No. 07-3605, 08-1224

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DENNIS HECKER, JONNA DUANE, and JANICE RIGGINS,
Plaintiffs-Appellants

v.

DEERE & COMPANY, FIDELITY MANAGEMENT TRUST, and FIDELITY MANAGEMENT AND RESEARCH COMPANY,
Defendants-Appellees.

On Appeal By Petition From The United States District Court For The Western District Of Wisconsin (Shabaz, J.)
Civil Action No. 06-C-719-S

Amended Brief Of The Secretary Of Labor, Elaine L. Chao, As Amicus Curiae In Support Of Plaintiffs-Appellants

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STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that, contrary to the Secretary of Labor's notice-and-comment regulation, ERISA section 404(c), 29 U.S.C. § 1104(c), immunizes fiduciaries from liability for imprudence in selecting and maintaining plan investment options that allegedly charged the plan excessive fees.

2. Whether the district court erred in holding that participants may never maintain an action against fiduciaries for violating the statutory duties of prudence and loyalty by making misleading and incomplete disclosures about the fees associated with plan investment options, where such disclosures are not elsewhere specifically required under ERISA or the Secretary's regulations.

3. Whether the district court erred in dismissing the plaintiffs' fiduciary breach claims by relying solely on the plan documents, not on the alleged actions of the Fidelity entities, in reaching its conclusion on the Fidelity defendants' fiduciary status.

STATEMENT OF INTEREST

The Secretary of Labor has primary enforcement authority for Title I of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, et seq. Accordingly, the Secretary has a strong interest in the proper construction of ERISA's fiduciary provisions, which were enacted to ensure the prudent management of pension plan assets and to safeguard the security of retirement benefits.

This case concerns, in part, a 1992 Department of Labor regulation that delineates when fiduciaries are relieved from potential liability for imprudent investment choices by the participants' exercise of control over assets held in certain participant-directed individual account plans. 29 U.S.C. § 1104(c); 29 C.F.R. § 2550.404c-1. Under the

statute and the regulation, fiduciaries to such plans remain obligated to ensure that the investment options offered by the plans are selected and maintained in accordance with ERISA's fiduciary provisions, while plan participants bear responsibility for the allocation of investments between funds appropriately chosen by the plans' fiduciaries. The district court erroneously concluded that the Secretary's regulation, as interpreted by the Secretary from its inception, is unreasonable in that it continues to hold fiduciaries responsible, and potentially liable, for selecting and maintaining the particular funds offered to plan participants, and shields fiduciaries only from liability for participants' choices between the various fund options.

Relying on the current absence of a Departmental regulation on fee disclosures, the decision also erroneously holds that there is "no merit" to the contention that "disclosure not required by the statutory disclosure requirements" may nonetheless be required by the general fiduciary obligations established by ERISA. Short Appendix ("S.A.") pt. A, at 11. In the Secretary's view, the statutory duties of prudence and loyalty forbid fiduciaries from misleading plan participants about their plans and can, in certain circumstances, require fiduciaries to disclose information that participants need to know to exercise rights under the plan or protect their interests in the plan. The Secretary is currently drafting a regulation which would mandate specific participant-level disclosures about fees which is based on these broad fiduciary duties.

Finally, the district court erred to the extent it concluded that the Fidelity defendants were not fiduciaries with respect to the selection and monitoring of the plans' specific investment options based solely on its reading of plan documents that gave the plan sponsor final selection authority without considering allegations regarding the

specific conduct of the Fidelity defendants. The Secretary has a strong interest in ensuring that ERISA's functional approach to fiduciary status, under which any party who exercises control over plan assets or discretionary control over the management of a plan is a fiduciary, is properly applied.

STATEMENT OF THE CASE

I. Factual Background

Defendant Deere and Company ("Deere") sponsors and administers two 401(k) pension plans governed by ERISA – the John Deere Savings & Investment Plan ("SIP Plan"), and the John Deere Tax Deferred Savings Plan ("TDS Plan") (the "Plans") – for its employees and subsidiaries. Defendant Fidelity Management Trust Company ("Fidelity Trust"), a subsidiary of Fidelity Investments, serves as trustee to these plans, which, together, hold more than $2.5 billion in assets. Pursuant to the trust agreement, Deere agreed to limit its selection of investment options offered to the plan participants to funds offered, managed and/or advised by Defendant Fidelity Management and Research Company ("Fidelity Research"), another subsidiary of Fidelity Investments, with an exception for certain pre-existing investments and for a company stock fund. Thus, at the time the Second Amended Complaint was filed, the Plans offered 26 investment options, 23 of which were retail mutual funds operated and managed by Fidelity Research, and in addition offered a company stock fund as well as two funds similar to mutual funds that were managed directly by Fidelity Trust. The Plans also offered participants an investment option called BrokerageLink, which is overseen by Fidelity Investments and gives participants the ability to invest in over 2500 different publicly available mutual

funds offered by Fidelity Investments and other mutual fund companies. S.A. pt. A at 2-5.

