Nos. 10-56406, 10-56415

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLENN TIBBLE, WILLIAM BAUER, WILLIAM IZRAL, HENRY RUNOWIECKI, FREDERICK SUHADOLC and HUGH TINMAN, Jr., as representatives of a class of similarly situated persons, and on behalf of the Plan,

Plaintiffs-Appellants,

v.

EDISON INTERNATIONAL, THE EDISON INTERNATIONAL BENEFITS COMMITTEE, f/k/a The Southern California Edison Benefits Committee, EDISON INTERNATIONAL TRUST INVESTMENT COMMITTEE, SECRETARY OF THE EDISON INTERNATIONAL BENEFITS COMMITTEE, SOUTHERN CALIFORNIA EDISON'S VICE PRESIDENT OF HUMAN RESOURCES and MANAGER OF SOUTHERN CALIFORNIA EDISON'S HR SERVICE CENTER,

Defendants-Appellees.

On Appeal from the United States District Court for the
Central District of California, No. 2:07-cv-05359-SVW-AGR
The Honorable Stephen V. Wilson

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

Federal Cases--(continued):

Federal Statutes and Regulations:

Federal Statutes and Regulations--(continued):

Miscellaneous:

Miscellaneous--(continued):

STATEMENT OF THE ISSUES

The Secretary of Labor addresses the following issues:

1. Whether the district court correctly held that plan fiduciaries acted imprudently by investing in retail mutual funds that were available as institutional funds at a much lower fee.

2. Whether the district court erred in concluding that claims challenging the inclusion of any mutual funds that were first selected prior to August 16, 2001, were barred by ERISA's six-year statute of limitations.

3. Whether the district court correctly concluded that ERISA section 404(c), 29 U.S.C. § 1104(c), does not immunize fiduciaries from liability for imprudence and disloyalty in selecting and maintaining plan investment options that charged excessive fees.

4. Whether the district court properly analyzed the participants' claims that plan fiduciaries violated ERISA section 406(b)(3), 29 U.S.C. § 1106(b)(3).

STATEMENT OF INTEREST, IDENTITY AND AUTHORITY TO FILE

The Secretary of Labor has primary authority to interpret and enforce the provisions of Title I of ERISA, which are designed to promote the interests of employees and their beneficiaries in employee benefit plans by ensuring the prudent and loyal management of plans and their assets. See 29 U.S.C. §§ 1132, 1135; Donovan v. Cunningham, 716 F.2d 1455, 1462-63 (5th Cir. 1983).

Accordingly, the Secretary has a strong interest in supporting the district court's conclusion that fiduciaries have an obligation to consider the fees associated with plan investments and, at a minimum, not to allow the plan to be burdened with a higher fee structure where lower fees for the same investment are readily available. Likewise, both with regard to private litigation and her own litigation, the Secretary has a strong interest in ensuring that ERISA's statute of limitations is not applied to allow fiduciaries to forever maintain imprudent investments merely because the fiduciaries first chose the investments more than six years before they were sued.

Furthermore, with regard to ERISA section 404(c), the district court agreed with the view expressed in the Secretary's regulation that "fiduciaries should not be shielded from liability for offering the participants investment options that are the result of a conflict of interest," Record Excerpts (RE) 97-98, and the Secretary has a strong interest in supporting this view in the court of appeals. Finally, the Secretary has a significant interest in ensuring that the prohibitions in ERISA section 406 are strictly applied.

The Secretary files this brief pursuant to her authority under Fed. R. App. P. 29(a).

STATEMENT OF THE CASE

Plaintiffs-Appellants are current or former employees and participants in the Edison 401(k) Savings Plan ("Plan"), a multi-billion dollar defined contribution plan with approximately 20,000 participants. See 29 U.S.C. § 1002(34). Edison International ("Edison") and its wholly-owned subsidiary Southern California Edison ("SCE") are sponsors of the Plan. The SCE Benefits Committee ("Benefits Committee") is a named fiduciary and the plan administrator of the Plan and is comprised of individuals appointed by the chief executive officer of SCE. SCE's CEO also appoints the members of the Edison International Trust Investment Committee ("TIC"), which is also a named fiduciary of the Plan, and which reports to SCE's Board of Directors. The TIC has delegated certain investment decisions to a subcommittee.

