No. 17-16208
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES E. WHITE, JR., JOHN P. JACOBS, VERLAN D. HOOPES, NORA L. PENNINGTON, JAMES A. RAY, AND JEANNETTE A. FINLEY, individually and as representatives of a class of similarly situated persons of the Chevron Employee Savings Investment Plan, *Plaintiffs-Appellants*,

v.

CHEVRON CORPORATION, ESIP INVESTMENT COMMITTEE, AND JOHN DOES 1–20, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of California, The Honorable Phyllis J. Hamilton, Presiding
No. 4:16-cv-00793-PJH

APPELLANTS' BRIEF

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §1331 and 29 U.S.C. §1132(e)(1) and (f) because this action arises under the Employee Retirement Income Security Act of 1974 (ERISA), and is brought under 29 U.S.C. §1132(a)(2) and (3). This Court has jurisdiction under 28 U.S.C. §1291 because this is an appeal from the district court's May 31, 2017 judgment dismissing the action with prejudice (ER1),[1] and orders granting Defendants' motions to dismiss under Fed.R.Civ.P. 12(b)(6) and dismissing all of Plaintiffs' claims with prejudice. (ER2–41, ER42–76). Plaintiffs filed a timely notice of appeal on June 9, 2017. (ER77–80). Fed.R.App.P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

I. Whether Plaintiffs' Complaint or Amended Complaint contain sufficient factual allegations to state a plausible claim of breach of ERISA's fiduciary duties, where Plaintiffs alleged that (1) Defendants caused Plaintiffs' 401(k) plan to incur excessive fees by providing retail-class shares of mutual funds as investment options instead of lower-cost, but otherwise identical, institutional-class shares of the same funds, resulting in revenue sharing payments to the recordkeeper that far exceeded the reasonable market rate for the recordkeeper's administrative services; and (2) Defendants failed to monitor the plan's investments and remove imprudent

[1] "ER" refers to Plaintiffs-Appellants' Excerpts of Record. "Doc." refers to the district court ECF Document Number.

ones, including a money market fund that failed to keep pace with inflation, and a small-cap mutual fund with a sustained track record of underperformance. Doc. 27; Doc. 32; ER47–76; Doc. 44; Doc. 47; ER12–41.

Review is de novo. *Int'l Longshore & Warehouse Union v. ICTSI Or., Inc.*, 863 F.3d 1178, 1187 n.5 (9th Cir. 2017). Plaintiffs are permitted to appeal the dismissal of the original complaint despite filing an amended complaint. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 925–28 (9th Cir. 2012)(en banc).

II.A. Whether the district court erred in finding Plaintiffs' fiduciary breach claim regarding excessive administrative fees time-barred under 29 U.S.C. §1113(2). Doc. 44 at 24–25; Doc. 47 at 26–27; ER33–35. Review is de novo. *Johnson v. Lucent Techs., Inc.*, 653 F.3d 1000, 1005 (9th Cir. 2011).

II.B. Whether the district court erred in finding Plaintiffs' prohibited transactions claim, 29 U.S.C. §1106(a)(1), time-barred under 29 U.S.C. §1113(1) based upon the date a service provider was initially hired. Doc. 44 at 25–26; Doc. 47 at 27–28; ER38–40. Review is de novo. *Johnson*, 653 F.3d at 1005.

STATEMENT OF THE CASE

Plaintiffs Charles E. White, Jr., John P. Jacobs, Verlan D. Hoopes, Nora L. Pennington, James A. Ray, and Jeannette A. Finley bring this action on behalf of current and former employees of Chevron Corporation (Chevron) who participate in the Chevron Employee Savings Investment Plan (Plan), an ERISA-governed, individual-account defined contribution retirement plan that Chevron maintains for its employees. ER188–90 ¶¶1, 8; *see* 29 U.S.C. §1002(2)(A), §1002(7), §1002(34).

Plaintiffs filed their original Complaint on February 17, 2016 (ER265), and Amended Complaint on September 30, 2016 (ER187). Plaintiffs allege that the Plan's fiduciaries (Defendants Chevron and the ESIP Investment Committee, ER191–92 ¶¶20–21), breached the duties imposed by 29 U.S.C. §1104(a)(1), and engaged in transactions prohibited by 29 U.S.C. §1106(a)(1). Plaintiffs bring this action in a representative capacity on behalf of the Plan under 29 U.S.C. §1132(a)(2) and (3), and seek to obtain the Plan's remedies under 29 U.S.C. §1109(a), including the recovery of all "losses to the plan" and appropriate equitable relief. ER189 ¶4. Plaintiffs seek to represent a class of all of the Plan's participants and beneficiaries since February 17, 2010. ER242 ¶149.

On August 29, 2016, the district court dismissed the Complaint, with leave to amend. ER76. On May 31, 2017, the district court dismissed the Amended Complaint with prejudice and entered final judgment. ER1, 41.

I. The Chevron Employee Savings Plan.

As of year-end 2014, the Plan had over 40,000 participants and held $19 billion, making it the 13th largest 401(k) plan in the United States based on asset size. ER188, 190 ¶¶2, 12. In defined contribution plans, "participants' retirement benefits are limited to the value of their own individual investment accounts, which is determined by the market performance of employee and employer contributions, less expenses." *Tibble v. Edison Int'l*, 843 F.3d 1187, 1191 (9th Cir. 2016)(en banc)(*Tibble V*)(quoting *Tibble v. Edison Int'l*, 135 S.Ct. 1823, 1826 (2015)(*Tibble IV*)). Defendants determine the investment options in which participants can invest, and arrange for necessary administrative services, including recordkeeping of participants' accounts. ER190, 193, 228 ¶¶10, 26, 112.

II. Plaintiffs' Complaint.

Plaintiffs allege that Defendants breached their fiduciary duties by providing two imprudent investment options, the Vanguard Prime Money Market Fund (Count I) and Artisan Small Cap Value Fund (Count IV), and causing the Plan to incur excessive fees for investment management (Count II) and administration (Count III). ER ¶¶24–99, 113–29. Each count alleges violations of the duties of loyalty and prudence, 29 U.S.C. §1104(a)(1)(A)–(B), while Counts I and IV additionally allege violations of §1104(a)(1)(D) based on Defendants' failure to follow the Plan's Investment Policy Statement (IPS), a governing Plan document. ER297–99 ¶¶114, 118, 122, 126. These breaches caused the Plan to lose millions of dollars in retirement savings. ER275, 281, 284, 287–88, 291 ¶¶38, 59, 72, 87, 90, 99. Count V alleges that Chevron failed to prudently monitor those to whom it delegated fiduciary responsibilities. ER300–01 ¶¶130–35.

A. Vanguard Prime Money Market Fund (Count I).

The IPS required at least one option that will “provide a high degree of safety and capital preservation.” ER272 ¶31; ER260. The IPS specified that the Plan would provide options in various categories, including “Short-Term Investment(s),” defined as “options that seek maximum current income that are consistent with preservation of capital and liquidity.” ER272 ¶31; ER261.

The Plan’s sole capital preservation option was the Vanguard Prime Money Market Fund (Money Market Fund). ER273 ¶33. Between 2010 and 2016, its annual returns were between 0.04% to 0.07%—below the rate of inflation. *Id*.

An alternative was available, particularly in light of the Plan’s massive size, that would have maximized current income while preserving capital, without any increase in risk compared to the Money Market Fund: a stable value fund. ER271–73 ¶¶27–30, 32. Stable value funds are designed specifically for use in employer-sponsored retirement plans as a conservative capital-preservation investment. ER271–72 ¶¶27–28. “Because they hold longer-duration instruments, [stable value funds] generally outperform money market funds, which invest exclusively in short-term securities.” ER271 ¶27 (quoting *Abbott v. Lockheed Martin Corp*., 725 F.3d 803, 806 (7th Cir. 2013), and citing Paul J. Donahue, *Plan Sponsor Fiduciary Duty for the Selection of Options in Participant-Directed Defined Contribution Plans and the Choice Between Stable Value and Money Market*, 39 AKRON L. REV.

9, 24 (March 2006)).

Since 1988—over 20 years *before* the start of the class period—stable value fund returns have been "more than double" money market fund returns, while preserving principal and incurring *less* risk than money market funds. ER272, 274 ¶¶29–30, 35–36. From 2010 through 2015, the returns of a typical stable value fund were up to *67 times higher* than the Plan's Money Market Fund (1.32%–3.12% vs. 0.04%–0.07%). ER273–74 ¶¶34–35.

In view of the decades-long advantage of stable value returns compared to money market returns for the same level of risk, a prudent investigation would have led Defendants to conclude that the Plan's Money Market Fund was not providing meaningful retirement benefits to participants and was not "maximizing current income," particularly once the fund began providing nearly zero annual returns. Defendants' retention of the Money Market Fund caused significant losses compared to what the Plan would have earned in a stable value fund. ER275 ¶38.

B. Excessive investment management fees (Count II).

The Plan's $19 billion asset size allowed it to qualify for investment products with much lower costs than products available to smaller investors. ER266, 276–77 ¶¶2, 44–46. These options included lower-cost share classes of the same mutual funds that Defendants had already selected, as well as non-mutual fund alternatives (separately managed accounts) that would have provided identical management at significantly lower cost. ER276–85 ¶¶43–77.

The lower-cost mutual fund share classes invested in the same portfolio of securities managed by the same investment adviser; they were identical in all respects except that they charged lower fees. ER277–79 ¶¶47, 49–51. For 13 of the Plan's mutual funds, Defendants provided a higher-cost share class instead of an available lower-cost share class, resulting in the Plan paying unnecessary fees. ER276–80 ¶¶43–55.

C. Excessive administrative fees (Count III).

Recordkeeping is a commodity service for large defined contribution plans. ER285–86 ¶79. The cost of recordkeeping depends on the number of participants in the plan, and is not tied to assets; it costs no more to recordkeep a $100,000 account than a $1,000 account. *Id*. Because the market is highly competitive, the surest way to determine the market rate for recordkeeping is through a competitive bidding process. ER285–87 ¶¶79, 83.

