No. 08-3798

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JEREMY BRADEN,

Plaintiffs-Appellant,

v.

WAL-MART STORES, INC., STANLEY GAULT, BETSY SANDERS, DON SODERQUIST, JOSE VILLARREAL, STEPHEN R. HUNTER, DEBBIE DAVIS CAMPBELL, and JOHN and JANE DOES 1-20,

Defendant-Appellees

On Appeal from the United States District Court
for the Western District of Missouri,
Southern Division (Dist. Court Case No. 08-03109-GAF)

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND REQUESTING REVERSAL

CAROL F. DeDEO
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor for Plan Benefits Security

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation

ROBIN SPRINGBERG PARRY
Senior Trial Attorney
U.S. Department of Labor
200 Constitution Ave., N.W., Room N-4611
Washington, D.C. 20210
(202) 693-5614

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Regulations:

STATEMENT OF THE ISSUES

1. Whether the district court erred in dismissing an ERISA plan participant's claims that the fiduciary defendants violated ERISA by causing the plan to pay excessive fees to a service provider for plan investments based on the court's conclusion that the participant had not adequately alleged that the fiduciaries failed to implement a prudent process to select the investment options.

2. Whether the district court erred in dismissing the plaintiffs' claim that the fiduciary defendants violated ERISA by failing to disclose information to plan participants about revenue sharing payments that the plan's trustee allegedly received from the mutual funds that the fiduciaries included as plan investment options.

3. Whether the district court erred in dismissing the plaintiff's prohibited transaction claims based on the court's conclusion that the plaintiff had failed to adequately allege that the plan trustee's receipt of revenue sharing fees resulted in the trustee's fees being unreasonably high in relation to the services provided.

STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

This case raises important issues concerning the pleading standards applicable in a case brought by a plan participant under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq., that alleges imprudence and other fiduciary breaches with regard to fees paid by an ERISA 401(k) plan for its investments.

The Secretary of Labor ("Secretary") has primary enforcement and interpretive authority for Title I of ERISA. 29 U.S.C. §§ 1002(13), 1136(b). Accordingly, in both her own cases and in suits brought by plan participants and beneficiaries, the Secretary has a strong interest in ensuring that courts do not erect unnecessarily high pleading standards with regard to claims brought under ERISA's fiduciary breach provisions, which were enacted to ensure the prudent management of pension plan assets and to safeguard the security of retirement benefits. She has authority to file this brief under Rule 29(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE CASE

This case concerns the Wal-Mart Profit Sharing and 401(k) Plan ("Plan"), a defined contribution, individual account pension plan that is governed by ERISA, 29 U.S.C. §1002(34), that defendant Wal-Mart Stores, Inc. ("Wal-Mart") offers and administers for its employees.[1] The plaintiff, Jeremy Braden, is an employee of Wal-Mart and a participant in the plan. Appx. at 18, ¶ 20. In a five count Complaint brought as a putative class action on behalf of the Plan, Braden sued Wal-Mart, Stanley Gault, Betsy Sanders, Don Soderquist, Jose Villarreal, Stephen R. Hunder, and Debbie Davis Campbell, all of whom he claims were fiduciaries of the Plan with appointment and oversight responsibilities over the Retirement Plan Committee ("Committee"), which, in turn, was authorized to select the Plan's investment options. Appx. at 14, 19-20, ¶¶ 4-7, 21-28. The plaintiff also sued the individual members of the Committee, but because he has not yet

[1] In addition to the 401(k) component, the Plan also has a profit-sharing component, which is not the subject of this suit, that is an employee stock ownership plan invested in Wal-Mart stock. Appx. at 21-24, ¶¶ 30-39.

ascertained their identities, he sued them as John Does 1-20. Appx. at 21, ¶ 29.[2]

In Count I, plaintiff alleges that, by failing to use the Wal-Mart Plan's considerable bargaining power, given its massive size, to negotiate better fees for the Plan, and instead choosing off-the-shelf products with their relatively higher fees, Wal-Mart and the Committee defendants caused the Plan to pay considerably more than prudent for ten mutual funds that were chosen as investment options for the Plan. Appx. at 55-58, ¶¶ 115-123. Moreover, the plaintiff alleges that Wal-Mart and the Committee defendants made these faulty choices because they failed to engage in a prudent process to select and manage these investment options, and that had they conducted an adequate investigation of available fund options, fees and performance, they would have saved the Plan tens of millions of dollars in excess fees. Appx. at 57-58, ¶¶ 121-122. The Complaint also alleges that, despite their high fees, a number of these funds provided inferior returns. Appx. at 56-57, ¶ 120. Further, according to the plaintiff, the mutual funds that the

