2002-3

November 5, 2002

Memorandum for: Virginia C. Smith
Director of Enforcement, Regional Directors

From: Robert J. Doyle
Director of Regulations and Interpretations

Subject: Disclosure and other Obligations Relating to "Float"

Issue

What does a fiduciary need to consider in evaluating the reasonableness of an agreement under which the service provider will be retaining "float" and what information is a service provider required to disclose to plan fiduciaries with respect to such arrangements in order to avoid engaging in a prohibited transaction?

Background

A number of financial services providers, such as banks and trust companies, acting as non-discretionary directed trustees or custodians maintain general or "omnibus" accounts to facilitate the transactions of employee benefit plans. The service provider may retain earnings ("float") resulting from the anticipated short-term investment of funds held in such accounts. Typically, these accounts hold contributions and other assets pending investment directions from plan fiduciaries. In addition, fiduciaries transfer funds to a general account of the financial institution in connection with issuance of a check to make a plan distribution or other disbursement. Funds are then held in the account earning interest until checks are presented for payment.

In Advisory Opinion 93-24A, 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. Advisory Opinion 93-24A dealt with a situation where there was no disclosure of the float to employee benefit plan customers. In a subsequent information letter to the American Bankers Association (August 11, 1994), the Department indicated that " . . . if a bank fiduciary has **openly negotiated** with an independent plan fiduciary to retain float attributable to outstanding benefit checks as part of its overall compensation, then the bank's use of the float would not be self-dealing because the bank would not be exercising its fiduciary authority or control for its own benefit. Therefore, to avoid problems, banks should, **as part of their fee negotiations, provide full and fair disclosure regarding the use of float** on outstanding benefit checks." (Emphasis supplied).

In general, the concepts of open **negotiation and full and fair disclosure**, as used in the 1994 letter, are intended to ensure that service providers provide sufficient information concerning such arrangements so that plan fiduciaries can make informed assessments concerning the prudence of the arrangements. Further, those concepts are intended to ensure that the amount of the service provider's compensation is determined and approved by a fiduciary independent of the service provider so that prohibited self-dealing is avoided.[1] Since the issuance of the letter, Field offices have found, as part of their investigations, a variety of methods by which plan fiduciaries are informed of, and or approve, the practice of plan service providers retaining float as part of their overall compensation. Typically, a service agreement will provide that, in addition to other specifically identified or scheduled fees, the service provider may also receive compensation in the form of earnings on funds awaiting investment or reinvestment or funds pending distribution. According to the investigations, however, there is little or no disclosure of specific information regarding compensation earned in the form of float.

Further guidance, therefore, has been requested concerning the obligations of plan fiduciaries and service providers regarding float arrangements and disclosures.

Analysis

Obligations of Plan Fiduciary - In selecting a service provider, plan fiduciaries must, consistent with the requirements of section 404(a), act prudently and solely in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan. Except as provided in section 408, plan fiduciaries also have an obligation under section 406(a) not to cause the plan to engage in certain transactions, including a direct or indirect furnishing of goods, services or facilities between the plan and a party in interest. Section 408(b)(2) exempts from the prohibitions of section 406(a) any contract or reasonable arrangement with a party in interest, including a fiduciary, for office space, or legal, accounting or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.[2] In carrying out these responsibilities, the Department has indicated that a plan fiduciary must engage in an objective process designed to elicit information necessary to assess the qualifications of the provider, the quality of services offered, and the reasonableness of the fees charged in light of the services provided. In addition, such process should be designed to avoid self-dealing, conflicts of interest or other improper influence.

In circumstances where a service provider may receive compensation in the form of float, we believe the selection and monitoring process engaged in by the responsible fiduciary should include:

1. A review of comparable providers and service arrangements (e.g., quality and costs) to determine whether such providers may credit float to the provider's own account, rather than the plan.
2. A review of the circumstances under which float may be earned by the service provider. For example, in the case of float on cash awaiting investment, fiduciaries should ensure that their service agreements include time limits within which the provider will implement investment instructions following receipt of cash from the plan. Fiduciaries also should understand that delays in the plan providing investment instruction or delays in implementing investment direction by the service provider would result in increased compensation in the form of float. In the case of float on funds awaiting disbursement, fiduciaries should ensure that their service agreements specify the time at which assets are transferred from the plan to the general account (e.g., the date the check is requested, the date the check is written, or the date the check is mailed). Inasmuch as timing of mailing or distribution of a check may also affect the amount of float, service agreements should provide, if relevant, an indication as to when checks are mailed following a direction to distribute funds. Fiduciaries also should understand that float will be earned on such disbursements until checks are presented for payment by the payee, the timing of which is beyond the control of the plan and service provider. In this regard, fiduciaries should review periodic

statements or reports of distribution checks to determine the extent to which checks tend to remain outstanding for unusually long periods of time (e.g., 90 or more days).

3. A review of sufficient information to enable the plan fiduciary to evaluate the float as part of the total compensation to be paid for the services to be rendered under the agreement. In this regard, fiduciaries should request and review the rates the provider generally expects to earn. For example, the provider might indicate that earnings on uncashed checks are generally at money market interest rates. Given the uncertainties with respect to both actual interest rates and the length of the periods during which any given funds may be pending investment or pending disbursement, it is anticipated that any projections by the fiduciary will result in only a rough approximation of the potential float. However, the information on which the approximation is based (e.g., basis for earnings rates and agreement terms relating to maximum periods within which funds will be invested following investment direction, timing of transfers of cash from the plan to the provider's general account following direction to distribute funds, period for mailing checks, extent to which experience shows that distribution checks remain outstanding for unusually long periods of time, etc.) and the approximation itself, will enable a fiduciary both to compare service provider float practices and assess the extent to which float is a significant component of the overall compensation arrangement.

Additionally, a plan fiduciary must periodically monitor compliance by the service provider with the terms of the agreement and the reasonableness of compensation under the agreement in order to ensure continuation of the agreement meets the requirements of sections 404(a)(1), 406 and 408(b)(2).

Obligations of Service Providers - The primary issue for service providers with float arrangements is whether the provider has disclosed to its employee benefit plan customers sufficient information concerning the administration of its accounts holding float so that the customer can reasonably approve the arrangement based on an understanding of the service provider's compensation. Moreover, the arrangement must not permit the service provider to affect the amount of its compensation in violation of section 406(b)(1) (e.g., by giving the service provider broad discretion over the duration of the float). For example, even where a service provider discloses in its service agreement that additional compensation may be paid to the service provider as a result of float, a prohibited transaction may nonetheless result to the extent that the service provider exercises discretionary authority or control sufficient to cause a plan to pay additional fees to the provider. As noted in Advisory Opinion 93-24A, a fiduciary's decision to handle plan assets in such a way as to benefit itself constitutes prohibited self-dealing, without regard to the status of the funds after they are placed in a disbursement or other account.

It is the view of this Office that, in connection with a service agreement pursuant to which the service provider may be retaining float as part of its compensation, the service provider can avoid self-dealing with respect to such earnings by taking the following steps:

1. Disclose the specific circumstances under which float will be earned and retained.
2. In the case of float on contributions pending investment direction, establish, disclose and adhere to specific time frames within which cash pending investment direction will be invested following direction from the plan fiduciary, as well as any exceptions that might apply.
3. In the case of float on distributions, disclose when the float period commences (e.g., the date check is requested, the date the check is written, the date the check is mailed) and ends (the date on which the check is presented for payment). Also disclose, and adhere to, time frames for mailing and any other administrative practices that might affect the duration of the float period.
4. Disclose the rate of the float or the specific manner in which such rate will be determined. For example, earnings on cash pending investment and earnings on uncashed checks are generally at a money market interest rate.

We note that the disclosure of and adherence to the foregoing by service providers will not only reduce the likelihood of prohibited self-dealing, but also will assist plan fiduciaries in discharging their obligations under sections 404(a)(1), 406 and 408(b)(2).

Conclusion

Float should be regarded by plan fiduciaries and service providers as part of the service provider's compensation for services to the plan. As such, the plan fiduciary must have an adequate understanding of how the service provider will earn float, and how it contributes to the service provider's compensation. The service provider must make disclosures sufficient to permit the fiduciary to make an informed decision regarding the proposed float arrangement. In addition, to avoid having the arrangement give rise to self-dealing violations of section 406(b), both parties must avoid giving the service provider discretion to affect the amount of compensation it receives from float.

Questions concerning this matter may be directed to Louis Campagna or Fred Wong, Division of Fiduciary Interpretations at 202.693.8510.

Footnotes

1. What constitutes an approval by an appropriate plan fiduciary will depend on the facts and circumstances of each case. See Advisory Opinion Nos. 97-16A and 2001-02A.
2. As interpreted by the Department, section 408(b)(2) exempts from the prohibitions of section 406(a) payment by a plan to a party in interest, including a fiduciary, for any service (or combination of services) if (1) such service is necessary for the establishment or operation of the plan; (2) such service is furnished under a contract or arrangement which is reasonable; (3) no more than reasonable compensation is paid for such service. However, section 408(b)(2) does not provide an exemption for an act described in section 406(b) of ERISA, even if such act occurs in connection with a provision of services that is exempt under section 408(b)(2). See 29 C.F.R. § 2550.408b-2.

United States Court of Appeals
For the First Circuit

No. 15-1445

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

FIDELITY INVESTMENTS; JOHN DOES 1-25
Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSSETS

APPENDIX ON APPEAL

TODD M. SCHNEIDER
MARK T. JOHNSON
JOSHUA G. KONECKY
SCHNEIDER WALLACE COTTRELL
KONECKY WOTKYNS LLP
2000 Powell Street, Suite 1400
Emeryville, CA 94680
T: 415-421-7100

(*Additional counsel listed on the inside cover*)

GARRETT W. WOTKYNS
MICHAEL C. MCKAY
SCHNEIDER WALLACE
COTTRELL KONECKY
WOTKYNS LLP
8501 North Scottsdale Road, #270
Scottsdale, AZ 85253
T: 480-428-0142

JOSEPH C. PEIFFER
DANIEL J. CARR
PEIFFER ROSCA ABDULLAH &
CARR
201 St. Charles Avenue, #4610
New Orleans, LA 70170
T: 504-523-2434

GREGORY Y. PORTER
Bailey & Glasser LLP
1054 31 Street NW, Suite 230
Washington, DC 20007
T: 202-463-2101

SUYASH AGRAWAL
JEANNIE Y. EVANS
AGRAWAL EVANS LLP
308 W. Erie Street, Suite 502
Chicago, IL 60654
T: 312-448-8800

BRANFORD S. BABBITT
CRAIG A. RABBE
ELIZABETH R. LEONG
DANIELLE ANDREWS LONG
ROBINSON & COLE LLP
One Boston Place
Suite 2500
Boston, MA 02108-4404

ROBERT A. IZARD, JR.
MARK P. KINDALL
IZARD NOBLE LLP
29 S. Main Street
West Harvard, CT 06107