In 2002, Chevron hired The Vanguard Group, Inc. (Vanguard) to be the Plan's recordkeeper. ER285. Until 2013, Defendants allowed Vanguard to be compensated for its administrative services through revenue sharing payments from the Plan's mutual funds. ER286–87. Because a revenue sharing model is asset-based, it bears no direct relation to the participant-based cost of the recordkeeping service, and results in excessive compensation if assets increase (through participant contributions and investment gains) without any change in services. ER286–87 ¶¶80, 82, 86.

From February 2010 through March 2012, the Plan's assets grew 22%—from $13 billion to $16 billion. ER287 ¶86. That $3 billion increase in Plan assets caused Vanguard's asset-based revenue sharing compensation to similarly increase, even though Vanguard's services to the Plan stayed largely the same. *Id*. As a result, the Plan paid millions of dollars in excessive recordkeeping fees compared to a reasonable market rate. ER287–88 ¶¶85–90.

D. Artisan Small Cap Value Fund (Count IV).

The Artisan Small Cap Value Fund (ARTVX) had the highest expense ratio among the Plan's options, at 122 to 124 basis points (100 basis points = 1%). ER290 ¶96. The fund used an active investment strategy to attempt to outperform its benchmark, the Russell 2000 index. ER289 ¶94. Industry and academic literature show that it is exceedingly rare for an active manager to consistently outperform its benchmark, after accounting for higher active management fees. ER275–76 ¶¶39–42. The Artisan fund ranked in the 94th percentile or worse in its peer group each year from 2010 through 2014 (higher percentile = worse performance), significantly underperforming its benchmark. ER288–91 ¶¶92–99. The Artisan fund was up to *20 times more expensive* than passively managed small cap value funds (which seek to track rather than outperform the index), while significantly underperforming those alternatives. ER289–90 ¶¶95–96.

The IPS required Defendants to maintain a watch list and to remove options that failed to meet objectives or that otherwise were no longer appropriate for the Plan. ER288 ¶92. Despite the persistent underperformance and excessive fees of the Artisan fund compared to alternative small cap value funds, Defendants failed to remove the fund until March 31, 2014, resulting in Plan losses of over $70 million compared to what the Plan would have earned by investing in a prudent alternative. ER289–90 ¶¶94, 97–99.

III. The district court's dismissal of the Complaint.

On August 29, 2016, the district court dismissed Plaintiffs' complaint with leave to amend. ER42–76. The district court dismissed the "disloyalty" claims, §1104(a)(1)(A), because Plaintiffs did not allege that Defendants engaged in self-dealing or acted under a conflict of interest. ER48–50. The court also dismissed each prudence claim.

A. Vanguard Prime Money Market Fund

Because neither ERISA nor the Plan's IPS specifically mandated a stable value fund, the district court held that "[o]ffering a money market fund as one of an array of mainstream investment options along the risk/reward spectrum more than satisfied the Plan fiduciaries' duty of prudence." ER54. The court faulted Plaintiffs for pleading no facts *directly* "showing that the Plan fiduciaries failed to evaluate whether a stable value fund or some other investment option would provide a higher return and/or failed to evaluate the relative risks and benefits of money market funds vs. other capital preservation options." ER55.

B. Excessive investment management fees

In finding that Defendants' use of retail-class shares of certain mutual funds instead of lower-cost, but otherwise identical, institutional-class shares of the same funds did not show imprudence, the district court relied on the decision by a panel of this Court in *Tibble v. Edison Int'l*, 729 F.3d 1110 (9th Cir. 2013)(*Tibble III*), *vacated*, 135 S.Ct. 1823 (2015). ER60. The order did not discuss the portion of *Tibble III* which affirmed a judgment for plan participants based on similar allegations. *See* 729 F.3d at 1137–39. Because "[f]iduciaries have latitude to value investment features other than price," the court found the availability of lower-cost share classes "not relevant." ER59–60 (citing *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009); *Loomis v. Exelon Corp.*, 658 F.3d 667, 670 (7th Cir. 2011); and *Renfro v. Unisys Corp.*, 671 F.3d 314, 326–27 (3d Cir. 2011)).

The court construed allegations that the plan's investment lineup did not remain static throughout the class period as "support[ing] the inference that the fiduciaries were monitoring the investment options." ER61. The court found that the "range of fees" of the plan's options—expense ratios between 0.05% and 1.24%—was "reasonable as a matter of law" under *Tibble III* and Third and

Seventh Circuit precedent. *Id*.

C. Excessive administrative fees

The court found the Complaint insufficient due to a lack of allegations "showing what recordkeeping fees Vanguard charged," or "that the same services were available for less on the market." ER67–68. Without such facts, the court found that Plaintiffs had provided only a "conclusory assertion that fees under a revenue-sharing arrangement are necessarily excessive and unreasonable." ER66. The Court inferred from the fact that Defendants renegotiated a per-participant fee in 2012 after the Plan's assets had increased by 22% that Defendants "were prudently monitoring recordkeeping fees to ensure that they did not become unreasonable." ER66–67.

The court found there was "no legal foundation" to Plaintiffs' "allegation that the Plan fiduciaries were required to solicit competitive bids on a regular basis," because ERISA does not contain an explicit "periodic competitive bidding" requirement. ER67.

D. Artisan Small Cap Value Fund

The district court found that Defendants' removal of the fund in 2014 "create[d] a plausible inference that the Plan fiduciaries were attentively monitoring the fund." ER72–73. The fund's poor performance could not create a reasonable inference of a flawed process, "as ERISA requires a plaintiff to plead some other objective indicia of imprudence." ER72.

The district court also dismissed the derivative failure to monitor claim in Count V, and granted Plaintiffs leave to amend their complaint. ER74–76.

IV. The Amended Complaint.

To address the district court's call for more detail, the Amended Complaint adds additional facts in support of each fiduciary breach claim under 29 U.S.C. §1104(a), and an additional cause of action alleging that Defendants engaged in prohibited transactions under 29 U.S.C. §1106(a). ER187–253; ER99–173 (redline).

A. Vanguard voted in favor of Chevron management's proposals and served as recordkeeper to Chevron's corporate plans at a discount.

In light of the district court's suggestion that self-dealing or "significant wrongdoing" was required to state a claim (ER49, 62, 68), the Amended Complaint includes additional facts showing that Chevron and Vanguard operated under conflicts of interest at the Plan's expense. ER194–99, 234–35 ¶¶29–40, 127–29.

As of June 30, 2016, Vanguard held $13 billion in Chevron stock (125 million shares), making it Chevron's largest institutional shareholder. ER197 ¶36. Vanguard has a documented track record of casting proxy votes in a manner that "overwhelmingly support[s]" management-sponsored proposals regarding executive compensation and corporate governance matters. ER194–95 ¶¶30–33. In

2015 and 2016, 40 Vanguard mutual funds voting on Chevron management or shareholder proposals: (1) voted in *favor* of each Chevron management proposal, including proposals to ratify Chevron executive officers' compensation, which were opposed by multiple other large fund families as "*not aligned with long-term shareholder interests*" (ER97 ¶37), and (2) voted *against* or abstained from voting on each of the 17 shareholder proposals, including proposals to increase Chevron's transparency and accountability relating to the environmental costs of its business practices (ER198 ¶38). Barron's reported on Vanguard's "significant conflict of interest," noting one plausible reason for its pro-management voting on shareholder climate change proposals: "[Vanguard] not only invests in utility and energy companies, but manages money for them in their 401(k) plans, collecting millions of dollars in fees in the process." ER196 ¶35. Chevron could have, but chose not to, hire a "pure" recordkeeper that was not subject to such conflicts. ER199, 234–35 ¶¶40, 127–28.

Chevron also hired Vanguard as the recordkeeper for each of the seven non-qualified corporate plans Chevron sponsors for its executives, which Chevron pays for directly, and for which Vanguard provided its services at a discount. ER234–35 ¶¶127–29.

B. Vanguard Prime Money Market Fund (Count I).

Given the district court's belief that the Money Market Fund's underperformance was a matter of hindsight, Plaintiffs cited extensive investment literature showing that the *general* superiority of stable value fund returns was not a recent or temporary development. ER211–12 ¶66. As of 2014, stable value funds had outperformed money market funds for 25 consecutive years—back to 1989—and did so while carrying *less* risk, as shown by money market funds requiring corporate and government intervention to avoid collapsing in 2008. ER203–07, 213–14 ¶¶51–57, 69c–d. As to the Plan's Money Market Fund specifically, its 2009 prospectus stated that the fund's short-term investment holdings would likely cause the fund's income to "decline because of falling interest rates." ER199 ¶41. An alternative stable value fund also should have been readily apparent to Defendants because Vanguard, the Plan's recordkeeper, offered a stable value fund that vastly outperformed the Money Market Fund. ER208–09 ¶¶60–61.

C. Excessive investment management fees (Count II).

In light of the court's finding that certain changes to the fund lineup raised an inference that Defendants were prudently monitoring the investment options (ER61), Plaintiffs included a chart showing that eight of the 13 higher-cost share class funds had remained in the Plan for roughly a *decade* or longer, even though Defendants could have switched to a lower-cost share class upon request. ER221–22 ¶88. Plaintiffs also pointed out that four of the higher-cost share class funds did not make any revenue sharing payments to offset the Plan's administrative costs, thereby ruling out a potential alternative explanation for Defendants' decision to include them in the Plan. ER219 ¶81.

D. Excessive administrative fees (Count III).

To address the district court's finding that Plaintiffs were required to allege the amount of Vanguard's fees and the cost of the same services on the market (ER66–68), Plaintiffs provided those details. ER231–32 ¶¶120–23.

Based on the services provided by Vanguard and the number of participants in the Plan (37,500–40,000), a reasonable market rate for Vanguard's services would have been an average charge of $25 per participant, which is consistent with the rate Vanguard agreed to once the contract was renegotiated ($23 base fee, $30.50, including certain additional charges). ER228, 232 ¶¶113, 121, 123. In 2010 and 2011, the Plan paid an average of $167 to $181 for each participant in the Plan—*six to seven* times higher than the market rate. ER232 ¶122.

Plaintiffs further alleged that since hiring Vanguard as the Plan's recordkeeper in 2002, market rates significantly declined due to a variety of factors, yet Defendants never obtained competitive bids during that period. ER233–34 ¶126.