[2] In accordance with the familiar standards for review of a dismissal on the pleadings, the Secretary assumes the truth of the plaintiff's allegations solely for purposes of this brief. The Secretary takes no position on the plaintiff's ability to prove the allegations or on the proper ultimate disposition of the case after the parties have had the opportunity to conduct discovery and submit appropriate factual evidence and expert testimony.

defendants included as investment options under the Plan made "revenue sharing payments" to the Plan's trustee, Merrill Lynch, as a "quid pro quo" to Merrill Lynch for offering the investment options to the Plan. Id.[3] These revenue sharing payments, the plaintiff alleges, were not in exchange for any actual services provided by Merrill Lynch or the investment companies to the Plan but were instead a quid pro quo to Merrill Lynch for offering the investment options to the Plan. Appx. at 56-58, ¶¶ 160-162. Thus, the plaintiff alleges in Count I that, by causing the Plan to pay excessive fees, including the fees associated with the alleged revenue sharing, for higher cost funds that underperformed available lower cost funds, the defendants breached their fiduciary duties of prudence and loyalty under sections 404(a)(1)(A) and (a)(1)(B), 29 U.S.C. §§ 1104(1)(1)(A), 1104(a)(1)(B). Appx. at 55-56, 58, ¶¶ 117-118, 122.

In Count II, the plaintiff alleges that the defendants who were responsible for appointing other fiduciaries failed in their duty to properly monitor these fiduciaries and to remove and replace them when they allegedly performed inadequately. Appx. at 58-61, ¶¶ 125-133.

---

[3] The complaint defines "Merrill Lynch" to encompass Merrill Lynch & Co., together with its subsidiaries, including Merrill Lynch Bank & Trust Co., FSB (formerly known as Merrill Lynch Trust Co., FSB) and its Global Wealth Management business segment (formerly known as Merrill Lynch Investment Managers LLC).

In Count III, the plaintiff alleges that Wal-Mart and the Committee defendants breached their fiduciary duty of loyalty by failing to provide complete and accurate information to Plan participants and beneficiaries with regard to fees and revenue sharing. Appx. at 62-63, ¶¶ 139, 141-142. In addition, Defendant Wal-Mart allegedly entered into a trust agreement with Merrill Lynch that prohibited Wal-Mart from disclosing to anyone, including employees and plan participants, the amount of revenue sharing that the fund companies would pay Merrill Lynch. Appx. at 63, ¶ 140. The plaintiff alleges that these omissions were material to participants' ability to exercise informed control over their Plan accounts, because they prevented participants from making informed decisions concerning "the investment of their retirement savings in the Plan Investment Options, and as to investment in mutual funds with more attractive fee arrangements." Appx. at 63, ¶ 141.

Count IV alleges that defendants breached their duties as co-fiduciaries by failing to prevent the various breaches alleged to have been committed by other fiduciaries.

Finally, in Count V, the plaintiff alleges that Wal-Mart and the Committee defendants engaged in prohibited transactions under ERISA sections 406(a)(1)(C) and 406(a)(1)(D), 29 U.S.C. §§ 1106(a)(1)(C), 1106(a)(1)(D), by causing the Plan to engage in transactions with Merrill

Lynch, the Plan Trustee, whereby Plan assets were improperly used by Merrill Lynch to obtain the revenue sharing and other similar payments from the companies that offered the various investment options. Appx. at 67-70, ¶¶ 158-165. These payments, the plaintiff alleges, were not in exchange for any actual services provided by Merrill Lynch or the investment companies to the Plan but instead were "kickback" payments that were part of a quid pro quo to Merrill Lynch for offering the investment options to the Plan. Appx. at 67-68, ¶¶ 160-162.

2. The named defendants filed a motion to dismiss, which the court granted in its entirety on October 28, 2008. Appx. at 1203. In a brief decision, the court concluded first that the named plaintiff had no standing to challenge any transactions or conduct that took place prior to October 31, 2003, the date on which he began to contribute assets to the Plan. Id. at 1210.[4]

Next, the court determined that the plaintiff had failed to state a claim for breach of the duties of prudence and loyalty for the payment of excessive fees because the plaintiff did not make specific factual allegations regarding the fiduciaries' conduct, such as "facts showing Wal-Mart and the [Committee] failed to conduct research, consult appropriate parties, conduct

[4] The Secretary's brief does not address this issue or any issues concerning the plaintiff's attempt to frame his complaint as a class action.

meetings, or consider other relevant information." Id. at 1212. Instead, the court found, the Complaint made only conclusory allegations that fiduciaries "did not analyze options or use a proper process to investigate the merits of such investments for the Plan," and states that "the expense ratios and fees were unreasonable and that alternatives were available." Id. According to the court, the Complaint did not establish a colorable claim that Wal-Mart and the Committee defendants failed to "investigate available options before making a decision," because they could have had "any number of reasons" for choosing funds that had higher fees, and further held that the plaintiff has the burden to allege some improper method or investigation, and cannot transfer that burden to defendants by requiring them to disclose information to "justify the minutiae of their investment decisions." Id. at 1213. Thus, the court dismissed Count I. Id.