Fidelity Trust is compensated in part for its services through direct payments from Deere. Defendant Fidelity Research is compensated through asset-based fees it charges for each of the funds for which it is investment advisor, ranging from an annual fee of .07% for one fund on the low end to a fee of 1.01% for another fund on the high end. Fidelity Research charges the same fees on a percentage basis to both large and small investors in the retail market who invest in these funds. Because the Deere Plans are multi-billion dollar plans, the annual dollar amounts the Plans pay in fees are substantial. Fidelity Research shares some of this fee revenue with Fidelity Trust, but the fact and the amount of this fee were not known to Deere or disclosed to the plan participants. S.A. pt. A at 4.

Dennis Hecker, Jonna Duane and Janice Riggins, each of whom participates in at least one of the Plans, brought suit in the Western District of Wisconsin, as a putative class action, under ERISA sections 502(a)(2) and 502(a)(3), 29 U.S.C. § 1132(a)(2), 1132(a)(3). They allege that the Fidelity defendants, in addition to Deere, are plan fiduciaries: Fidelity Trust in its role as trustee, and also as a functional fiduciary under ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A), because it directly manages two of the Plans' funds and plays a role in the selection of investment options the Plans make available to participants, and Fidelity Research because it "exercises discretion in the selection of the investment options the Plans make available to participants," and because it "exercises discretion over plan assets when it decides how much Revenue Sharing to

send to Fidelity affiliates like [Fidelity Trust], and thus offset the Plans' expenses." Second Am. Compl. ¶ 22.

The plaintiffs claim that Deere, as well as Fidelity Trust and Fidelity Research (the "Fidelity Defendants"), breached their fiduciary duties to the Plans in two ways: (1) by imprudently causing the Plans to pay fees that were excessive and not incurred solely for the benefit of the participants and beneficiaries; and (2) by failing to communicate honestly, clearly and accurately with participants concerning the fees and to disclose to participants and to the other fiduciaries (or discover themselves) how much the Plans paid in fees and expenses and who receives the compensation and for what services through revenue sharing. According to the complaint, the fiduciaries failed to establish, implement and follow any procedures to prudently determine the reasonableness of the fees, failed to negotiate the amount of the fees and, consequently, caused the Plans to pay excessive fees. Second Am. Compl. ¶¶ 76; 93; 95; 105(b), (f), (g), (i), (j).

II. Procedural History

Deere and the Fidelity Defendants filed motions to dismiss, which the court granted in their entirety on June 20, 2007, S.A. pt. A, affirming the dismissal on reconsideration on October 23, 2007. S.A. pt. C. The plaintiffs argued that the fiduciaries had a general duty of loyalty and prudence that mandated disclosure of revenue sharing, even when the specific statutory disclosure provisions and regulations did not specifically require it. Plaintiffs further argued that Deere affirmatively misled participants by stating in summary plan descriptions and elsewhere that the total costs of administering the Plans were paid by Deere, when in actuality the Plans effectively paid

excessive compensation to Fidelity Trust, in the form of a fixed percentage of their investments, pursuant to revenue sharing arrangements.

The court, however, concluded that no statutory or regulatory duty exists to disclose revenue sharing arrangements under the circumstances for a number of reasons. S.A. pt. A, at 8-9 . The court found that each prospectus accurately listed the total fees for each fund paid to the fund manager for its services – the same fees that the funds charged to all retail customers. Id. pt. A, at 9. Next, the court viewed the Secretary's current proposal to amend the reporting and disclosure regulations to require reporting of revenue sharing as evidence that no such requirement currently exists. Id. Finally, the court rejected the contention that the general ERISA fiduciary obligations require any disclosure other than that separately mandated by the statutory and regulatory disclosure requirements. Id. pt. A, at 11. Instead, the court concluded that where "Congress has by statute and related regulation, created detailed rules governing disclosure requirements, it would be inappropriate to ignore and augment them by using the general power to define fiduciary obligations." Id. On reconsideration, the court held that fiduciaries are entitled to rely on the regulatory requirements as the complete extent of their disclosure obligations, as long as they have not otherwise misled participants. Id. pt. C, at 5-6.

