No. 09-4081

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Brian LOOMIS, et al.,
Plaintiffs-Appellants
v.

EXELON CORPORATION, et al.,
Defendants-Appellees.

On Appeal by Petition from the United States District Court For the
Northern District of Illinois (Darrah, J.)
Civil Action No. 06-cv-4900

Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Plaintiffs-Appellants

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Herman v. NationsBank Trust Co.,
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Homeyer v. Stanley Tulchin Assoc.,
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U.S. Department of Labor Documents:

Pension and Welfare Benefits Administration, U.S.
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Other:

Estelle James, Gary Ferrier, James Smalhout, and Dimitri Vittas, Mutual Funds and Institutional Investments: *What is the Most Efficient Way to Set Up Individual Accounts in a Social Security System?*. National Bureau of Economic Research ("NBER") Working Paper 7049, p. 16, available at http://www.nber.org/papers/w7049..18

Estelle James, Gary Ferrier, James Smalhout, and Dimitri Vittas, Administrative Costs and the Organization of Individual Retirement Account Systems: *A Comparative Perspectiv,* p. 4 (2005), available at http://www.nabe.com/ps2000/jamescst.pdf 19

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STATEMENT OF THE ISSUES

Plaintiffs, who are participants in individual-account plans under the Employee Retirement Income Security Act, claim that the plan fiduciaries caused them to be charged fees that are excessive in relation to the services provided for the investment funds offered in their plans. The question presented is:

Whether the district court erred in dismissing participants' fiduciary-breach claims on the pleadings for failure to state a claim, based primarily on the court's reading of Hecker v. Deere.

STATEMENT OF INTEREST

The Secretary of Labor ("Secretary") has primary enforcement and interpretive authority for Title I of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq. See 29 U.S.C. §§ 1002(13), 1136(b); Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 687-691 (7th Cir. 1986) (en banc). In both her own cases and in suits brought by plan participants, the Secretary has a strong interest in ensuring that courts do not erect unnecessarily high pleading standards for claims brought to enforce ERISA's fiduciary provisions, which were enacted to ensure the prudent management of pension plans and to safeguard their assets.[1]

Rule 29(a) of the Federal Rules of Appellate Procedure grants the Secretary authority to file this brief.

STATEMENT OF THE CASE

I. Factual Background

Defendant Exelon Corp. ("Exelon") provides electric and gas utility services to consumers in Illinois and Pennsylvania. Doc. 128 (App. 13 ¶ 8). Exelon sponsors and administers for its employees the Exelon Corporation Employee Savings Plan (the "Plan"), which is a defined-contribution (individual account) pension plan governed by ERISA. Id. (App. 12-13, 19 ¶¶1, 8, 22). The participants' accounts are calculated based on the participants' contributions, Exelon's matching and discretionary contributions, and the Plan's earnings net of fees. Id. (App. 19 ¶24). The Plan offers around two dozen stock funds in which participants can place their investments. Id. (App. 20. ¶26). Each fund charges various

[1] For the purposes of this brief, the Secretary assumes the truth of the plaintiffs' allegations but takes no position on the plaintiffs' 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.

transactional and administrative fees (collectively, "investment fees") for various services associated with its management. Id. (App. 20 ¶27).

Plaintiffs Brian Loomis, Debra Cogswell, Ron Welte and Wayne Johnson are employees of Exelon and participants in the Plan. Id. (App. 13 ¶¶3-7). Claiming that the defendants were all fiduciaries of the Plan, they brought this putative class action on behalf of the Plan against Exelon, the Plan's administrator, the Exelon Board of Directors' Compensation Committee, the Employee Savings Plan Investment Committee, the Exelon Board's Risk Oversight Committee, and members of the Compensation and Risk Oversight Committees. Id. (App. 13-15 ¶¶8-12).

According to the amended complaint, a substantial majority of the investment options the fiduciaries included in the Plan paid retail-level investment fees, when the Plan, which at times exceeded $1 billion in assets, could have selected investment options designed for large institutional investors. Id. (App. 20 ¶30). The complaint alleges that the fiduciaries imprudently caused the Plan participants to pay excessive fees in relation to the services received, when compared to other plans or institutional investors of comparable size and bargaining power. Id. (App. 22-24, 27-29, ¶¶39, 44).

