No. 11- 2181

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELENA M. DAVID, ARLEEN J. STACH, and VICTOR M. HERNANDEZ, for themselves and all others similarly situated,

Plaintiffs – Appellants

v.

J. STEELE ALPHIN; J. TIM ARNOULT; CATHERINE P. BESSANT; AMY WOODS BRINKLEY; EDWARD J. BROWN, III; CHARLES J. COOLEY; RICHARD M. DEMARTINI; BARBARA J. DESOER; JAMES H. HANCE, JR.; KENNETH D. LEWIS, JR.; TIM MAYOPOULOUS; LIAM E. MCGEE; EUGENE M. MCQUADE; BRIAN T. MOYNIHAN; ALVARO G. DE MOLINA; OWEN G. SHELL, JR.; R. EUGENE TAYLOR; F. WILLIAM VANDIVER, JR.; BRADFORD H. WARNER, AND BANK OF AMERICA CORPORATION,

Defendants – Appellees

Appeal from Judgment of the United States District Court
for the Western District of North Carolina

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 4th Cir. R. 26.1(a)(2), Plaintiff-Appellants (henceforth "Plaintiffs") make the following disclosure:

(A) As Plaintiffs are all individuals, they have no parent corporation and no publicly held corporation owns 10% or more of their stock.

(B) To the best of Plaintiffs' knowledge, other than Defendant Bank of America Corporation, there is no "publicly held corporation...that has a direct financial interest in the outcome of this litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement." 4th Cir. R. 26.1(a)(2)(B).

(C) To the best of Plaintiffs' knowledge, there are no master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded that meet the conditions outlined in (A)-(B) for publicly held corporations.

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JURISDICTIONAL STATEMENT

The District Court's jurisdiction arose from ERISA, 29 U.S.C. §1132(e)(1), which grants federal courts jurisdiction over claims asserted under 29 U.S.C. §1132(a).

This Court's jurisdiction arises from 28 U.S.C. §1291, which grants appellate jurisdiction over final decisions of district courts. The District Court's opinion granting "Defendants' Motion for Summary Judgment on Statute of Limitations Grounds" and dismissing the entire action with prejudice was entered September 22, 2011 (Dkt. No. 259; JA7:2976-3009), and judgment was entered on the same date, (Dkt. No. 260; JA7:3010).[1]

A Notice of Appeal was timely filed October 22, 2011. (Dkt. No. 261 JA7:3011).

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1 "Dkt. No." refers to the docket number in the proceedings below unless otherwise indicated. Docket entries 1-64, which were entered in the Northern District of California are at Joint Appendix ("JA") vol. I, pages A1-A17; docket entries 65-263, entered in the Western District of North Carolina, are at JA1:33-65 (volume numbers of the JA are indicated herein by arabic numerals following "JA" and page numbers follow the colon; when helpful, descriptive citations will also follow JA citations in parentheses).

STATEMENT OF ISSUES

1. Whether the District Court erred in finding, at summary judgment, that Counts I-III of Plaintiffs' Complaint are untimely under ERISA's principal statute of limitations, where (i) each and every act that constituted the fiduciary breaches and statutory violations forming the basis of these claims occurred within the limitations period, and (ii) finding such claims untimely means that imprudent investments may be forever enshrined in a retirement plan and fiduciaries who refuse to remove them are immune from liability despite the fact that the investments' poor performance and high fees continue to siphon off millions of dollars of participants' retirement savings every year?

Suggested Answer: Yes.

2. Whether the District Court erred in finding, at summary judgment, that Count IV of Plaintiffs' Complaint is untimely under ERISA's principal statute of limitations, where (i) the last act that constituted the fiduciary breach forming the basis of that claim occurred within the limitations period and the claim is thus timely under the plain language of the statute, and (ii) the District Court based its rejection of the argument on an erroneous factual finding that Plaintiffs invested in the relevant investment options prior to the beginning of the limitations period?

Suggested Answer: Yes.

3. Whether the District Court erred in denying Plaintiffs an opportunity to amend the complaint by dismissing with prejudice, where (i) Plaintiffs only had one previous amendment that required court approval, and (ii) the Court's opinion established novel rules of law?

Suggested Answer: Yes.

4. Whether the District Court erred in holding, on Defendants' partial motion to dismiss, that Plaintiffs lacked Article III standing to pursue claims related to the Bank of America Pension Plan because they had not suffered an injury-in-fact, where (i) the Pension Plan itself suffered a loss and ERISA authorizes participants to bring suit on the plan's behalf; (ii) trust beneficiaries like Plaintiffs here have standing to sue for self-dealing and conflicts even absent economic loss, (iii) Plaintiffs were Pension Plan participants and were personally injured by Defendants' fiduciary breaches, and (iv) Plaintiffs have standing to enforce statutorily created rights?

Suggested Answer: Yes.

STATEMENT OF THE CASE

I. Nature of the Case

This case is a civil enforcement action brought pursuant to ERISA, 29 U.S.C. §1132(a) to remedy corporate self-dealing. All three named Plaintiffs are participants in the Bank of America 401(k) Plan ("401(k) Plan") and the Bank of America Pension Plan ("Pension Plan"). (JA8:3087-88 (Third Amended Complaint ("**TAC**") ¶¶17-19); JA3:964-65 (Answer ¶¶17-19)).[2] Pursuant to ERISA, they bring the action on behalf of the Plans and as a class action on behalf of similarly situated participants and beneficiaries (collectively "participants").

The suit concerns Defendants' fiduciary breaches and ERISA violations stemming from their decisions favoring the financial interests of Defendant Bank of America Corporation ("BofA") over those of the Plans and their participants. In making decisions about investments in both Plans, Defendants favored BofA-affiliated mutual funds, which increased the amount of fee income paid to BofA affiliates, despite the fact that these were poor performing and high-cost investments, and that many better performing and lower cost alternatives were available.

2 "Answer" refers to Defendants' Answer to the TAC. (An allegation regarding Plaintiff Stach's participation in the Pension Plan was inadvertently omitted from the TAC.)