In dismissing the claims that Deere breached its duties by accepting options with unreasonably high fees, and that the Fidelity Defendants breached their duties by imprudently and disloyally advising Deere to accept funds with excessive fees, the court relied on section 404(c) of the statute, which shields fiduciaries from liability for losses in certain participant-directed accounts where participants exercise control over assets and where losses result from participants' exercise of control. 29 U.S.C. § 1104(c). The court

held that even if the fiduciaries "could have negotiated lower fees . . . but made no effort to do so," S.A. pt. A, at 4-5, and thus "failed to satisfy their fiduciary obligation to consider expenses when selecting mutual fund obligations," id. pt. A, at 16, they will be sheltered from liability for losses under section 404(c) if "[p]articipants have access to information about the Plan's investments . . . and they are furnished with risk-diversified investment options," which the court found was true in this case. Id. pt. A, at 15. In reaching this conclusion, the court relied again on its view that disclosure of revenue sharing is neither required by the regulations, nor material to participant investors assessing the investment opportunity, because it would have no impact in determining the return on an investment. Id. pt. A, at 9.

Although pointing out that "the safe harbor acts as a defense only if participants could have avoided the losses by making investment choices available to them," the court nevertheless rejected the plaintiffs' contention that "every investment option was burdened with excessive expenses and therefore participants were powerless to avoid them." S.A. pt. A, at 16. Instead, noting that in addition to the 20 primary mutual funds investments offered by Fidelity Investments, participants could choose from more than "2500 others through BrokerageLink," the court concluded that "[i]t is untenable to suggest" that all of these options had excessive fees. Id.

On reconsideration, the court again rejected the Secretary's longstanding and contemporaneous interpretation of her 404(c) regulation, that fiduciaries are not immunized against claims of losses stemming from imprudent or disloyal selection of investment options. S.A. pt. C, at 10. The court relied on the Fifth Circuit's decision in Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299, 311 (5th Cir. 2007) ("EDS"), which

rejected the Secretary's interpretation, and on the Third Circuit's decision in In re Unisys Sav. Plan Litig., 74 F.3d 420 (1996), which predates the regulation in question. Accordingly, the court broadly restated its view that 404(c) "precludes a claim based on faulty procedures in investment selection." S.A. pt. C, at 4.[1] Finally, the court held that, based on the governing trust agreements, which "unequivocally provide that defendant Deere has sole responsibility for selection of plan investment options," neither of the Fidelity Defendants "had fiduciary responsibility for making plan disclosures or selecting plan investments." S.A. pt. A, at 17; id. pt. C at 4.

SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

An order dismissing a suit for failure to state a claim under Rule 12(b)(6) is reviewed de novo, accepting as true the plaintiffs' factual allegations and drawing all inferences in their favor. May v. Sheahan, 226 F.3d 876, 882 (7th Cir. 2000). In determining whether, as a legal matter, the plaintiff has stated a claim upon which relief may be granted, this Court has noted that the "plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Killingsworth v. HSBC Bank Nevada, N.A., 507 F.3d 614, 618 (7th Cir. 2007), citing Bell Atlantic v. Twombly, 127 S. Ct. 1955, 1964-65 (2007). The factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id. at 618, citing

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[1] The court recognized that the section 404(c) "safe harbor" is an affirmative defense, which the plaintiff had no obligation to overcome in its complaint, but the court found that "satisfaction of the requirements for the safe harbor is largely discernable from the documents" referenced in the complaint." S.A. pt. C, at 8. In this regard, because five pages of the complaint were devoted to arguing that the plan did not qualify for 404(c) status based on the fiduciaries' alleged failure adequately to disclose the fee structure, the court drew the inference that, in all other respects, the plan met the 404(c) requirements. Id. pt. C, at 9.

Bell Atlantic at 1965; EEOC v. Concentra Health Servs., Inc., 496 F.3d 773, 776-77 (7th Cir. 2007); Airborne Beepers & Video, Inc. v. AT & T Mobility LLC, 499 F.3d 663 (7th Cir. 2007). But, as this Court has recognized, Bell Atlantic does "not require heightened fact pleading of specifics." Killingsworth, 507 F.3d at 618. Instead, it merely requires the complaint to contain "enough facts to state a claim to relief that is plausible on its face." Id. (citations omitted) ("we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8").

As discussed in Part I below, the statutory safe harbor in section 404(c) does not immunize the Plans' fiduciaries to the extent they acted imprudently in offering investment options with excessive fees. The Secretary's regulation interpreting section 404(c), issued after notice and comment pursuant to an express delegation of authority, reasonably interprets 404(c) as providing no defense to the imprudent selection or retention of an investment option by the fiduciary of an individual account plan that otherwise provides for participant-directed investments. The Secretary's contemporaneous interpretation to that effect is expressed in the preamble to her regulation, in briefs, and in Department of Labor Opinion Letters, and is therefore entitled to the highest level of deference under controlling Supreme Court precedent. This interpretation has effectively ensured for fourteen years that plan fiduciaries retain responsibility – and accountability – for the prudent selection and monitoring of plan investment options in accordance with ERISA's stringent fiduciary obligations. The court's decision to disregard this interpretation sharply limits the liability of fiduciaries that have imprudently selected or maintained investment options in individual account

plans, gives insufficient deference to the Secretary's determination of an issue expressly delegated to her by Congress, and threatens to deprive participants in individual account plans of adequate remedies for fiduciary misconduct. The court thus erred in dismissing the plaintiffs' claims based on its misconception about the scope of ERISA section 404(c).