E. Artisan Small Cap Value Fund (Count V).

Plaintiffs clarified that this fund was first included in the Plan in 2003, and had already developed a track record of underperformance as of the first quarter of 2010. ER235–39 ¶¶130, 133–34, 139. On a quarterly basis from March 31, 2010 through March 31, 2014, the fund ranked below the median of its peer group based on 1-year total return for 15 out of 17 quarters, and consistently ranked in the bottom quartile and decile in nine consecutive quarters from March 31, 2010 through March 31, 2014. ER236 ¶133. Even if it was prudent to retain the fund after March 2010, based on the monitoring standards used by independent fiduciaries, the fund should have been removed by no later than March 31, 2013, after an additional three years of consistently deteriorating performance. ER236, 238–39 ¶¶133, 139.

V. Plaintiffs' notice to the district court regarding *Tibble V*.

Three days after briefing concluded on Defendants' motion to dismiss the Amended Complaint, this Court issued its opinion in *Tibble V*, analyzing an ERISA fiduciary's duty to obtain lower-cost share classes. *See* 843 F.3d at 1197–98. Plaintiffs informed the district court that *Tibble V* supported Plaintiffs' opposition. ER312 (Doc. 49).

VI. The district court's dismissal of the Amended Complaint.

On May 31, 2017, the district court dismissed Plaintiffs' Amended Complaint with prejudice. ER2–41. The court treated Plaintiffs' opposition as a "motion for reconsideration," and heavily relied upon its prior order. ER11, 19–21, 24, 26, 38.

A. Duty of loyalty

The district court disregarded Plaintiffs' allegation that Vanguard provided "discounted recordkeeping services" to Chevron's corporate plans, because the allegation was made "on information and belief." ER14–16. The Court rejected as speculative the contention that Vanguard's voting in favor of 100% of Chevron management's proposals in any way influenced Chevron's decision to retain Vanguard's funds and recordkeeping services. *Id*. The court also construed the Amended Complaint as showing that Defendants "took actions to reduce Vanguard's fees" during the class period. ER15–16.

B. Duty of prudence

1. Vanguard Prime Money Market Fund

The district court adhered to its prior order, finding the Amended Complaint contained "no new facts showing defendants failed to conduct a prudent process" with respect to the Money Market Fund. ER18. The court construed certain materials cited in the Amended Complaint as showing that a money market fund was a "safer alternative" to a stable value fund, and that "there is not *always* a *large* performance gap between stable value funds and money market funds." ER18–20 (emphasis added). The court dismissed the claim because Plaintiffs were "unable to allege any facts showing that the Plan fiduciaries failed to consider the advantages and disadvantages of" stable value and money market funds. ER20.

2. Excessive investment management fees.

The court adhered to its prior decision regarding mutual fund share classes, based on "ample authority" from other circuits. ER26. The district court did not cite the intervening decision of this Court in *Tibble V*. *See* ER21–27. The court found *Tibble III* distinguishable because it was based on "a three-day bench trial and months of post-trial evidence and briefing" showing that the defendants "failed to investigate" the institutional-class shares, while Plaintiffs alleged no facts directly related to Defendants' "process for choosing funds" or "investigations into the appropriateness of various funds." ER23–24, 26.

The court found that the Amended Complaint also provided an "obvious alternative explanation" for Defendants' use of retail-class shares: the shares paid revenue sharing, which covered the Plan's administrative fees. ER25–26.

3. Excessive administrative fees.

Despite adding facts to address the court's finding that Plaintiffs were required to allege "what recordkeeping fees Vanguard charged" (ER68), the district court rejected those figures as inaccurate "guesswork." ER32–33.

The district court also found the claim time-barred under ERISA's three-year limitations period, 29 U.S.C. §1113(2), which is triggered by "actual knowledge of the breach or violation." ER33–35.

4. Artisan Small Cap Value Fund.

Relying on its prior holding and finding that the Amended Complaint did not contain any new facts aside from performance, the court concluded Plaintiffs had not shown that Defendants should have removed the fund from the Plan any sooner than they did. ER38.

5. Prohibited transactions.

Without addressing the merits, the district court found the claim time-barred under ERISA's six-year limitations period, 29 U.S.C. §1113(1). ER39–40. The court reasoned that the relevant transaction—hiring Vanguard as the Plan's recordkeeper—occurred in 2002, and that *Tibble IV* was inapplicable because the "duty to monitor" was limited to "§1104's duty of prudence." *Id.*

Again dismissing Plaintiffs' derivative duty to monitor claim, and finding that further amendment would be futile, the court dismissed the Amended Complaint with prejudice. ER41.

SUMMARY OF THE ARGUMENT

To state a claim for breach of ERISA's fiduciary duties, plan participants are not required to allege facts that are in the exclusive possession of the plan's fiduciaries, as long as the complaint contains sufficient facts, accepted as true, to allow a court to reasonably infer that the fiduciary's process was flawed.

Defendants had a fundamental duty to maximize returns consistent with a given level of risk and to avoid wasting the Plan's assets (participant's retirement savings) on unnecessary expenses. Plaintiffs allege detailed facts showing that Defendants failed to meet those fundamental duties and thus failed to prudently and loyally monitor the Plan's fees and investment options. Defendants provided a money market fund that returned almost nothing year after year when they could have provided a stable value fund with a *higher* return and *lower* risk. Defendants provided higher-cost shares of mutual funds when the same investment services were available at lower cost through institutional-class shares of the same mutual funds and other vehicles. Those higher-cost funds paid Vanguard more revenue sharing, resulting in the Plan paying asset-based administrative fees in an amount six to seven times higher than the market rate. Defendants provided a high-cost actively managed mutual fund which had no reasonable prospect of generating returns sufficient to justify its higher management fees, and retained it in the Plan long after a prudent fiduciary would have removed it based on monitoring standards and the IPS criteria.

These facts, accepted as true, provide plausible grounds for relief, because they raise a reasonable inference that Defendants' process was flawed due to a lack of prudence or loyalty.

In dismissing Plaintiffs' fiduciary breach claims, the district court erred in multiple ways. The court required Plaintiffs to plead detailed facts *directly* showing a deficiency in the process by which Defendants failed to discharge their fiduciary duties, which are facts that Plaintiffs could not obtain in advance of discovery, and are unnecessary to state a plausible claim. The court drew inferences in favor of Defendants by requiring Plaintiffs to rule out possible lawful explanations for Defendants' decisions, which is inappropriate on a motion to dismiss. The court declined to accept the truth of well-pleaded factual allegations, took judicial notice of disputed facts, failed to construe the facts in Plaintiffs' favor, and resolved factual disputes in Defendants' favor. In short, the court applied an improper, heightened pleading standard.

The district court similarly erred in finding two of Plaintiffs' claims time-barred. Because ERISA's three-year limitations period requires the defendant to prove that the plaintiff had "actual knowledge of the *breach*," a document which can be interpreted as showing that the defendant acted prudently, as the district court found, cannot possibly establish actual knowledge of a breach at this stage. And the continuing nature of fiduciary duties recognized by the Supreme Court in *Tibble* is not eliminated in the context of prohibited transactions. To hold otherwise would immunize per se ERISA violations and allow defendants to maintain such prohibited arrangements in perpetuity once six years have passed.

ARGUMENT

This Court should reverse the district court's judgment because Plaintiffs alleged sufficient facts to raise a plausible right to relief arising from Defendants' failure to prudently and loyally manage the Plan's fees and investment options. Plaintiffs are not required to explain exactly *how* Defendants breached their duties at this stage. It is sufficient that the facts Plaintiffs have alleged—Defendants provided and retained higher-cost and poorly performing options when superior alternatives were readily available—raise a "'reasonable expectation that discovery will reveal [further] evidence' to support the allegations." *Starr v. Baca*, 652 F.3d 1202, 1217 (9th Cir. 2011)(quoting *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 556 (2007)). Plaintiffs amply meet that standard.

I. Plaintiffs' allegations state plausible claims of breach of fiduciary duties.

Rule 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Allen v. Boeing Co.*, 821 F.3d 1111, 1119 n.8 (9th Cir. 2016)(quoting *Twombly*, 550 U.S. at 555). "The facts in the complaint are accepted as true and are construed in the light most favorable to the plaintiff." *Sheppard v. David Evans & Assoc.*, 694 F.3d 1045, 1048 (9th Cir. 2012).

A complaint need not contain "detailed factual allegations," but only "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Sonoma Cty. Ass'n of Retired Emples. v. Sonoma Cty.*, 708 F.3d 1109, 1115 (9th Cir. 2013)(quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). While plausibility requires something "more than a sheer possibility,'" it does not impose "a 'probability requirement[.]'" *Id*. (quoting *Iqbal*, 556 U.S. at 678). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1025 (9th Cir. 2017)(quoting *Twombly*, 550 U.S. at 556).

"[A]nalyzing the sufficiency of a complaint's allegations is a 'context-specific task[.]'" *Sheppard*, 694 F.3d at 1051(quoting *Iqbal*, 556 U.S. at 679). In the ERISA context, the details of how a fiduciary made decisions "will frequently be in the exclusive possession of the breaching fiduciary." *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995). This Court "relax[es] pleading requirements where the relevant facts are known only to the defendant." *Park v. Thompson*, 851 F.3d 910, 928 (9th Cir. 2017)(quoting *Concha*, 62 F.3d at 1503).

As other circuits have held, plaintiffs alleging a breach of fiduciary duty are not required to: (1) "describe directly the ways in which [defendants] breached their fiduciary duties," or (2) "to rebut all possible lawful explanations for a defendant's conduct." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595–97 (8th Cir. 2009); *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 675 (7th Cir. 2016)(adopting *Braden* standard). In assessing the plausibility of a fiduciary breach claim, "the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Braden*, 588 F.3d at 594. A fiduciary breach claim is plausible if "[i]t is reasonable … to infer from what is alleged that the process was flawed," and "tainted by failure of effort, competence, or loyalty." *Id.* at 596.