II. Procedural History

Plaintiffs filed their complaint on August 7, 2006 in the Northern District of California. (Dkt. No. 1; JA1:67-86). On October 16, 2006 Plaintiffs filed an amended complaint as of right to add class allegations. (Dkt. No. 6; JA1:87-112). Defendants moved to transfer venue, (Dkt. No. 30), and while that motion was pending Defendants moved to dismiss, (Dkt. No. 38), and Plaintiffs moved for class certification, (Dkt. No. 41). The motion to transfer venue was granted and the case transferred to the Western District of North Carolina effective January 11, 2007. (Dkt. No. 64). Hearings on the pending motions to dismiss and for class certification were vacated. *Id.*

On July 31, 2007 Plaintiffs filed a Second Amended Complaint ("**SAC**") (Dkt. No. 83; JA1:118-45) which did not require leave of court because it was filed with Defendants' consent. (*See* JA1:114, ¶3; Fed. R. Civ. P. 15(a)(2)). The SAC made minor enhancements, corrections, and additions to the complaint: (i) it changed the caption and added a reference to local counsel reflective of the new venue; (ii) it added two additional named plaintiffs; (iii) it removed allegations related to the BofA's Board of Directors and their duties to monitor fiduciaries; (iv) added factual allegations related to BofA's application for a DOL exemption to make changes to the Pension Plan; and (v) added factual allegations related to the scandal exposed by New York Attorney General Eliot Spitzer involving BofA-

affiliated mutual funds. Defendants then filed a Partial Motion to Dismiss on August 14, 2007, seeking (i) to dismiss a fiduciary committee named as a defendant (as opposed to its individual members) on the grounds that the committee itself was not a proper defendant, and (ii) dismissal of all claims against the BofA Pension Plan on the grounds that Plaintiffs lacked Article III standing to assert those claims. (Dkt. No. 84; JA1:146-47). The Magistrate Judge recommended that Defendants' partial motion to dismiss be granted, (Dkt. No. 98), and Plaintiffs objected, (Dkt. No. 100). On December 15, 2008, District Judge Robert J. Conrad, Jr. adopted the Magistrate's recommendation and granted the motion. (Dkt. No. 104). Defendants answered the SAC on February 2, 2009. (Dkt. No. 110).

On March 4, 2009, Judge Conrad issued a Pretrial Order and Case Management Plan. (Dkt. No. 117; JA1:667-74). The order set deadlines for completion of fact and expert discovery, expert reports, filing of all motions, and trial. The order did not bifurcate merits discovery and discovery related to class certification, so Plaintiffs expectation was that a renewal of their class certification motion would wait until after the completion of fact discovery. Plaintiffs promptly initiated fact discovery by serving their first request for production of documents on March 5, 2009. (Dkt. No. 152, Ex. A to Moore Decl.). Document fact discovery, including electronic discovery and the litigation of multiple discovery

motions, then proceeded. Defendants produced over 2.4 million pages of documents which required considerable time for Plaintiffs to review and analyze. (Dkt. No. 168, McTigue Decl. ¶3). Plaintiffs also propounded interrogatories and conducted one merits deposition, though they had plans to conduct many more. The close of fact discovery was set for August 2, 2010. (Dkt. No. 159). On May 11, 2010 Defendants filed their first Motion for Summary Judgment on Statute of Limitations Grounds. (Dkt. No. 166).

After Defendants' moved for summary judgment, Plaintiffs moved under Fed. R. Civ. P. 56(d) (now denominated 56(f)) to postpone their reply until they could conduct discovery related on the limitations issues in Defendants' motion. The court granted this motion. (Dkt. No. 171). The parties also jointly moved to stay all discovery except that related to limitations issues until after Defendants' motion for summary judgment had been decided. (Dkt. No. 172). This motion was also granted. (Dkt. No. 173). Plaintiffs then conducted discovery on limitations issues, including litigating discovery motions. (See, e.g., Dkt. No. 196). On October 8, 2010, the deadline set by the Court (Dkt. No. 171), Plaintiffs filed their Opposition (Dkt. No. 199) to Defendant's Motion for Summary Judgment. In the Opposition, Plaintiffs' indicated (i) they had discovered evidence of concealment supporting a tolling of the statute of limitations; (ii) argued that Defendants' assertions that Plaintiffs' claims were untimely were based upon a

distortion of the claims in the SAC — Defendants incorrectly assumed the claims only concerned the initial selection of funds and not the failure to remove the funds; and (iii) that Plaintiffs would soon move to amend the complaint to clarify their claims and to allege Defendants' concealment, which Defendants themselves asserted must be pled to be argued. (JA2:746-48). Plaintiffs then moved for leave to file a third amended complaint. District Judge Conrad granted that motion over Defendants' objections, (Dkt. No. 218; JA3:906-07), and the TAC was filed November 19, 2010, (Dkt. No. 219). (Though claims brought on behalf of the Pension Plan had been dismissed, the TAC retained those claims in order to eliminate any possibility of an argument that Plaintiffs had waived those claims by removing them from the complaint. However, those allegations were not updated in to avoid creating the impression that Plaintiffs were pursuing dismissed claims.) Judge Conrad also dismissed Defendants' (first) Motion for Summary Judgment on Statute of Limitations Grounds as moot, since it was based upon the now obsolete SAC. *Id.*

Defendants then filed their (second) Motion for Summary Judgment on Statute of Limitations Grounds. (Dkt. No. 222). This motion was referred to U.S. Magistrate Judge Dennis Howell on January 3, 2011. (JA1:58). On March 23, 2011, the case was reassigned to District Judge Max O. Cogburn, Jr., who had not previously presided over any aspect of the case. (JA1:63). On July 14, 2011 Judge

Cogburn withdrew the reference of the motion to Magistrate Judge Howell who had been intimately involved in the case for over three years, and terminated his assignment to the case. (JA1:65). Judge Cogburn subsequently granted Defendants' (Second) Motion for Summary Judgment, dismissing the action with prejudice. (Dkt. No. 259). This was Judge Cogburn's first decision in this case.

On October 20, 2011, Plaintiffs timely filed their Notice of Appeal. (Dkt. No. 261).

III. <u>The District Court's Errors in Recounting the Procedural History</u>

As noted above, Judge Cogburn's decision granting Defendants' Motion for Summary Judgment was his only involvement in this case. His lack of familiarity is reflected in his opinion's discussion of the procedural history, which contains several errors.

Notably, Judge Cogburn stated "in the four years this action has been pending, the court has allowed plaintiffs three opportunities to amend their Complaint to address issues raised by defendants." (JA7:2977). This statement is incorrect. The District Court did not "allow" Plaintiffs three opportunities to amend their complaint. Only one amendment required court approval. As noted above, Plaintiffs' first amended complaint was filed as of right only two months after the case was initiated, the second was filed with Defendants' consent, and only the third required leave of court. Moreover, the first amended complaint was

not filed to "address issues raised by defendants". It was filed before Defendants raised any issues at all.

Moreover, Judge Cogburn's opinion states "no motion to certify a class has been filed". (JA7:3). In fact, a motion for class certification was filed early on in the case, on December 14, 2006. (Dkt. No. 41).