Counts I and II seek to recover losses on behalf of the Plan, pursuant to ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2). In Count I, the plaintiffs claim that the fiduciaries breached their duties of prudence and loyalty by failing "to properly monitor, benchmark and/or compare the costs for investment management services that were paid and/or made available to other 401(k) plans of similar size in terms of participant numbers, assets, and features," and "to ensure that the Plan, an institutional-sized investor, did not pay for investment management services at individual investor/retail rates without receiving any additional services beyond that received by non-institutional investors." Id. (App. 23 ¶39).[2] In Count II, the plaintiffs claim that the fiduciaries similarly failed "to ensure that the Plan, an institutional-sized investor, did not pay for administrative services at individual investor/retail rates without receiving any additional services beyond that received by non-institutional investors; [and to] ensure that administrative fees assessed against the Plan did not increase as the assets in the Plan increased [substantially from 1995 to 2009] without a commensurate increase in the level of these services being provided," Id. (App 28 ¶44).

[2] Large institutional investors typically receive discounted rates on fees, often referred to as "wholesale" fees. Non-discounted fees paid by individual investors are often referred to as "retail" fees. See infra, at pp. 22-25 (citing studies).

II. Procedural History and Decision Below

The original complaint in this case was similar to the one that was dismissed for failure to state a claim in Hecker v. Deere, 556 F.3d 575 (7th Cir.), modified by 569 F.3d. 708 (June 24, 2009) (denying rehearing and rehearing en banc, but clarifying its earlier decision). Following the Hecker rehearing decision, the district court in this case permitted the plaintiffs to amend the complaint, which they did as described above.

The defendants filed a motion to dismiss the amended complaint for failure to state properly pleaded ERISA claims. The court found the case to be governed by the Hecker decision, and dismissed it in its entirety. Doc. 144 (App. 1, 5) (Dec. 9, 2009). The court determined that Hecker's admonition (556 F.3d at 586) against requiring fiduciaries "to scour the market to find and offer the cheapest possible fund" applies equally to these claims, because the fee ratios here are similar to, and within the same range as, the fee ratios at issue in Hecker. Doc. 144 (App. 5-6, 8). In the court's view, Hecker established that a failure to obtain lower wholesale fees is not sufficient to state a claim insofar as retail fees are not per se imprudent.[3] Id.

[3] The court noted that this Plan, unlike the Plan in Hecker, offered wholesale funds (with their presumably lower fees) as well as retail funds. Doc. 144 (App. 8). For the 2006 Plan year, the wholesale-level investments made up approximately 30% of the Plan's investments and company stock made up approximately 10%, whereas the retail-level funds amounted to

(App. 7-8). The court also rejected the plaintiffs' claim that they failed to receive additional services, crediting the defendants' assertion in support of its motion to dismiss on the pleadings that additional services were provided to Plan participants that were not provided to the general public. Id. (App. 8).

SUMMARY OF ARGUMENT

I. ERISA imposes rigorous duties on plan fiduciaries in order to serve the statute's purpose of protecting the financial interests of plan participants and beneficiaries. Plan participants play a significant part in enforcing ERISA, and one stated purpose of the statute is to provide them with ready access to the courts. Enacting unduly high pleading standards in fiduciary breach cases thwarts that purpose.

This Circuit has repeatedly held that recent Supreme Court cases do not change the fact that the federal civil-court system operates on a notice pleading standard. To state a claim upon which relief may be granted, the complaint need only provide a short and plain statement of the claim, sufficient to provide the defendant with fair notice of the claim and the basis for relief. A plaintiff must provide more than mere conclusions or formulaic

approximately 58% (with the other 2% consisting chiefly of participant loans). 2006 Form 5500 for the Plan. See n. 10 infra.

recitation of the elements of a cause of action, but need not plead detailed factual allegations.

The plaintiffs' amended complaint meets this standard. It alleges that the Plan fiduciaries breached their statutory duties by imprudently selecting Plan investment options that were unreasonably expensive for the plan's size and bargaining power and did not provide services commensurate with their high fees. Such conduct, if true, would constitute a breach of fiduciary duty under ERISA and would make the responsible fiduciaries liable for any resulting losses. These allegations suffice to put the defendants on notice of the claims against them.