The court next held, in dismissing Count III, that Wal-Mart and the Committee defendants had no duty to disclose additional information about the mutual fund fees, including revenue sharing related fees, to the Plan participants. Id. at 1213. In reaching that conclusion, the court relied on another district court decision that held that since no specific statutory or regulatory duty exists to disclose revenue sharing arrangements, such information "need not be disclosed under today's ERISA." Appx. at 1213,

citing Tussey v. ABB, Inc., 2008 WL 379666, *2-3 (W.D. Mo. Feb 11, 2008).

The district court dismissed the Count V prohibited transaction claims on the grounds that the plaintiff had failed to make a showing that the revenue sharing payments were unreasonable in relation to the services provided. Appx. at 1214. Although noting that the Complaint provided charts "comparing the expense ratios" of the ten Plan mutual fund investment options and a number of alternative mutual funds, the court pointed out that the charts did not describe "the services provided by the respective options," and reiterated its view that the defendants "could have chosen the more expensive [options] for a variety of legitimate and sound reasons." Id.

Finally, noting that the co-fiduciary and monitoring claims were derivative of the other fiduciary breach claims, the court likewise dismissed these counts. Appx. at 1215.

SUMMARY OF ARGUMENT

Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief," a standard that is met so long as the complaint gives the defendant fair notice of the nature of the claim and the grounds

upon which it rests. The Supreme Court has recently clarified that although specific facts are not necessary, the complaint must plead enough facts to state a claim to relief that is plausible on its face. The Complaint here meets this standard.

The Complaint alleges that the fiduciary defendants breached their statutory duties to the Plan by failing to implement a prudent process for selecting, evaluating and monitoring Plan investment options, the result of which was the imprudent selection of unduly expensive options that caused Plan losses. Such conduct, if true, would constitute a breach of fiduciary duties under ERISA and would make the responsible fiduciaries liable for any resulting losses. In the Secretary's view, the allegations in plaintiff's Complaint suffice to put defendants on notice of the claims against them and to state a plausible claim for relief under applicable Supreme Court and Eighth Circuit precedent. Contrary to the holding of the district court, the plaintiff was not required to allege additional facts establishing the defendants' specific procedural failures, nor was the plaintiff required to plead facts in rebuttal of possible arguments that the defendants had done an adequate investigation and had prudently selected the funds. These may well be disputed matters that require factual development, but as such they are not proper bases for granting a motion to dismiss under Rule 12(b)(6).

Accordingly, the district court erred in dismissing the plaintiff's claims that the defendants acted imprudently in selecting unduly expensive investment options.

So too, the court below erred in dismissing the plaintiff's claims that the defendants breached their duties of prudence and loyalty by allegedly failing to make complete and accurate disclosures to Plan participants about revenue sharing payments made to Merrill Lynch, the Plan trustee, by various mutual funds that were designated as investment options. The plaintiff alleges that the mutual funds were unduly expensive and imprudently selected options that were included on the Plan's line-up as the result of a "quid pro quo" in which the Plan trustee received revenue sharing from the mutual funds Additionally, the plaintiff alleges that the defendants entered into an agreement with Merrill Lynch that the plaintiff describes as an agreement to "conceal" these allegedly improper revenue sharing payments from participants and beneficiaries, allegations that, if proven, raise significant concerns about whether the fiduciaries acted with undivided loyalty to the Plan's participants. The Eighth Circuit has recognized that ERISA's duties of prudence and loyalty requires disclosure of information not specifically requested or otherwise mandated in ERISA's reporting and disclosure provisions that plan participants need to protect their interests

from substantial harm, Kalda v. Sioux Valley Physician Partners, Inc., 481 F.3d 639, 644 (8th Cir. 2007), a standard the court erroneously declined to apply to the revenue sharing allegations in this case. Appx. at 1213, citing Tussey. Moreover, in general, the determination of whether specific information is material requires factual development and cannot ordinarily be resolved at the motion to dismiss stage. In the particular context of this case, a conclusion cannot fairly be made concerning whether information on the revenue sharing arrangements was immaterial to Plan participants without evidence as to the nature, amount, or justification for the fees involved, or whether consideration of the revenue sharing fees had, in fact, improperly influenced the fiduciaries' selection of overpriced fund options, as alleged by the plaintiff.