Other errors are noted below.

STATEMENT OF FACTS

The Plans are ERISA-governed retirement plans; the 401(k) Plan is a defined contribution plan, and the Pension Plan is a defined benefit plan. (JA8:3092-91 (TAC ¶¶22, 29); JA3:970-71 (Answer ¶¶22, 29)). The Corporate Benefits Committee ("CBC") is the fiduciary of the Plans with authority to make decisions with respect to adding, monitoring, removing, or replacing investment options in the Plans. (JA8:3095 (TAC ¶40); JA3:974 (Answer ¶40);[3] JA3:1000, ¶3). Defendants are the individual CBC members ("Committee Defendants") and BofA. (JA8:3088-91 (TAC ¶¶20-21)). The funds at issue are BofA proprietary mutual funds offered in the Plan that were managed by, and generated millions of

3 Though Defendants' answer to paragraph 40 and other paragraphs do not expressly admit the allegations, it is well settled that the answer they give — stating that documents speak for themselves, etc. — is improper and does not effect a denial. 5 Charles Alan Wright & Arthur R. Miller, *Fed. Practice and Procedure,* §1264 at 542-43 & n. 4 (3d ed. 2004); Fed. R. Civ. P. 8(b). Hence, those allegations are deemed admitted. *Id.*

dollars of fees and profits for, BofA affiliates. (JA8:3084-86, 3092-93, 3102-03 (TAC ¶¶4-8, 28, 65); JA3:962-63, 971, 979 (Answer ¶¶4-8, 28, 65)). The Committee Defendants were all BofA officers and employees, (JA:8 3088-91 (TAC ¶21); JA3:966-70 (Answer ¶21)), and Defendants have admitted that some served simultaneously as officers of the investment advisor to the Affiliated Funds, (JA2:684).

Claims and Facts with Respect to the 401(k) Plan

Plaintiffs' claims with respect to the 401(k) Plan all concern Defendants' acts (selecting) and omissions (failing to remove) that caused the 401(k) Plan to offer participants, as its primary investment vehicles, BofA proprietary funds. Plaintiffs' allege Defendants offered these funds despite the fact that many better options were available for large institutional investors such as the 401(k) Plan and that most of the proprietary funds offered participants poor performance and high fees. (JA8:3097, 3099 (TAC ¶¶46, 53)). Defendants nevertheless offered and maintained them in the 401(k) Plan in order to benefit BofA by (i) generating millions of dollars of fee income for BofA affiliates, and (ii) promoting BofA's mutual fund business. (JA8:3097 (TAC ¶¶47-49)).

The 401(k) Plan claims are brought on behalf of two classes. The "Removal Class" consists of 401(k) Plan participants who invested in the five funds referred to as the "Affiliated Funds" at any time from August 7, 2000 (six years before the

complaint was filed) through December 31, 2007 ("Removal Class Period"). (JA8:3116 (TAC ¶98)). The "Selection Class" consists of Plan participants who invested in any of ten proprietary funds ("Selection Class Funds") from July 1, 2000 through December 31, 2007 ("Selection Class Period"). *Id.* All claims are brought on behalf of the Removal Class only, except Counts IV, VI, and VII, which are brought on behalf of the Selection Class only. However, the only Counts that are the subject of this appeal are Counts I-IV. Plaintiffs are not appealing the dismissal of Counts V-VII.

The Removal Class Claims in this appeal are Counts I-III. Count II alleges Committee Defendants breached their fiduciary duties of loyalty to participants and prudence by failing to prudently and loyally fulfill their duty to remove imprudent investments. Plaintiffs' claim is that Defendants breached their duty to remove by effectively applying different monitoring standards to proprietary versus non-proprietary funds, thereby setting the bar much higher for removal of a proprietary fund. Plaintiffs also allege that during the Removal Class Period, the Affiliated Funds had poor performance and excessive fees. For example, comparable mutual funds from Vanguard would have earned participants $79 million more for their retirement during that time and charged fees in some cases one sixth the amount charge by the comparable BofA fund. (JA8:3098-100 (TAC ¶¶52, 54-55)).

Counts I and III allege that Defendants violated ERISA by causing the Plan to engage in prohibited transactions during the Removal Class Period. The transactions at issue were the investment of Plan assets in the Affiliated Funds. (JA8:3120 (TAC ¶110)). These investments occurred throughout the class period, e.g. when participants made their periodic contributions to their accounts. (JA8:3120 (TAC ¶111)). Defendants caused these transactions to occur by failing to remove the Affiliated Funds during the class period. *Id.* In other words, had Defendants removed the imprudent investments, millions of dollars in new contributions to the funds, i.e. discrete investment transactions, would not have occurred. Defendants' actions violated ERISA because these constituted transactions between the 401(k) Plan and a party-in-interest to the 401(k) Plan, i.e. the investment manager of the Affiliated Funds which was a subsidiary of the Plan sponsor, BofA. 29 U.S.C. §1106(a)(1)(A); (JA8:3120 (TAC ¶110)).

Finally, Selection Class Count IV concerns the initial selection of the ten selection class funds. Plaintiffs allege that Committee Defendants breached their duties of prudence and loyalty by selecting funds for the 401(k) Plan simply because they would financially benefit BofA affiliates with fee income and help promote its mutual fund business. (JA8:3123-24 (TAC ¶131)). Committee Defendants began the first step in the process of offering these funds by approving their addition to the 401(k) Plan during meetings held June 15, 1999 and December

1999. (JA8:3123 (TAC ¶128)). As discussed further below, the last step in the process, following a black out period when participants had no control over their investments, was permitting participants to invest in the funds, which occurred on August 7, 2000—within six years of the filing of the original complaint.

Pension Plan Claims

As noted above, the District Court dismissed all claims brought on behalf of the Pension Plan for lack of standing shortly after the SAC was filed. The dismissed claims alleged fiduciary breaches and prohibited transactions similar to those alleged with respect to the 401(k) Plan, i.e. prohibited transactions in causing proprietary funds to be used in the Pension Plan and fiduciary breaches by favoring proprietary funds for the Pension Plan, despite their high fees and poor performance. (JA1:141-43 (SAC ¶¶75-84)).

SUMMARY OF ARGUMENT

Issue 1: The District Court found untimely Plaintiffs' claims that Defendants breached their fiduciary duties of prudence and loyalty, and participated in other ERISA violations, by failing to remove imprudent proprietary investments from an ERISA 401(k) retirement plan. The Court so held despite the fact that all of the omissions of which Plaintiffs complain occurred within the limitations period. The Court held that Plaintiffs' claims for omissions were "really" complaints about the initial selection of the funds at issue, which it held occurred before the limitations

period. The District Court's holding not only defies logic and Supreme Court precedent, but it is also unsupported by ERISA's statutory language and is directly contrary to ERISA's remedial purpose of protecting participants.