Braden involved a similar claim, alleging that the fiduciary of a large 401(k) plan "failed adequately to evaluate the investment options included in the Plan," resulting in plan losses due to excessive fees. *Id*. at 589–90. The plaintiff alleged that despite the plan's "substantial bargaining power in the highly competitive 401(k) marketplace" and ability to obtain "institutional shares of mutual funds," the plan included "retail class shares, which charge significantly higher fees than institutional shares for the same return on investment." *Id*. at 589–90, 595. The complaint included specific comparisons of "the relative cost of institutional and retail shares in the funds actually included in the Plan." *Id*. at 595 & n.5. The court read the allegations as asserting "that the Plan includes a relatively limited menu of funds which were selected by Wal-Mart executives despite the ready availability of better options," and were chosen because they paid revenue sharing to Merrill Lynch, the third-party recordkeeper/trustee. *Id*. at 596. If the allegations were "substantiated, the process by which [Wal-Mart] selected and managed the funds in the Plan would have been tainted by failure of effort, competence, or loyalty." *Id*.

While "there may well be lawful reasons" that Wal-Mart "chose the challenged investment options"—such as the "potential for higher return, lower financial risk, more services offered, or greater management flexibility"—it was not the plaintiff's "responsibility to rebut these possibilities in his complaint[.]" *Id*. That obligation arises only when "there is a concrete, 'obvious alternative explanation' for the defendant's conduct"—when the facts the plaintiff "points to are precisely the result one would expect from lawful conduct *in which the defendant is known to have engaged*." *Id*. at 597 (emphasis added); *see also Starr*, 652 F.3d at 1216–17 (defendant's alternative explanation is not a basis for dismissal unless it "is so convincing that plaintiff's explanation is *implausible*."). "[A] defendant is not entitled to dismissal if the facts are merely consistent with lawful conduct[,]" which was the situation in *Braden*. 588 F.3d at 597. "Requiring a plaintiff to rule out every possible lawful explanation for the conduct he challenges would invert the principle that the 'complaint is construed most favorably to the nonmoving party,' and would impose the sort of 'probability requirement' at the pleading stage which *Iqbal* and *Twombly* explicitly reject." *Id*. (citations omitted).

The Eighth Circuit's approach takes into account "the practical context of ERISA litigation" and ERISA's remedial purpose. *Id*. at 597–98 & n.8. "Congress intended that private individuals would play an important role in enforcing ERISA's fiduciary duties," and the Secretary of Labor "depends in part on private litigation to ensure compliance with the statute." *Id*. "No matter how clever or diligent, ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." *Id.* at 598. "If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer." *Id.*

A. Plaintiffs allege a plausible breach of fiduciary duty regarding the Money Market Fund.

ERISA's fiduciary duties are "the highest known to the law." *Tibble V*, 843 F.3d at 1197 (quoting *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996)). The duties "are derived from the common law of trusts, so 'courts often must look to the law of trusts' to 'determin[e] the contours of an ERISA fiduciary's duty.'" *Id.* (quoting *Tibble IV*, 135 S.Ct. at 1828).

Under trust law (and hence ERISA), "fiduciaries . . . ordinarily have a duty to seek . . . the lowest level of risk and cost for a particular level of expected return—or, inversely, the highest return for a given level of risk and cost." *Tatum v. RJR Pension Inv. Comm.*, 855 F.3d 553, 566 (4th Cir. 2017)(*Tatum II*)(quoting RESTATEMENT (THIRD) OF TRUSTS §90 cmt. f(1)). A fiduciary "is duty-bound 'to make such investments and only such investments as a prudent [person] would make of his own property having in view the preservation of the [Plan] *and the amount and regularity of the income* to be derived.'" *Tibble III*, 729 F.3d at 1134 (emphasis added, quoting *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996), and RESTATEMENT (SECOND) OF TRUSTS §227 (1959)). "By the use of care, skill and caution, an investment can ordinarily be made which will yield a higher income [than United States government bonds] and as to which there is no reason to anticipate a loss of principal." RESTATEMENT (SECOND) OF TRUSTS §227 cmt e.

Further, "a trustee has a continuing duty to monitor trust investments and remove imprudent ones . . . separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset." *Tibble V*, 843 F.3d at 1197 (quoting *Tibble IV*, 135 S.Ct. at 1828). A fiduciary therefore "cannot assume that if investments are legal and proper" when selected that "they will remain so indefinitely," but rather must "reevaluat[e] the trust's investments periodically as conditions change." *Id*. (quoting *Tibble IV*, 135 S.Ct. at 1828, and A. Hess, G. Bogert & G. Bogert, Law of Trusts and Trustees §684 (3d ed. 2009)).

When making investment decisions, the fiduciary must "balance the relevant factors and make a reasoned decision as to the preferred course of action[.]"*George v. Kraft Foods Global, Inc.*, 641 F.3d 786, 796 (7th Cir. 2011); *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 358, 369 (4th Cir. 2014)(*Tatum I*). A failure to do so "under circumstances in which a prudent fiduciary would have done so is a breach of the prudent man standard of care." *George*, 641 F.3d at 796.

"Fiduciaries who are responsible for plan investments governed by ERISA must comply with the plan's written statements of investment policy, insofar as those written statements are consistent with the provisions of ERISA." *Cal.*

Ironworkers Field Pension Tr. v. Loomis Sayles & Co., 259 F.3d 1036, 1042 (9th Cir. 2001)(citations omitted). A failure to do so is violates §1104(a)(1)(D), independent of whether the fiduciary acted prudently. *Id*.

1. Plaintiffs plausibly allege a flawed process and IPS violations regarding the Money Market Fund.

The alleged facts show that a stable value fund, rather than the Plan's Money Market Fund, would have provided maximum current income consistent with preservation of capital, and the highest return for a given level of risk—in fact, a higher return for *less* risk. ER199–215 ¶¶41–70. Indeed, stable value funds are specifically "*designed* to offer [defined contribution] plan participants the greatest yield consistent with protection of principal possible in the benefit plan environment." ER202 ¶47 (quoting Paul J. Donahue, *Stable Value Re-examined*, 54 RISKS AND REWARDS 26, 26 (Aug. 2009)).

That stable value funds would provide higher returns was not a matter of hindsight as the district court found (ER55, ER18)—it was entirely predictable. ER203–04, 206–07, 213 ¶¶48–49, 56, 69c. Over a 20-year period through December 2009, stable value funds had exhibited a superior risk vs. return profile compared to money market funds. ER205 ¶55. The same was true over a 10-year period from 2006 through 2016. ER204–05 ¶54.

Stable value funds provide predictably higher returns "[b]ecause they hold longer-duration instruments," while money market funds "invest exclusively in short-term securities." ER203 ¶48. Over a 25-year period ending March 31, 2016, stable value had outperformed money market *every* year, and by "more *than double*" from 1988 through 2015. ER206–07, 211 ¶¶56–57, 65. That longer-duration character is more compatible with the long-term horizon of a retirement plan. ER199, 202–04 ¶¶41, 47, 49–50. Money market funds, in contrast, are short-term "parking accounts," according to the Department of Labor's 1998 study of 401(k) plans. ER199 ¶41; *see also Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 345 n.6 (2010)(a money market fund "resembles an investment 'more like a bank account than [a] traditional investment in securities.'").

On the risk side of the ledger, stable value again has the advantage. ER204–05, 213 ¶¶54, 69c. Even during the 2008 financial crisis, "stable value participants received point-to-point protection of principal, with no sacrifice of return[.]" ER204 ¶51 (quoting Donahue, *Stable Value Re-examined*, at 28). At the same time, money market fund failures required unprecedented corporate and government intervention to avoid fund collapses. ER204, 213–14 ¶¶52–53, 69d.

The IPS required Defendants to understand "risk and return characteristics" of the plan's investment and to conduct a due diligence process based on "qualitative and quantitative factors." ER212 ¶67; ER261–62. "Stable Value has an absolute superiority to Money Market, *as any reasonable due diligence investigation would make clear*." ER211–12 ¶66 (quoting Donahue, *Plan Sponsor Fiduciary Duty*, 39

AKRON L. REV at 25–26). There is "no quantitative analysis that attempts to show that Money Market Funds are superior to Stable Value Funds for risk/return preference." *Plan Sponsor Fiduciary Duty*, 39 AKRON L. REV at 24 n.77; *id*. at 17 (a prudent financial expert "would identify all aspects of return and risk and provide the greatest expected return for a given level of risk.").

Even if the Money Market Fund was prudent as of the Plan's inception in 2002 (ER194, 221 ¶¶28, 88 n.43), by the beginning of the class period, conditions had changed, due to short-term interest rates falling to historic lows of near 0% as of September 2008, where they have remained. ER200–01, 210, 213 ¶¶44–45, 64, 69b. As of 2009, the risk "that the fund's income will decline because of falling interest rates" was "*expected to be high*." ER299 ¶41; Vanguard Prime Money Market Fund Prospectus, Form N-1A at 2 (Dec. 23, 2009)(emphasis added), https://www.sec.gov/Archives/edgar/data/106830/000093247109001994/mmreserves485b.htm.

From 2010 through 2015, the Money Market Fund's annual returns were 0.11% at best and 0.04% at worst—below the rate of inflation, and *67 times lower* than average stable value returns over the same period (1.69%–3.12%). ER209–10 ¶¶62–64. Defendants also knew based on the Plan's $875 million investment in the fund that participants were not using it as a short-term parking spot. ER213 ¶69a. Defendants should have been aware that stable value funds providing higher returns were readily available, including from Vanguard, particularly to a Plan of this size. ER207–08 ¶¶60–61.

As this Court illustrated in *Tibble V*, "[i]t is beyond dispute that the higher the fees charged to a beneficiary, the more the beneficiary's investment shrinks." 843 F.3d at 1198. Over time, a difference of tenths of a percent adds up to a substantial reduction in retirement savings. *Id*. The same principle applies to investment returns, only the 2%–3% difference between stable value and money market returns has a much more dramatic effect on a participant's balance. ER213 ¶69a. Just as a fiduciary cannot ignore a plan's ability to obtain cost savings for participants through identical lower-cost mutual fund shares, neither can it ignore a plan's ability to procure investment vehicles providing predictably higher returns without additional risk. *Tibble V*, 843 F.3d at 1198. By retaining the Money Market Fund, Defendants "meaningfully decrease[d]" Plan participants' retirement savings, causing Plan losses of $143 million. ER211–12, 215 ¶¶66, 70.