Whether the complaint adequately states a claim for fiduciary breaches with regard to the allegedly inadequate and misleading disclosures is a question on which the Secretary takes no position. However, as argued in Part II below, the Secretary disagrees with the district court to the extent that it dismissed this claim based on its erroneous conclusion that, if a fiduciary satisfies ERISA's express statutory reporting and disclosure requirements, it can never have additional disclosure duties under ERISA's general fiduciary provisions. This Court and others have held that ERISA's duties of prudence and loyalty not only forbid fiduciaries from misleading plan participants, but may, under some circumstances, also require fiduciaries to disclose information that participants need to protect their interests, even if the disclosure is not specifically requested or otherwise mandated in ERISA's reporting and disclosure provisions. The district court therefore erred in holding that because the statute and regulations impose detailed reporting and disclosure requirements on plan fiduciaries, those statutory and regulatory provisions necessarily delimit the duty of fiduciaries to disclose information.

Finally, as set forth in Part III, the court below erred in holding that the Fidelity Defendants could not be fiduciaries with respect to the selection of the funds because Deere was given sole responsibility for selection of plan investment options in the plan documents. In so holding, the court disregarded the well-established rule that entities can

become fiduciaries through their actions, even in the face of express limitations on their authority in governing plan documents. To the extent that the complaint can be plausibly read to allege that the Fidelity defendants in fact selected the investment options that would be available under the plan and that Deere's role was understood to be merely a rubber-stamp of the investment selections actually made by the Fidelity defendants, this would suffice to establish the fiduciary status of the Fidelity defendants with regard to the selection of the investment options for the Plans.

ARGUMENT

I. ERISA Section 404(c) Does Not Provide a Defense to Plaintiffs' Allegations that the Defendants Imprudently and Disloyally Selected Investment Choices with Excessive Fees

ERISA section 404(c)(1)(B), 29 U.S.C. § 1104(c)(1)(B), provides that "[i]n the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) . . . no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's, or beneficiary's exercise of control."

Under the terms of the statutory provision and the Secretary's 404(c) regulation, plan fiduciaries are shielded 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. Consequently, section 404(c) does not give fiduciaries a defense to liability for their own imprudence in the selection or monitoring of investment options available under the plan. 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. It is the fiduciary's responsibility to choose investment options in a manner consistent with the core fiduciary duties of prudence and loyalty. If it has done so, section 404(c) relieves the fiduciary from responsibility for the participants' exercise of authority over their own accounts. If, however, the funds offered to the participants were imprudently selected or monitored, the fiduciary retains liability for the losses attributable to the fiduciary's own imprudence.

This straightforward interpretation of the statute is reflected in the 404(c) regulation, which provides: "If a plan participant or beneficiary of an ERISA section 404(c) plan exercises independent control over assets in his individual account in the manner described in [the regulation]," then the fiduciaries may not be held liable for any loss or fiduciary breach "that is the direct and necessary result of that participant's or beneficiary's exercise of control." 29 C.F.R. § 2550.404c-1(d)(2); see also 29 CFR § 2550.404c-1(b)(2)(i)(B)(1)(i).

The preamble to the regulation explains that:

> the act of designating investment alternatives . . . in an ERISA section 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable. All of the fiduciary provisions of ERISA remain applicable to both the initial designation of investment alternatives and investment managers and the ongoing determination that such alternatives and managers remain suitable and prudent investment alternatives for the plan.

57 Fed. Reg. 46,922 (Oct. 13, 1992). The preamble further explains, in a footnote, that the fiduciary act of making a plan investment option available is not a direct and necessary result of any participant direction:

> In this regard, the Department points out that the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan is a fiduciary function which, whether achieved through fiduciary designation or express plan language, is not a direct or necessary result of any participant direction of such plan. Thus, ... the plan fiduciary has a fiduciary obligation to prudently select ... [and] periodically evaluate the performance of [investment] vehicles to determine ... whether [they] should continue to be available as participant investment options.

Id. at n.27. In other words, although the participants in such defined contribution plans are given control over investment decisions among the options presented to them, the plan fiduciaries nevertheless retain the duty to prudently choose and monitor the investment options – a duty that includes ensuring that the fees charged to the plan by those investments are reasonable.