The District Court's holding defies logic because the claims it found untimely exclusively concerned conduct that occurred within the limitations period. The holding also defies Supreme Court precedent because the Supreme Court has held that where there is no dispute that the challenged conduct is within the limitations period, a claim cannot be untimely.

The holding severely undermines ERISA's remedial purpose because it means, in effect, that retirement plan participants have no remedy against conflicted fiduciaries who sit idly by and do nothing — within the limitations period — as the high fees and poor performance of imprudent investments siphon off millions of dollars in participant retirement savings. Such a holding eviscerates the well-settled continuing obligation of ERISA fiduciaries to fulfill their fiduciary duties and remove imprudent investments.

The District Court's argument that finding Plaintiffs' failure-to-remove claims timely would render the statute of limitations "meaningless" is also without merit. Plaintiffs' claims only seek to hold those Defendant fiduciaries liable who acted or failed to act within the limitations period — not those responsible for the original selection. Moreover, Plaintiffs only seek losses that accrued within the

limitations period. Finally, Plaintiffs only make a claim with respect to conduct that occurred within the limitations period. Hence, claims with respect to actions and losses resulting from fiduciary conduct that occurred prior to the limitations period would remain time-barred, as they should, under Plaintiffs' position,.

Issue 2: The District Court also erred in finding that Plaintiffs' fiduciary breach claim with respect to Defendants' initial selection of imprudent investment options was untimely. ERISA's statute of limitations provides that the statute begins to run on the date of the "last act" which constituted a part of the breach. Here, the last act was offering the investment options to participants, and that occurred within the limitations period. The District Court's rejection of this argument erroneously found that the named Plaintiffs invested in the funds at issue prior to the limitations period.

Issue 3: The District Court also erred in dismissing all claims with prejudice. Judge Cogburn was new to the case and incorrectly believed that the court had given Plaintiffs three opportunities to amend the complaint, when only one amendment required court approval. Moreover, the District Court's opinion created novel principles of law, and Plaintiffs should have been given the opportunity to conform their pleading to those new principles.

Issue 4: Finally, the District Court erred in dismissing Plaintiffs' Pension Plan claims. The District Court misapplied the law of standing when it wrongfully

held that Plaintiffs lacked Article III standing to pursue those claims because their pension benefits were not reduced by Defendants' fiduciary breaches. Plaintiffs satisfy each of the requirements for Article III standing: injury-in-fact, causation, and redressability.

Plaintiffs demonstrated four distinct injuries, any of which confers constitutional standing. First, ERISA expressly authorizes participants to represent the Pension Plan and to pursue redress for injury to the Pension Plan itself. Congress gave Plaintiffs standing to sue under ERISA to protect their benefits and their Plan. As representatives of the Plan, Plaintiffs possess the same kind of representational standing as a trustee, fiduciary, guardian ad litem, or assignee. Second, trust law and ERISA have long-recognized that beneficiaries may sue a trustee for self-dealing and conflicts of interest without showing economic loss. Plaintiffs' detail a long history of self-dealing and conflicts by Defendants at the Pension Plan's and Plaintiffs' expense. Third, Plaintiffs suffered a personal injury caused by Defendants' fiduciary breaches. Defendants' actions diminished the Pension Plan's assets, increasing the risk that the Plan would fail and that Plaintiffs' retirement benefits would not be paid as promised. The District Court erroneously believed that an actual reduction in Plaintiffs' pension payments was necessary. Under this Court's precedent, so long as a defined benefit plan participant has suffered any injury to his interest in the plan (however small), he

has suffered an injury sufficient for Article III standing. Finally, Plaintiffs have standing to sue to enforce their statutorily created rights, separate and apart from any economic injury or representational standing.

The causation prong is satisfied. Since the standing decision was on a motion to dismiss, the truth of Plaintiffs' allegations that the Pension Plan suffered investment losses from Defendants' fiduciary breaches and self-dealing is presumed.

The redressability prong is also satisfied. Restoration of losses to the Plan, disgorgement of Defendants' ill-gotten gains and profits, and injunctive relief will remedy Plaintiffs' and the Plan's economic and statutory injuries.

STANDARD OF REVIEW

The District Court's decisions with respect to issues 1 and 2 were made in its opinion granting Defendants' motion for summary judgment on statute of limitations grounds. This Court reviews "de novo the district court's grant of summary judgment..., viewing the facts in the light most favorable to, and drawing all reasonable inferences in favor of, [the non-movant]." *EEOC v. Xerxes Corp.*, 639 F.3d 658, 668 (4th Cir. 2011) (quotation marks omitted).

Issue 3 concerns the District Court's dismissal of Plaintiffs' claims with prejudice rather than permitting amendment. Review of a District Court's decision

to dismiss claims with prejudice is for abuse of discretion. *Matrix Capital Mgt. Fund v. BearingPoint*, 576 F.3d 172, 192 (4th Cir. 2009).

Issue 4 concerns the District Court's dismissal of claims at the pleading stage for lack of standing. This Court reviews legal questions involving standing *de novo*. *See Piney Run Pres. Ass'n v. Cnty. Comm'rs*, 268 F.3d 255, 262 (4th Cir. 2001).

ARGUMENT

I. ERISA LEGAL BACKGROUND

A core purpose of ERISA is to protect employees' retirement security and benefits. 29 U.S.C. §1001(a). "ERISA is, of course, a remedial statute and should be given a liberal construction in order to carry out the vitally important public policies of protecting the integrity of employee benefit plan assets and of deterring fiduciary violations." *Brink v. DaLesio*, 667 F.2d 420, 427 (4th Cir. 1981); *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 123 (4th Cir. 1991) (as a "remedial statute[]," ERISA "should be liberally construed in favor of protecting the participants in employee benefit plans"). "Congress intended that private individuals would play an important role in enforcing ERISA's fiduciary duties — duties which have been described as 'the highest known to the law'." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) (quotation marks omitted). Thus, ERISA empowers participants, such as Plaintiffs here, to

sue on behalf of their plan. 29 U.S.C. §1132(a)(2).