Based on these facts, it is reasonable to infer that Defendants violated their trust law duty to seek "the highest return for a given level of risk[.]" *Tatum II*, 855 F.3d at 566. It is reasonable to infer that a prudent fiduciary, bound by an IPS requiring "maximum current income" consistent with capital preservation, would not have retained a fund that returned next to nothing year after year. It is reasonable to infer that a prudent fiduciary acting "for the exclusive purpose of providing *benefits* to participants" would not allow those benefits to be eroded year after year due to the effects of inflation, particularly when an equally safe option was readily available, even from the Plan's own recordkeeper, that would have provided higher returns and preserved participants' purchasing power. *See* 29 U.S.C. §1104(a)(1)(A)(emphasis added). And because a money market fund that produced *negative* income after inflation does not remotely meet the requirement of "maximum current" income, it is reasonable to infer that Defendants violated the IPS. *Cf.* ER17–18, 54–55.

In short, it is reasonable to infer that if Defendants had employed a prudent monitoring process, they would not have retained the Money Market Fund in the Plan. Accordingly, the alleged facts raise a reasonable inference that Defendants' process for monitoring the Money Market Fund was "flawed," and "tainted by failure of effort, competence, or loyalty." *Braden*, 588 F.3d at 596.

2. The district court erred by construing facts, drawing inferences, and resolving fact disputes in Defendants' favor.

The district court required Plaintiffs to rule out the possibility that Defendants had legitimate reasons for retaining the Money Market Fund, finding that a money market fund was "a safer alternative" and "there is not always a large performance gap between stable value funds and money market funds." ER18; ER55. The court dismissed the claim because Plaintiffs were "unable," before discovery, "to allege any facts showing that the Plan fiduciaries failed to consider the advantages and disadvantages of" stable value funds compared to money market funds. ER20. In so doing, the district court inverted the proper standard of review by drawing inferences in favor of Defendants and against Plaintiffs. *Braden*, 588 F.3d at 597; *Starr*, 652 F.3d at 1216–17; *Gregg v. Hawaii*, 870 F.3d 883, 887 (9th Cir. 2017)(reasonable inferences drawn in favor of plaintiff).

The district court's premise—that money market funds are "safer" and do not always underperform by a "large" amount (ER18)—resulted from construing the facts in Defendants' favor. Had it construed the facts favorably to Plaintiffs, the district court would have read the complaint as alleging that stable value funds have a significant, decades-long, and predictable return advantage over money market funds—typically 2–3% higher per year—without an increase in risk. *E.g.*, ER204–10, 213 ¶¶54–57, 60, 62, 69c. The district court instead disregarded those allegations, and relied on cherry-picked portions of materials cited in the Amended Complaint to characterize the return advantage of stable value funds as minimal and a matter of hindsight.[2] As to risk, the district court disregarded the truth of Plaintiffs' allegations altogether, relying on those outside materials to find that

[2] ER55 ("stable value funds *may* provide a *somewhat* higher return"); ER55–56 (claim is "an improper hindsight-based challenge."); ER18 ("there is not *always* a *large* performance gap"); ER19 (according to a 2016 article, the performance gap "*may* narrow in the *future*"); *id*. (if interest rates were to rise "*sharply*, money market funds' yields *might* be higher, over the *short-term*, than those of stable value funds"); ER20 ("in *some* years, a stable value fund *might* outperform some other type of fund")(all emphases added).

money market funds are "safer," and that it was a "*fact* that stable value funds *take greater risks* than money market funds … as *explained by defendants* in their motion[.]" ER18, 20 (emphasis added); *cf. Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001)("[F]actual challenges to a plaintiff's complaint have no bearing on the legal sufficiency of the allegations[.]").

While the district court was permitted to take "judicial notice of *undisputed* matters of public record," it was not permitted to "take judicial notice of a fact that is 'subject to reasonable dispute.'" *Lee*, 250 F.3d at 689–90 (quoting Fed. R. Evid. 201(b)); *United States v. Ritchie*, 342 F.3d 903, 908–09 (9th Cir. 2003). The risk level of investments involves disputed issues that must be resolved based on evidence and expert testimony. *Tibble III*, 729 F.3d at 1136 (finding "*the record here*" showed that stable value funds "typically outperform money market funds.")(emphasis added).

The district court was required to construe any extrinsic materials in the light most favorable to Plaintiffs. *Papasan v. Allain*, 478 U.S. 265, 283 (1986); 2 James Wm. Moore, et al., MOORE'S FEDERAL PRACTICE §12.34 (3d ed.)("[E]ven when the court is allowed to consider these extrinsic materials, it must do so under the appropriate standard of Rule 12(b)(6), so that the materials must be viewed in the light most favorable to the plaintiffs, and all reasonable inferences from them must be drawn in the plaintiff's favor.")(citing cases). The GAO report cited by the district court does not support the district court's risk finding. It noted that "during 2007 and 2008, many money market funds experienced severe financial difficulties," including the oldest money market fund in the United States. ER204 ¶52. Thus, the report merely shows that all capital preservation investments have certain risks that fiduciaries must consider as part of a reasoned decisionmaking process. *George*, 641 F.3d at 796; *Tatum I*, 761 F.3d at 358, 369. Given the persistent and well-established superiority of stable value funds to money market funds for a plan of this size, the undisputed fact that Defendants used a money market fund in the Plan plausibly shows a process "tainted by failure of effort, competence, or loyalty." *Braden*, 588 F.3d at 596.

The district court relied on *Pension Benefit Guar. Corp. ex rel. St. Vincent v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705 (2d Cir. 2013) and *DeBruyne v. Equitable Life Assurance Society*, 920 F.2d 457 (7th Cir. 1990)(ER55–56).

In *St. Vincent*, the plaintiff was the plan's fiduciary, and thus "in a position to plead its claims with greater factual detail than is typically accessible to plaintiffs prior to discovery." 712 F.3d at 709. Yet the fiduciary alleged only that a particular security within a defined benefit plan portfolio declined in price, without *any* supporting facts showing that a prudent fiduciary would have viewed the investment as an imprudent component of the portfolio before the decline. *Id*. at 721–25. The court noted, however, that plaintiff could have stated a claim by showing that "a prudent fiduciary in like circumstances would have acted differently," such as by alleging that "a superior alternative investment was readily apparent such that an adequate investigation would have uncovered that alternative." *St. Vincent*, 712 F.3d at 719–20. A stable value fund is precisely such a "superior alternative investment," due to its superior risk/return profile. A prudent fiduciary seeking "maximum current income" would have used that superior alternative or made a reasoned decision otherwise.

In *Abbott*, involving a similar claim regarding a principal preservation option in a large 401(k) plan, the Seventh Circuit specifically rejected the defendants' reliance on *DeBruyne*. *Abbott*, 725 F.3d 810–12. In *DeBruyne*, which "arose out of the 'Black Monday' stock market crash of 1987," the plaintiffs lost at summary judgment due to a lack of evidence that a "balanced fund" was mismanaged. *Id.* at 811–12. *DeBruyne* had no bearing on the *Abbott* plaintiffs' claim that a principal preservation option "was heavily invested in short-term money market investments" and thus predictably provided "a low rate of return" that did "not beat inflation by a sufficient margin to provide a meaningful retirement asset." *Id.* at 806, 810–12.

3. The district court erred in finding money market funds per se prudent.

The district court misconstrued Plaintiffs' claim as asserting "that defined contribution plans are required to offer stable value funds as capital preservation options." ER51–52. Because neither ERISA nor the Plan's IPS specifically mandated a stable value fund, the district court held that "[o]ffering a money market fund as one of an array of mainstream investment options along the risk/reward spectrum more than satisfied the Plan fiduciaries' duty of prudence." ER54–55.

Courts have rejected arguments that particular investments may be deemed per se prudent, finding that approach to be "directly at odds" with applicable regulations and the duty of prudence. *Tatum I*, 761 F.3d at 360. Although ERISA does not mandate particular types of investments, it does require fiduciaries to "invest and manage trust assets as a prudent investor would" in like circumstances. *Tibble V*, 843 F.3d at 1197 (quoting Bogert 3d §684).

A finding that Plaintiffs alleged a plausible breach does not imply that it is a per se breach not to offer a stable value fund. *Cf*. ER51. Defendants will have an opportunity to show whether they even considered stable value funds and whether they had a reasoned decision for providing the Money Market Fund instead. *George*, 641 F.3d at 796. Although the district court suggested that *Tibble III* supported a finding that providing a money market fund can be deemed per se prudent (ER19), *Tibble III* involved *summary judgment*. 729 F.3d at 1136. *Tibble* "relied on a wealth of evidence to assess whether the inclusion of the challenged fund was prudent, including expert testimony regarding whether the alternative investment option was an appropriate comparator." *Terraza v. Safeway Inc.*, 241 F.Supp.3d 1057, 1078 (N.D.Cal. 2017). *Tibble III* thus confirms that the prudence inquiry is "fact intensive." *Id*. It does not suggest money market funds are prudent as a matter of law.

The district court believed *Loomis* holds that providing a range of options that includes a money market fund is automatically prudent. ER54 (citing *Loomis*, 658 F.3d at 673–74). *Loomis* did not concern a claim that any particular plan investment option was imprudent, much less a money market fund instead of a stable value fund. *Loomis* concerned a broad challenge to the "array" of available options and the use of *any* retail mutual fund in a large 401(k) plan. 658 F.3d at 670. Because the plaintiffs did not claim that any *particular* fund within the plan was flawed, the court found no fault with a menu that provided a choice of fees and risk levels. Here, in contrast, participants who desired principal preservation had no alternative to the Money Market Fund, and thus were left with the choice of putting principal at risk or having it eroded due to the effect of inflation.

B. Plaintiffs allege a plausible breach of fiduciary duty based on excessive investment management fees.

In *Tibble V*, this Court confirmed it is a breach of duty to provide retail instead of institutional shares of the same investment option. 843 F.3d at 1197–98. Based on relevant trust law principles, the Court concluded that "a trustee cannot ignore the power the trust wields to obtain favorable investment products, particularly when those products are substantially identical—other than their lower cost—to products the trustee has already selected." *Id*.

At the pleading stage, courts have consistently found that because "the *only* difference between the option that was offered and the option that allegedly should have been offered was price," it is reasonable to infer "that the Defendants acted imprudently by selecting the more expensive option, all else being equal." *Terraza*, 241 F.Supp.3d at 1077; *Braden*, 588 F.3d at 595–96.