Moreover, it was not appropriate for the district court to resolve factual issues, such as whether the plaintiffs received additional services for the fees they paid, at this stage in favor of the defendants, particularly as well-pleaded facts are to be construed in the non-moving party's favor. As the court recognized, whether a complaint withstands a motion to dismiss is context-specific. This is particularly true in cases alleging a prudence violation, as ERISA's prudence standard, like the trust law standard it embodies, 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." 29 U.S.C. § 1104(a)(1)(B). The context here includes the Secretary's previous pronouncements that fiduciaries must consider fees and their effect on investment return for the participants, and recognizing that institutional funds typically charge less and can achieve substantial savings for large plans. Economic research and academic literature support this view, adding to the plausibility of the plaintiffs' assertion that, if the facts are as alleged, the fiduciaries were imprudent in failing to take advantage of economies of scale to protect participants from overpaying.

II.   The district court erred in holding that dismissal of the claims in this case was required by the decision in Hecker v. Deere. The participants' amended complaint distinguished it from the one in Hecker by specifically alleging that the challenged fees were too high, not just in the abstract, but in relation to the services received. The Hecker rehearing opinion clarifying its original opinion repeatedly stated that it was limited to its facts. By reading Hecker too broadly, the court failed to consider whether the facts alleged in this case, which must be considered true at the pleadings stage, plausibly describe fiduciary violations.

ARGUMENT

I. The participants' allegations that the fiduciaries imprudently and disloyally selected investment choices charging fees that were excessive in relation to the services provided are sufficient, under applicable pleading standards, to state a claim under ERISA for fiduciary breach

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 legislative history "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). 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." Id. at 142-43.

To this end, ERISA imposes a number of stringent duties on plan fiduciaries, including a duty of loyalty, a duty to act for the exclusive purposes of providing plan benefits, and a duty of care grounded in traditional trust law's prudent-man standard. 29 U.S.C. § 1104(a)(1)(A), (B). Although the Secretary has authority to enforce these standards, participants and beneficiaries play a major role in policing the statute. Not only does ERISA give participants standing to bring private actions on behalf of plans to remedy losses plans suffer as a result of fiduciary breaches and to obtain appropriate equitable relief for statutory violations, see 29 U.S.C. §§ 1132(a)(2), (3), but a stated purpose of the Act is to provide them with "ready access to the Federal courts." Id. § 1001(b). That purpose is impaired if the pleading standard in ERISA fiduciary-breach cases is set so high that the amended complaint in this case, which plausibly alleges violations of these fiduciary duties, does not suffice.

A. The Amended Complaint Satisfies Applicable Pleading Standards Under Federal Rule Of Civil Procedure 8(a) And Applicable Supreme Court And Circuit Precedent

1. Federal Rule of Civil Procedure 8(a) requires only 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 is "sufficient to provide the defendant with fair notice of the claim and its basis." Tamayo v. Blagojevich, 526 F.3d 1074, 1081 (7th Cir. 2008) (citing Rule 8(a)(2) and Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007)). When evaluating the sufficiency of a complaint, the court construes it in the light most favorable to the non-moving party, accepting as true the plaintiffs' well-pleaded factual allegations, and drawing all inferences in their favor.

Reger Development, LLC v. National City Bank, 2010 WL 174083, *2 (7th Cir. 2010). Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. at *3 (quoting Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009)). And a claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Bissessur v. Indiana University Bd. of Trustees, 581 F.3d 599, 602 (7th Cir. 2009) (citing Iqbal, 129 S.Ct. at 1949). Conversely, "some factual allegations will be so sketchy or implausible that they fail to provide sufficient notice to defendants of the plaintiff's claim." Brooks v. Ross, 578 F.3d 574, 581 (7th Cir. 2009).

After analyzing Twombly and Iqbal, this Circuit has thus held that "[o]ur system operates on a notice pleading standard; Twombly and its progeny do not change this fact." Bissessur, 581 F.3d at 603. Indeed, as the Court observed, id. at 602-3 (citation omitted), under Twombly's "reasonable inference" standard, "in examining the facts and matching them up with the stated legal claims, we give 'the plaintiff the benefit of imagination, so long as the hypotheses are consistent with the complaint.'" See Tamayo, 526 F.3d at 1081; Schaaf v. Residential Funding Corp., 517 F.3d 544, 549 (8th Cir. 2008).