PETER J. MOUGEY
LAURA DUNNING
LEVIN, PAPANTONIO, THOMAS,
MITCHELL, RAFFERTY &
PROCTOR, PA
316 S. Baylen Street, Suite 600
Pensacola, FL 32502
T: 854-435-7000

RICHARD S. FRANKOWSKI
THE FRANKOWSKI FIRM,
Suite 203
231 22nd Street South
Birmingham, AL 35233
T: 205-390-0399

THOMAS G. SHAPIRO
MICHELLE H. BLAUNER
SHAPIRO HABER & URMY LLP
Seaport East
2 Seaport Lane
Boston, MA 02210
T: 617-439-3939

JOHN J. RODDY
ELIZABETH A. RYAN
BAILEY & GLASSER LLP,
SUITE 304
99 High Street
Boston, MA 02110
T: 617-439-6730

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APPEAL,LEAD

United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:13-cv-10222-DJC

In Re Fidelity ERISA Float Litigation
Assigned to: Judge Denise J. Casper
related Cases: 1:13-cv-10570-DJC
1:13-cv-10524-DJC
1:13-cv-11011-DJC
Case in other court: USCA - First Circuit, 15-01445
Cause: 29:1001 E.R.I.S.A.: Employee Retirement

Date Filed: 02/05/2013
Date Terminated: 03/11/2015
Jury Demand: Plaintiff
Nature of Suit: 791 Labor: E.R.I.S.A.
Jurisdiction: Federal Question

Date Filed	#	Docket Text
02/05/2013	1	COMPLAINT against John Does 1-25, Fidelity Management and Research Company, Fidelity Management and Trust Company, Fidelity Investments Filing fee: $ 350, receipt number 0101-4312357 (Fee Status: Filing Fee paid), filed by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Civil Cover Sheet)(Ryan, Elizabeth) (Entered: 02/05/2013)
02/05/2013	2	ELECTRONIC NOTICE of Case Assignment. Judge Denise J. Casper assigned to case. If the trial Judge issues an Order of Reference of any matter in this case to a Magistrate Judge, the matter will be transmitted to Magistrate Judge Jennifer C. Boal. (Abaid, Kimberly) (Entered: 02/05/2013)
02/05/2013	3	Summons Issued as to Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company, John Does 1-25. **Counsel receiving this notice electronically should download this summons, complete one for each defendant and serve it in accordance with Fed.R.Civ.P. 4 and LR 4.1. Summons will be mailed to plaintiff(s) not receiving notice electronically for completion of service.** (Johnson, Jay) (Entered: 02/05/2013)
03/04/2013	4	WAIVER OF SERVICE Returned Executed by Timothy M. Kelley, Jamie A. Fine. All Defendants. (Johnson, Mark) (Entered: 03/04/2013)
03/04/2013	5	WAIVER OF SERVICE Returned Executed by Timothy M. Kelley, Jamie A. Fine. All Defendants. (Johnson, Mark) (Entered: 03/04/2013)
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04/02/2013	7	MOTION to Consolidate Cases by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Text of Proposed Order)(Roddy, John) (Entered: 04/02/2013)
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04/08/2013	9	MOTION to Appoint Counsel *(Interim Co-Lead Counsel)* by Jamie A. Fine, Timothy M. Kelley.(Roddy, John) (Entered: 04/08/2013)
04/08/2013	10	MEMORANDUM in Support re 9 MOTION to Appoint Counsel *(Interim Co-Lead Counsel)* filed by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Roddy, John) (Entered: 04/08/2013)
04/08/2013	11	DECLARATION re 9 MOTION to Appoint Counsel *(Interim Co-Lead Counsel) (Gregory Y. Porter)* by Jamie A. Fine, Timothy M. Kelley. (Roddy, John) (Entered: 04/08/2013)
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04/08/2013	13	NOTICE of Appearance by Joseph F. Savage, Jr on behalf of Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company (Savage, Joseph) (Entered: 04/08/2013)
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04/08/2013	16	MOTION to Appoint Counsel *(Interim Lead Plaintiff and Interim Co-lead Counsel)* by Colombia Air Services Inc..(Babbitt, Bradford) (Entered: 04/08/2013)
04/08/2013	17	MEMORANDUM in Support re 16 MOTION to Appoint Counsel *(Interim Lead Plaintiff and Interim Co-lead Counsel)* filed by Colombia Air Services Inc.. (Babbitt, Bradford) (Entered: 04/08/2013)
04/08/2013	18	DECLARATION re 17 Memorandum in Support of Motion, 16 MOTION to Appoint Counsel *(Interim Lead Plaintiff and Interim Co-lead Counsel) (of Robert A. Izard)* by Colombia Air Services Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N)(Babbitt, Bradford) (Entered: 04/08/2013)
04/10/2013	19	Letter/request (non-motion) *Kelley and Boudreau Plaintiffs' Request for Hearing*. (Roddy, John) (Entered: 04/10/2013)
04/10/2013	20	MOTION for Extension of Time to 4/29/2013 to File Response/Reply as to 9 MOTION to Appoint Counsel *(Interim Co-Lead Counsel)*, 16 MOTION to Appoint Counsel *(Interim Lead Plaintiff and Interim Co-lead Counsel)* by Jamie A. Fine, Timothy M. Kelley.(Roddy, John) (Entered: 04/10/2013)
04/11/2013	21	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 20 Motion for Extension of Time to File Response/Reply re 9 MOTION to Appoint Counsel *(Interim Co-Lead Counsel)* and 16 MOTION to Appoint Counsel (Interim Lead Plaintiff and Interim Co-lead Counsel) Responses due by 4/29/2013 (Maynard, Timothy) Modified

		on 4/18/2013 to correct docket text (Maynard, Timothy). (Entered: 04/11/2013)
04/16/2013	22	MOTION for Leave to Appear Pro Hac Vice for admission of Brian Boyle Filing fee: $ 100, receipt number 0101-4413677 by Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company. (Attachments: # 1 Certificate of Brian Boyle in Support of Motion for Admission Pro Hac Vice)(Savage, Joseph) (Entered: 04/16/2013)
04/16/2013	23	MOTION for Leave to Appear Pro Hac Vice for admission of Abby F. Rudzin Filing fee: $ 100, receipt number 0101-4413684 by Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company. (Attachments: # 1 Certificate of Abby F. Rudzin in Support of Motion for Admission Pro Hac Vice)(Savage, Joseph) (Entered: 04/16/2013)
04/18/2013	24	MOTION for Leave to Appear Pro Hac Vice for admission of Gregory Y. Porter Filing fee: $ 100, receipt number 0101-4417067 by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Affidavit of Gregory Y. Porter)(Roddy, John) (Entered: 04/18/2013)
04/18/2013	25	MOTION for Leave to Appear Pro Hac Vice for admission of Garrett W. Wotkyns Filing fee: $ 100, receipt number 0101-4417088 by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Affidavit of Garrett W. Wotkyns)(Roddy, John) (Entered: 04/18/2013)
04/18/2013	26	MOTION for Leave to Appear Pro Hac Vice for admission of Joshua G. Konecky Filing fee: $ 100, receipt number 0101-4417094 by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Affidavit of Joshua G. Konecky)(Roddy, John) (Entered: 04/18/2013)
04/18/2013	27	MOTION for Leave to Appear Pro Hac Vice for admission of Michael C. McKay Filing fee: $ 100, receipt number 0101-4417100 by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Affidavit of Michael C. McKay)(Roddy, John) (Entered: 04/18/2013)
04/18/2013	28	MOTION for Leave to Appear Pro Hac Vice for admission of Mark T. Johnson Filing fee: $ 100, receipt number 0101-4417106 by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Affidavit of Mark T. Johnson)(Roddy, John) (Entered: 04/18/2013)
04/18/2013	29	MOTION for Leave to Appear Pro Hac Vice for admission of Todd M. Schneider Filing fee: $ 100, receipt number 0101-4417114 by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Affidavit of Todd M. Schneider)(Roddy, John) (Entered: 04/18/2013)
04/19/2013	30	MOTION for Leave to Appear Pro Hac Vice for admission of Daniel J. Carr Filing fee: $ 100, receipt number 0101-4417499 by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Affidavit of Daniel J. Carr)(Roddy, John) (Entered: 04/19/2013)
04/19/2013	31	MOTION for Leave to Appear Pro Hac Vice for admission of Joseph C. Peiffer Filing fee: $ 100, receipt number 0101-4417514 by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Affidavit of Joseph C. Peiffer)(Roddy, John) (Entered: 04/19/2013)
04/19/2013	32	MOTION for Leave to Appear Pro Hac Vice for admission of Jeannie Y. Evans Filing fee: $ 100, receipt number 0101-4417527 by Jamie A. Fine, Timothy M. Kelley.

		(Attachments: # 1 Affidavit of Jeannie Y. Evans)(Roddy, John) (Entered: 04/19/2013)
04/19/2013	33	MOTION for Leave to Appear Pro Hac Vice for admission of Peter J. Mougey Filing fee: $ 100, receipt number 0101-4417543 by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Affidavit of Peter J. Mougey)(Roddy, John) (Entered: 04/19/2013)
04/19/2013	34	MOTION for Leave to Appear Pro Hac Vice for admission of Richard S. Frankowski Filing fee: $ 100, receipt number 0101-4417550 by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Affidavit of Richard S. Frankowski)(Roddy, John) (Entered: 04/19/2013)
04/19/2013	35	MOTION for Leave to Appear Pro Hac Vice for admission of Suyash Agrawal Filing fee: $ 100, receipt number 0101-4417560 by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Affidavit of Suyash Agrawal)(Roddy, John) (Entered: 04/19/2013)
04/23/2013	36	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 22 Motion for Leave to Appear Pro Hac Vice Added Brian Boyle. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Maynard, Timothy) (Entered: 04/23/2013)
04/23/2013	37	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 23 Motion for Leave to Appear Pro Hac Vice Added Abby F. Rudzin. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Maynard, Timothy) (Entered: 04/23/2013)
04/23/2013	38	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 24 Motion for Leave to Appear Pro Hac Vice Added Gregory Y. Porter. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Maynard, Timothy) Modified on 4/23/2013 to correct name (Maynard, Timothy). (Entered: 04/23/2013)
04/23/2013	39	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 25 Motion for Leave to Appear Pro Hac Vice Added Garrett W. Wotkyns. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Maynard, Timothy) (Entered: 04/23/2013)
04/23/2013	40	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 26 Motion for Leave to Appear Pro Hac Vice Added Joshua G. Konecky. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing**