Despite the Secretary's regulation and clear guidance to the contrary, the court below relied on the Fifth Circuit's EDS decision to conclude that the 404(c) defense is available to plan fiduciaries that imprudently choose or maintain investment options that a reasonable fiduciary would not offer.[2] The EDS majority held that the Secretary's interpretation of the defense was not reasonable because the preamble and explanatory footnote to the regulatory text of the preamble "contradict[ed] the governing statutory language" in that, in the court's view, it provided for liability even when an individual account plan fully complied with the provisions set out in section 404(c). EDS, 476 F.3d at 311.

[2] The court below also relied on In re Unisys Sav. Plan Litig., 74 F.3d 420, 443-46 (3d Cir. 1996), which suggested that if a plan is section 404(c)-qualified, a plaintiff may not recover his investment losses, even if the investment option was imprudently selected by the fiduciary. Because the Unisys case arose before the effective date of the Secretary's 404(c) regulation, which is entitled to the highest deference, the Unisys decision should not be followed. EDS, 476 F.3d at 322 (Reavley dissenting) (5th Cir. 2007); cf. Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

Contrary to the holding of the EDS majority, the Secretary's interpretation of section 404(c) as allowing lawsuits against fiduciaries for imprudent investment choices is both consistent with the statutory provision and entirely reasonable, as a number of courts have concluded. 476 F.3d at 320-22 & n.6 (Reavley, dissenting) (collecting cases holding that the fiduciary retains the duty to prudently select and monitor investment options even if a plan qualifies as a 404(c) plan); accord DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 418 n.3 (4th Cir. 2007). The purpose of section 404(c) and the Secretary's implementing regulation is to relieve a fiduciary of liability for a participant's independent investment choices, but not from the fiduciary's imprudent decisions.

The Secretary's regulation sensibly draws the line between losses that "result from" a participant's own imprudence while exercising independent control and those that do not. If, as the result of the defendants' inclusion of imprudent investment options, the Deere Plans spent too much money on fees and expenses, the appropriate fiduciaries retain liability for the Plans' resulting losses. The plaintiffs allege that Deere did not understand the fee structure associated with the Plans' investment options, failed to implement any process for ensuring the reasonableness of the Plans' fees and expenses or to negotiate over the fees and paid considerably more than was necessary given the size of the Plan and the availability of investment alternatives. Second Am. Compl. ¶ 11. If these allegations are true, any resulting losses would not be the "direct and necessary result" of the participant's exercise of control within the meaning of the Secretary's regulation, 29 C.F.R. § 2550.404c-1(d)(2)(i), but rather the result of the fiduciaries' imprudence in determining the Plans' investment options without ensuring the reasonableness of the fees associated with those options. By disregarding the Secretary's

construction of her own regulation, the district court's decision effectively immunizes the Plans' fiduciaries from liability for their own lack of diligence.[3]

Indeed, the Secretary's interpretation of section 404(c) and of her own regulation is entitled to the highest degree of deference. The regulation was issued after notice-and-comment rulemaking pursuant to an express delegation of authority to the Secretary to determine the circumstances under which "a participant or beneficiary exercises control over the assets in his account." Moreover, the Secretary has consistently adhered to this interpretation. See, e.g., Department of Labor Opinion Letter No. 98-04A, 1998 WL 326300, at *3, n.1 (May 28, 1998); Letter from the Pension and Welfare Benefits Administration, U.S. Department of Labor, to Douglas O. Kant, 1997 WL 1824017, at *2 (Nov. 26, 1997); see also amicus briefs of the Secretary of Labor in EDS; In re Schering-Plough Corp. ERISA Litig., 420 F.3d 231 (3d Cir. 2005); Lively v. Dynegy, No. 07-2073 (7th Cir., submitted October 10, 2007); In re Enron Corp. Secs., Derivative & ERISA Litig., 284 F. Supp.2d 511 (S.D. Tex. 2003). The consistency with which the Secretary has applied the interpretation bears on the reasonableness of the Secretary's position. Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 157 (1991);

[3] Although the district court assumed that the existence of a large number of investment options in the Deere Plans demonstrated the availability of a 404(c) defense based on participant control, the assumption is unwarranted even if the prudent selection of some funds could somehow excuse imprudence as to the rest. The plaintiffs alleged that all of the selected fund options were overpriced. Second Am. Compl. ¶¶ 11, 105; Br. at 50-51. Moreover, although the district court appeared to assume that the Plans' open brokerage window (Brokerage Link) was unaffected by any fiduciary misconduct, the plaintiffs maintain that it too was overpriced and that it was similarly tainted by undisclosed revenue sharing between Fidelity Investments and the brokers. Joint Consolidated Brief and Required Short Appendix of Plaintiffs-Appellants ("Consolidated Br.") at 50 ("the funds selected through the Brokerage Link were more expensive than the 'core' funds").

Gose v. U.S. Postal Serv., 451 F.3d 831, 837 (Fed. Cir. 2006) ("Deference is particularly appropriate when the agency interpretation has been consistently applied.").