Finally, the court below erred in dismissing the plaintiff's claims that the defendants engaged in transactions for services with Merrill Lynch that ERISA sections 406 and 408 classify as nonexempt "prohibited transactions" on the grounds that the plaintiff failed to make a showing that the revenue sharing payments resulted in unreasonable compensation being paid to Merrill Lynch in relation to the services provided. The Complaint in this case alleged that Merrill Lynch's compensation was unreasonable in relation to the services provided and put forward factual allegations regarding

Merrill Lynch's receipt of undisclosed revenue sharing payments to support that allegation. Dismissal of this Count constituted error because a plaintiff is not required to plead affirmatively in his complaint matters that might be responsive to a defense even before the defense is raised.

ARGUMENT

THE PLAINTIFF HAS ADEQUATELY STATED CLAIMS FOR FIDUCIARY BREACHES WITH REGARD TO PLAN FEES

ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983); Nachman v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361-62 (1980). "The floor debate . . . reveals that the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 n.8 (1985) (citing the legislative history). Moreover, "the fiduciary obligations of plan administrators are to serve the interests of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan . . . [and] the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper

records, the disclosure of specified information, and the avoidance of conflicts of interest." Russell, 473 U.S. at 142-143.

To this end, ERISA imposes a number of stringent duties on those who serve as plan fiduciaries, including a duty of undivided loyalty, a duty to act for the exclusive purposes of providing plan benefits and defraying reasonable expenses of administering the plan, and a stringent duty of care grounded in the prudent man standard familiar from trust law. 29 U.S.C. § 1104(a)(1)(A), (B). The plaintiff, as we discuss below, sufficiently alleges violations of these fiduciary duties.

A. The plaintiff's allegations that the defendants imprudently and disloyally selected investment choices with excessive fees were sufficient to put defendants on notice of the claims against them and did not require additional factual allegations at the pleadings stage

The plaintiff's Complaint properly states a claim for relief under Federal Rule of Civil Procedure 8(a). That Rule requires only that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief," a requirement that the Supreme Court has repeatedly found satisfied if the complaint provides the defendant notice of the character of the claim and the grounds on which it rests. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514-15 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163,

168 (1993) (the Rule "means what it says"); Sheuer v. Rhodes, 416 U.S. 232, 236 (1974) (in evaluating the sufficiency of a complaint, the court's role is limited to evaluating "not whether the plaintiff will ultimately prevail . . . but whether the claimant is entitled to offer evidence to support the claims").

The Supreme Court's decision in Bell Atlantic v. Twombly, 127 S. Ct. 1955 (2007), does not depart from these fundamental principles. Although the Supreme Court held there that complaints must contain more than conclusory allegations that merely restate the elements of a cause of action, Twombly, 127 S. Ct. at 1965-68, the Court continues to emphasize that "[s]pecific facts are not necessary." Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007) (per curiam). Instead, a complaint must include sufficient factual information to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Id. (quoting Twombly, 127 S. Ct. at 1964). Indeed, the Court in Twombly pointed out that it was not imposing a "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face," 127 S. Ct. at 1974, and that plausibility does not impose a "probability requirement at the pleading stage." Id. at 1965. Thus, while "[f]actual allegations must be enough to raise a right to relief above the speculative level," courts must continue to operate "on the

assumption that all the allegations in the complaint are true (even if doubtful)." Id. at 1965 (citations omitted).

This Court's precedent is in line with these principles. Eighth Circuit decisions recognize that under Twombly the allegations of a complaint must be sufficient to show more than just a speculative right to relief and complaints must contain more than labels and conclusions or "formulaic recitation of the elements of a cause of action." Potter v. Tontitown, 2009 WL 56969, *1 (8th Cir. Jan. 12, 2009). But, this Court continues to recognize that a plaintiff need not provide specific facts in support of his allegations, but must include only sufficient factual information to provide the grounds on which the claim rests, and to raise a right to relief above a speculative level. Schaaf v. Residential Funding Corp., 517 F.3d 544, 549 (8th Cir. 2008) (citing Erickson, 127 S. Ct. at 2200, and Twombly, 127 S. Ct. at 1964-65 & n.3.).

Under this standard, the district court erred in dismissing the plaintiff's prudence and loyalty claims on the grounds that the plaintiff did not make more specific factual allegations regarding the fiduciaries' conduct. As required by the Supreme Court and Eighth Circuit standard, the plaintiff made all of the necessary allegations to provide the grounds on which the

claims rest, and raise a right to relief above a speculative level. Schaaf, 517 F.3d at 549.