		(CM/ECF) and go to the CM/ECF Registration Form. (Maynard, Timothy) (Entered: 04/23/2013)
04/23/2013	41	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 27 Motion for Leave to Appear Pro Hac Vice Added Michael C. McKay. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Maynard, Timothy) (Entered: 04/23/2013)
04/23/2013	42	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 28 Motion for Leave to Appear Pro Hac Vice Added Mark T. Johnson. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Maynard, Timothy) (Entered: 04/23/2013)
04/23/2013	43	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 29 Motion for Leave to Appear Pro Hac Vice Added Todd M. Schneider. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Maynard, Timothy) (Entered: 04/23/2013)
04/23/2013	44	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 30 Motion for Leave to Appear Pro Hac Vice Added Daniel J. Carr. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Maynard, Timothy) (Entered: 04/23/2013)
04/23/2013	45	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 31 Motion for Leave to Appear Pro Hac Vice Added Joseph C. Peiffer. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Maynard, Timothy) (Entered: 04/23/2013)
04/23/2013	46	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 32 Motion for Leave to Appear Pro Hac Vice Added Jeannie Y. Evans. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Maynard, Timothy) (Entered: 04/23/2013)

04/23/2013	47	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 33 Motion for Leave to Appear Pro Hac Vice Added Peter J. Mougey. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Maynard, Timothy) (Entered: 04/23/2013)
04/23/2013	48	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 34 Motion for Leave to Appear Pro Hac Vice Added Richard S. Frankowski. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Maynard, Timothy) (Entered: 04/23/2013)
04/23/2013	49	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 35 Motion for Leave to Appear Pro Hac Vice Added Suyash Agrawal. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Maynard, Timothy) (Entered: 04/23/2013)
04/29/2013	50	Opposition re 9 MOTION to Appoint Counsel *(Interim Co-Lead Counsel) (Kelley and Boudreau)* filed by Colombia Air Services Inc.. (Babbitt, Bradford) (Entered: 04/29/2013)
04/29/2013	51	DECLARATION re 50 Opposition to Motion *(Robert A. Izard)* by Colombia Air Services Inc.. (Babbitt, Bradford) (Entered: 04/29/2013)
04/29/2013	52	MEMORANDUM in Opposition re 16 MOTION to Appoint Counsel *(Interim Lead Plaintiff and Interim Co-lead Counsel)* filed by Jamie A. Fine, Timothy M. Kelley. (Roddy, John) (Entered: 04/29/2013)
04/29/2013	53	DECLARATION re 52 Memorandum in Opposition to Motion by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Exhibit 1(a) - (c), # 2 Exhibit 2, # 3 Exhibit 3)(Roddy, John) (Entered: 04/29/2013)
05/03/2013	54	Assented to MOTION for Leave to File *Responsive Affidavit* by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 [Proposed] Declaration of Thomas G. Shapiro) (Roddy, John) (Entered: 05/03/2013)
05/07/2013	55	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 54 Motion for Leave to File Responsive Affidavit ; Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (Maynard, Timothy) (Entered: 05/07/2013)

05/07/2013	56	DECLARATION re 50 Opposition to Motion *(Shapiro, Thomas)* by Jamie A. Fine, Timothy M. Kelley. (Roddy, John) (Entered: 05/07/2013)
06/05/2013	57	MOTION for Leave to Appear Pro Hac Vice for admission of Laura S. Dunning Filing fee: $ 100, receipt number 0101-4487587 by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Affidavit of Laura S. Dunning)(Roddy, John) (Entered: 06/05/2013)
06/11/2013	58	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 57 Motion for Leave to Appear Pro Hac Vice Added Laura S. Dunning. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Maynard, Timothy) (Entered: 06/11/2013)
10/04/2013	59	Amended MOTION to Consolidate Cases , Amended MOTION to Appoint Counsel *(Unopposed)* (Responses due by 10/18/2013) by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Text of Proposed Order)(Roddy, John) (Entered: 10/04/2013)
10/04/2013	60	MEMORANDUM in Support re 59 Amended MOTION to Consolidate Cases Amended MOTION to Appoint Counsel *(Unopposed)* filed by Jamie A. Fine, Timothy M. Kelley. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E)(Roddy, John) (Entered: 10/04/2013)
12/27/2013	61	Judge Denise J. Casper: ORDER entered granting (59) Motion to Consolidate Cases; granting (59) Motion to Appoint Counsel in case 1:13-cv-10222-DJC Associated Cases: 1:13-cv-10222-DJC, 1:13-cv-10524-DJC, 1:13-cv-10570-DJC, 1:13-cv-11011-DJC(Maynard, Timothy) (Entered: 12/27/2013)
12/27/2013	62	Judge Denise J. Casper: ELECTRONIC ORDER entered. In light of the Court's allowance of D. 59 and the Plaintiffs' position that D. 59 superseded D. 7, 9 and 16, the Court DENIES as moot D. 7, 9 and 16. With the entry of D. 59, 4 cases are now consolidated as one (see para 1 of the order listing the 4 cases). They will be consolidated under the case number of the first case (Kelley, 13-cv-10222), but the name of the case will now be changed to "In Re Fidelity ERISA Float Litigation, 13-10222-DJC" (see para 33 of Order). The other three cases can then be administered closed. All further filings will only be in the single, consolidated case. There should also be a separate ECF entry noting the new deadlines for the filing of the Consolidated complaint and Defendants answer (see para 5 of the Order). (Maynard, Timothy) (Entered: 12/27/2013)
12/27/2013	63	Judge Denise J. Casper: ELECTRONIC ORDER entered denying as moot 7 Motion to Consolidate Cases; denying as moot 9 Motion to Appoint Counsel ; denying as moot 16 Motion to Appoint Counsel (Hourihan, Lisa) (Entered: 01/09/2014)
01/10/2014	64	Judge Denise J. Casper: ELECTRONIC ORDER entered. Plaintiff shall have until 2/7/14 to file a Consolidated Amended Complaint and defendant shall have until 3/7/14 to answer or otherwise respond to the Consolidated Amended Complaint. (Hourihan, Lisa) (Entered: 01/10/2014)

01/10/2014	65	NOTICE of Scheduling Conference Scheduling Conference set for 3/10/2014 02:00 PM in Courtroom 11 before Judge Denise J. Casper. (Hourihan, Lisa) (Entered: 01/10/2014)
01/10/2014	66	Judge Denise J. Casper: ORDER entered. Standing Order Re: Courtroom Opportunities for Relatively Inexperienced Attorneys(Hourihan, Lisa) (Entered: 01/10/2014)
02/07/2014	67	AMENDED COMPLAINT *(Consolidated Complaint)* against Fidelity Investment Institution Operations Company, Inc., Fidelity Management and Trust Company, Fidelity Management and Research Company, Fidelity Investments, filed by Colombia Air Services Inc..(Babbitt, Bradford) (Entered: 02/07/2014)
02/10/2014	68	MOTION for Leave to Appear Pro Hac Vice for admission of Craig A. Raabe Filing fee: $ 100, receipt number 0101-4854126 by Colombia Air Services Inc..(Babbitt, Bradford) (Entered: 02/10/2014)
02/11/2014	69	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 68 Motion for Leave to Appear Pro Hac Vice Added Craig A. Raabe. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Maynard, Timothy) (Entered: 02/11/2014)
02/25/2014	70	Joint MOTION for Extension of Time *of the Briefing Schedule and Expand Page Limits* by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company.(Douglass, Alison) (Entered: 02/25/2014)
02/26/2014	71	CORPORATE DISCLOSURE STATEMENT by Fidelity Investment Institution Operations Company, Inc.. (Douglass, Alison) (Entered: 02/26/2014)
03/03/2014	72	CERTIFICATION pursuant to Local Rule 16.1 by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company.(Douglass, Alison) (Entered: 03/03/2014)
03/03/2014	73	JOINT SUBMISSION pursuant to Local Rule 16.1 by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company. (Attachments: # 1 Text of Proposed Order)(Douglass, Alison) (Entered: 03/03/2014)
03/04/2014	74	CERTIFICATION pursuant to Local Rule 16.1 . (Shapiro, Thomas) (Entered: 03/04/2014)
03/04/2014	75	CERTIFICATION pursuant to Local Rule 16.1 . (Shapiro, Thomas) (Entered: 03/04/2014)
03/04/2014	76	CERTIFICATION pursuant to Local Rule 16.1 . (Shapiro, Thomas) (Entered: 03/04/2014)

03/04/2014	77	CERTIFICATION pursuant to Local Rule 16.1 *by Columbia Air Services, Inc*. (Porter, Gregory) (Entered: 03/04/2014)
03/05/2014	78	CERTIFICATION pursuant to Local Rule 16.1 *by Timothy M. Kelley*. (Porter, Gregory) (Entered: 03/05/2014)
03/05/2014	79	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 70 Motion for Extension of Time and Expand Page Limits. Defendants' memorandum in support of their motion to dismiss the Complaint due on March 7, 2014 shall not exceed 35 pages. Plaintiffs' opposition to motion to dismiss is due on April 7, 2014 and shall not exceed 35 pages. Defendants have until May 1, 2014 to file a reply in support of their motion and it shall not exceed 20 pages. (Maynard, Timothy) Modified on 3/6/2014 to add dates (Maynard, Timothy). (Entered: 03/05/2014)
03/06/2014	80	CERTIFICATION pursuant to Local Rule 16.1 *by Jamie A. Fine*. (Johnson, Mark) (Entered: 03/06/2014)
03/07/2014	81	NOTICE of Appearance by Abigail K. Hemani on behalf of Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company (Hemani, Abigail) (Entered: 03/07/2014)
03/07/2014	82	MOTION to Dismiss *Plaintiffs' Consolidated Complaint* by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company.(Douglass, Alison) (Entered: 03/07/2014)
03/07/2014	83	MEMORANDUM in Support re 82 MOTION to Dismiss *Plaintiffs' Consolidated Complaint* filed by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company. (Douglass, Alison) (Entered: 03/07/2014)
03/10/2014	84	ELECTRONIC Clerk's Notes for proceedings held before Judge Denise J. Casper: Scheduling Conference held on 3/10/2014. Initial disclosures due by 3/28/14. Court adopts joint statement. By 6/16/14, parties to submit a status report as to where they are in discovery and submit a proposal for any further discovery needed. Status Conference set for 6/18/2014 03:00 PM in Courtroom 11 before Judge Denise J. Casper. (Court Reporter: Debra Joyce at joycedebra@gmail.com.)(Attorneys present: Gregory Porter, Bradford Babbit and Thomas Shapiro for the plaintiffs. Brian Boyle and Alison Douglass for the defendants.) (Hourihan, Lisa) (Entered: 03/11/2014)
03/11/2014	85	ELECTRONIC NOTICE Canceling Hearing. Status Conference set for 6/18/14. This will be a hearing on the pending motion to dismiss. (Hourihan, Lisa) (Entered: 03/11/2014)
03/11/2014	86	ELECTRONIC NOTICE Setting Hearing on Motion 82 MOTION to Dismiss *Plaintiffs' Consolidated Complaint* : NOTICE TO COUNSEL re: Cameras in the Courtroom Project. The parties in this case are hereby notified that this scheduled proceeding is eligible for video recording. Counsel are directed to the district court web site at http://www.mad.uscourts.gov/general/cameras.html to determine if they wish to consent to video recording. Responses are due seven days from the date of this