With the possible exception of Hecker, discussed below, therefore, this Circuit has consistently held that a plaintiff need not plead detailed factual allegations to survive a motion to dismiss so long as the complaint does not "merely parrot the statutory language of the claims that they are pleading . . . rather than providing some specific facts to ground those legal claims," Brooks, 578 F.3d at 581, and provides more than "mere labels and conclusions" or "formulaic recitation of the elements of a cause of action." Bissessur, 581 F.3d at 602 (citing Twombly, 550 U.S. at 555-60). See also Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam) ("[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests'" (citing Twombly, 550 U.S. at 555); Twombly, 550 U.S. at 555-56 (plausibility does not impose a "probability requirement at the pleading stage"; courts must continue to operate "on the assumption that all the allegations in the complaint are true (even if doubtful)").

2. Accordingly, fair notice of the grounds for a claim is still the measure by which the adequacy of a pleading is judged. Under this permissive standard, the district court erred in dismissing the participants' fiduciary-breach claims on the ground that the plaintiffs did not sufficiently allege specific facts regarding the fiduciaries' conduct.

The plaintiffs allege in their amended complaint that defendants are plan fiduciaries and that they breached their fiduciary duties of prudence and loyalty because a substantial majority of the investment options offered by the Plan charged fees that are excessive compared to the services provided. In particular, the plaintiffs allege that most of the investment options charged retail-level fees instead of wholesale-level fees, which the Plan could have secured given its large asset size, and that the Plan did not receive any services in exchange for the fees beyond those provided to retail customers.

In an ERISA case alleging excessive fees in terms very similar to the allegations at issue here, the Eighth Circuit, reversing the district court's grant of a motion to dismiss, recently recognized the presumptive inappropriateness of dismissing a prudence claim at the pleadings stage. In Braden v. Wal-Mart, 588 F.3d 585, 595 (8th Cir. 2009), the court held that the plaintiff met the pleading requirements of Twombly and Iqbal, and was not required to plead additional facts explaining precisely how the fiduciaries' conduct was unlawful. The court noted that the statute intends to prevent through private litigation the mismanagement of plan assets, and furthermore that, before discovery, plan participants generally lack inside information needed to describe their ERISA claims in detail. "Thus, while a plaintiff must offer sufficient factual allegations to show that he or she is not merely engaged in a fishing expedition or strike suit, we must also take account of their limited access to crucial information. 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. at 597-98.[4]

Considering the fact-intensive nature of most ERISA fiduciary-breach claims, and the near monopoly defendants often have over many of the determinative facts, the statutory scheme militates against dismissal at the pleadings stage in the ordinary fiduciary-breach case. See, e.g., Herman v. NationsBank Trust Co., 126 F.3d 1354, 1369 (11th Cir. 1997); Harley v. Minnesota Mining & Mfg. Co., 42 F. Supp.2d 898, 907 (D.Minn. 1999), aff'd, 284 F.3d 901 (8th Cir. 2002) ("[t]ypically, whether a fiduciary acted prudently - or in other words, as a reasonably prudent fiduciary - is a question of fact"); Boeckman v. A.G. Edwards, Inc., 2007 WL 4225740, *4 (S.D. Ill. 2007); Anderson v. DePhillips, 2004 WL 816464, *9 (N.D. Ill. 2004).

[4] The court specifically held in that case that the allegations of excessive fees did not need to spell out the process by which the plan was managed, because it was reasonable to infer from what was alleged that the process was flawed. Id. at 596. The court further held that the plaintiff was not required to plead facts tending to rebut all possible lawful explanations for defendants' conduct. Id.

The district court here erred in holding that the amended complaint fell short of meeting the notice-pleading standard, since it goes well beyond "merely parrot[ing] the statutory language of the claims that they are pleading." Brooks, 578 F.3d at 581. Rather, as in Braden, the plaintiffs allege facts that put the defendants on notice of the grounds for the claim and that are "enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555. Moreover, the alleged facts – that the fees were excessive when measured against comparable options available in the marketplace to similarly large plans, that the plan's size gave it leverage to obtain lower fees or higher services, that the fiduciaries failed to use that leverage, that the participants did not receive a higher level of service commensurate with the level of their fees, and that the defendants failed to engage in a prudent process to select and manage these investment options – are no less detailed than those pleaded in the Braden complaint. See Braden, 588 F.3d at 595-96 (plaintiff was not required to describe directly the ways in which fiduciaries breached duty).