The two fundamental ERISA fiduciary duties are the duty of loyalty and the duty of prudence. *DiFelice v. U.S. Airways*, 497 F.3d 410, 417-18 (4th Cir. 2007). Fiduciaries must "scrupulously adhere to [the] duty of loyalty, and make any decisions in a fiduciary capacity with an eye single to the interests of the participants." *Id.* at 418-19 (quotation marks omitted). In accordance with this duty, "Corporate officers must avoid placing themselves in a position where their acts or interests as officers or directors...prevent their functioning with...complete loyalty to participants...." *Id.* at 419 (quotation marks omitted). Indeed, a "fiduciary with a conflict of interest must act as if he is 'free' of such a conflict. 'Free' is an absolute. There is no balancing of interests; ERISA commands undivided loyalty to the plan participants." *Bedrick v. Travelers Ins. Co.*, 93 F.3d 149, 154 (4th Cir. 1996). The duty of prudence requires fiduciaries to act with the care, skill, diligence and prudence of a person familiar with such matters. 29 U.S.C. §1104(a)(1)(B).

With respect to investment options, a "fiduciary of a defined contribution...plan...who is given discretion to select and maintain specific investment options for participants — must exercise prudence in selecting and *retaining* available investment options." *DiFelice*, 497 F.3d at 418 (emphasis added). "The general ERISA fiduciary duties with respect to investments include

the duty of "monitoring plan investments 'with the care, skill, prudence and diligence...that a prudent man acting in a like capacity and familiar with such matters would use'." *DiFelice v. U.S. Airways, Inc.*, 397 F.Supp.2d 735, 743 (E.D. Va. 2005).

To satisfy ERISA's prudence requirement with respect to investment decisions, the fiduciary must "(1) employ proper methods to investigate, evaluate and structure the investment; (2) act in a manner as would others who have a capacity and familiarity with such matters, and (3) exercise independent judgment when making investment decisions." *Meyer v. Berkshire Life Ins.*, 250 F.Supp.2d 544, 564 (D. Md. 2003) (quotation marks omitted), *aff'd* 372 F.3d 261 (2004). "In sum, a fiduciary's independent investigation of the merits of a particular investment is at the heart of the prudent person standard." *Id* at 566 (quotation marks omitted; quoting *Fink v. Nat'l Sav. & Trust Co.*, 772 F.2d 951, 957 (D.C. Cir. 1985)).

<u>ERISA's Statute of Limitations</u>

ERISA's statute of limitations provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of--
>
> > **(1)** six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
> >
> > **(2)** three years after the earliest date on which the plaintiff had

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

29 U.S.C. §1113. This section "creates a general six-year statute of limitations, shortened to three years in cases where the plaintiff has actual knowledge, and potentially extended to six years from the date of discovery in cases involving fraud or concealment." *Browning v. Tiger's Eye Benefits Consulting*, 313 Fed.Appx. 656, 660 (4th Cir. 2009) (quotation marks omitted).

II. ISSUE 1: THE DISTRICT COURT ERRED IN FINDING COUNTS I-III UNTIMELY

As the party asserting the affirmative defense of the statute of limitations, Defendants have the burden of proving the facts showing that the statute has run. *Columbia Venture, LLC v. Dewberry & Davis, LLC*, 604 F.3d 824, 829 (4th Cir. 2010); *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007).

A. The District Court Erred in Finding that Count II Was Barred by ERISA's Six-Year Limitations Provision Because All the Relevant Actions Occurred within the Limitations Period

1. Timeliness

The TAC caption to Count II nicely describes this cause of action against the Committee Defendants: "Breach of Duties of Loyalty and Prudence by Failing to Remove or Replace the BoA Affiliated Funds as 401(k) Plan Investment Vehicles during the Removal Class Period." (JA8:3121). This caption makes clear that this

Count exclusively concerns actions occurring within the Removal Class Period, which begins six years before the complaint was filed (August 7, 2000), and thus is entirely within ERISA's six-year limitations provision. The allegations similarly state:

> Committee Defendants committed these breaches during each of the committee meetings that occurred periodically during each year of the removal Class Period. At each of these meetings, the Committee Defendants had cause to remove the Affiliated Funds based on their poor performance and high fees, but failed to do so.

(JA8:3122 (TAC ¶118)).

The Supreme Court has made clear that claims only challenging conduct occurring within the limitations period cannot, as a matter of logic and law, be untimely:

> [Where] no one disputes that the conduct petitioners challenge occurred within the charging period[, t]he real question...is not whether a claim predicated on that conduct is *timely,* but whether the practice thus defined can be the basis for a...claim *at all.*

Lewis v. City of Chicago, 130 S.Ct. 2191, 2197 (2010). Thus, according to the plain language of the TAC, Count II cannot be barred by the six-year limitations period.

The District Court, however, disregarded the plain language of the TAC. It effectively rewrote the TAC in order to find Count II untimely:

> Plaintiffs do not claim that the bank-Affiliated Funds became imprudent during the period through fund performance or increased fees; rather, they contend that the funds were improperly selected.

> Count II is, therefore, not a claim of improper monitoring of the fund, but a claim based on the non-existent duty to revisit initial selection of the fund to determine if it was a prohibited transaction. [Citation and parenthetical omitted]. As there is no duty under ERISA to revisit initial selection decisions and there have been no allegations or evidence as to material changes occurring since such selection, this claim challenges the initial selection of bank affiliated funds and is, therefore, time barred.

(JA7:3003-04). The conclusion that "this claim challenges the initial selection of bank affiliated funds" is plain error. Nowhere in Count II is the selection of the funds even mentioned. The District Court's rewriting of the TAC violates not only Supreme Court authority and the complaint's plain language, but also the well-settled principle that "the plaintiff is the master of the complaint". *Lincoln Property v. Roche*, 546 U.S. 81, 91 (2005) (quotation marks omitted); *Johnson v. Advance Am.*, 549 F.3d 932, 937 (4th Cir. 2008). It also violates the principle, noted by the District Court, that at summary judgment the court is to "draw inferences favorable to the [non-moving] party if the inferences are reasonable." (JA7:2993 (quotation marks omitted)).[4]

Numerous courts have found that similar allegations of breach by failing to

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[4] The District Court also described Count II as a "slightly different take on a continuing violation claim." (JA7:3003). The District Court did not define what it meant by "continuing violation", but it is not Plaintiffs' terminology and Plaintiffs reject that characterization. The claims of failure to remove funds are separate and independent causes of action and do not in any sense continue from the initial selection of the funds. The fact that similar claims of failure to remove recur or repeat through the Class Period is not relevant to the timeliness of the claims.

remove an investment are distinct causes of action that are timely even when the investment was initially selected prior to the limitations period.[5] The District Court simply ignored this authority.