		notice. A RESPONSE FROM EACH PARTY IS REQUIRED. Motion Hearing set for 6/18/2014 03:00 PM in Courtroom 11 before Judge Denise J. Casper. (Hourihan, Lisa) (Entered: 03/11/2014)
03/14/2014	88	Joint MOTION for Protective Order by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company. (Attachments: # 1 Exhibit A)(Douglass, Alison) (Entered: 03/14/2014)
03/19/2014	89	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 88 Motion for Protective Order (Maynard, Timothy) (Entered: 03/19/2014)
03/19/2014	90	Judge Denise J. Casper: ORDER entered. PROTECTIVE ORDER (Maynard, Timothy) (Entered: 03/19/2014)
03/25/2014	91	NOTICE by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company *of Development in a Related Case* (Attachments: # 1 Exhibit A)(Douglass, Alison) (Entered: 03/25/2014)
03/26/2014	92	Response by Patricia Boudreau, Korine Brown, Colombia Air Services Inc., Jamie A. Fine, Alex Gray, Timothy M. Kelley, Bobby Negron to 91 Notice (Other), . (Porter, Gregory) (Entered: 03/26/2014)
04/07/2014	93	MEMORANDUM in Opposition re 82 MOTION to Dismiss *Plaintiffs' Consolidated Complaint* filed by Patricia Boudreau, Korine Brown, Colombia Air Services Inc., Jamie A. Fine, Alex Gray, Timothy M. Kelley, Bobby Negron. (Porter, Gregory) (Entered: 04/07/2014)
04/07/2014	94	DECLARATION re 93 Memorandum in Opposition to Motion, by Patricia Boudreau, Korine Brown, Colombia Air Services Inc., Jamie A. Fine, Alex Gray, Timothy M. Kelley, Bobby Negron. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3)(Porter, Gregory) (Entered: 04/07/2014)
05/01/2014	95	REPLY to Response to 82 MOTION to Dismiss *Plaintiffs' Consolidated Complaint* filed by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company. (Douglass, Alison) (Entered: 05/01/2014)
06/10/2014	96	Letter/request (non-motion) from Alison V. Douglass *Dated June 10, 2014*. (Douglass, Alison) (Entered: 06/10/2014)
06/11/2014	97	Response by Patricia Boudreau, Korine Brown, Colombia Air Services Inc., Jamie A. Fine, Alex Gray, Timothy M. Kelley, Bobby Negron to 96 Letter/request (non-motion) . (Porter, Gregory) (Entered: 06/11/2014)
06/16/2014	98	STATUS REPORT *[JOINT]* by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company. (Douglass, Alison) (Entered: 06/16/2014)
06/19/2014	99	ELECTRONIC Clerk's Notes for proceedings held before Judge Denise J. Casper: Motion Hearing held on 6/19/2014 re 82 MOTION to Dismiss *Plaintiffs' Consolidated Complaint* filed by Fidelity Investment Institution Operations Company, Inc., Fidelity

		Management and Trust Company, Fidelity Investments, Fidelity Management and Research Company. Arguments. Court takes under advisement 82 Motion to Dismiss; (Court Reporter: Debra Joyce at joycedebra@gmail.com.)(Attorneys present: Gregory Porter and Robert Izard for the plaintiffs. Brian Boyle, Abigail Hermani and Alison Douglass for the defendants.) (Hourihan, Lisa) (Entered: 06/19/2014)
06/24/2014	100	Transcript of Motion to Dismiss Hearing held on June 18, 2014, before Judge Denise J. Casper. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Debra Joyce at joycedebra@gmail.com Redaction Request due 7/15/2014. Redacted Transcript Deadline set for 7/25/2014. Release of Transcript Restriction set for 9/22/2014. (Scalfani, Deborah) (Entered: 06/24/2014)
06/24/2014	101	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm (Scalfani, Deborah) (Entered: 06/24/2014)
06/27/2014	102	Assented to MOTION to Seal by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company.(Douglass, Alison) (Entered: 06/27/2014)
06/30/2014	103	Supplemental MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *Plaintiffs' Consolidated Complaint* by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company.(Douglass, Alison) (Entered: 06/30/2014)
06/30/2014	104	MEMORANDUM in Support re 103 Supplemental MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *Plaintiffs' Consolidated Complaint* filed by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company. (Douglass, Alison) (Entered: 06/30/2014)
06/30/2014	105	DECLARATION re 103 Supplemental MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *Plaintiffs' Consolidated Complaint of Alison V. Douglass* by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company. (Attachments: # 1 Exhibit 1)(Douglass, Alison) (Entered: 06/30/2014)
06/30/2014	106	NOTICE OF MANUAL FILING by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company (Douglass, Alison) (Entered: 06/30/2014)
07/08/2014	108	MOTION for Extension of Time to July 30, 2014 to File Response/Reply as to 103 Supplemental MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *Plaintiffs' Consolidated Complaint* by Patricia Boudreau, Korine Brown, Colombia Air Services Inc., Jamie A. Fine, Alex Gray, Timothy M. Kelley, Bobby Negron.(Shapiro, Thomas) (Entered: 07/08/2014)

07/08/2014	109	NOTICE of Change of Address or Firm Name by Thomas G. Shapiro (Shapiro, Thomas) (Entered: 07/08/2014)
07/08/2014	110	Letter/request (non-motion) from Michelle H. Blauner . (Blauner, Michelle) (Entered: 07/08/2014)
07/08/2014	111	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 102 Motion to Seal Exhibit 1 to the Declaration of Alison V. Douglas in support of the Supplemental Motion. (Hourihan, Lisa) (Entered: 07/08/2014)
07/08/2014	112	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 108 Motion for Extension of Time to File Response/Reply re 103 Supplemental MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *Plaintiffs' Consolidated Complaint* Responses due by 7/30/2014 (Hourihan, Lisa) (Entered: 07/08/2014)
07/10/2014	113	Response by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company to 110 Letter/request (non-motion) . (Douglass, Alison) (Entered: 07/10/2014)
07/21/2014	114	AMENDED COMPLAINT *(First Amended Consolidated)* against Fidelity Investment Institution Operations Company, Inc., Fidelity Management and Trust Company, Fidelity Management and Research Company, filed by Patricia Boudreau, Korine Brown, Colombia Air Services Inc., Jamie A. Fine, Alex Gray, Timothy M. Kelley, Bobby Negron. (Attachments: # 1 Exhibit 1 - Declaration of Duane Napier)(Porter, Gregory) (Entered: 07/21/2014)
07/28/2014	115	Joint MOTION for Extension of Time *Re: Briefing Schedule and to Expand Page Limits* by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company.(Douglass, Alison) (Entered: 07/28/2014)
08/05/2014	117	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 115 Motion for Extension of Time of the Briefing Scheduling. Defendants shall have until September 24, 2014 to respond to the FAC. Defendants' memorandum in support of their response to the FAC shall not exceed thirty-five pages. Plaintiffs shall file their opposition brief by November 7, 2014. Plaintiffs' opposition brief shall not exceed thirty-five pages. Defendants shall file their reply brief within fifteen days of Plaintiffs' opposition. Defendants' reply brief shall not exceed fifteen pages. (Maynard, Timothy) (Entered: 08/05/2014)
09/05/2014	118	MOTION to Amend *Complaint* by Patricia Boudreau, Korine Brown, Colombia Air Services Inc., Jamie A. Fine, Alex Gray, Timothy M. Kelley, Bobby Negron. (Attachments: # 1 Exhibit Second Amended Consolidated Complaint)(Porter, Gregory) (Entered: 09/05/2014)
09/22/2014	119	MOTION for Extension of Time *Re: Briefing Schedule and to Expand Page Limits (UNOPPOSED)* by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company.(Douglass, Alison) (Entered: 09/22/2014)

09/24/2014	120	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 118 Motion to Amend Complaint. Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (Hourihan, Lisa) (Entered: 09/24/2014)
09/24/2014	121	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 119 Motion for Extension of Time to this extent; Defendants' memorandum in support of their response to the SAC shall not exceed twenty pages. Plaintiffs shall file their opposition brief by 11/14/14. Plaintiffs' opposition brief shall not exceed twenty pages. Defendants shall file their reply brief by 11/26/14. Defendants' reply brief shall not exceed 10 pages. (Hourihan, Lisa) (Entered: 09/24/2014)
09/24/2014	122	AMENDED COMPLAINT *(Second Consolidated)* against Fidelity Investment Institution Operations Company, Inc., Fidelity Management and Trust Company, Fidelity Management and Research Company, filed by Patricia Boudreau, Korine Brown, Colombia Air Services Inc., Jamie A. Fine, Alex Gray, Timothy M. Kelley, Bobby Negron.(Porter, Gregory) (Entered: 09/24/2014)
10/01/2014	123	Assented to MOTION to Seal *Exhibits 1 and 2 to the Declaration of Abigail K. Hemani to be filed in support of the Motion to Dismiss* by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company.(Douglass, Alison) (Entered: 10/01/2014)
10/02/2014	124	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 123 Motion to Seal Seal Exhibits 1 and 2 to the Declaration of Abigail K. Hemani to be filed in support of the Motion to Dismiss by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company. (Hourihan, Lisa) (Entered: 10/02/2014)
10/03/2014	125	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *(Defendants' Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint)* by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company. (Douglass, Alison) (Entered: 10/03/2014)
10/03/2014	126	MEMORANDUM in Support re 125 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *(Defendants' Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint)* filed by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company. (Douglass, Alison) (Entered: 10/03/2014)
10/03/2014	127	DECLARATION re 125 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *(Defendants' Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint)* by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Douglass, Alison) (Entered: 10/03/2014)