Nor was it appropriate at the pleadings stage for the district court to resolve factual issues in favor of defendants. At this stage, the court must construe the sufficiency of a complaint in the light most favorable to the non-moving party, accepting as true the plaintiffs' well-pleaded factual allegations, and drawing all inferences in their favor. Reger Development, LLC, 2010 WL 174083, at *2; see Homeyer v. Stanley Tulchin Assoc., 91 F.3d 959, 962-63 (7th Cir. 1996) (factual determinations should be considered no earlier than summary judgment so the evidence can be weighed). The court here did the opposite, resolving factual issues and drawing inferences in the defendants' favor when it noted that "Defendants set forth a list of additional services provided to Plan participants that were not available to the general public." Doc. 144 (App. 8). Whether those services were in fact not available to the general public and, if so, whether those extra services were reasonably worth the above-institutional-level fees are factual issues that are matters for discovery and either summary judgment or trial. On this and other unresolved factual issues, the plaintiffs are not required in their pleadings to provide additional factual support. Bissessur, 581 F.3d at 602-3. Given the fact-intensive nature of a prudence inquiry, the district court erred in ruling that these plaintiffs could not even try to prove that these fiduciaries were imprudent for causing the plaintiffs to pay excessive fees.

3. As the district court correctly recognized (but did not apply), "determining whether a complaint should survive a motion to dismiss is a 'context specific task that requires the reviewing court to draw on its judicial

experience and common sense.'" Doc. 144 (App. 3-4) (citing Iqbal, 129 S. Ct. at 1950). The statute's specific frame of reference for determining imprudence is whether the fiduciary's conduct comports with what traditional trust law expects a "prudent man acting in a like capacity, and familiar with such matters" to do "in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B); see Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989); cf. Restatement of Trusts, §90, General Standard of Prudent Investment, Comment f(1) ("Trustees, like other prudent investors, prefer (and, as 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").

Of particular significance in the fee context, the Secretary's previous pronouncements support the plausibility of the participants' assertion that the fiduciaries were imprudent if, as they allege, they failed to consider lower-cost institutional funds or use their institutional leverage to secure lower fees or greater services for the various investment fees the Plan participants are charged by their retail investment funds. See, e.g., 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) ("plan fiduciaries must consider, among other things, costs or fees associated with the investments, and their effect on investment returns to the plan participants and beneficiaries"); Study of 401(k) Plan Fees & Expenses, Pension Welfare Benefit Administration (Apr. 13, 1998) ("institutional mutual funds typically charge lower expense ratios than do the retail funds with similar holdings and risk characteristics" and can result in substantial savings for "very large plans," those with assets over $500 million).

Other economic research and academic literature support the viewpoint that fee levels are an important component in the consideration of overall plan performance. See Estelle James, Gary Ferrier, James Smalhout, and Dimitri Vittas, Mutual Funds and Institutional Investments: What is the Most Efficient Way to Set Up Individual Accounts in a Social Security System?," National Bureau of Economic Research ("NBER") Working Paper 7049, p. 16[5]; see also Sarah Holden and Michael Hadley, Investment Company Institute Research Fundamentals, The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2007, Vol. 17, No. 5, 6-12 (Dec. 2008)[6] (401(k) plan participants tend to be invested in low-cost, "no load" funds); Hewitt Associates, Be a Responsible Fiduciary: Ask the Right

[5] Available at http://www.nber.org/papers/w7049.

[6] Available at http://www.icief.org/pdf/fm-v18n6.pdf

Questions About 401(k) Plan Fees, (Oct. 2008)[7]; Hewitt Associates, Building the Ideal 401(k) Plan: Providing Optimal Accumulation and Effective Distribution, (Oct. 2008)[8].

Under common circumstances, an annual fee of 1% can reduce retirement accumulations by 20% for a lifetime contributor. Estelle James, James Smalhout, and Dimitri Vittas, Development Research Group, the World Bank, Administrative Costs and the Organization of Individual Retirement Account Systems: A Comparative Perspective, p. 4 (2005)[9] ("[t]he institutional market, which caters to large investors, benefits from scale economies without large marketing costs, hence its total costs are much lower"). As researchers have found, "[t]he same assets can be amassed with much lower distribution and record-keeping expenses from large institutions than from small individuals." Mutual Funds and Institutional Investments, p.16. One author notes that plan fiduciaries are putting pressure on the price structure of mutual funds, saying that their

[7] Available at http://www.hewittassociates.com/_MetaBasicCMAssetCache_/Assets/Articles/2008/Hewitt_POV_401K_1_online.pdf

[8] Available at http://www.hewittassociates.com/_MetaBasicCMAssetCache_/Assets/Articles/2009/hewitt_pov_ideal401k_0109.pdf.