Consequently, the regulation is entitled to controlling deference under Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). See Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2349-50 (2007); United States v. Mead Corp., 533 U.S. 218, 229-30 (2001); Gose, 451 F.3d at 837 ("We defer even more broadly to an agency's interpretations of its own regulations than to its interpretation of statutes, because the agency, as the promulgator of the regulation, is particularly well suited to speak to its original intent in adopting the regulation."). The preamble language explaining the regulation and declining to shield fiduciaries from liability for losses attributable to their own imprudent selection and monitoring of investment options is likewise entitled to controlling deference, insofar as it represents the Secretary's authoritative and contemporaneous interpretation of her own regulation and was itself the product of the same notice-and-comment rulemaking. See, e.g., Geier v. Am. Honda Motor Co., 529 U.S. 861, 877-80 (2000) (deferring to agency regulation and interpretation of regulation contemporaneously set forth in preamble and consistently adhered to in later pronouncements); Am. Fed'n of Govt. Employees v. Gates, 486 F.3d 1316, 1327 (D.C. Cir. 2007) (citing Chevron in deferring to agency's reasonable interpretation as articulated in preamble); Rucker v. Lee Holding Co., 471 F.3d 6, 12 (1st Cir. 2006) (giving controlling weight to Labor Department's interpretation in preamble and amicus brief); Indus. Truck Ass'n, Inc. v. Henry, 125 F.3d 1305, 1311-12 (9th Cir. 1997); WRT Energy Corp. v. F.E.R.C., 107 F.3d 314, 320 (5th Cir. 1997); Clark v. Alexander, 85 F.3d 146, 153 (4th Cir. 1996).

In fact, the Supreme Court has stressed the strength and importance of such deference, and consistently given controlling weight to interpretations of regulations that were made much later and in much less formal settings. See Long Island Care, 127 S. Ct. at 2349 (2007) (controlling deference to agency's interpretation of regulation set out in an advisory memorandum in response to litigation); Auer v. Robbins, 519 U.S. 452, 462 (1997) (controlling deference to an interpretation made for the first time in a legal brief). Unsurprisingly, the Supreme Court and other courts likewise defer to reasonable interpretations set forth in regulatory preambles. "Given the complexity of the ERISA statutory and regulatory scheme, the Department of Labor's 'distinctive institutional capacity' is certainly 'called into play' in interpreting [the statute], particularly when, as here, the real issue is whether a plan falls within the Department's own regulatory safe harbor" and therefore "deference to agency interpretations is appropriate." Nichols v. Se. Health Plan of Alabama., Inc., 859 F. Supp. 553, 558 (S.D. Ala. 1993).

If, as alleged, the defendants violated their fiduciary duties by selecting investment options with excessive fees, section 404(c) provides no defense to their fiduciary misconduct. The district court thus erred in holding that ERISA section 404(c) immunizes fiduciaries from liability for any resulting losses as the basis for dismissing plaintiffs' claim for excessive fees.

II. Fiduciaries' Duties to Disclose Material Information Can Arise From Their Core Statutory Duties of Prudence and Loyalty, Not Just From Specific Reporting and Disclosure Requirements

To protect the interests of the participants in employee benefit plans, ERISA requires plan sponsors and administrators to disclose to the participants and their beneficiaries information describing and summarizing the benefit plan (summary plan

descriptions). 29 U.S.C. §§ 1021, 1022. Sponsors and administrators are also required to file with the Secretary and make available to participants annual reports (Form 5500) describing the benefit plans, and providing other specific information relating to those plans. 29 U.S.C. §§ 1023, 1024. See also 29 U.S.C. § 1027 (providing that any administrator or employer who is subject to the reporting and filing requirements must maintain records that document all of the information and data that is reported so that the information can be verified).

In addition to these specific reporting and disclosure requirements, ERISA section 404, 29 U.S.C. § 1104, imposes strict duties of "care, diligence, and loyalty" on plan fiduciaries that are "far more exacting than the duty imposed by tort law not to mislead a stranger." Harzewski v. Guidant, 489 F.3d 799, 805 (7th Cir. 2007), citing Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992). "As this section suggests, the duties of an ERISA fiduciary are not limited by that statute's express provisions but instead include duties derived from common law trust principles. '[R]ather than explicitly enumerat[e] all of the . . . duties [of ERISA fiduciaries], Congress invoked the common law of trusts to define the general scope of their . . . responsibility." Eddy v. Colonial Life Ins. Co., 919 F.2d 747, 750 (D.C. Cir. 1990), quoting Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985) (additional citations omitted).

The plaintiffs argue that the defendants breached their fiduciary duties both by misleading the plan participants concerning the fees that were being paid by the Plan for the Fidelity investments and by failing to disclose the amount and flow of the fees. If the complaint plausibly alleges that the disclosures were, in fact, materially misleading, it is clear that it should not be dismissed because the Supreme Court's decision in Varity v.