1. Plaintiffs plausibly allege a flawed process regarding the Plan's investment management fees.

By providing a more expensive share class of 13 of the Plan's mutual funds even though a lower-cost share class was available, Defendants failed to use the Plan's $13 billion asset size to obtain favorable investment products that were identical to options they had already selected. ER188, 216–220, 233 ¶¶2, 74–85, 125. The Plan invested a *minimum* of $216 million in each of the 10 Vanguard mutual funds—and as much as $932 million—meaning the Plan easily could have qualified for the lowest-cost share class. ER218–19 ¶79. Four of these options did not contribute any revenue sharing to the Plan's administrative expenses, meaning no portion of the fee differential provided any benefit to participants. ER219 ¶81; *see also Tibble v. Edison Int'l*, No. 07-5359, 2017 U.S.Dist.LEXIS 130806, *25–26, 37–38 (C.D.Cal. Aug. 16, 2017)(*Tibble VI*)(rejecting argument at trial on remand that a "hypothetical prudent fiduciary" would have retained retail-class shares to cover administrative costs). Defendants also could have obtained institutional alternatives to mutual funds from the same investment managers, which would have significantly reduced costs without sacrificing investment quality. ER223–27 ¶¶93–110. By causing the Plan to invest in higher-cost share classes of mutual funds instead of identical lower-cost alternatives, Defendants caused the Plan to incur millions of dollars in unnecessary fees. ER 222, 226–27 ¶¶89, 105, 110; *see Tibble V*, 843 F.3d at 1198.

Accepted as true, these facts raise a plausible inference that Defendants' process for monitoring the Plan's investments was flawed by a lack of cost-consciousness and by wasting beneficiaries' money. *Tibble V*, 843 F.3d at 1198; *Braden*, 588 F.3d at 596. Because "the institutional share classes offered the exact same investment at a lower fee," it is reasonable to infer that "a prudent fiduciary acting in a like capacity would have invested in the institutional share classes." *Tibble v. Edison Int'l*, No. 07-5359, 2010 U.S.Dist.LEXIS 69119, *95 (C.D.Cal. July 8, 2010) (*Tibble II*), *aff'd*, 729 F.3d at 1137–39.

2. The district court erred by drawing inferences against Plaintiffs.

The district court inverted the Rule 12(b)(6) standard by construing allegations that funds were removed in 2012, 2014, and 2015 as "support[ing] an inference that the fiduciaries were monitoring the investments[.]" ER24 (citing ER61); *see also* ER67 (share class changes "plausibly suggest that defendants were monitoring recordkeeping fees”). Those changes may well have had nothing to do with prudent monitoring. Vanguard itself may have initiated the changes because 2012 regulations requiring revenue sharing disclosures would have revealed the excessiveness of its fees from the retail shares. Reasonable Contract Or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed.Reg. 5632, 5635–36 (Feb. 3, 2012)(required service providers to disclose “comprehensive information” about direct fees and revenue sharing), https://www.gpo.gov/fdsys/pkg/FR-2012-02-03/pdf/2012-2262.pdf.

Even assuming Defendants were prudently monitoring investments in 2012 or later, it does not follow that Defendants were doing so at the start of the class period in February 2010. When the higher-cost shares were removed, eight of them had been in the Plan for 10 years or longer, which negates any inference of prudent monitoring. ER219, 221 ¶¶80, 88. Plaintiffs have a right to recover excessive fees paid by the Plan during the time Defendants failed to discharge their duty.

The district court’s finding that the use of revenue sharing to cover the Plan’s administrative fees provided an “obvious alternative explanation” for Defendants’ use of retail-class shares (ER25–26), hinges on its erroneous disregard of facts showing that those administrative fee payments were grossly excessive (ER32–33; *cf*. ER231–32 ¶¶120–22), *see infra* I.C. Using retail-class shares to pay excessive administrative fees is not “precisely the result one would expect from lawful conduct[.]" *Braden*, 588 F.3d at 597; *Starr*, 652 F.3d at 1216–17.

3. The district court misread *Tibble III* and out-of-circuit precedent.

In relying on *Hecker*, *Loomis*, and *Renfro* (ER26; ER60), the district court conflated institutional *share classes* of mutual funds and institutional non-mutual fund *vehicles*. *Cf. Tibble III*, 729 F.3d at 1134 (noting distinction between mutual funds and non-mutual fund "'commingled pools' or 'separate accounts.'"). After discussing differences between mutual funds and non-mutual funds, the court found that the mutual fund "*share-class* claim must be dismissed." ER60 (emphasis added). The court found that perceived differences in "investment features other than price" may justify using the higher cost funds. ER59–60 (citations omitted); ER26–27. Different share classes of a given mutual fund, however, are identical except for cost; they *have no different features* other than price. ER217–22 ¶¶76–77, 79–85, 87–88; *see Tibble III*, 729 F.3d at 1137.

Moreover, *Hecker*, *Loomis*, and *Renfro* were "tethered closely" to their facts. *Hecker v. Deere & Co.*, 569 F.3d 708, 711 (7th Cir. 2009)(*Hecker II*); *see Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014)(courts "carefully limited their decisions to the facts presented"). The plaintiffs "d[id] not challenge the prudence of the inclusion of any particular investment option." *Renfro*, 671 F.3d at 326; *Hecker II*, 569 F.3d at 711 (plaintiffs alleged generally that "*presumptively* lower 'wholesale' fees" were available, but not that any particular fund was imprudent).

Here, Plaintiffs identify specific, identical lower-cost alternatives that were readily available (ER215–27 ¶¶71–110), which is more than "a bare allegation that cheaper alternative investments exist in the marketplace," *Braden*, 588 F.3d at 596 n.7 (distinguishing *Hecker*), and far from "speculation that the Plan fiduciaries 'could have' provided lower-cost versions of the funds." *Cf.* ER21, 62.

The court's suggestion that the "range of fees" could be deemed "reasonable as a matter of law" (ER61), is contrary to *Tibble*, where the fiduciaries were liable for providing higher-cost share classes of certain funds even though the overall range of fees was comparable to *Hecker*. *Tibble V*, 843 F.3d at 1198 & nn. 4–5; *Tibble III*, 729 F.3d at 1135, 1137–39. *Hecker*, *Loomis*, and *Renfro* "held that the *range* of expense ratios offered was reasonable" because the plaintiffs challenged the range, but did not hold "that a fiduciary's decision to include an investment option that has an expense ratio within that range is always reasonable as a matter of law." *Terraza*, 241 F.Supp.3d at 1077–79.

The district court distinguished *Braden* on the ground that the plaintiff there alleged that the "funds paid 'kickbacks'" to the trustee/recordkeeper. ER62; ER24. But "[t]he *Braden* court did not require the kickback allegation to survive a motion to dismiss." *Kruger v. Novant Health, Inc.*, 131 F.Supp.3d 470, 477 (M.D.N.C. 2015). The premise of the district court's distinction—that disloyalty or serious wrongdoing is required to state a claim—would eliminate the separate duty of *prudence* altogether. And Plaintiffs allege that the revenue sharing payments far exceeded the value of Vanguard's services to the Plan (ER231–32 ¶¶120–22), which is exactly how the Eighth Circuit construed the "kickback" allegation in *Braden*. 588 F.3d at 600–01 & n.9 ("[W]e understand his allegation to be that the revenue sharing payments far exceeded the value of services actually performed.").

C. Plaintiffs allege a plausible breach of fiduciary duty based on excessive administrative fees.

ERISA "states that plan administrative costs must be 'reasonable.'" *George*, 641 F.3d at 789 (citing 29 U.S.C. §1104(a)(1)); *see also Tibble V*, 843 F.3d at 1197–98. A failure to properly "monitor and control recordkeeping fees" through "excessive revenue sharing" is a breach of fiduciary duties. *Tussey*, 746 F.3d at 336. Fiduciaries must obtain information regarding all sources of a recordkeeper's compensation—including "revenue sharing"—and assess whether that amount is reasonable for the services provided. *Id.*; *Terraza*, 241 F.Supp.3d at 1081 (fiduciaries must consider "all fees or compensation received by" the service provider, "including any revenue sharing.")(quoting DOL Adv. Op. 2013-03A (July 3, 2013)). Fiduciaries breach their duty of prudence if a plan overpays for recordkeeping services due to the fiduciaries' "failure to solicit bids" when a prudent fiduciary would have done so. *George*, 641 F.3d at 798–99.

1. Plaintiffs plausibly allege a flawed process regarding the Plan's administrative fees.

Even though the market for 401(k) plan recordkeeping services is highly competitive and the Plan's 40,000-participant size afforded it substantial bargaining power, Defendants failed to wield that leverage. ER228–29, 233–34 ¶¶112–13, 126. Instead, Defendants retained Chevron's largest corporate shareholder as the Plan's recordkeeper on a no-bid basis, and allowed it to collect uncapped, asset-based revenue sharing for over a decade, in an amount six to seven times higher than a reasonable market rate for the same services. ER227–28, 231–34 ¶¶111, 120–22, 125–126. In exchange for these excessive payments from the Plan, Vanguard provided recordkeeping services at a discount to seven non-qualified corporate plans that Chevron sponsors for its executives, meaning the Plan was subsidizing costs that Chevron would have otherwise had to pay. ER234–35 ¶¶127–29.

Prudent and loyal fiduciaries in the same circumstances regularly test the market by soliciting competitive bids, and obtain rebates of any revenue sharing that exceeds a reasonable per-head rate (if revenue sharing is even used). ER230–31 ¶¶117, 120. When Defendants finally replaced the uncapped revenue sharing model with flat per-head fees, Vanguard's compensation was drastically reduced, to an amount consistent with the market rate that the Plan could have obtained years earlier. ER228–29, 232 ¶¶113, 123.