A class of Plan participants brought suit against all of these entities, as well as two individuals employed in the human resources division of SCE. They claimed that, by choosing investment options for the Plan that charged excessive fees and that benefitted the fiduciaries and other parties in various ways, the defendants violated their fiduciary duties of prudence and loyalty under ERISA sections 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B), failed to administer the Plan in accordance with the plan documents in violation of section

404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), and engaged in prohibited transactions in violation of various subdivisions of section 406, 29 U.S.C. § 1106.

On July 16, 2009, the district court granted summary judgment to the defendants on all but two claims. RE 98. First, as relevant here, the court dismissed the plaintiffs' claim that the defendants violated section 406(b)(3) because they caused or allowed SCE, which they assert was a fiduciary, to receive consideration from the mutual funds in the form of a credit to amounts that SCE would otherwise owe to Hewitt Associates, the Plan's recordkeeper. The court relied on the fact that the Benefits Committee or TIC, and not SCE "influenced whether to enter into service contracts with the mutual finds" and determined "whether certain mutual funds would become investment options for the funds." Id. at 24. The court concluded that the defendants did not violate section 406(b)(3) because the fiduciary receiving the consideration, SCE, did not have control over the transaction in question. Id. at 20-21 (citing Lockheed Corp. v. Spink, 517 U.S. 882, 888 (1996); Wright v. Oregon Metallurgical Corp., 360 F.3d 1090, 1101 (9th Cir, 2004)).

The district court also held that ERISA's six-year statute of limitations barred any claims involving mutual funds that were first made available to the Plan pursuant to contracts entered into before August 16, 2001.   RE 31-32. The court reasoned that the Ninth Circuit had previously rejected a continuing violation theory in the ERISA context. Id. at 17-19 and 31-32. Although the district court thus dismissed all claims in connection with the selection for inclusion in the Plan of any investment option selected prior to August 16, 2001, the court did preserve for trial plaintiffs' claims that the defendants breached their duties of prudence and loyalty with respect to three mutual funds selected after that date. Id. at 31-32. In so doing, the court rejected the defendants' argument that the statutory safe harbor in ERISA section 404(c) immunized them from any liability for resulting losses. The court concluded that "the better view is that expressed by other courts, and supported by Department of Labor, that the fiduciaries should not be shielded from liability for offering the participants investment options that are the result of a conflict of interest." Id. at 97-98.

On July 8, 2010, following a three-day bench trial, the court issued a decision on the merits. RE 101-182. The court found that, with respect to the retail mutual funds included after August 16, 2001, the plaintiffs failed to prove that defendants selected the retail mutual funds in order to capitalize on the revenue sharing aspect of these investments, and the court dismissed the plaintiffs' claims for breach of the duty of loyalty on this basis. Id. at 115-117, 150. Nevertheless, the district court held that the plaintiffs proved that the defendants breached their duty of prudence by including three retail mutual funds in the Plan when otherwise identical institutional funds were available at a much lower fee.

Id. at 155-156. The court noted that the only difference between the retail and the institutional funds was the fee and that the defendants failed even to investigate the more favorable option. Nor, in the court's view, was the defendants' reliance on the investment advice offered by Hewitt a sufficient basis to conclude that they acted prudently in choosing the three retail mutual funds "in the absence of any evidence about the thoroughness and scope of [Hewitt's] review as to these three particular funds." Id. at 157. Moreover, the court found that "[a]t trial, the Defendants could not offer any credible reason why the Plan fiduciaries chose the retail share classes." Id. And, the court pointed out, the testimony defendants offered about why investments in retail shares might be appropriate in some circumstances had no bearing given the actual facts as presented. Id. at 158-162 (finding, among other things, that the retail funds at issue did not, in fact, have a better performance history or rating than the corresponding institutional funds, and that any mandatory minimums for investment in the institutional funds would have been waived for a plan of this size). The court awarded plaintiffs over $370,000 in damages to the Plan, calculated as the difference between what the Plan earned through its investment in the three mutual funds and what it would have earned had it been invested in the corresponding institutional funds during the same period. Id. at 2.

SUMMARY OF ARGUMENT

The district court correctly held that defendants acted imprudently by failing to take action to ensure that the Plan would not pay higher fees than necessary in connection with the selection of mutual funds for inclusion in the Plan. The district court found, as a matter of fact, that the defendants failed to conduct any investigation concerning the availability of share classes with lower, institutional fees for this multi-billion dollar plan. Moreover, the court concluded that even a minimum investigation would have shown that the same investments were available to the Plan at lower, institutional level fees. These factual findings fully support the district court's conclusion that the defendants did not act with the requisite level of care imposed by ERISA on those charged with the management of plans and their assets.