11/14/2014	129	MEMORANDUM in Opposition re 125 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *(Defendants' Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint)* filed by Patricia Boudreau, Korine Brown, Colombia Air Services Inc., Jamie A. Fine, Alex Gray, Timothy M. Kelley, Bobby Negron. (Attachments: # 1 Exhibit 1)(Porter, Gregory) (Entered: 11/14/2014)
11/17/2014	130	MEMORANDUM in Opposition re 125 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *(Defendants' Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint) (Corrected)* filed by Patricia Boudreau, Korine Brown, Colombia Air Services Inc., Jamie A. Fine, Alex Gray, Timothy M. Kelley, Bobby Negron. (Attachments: # 1 Exhibit 1)(Porter, Gregory) (Entered: 11/17/2014)
11/26/2014	131	REPLY to Response to 125 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *(Defendants' Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint)* filed by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company. (Douglass, Alison) (Entered: 11/26/2014)
12/15/2014	132	ELECTRONIC NOTICE Setting Hearing on Motion 125 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *(Defendants' Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint)* : NOTICE TO COUNSEL re: Cameras in the Courtroom Project. The parties in this case are hereby notified that this scheduled proceeding is eligible for video recording. Counsel are directed to the district court web site at http://www.mad.uscourts.gov/general/cameras.html to determine if they wish to consent to video recording. Responses are due seven days from the date of this notice. A RESPONSE FROM EACH PARTY IS REQUIRED. Motion Hearing set for 1/21/2015 02:00 PM in Courtroom 11 before Judge Denise J. Casper. (Hourihan, Lisa) (Entered: 12/15/2014)
01/15/2015	133	Assented to MOTION for Leave to Appear Pro Hac Vice for admission of Jonathan Hacker Filing fee: $ 100, receipt number 0101-5370417 by Fidelity Investment Institution Operations Company, Inc., Fidelity Investments, Fidelity Management and Research Company, Fidelity Management and Trust Company. (Attachments: # 1 Exhibit A: Certificate of Jonathan Hacker)(Douglass, Alison) (Entered: 01/15/2015)
01/19/2015	134	MOTION for Leave to File *Notice of Supplemental Authority in Support of Defendants' Motion to Dismiss the Second Amended Consolidated Complaint (Unopposed)* by Fidelity Investment Institution Operations Company, Inc., Fidelity Management and Research Company, Fidelity Management and Trust Company. (Attachments: # 1 Exhibit A)(Hemani, Abigail) (Entered: 01/19/2015)
01/20/2015	135	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 134 Motion for Leave to File Notice of Supplemental Authority in Support of Defendants' Motion to Dismiss the Second Amended Consolidated Complaint (Unopposed) by Fidelity Investment Institution Operations Company, Inc., Fidelity Management and Research Company, Fidelity Management and Trust Company; Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (Hourihan, Lisa) (Entered: 01/20/2015)

01/20/2015	136	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 133 Motion for Leave to Appear Pro Hac Vice Added Jonathan Hacker. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Maynard, Timothy) (Entered: 01/20/2015)
01/20/2015	137	Notice of Supplemental Authorities re 125 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *(Defendants' Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint) (Leave to File Granted on January 20, 2015)* (Attachments: # 1 BONY Mellon Decision)(Hemani, Abigail) (Entered: 01/20/2015)
01/21/2015	138	ELECTRONIC Clerk's Notes for proceedings held before Judge Denise J. Casper: Motion Hearing held on 1/21/2015 re 125 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *(Defendants' Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint)* filed by Fidelity Investment Institution Operations Company, Inc., Fidelity Management and Trust Company, Fidelity Investments, Fidelity Management and Research Company. Arguments. Court takes under advisement 125 Motion to Dismiss for Failure to State a Claim; (Court Reporter: Debra Joyce at joycedebra@gmail.com.)(Attorneys present: Gregory Porter, Mark Johnson, Robert Izard and Michelle Blauner for the plaintiffs. Jonathan Hacker, Abigail Hemani and Alison Douglass for the defendants.) (Hourihan, Lisa) (Entered: 01/22/2015)
01/29/2015	139	Transcript of Motion to Dismiss Hearing held on January 21,2015, before Judge Denise J. Casper. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Debra Joyce at joycedebra@gmail.com Redaction Request due 2/19/2015. Redacted Transcript Deadline set for 3/2/2015. Release of Transcript Restriction set for 4/29/2015. (Scalfani, Deborah) (Entered: 01/29/2015)
01/29/2015	140	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm (Scalfani, Deborah) (Entered: 01/29/2015)
03/11/2015	141	Judge Denise J. Casper: ORDER entered. MEMORANDUM AND ORDER - The Court ALLOWS Fidelity's motion to dismiss, D. 125. In light of this ruling, the Court also DENIES the Defendant's prior motions to dismiss, D. 82, 103, as moot.(Hourihan, Lisa) (Entered: 03/11/2015)
03/11/2015	142	Judge Denise J. Casper: ORDER entered. ORDER DISMISSING CASE(Hourihan, Lisa) (Entered: 03/11/2015)
04/09/2015	143	NOTICE OF APPEAL re 141 MEMORANDUM AND ORDER, 142 ORDER DISMISSING CASE by Jamie A. Fine, Timothy M. Kelley Filing fee: $ 505, receipt number 0101-5505724 Fee Status: Not Exempt. NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov MUST be completed and

		submitted to the Court of Appeals. **Counsel shall register for a First Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel shall also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/cmecf. US District Court Clerk to deliver official record to Court of Appeals by 4/29/2015. (Johnson, Mark) (Modified on 4/13/2015 to Correct CM/ECF Document Link) (Paine, Matthew). (Entered: 04/09/2015)**
04/13/2015	144	Certified and Transmitted Abbreviated Electronic Record on Appeal to US Court of Appeals re 143 Notice of Appeal. (Paine, Matthew) (Entered: 04/13/2015)
04/13/2015	145	USCA Case Number 15-1445 for 143 Notice of Appeal filed by Jamie A. Fine, Timothy M. Kelley. (Paine, Matthew) (Entered: 04/13/2015)

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09/02/2015 18:56:39			
PACER Login:	sm070707:2637106:0	**Client Code:**	30211
Description:	Docket Report	**Search Criteria:**	1:13-cv-10222-DJC
Billable Pages:	13	**Cost:**	1.30

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE FIDELITY ERISA FLOAT LITIGATION	CIVIL ACTION NO. 13-10222-DJC **Leave to File Granted September 24, 2014**

SECOND AMENDED CONSOLIDATED COMPLAINT

I. INTRODUCTION

1. This Consolidated Complaint concerns fiduciary self-dealing that violates the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, *et seq*.

2. The Plaintiffs bring this class action on behalf of the ERISA retirement plans in which they are or have been participants or fiduciaries to recover investment earnings wrongfully taken by the Defendants from Plaintiffs' retirement plans and a host of similarly-situated ERISA retirement plans (collectively, "Plans").

3. The Defendants (referred to collectively herein as "Fidelity" or "Defendants") caused certain of the Plans' assets to be deposited on an interim basis in accounts ("Deposit Accounts") before Defendants disbursed monies as directed by the Plans. Plan funds in the Deposit Accounts earned interest, generally via investment in overnight securities. This interest is often referred to as "float." Float is a plan asset because the principal from which it is earned is a plan asset. Fidelity was the trustee for the Plans and their assets. It exercised authority or control over the investment of the Plans' assets in Deposit Accounts and over the float earned thereon. Accordingly, Fidelity was a fiduciary for the Plans with respect to float. As a fiduciary, Fidelity was prohibited from dealing with float for itself or for the benefit of another and was

required to deal with float with prudence and unflagging loyalty to the Plans. Fidelity instead used the float for itself and for the benefit of others.

4. First, Fidelity misappropriated the Plans' float to pay trust and record-keeping and/or banking fees that Fidelity was contractually obligated to pay. Each time Fidelity used the Plans' float to pay these fees, Fidelity used the Plans' assets for its own benefit. Fidelity engaged in repeated self-dealing transactions and breaches of duty in violation of ERISA §§ 404 and 406 and Department of Labor Regulations, 29 C.F.R. § 2550.

5. Second, Fidelity misappropriated the Plans' float and gave it to other Fidelity clients. Each time Fidelity gave the Plans' float to its other customers, Fidelity used the Plans' assets for the benefit of its other customers. Fidelity engaged in repeated transactions for the benefit of others and breaches of duty in violation ERISA §§ 404 and 406 and Department of Labor Regulations, 29 C.F.R. § 2550.

6. Plaintiffs bring this action to recover the float interest Fidelity improperly took from Plaintiffs and the members of the proposed nationwide class in violation of ERISA.

II. JURISDICTION AND VENUE

7. Subject matter jurisdiction is proper pursuant to 28 U.S.C. § 1331(e)(1) and ERISA § 502(e)(1). The claims asserted here are brought as a class action under Federal Rule of Civil Procedure 23.

8. Venue is proper in this district pursuant to ERISA § 502(e)(2) because this District is where the breaches took place and where one or more of the Defendants reside or may be found.

III. THE PARTIES

A. The Plaintiffs

9. Timothy M. Kelley ("Kelley") is a former participant in both the Avanade, Inc. 401(k) Retirement Plan ("Avanade Plan") and the Hewlett-Packard Company 401(k) Plan ("HP Plan"). Kelley resides in North Dakota. Kelley was an active participant in the Avanade Plan from approximately February 2008 to July 2010. He was an active participant in the HP Plan from approximately February 2007 to January 2008.

10. Jamie A. Fine ("Fine") is and has been a participant in the Delta Airlines 401(k) Plan ("Delta Plan") since on or about 1997. Fine resides in Georgia.

11. Patricia Boudreau ("Boudreau") is a participant in the Bank of America 401(k) Plan ("BOA Plan"). Boudreau resides in Massachusetts. Boudreau was an active participant in the BOA Plan from 2005 until June 30, 2013.

12. Alex Gray ("Gray") is a participant in the EMC Corporation 401(k) Plan ("EMC Plan"). Gray resides in Massachusetts. Gray has been an active participant in the EMC Plan since 2008.

13. Bobby Negron ("Negron") is a participant in the Safety Insurance Company 401(k) Plan ("Safety Insurance Plan"). Negron resides in Massachusetts. Negron has been an active participant in the Safety Insurance Plan since 2006.

14. Korine Brown ("Brown") is a participant in the General Motors Personal Savings Plan ("GM Plan"). Brown resides in New York State. She has been an active participant in the GM Plan since 2007.

15. Columbia Air Services, Inc. ("Columbia") is a Connecticut corporation with its principal place of business in Groton, Connecticut. Columbia has at all material times been the

sponsor and administrator for the Columbia Group of Companies 401(k) Retirement Savings Plan ("Columbia Plan").

B. The Defendants

16. Fidelity Management Trust Company ("FMTC") is a Massachusetts corporation with its headquarters in Boston, Massachusetts. FMTC is a trust company and manages assets for over 500 institutional clients worldwide, with more than $175.5 billion in trusts and other assets under management as of June 30, 2012. As trustee, FMTC is, by definition, a fiduciary to the Plans.

17. Fidelity Management & Research Company ("FMRC") is an affiliate of FMTC. FMRC is a registered investment company that serves as the leading asset manager and investment advisor for the Plans' investment accounts. FMRC has three divisions, two of which are located in Boston, Massachusetts. FMRC has over one trillion dollars under its administration and management.

18. Fidelity Investments Institutional Operations Company, Inc. ("FIIOC") is an affiliate of FMTC and FMRC. FIIOC provides trust services, recordkeeping and information management services for employee benefit plans. FIIOC serves as an agent to FMTC and is located in Boston, Massachusetts.

IV. THE PLANS

19. The Plans are employee benefit plans within the meaning of ERISA §§ 3(3) and 3(2)(A). The purpose of the Plans is to provide retirement benefits to Plan Participants.