These facts plausibly show that Defendants breached their duty to minimize costs, *Tibble V*, 843 F.3d at 1197–98, to monitor and control fees, *Tussey*, 746 F.3d at 336, *George*, 641 F.3d at 798–99, and to ensure that fees were reasonable and incurred for the benefit of participants, §1104(a)(1)(A). Because revenue sharing is asset-based, a prudent, cost-conscious fiduciary acting for the benefit of participants would have implemented a cap to ensure Vanguard's compensation did not become excessive and that participants' money was not being wasted. A prudent and loyal fiduciary would not ignore declining market rates and skyrocketing, uncapped asset-based compensation while retaining the recordkeeper on a no-bid basis. A prudent, loyal, and cost-conscious fiduciary would have negotiated to recover the excess revenue sharing for the benefit of the Plan. Thus, it is reasonable to infer that Defendants' "process was flawed," and "tainted by failure of effort, competence, or loyalty." *Braden*, 588 F.3d at 596.

2. The district court erred in disregarding factual allegations showing that Vanguard's fees were excessive.

The district court was obliged to accept Plaintiff's factual allegations as true. *In re Mortgs. Ltd.*, 771 F.3d 623, 632 (9th Cir. 2014); *PAE Gov't Servs. v. MPRI, Inc.*, 514 F.3d 856, 858–60 & n.3 (9th Cir. 2007). Defendants' "factual challenges" to those allegations are irrelevant to their legal sufficiency. *Lee*, 250 F.3d at 688; *PAE*, 514 F.3d at 858.

Despite acknowledging that the prudence of paying Vanguard "a particular amount of recordkeeping fees" involves "questions of fact that cannot be resolved on a Rule 12(b)(6) motion" (ER66) the district court resolved such disputed facts when it refused to credit Plaintiffs' allegations regarding Vanguard's fees. ER31–33. This was error. *Mortgs.*, 771 F.3d at 632 ("[C]ourts cannot examine statements in [a pleading] and decide, on the basis of their own intuition that the statements are implausible or a sham and thus can be disregarded. Factual allegations in a pleading, as opposed to legal conclusions, must be presumed to be true.")(citing *Twombly*, 550 U.S. at 555).

The Seventh Circuit reversed a similar error in *Allen*. There, participants in an employee stock ownership plan (ESOP) alleged that the plan paid an "unreasonably high" interest rate compared to the customary market rate on similar transactions. *Allen*, 835 F.3d at 680. In briefing on the motion to dismiss, plaintiffs retracted the alleged market rate, and the district court dismissed the remaining allegations of excessiveness as conclusory. *Id*. The Seventh Circuit reversed. The allegation that the rate "was unreasonably high" was a "factual claim" entitled to the presumption of truth, not a legal assertion that could be dismissed as conclusory. *Id.* "[T]he specific number is unimportant" at the pleading stage. *Id*. Whether plaintiffs could prove "the rate was indeed high" would depend on the facts developed in discovery. *Id*.

The same reasoning applies here. Regardless of the precise amount, the allegation that Vanguard's compensation was excessive is a factual allegation that can be proven through evidence and expert testimony. Even at trial, damages "[c]alculations need not be exact," *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013), and doubts regarding the amount of loss are resolved against the breaching fiduciary, which avoids the "unfair result[] of . . . depriving the plaintiffs of any recovery simply because the defendants have made it difficult to disentangle" the transaction, *Kim v. Fujikawa*, 871 F.2d 1427, 1430–31 (9th Cir. 1989)(citation omitted); *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985).

The district court held Plaintiffs to a higher standard of precision than would even be required at trial, even though Defendants *caused* the ambiguity by its method of reporting Vanguard's compensation. ER29. Although Plaintiffs cannot be expected to disentangle precisely how much of the reported $2,158,730 in direct payments to Vanguard was for recordkeeping, even excluding that sum altogether still produces a conservative estimate of over $100 per participant on the low end—still four times higher than the $25 market rate.[3] ER232 ¶121.

The district court also erred in accepting Defendants' presumption, unsupported by authority, that a summary prospectus is required to disclose "internal revenue sharing" payments. ER29, 32–33. The lack of such disclosure is

[3] With 37,500 participants at $167/participant (ER232 ¶¶121–22), the total is $6,262,500. Subtracting $2,158,730 produces a rate of $109.43/participant ($4,103,770/37,500).

precisely why revenue sharing arrangements have been recognized as "opaque." *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 907 (7th Cir. 2013). The court's suggestion that Plaintiffs are required to provide the "source" of their numbers (ER29–30, 32–33), shows that it erroneously required Plaintiffs to prove their case in the complaint. Even under the heightened pleading standard that applies to fraud claims, a plaintiff "need not prove its case at the outset." *ESG Capital Partners, Ltd. P'ship v. Stratos*, 828 F.3d 1023, 1035 (9th Cir. 2016).

Also incorrect were the district court's findings that Plaintiffs failed to allege the market rate prior to 2012 and that Plaintiffs' estimate of the revenue sharing rates "has no factual basis." ER 32–33. Vanguard's recordkeeping contract confirmed the rates cited in the Amended Complaint, and Plaintiffs alleged that the market rate established by competitive bidding would have been $25 per-participant. ER228, 231–32 ¶¶112, 120–21; ER96–97.

The district court's finding that this claim is based on hindsight is also wrong. While Defendants were not required to "foresee[] that the market would go up" *when* it did (ER33), it was entirely foreseeable that Plan assets would grow over time. Fiduciaries need not be prescient to hedge against the risk that asset-based fees will become excessive; they can negotiate a cap on revenue sharing. ER233 ¶125.

The district court also improperly disregarded Plaintiffs' allegation that

Defendants "never engaged in a competitive bidding process" for the Plan's recordkeeping services, apparently because the allegation was made "on information and belief." ER27. "The *Twombly* plausibility standard … does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible." *Park*, 851 F.3d at 928.

The court's finding that there was "no legal foundation" for a competitive bidding requirement (ER67), overlooks *George* and *Tussey*. *George*, 641 F.3d at 798–800; *Tussey*, 746 F.3d at 336. While ERISA does not require "any particular course of action," it requires fiduciaries to act as a prudent person would in like circumstances. *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006). Plaintiffs show that a prudent fiduciary in like circumstances would have solicited competitive bids. ER231 ¶120; *see George*, 641 F.3d at 800 (reversing summary judgment where evidence showed that "a bid from another service provider" was needed to determine if the recordkeeper's fee was competitive). While the court noted that the plaintiffs in *George* and *Tussey* presented "concrete evidence"—at summary judgment and trial—regarding the flaws in the fiduciaries' process (ER67–68), the very fact that the district court expected Plaintiffs to present similar evidence at the pleading stage confirms that it imposed an improper, heightened pleading standard.

D. Plaintiffs allege a plausible breach of fiduciary duty based on Defendants' retention of the Artisan Small Cap Value Fund.

Because virtually no active manager consistently beats the market over time after fees, and "active management strategies involve investigation expenses and other transaction costs," fiduciaries must consider those higher costs, "realistically, in relation to the likelihood of increased return from such strategies." RESTATEMENT (THIRD) OF TRUSTS ch. 17, intro. note; *id*. §90 cmt. h(2).

1. Plaintiffs plausibly allege a flawed process regarding the Artisan Small Cap Value Fund.

The Artisan fund was *twenty times* more expensive than a comparable index fund. ER238 ¶137. In light of the tendency of poorly performing actively managed funds to persistently underperform (ER216 ¶72), a prudent fiduciary would have carefully monitored the Artisan fund once it developed a track record of underperformance as of the first quarter of 2010. ER235–36, 238–39 ¶¶130, 133–34, 139.

After the first quarter of 2010, the persistently abysmal performance continued, as the fund ranked below its peer group median in 15 of 17 quarters, in the bottom quartile and decile in nine consecutive quarters from March 31, 2010 through March 31, 2014 (81st, 86th, 97th, 98th, 97th, 94th, 92nd, 95th, and 97th). ER236, 238 ¶¶133, 138. Even if it was somehow prudent to retain the fund after March 2010, based on the monitoring standards used by independent fiduciaries and the

IPS criteria, the fund should have been removed by no later than March 31, 2013, after an additional three years of consistently deteriorating performance. ER235–39 ¶¶131, 133–34, 139. Defendants failed to remove the Artisan fund until April 1, 2014, resulting in $78 million in Plan losses. ER237, 239 ¶¶135, 140.

These facts, accepted as true, raise a plausible inference that Defendants failed to discharge their duty to "reevaluat[e] the trust's investments periodically as conditions change." *Tibble V*, 843 F.3d at 1197. Continuing for several years to pay active management fees that were 20 times higher than an index fund despite sustained subpar results raises a plausible inference that Defendants failed in their duty to be cost-conscious and to prudently consider whether continuing to pay those higher costs was justified by a realistic expectation of higher returns. *Id*. at 1197–98; RESTATEMENT (THIRD) OF TRUSTS ch. 17, intro. note; *id*. §90 cmt. h(2).

2. The district court erred by construing the facts unfavorably to Plaintiffs and drawing inferences in favor of Defendants.

In finding that Defendants' removal of the Artisan fund in 2014 "create[d] a plausible inference that the Plan fiduciaries were attentively monitoring the fund" (ER72–73, ER36), the court again inverted the pleading standard by construing the facts unfavorably to Plaintiffs. *Braden*, 588 F.3d at 597. Even assuming Defendants were monitoring the fund as of 2014 (ER73), that has nothing to do with whether Defendants were doing so for the first four years of the class period.

The district court's assumption that it is common to retain investments through years of underperformance (ER72, ER37), relies on a case in which summary judgment was granted based on unrebutted evidence that the fiduciary followed a reasoned process, and the plaintiff failed to "suggest any *concrete* course of action that would have been better[.]" *Jenkins v. Yager*, 444 F.3d 916, 926 (7th Cir. 2006). This is not summary judgment. Plaintiffs have identified a concrete action—Defendants could have replaced the Artisan fund with a comparable index fund once it became apparent that paying *20 times more* for Artisan's active management was not justified by a realistic expectation of higher returns.

In *St. Vincent* (ER38, 72), which involved an unexpected loss due to the subprime mortgage crisis, the complaint omitted facts "suggesting that a prudent investor" would have viewed the securities as imprudent under a "metric or method used by prudent investors at the time." *Id*. at 710–12, 722 & n.20. Plaintiffs allege that a prudent investor would have viewed the Artisan fund as imprudent based on its track record, the IPS criteria, and investment monitoring standards used by prudent fiduciaries. ER215–16, 235–39 ¶¶71–73, 131–34, 139. Plaintiffs thus did not rely "solely on the fact that the Fund did not perform well." ER38.