The plaintiff alleges that Wal-Mart and the Committee defendants failed to "implement a prudent procedure for evaluating, selecting, and monitoring the Plan Investment Options," and "failed to conduct an appropriate investigation of the merits of the Plan Investment Options," particularly the impact that the allegedly excessive fees had on participants' overall retirement savings.[5] Appx. at 56-58, ¶¶ 120-122. He alleges that, as a result, the defendants selected and maintained Plan investment options that were unreasonably expensive when compared to readily available, less expensive, comparable and better-performing fund options. Id. at 57, ¶ 121. He additionally alleges that, by failing to use the Wal-Mart Plan's considerable bargaining power, given its massive size, to obtain better fees for the Plan, and instead choosing off-the-shelf products with their relatively higher fees, Wal-Mart and the Committee defendants caused the Plan to pay considerably more than what was prudent in fees for the ten mutual funds

[5] ERISA's prudence standard, 29 U.S.C. § 1104 (a)(1)(B), like the trust law standard from which it is derived, requires that a plan fiduciary act "with the care, skill, prudence, and diligence that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of the enterprise of a like character and aims."

that were chosen as investment options for the Plan.[6] Appx. at 13, 55-58, ¶¶ 5, 115-123. Moreover, he also alleges that the ten mutual funds were included as investment options under the Plan as part of a "quid pro quo" for revenue sharing payments made by the funds to Merrill Lynch in order for Merrill Lynch to present the funds to the Plan as potential investment options. Id. at 15, 56-57, ¶¶ 10, 120. These allegations are sufficient to let defendants know what the claims against them are and, if proven, to establish fiduciary breaches and entitle the plaintiff to obtain relief under ERISA on behalf of the Plan for resulting losses. See, e.g., Reich v. Lancaster, 843 F. Supp. 194, 199 (N.D. Tex.,1993) (fiduciary who caused plan to purchase individual whole life policies rather than group life, at a much higher cost, violated section 404(a)(1)(B)'s prudence standard), aff'd, 55 F.3d 1034 (5th Cir. 1995).

Here the plaintiff alleged that the fees paid by the Plan were, in fact, excessive and therefore imprudent, and additionally alleged that the defendants did not appropriately investigate the fees. The plaintiff is not

[6] The Secretary does not read the complaint as alleging that the Plan's fiduciaries acted imprudently solely because they included "retail" or "off the shelf" mutual funds in the Plan's lineup, but rather because they allegedly conducted an inadequate investigation of the funds' options, fees, and performance, overpaid for the funds, and were unduly influenced by the trustee's interest in receiving revenue sharing payments. This brief should not be construed as suggesting that it is per se illegal for ERISA employee benefit plans to include retail mutual fund options.

required to go further at the pleading stage, as the district court thought, to provide additional factual support rebutting possible defenses, i.e., that the defendants conducted an adequate investigation and decided that these fees were worth it; such a requirement is in contravention of Eighth Circuit and Supreme Court law, which recognizes that a complaint may proceed even if it appears "that a recovery is very remote and unlikely." Twombly, 127 S. Ct. at 1965, citing Sheuer, 416 U.S. at 236. Accord Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974) ("a complaint should not be dismissed merely because the court doubts that a plaintiff will prevail in the action"). Although the district court speculates that defendants "could have chosen funds with higher fees for any number of reasons," that is a matter for discovery and either summary judgment or trial, not for a motion to dismiss.

The recent decision from the Seventh Circuit in Hecker v. Deere, 2009 WL 331285 (7th Cir. Feb. 12, 2009), is not to the contrary. Unlike in this case, the dismissal in Hecker was not based on a perceived failure to plead sufficient facts to indicate an imprudent process, but was instead based on the court's conclusion that, given the specific range of fees in the 22 selected mutual funds and the open brokerage window, which made available an additional 2,500 funds, no rational trier of fact could find that Deere had not offered a prudent mix of investments with a wide range of

expense ratios. 2009 WL 331285, at *10. Here, however, the factual allegations do not describe a similar broad range of options with comparable expense ratios. See Appx. at 34-42, ¶¶ 72-80. Hecker is further distinguishable because the court's decision there is based, in part, on the assertion that the defendants' conduct was immunized by section 404(c) of ERISA, see 29 U.S.C. § 1104(c), which provides that, with respect to certain individual account plans that meet numerous regulatory requirements, plan fiduciaries are immunized from liability "for any loss, or by reason of any breach, which result from such participant's or beneficiary's exercise of control." The parties did not brief, and the court did not consider any potential 404(c) defense in the proceedings below.[7]