Nevertheless, the court concluded, erroneously, that most of the plaintiffs' prudence and prohibited transaction claims were barred because the fiduciaries first selected the challenged investments or entered into the challenged transactions more than six-years before the suit was filed. The Plan fiduciaries had a continuing obligation to manage Plan investments and eliminate imprudent ones, just as they had a duty to refrain at all times from self-dealing and other transactions that violate ERISA. Accordingly, they could not turn a blind eye to the impropriety of causing the Plan to pay unreasonable higher fees and simply wait out the statutory period. Nor could they continue on an imprudent or otherwise prohibited course of conduct forever merely because they had engaged in such conduct for more than six years. This Court's decision in Phillips v. Alaska Hotel Restaurant Employees Pension Fund, 944 F.2d 509, 520-21 (9th Cir. 1991), involved ERISA's three-year limitations period applicable when plaintiffs have actual knowledge of a breach and is therefore not to the contrary.

The district court correctly held that ERISA section 404(c) and the Secretary's 404(c) regulation provide a safe harbor for fiduciaries against losses only when they result from the participant's exercise of control and not from the losses attributable to a fiduciary's own misconduct. Even where, as here, the participants in a defined contribution plan are given control over investment decisions among the options presented to them, plan fiduciaries must still act prudently in deciding what investment options ought to be offered to the plan's participants. For this reason, the district court correctly declined to apply section 404(c)'s pass from liability to the defendants' conduct in this case.

The district court erred, however, in relying on Department of Labor Advisory Opinions to conclude that SCE was sufficiently independent of the investment committees that transactions undertaken by those committees could not constitute prohibited transactions under ERISA section 406(b)(3) even if they benefited SCE by allowing it to offset amounts it would otherwise owe to the Plan recordkeeper. ERISA section 406(b)(3) flatly forbids fiduciaries from receiving any personal consideration from any party dealing with a plan in connection with transactions involving the assets of the plan, and the Labor Department Advisory Opinions merely recognize that a fiduciary does not violate this provision by receiving, as part of its compensation, fees specifically approved by another independent fiduciary. These Advisory Opinions were not addressed at situations where, as here, the fiduciaries engaging in the transactions are the officers and directors of the corporate fiduciary that is receiving the consideration. Rather, there can be little doubt that section 406(b)(3) prohibits fiduciaries from making investment decisions that result in the company on which they serve as directors and officers receiving an economic benefit from a third party, and the district court erred in holding to the contrary in reliance on the Advisory Opinions.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT DEFENDANTS ACTED IMPRUDENTLY BY INCLUDING RETAIL MUTUAL FUNDS THAT WERE AVAILABLE AT A LOWER INSTITUTIONAL FEE

The district court held that the defendants acted imprudently with regard to the inclusion of three funds – the William Blair Small Cap Growth Fund, the PIMCO RCM Global Technology Fund and the MFS Total Return A Fund – when there were almost identical funds available to the Plan at lower, institutional fees, and the defendants failed even to investigate the availability of institutional funds. RE 155-156. This accords with the statute and Ninth Circuit precedent.

The duty of care imposed by ERISA section 404(a) is the "highest known to the law." Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982). The Ninth Circuit has repeatedly recognized that to comply with ERISA's exacting prudence obligations, a fiduciary must investigate the merits of any transaction in which he or she represents the plan. See Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996) (in order to determine if a fiduciary has acted prudently, courts must look not only at the merits of the transaction, but also at the "thoroughness of the investigation into the merits of the transaction"); Donovan v. Mazzola, 716 F.2d 1226, 1232 (9th Cir. 1983) (questioning whether a fiduciary "employed the appropriate methods to investigate the merits of the investment and to structure the investment"). Indeed, the district court relied on plaintiffs' experts in finding that a prudent fiduciary "commonly would review all available share classes and the relative costs for each when selecting a mutual fund for a 401(k) Plan." RE 153. Having found "no evidence that the defendants even considered or evaluated the different share classes" for the funds, the court correctly held that defendants did not conduct the kind of thorough investigation mandated by the statute. Id. Moreover, the court correctly held the fiduciaries' reliance on Hewitt's investment advice was not sufficient to establish that they acted prudently in this regard in the absence of any evidence about the scope and depth of Hewitt's role. Id. at 156.