20. The Plans are "defined contribution" or "individual account" plans within the meaning of ERISA § 3(34), in that they provide for individual accounts for each Participant and for benefits based solely on the amount contributed to those accounts plus any income, expenses,

gains and losses, and forfeitures of accounts of other Participants which may be allocated to such Participant's account. Consequently, retirement benefits provided by the Plans are based solely on the amounts allocated to each individual's account. The Plans, then, are typical 401(k) retirement plans similar to those offered by employers throughout the country.

21. A number of services may be provided to defined contribution retirement plans in order for them to operate. Such services include investment management, consulting and financial advice concerning investment selection and monitoring, record-keeping to keep track of employee contributions and accounts, custodial or trust services to hold and invest plan assets, and communications to Participants to advise and educate Participants regarding the operation of the plan and investment of plan assets.

22. The Plans entered into Trust Agreements with Fidelity to establish trusts to hold Plan assets.

23. Under the Trust Agreements, FMTC agreed to accept all of the duties of trustee. In particular, FMTC agreed to open and maintain a trust account for each Plan and an individual trust account for each participant in the Plans; accept contributions on behalf of participants in the Plans; and invest and reinvest Plan assets and hold Plan assets including assets in the Deposit Accounts and float earned thereon, all in accordance with the terms of the Plans.

24. Fidelity's Trust Agreements with the Plans provide that FMTC would charge only three types of fees to the Plans: (1) an asset-based fee based on a percentage of plan assets held in a particular Plan investment, (2) an administrative fee that is a fixed dollar rate per plan participant (also known as a "hard-dollar" payment), and (3) fees for individual participant services such as loans. Defendants were not authorized to receive any other consideration for fees and expenses for managing the Deposit Accounts or other Plan assets.

25. The Plans' Trust Agreements are substantially the same in all material respects:

- All Trust Agreements specified that FMTC would hold the assets of the trust funds, including in Deposit Accounts, for the exclusive benefit of plan participants and beneficiaries, and for the defraying of reasonable plan expenses.
- All Trust Agreements specified that FMTC was acting as a directed trustee of the Plan Administrator.
- All Trust Agreements gave FMTC broad powers to invest, retain, sell, exchange, or otherwise dispose of any of the assets of the trust fund, including funds in the Deposit Accounts.
- All Trust Agreements detailed the services that FMTC would perform and specified the fees that FMTC would charge for the services it provided.
- None of the Trust Agreements included any language that includes float income among permissible fees or otherwise authorizes Defendants to appropriate float income for their own or any other purposes.

V. DEFENDANTS' FIDUCIARY STATUS

26. ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under § 402(a)(1), but also any other persons who in fact perform fiduciary functions. Thus, a person is a fiduciary to the extent that "(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A)(i).

27. Defendant FMTC is a fiduciary of the Plan. As the Trustee, FMTC had "authority or control respecting management or disposition of [plan] assets." Based on a review of the Columbia Plan, a form or prototype plan used by Fidelity for hundreds of 401K plan accounts, the Trust Agreements provide that FMTC had the duty and/or power, among other things, to "open and maintain a trust account for the Plan," "to accept and hold" in the trust account participant contributions, "to invest" the Trust Fund in Permissible Investments, to "retain uninvested cash," including in Deposit Accounts, "to sell, lease, convert, redeem, exchange, or otherwise dispose of all or any part of the assets constituting the Trust Fund," to "employ such agents and counsel as may be reasonably necessary in collecting, managing, administering, investing, distributing and protecting the Trust Fund or the assets thereof and to pay them reasonable compensation," and "generally to exercise any of the powers of an owner with respect to all or any part of the Trust Fund." The Trust Agreements also stated that "[t]he Trustee . . . and ***any other fiduciary*** shall discharge their duties under the Plan and this Trust Agreement solely in the interests of Participants and their Beneficiaries in accordance with the requirements of ERISA" (emphasis added). FMTC, as principal for its agent FIIOC, was and is a fiduciary concerning the violations alleged below.

28. Defendant FIIOC is a fiduciary of the Plan. As the agent for FMTC, FIIOC established, managed and maintained the Deposit Accounts, including the Redemption Account described herein, and used its discretionary authority and control to transfer Plan Assets to the REPO account and use float income to pay FMTC's bank fees and/or benefit investment accounts not held exclusively by the Plan. Accordingly, it had authority or control over the management or disposition of Plan Assets.

29. Defendant FMRC is a fiduciary of the Plan by virtue of its discretionary management and control over Plan Assets transferred to the FICASH program. FMRC exercised discretion in choosing securities as overnight investments for plan assets.

VI. DEFENDANTS' FIDUCIARY DUTIES

30. ERISA imposes on all plan fiduciaries the duty of loyalty to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." ERISA § 404(a)(1).

31. ERISA § 406(b)(1) prohibits a fiduciary from dealing with assets of a plan for its own interest or account. The Department of Labor has indicated, in both Advisory Opinion 93-24A and in Field Assistance Bulletin 2002-3, that a trustee's use of float income for its own benefit constitutes a prohibited transaction unless the trustee (1) disclosed the float to the independent plan fiduciary at the time the trustee was retained, (2) openly negotiated with the independent plan fiduciary to retain float income as part of its overall compensation, and (3) was not in a position to affect the amount of its float compensation, as it would, for example, if it had "broad discretion over the duration of the float." FAB 2002-3. In particular, even if there is a float-related disclosure, the service provider may not use the float to cause "a plan to pay additional fees to the provider." *Id.* The Department of Labor's advisory opinions and field assistance bulletins are publicly available documents designed to provide guidance to the regulated ERISA community, including ERISA fiduciaries such as the Defendants, and the Defendants knew or should have known of these requirements.

VII. DEFENDANTS' VIOLATIONS OF ERISA

32. The Defendants' ERISA violations arise from (1) their practice of appropriating float earned on Plan assets to pay banking fees that Fidelity was required to pay, and (2) their practice of misappropriating float income for the use of clients other than the participants in the Plans. These processes are further described below.

33. During the Class Period, when Plan Participants withdrew funds from their Plan accounts, disbursements of Plan assets were triggered. Such disbursements are paid as a lump sum unless a plan participant has entered retirement and is receiving regular, periodic retirement payments from the plan. The withdrawals were received by Participants after the following general sequence:

a. The day after withdrawals were requested by Participants and investments were "sold," funds moved from the relevant investment option account into a redemption bank account. The redemption bank account was held at Deutsche Bank, and was registered to Fidelity Operations.

b. Later that same day, the IRS was paid on any withdrawals that were taxable, and any remaining balances were transferred to the REPO Account.

c. Once funds reached the REPO Account, they were immediately transferred to FICASH, an interest bearing account owned and controlled by Fidelity.

d. The following day, after remaining with FICASH overnight, the principal of those funds was transferred back to the redemption bank account. The interest earned in the FICASH account was not transferred back to the REPO account as alleged below.

e. Depending on state tax remittance schedules, state taxes were then paid.

f. Either on or after the same day that the redemption bank account (the "Redemption Account") received funds back from the FICASH account, withdrawn funds were electronically disbursed from the redemption bank account to Participants who were able to receive electronic disbursements.

g. For Participants who did not receive an electronic disbursement, withdrawn funds were transferred from the redemption bank account to an interest bearing disbursement bank account at Deutsche Bank owned and controlled by Fidelity. The disbursement bank account then issued a check to those Participants in the amount of the withdrawal but not including any interest. Participants receive the funds after they cash or deposit their checks.

h. Fidelity retained some portion of the float income generated during the disbursement process for itself, and the remainder was credited to mutual funds – not to the Plans and their respective Participants who made the redemption. Thus, the entirety of float income earned on Participant withdrawals was taken by Fidelity for the benefit of itself or other clients.

34. As used herein, the term "float" refers to both (a) the interest earned on amounts in the disbursement bank accounts pending the cashing of Participant checks and (b) interest amounts in the FICASH account.

35. All of the accounts in the processes described above are Deposit Accounts that incurred bank expenses. Because maintaining these accounts was integral to the services Fidelity rendered to the Plans and Plan Participants, such bank expenses were part of Fidelity's ordinary operating expenses for recordkeeping and administering the Plans.

36. Thus, Fidelity used float income to pay bank expenses that were operating expenses for administering Plan assets – and that should have been paid by Fidelity itself.

37. By using the float income to pay their own operating expenses, Defendants diverted Plan assets and engaged in self-dealing in violation of ERISA. Defendants had already been paid for such trustee and administration services through revenue sharing arrangements with mutual funds and other sources as provided in its trust agreements.

38. Following the payment of the Defendants' operating expenses, any remaining float interest was then distributed *pro rata* among various investment funds, rather than to the specific Plan Participants or beneficiaries whose redemptions generated the float income. As a

result, interest generated by the Plans' assets was not used solely for the benefit of the Plans' Participants and beneficiaries.

39. Under controlling First Circuit ERISA precedent, sums due plan participants "remain plan assets subject to [Fidelity's] fiduciary obligations until actual payment." *Mogel v. Unum Life Ins. Co. of Am.*, 547 F.3d 23, 26 (1st Cir. 2008). Thus, when Fidelity liquidates a participant's holdings in an investment option—a redemption—the cash proceeds remain plan assets "until the check to the beneficiary is actually presented to the plan for payment through the banking system." *Id.* (quotation and citation omitted). Any interest on the cash proceeds, therefore, is also a plan asset. *Id.* at 26 n. 6.

40. Under ERISA, "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets." ERISA § 3(21)(A). This definition does not depend on payment or nonpayment of a fee to such a person. 29 C.F.R. § 2510.3-101(a)(2) ("[A]ny person who exercises authority or control respecting the management or disposition of such underlying [plan] assets, and any person who provides investment advice with respect to such assets for a fee . . . is a fiduciary of the investing plan.").

41. Thus, the Defendants are fiduciaries to the Plans because they exercised authority or control over the Plans' assets in FICASH by directing such assets to be used to pay bank fees and to be invested in various overnight securities. Further, FMTC was the trustee for the accounts and for the Plans.

42. The Plaintiffs had no knowledge of the Defendants' ERISA breaches and violations until shortly before the institution of these now-consolidated actions.

VIII. REMEDIES FOR VIOLATIONS OF ERISA

43. ERISA § 502(a)(2) provides that a civil action for breach of fiduciary duty for relief under ERISA § 409 may be brought by a participant, beneficiary, or fiduciary of a plan.

44. ERISA § 409 requires "any person who is a fiduciary who breaches any of the duties imposed upon fiduciaries to make good to such plan any losses to the plan." Section 409 also authorizes "such other equitable or remedial relief as the court may deem appropriate," which is actionable under ERISA § 502(a)(3).