[7] For that reason, the Secretary does not brief the issue here. Even had the issue been properly raised below, however, section 404(c) would not give fiduciaries a defense to liability for their own imprudence or disloyalty in the selection or monitoring of investment options available under the plan. The individual plan participants were not responsible for the selection of fund options. Only the Plan's fiduciaries could make the selections. The terms of ERISA and the Secretary's 404(c) regulation shield plan fiduciaries only for losses "which result[] from" the participant's exercise of control, and not from losses attributable to their own fiduciary misconduct. 29 U.S.C. § 1104(c)(1)(B); 29 C.F.R. § 2550.404c-1. Under the Secretary's long-standing, contemporaneous, and uniform interpretation of her regulation, the selection of the particular funds to include as investment options in a retirement plan is the responsibility of the plan's fiduciaries, and logically precedes (and thus cannot "result[] from") a participant's decision to invest in any particular option. For this reason, the Secretary disagrees with the Seventh Circuit's analysis of the issue in Hecker.

B. The plaintiff adequately alleged that the defendants failed to disclose material information to plan participants about revenue sharing

The district court also erred in dismissing the plaintiff's claim that defendants violated ERISA by making incomplete disclosures to Plan participants about revenue sharing payments made to Merrill Lynch, the Plan trustee, by various mutual funds that were designated as investment options. Although the district court correctly recognized that, in some contexts, ERISA's general fiduciary responsibility provisions obligate plan fiduciaries to disclose "material" information to plan participants, the court erred in its conclusion that Count III was not subject to the "materiality" standard because "revenue sharing need not be disclosed under today's ERISA." Appx. at 1213, citing Tussey, 2008 WL 379666, at *2-3.[8]

Unlike the court below, the Secretary disagrees with the "logic of Tussey." Appx. at 1213. ERISA's duties of prudence and loyalty not only forbid a fiduciary from misleading plan participants, Varity v. Howe, 516 U.S. 489, 505 (1996), but, as this Court has recognized, also require

[8] In addition to alleging that the defendants breached their fiduciary obligations by failing to disclose Merrill Lynch's revenue sharing arrangements, the plaintiff asserts a number of additional disclosure failures which appear largely redundant of the plaintiff's claim that the fiduciaries imprudently maintained overpriced funds (e.g., the plaintiff alleges that the defendants failed to disclose the ready availability of less expensive funds). The Secretary does not address these allegations here.

disclosure of information not specifically requested or otherwise mandated in ERISA's reporting and disclosure provisions that plan participants need to protect their interests from substantial harm. Kalda v. Sioux Valley Physician Partners, Inc., 481 F.3d 639, 644 (8th Cir. 2007); Shea v. Esensten, 107 F.3d 625, 628 (8th Cir. 1997). In the absence of any specific statutory or regulatory requirements expressly addressing disclosure of revenue sharing information, the district court should have applied the "materiality" standard set forth by the Eighth Circuit in Kalda.[9]

In the decision below, Appx. at 1212-1213, the district court correctly pointed to Kalda as the relevant Eighth Circuit authority recognizing that ERISA's duty of loyalty requires a fiduciary to disclose material information that could adversely affect a participant's interests. Kalda, 481 F.3d at 644. Here, the plaintiff alleges that the mutual funds options selected by the defendants were excessively expensive in part due to the revenue sharing payments made to Merrill Lynch. According to the plaintiff, the mutual funds' inclusion on the Plan menu was unduly influenced by a "quid pro quo" in which Merrill Lynch received revenue sharing payments from the mutual funds for offering the funds as investment options to the Plan. Appx.

[9] The Secretary could also address disclosure obligations through regulations. See, e.g., proposed fee disclosure regulations at 73 Fed. Reg. 43,014 (July 23, 2008); 72 Fed. Reg. 70988 (Dec. 19, 2007).

at 15, 57 ¶¶ 10, 120. These revenue sharing payments, the plaintiff alleges, were not in exchange for any actual services provided by Merrill Lynch or the investment companies to the Plan but were instead a "kickback" payment to Merrill Lynch for offering the investment options to the Plan. Moreover, the defendants allegedly entered into an agreement with the trustee, Merrill Lynch, to "conceal" the revenue sharing payments, an allegation that raises significant concerns about whether the fiduciaries acted prudently and with undivided loyalty to the Plan's participants in the context of this case involving allegations of excessive fees and a flawed selection process.[10]