The district court also found that had the defendants considered the institutional class shares, they would have realized that these shares were identical to the retail class shares and that the only difference was the amount of the fees, which were significantly higher in the retail class. Based on these factual findings, the district court correctly held that defendants breached their fiduciary duties by including the William Blair, PIMCO and MFS funds in the Plan. See Mazzola, 716 F.2d at 1232 (fiduciary breach where a reasonable investigation would have revealed that loan made by a plan was an unreasonably risky and, therefore, imprudent investment); Katsaros v. Cody, 744 F.2d 270, 279-80 (2d Cir. 1984) (if the trustees had conducted an adequate investigation, they would have determined that a plan loan was a "loser from its inception"); In re Unisys Savings Plan Litig., 74 F.3d 420, 436 (3d Cir. 1996) (fiduciaries not entitled to summary judgment where plaintiffs presented evidence that a thorough investigation, which was not done, would have disclosed problems with investment); cf. Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992) (knowingly overpaying for an asset is imprudent and not in the interests of the participants and beneficiaries). The district court's conclusion is unassailable.

However, although these same problems allegedly existed with regard to a number of other mutual fund investments for which lower institutional investments were available, the district court dismissed these claims because the fiduciaries first selected these funds more than six years before the commencement of the suit. The court likewise dismissed the plaintiffs' other claims challenging the fees associated with other plan investments and asserting various prohibited transactions with regard to these investments. As we discuss next, the court erroneously dismissed all of these claims based on its misapplication of ERISA's statute of limitations.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT CLAIMS CHALLENGING INVESTMENTS THAT WERE FIRST SELECTED PRIOR TO AUGUST 16, 2001 WERE BARRED BY ERISA'S SIX-YEAR STATUTE OF LIMITATIONS

ERISA sets forth a six-year statute of limitations generally applicable in fiduciary breach cases, 29 U.S.C. § 1113(1), unless the plaintiffs have actual knowledge of a breach, in which case the limitations period is "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." Id. § 1113(2). Absent such knowledge, which is not alleged in this case, the six-year limitations period begins on "the date of the last action which constituted a part of the breach or violation, or in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." Id. § 1113(1)(A), (B).

The district court held that because the decision to invest in most of the challenged mutual funds and other investments was made more than six years before the commencement of the suit, the inclusion of these funds could not be challenged either as a prohibited transaction or as a matter of prudence. This holding is based on a misapprehension of what activity by a fiduciary constitutes a prohibited transaction under ERISA and what fiduciary conduct is subject to ERISA's standard of care.

Plaintiffs argue that, by allowing SCE to credit the amount that Hewitt received as revenue sharing, against amounts it owed to Hewitt, the defendants were acting in violation of ERISA section 406(b)(3), which provides that a fiduciary "shall not receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." 29 U.S.C. § 1106(b)(3). Moreover, the plaintiffs allege that by allowing the Plan to invest in mutual funds with unreasonably high fees, the defendants violated their duty to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B).

It may well be that the defendants engaged in an imprudent transaction when they first decided to include certain mutual funds as investment options for the

Plan. Nevertheless, plan fiduciaries owe a continuing, and not merely a one-time, duty to act prudently with regard to the management of the plan and the investment of plan assets. See Martin v. Consultants & Adm'rs, Inc., 966 F.2d 1078, 1087-88 (7th Cir. 1992) (rejecting the defendants' argument that claims based on a flawed bidding process were untimely because the process, which had not materially changed over the years, was originally used outside the limitations period, noting that "[t]he flaw in the trustees' argument is that it ignores the continuing nature of the trustee's duty under ERISA to review plan investments and eliminate imprudent ones"); Boeckman v. A.G. Edwards, Inc., 461 F. Supp. 2d 801, 814 (S.D. Ill. 2006) (holding that A.G. Edwards' continued payments of allegedly excessive mutual fund fees represented new fiduciary breaches, noting that "[i]n light of the continuing duty of prudence imposed on plan fiduciaries by ERISA, each failure to exercise prudence constitutes a new breach of duty, that is to say, a new claim."); Buccino v. Cont'l Assurance Co., 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983) (holding that claims related to the initial decision to purchase imprudently expensive insurance and the failures to correct that action occurred more than six years before suit was filed were time-barred, but claims based on defendants continued failure to take steps to terminate the Fund's insurance arrangement during the limitations period were not). Any other rule would mean that if a fiduciary acted imprudently or in violation of the statute's prohibitions outside of the limitations period, it could continue to do so forever without fear of liability under ERISA. This is not the case.