45. Plaintiffs are participants, beneficiaries or fiduciaries of the Plans and are therefore entitled to bring suit on behalf of the Plans seeking relief from the Defendants in the form of:

a. A monetary payment to the Plans to make good to the Plans the loss of benefits to the Plans resulting from the breaches of fiduciary duties alleged above in an amount to be proven at trial based on the principles described above, as provided by ERISA §§ 409(a) and 502(a)(2);

b. Injunctive and other appropriate equitable relief to remedy the breaches alleged above, as provided by ERISA §§ 409(a) and 502(a)(3);

c. Disgorgement of profits earned thereon as a result of prohibited transactions;

d. Reasonable attorneys' fees and expenses, as provided by ERISA § 502(g), the common fund doctrine, and other applicable law;

e. Taxable costs and interest on these amounts, as provided by law; and such other legal and equitable relief as may be just and proper; and

f. Such other legal or equitable relief as may be just and proper.

46. Under ERISA, each Defendant is jointly and severally liable.

IX. CLASS ACTION ALLEGATIONS

47. ERISA §§ 409(a) and 502(a)(2) authorize ERISA plan participants, beneficiaries and fiduciaries to sue in a representative capacity for losses suffered by plans as a result of

breaches of fiduciary duty. Pursuant to that authority, the Plaintiffs bring this action as a class action under Federal Rule of Civil Procedure 23. The Plaintiffs seek to restore losses to the Plans for which the Defendants are personally liable pursuant to ERISA §§ 409 and 502(a)(2).

48. **Class Definition**. The Plaintiffs bring this action as a class action pursuant to Rules 23(a), (b)(1), (b)(2), and, in the alternative, (b)(3) of the Federal Rules of Civil Procedure on behalf of the following Class the "Class"):

> Employee benefit plans covered by the Employee Retirement Income Security Act of 1974 subject to Internal Revenue Code §§ 401(a), (k), for which Fidelity has served as trustee or service provider from February 1, 2007 to the present ("the Class Period").

Excluded from the Class is the ABB PRISM Plan that was the subject of the litigation in *Tussey v. ABB, Inc*., *et al.*, Case No. 06-04305-CV-NKL, in the U.S. District Court for the Western District of Missouri, Central Division.

49. **Numerosity**. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to the Plaintiffs at this time and can only be ascertained through appropriate discovery, the Plaintiffs believe that the Class includes thousands of Plans throughout the country. Moreover, Fidelity Trust's website indicates that over 500 clients, with assets in excess of $260 billion, use its "custom trustee services." *See* http://institutional.fidelity.com.

50. **Commonality**. The claims of the Plaintiffs and the Class originate from the same misconduct and violations of ERISA. Proceeding as a class action is particularly appropriate here because Fidelity uniformly applied its system for processing disbursements for the Plans, and, therefore, the Defendants' self-dealing in violation of ERISA's prohibited transaction provision has affected all Plans in the same manner. Furthermore, common questions of law and fact exist

for all members of the Class and predominate over any questions solely affecting individual members of the Class. The many questions of law and fact common to the Class include:

a. Whether the Defendants are fiduciaries under ERISA;

b. Whether the Defendants engaged in a prohibited transaction under ERISA § 406(b)(1) by using float for its own purposes to pay or offset bank expenses;

c. Whether float is an asset of the Plans;

d. Whether the Defendants breached their fiduciary duties by receiving excessive compensation and/or converting Plan assets to their own use;

e. Whether the Defendants breached their fiduciary duties by failing to credit float in full to the Plans;

f. Whether the Defendants breached their fiduciary duties by diverting to other investors float income that should have been included in the Plans;

g. Whether the Defendants' acts proximately caused losses to the Plans;

h. Whether the Class is entitled to damages and injunctive relief;

i. Whether Defendants' conduct is permitted based upon any prohibited transaction exemption or other authority.

51. **Typicality.** The claims asserted by the Plaintiffs on behalf of the their plans are typical of the claims of the members of the Class because the Plaintiffs' plans and the members of the Class sustained injury arising out of the Defendants' wrongful conduct in breaching their fiduciary duties and violating ERISA as complained of herein. The Plaintiffs' claims are also typical of the claims of the members of the Class inasmuch as the Plaintiffs seek relief on behalf of the Plans pursuant to ERISA § 502(a)(2), and, thus, the Plaintiffs' claims on behalf of the Plans are not only typical of, but identical to, the claims of Class members. If cases were brought and prosecuted individually, each member of the Class would be required to prove the same claims based upon the same facts, pursuant to the same remedial theories, and would be seeking the same relief.

52. **Adequacy.** The Plaintiffs will fairly and adequately protect the interests of the members of the Class. The Plaintiffs have retained competent counsel with experience in class action and ERISA litigation. The Plaintiffs and the plans they represent have no interests antagonistic to or in conflict with those of the Class.

53. **Rule 23(b)(1)(A) & (B) Requirements.** Class action status in this action is warranted under Rule 23(b)(1)(A), because prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for the Defendants. Class action status is also warranted under Rule 23(b)(1)(B), because prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class that, as a practical matter, would be dispositive of the interests of other members not parties to this action, or that would substantially impair or impede their ability to protect their interests.

54. **Rule 23(b)(2) Requirements.** Certification under Rule 23(b)(2) is warranted because Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole.

55. **Rule 23(b)(3) Requirements.** Certification under Rule 23(b)(3) is also appropriate because common questions of law and fact clearly predominate over any questions affecting only individual members. A class action is superior to the other available methods for the fair and efficient adjudication of this controversy since joinder of all members of the Class is impracticable. Furthermore, because the injury suffered by the individual Class members may be relatively small, the expense and burden of individual litigation makes it impracticable for the

Class members individually to redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

X. CLAIMS FOR RELIEF

COUNT ONE – BREACH OF FIDUCIARY DUTY

56. Plaintiffs repeat and reallege each of the allegations set forth in the foregoing paragraphs as if fully set forth herein.

57. Interest and income earned from plan assets are themselves plan assets, and, thus, float was a Plan asset.

58. The Defendants owe to the Plans, their participants and beneficiaries extensive fiduciary duties including, without limitation:

a. To perform duties with the utmost loyalty and fidelity to the Plans and their participants and beneficiaries, avoiding at all times conflicts of interest, self-interest, and duplicity;

b. To ensure, at all times, that Plan assets shall be held for the exclusive purposes of providing benefits to Plan Participants and their beneficiaries;

c. To ensure, at all times, that the Plans avoid prohibited transactions;

d. To track and account for all transactions involving the Plans and Plan assets so as to ensure that Plan assets are retained, managed, and disbursed in compliance with Plan Documents and ERISA.

59. The Defendants breached their fiduciary obligations to the Plans by using the float income for themselves to defray their own expenses.

60. The Defendants also breached their fiduciary obligation of loyalty to the Class by giving float belonging to the Plans to other Fidelity clients.

61. As a consequence of the Defendants' breaches, the Plans have suffered financial losses and damages equal to the amount of the float income together with any amounts that could have been earned thereon.

62. Pursuant to ERISA §§ 409 and 502(a), the Defendants are personally liable to make good to the Plans for the losses the Plans experienced as a result of the Defendants' breaches of fiduciary duty.

63. Pursuant to ERISA § 502(a)(3), the Court should also award equitable relief to the Class.

COUNT TWO – PROHIBITED TRANSACTIONS

64. Plaintiffs repeat and reallege each of the allegations set forth in the foregoing paragraphs as if fully set forth herein.

65. ERISA § 406(a)(1) provides that a fiduciary "shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." ERISA defines a "party in interest" to include "any fiduciary (including, but not limited to, any . . . trustee)." ERISA § 3(14)(A).

66. As discussed above, the Defendants were at all relevant times ERISA fiduciaries with respect to the Plans. Thus, each was a "party in interest" pursuant to ERISA § 3(14)(H).

67. The Defendants' use of the Plans' float income to pay the Defendants' bank fees is a plan transaction within the meaning of ERISA § 406(a)(1).

68. The Defendants knew or should have known that, by using plan assets to pay the Defendants' bank fees for accounts such as the Depository Account and the REPO Account, they were using Plan assets to indirectly benefit themselves, and each of them was a "party in interest." Accordingly, the Defendants engaged in a prohibited transaction under ERISA § 406(a)(1).

69. Additionally, ERISA § 406(b)(1) prohibits a fiduciary from dealing with the assets of a plan for its own interest or account.

70. The float retained by the Defendants, or used to benefit Defendants by payment of their operating expenses, consisted of interest earned from Plan assets. The returns from investing Plan assets in overnight securities are Plan assets, and each Defendant is a fiduciary.

71. The Defendants violated ERISA § 406(b)(1) by using the float in their own interests by defraying their own administrative expenses.

72. The Department of Labor's Field Assistance Bulletin 2002-3 indicates that a financial service provider's use of float income for its own benefit constitutes a prohibited transaction under ERISA § 406(b)(1) unless the practice is disclosed and openly bargained-for at the time the service provider is retained, and even then, only where the agreement does not permit the service provider to affect (and in particular increase) the amount of its float compensation. The Defendants here (1) did not disclose the float income, (2) did not negotiate for extra compensation in the form of the float income, or provide the Plans with information sufficient to understand the Defendants' compensation, and (3) had discretion to use the float income to pay themselves excessive compensation. FAB 2002-3, therefore, confirms that the Defendants' actions constitute prohibited transactions under ERISA § 406(b)(1).

73. As a result of the prohibited transactions engaged in by the Defendants, the Plans suffered losses in the form of the interest income retained by or applied for the benefit of the Defendants and the return the Plans would have realized on that income had it been prudently invested for their benefit by the Defendants.

74. Pursuant to ERISA §§ 409, 502(a)(2) and 502(a)(3), the Defendants are liable to personally make good to the Plans the damages they sustained.

75. Pursuant to ERISA § 502(a)(3), the Court should also award equitable relief to the Class.

COUNT THREE – CO-FIDUCIARY LIABILITY

76. Plaintiffs repeat and reallege each of the allegations set forth in the foregoing paragraphs as if fully set forth herein.

77. **Knowledge of a Breach and Failure to Remedy**: ERISA § 405(a)(3) imposes co-fiduciary liability on fiduciary "A" for a fiduciary breach by fiduciary "B" if fiduciary A has knowledge of the breach by fiduciary B, unless fiduciary A makes reasonable efforts under the circumstances to remedy the breach. Each Defendant knew of the breaches by the other fiduciaries and made no reasonable efforts to remedy those breaches.

78. **Knowing Participation in a Breach**: ERISA § 405(a)(1) imposes liability on fiduciary A for a breach of fiduciary responsibility of fiduciary B with respect to the same plan if fiduciary A participates knowingly in, or knowingly undertakes to conceal, an act or omission of fiduciary B, knowing such act or omission is a breach. As alleged above, each of the Defendants were intimately involved in the process of generating and improperly disbursing the float income, and, thus, knowingly participated in the improper management of that investment by the other Defendants.