In general, the determination whether specific information is material requires factual development and cannot ordinarily be resolved at the motion to dismiss stage. See, e.g., In re Adams Golf, Inc. Securities Litigation, 381 F.3d 267, 274-275 (3d Cir. 2004) ("Materiality is ordinarily an issue left to the fact-finder and is therefore not typically a matter for Rule 12(b)(6)

---

[10] This is not to say that fiduciaries could never enter into an agreement to protect a service provider's confidential business information or restricting the disclosure of fee information based upon a reasonable conclusion that the agreement was in the interest of the plan, its participants, and beneficiaries. We do not read the plaintiff's complaint to allege that the failure to disclose revenue sharing is per se illegal, but rather that the undisclosed revenue sharing practices contributed to a flawed selection process that resulted in the plan offering participants overpriced fund investment options and the plan trustee receiving excess compensation, and that the nondisclosure agreement was designed to conceal those circumstances from affected participants and beneficiaries. Brief of Appellant, 49-50.

dismissal"). Given the allegations in this case – that the Plan trustee received additional undisclosed payments from the outside mutual funds that it offered to the Plan, that those payments were not in exchange for any services provided to the Plan, that the payments contributed to the allegedly unreasonable fees charged to participants investing in the mutual funds, and that the trustee had an agreement with the fiduciaries forbidding the disclosure of its receipt of these additional payments – plaintiff's claim was sufficient to withstand a motion to dismiss for failure to state a claim. Certainly, a judgment regarding the materiality of the information could not fairly be made in the absence of evidence concerning the nature, amount, or justification for the fees involved, or concerning whether the revenue sharing fees had, in fact, improperly influenced the fiduciaries' selection of overpriced fund options, as alleged by the plaintiff. Similarly, the defendants' compliance with their duties of prudence and loyalty can scarcely be resolved at the motion to dismiss stage without consideration of any evidence as to the significance of and rationale for the defendants' alleged agreement with Merrill Lynch to "conceal" the trustee's compensation from Plan participants.

Here again, the Hecker decision is not to the contrary. Although the district court in Hecker dismissed the disclosure claims based on the

existence of a regulatory scheme that does not require such disclosures, the Seventh Circuit did not affirm the dismissal on this basis. Instead, Hecker held that information about the "internal, post-collection distribution" of fees among subsidiaries of Fidelity Investments was simply not material to the participants.[11] 2009 WL 331285, at *10. In the court's view, the plaintiffs had received full disclosure of the total fees paid to Fidelity, and had no further interest in knowing how Fidelity divided up those fees among its own affiliates. The Hecker conclusions about materiality – that information concerning how Fidelity chose to allocate money from fully disclosed fees it received as a result of a plan's investments in Fidelity mutual funds through revenue sharing among its affiliates was not material to plan participants – have no applicability here.

C. The plaintiff's allegation that the fees received by Merrill Lynch were unreasonable is sufficient to state a prohibited transaction claim under ERISA

As the Supreme Court has noted, "[r]esponding to deficiencies in prior law regulating transactions by plan fiduciaries, Congress enacted ERISA §

[11] The Secretary filed an amicus brief in the Hecker case taking issue with the plaintiff's sweeping suggestions in that case that fiduciaries of participant-directed plans must always, or even usually, disclose revenue sharing arrangement as a matter of general fiduciary principles. In that case, we expressed considerable skepticism about the materiality to participants of information about how Fidelity chose to share the revenue it received from the Deere plan within its family of Fidelity affiliates. Hecker v. Deere, Brief of the Secretary of Labor as Amicus Curiae, 20.

406(a)(1), which supplements the fiduciary's general duty of loyalty to the plan's beneficiaries, § 404(a), by categorically barring certain transactions deemed 'likely to injure the pension plan.'" Harris Trust & Sav. Bk. v. Salomon Smith Barney, Inc., 530 U.S. 238, 241 (U.S. 2000), quoting Commissioner v. Keystone Consol. Industries, Inc., 508 U.S. 152, 160 (1993). These prohibitions are subject to the statutory exemptions in section 408 of ERISA, 29 U.S.C. § 1108.