Thus, in addition to being liable for imprudently selecting the three mutual funds that were added during the limitations period, if the fiduciaries acted imprudently during the limitations period in failing to remove previously-included retail mutual funds when identical, lower-cost institutional funds were available, then those claims were timely and the district court erred in dismissing them on the basis of the statute of limitations. Likewise, if the plaintiffs can establish that the fee sharing arrangements associated with those investments constituted prohibited transactions, then those claims were not untimely merely because the mutual funds were already in the plan at the beginning of the limitations period. In holding that such claims were barred, the court failed to account for the continuing duty of plan fiduciaries to monitor both the activities of the trustee and the reasonableness of the fees paid to the trustee. See Leigh v. Engle, 727 F.2d 113, 134-35 (7th Cir. 1984) ("As the fiduciaries responsible for selecting and retaining their close business associates as plan administrators, Engle and Libco had a duty to monitor appropriately the administrators' actions."); Howell v. Motorola, Inc., 633 F.3d. 552, 562 (7th Cir. 2011) ("Under this Court's decision in Leigh v. Engle, a company can be a plan fiduciary where there is evidence that it played a role in appointing the administrators of the plan (and thus had a duty to choose appointees wisely and to monitor their activities)"); see also ERISA Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8 ("[a]t reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan"); Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 640 (W.D. Wis. 1979) (defendants were not relieved of fiduciary responsibility when they appointed seller trustees to handle sales transaction because ERISA imposed a duty to monitor the seller trustees).

The Ninth Circuit's decision in Phillips, 944 F.2d at 520-21, is not to the contrary. That case involved application not of the six-year statute of limitations, but of the alternative three-year statutory period, which applies only where a plaintiff has actual knowledge of a fiduciary breach and commences from the earliest date of such knowledge. In Phillips, the plaintiffs complained that the vesting rules of their pension plan unduly restricted their ability to vest in their benefits and thus violated the Labor Management Relations Act and ERISA. Id. at 512. The Ninth Circuit held that although the exclusion rate was unusually high, the plan met its burden of establishing the reasonableness of its vesting provisions. Id. at 518-19. In dicta, the court declined to apply a continuing violation theory with respect to the three-year statute of limitations because to do so in that context "would read the 'actual knowledge' standard out of the statute." Id. at 520 (noting that the district court failed to make the actual knowledge determination but that the "disposition of the merits makes its resolution unnecessary"). In the court's view, awareness of the trustees' continuing failure to amend the vesting rules did not add "any materially" new information that would change the actual knowledge timeline. If the plaintiffs had had actual knowledge of the vesting rules more than three years prior to bringing suit, in the court's view, they would be barred by the actual knowledge provision of ERISA's statute of limitations. At the same time, however, the court acknowledged that, even in the context of the actual knowledge provision, a "continuous series of breaches may allow a plaintiff to argue that a new cause of action accrues with each new breach," stating only that "if the breaches are of the same kind and nature and the plaintiff had actual knowledge of one of them more than three years before commencing suit," then ERISA bars a suit based on that conduct. Phillips, 944 F.2d at 521.[1] This dicta in Phillips should be limited to the "actual knowledge" context, and not extended to the very different six-year period, which, by its terms, commences not from the "first date" on which

[1] The Ninth Circuit has not applied Phillips to any fiduciary breach claims that are covered by ERISA's statute of limitations provision since the decision in that case. In Pisciotta v. Teledyne Indus., Inc., 91 F.3d 1326 (9th Cir. 1996), the only published Ninth Circuit case citing the Phillips actual knowledge standard, the court relied on Phillips by analogy to deny benefits under a borrowed state statute of limitations where retired health plan participants complained years after a freeze in the level of health benefits that failure to revoke the freeze, which resulted in payment of reduced benefits, violated the terms of their plan. Id. at 1332.

a plaintiff has knowledge but from the "last act" that constitutes the breach. Compare 29 U.S.C. § 1113(1), with id. § 1113(2).