79. **Enabling a Breach**: ERISA § 405(a)(2) imposes liability on fiduciary A if, by failing to comply with ERISA § 404(a)(1) in the administration of the specific responsibilities which give rise to fiduciary status, fiduciary A has enabled fiduciary B to commit a breach. FMTC enabled the breach by engaging FIIOC and FMRC for purposes of effectuating transfers, contributions and distributions from plans.

80. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Class lost millions of dollars of retirement savings.

81. Pursuant to ERISA §§ 409, 502(a)(2) and 502(a)(3), the Co-Fiduciary Defendants are liable to make good to the Plans for the losses caused by their breaches of fiduciary duty alleged in this Count and to provide other equitable relief as appropriate.

XI. **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for judgment as follows:

A. A determination that this action may be maintained as a class action under Federal Rule of Civil Procedure 23, and appointing Plaintiffs as class representatives;

B. A Declaration that the Defendants, and each of them, are not entitled to the protection of ERISA § 404(c)(1)(B), 29 U.S.C. § 1104(c)(1)(B);

C. A Declaration that the Defendants, and each of them, breached ERISA fiduciary duties owed to the Plans;

D. An Order compelling the Defendants to make good to the Plans all losses resulting from the Defendants' breaches of fiduciary duty and prohibited transactions;

E. Imposition of a constructive trust on any amounts by which the Defendants were unjustly enriched at the expense of the Plans;

F. An Order awarding damages to the Plans, with interest as provided by law;

G. An Order enjoining the Defendants from any further violations of their ERISA fiduciary obligations;

H. An Order awarding costs pursuant to 29 U.S.C. § 1132(g);

I. An Order awarding attorneys' fees pursuant to 29 U.S.C. § 1132(g) or as provided by law;

J. An Order for equitable restitution and other appropriate equitable and injunctive relief against Defendants; and

K. Granting such other and further relief as the Court may deem just and proper.

XII. **DEMAND FOR JURY TRIAL**

Plaintiffs demand a jury trial on all claims so triable.

Dated: September 24, 2014

Respectfully submitted,

/s/ Gregory Y. Porter
Gregory Y. Porter
BAILEY & GLASSER LLP
910 17th Street, NW
Suite 800
Washington, DC 20004
Tel: (202) 463-2101
Fax: (202) 463-2103
Email: gporter@baileyglasser.com

Elizabeth A. Ryan
John J. Roddy
BAILEY & GLASSER LLP
125 Summer Street
Boston, MA 02110
Tel: (617) 439-6730
Fax: (617) 951-3954
Email: eryan@baileyglasser.com
jroddy@baileyglasser.com

Todd M. Schneider
Mark T. Johnson
SCHNEIDER WALLACE COTTRELL KONECKY LLP
180 Montgomery Street
Suite 2000
San Francisco, CA 94104
Tel: (415) 421-7100
Email: tschneider@schneiderwallace.com
mjohnson@schneiderwallace.com

Garrett W. Wotkyns
Michael C. Mckay
SCHNEIDER WALLACE COTTRELL KONECKY LLP
8501 North Scottsdale Road, Suite 270
Scottsdale, AZ 85253
Tel: (480) 428-0142
Email: gwotkyns@schneiderwallace.com

Counsel for Plaintiffs Timothy M. Kelley and Jamie A. Fine

Bradford S. Babbitt (BB 566390)
Craig A. Raabe
Elizabeth R. Leong
ROBINSON & COLE LLP
280 Trumbull Street
Hartford, Connecticut 06103-3597
Tel: (860) 275-8200
Fax: (860) 275-8299
Email: bbabbitt@rc.com
craabe@rc.com
eleong@rc.com

Robert A. Izard
Mark P. Kindall
IZARD NOBEL LLP
29 South Main Street, Suite 305
West Hartford, CT 06107
Tel: (860) 493-6292
Fax: (860) 493-6290
Email: mkindall@izardnobel.com
rizard@izardnobel.com

Counsel for Columbia Air Services, Inc.

Thomas G. Shapiro (BB 454680)
Michelle H. Blauner (BB 549049
SHAPIRO HABER & URMY LLP
Seaport East
2 Seaport Lane
Boston, MA 02210
Tel: (617) 439-3939
Fax: (617) 439-0134
Email: tshapiro@shulaw.com
mblauner@shulaw.com

Counsel for Plaintiffs Patricia Boudreau, Alex Gray, Bobby Negron and Korine Brown

CERTIFICATE OF SERVICE

I hereby certify that on, September 24, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to registered CM/ECF participants.

/s/ Gregory Y. Porter
Gregory Y. Porter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE FIDELITY ERISA FLOAT LITIGATION	Civil Action No. 13-10222-DJC

DECLARATION OF ABIGAIL K. HEMANI
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS
PLAINTIFFS' SECOND AMENDED CONSOLIDATED COMPLAINT

Pursuant to 28 U.S.C. § 1746, I, Abigail K. Hemani, declare as follows:

1. I am a partner of the law firm Goodwin Procter LLP, counsel for Defendants Fidelity Management Trust Company, Fidelity Management and Research Company, and Fidelity Investments Institutional Operations Company, Inc. (collectively, "Defendants"). I am a member in good standing of the Bars of the Commonwealth of Massachusetts and the United States District Court for the District of Massachusetts, among others.

2. I submit this declaration in support of Defendants' Motion To Dismiss Plaintiffs' Second Amended Consolidated Complaint.

3. Attached hereto as Exhibit 1 is a true and correct copy of an Adoption Agreement for the Columbia Group of Companies 401(k) Retirement Savings Plan ("Adoption Agreement") and Fidelity Basic Plan Document No. 14, which the Adoption Agreement references. Exhibit 1 is being filed under seal.

4. Attached hereto as Exhibit 2 is a true and correct copy of a Service Agreement between Columbia Air Services, Inc. and Fidelity Management Trust Company. Exhibit 2 is being filed under seal.

5. Pricing information unrelated to the above-referenced motion has been redacted from Exhibits 1 and 2 by agreement between the parties.

6. I declare that the foregoing is true and correct under penalty of perjury. Executed on this 3rd day of October, 2014 in Boston, Massachusetts.

/s/ Abigail K. Hemani____________________
Abigail K. Hemani (BBO # 650721)
Goodwin Procter LLP
Exchange Place
53 State Street
Boston, MA 02109
T: 617-570-1000
F: 617-523-1231
AHemani@goodwinprocter.com

CERTIFICATE OF SERVICE

I, Abigail K. Hemani, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on October 3, 2014. I further certify that paper copies of the under seal exhibit will be served by First-Class mail postage prepaid upon all counsel of record for the Plaintiffs in this action.

/s/ Abigail K. Hemani__________________

Exhibit 1
Filed Under Seal

Exhibit 2
Filed Under Seal

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE FIDELITY ERISA FLOAT LITIGATION	))))	Civil Action No. 13-10222-DJC

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs in the above-entitled matter, Timothy M. Kelley, Jamie A. Fine, Patricia Boudreau, Alex Gray, Bobby Negron, Columbia Air Services, Inc. and Korine Brown hereby appeal to the United States Court of Appeals for the First Circuit from the Order of Dismissal entered in this action on March 11, 2015.

Dated: April 9, 2015

/s/ *Mark T. Johnson*
Todd M. Schneider (*pro hac vice*)
Joshua G. Konecky (*pro hac vice*)
Mark T. Johnson (*pro hac vice*)
Schneider Wallace Cottrell Konecky Wotkyns LLP
180 Montgomery Street
Suite 2000
San Francisco, CA 94104
T: 415-421-7100
tschneider@schneiderwallace.com
jkonecky@schneiderwallace.com
mjohnson@schneiderwallace.com

Garrett W. Wotkyns (*pro hac vice*)
Michael C. Mckay
Schneider Wallace Cottrell Konecky Wotkyns LLP
8501 North Scottsdale Road
Suite 270
Scottsdale, AZ 85253
T: 480-428-0142
gwotkyns@schneiderwallace.com
mmkcay@schneiderwallace.com

Gregory Y. Porter (*pro hac vice*)
Bailey & Glasser LLP
910 17th Street, NW
Suite 800
Washington, DC 20004
T: 202-543-0226
gporter@baileyglasser.com

John J. Roddy
Elizabeth A. Ryan
Bailey & Glasser LLP
Suite 1030
125 Summer Street
Boston, MA 02110
T: 617-439-6730
F: 617-951-3954
jroddy@baileyglasser.com
eryan@baileyglasser.com

Joseph Peiffer
Daniel Carr
Peiffer Rosca Wolf Abdullah Carr & Kane
201 St. Charles Avenue
Ste. 4610
New Orleans, LA 70170
T: 504-523-2434
F: 504-523-2464
jpeiffer@prwlegal.com

Suyash Agrawal
Jeannie Y. Evans
Agrawal Evans LLP
308 W. Erie Street
Suite 502
Chicago, IL 60654
T: 312-448-8800

Peter J. Mougey
Laura Dunning
Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor
316 S. Baylen Street
Pensacola, FL 32502
T: 850-432-2451
F: 850-469-3331
pmougey@levinlaw.com

ldunning@levinlaw.com

Richard S. Frankowski
The Frankowski Firm
Suite 203
231 22nd Street South
Birmingham, AL 35233
T: 205-390-0399
richard@frankowskifirm.com

Attorneys for Plaintiffs Timothy M. Kelley and Jamie A. Fine

Robert A. Izard (*pro hac vice*)
Mark P. Kindall (*pro hac vice*)
Izard Nobel LLP
29 South Main Street
Suite 215
West Hartford, CT 06107
T: 860-493-6295
F: 860-493-6290
firm@izardnobel.com
mkindall@izardnobel.com

Bradford S. Babbitt (*pro hac vice*)
Craig A. Raabe (*pro hac vice*)
Elizabeth R. Leong (*pro hac vice*)
Robinson & Cole, LLP
280 Trumbull St.
Hartford, CT 06103-3597
T: 860-275-8200
F: 860-275-8299
bbabbitt@rc.com
craabe@rc.com
elong@rc.com

Attorneys for Plaintiff Columbia Air Services, Inc.

Thomas G. Shapiro
Shapiro Haber & Urmy LLP
Seaport East
2 Seaport Lane
Boston, MA 02210
T: 617-439-3939
F: 617-439-0134
tshapiro@shulaw.com

Michelle H. Blauner
Shapiro Haber & Urmy LLP
53 State Street
37th Floor
Boston, MA 02109
T: 617-439-3939
F: 617-439-0134
mblauner@shulaw.com

Attorneys for Plaintiffs Patricia Boudreau, Esquire Alex Gray and Bobby Negron

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2015, I electronically filed the foregoing document with the Clerk of the Court using the Court's CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ *Mark T. Johnson*
Mark T. Johnson (*pro hac vice*)
Schneider Wallace Cottrell Konecky Wotkyns LLP
180 Montgomery Street
Suite 2000
San Francisco, CA 94104
T: 415-421-7100
mjohnson@schneiderwallace.com