E. Plaintiffs allege a plausible breach of 29 U.S.C. §1104(a)(1)(A).

The district court erroneously limited the duty of loyalty as expressed in 29 U.S.C. §1104(a)(1)(A) to a prohibition against self-dealing and conflicts of interest. ER48–50. Because self-dealing and conflicts of interest are already covered by 29 U.S.C. §1106(b), *see Patelco Credit Union v. Sahni*, 262 F.3d 897, 909–11 (9th Cir. 2001), the district court's interpretation of §1104(a)(1)(A) would render it superfluous. The court's quotation of the statute (ER48), cuts off the clause requiring fiduciaries to discharge their duties for the exclusive purpose of "defraying *reasonable* expenses of administering the plan." 29 U.S.C. §1104(a)(1)(A)(ii)(emphasis added).

A fiduciary that allows a plan to pay excessive fees that benefit a service provider at the expense of participants violates §1104(a)(1)(A), through fees that are not for the exclusive purpose of providing benefits or defraying reasonable expenses. Providing imprudent investment options also violates §1104(a)(1)(A). *Pfeil v. State St. Bank & Trust Co.*, 671 F.3d 585, 597 (6th Cir. 2012)("a single imprudent investment offered as part of an otherwise prudent menu of investment choices amounts to a breach of fiduciary duty, both the duty to act as a prudent person would in a similar situation with single-minded devotion to the plan participants and beneficiaries, as well as the duty to act for the exclusive purpose of providing benefits to plan participants and beneficiaries.").

The Amended Complaint also showed that Defendants and Vanguard were conflicted, in light of Vanguard voting 125 million shares in Chevron's favor on shareholder resolutions, and Chevron hiring Vanguard to service its corporate plans at a discount. ER195–99, ER234–35 ¶¶31–39, 127–29. The district court mistakenly disregarded these allegations because they were made on "information and belief." ER15–16; *see Park*, 851 F.3d at 928.

While Defendants may have eventually "reduce[d] Vanguard's fees" (ER15–16), that is not a defense for other disloyal acts. *Tussey v. ABB, Inc.*, 850 F.3d 951, 957 (8th Cir. 2017)(*Tussey II*)("The fact the ABB fiduciaries apparently *did not always favor Fidelity as much as they could, or seize every opportunity to send Fidelity more of the participants' money*, does little to undermine the district court's finding" of disloyalty)(emphasis added).

II. The district court erred in finding Plaintiffs' administrative fee claim and prohibited transactions claims time-barred.

ERISA's six-year limitations period is shortened to three years if the plaintiff had "actual knowledge of the breach or violation." 29 U.S.C. §1113. The district court erred in applying the three-year period to Plaintiffs' administrative fee claim (ER33–35), and the six-year period to Plaintiffs' prohibited transactions claim (ER38–40).

A. Defendants did not establish an "actual knowledge" defense regarding excessive administrative fees.

ERISA's statute of limitations is an affirmative defense. *Richard B. Roush, Inc. Profit Sharing Plan v. New Eng. Mut. Life Ins. Co.*, 311 F.3d 581, 585 (3d Cir. 2002). On a motion to dismiss, the defendant must show that the "affirmative defense is obvious on the face of [the] complaint[.]" *Rivera v. Peri & Sons Farms,* *Inc.*, 735 F.3d 892, 902 (9th Cir. 2013)(citation omitted).

The district court went beyond the pleadings to take judicial notice of a 2012 Chevron newsletter (ER10–11), which is not a "matter of public record." *Cf. Lee*, 250 F.3d at 689. The fact of whether a party "had actual notice … do[es] not remotely fit the requirements of Rule 201." *Ritchie*, 342 F.3d at 909.

Further, a showing "[t]hat the documents (or the relevant facts in the documents) were provided to [plaintiff] is a necessary predicate to establishing the three-year bar." *Fuller v. Suntrust Banks, Inc.*, 744 F.3d 685, 697 (11th Cir. 2014). Nothing in the record supports the court's assumption that Plaintiffs "received" the newsletter. ER33, 35.

The newsletter did not provide "actual knowledge of *the breach.*" *See* 29 U.S.C. §1113(2)(emphasis added). "In order to apply ERISA's limitation periods, the court 'must first isolate and define the underlying violation.'" *Tibble III*, 729 F.3d at 1120 (citation omitted). When the underlying violation depends on the process used by the fiduciary, knowledge of the "breach or violation" requires knowledge of the process. *Tibble III*, 729 F.3d at 1121.

The underlying breach is Defendants' failure to monitor Vanguard's compensation to determine if it was reasonable for the services provided. ER229–34 ¶¶116–17, 119–20, 125–26. Actual knowledge of that breach would require facts showing that Defendants were *not* monitoring revenue sharing, or that

Vanguard's compensation was excessive. But the district court interpreted the document as showing "that the Plan fiduciaries *were* monitoring revenue sharing"—the exact *opposite* of the alleged breach. ER35 (emphasis added). The document also confirms that the revenue sharing was hidden—"deducted directly from the fund's investment returns before you see them" (ER177)—and thus provided no indication the amount was excessive.

"[D]isclosure of a transaction that is not inherently a statutory breach of fiduciary duty . . . cannot communicate the existence of an underlying breach." *Waller v. Blue Cross of Cal.*, 32 F.3d 1337, 1341 (9th Cir. 1994)(citation omitted). The newsletter merely discloses the *fact* of a revenue sharing arrangement, which is not an inherent breach. ER230 ¶117; *see Tibble v. Edison Int'l*, 639 F.Supp.2d 1074, 1113 (C.D. Cal. 2009)(*Tibble I*)("[T]here is nothing inherently wrong with using revenue sharing."), *rev'd in part on other grounds*, 843 F.3d 1187 (9th Cir. 2016)(en banc). Accordingly, "mere notification" that Vanguard was paid through revenue sharing "falls short of providing 'actual knowledge of the breach or violation.'" *Tibble III*, 729 F.3d at 1121 (quoting 29 U.S.C. §1113(2)).

B. Defendants had a continuing duty as to prohibited transactions.

Section 1106(a) prohibits transactions between a plan and a "party in interest," which includes a plan service provider. 29 U.S.C. §1106(a)(1); 29 U.S.C. §1002(14)(B).

The district court found this claim time-barred under §1113(1) because Vanguard was initially hired more than six years before Plaintiffs filed suit. ER39–40. The district court's presumption that there is no continuing fiduciary duty after the *initial* transaction—even when the arrangement remains in place—is contrary to *Tibble IV*.

Tibble IV held that it was error to apply "a 6-year statutory bar based solely on the initial selection of [certain mutual funds], without considering the contours of the alleged breach of fiduciary duty," as defined by trust law. 135 S.Ct. at 1829. Although *Tibble IV* involved a claim under §1104, the same trust law analysis applies to §1106. *See id*. at 1828; *Harris Tr. & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000)(trust law "offers a 'starting point for analysis [of ERISA]'")(citation omitted).

Fiduciaries have a continuing duty "not to engage in prohibited transactions," because "the general duty of loyalty recognized by the common law of trusts … continues 'throughout the administration of the trust,'" and entails a duty to "immediately remove" conflicts of interest. *In re Northrop Grumman Corp. ERISA Litig.*, No. 06-6213, 2015 U.S.Dist.LEXIS 176822, *105–07 (C.D.Cal. Nov. 24, 2015)(quoting G. Bogert, G. Bogert & A. Hess, The Law of Trusts and Trustees §543 (3d ed. 2015)). Thus, the fact that a contract was first executed outside of the limitations period did not bar the claim, because each payment was a separate transaction. *Id*. at *106–07; *Wildman v. Am. Century Servs., LLC*, 237 F.Supp.3d 918, 924–25 (W.D.Mo. 2017); *Dole v. Formica*, No. 87-2955, 1991 U.S.Dist.LEXIS 19743, *21–22 (N.D.Ohio Sep. 30, 1991)(a new §1106(a)(1)(C) claim arose "each time the Funds paid the Union an excessive administrative fee").

The district court distinguished *Northrop* by reading the Amended Complaint as challenging only the hiring of Vanguard in 2002 and not an annually renewed contract as in *Northrop*. ER40. But "engaging" Vanguard was not a one-time event—Defendants continued "to engage Vanguard" on an ongoing, no-bid basis under an agreement providing excessive compensation. ER231–34, 248–29 ¶¶120–26, 165–68; *see Braden*, 588 F.3d at 601 & n.9 (finding plausible §1106(a)(1)(C) violation).

Wright v. Oregon Metallurgical Corp., 360 F.3d 1090 (9th Cir. 2004), did not address the timeliness of a prohibited transaction claim. The plaintiff failed to *identify* a relevant "transaction that falls within" §1106. *Id*. at 1101. Here, it is undisputed that recordkeeping arrangements are covered by §1106(a)(1).

The ruling below undermines the purpose of the prohibited transaction provisions. *Harris Tr.*, 530 U.S. at 241–42 (Congress enacted §1106(a)(1) to "supplement[]" the fiduciary duties, due to "deficiencies in prior law regulating transactions by plan fiduciaries"). Without a continuing duty, fiduciaries would obtain immunity after six years to continue in perpetuity transactions deemed "likely to injure" a plan. *See id.*

CONCLUSION

The Court should reverse the district court's dismissal of Plaintiffs' claims.

November 8, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitation set forth in Fed.R.App.P. 32(a)(7)(B) and Circuit Rule 32-1 because this brief contains 13,840 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. I certify that this brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 Times New Roman 14 point font.

s/ Jerome J. Schlichter
Jerome J. Schlichter
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November 8, 2017

STATEMENT OF RELATED CASES

I certify, pursuant to Ninth Circuit Rule 28-2.6, that Appellants and their counsel know of no related cases pending in this Court.

s/ Jerome J. Schlichter
Jerome J. Schlichter
Attorney for Plaintiffs-Appellants
November 8, 2017

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 8, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Jerome J. Schlichter
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November 8, 2017

ADDENDUM

29 U.S.C. §1104

(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; [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.

29 U.S.C. §1106

(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;

…

(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[.]

29 U.S.C. §1113

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

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or

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

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