As Phillips expressly acknowledged, a new series of breaches may allow plaintiffs to argue that "a new cause of action accrued with each new breach." Phillips, 944 F.2d at 521. See also Meagher v. Int'l Assoc. of Machinists & Aerospace Workers, 856 F.2d 1418 (9th Cir. 1988) (treating each benefit check that was reduced as a result of an improper plan amendment as giving rise to a new breach which recommenced the statute of limitations). Here, the defendants have not established that the plaintiffs had actual knowledge of a fiduciary breach for more than three years, nor do the plaintiffs allege that the defendants merely failed to correct a known violation that had occurred outside the applicable statute of limitations, as the court believed to be the case in Phillips. Instead, the plaintiffs allege that, within the statutory period, the defendants repeatedly caused the Plan to pay excessive fees to service providers and repeatedly permitted illegal asset transfers to a plan fiduciary in violation of ERISA's prohibited transaction rules. If the plaintiffs' allegations are true, each payment reflected a new breach.

Whether or not the payments, in fact, violated ERISA depends on the facts and circumstances that existed at the time of the payments, not conditions existing at some earlier time. For example, the prudence of the payments at any particular time depended on the process that the fiduciaries employed to determine fees at the time of the transactions, the availability of alternative funds at that time, and the services being rendered in exchange for those fees. Similarly, whether or not the revenue sharing practices violated ERISA depends on who authorized the practices, what they authorized, and how the funds were handled at the time of the particular transactions at issue. None of these facts are static, unchanging, or could have supported a fiduciary breach claim prior to their actual occurrence.

Even if the defendants had previously approved illegal fee practices, nothing in ERISA or Phillips gave them license to engage in still more transactions that violated the law, regardless of whether and when the plaintiffs knew about earlier violations. Here, there is no proof that the plaintiffs even had actual knowledge of earlier breaches and, in the absence of such knowledge, the statute provides that they did not have to bring suit until "six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113(1) (emphasis added). As a matter of plain language, these statutory deadlines could not have expired until the payments were actually made (or at least contractually obligated).

III. THE DISTRICT COURT CORRECTLY HELD THAT THE SAFE HARBOR PROVISIONS OF SECTION 404(C) ARE INAPPLICABLE

ERISA section 404(c)(1)(B) provides that "in the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) 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." Id. § 1104(c)(1)(B). The district court correctly held that this statutory provision does not immunize fiduciaries from liability based on their own imprudence or disloyalty in selecting or monitoring investment options for a plan.

Under the terms of the Act 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 the losses attributable to their own fiduciary misconduct. 29 U.S.C. § 1104(c)(1)(B); 29 C.F.R. § 2550.404c-1(d)(2) ("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 liable for any loss or fiduciary breach "that is the direct and necessary result of that participant's or beneficiary's exercise of control."). 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 because the selection of the particular funds to include and retain 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 losses that "result[] from" 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.

Thus, 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 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 section 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 46,922 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.

The Secretary recently reiterated this interpretation in a new disclosure regulation that, among other things, amends the text of the 404(c) regulation to explain that the safe harbor provision "does not serve to relieve a fiduciary from its duty to prudently select and monitor any service provider or designated investment alternative offered under the plan." Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 75 Fed. Reg. 64,910, 64,946 (Oct. 20, 2010) (to be codified at 29 C.F.R. § 2550.404c-1(d)(2)(iv)). In proposing this amendment, the Department explained that the new language would serve to "reiterate [the Department's] long held position that the relief afforded by section 404(c) and the regulation thereunder does not extend to a fiduciary's duty to prudently select and monitor . . . designated investment alternatives under the plan." 73 Fed. Reg. 43,014, 43,018 (July 23, 2008).