[9] Available at http://www.nabe.com/ps2000/jamescst.pdf

plans deserve the lower prices they pay in the institutional market to reflect the economics of scale they bring, and that they deserve a significant price break on the distribution fees because they are bringing thousands of investors to the fund at once. Robert C. Pozen, The Mutual Fund Business 359 (2nd ed. 2002).

In this case, the Exelon Plan is not only a very large plan in terms of its aggregate assets, but also very large in terms of average account size. The Plan's 2006 Form 5500 (an annual report publicly filed with the Department of Labor) reports that the Plan held over $3.5 billion in plan assets.[10] According to all 2006 Forms 5500 filed with the Department, the average account balance for all 401(k) plans is $44,361; the average account balance for all 401(k) plans with more than 100 participants is $40,247; and

[10] The 5500 data can be obtained through requests to EBSA's Office of Participant Assistance; see http://www.dol.gov/ebsa/publications/form5500dataresearch.html#form5500pensionresearchfiles. It is proper for courts to take judicial notice of Forms 5500, which are public disclosure documents filed with a federal agency. See Knight v. Standard Ins. Co., 2008 WL 343852, *2 (E.D. Cal. 2008) (taking judicial notice of Form 5500); Janpol v. C.I.R., 102 T.C. 499, 502 (1994). Cf. Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1017-18 (5th Cir. 1996) (on motion to dismiss, proper to take judicial notice of public documents filed with SEC); Jackson v. City of Columbus, 194 F.3d 737, 745 (6th Cir. 1999); Kramer v. Time Warner Inc., 937 F.2d 767, 773-74 (2d Cir.1991); Rea v. Hershey Co. 2005 Enhanced Mut. Separation Plan, 2007 WL 776882, *6 (M.D. Pa. 2007). Judicial notice is proper at any stage of the proceeding. Lovelace, 78 F.3d 1018 (citing Fed. R. Evid. 201(f)).

the average account balance for all 401(k) plans with more than 20,000 participants is $60,547. Large account balances lead to economies of scale with respect to recordkeeping, as it essentially costs no more to keep records for a large account than for a small one, so a plan with large account balances should pay proportionately less than one with small balances. See Mutual Funds and Institutional Investments, p.13 (the expense ratio falls if average assets per shareholder grow, because "funds incur a fixed cost per account for record-keeping and shareholder service, so the larger each account the smaller this cost will be, as a percentage of assets."); The Economics of Providing 401(k) Plans, p. 10 (Nov. 2006) (large average account balances are economies of scale that help to reduce the fees and expenses of the funds offered in these plans).

The relevant literature also supports the plausibility of the assertion that the fiduciaries for the Exelon Plan, a large institutional investor, could have taken advantage of its size to secure lower fees (or greater services) for the participants. See Mutual Funds and Institutional Investments, p.12 (expense ratios fall when total assets in fund increase). "The size of the plan in terms of assets and participants and the average account balance are key factors in the pricing of fund services." The Economics of Providing 401(k) Plans, p.17 n.49; see also Deloitte and The Investment Company Institute, Defined Contribution / 401(k) Fee Study, Spring 2009, p. 7[11] (higher number of participants and higher average account balance tend to be associated with lower fees as a percentage of assets).

This Court can take judicial notice of this literature, not to establish that the participants' allegations are necessarily correct, but rather as demonstrating that their allegations are plausible and cannot be resolved at the motion to dismiss stage. Whether particular fiduciaries acted imprudently depends on the facts and circumstances of the particular case, and cannot be determined based on a mere paper review of the pleadings. But that is a strong reason not to rule on the pleadings. It was therefore error for the district court to decide at this stage that under any plausible inference based on the facts as alleged, the defendants could not possibly have acted imprudently when they selected investment options charging retail-level fees and providing retail-level services without, according to the allegations, attempting to obtain the fees (or services) that plans of comparable size are expected to secure in the institutional-fund market. Under any reasonable application of the pleadings standards, under which the facts as pleaded are assumed to be true (even if doubtful), the plaintiffs have met the requirements for their fiduciary breach claims to go forward for a decision

[11] Available at http://www.ici.org/pdf/rpt_09_dc_401k_fee_study.pdf.

on the merits after a full opportunity, through discovery, to further establish the facts.