Even more significantly, in its opinion the District Court relied heavily upon, and quoted extensively from, *Leber v. Citigroup*, No. 07-9329, 2010 WL 935442 (S.D.N.Y. Mar. 16, 2010) ("*Leber I*"). (JA7:2998-99). In an opinion issued subsequent to the District Court's opinion here, the *Leber* court explained its prior ruling. *Leber v. Citigroup, Inc.*, No. 07-9329, 2011 WL 5428784 (S.D.N.Y. Nov.

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[5] *See, e.g., George v. Kraft Foods Global*, __F.Supp.2d__, No. 08-3799, 2011 WL 2784153 at *16 (N.D. Ill. July 14, 2011) (even though ERISA fiduciaries selected funds for 401(k) plan before the ERISA limitations period, claims for failure to eliminate those funds within the limitations period were timely [while this opinion was issued after Plaintiffs' filed their briefs below, it was provided to the District Court at oral argument (JA7:2931)); *Buccino v. Cont'l Assur.*, 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983) (in ERISA fiduciary breach case court found "although the statute of limitations may protect defendants from liability for the initial purchase decision..., it does not bar suit for defendants' continued failure [during the limitations period] to take steps to terminate" the imprudent investments in the plan); *Reich v. Johnson*, 891 F. Supp. 208, 209 (D.N.J. 1995) (finding plaintiffs' action was timely because they "filed...within six years of the time in which defendants could have cured the alleged breaches stemming from the 1988 [stock purchases]"); *Howard Elec. v. Am. Bank & Trust*, No. 88-20399, 1990 U.S. Dist. LEXIS 7704 at *22 (N.D. Cal. Apr. 2, 1990) (agreeing with plaintiffs that their action was timely because "the breaches of fiduciary duty complained of are not the [initial] investments themselves, but the failure to properly monitor the diversification of the investment portfolio"). Another case made a similar finding in the context of excessive mutual fund fees. See *Boeckman v. A.G. Edwards*, 461 F.Supp.2d 801, 814 (S.D. Ill. 2006) ("allegations that, following the execution of the release, AG Edwards continued to breach its [ERISA] fiduciary duty by continuing to pay excessive fees to mutual funds represent new, prospective claims not in existence when the release was executed").

8, 2011) ("*Leber II*"). *Leber II* makes clear that the District Court misinterpreted *Leber I*, and that the *Leber* court would reject the District Court's reasoning here.

Leber II is a decision on a motion to amend. Plaintiffs sought to amend their complaint to assert for the first time separate claims that Defendants breached their fiduciary duties by failing to remove imprudent investment options in the 401(k) Plan. *Leber II* at *2, *4. As do Defendants here, the *Leber* Defendants argued that *Leber I* had both rejected "failure to remove claims" and found they were indistinguishable from "initial selection claims". *Id.* at *4. *Leber II* completely rejected Defendants' interpretation of its previous holding, as well as the idea that failure to remove claims are indistinguishable from initial selection claims:

> Defendants assert that the Court, in...[*Leber I*], considered and dismissed plaintiffs' breach-by-omission [i.e. failure-to-remove] claim. Defendants are incorrect. The Court's opinion addressed plaintiffs' claim that the Committee Defendants' breached their fiduciary duties by *selecting* the Affiliated Funds for inclusion in the Plan. The claim stated in proposed Count Two is different because it specifically alleges that — after the initial selection of the Affiliated Funds — the committee defendants breached their fiduciary duties by failing to (1) adequately monitor Plan investments, and (2) remove the Affiliated Funds from the Plan over the course of the Class Period, even though it should have been clear to the Committee Defendants that such investments were unsound because of their high fees.
>
> The Court also finds unavailing defendants' contention that plaintiffs' omission claim is indistinguishable from their selection claim. Defendants ignore the continuing nature of a plan fiduciary's duty pursuant to ERISA to dispose of improper investments.

Leber II at *4 (quotation marks and citations omitted). Accordingly, *Leber II* held that Plaintiffs' failure to remove claims were not futile, and granted, in relevant

respects, their motion to amend. *Id.* at *4, *6. *Leber II* makes clear that the District Court misinterpreted *Leber I* to be addressing both failure to remove claims and initial selection claims and then incorrectly asserted that *Leber I* "concluded that the relevant conduct for plaintiffs' prohibited transaction and fiduciary duty claims was not the failure to remove funds, but the initial selection of the challenged funds." (JA7:2998). Moreover, *Leber II* makes clear that that court views failure to remove and initial selection claims as independent, and that the former can be timely regardless of when the initial selection occurred.

Though it appears clear that the District Court erred in finding Plaintiffs' claims untimely, this Court can of course affirm on grounds other than those raised by the District Court. The District Court's discussion may suggest the following argument it did not actually propound: "Count II fails because as written it fails to state a claim, and the only similar claim that might be stated — relating to initial selection of the funds — is untimely." This argument fails because, as discussed next, Plaintiffs have stated a claim under well-settled law.

2. Count II States a Claim for Violating the Duty to Remove Imprudent Investments

The Fourth Circuit has held that ERISA fiduciaries have a duty to monitor investments and a duty to remove imprudent investments. *DiFelice v. U.S. Airways*, 497 F.3d 410, 423 (4th Cir. 2007) ("a fiduciary must initially determine, and continue to monitor, the prudence of *each* investment option available to plan

participants"). Moreover, fiduciaries are "subject to ERISA's general fiduciary standards" not only in initially choosing an investment option, but also in "continuing to designate investment alternatives" for the plan once those options are selected. *Id.* at 418 n. 3 (quoting opinion letter from U.S. Dept. of Labor ("DOL")). In addition, there is a duty to remove imprudent or otherwise improper funds, and plaintiffs may assert a claim for failing to remove such funds. *Id* at 420 (recognizing as an ERISA cause of action "that a fiduciary's *failure* to engage in a transaction, such as removal or closure of a company fund, breaches a duty"). Other circuits have also found that failure to remove an imprudent investment states a claim.[6] And Committee Defendants' own Investment Policy Statement, a document designed to provide guidance for the CBC's investment decisions, acknowledges the existence of such a duty.[7]

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6 See *Morrissey v. Curran*, 567 F.2d 546, 548-49 & n. 9 (2d Cir. 1977) ("trustee's obligation to dispose of improper investments within a reasonable time is well established at common law" and applies to ERISA fiduciaries); *Martin v. Consultants & Adm'rs*, 966 F.2d 1078, 1087-88 (7th Cir. 1992) (emphasizing "the continuing nature of a trustee's duty under ERISA to review plan investments and eliminate imprudent ones"); *Whitfield v.Cohen*, 682 F. Supp. 188, 196 (S.D.N.Y. 1988) (finding that an ERISA fiduciary "had a duty to monitor [an investment's] performance with reasonable diligence and to withdraw the investment if it became clear or should have become clear that the investment was no longer proper for the Plan").