This regulatory interpretation is consistent with ERISA's purposes and overall structure, which places stringent trust-based fiduciary duties at the heart of the statutory scheme. See 29 U.S.C. § 1001(b), 1104. Under the statute, fiduciaries are defined not simply by their titles, but also functionally, based on the discretionary authority they are granted and the control they exercise over the plan and its assets. See 29 U.S.C. § 1002(21). Thus, the Supreme Court has noted that ERISA "allocates liability for plan-related misdeeds in reasonable proportion to the respective actor's power to control and prevent misdeeds." Mertens v. Hewitt Assocs. 508 U.S. 248, 262 (1993). Consistent with these principles, the statute provides that if a fiduciary exercises control over the plan assets, it must do so prudently and loyally, and the fiduciary is relieved from liability only in the limited circumstances where the control that the fiduciary would otherwise have exercised is properly delegated to and exercised by someone else. See, e.g., 29 U.S.C. § 1105(c)(1) (permitting the named fiduciary in some circumstances to designate other fiduciaries to carry out specific functions, and relieving the named fiduciary of liability except with respect to appointing and monitoring the designee); 25 C.F.R. § 408b-2(e)(2) (explaining that a fiduciary does not self-deal under section 406(b)(1) if "the fiduciary does not use any of the authority, control, or responsibility which makes such person a fiduciary to cause the plan to pay additional fees"). The Secretary's 404(c) regulation, issued after notice-and comment pursuant to an express statutory delegation of authority, and her interpretation of that regulation, are entitled to controlling deference because they are consistent with, and indeed best serve, these statutory principles. Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 844-45 (1984).

The district court in this case correctly rejected the 404(c) defense. Although the defendants relied on the Seventh Circuit's discussion of 404(c) in Hecker v. Deere & Co., 556 F.3d 575, 589 (7th Cir. 2009), the district court correctly noted that the Seventh Circuit's decision denying rehearing in Hecker backed away from "the breadth of its earlier ruling," id. (citing Hecker rehearing decision, 569 F.3d 708 (2009), which has since been confirmed by the Seventh Circuit's recognition that "the selection of plan investment options and the decision to continue offering a particular investment vehicle are acts to which fiduciary duties attach, and that the [404(c)] safe harbor is not available." Howell, 633 F.3d at 567. The court then sought to distinguish the factual context of Hecker from the facts of this case based on the allegations here that the defendants not only acted imprudently by including options with excessive and unnecessary fees, but also acted disloyally by selecting retail mutual funds that shifted SCE's obligation to pay the Plan's administrative expenses to the Plan through revenue sharing. Id. ("because this case involves a possible breach of the duty of loyalty . . . the fiduciaries should not be shielded from liability for offering the participants investment options that are the result of a conflict of interest"). Such a conflict of interest is not necessary for fiduciaries to retain liability, however, and indeed, the plaintiffs in this case did not ultimately prove their disloyalty claims. Instead, as the Seventh Circuit has more recently affirmed, "the selection of plan investment options and the decision to continue offering a particular investment vehicle are acts to which fiduciary duties attach." Howell, 633 F.3d at 567 (agreeing on this point "with the position taken by the Secretary of Labor in her *amicus curiae* brief").

IV. THE DISTRICT COURT ERRONEOUSLY HELD THAT THE BENEFITS COMMITTEE AND THE TIC WERE INDEPENDENT OF SCE FOR PURPOSES OF SECTION 406(b)(3)

The court held that SCE's receipt of offsets from Hewitt was not a prohibited transaction under section 406(b)(3), because the court concluded, as a factual matter, that SCE did not control or influence the decisions to select the mutual funds at issue. ERISA section 406(b)(3) prohibits fiduciaries from receiving any personal consideration from any party dealing with a plan in connection with transactions involving the assets of the plan. The plaintiffs assert that SCE was a fiduciary and that it was obligated to pay the Plan's expenses under the terms of the

Plan. If so, its receipt of consideration in the form of offsets from Hewitt would violate 406(b)(3). As many cases have correctly noted, Congress generally intended that the prohibitions in section 406 be interpreted and applied broadly as a prophylactic measure against the many abuses that had previously existed. See, e.g., Leigh v. Engle, 727 F.2d at 126 ("[w]e do not believe that Congress intended the language [of section 406(a)(1)(D) and 406(b)(1)] . . . to be interpreted narrowly. The entire statutory scheme of ERISA demonstrates Congress' overriding concern with the protection of plan beneficiaries, and we would be reluctant to construe narrowly any protective provisions of the Act."); Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1213 (2d Cir. 1987) (same); Cutaiar v. Marshall, 590 F.2d 523, 529 (3d Cir. 1979) (noting that section 406 imposes liability even where there is "no taint of scandal, no hint of self-dealing, no trace of bad faith,"); Martin v. Nat'l Bank of Alaska, 828 F. Supp. 1427, 1435-36 (D. Alaska 1993) ("This court agrees with the majority of circuits and reads the prohibitions set forth in ERISA Section 406(b) broadly.").