B. The Court Misread Hecker v. Deere When It Held That Hecker Required Dismissal Of The Plaintiffs' Case.

The district court erred in holding that dismissal of the claims in this case was, independent of the general pleading standards discussed above, dictated by the decision in Hecker. Hecker is not controlling because the participants' amended complaint distinguishes this case from Hecker in key part. Notably, given the opportunity to clarify its opinion in response to the petition for rehearing, the Hecker panel went out of its way to explain that the decision is narrowly tailored to its facts. Hecker, 569 F.3d. at 711 ("the [original] opinion was tethered closely to the facts before the court").

The district court treated the "tethered closely" language as only referring to the Hecker plaintiffs' claims that Deere was not entitled to the "safe harbor" defense under ERISA section 404(c), 29 U.S.C. § 1104(c), which, as the court pointed out, is "not at issue here." Doc. 144 (App. 6) ("that quote referred to the Seventh Circuit's alternate holding regarding ERISA's 404(c) safe-harbor defense"). The court, however, was mistaken in reading it this way. The "tethered closely" quote says that "the opinion," not the specific holding, is tethered closely to the facts. And the opinion elsewhere states:

- "The panel's opinion, however, stands for no such broad proposition. It was limited to the complaint before the court." (569 F.3d at 710)

- "The Secretary also fears that our opinion could be read as a sweeping statement that any Plan fiduciary can insulate itself from liability." (Id. at 711)

- "The panel's opinion, however, was not intended to give a green light to such 'obvious, even reckless, imprudence in the selection of investments' (as the Secretary puts it in her brief). Instead, the opinion was tethered closely to the facts before the court." (Id.)

- "The opinion discusses a number of reasons why that particular assertion is not enough, in the context of these Plans, to state a claim." (Id.) (emphasis added)

- "[T]his complaint, alleging that Deere chose this package of funds to offer for its 401(k) Plan participants, with this much variety and this much variation in associated fees, failed to state a claim upon which relief can be granted." (Id.) (emphasis in original)

The last quote above is from a section that is not discussing the section 404(c) safe-harbor defense, but rather is discussing the excessive-fee claim at issue here.

Thus, throughout the rehearing opinion, the Court emphasized that its dismissal of the Hecker complaint was not meant to give plan fiduciaries carte blanche to select imprudent investment options so long as participants are also given some prudent investment choices. It also clarified that "the complaint is silent about the services that Deere participants received . . . it would be quite another [thing] if, for example, they received extra investment advice from someone dedicated to the Deere accounts, or if they received other extra services." Id. at 711.

Hecker thus considered the complaint deficient principally because the allegations that the fiduciaries offered only investments charging retail-level fees did not include allegations that they only received retail-level services, and therefore did not expressly allege that the price they paid as a large institutional investor was excessive in relation to the services received. By continually returning to the point that the panel's opinion was limited to the particular facts as alleged, Hecker clearly and deliberately left the door open for other cases like this one in which the allegations about fees are tied directly to allegations about services.

The district court appears to view Hecker as holding broadly that so long as there are no allegations that underlying investments themselves are unsound or reckless, fees within the range paid in Hecker are per se reasonable. However, Hecker did not hold as a matter of law that there cannot be a claim for imprudence in paying too much for a fund in certain cases. Specifically, the holding that fiduciaries are not duty-bound to "scour the market" to find the lowest possible fees should not be read to mean they are free to pay any fee the market bears, without making a diligent effort to assure that they are getting reasonable services for the fees comparable to what prudently managed plans of similar size and type plans also pay. Given the significant impact fee levels have on the net return of investment over time, plan fiduciaries' duty to select prudent investment options necessarily includes consideration of the reasonableness of the fees charged and the services received in payment of those fees.