7 "The Committee acknowledges that, as a result of exercising its fiduciary duty to monitor the investments, it may from time to time need to give consideration to replacing investment vehicles/managers that are not achieving expected

Count II is thus well grounded in the law. Plaintiffs have alleged that the process Defendants employed in deciding whether to remove an investment option was flawed and biased against removing BofA proprietary funds. (JA8:3121-22 (TAC ¶¶117-18)). Prudent and loyal fiduciaries should have removed the funds at the meetings that occurred during the relevant period given the funds' performance and fees compared to the available alternatives. *Id.* Plaintiffs have alleged that during the relevant period, "Plan participants would have earned over $79 million more if they had earned, on the money they invested through the 401(k) Plan and the Affiliated Funds, the returns of comparable Vanguard funds, rather than the returns of the Affiliated Funds themselves." (JA8:3099-100 (TAC ¶55)). Plaintiffs allege the amount lost from investment in specific Affiliated Funds, *id.,* and also provide examples of the high fees of the Affiliated Funds, noting that during the relevant period the Nations Large Cap Index Fund had an expense ratio six times higher than a comparable Vanguard fund, (JA8:3098-99 (TAC ¶52)).

The District Court opinion hints at two arguments why this fiduciary breach claim might not state a claim.[8] Both fail.

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performance. The Committee reserves the right to terminate or add investment vehicles/managers at its discretion." (JA8:3210).

8 As the District Court acknowledged, its decision was resolving a limited summary judgment motion, i.e. one limited to issues of timeliness. (JA7:2976). This meant that Plaintiffs had no obligation to submit evidence on the merits.

First, the Court commented that there were "no allegations...as to material changes occurring since" the initial selection of the Affiliated Funds. (JA7:3004). The Court cited no authority, and Plaintiffs are aware of none, requiring such an allegation, and there is no basis for it in ERISA. Moreover, the notion that ERISA fiduciaries would *only* have an obligation to remove an imprudent investment if it materially changed after its initial selection runs directly contrary to the cases cited above recognizing an unqualified duty to remove imprudent investments. It also is contrary to the settled principle in this Circuit, cited above, that ERISA is a remedial statute to be interpreted liberally to deter fiduciary breaches and protect participants. Significantly, the only appellate court case Plaintiffs are aware of addressing a similar issue regarding a purported need to allege a material change completely rejected the argument. *Martin v. Consultants & Administrators*, 966 F.2d 1078, 1087-88 (7th Cir. 1992) was an ERISA case involving allegations of breach for repeated failure to follow prudent bidding procedures for plan services. The court held:

> The bidding activities leading up to the 1987 contract, however, involve a new transaction and a distinct violation. **The trustees contend that it is essentially the bidding procedure that is being challenged, and since the bidding procedure did not materially change between 1984 and 1987, the 1987 bidding claim is barred**

(And as noted, *supra*, merits discovery was stayed as soon as Defendants filed their motion.) Moreover, to the extent the question involves whether Plaintiff has stated a claim, the standard of review is, of course, the same as a motion to dismiss.

> **along with the 1984 claim. The flaw in the trustees' argument is that it ignores the continuing nature of a trustee's duty under ERISA to review plan investments and eliminate imprudent ones.** See 29 U.S.C. §1104(a)(1)(B); *Morrissey v. Curran*, 567 F.2d 546, 549 n. 9 (2d Cir.1977). **If knowledge of an ERISA violation barred claims based on similar future conduct, this continuing fiduciary duty would be severely weakened, and trustees would be left free to engage in repeated violations, so long as they have once been discovered but not sued.** See *Buccino v. Continental Assurance...*, 578 F.Supp. 1518, 1521 (S.D.N.Y.1983).

Martin, 966 F.2d at 1087-88 (bold emphasis added). Other courts have found that ERISA fiduciaries have a duty to remove imprudent investments even when there has been no material change in the investment after it is selected.[9] The District Court here simply ignored this contrary authority. And *Martin*'s warning that requiring such a "material change" would result in "severely weakened" ERISA fiduciary duties has been realized with the District Court's ruling. According to the District Court, even though imprudent poor performing and high cost investments

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[9] *See, e.g., George v. Kraft Foods Global,* __F.Supp.2d__, No. 08-3799, 2011 WL 2784153 at *16 (N.D. Ill. July 14, 2011) (court implied claims for failure to remove imprudent funds in 401(k) Plan stated a claim (and were timely) even though there was no mention of any material change after the initial selection of the funds); *Buccino v. Cont'l Assur.*, 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983) (in ERISA fiduciary breach case court found "fiduciaries...were under a continuing obligation to advise the Fund to divest itself of unlawful or imprudent investments. Their failure to do so gave rise to a new cause of action each time the Fund was injured by its continued possession of [the investments]...."); *see also Boeckman v. A.G. Edwards,* 461 F.Supp.2d 801, 814-15 (S.D. Ill. 2006) (collecting cases that stand for the proposition that a new cause of action arises whenever ERISA fiduciaries fail to take action to remedy a situation that is causing harm to the plan, even when there was a prior initial selection or similar event that was a contributing cause).

continue to rob participants of millions of dollars of retirement savings, participants have no legal remedy to force the breaching Plan fiduciaries to do anything about it. In effect, the ruling permanently grandfathers into the Plan imprudent investments. This cannot be what Congress intended. ERISA can only provide meaningful protection for participants if fiduciaries *always* have an enforceable obligation to remove imprudent investments from a Plan.

Second, the District Court's opinion might be read to suggest a policy argument that if such allegations were found to state a claim, then it would make ERISA's statute of limitations “meaningless”. The District Court contended that if the claims asserted were allowed to stand:

> the limitations [sic] imposed by Section 1113(1)(a) would be meaningless and expose present Plan fiduciaries to liability for decisions made by their predecessors — decisions which may have been made decades before and as to which institutional memory may no longer exist.

(JA7:2997).