Nevertheless, as the court below pointed out, RE 25-28, the Secretary has issued Advisory Opinions that take the position that a fiduciary's receipt of a fee or other compensation from a mutual fund in connection with a plan's investment does not violate section 406(b)(3) so long as the fiduciary "does not exercise authority or control" over the plan's investment in the mutual funds, but instead "the decision to invest in such funds is made by a fiduciary who is independent" of the fiduciary receiving the fee. DOL Advisory Opinion 97-15A (May 22, 1997); DOL Advisory Opinion 2003-09A (June 25, 2003). Cf. DOL Advisory Opinion 97-16A (May 22, 1997) (receipt of mutual fund fees by service provider does not violate 406(b)(3) where provider is not a fiduciary because the decision to accept or reject the provider's proposed changes to the fund's menu of investment options is made by a fiduciary that is independent of the service provider). ERISA generally permits fiduciaries to receive compensation for their services, provided that the fiduciaries do not set their own compensation. See 29 U.S.C. § 1106(c)(2). The Advisory Opinions merely reflect the view that a fiduciary does not violate ERISA section 406(b)(3) by receiving, as part of its compensation, fees specifically approved by another independent fiduciary in connection with a transaction in which the recipient is not acting as a fiduciary within the meaning of ERISA's fiduciary provisions. See 29 U.S.C. § 1002(21)(A).

These advisory opinions provide no support for the district court's conclusion that the defendants did not commit prohibited transactions under section 406(b)(3). Unlike the situations alluded to in those opinions – where the fiduciary that receives a fee does not control or influence, and in fact was independent of, the fiduciaries involved in the transaction – there is no basis here to conclude that the Benefits Committee and the TIC were truly independent of

SCE, where the members of those committees were appointed by SCE's CEO and were comprised of SCE's own corporate executives. Allowing fiduciaries to make plan asset investment decisions that result in the company on which they serve as directors and officers receiving an economic benefit from a third party is precisely the kind of transaction – rife with the potential for abuse – that Congress intended to prohibit in section 406(b)(3). Thus, the court below erred to the extent that it relied on these advisory opinions to conclude that SCE's receipt of the offsets from Hewitt was permissible.

However, if the court was correct in finding as a factual matter, RE 49-53, that the plan documents only required SCE to pay Hewitt's fees net of the revenue sharing, then Hewitt's receipt of revenue sharing would not relieve SCE of any obligation to pay Hewitt's fee and, therefore, would not constitute the receipt of any "consideration" by SCE (i.e., a discount from Hewitt on the fees it would otherwise owe to Hewitt) within the meaning of the section 406(b)(3) prohibition. ERISA section 408(b)(2), 29 U.S.C. § 1108(b)(2), and the Secretary's regulation at 29 C.F.R. § 2550.408b-2 provide that a fiduciary can receive reimbursement from an unrelated mutual fund of direct expenses for which the plan would otherwise be liable. See also DOL Advisory Opinion 97-19A (August 28, 1997) (citing 29 C.F.R. § 2550.408b-2). The Secretary does not take a position on the district court's resolution of this factual matter, but does not agree that the SCE and the committees are sufficiently independent if, in fact, SCE was a fiduciary to the Plan and was itself obligated to pay Hewitt for all its services to the Plan.

CONCLUSION

Accordingly, this Court should (i) affirm the district court's holding that defendants acted imprudently by including in the Plan retail mutual funds that were available at much lower, institutional fees; (ii) reverse the district court's holding that any claims based on mutual funds selected prior to August 16, 2001, were time barred; (iii) affirm the district court's conclusion that ERISA section 404(c) is inapplicable; and (iv) reverse the district court's finding that the fiduciary decisionmakers were independent of SCE within the meaning of the Secretary's Advisory Opinions construing section 406(b)(3).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE OF BRIEFS AND VIRUS CHECK

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 29(d), I certify that this amicus brief uses a mono-spaced typeface of 14 characters per inch and contains six thousand nine hundred (6,900) words. Pursuant to Fed. R. App. P. 29(d), this brief complies with the 7,000 word limit.

I further certify that a virus scan was performed on the Brief using McAfee, and that no viruses were detected.

Dated: May 25, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief For The Secretary Of Labor As Amicus Curiae with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 25, 2011.

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

Dated: May 25, 2011

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