Howe, 516 U.S. 489, 506 (1996), made plain that "[f]iduciaries breach their duty of loyalty and care if they mislead plan participants or misrepresent the terms or administration of a plan." Anweiler v. Am. Elec. Power Serv. Corp., 3 F.3d 986, 991 (7th Cir. 1993). See also Becker v. Eastman Kodak Co., 120 F.3d 5, 9 (2d Cir. 1997); Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 381 (4th Cir. 2001).

Furthermore, although the Supreme Court in Varity specifically reserved the question "whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries," 516 U.S. at 506, many circuits, including this one, have held that, in certain circumstances, a fiduciary has an obligation to accurately convey material information to beneficiaries, including material information that the beneficiary did not specifically request. See Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 590 (7th Cir. 2000); Anweiler v. Am. Elec. Power Serv. Corp., 3 F.3d 986, 991 (7th Cir. 1993); Griggs, 237 F.3d at 380-31; Harte v. Bethlehem Steel Corp., 214 F.3d 446, 452 (3d Cir. 2000); Krohn v. Huron Mem'l Hosp., 173 F.3d 542, 547-48, 550 (6th Cir.1999); Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1403 (9th Cir.1995); Eddy, 919 F.2d at 750-52. This obligation is in accordance with the common law of trusts, under which the trustee has "a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person." The Restatement (Second) of Trusts § 173, cmt. d (1959); see Enron, 284 F. Supp.2d at 657.

In the Secretary's view, the fiduciary duties of prudence and loyalty can encompass a duty to disclose information and, to that extent, the district court erred in

rejecting "plaintiffs' contention that disclosure not required by the statutory disclosure requirements is separately required by the general ERISA fiduciary obligations," S.A. pt. A, at 11, and in holding that a plan fiduciary "is entitled to rely on the regulatory requirements to satisfy its disclosure obligations, provided it has not otherwise misled participants." Id. pt. C, at 6. Nothing in the text of the Act or the regulations governing annual reports (Forms 5500) and summary plan descriptions indicates that those requirements were intended to be the exclusive disclosure obligations under ERISA, or purport to qualify in any way the general fiduciary obligations of prudence and loyalty. Rather, "satisfaction by an employer as plan administrator of its statutory disclosure obligations under ERISA does not foreclose the possibility that the plan administrator may nonetheless breach its fiduciary duty owed [to] plan participants." In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig., 57 F.3d 1255, 1264 (3d Cir. 1995); accord Hussey v. Chase Manhattan Bank, 2005 WL 2203146, *5 (E.D. Pa. 2005). Thus, where the Act and regulations promulgated by the Department do not expressly address whether a particular type of disclosure is required or what form a disclosure should take, the general fiduciary duty of prudence and loyalty applies and may, depending on the facts and circumstances of the case, require that a disclosure be made.

This is not to say, however, that the Secretary agrees with plaintiffs' more sweeping suggestions that the fiduciaries of participant-directed plans must always, or even usually, disclose revenue sharing arrangements as a matter of general fiduciary principles. Indeed, we are skeptical that, absent any misrepresentations, ERISA's duties of prudence and loyalty would have required disclosure to plan participants of revenue sharing among Fidelity affiliates. Rather, the Secretary's concern here is primarily to

ensure that this Court does not adopt the trial court's broad rejection of any possible fiduciary duty to disclose.

III. The District Court Erred in Holding that the Fidelity Defendants Were Not Fiduciaries With Respect to the Selection of Funds Based Solely on the Plan Documents Without Regard to the Fidelity Defendants' Actions

In rejecting the asserted fiduciary status of the Fidelity Defendants, the court held that "neither had fiduciary responsibility for making plan disclosures or selecting plan investments." S.A. pt. A, at 17. The sole basis given by the court for its conclusion was that the governing trust agreement gave Deere sole authority to select investment options, and it therefore was the only entity with fiduciary duties in this regard. Id. ERISA, however, "provides that not only the persons named as fiduciaries by a benefit plan, see 29 U.S.C. § 1102(a), but also anyone else who exercises discretionary control or authority over the plan's management, administration, or assets, see 29 U.S.C. § 1002(21)(A), is an ERISA 'fiduciary.'" Mertens v. Hewitt Assocs., 508 U.S. 248, 251 (1993). Thus, ERISA expands the definition of fiduciary beyond the common law's formalistic approach to encompass all those who function as fiduciaries. To this end, section 3(21)(A), 29 U.S.C. § 1002(21)(A) provides:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Many courts, including the Seventh Circuit, have recognized the broad sweep of this functional definition. Sladek v. Bell Sys. Mgmt. Pension Plan, 880 F.2d 972, 976 (7th Cir. 1989); see also Beddall v. State Street Bank & Trust Co., 137 F.3d 12, 18 (1st