The plaintiff's prohibited transaction claims in this case are based on allegations that the defendants caused the plan to pay excessive fees to Merrill Lynch for transactions that constituted direct or indirect furnishing of services between the Plan and a party in interest, in violation of section 406(a)(1)(C), and transfer of plan assets to or for the benefit of a party in interest, in violation of section 406(a)(1)(D).[12] The district court dismissed these claims on the grounds that the plaintiff had failed to make a showing

[12] The district court did not address the question, briefed by both parties below, whether the revenue sharing payments constituted plan assets for purposes of establishing a prohibited transaction under section 406(a)(1)(D). It is the Secretary's view that the revenue sharing payments described in the complaint do not constitute plan assets for purposes of section 406(a)(1)(D), see 29 U.S.C. § 1101(b)(1). Accordingly, the Secretary does not take issue with the district court's dismissal of prohibited transaction claims based on an allegation that the revenue sharing payments constituted plan assets. The plaintiff, however, also alleged a violation of section 406(a)(1)(C), which prohibits the furnishing of services by a party in interest to a plan, and the plan asset issue is irrelevant to this claim.

that the revenue sharing payments were unreasonable in relation to the services provided, and thus subject to the exemption in 408(b)(2), 29 U.S.C. § 1108(b)(2).

The Complaint did allege, however, that Merrill Lynch's compensation was unreasonable in relation to the services provided and put forward factual allegations regarding Merrill Lynch's receipt of undisclosed revenue sharing payments to support that allegation. See Appx. 50-51, 67-70, ¶¶ 103, 161-162, 164. This certainly suffices to satisfy the Twombly standard, particularly in light of the fact that the 408 exemptions are affirmative defenses that must be proven by the defendant. See, e.g., Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir.1996) (recognizing that 408 provides affirmative defenses to the prohibitions in 406 and must be proven by defendants); Donovan v. Cunningham, 716 F.2d 1455, 1468 (5th Cir. 1983) (same). See also FTC v. Morton Salt Co., 334 U.S. 37, 44-45 (1948) (exceptions to statutory prohibitions are generally treated as affirmative defenses that must be raised and proven by the defendant); Davis v. Indiana State Police, 541 F.3d 760, 763-64 (7th Cir.2008) (nothing in Twombly revised the allocation of proof and pleading regarding affirmative defenses).

The defendants may be able to show that the service transactions with Merrill Lynch are exempt transactions under the relevant provisions in

section 406 and 408 of ERISA if Merrill Lynch received no more than reasonable compensation for its services. Because, however, the Complaint does state that Merrill Lynch's compensation was unreasonable in relation to the services provided, it states a claim for a non-exempt prohibited transaction. Dismissal of this Count constituted error because a plaintiff is not required to plead affirmatively in his complaint matters that might be responsive to a defense even before the defense is raised. Goodman v. Praxair, Inc., 494 F.3d 458, 465-66 (4th Cir. 2007) (discussing Twombly and recognizing that it remains the case that a plaintiff is not required "to plead affirmatively in his complaint matters that might be responsive to affirmative defenses even before the affirmative defenses are raised").

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court reverse the decision of the district court.

Respectfully submitted,

CAROL A. DE DEO
Deputy Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor
Plan Benefits Security Division

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation

ROBIN SPRINGBERG PARRY
Senior Trial Attorney
U.S. Department of Labor
Room N-4611
200 Constitution Ave., N.W.
Washington, D.C. 20210
(202) 693-5614

CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(A)(7)(B)

I certify that the foregoing brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a) (7) (B) (i). The brief contains 7000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a) (7) (B) (iii). The brief was prepared by using Microsoft Office Word, 2003 edition.

_____

Robin Springberg Parry
Senior Trial Attorney

Dated: March 13, 2009

CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS AND VIRUS CHECK

I certify that the digital version and hard copies of the Secretary's Brief are identical. I further certify that a virus scan was performed on the Brief using McAfee, and that no viruses were detected.

_____

Robin Springberg Parry
Senior Trial Attorney

Dated: March 13, 2009

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2009, I caused true and correct copies of the Secretary of Labor's Amicus Curiae Brief in paper form and on a CD-Rom in the Adobe Acrobat PDF Format to be served via Federal Express to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit and the Amicus Curiae Brief in paper form to be served via Federal Express to counsel at the addresses listed below:

Clerk of the Court Michael E. Gans
Eighth Circuit Court of Appeals
Thomas F. Eagleton Courthouse
Room 24.329
111 South 10th Street
St. Louis, MO 63102

William Robb
Aleshire & Robb
2827 S. Ingram Mill Road
Suite A-102
Springfield, MO 65804

Lynn Lincoln Sarko
Derek W. Loeser
Gretchen Freeman Cappio
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-1900

Nancy Jo Morales Gonzales
400 E. Ninth Street
Kansas City, MO 64106

Eric Serron
Morgan D. Hodgson
Paul J. Ondrasik, Jr.
Steptoe & Johnson
1330 Connecticut Ave., N.W.
Washington, DC 20036-0000

Kristen A. Page
William C. Martucci
Shook & Hardy
2555 Grand Boulevard
Kansas City, MO 64108-2613

Dated: March 13, 2009 By: _____
Robin Springberg Parry