The Hecker holding is thus not a substitute for the "facts and circumstances" analysis appropriate to fiduciary-breach cases. Certainly, Hecker cannot reasonably be read as establishing, as a legal proposition, that the particular range of fees for the plans' investment options in that case (.07% to just over 1%) was *per se* prudent, without regard to the particular facts, circumstances, and context of the particular case before the court.[12]

[12] It is one thing, for example, if virtually all of the funds were at the lower end of the cited range of fees (.03% in this case, according to the district court). It is quite another, however, if most of the funds on the plan's investment menu were concentrated at the high end of the range (.96%), or if there were equivalent but cheaper funds available at every point in the continuum of fees. In a recent article in the New York Times, John Bogle, the founder of the Vanguard Group, is quoted as stating that charges levied on mutual fund investors are much higher than those that the identical firms charge pension customers: "The three largest money managers, Mr. Bogle pointed out, charged an average fee rate of 0.08 percent to pension customers. This compares with 0.61 percent charged to fund shareholders." Gretchen Morgenson, He Doesn't Let Money Managers Off the Hook, N.Y. Times, April 11, 2009, at 2009 WLNR 6839746. While both .08 percent and .61 percent fall within the range cited by the court in Hecker, it would raise a significant issue under the prudence standard if a plan fiduciary

Whether a plan's fiduciaries acted prudently in establishing a particular fee structure necessarily depends on myriad factual considerations and questions, which can only be resolved through the consideration of evidence after discovery. Relevant considerations include the particular charges for particular funds; how many and which of the funds are concentrated at the higher end of the range of fees; the relationship between the size of the fees and the level of services provided; the fees paid by plans of comparable size for comparable funds; the diligence with which the fiduciaries compared fees for comparable funds; and generally whether the fiduciaries used a reasonable process to determine whether the particular funds were reasonable investments in light of their fees and other attributes. The district court erred by failing to apply the multi-factor test of prudence, and ruling instead, without inquiry, that the mere existence of fee ratios comparable to those in Hecker (.03 to .96% in this case) meant that the fees must be reasonable and prudently selected, such that the allegations here did not even state a cognizable fiduciary-breach claim. Nothing in ERISA or Hecker establishes that a particular numerical range of fees is either per se prudent or per se imprudent, or authorizes the courts to fashion a simple numerical

willfully chose to pay .61 percent if he had the ready option of paying .08 percent for essentially the exact same investment.

test, without regard to what the evidence actually shows after the plaintiffs have been given an opportunity to present their case at trial or on summary judgment.

In Hecker, the Court considered it to be outcome determinative that the plaintiffs alleged that their fees were too high but never alleged that they failed to receive higher services in exchange for those fees. The Hecker opinion denying rehearing emphasizes the complaint's silence concerning the services that the Deere participants received.

> It would be one thing if they were treated exactly like all other retail market purchasers . . . it would be quite another if, for example, they received extra investment advice from someone dedicated to the Deere accounts, or if they received other extra services. If the Deere participants received more for the same amount of money, then their effective cost of participation may in fact have approached wholesale levels.

Hecker, 569 F.3d at 711. In this case, the plaintiffs amended their complaint after, and in direct response to, this statement. The amended complaint not only removed any allegations that would implicate ERISA's section 404(c) safe-harbor defense, but, significantly, additionally alleged the specific services (investment management and administrative) that the plaintiffs claim resulted in excessive and unreasonable charges against the Plan because the Plan received no additional services for these retail-level fees.

The amended complaint thus specifically alleges that the services provided in exchange for the allegedly excessive fees are exactly like the services that all other retail market purchasers receive. Unlike the Hecker plaintiffs, the Exelon plaintiffs make very clear that they have not received more services for the same amount of money, and therefore the fees are not appropriate for an institutional investor.

The amended complaint thus corrects the main deficiency that Hecker found to be significant. Consequently, the reasoning in Hecker does not require dismissal on the pleadings in this case. By taking a far broader view of the opinion than is warranted by Hecker's own language, the district court here dismissed the claims without giving due consideration to whether the factual allegations, which must be considered as true at this stage, plausibly describe imprudent conduct by the defendants in their payment of retail-level investment fees, in light of the exacting fiduciary standards required by ERISA. For the reasons stated above, the dismissal was error, not only because it was based on a misreading of Hecker, but because it misapplied the established pleading standards and gave the benefit of the doubt to the wrong party.

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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Dated: March 10, 2010

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Dated: March 10, 2010

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2010, two copies of the foregoing Brief for the Secretary of Labor as Amicus Curiae were served using Federal Express, postage prepaid, upon the following:

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