Cir. 1998) ("the statute also extends fiduciary liability to functional fiduciaries"); Olsen v. E.F. Hutton & Co., 957 F.2d 622, 625 (8th Cir. 1992); Acosta v. Pac. Enters., 950 F.2d 611, 618 (9th Cir. 1991) ("a person's actions, not the official designation of his role, determine whether he enjoys fiduciary status"); Brock v. Hendershott, 840 F.2d 339, 342 (6th Cir. 1988); Blatt v. Marshall & Lassman, 812 F.2d 810, 812 (2d Cir. 1987); Donovan v. Mercer, 747 F.2d 304, 308 (5th Cir. 1984); Eaves v. Penn, 587 F.2d 453, 458-59 (10th Cir. 1978). Under this definition, persons who carry out the basic fiduciary functions relating to asset management, plan administration, and provision of investment advice for a fee are routinely held to be fiduciaries. See, e.g., Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209 (2d Cir. 1987); Jones v. Am. Gen. Life & Acc. Ins. Co., 370 F.3d 1065, 1072 (11th Cir. 2004).

The complaint asserts that Fidelity Trust had the requisite fiduciary status because it is the trustee, because it directly manages two of the Plans' funds (although not any of the 23 at issue), and because it "played a role" in the selection of the investment options the Plans make available to participants. Second Am. Compl. ¶¶ 20-21. Similarly, the complaint alleges that Fidelity Research is a fiduciary because it "exercises discretion in the selection of the investment options the Plans make available to the participants," and because it "exercises discretion over plan assets when it decides how much Revenue Sharing to send to Fidelity affiliates like [Fidelity Trust], and thus offset the Plans' expenses." Second Am. Compl. ¶ 22. The Secretary does not believe that the last of these allegations, even if proven, would establish the fiduciary status of Fidelity Research, because the sums paid do not constitute plan assets, 29 U.S.C. § 1101(b)(1); nor does she think that Fidelity Research (or Fidelity Trust) became a fiduciary merely by

virtue of developing and presenting a list of investment options to Deere for its selection as a fiduciary. However, if the complaint can plausibly be read as alleging that Fidelity in fact made the selection regarding investment options that would be available under the plan or otherwise exercised discretionary authority in respect to the management or administration of the plan, or meaningful control over its assets, this would be a sufficient allegation for pleading purposes that the Fidelity defendants are fiduciaries within the meaning of ERISA section 3(21)(A). See Torres v. Bella Vista Hosp., Inc., 523 F. Supp.2d 123, 133, 136 (D.P.R. 2007) (under Bell Atlantic standard, plaintiffs who pled that service provider actually managed plan operation and exercised discretionary control and authority pled sufficient allegations to raise their right to relief above the speculative level; liability extends not only to those named in plan documents as fiduciaries).

CONCLUSION

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

Respectfully submitted,

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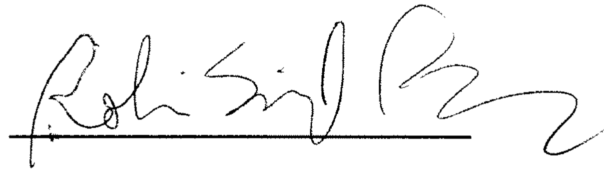

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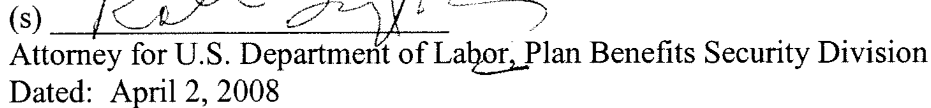

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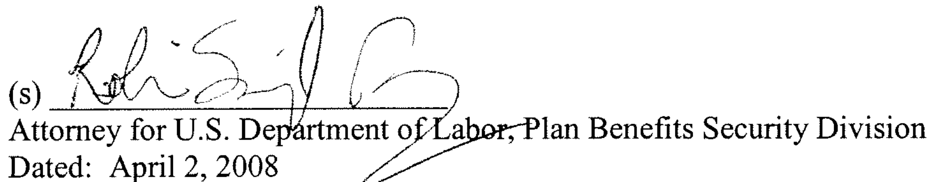

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I hereby certify that on April 2, 2008, two copies of the foregoing Amended Brief for the Secretary of Labor as Amicus Curiae were served using Federal Express, postage prepaid, and by courier, upon the following:

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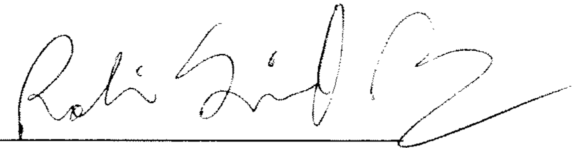

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