Contrary to the District Court, Plaintiffs are not attempting to hold current Plan fiduciaries liable for the acts of their predecessors, and nothing in the TAC suggests otherwise. There is no inconsistency, on Plaintiffs' view, between finding that fiduciaries making an initial fund selection breached their duties, but subsequent fiduciaries escaped all liability. All that would have to happen would be for the subsequent fiduciaries to fulfill their fiduciary obligations in their

subsequent actions, i.e. monitoring funds and making decisions to remove poor performing and high cost funds prudently and loyally, without regard to whether they were affiliated or unaffiliated with the plan sponsor. Not only are Plaintiffs not seeking to hold Plan fiduciaries liable for the acts of their predecessors outside the limitations period, they are also not seeking recovery of any losses outside the limitations period. Thus, the statute of limitations would function as fully as it does in any case: conduct occurring prior to the limitations period, the persons engaging in that conduct, and the losses resulting from that conduct, would all be protected from suit. The court in *Buccino v. Cont'l Assur.*, 578 F. Supp. 1518 (S.D.N.Y. 1983) rejected essentially the same argument made by the District Court here with similar reasoning:

> Finally, the Court is unpersuaded that its holding, that an employee benefit plan fiduciary's failure to act to eliminate an illegal or imprudent investment gives rise to a new cause of action each time the plan is injured by the fiduciary's neglect, is inconsistent with the important policies that lie behind statutes of limitations. **Defendants' contention that this rule would permit a lawsuit challenging an investment to be brought "fifty years or more" after the fact is incorrect. While new causes of action may periodically accrue if a fiduciary continually fails to dispose of an inappropriate investment, the statute of limitations begins to run on each such cause of action as it accrues**. Thus, if a suit were brought under ERISA challenging the acquisition and retention of a fifty year old investment, to use defendants' example, only the causes of action for failure to divest which accrued over the six years prior to the suit would not be time barred. The propriety or impropriety of the initial investment decision and the first forty-four years of retention would be irrelevant. No stale claim would be litigated, but, conversely, the fiduciary's breach of duty fifty years ago would not serve to shield

> him from liability for his most recent transgressions.

Id. at 1522 (citation omitted; emphasis added).

It should also be emphasized that the decision not to remove the funds at issue here at a specific point in time, which is the subject of Count II, is factually and legally distinct from the earlier initial selection decision. The decision not to remove was made by different committee members, who had different information available, and considered different facts, at a different time. For example, at meetings of the CBC subsequent to the initial selection, each of the Affiliated Funds necessarily had a different history of past performance. It is undisputed that past performance is a factor that the Committee Defendants were supposed to monitor when deciding whether to remove or replace funds. (JA2:840-41, 843-44 (referencing Plan Investment Policy Statement, which is at JA8:3207-12)). Other relevant factors also necessarily change over time. These include the type and cost of investment alternatives in the financial services market and the tenure and track record of the mutual fund manager (i.e. as time progresses either the manager will manage the fund for a longer period, which is often considered a good thing, or will have been replaced with a new manager with shorter tenure at the fund). *Id.*

Finally, Plaintiffs must address several errors in the District Court's only case citation in its discussion of Count II. The Court stated:

> Count II is, therefore, not a claim of improper monitoring of the fund, but a claim based on the non-existent duty to revisit initial selection of

> the fund to determine if it was a prohibited transaction. *Tibble*, 2010 WL at *31-33 (fiduciaries had no duty to engage in a "full due diligence review equivalent to that performed for a newly-added fund" where funds did not materially change during limitations period).

(JA7:3003-04).[10] **First**, the parenthetical statement, even if it were an accurate representation of the holding (which it is not), has nothing to do with Plaintiffs' failure to remove claims. Nowhere in the TAC is it alleged that Defendants breached their fiduciary duties by failing to do a "full due diligence review equivalent to that performed for a newly added fund" for the Affiliated Funds that were already in the Plan. Instead, as discussed above, Plaintiffs have plainly alleged that Defendants breached their duties by failing to remove funds that should have been removed for poor performance and high fees, but were not because Defendants gave favored treatment to funds that enriched BofA with fee income. One does not have to do a "full due diligence review" to figure out that a fund is underperforming benchmarks and is expensive compared to its peers. (Plaintiffs do not have proof of this in the record because this was not summary judgment on the merits; but they should have had the opportunity to present such

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10 The only citation to the *Tibble* case in the lower court's opinion is a short form citation that provides insufficient information to determine what opinion is being referred to. However, the parenthetical following the citation reproduces exactly a parenthetical in Defendants' brief below, (JA3:1020), so Plaintiffs assume for purposes of this brief that Judge Cogburn was referring to the same opinion to which Defendants refer in their brief, i.e. *Tibble v. Edison Int'l*, No. 07-5359, 2010 WL 2757153 (C.D. Cal. July 8, 2010).

evidence at trial). **Second**, the quotation from *Tibble* is taken out of context and the meaning is distorted. *Tibble* was a trial opinion, and the quotation is the opinion of an expert who testified that mere change in the name of a fund would not require full due diligence review equivalent to that for a newly added fund. It thus has nothing at all to do with what is required to state a claim, and has nothing at all to do with the timeliness of a cause of action. The quote in context is:

> Defendants' experts opined that the change [of name] to the fund was cosmetic only and did not require a full due diligence review equivalent to that performed for a newly-added fund.
>
> The Court accepts the conclusion of Defendants' experts. Here too, Plaintiffs' expert does not explain why it would be prudent to review the available share classes and fee structure of the Allianz Fund as a result of the April 2005 re-branding.

Tibble v. Edison Int'l, No. 07-5359, 2010 WL 2757153 at *31 (C.D. Cal. July 8, 2010). There is nothing here with which Plaintiffs would disagree. They do not maintain that a mere change in the name of the fund requires a full due diligence review. Moreover, there is nothing at all in the passage that supports the District Court's holding or has anything to do with timeliness. **Third**, the Court's suggestion that Plaintiffs were arguing that Count II was for "improper monitoring" is inaccurate. As discussed above, Count II alleges a violation of the well-settled duty to remove imprudent investments, not the duty to monitor. **Fourth**, the District Court's suggestion that Count II concerns a "duty to revisit initial selection of the fund to determine if it was a prohibited transaction" makes

no sense. Plaintiff's prohibited transaction claims are in Counts I and III. Count II is not a prohibited transaction claim but a fiduciary breach claim.

B. The District Court Erred in Finding Counts I & III, Alleging Defendants Engaged in Prohibited Transactions, are Untimely

In enacting ERISA, Congress was aware that there had been a history of plan sponsors and fiduciaries misappropriating employees' pension plan funds for their own purposes. *C.I.R. v. Keystone Consol. Indus.*, 508 U.S. 152, 160 (1993). Accordingly, it enacted what are referred to as ERISA's "prohibited transaction provisions", the goal of which "was to bar categorically a transaction that was likely to injure the Pension Plan," *id.* Because of their remedial function, these provisions are to be broadly construed. *See id.*

Count I of the TAC alleges Committee Defendants violated ERISA's prohibited transaction provisions, specifically 29 U.S.C. §1106(a)(1)(A), (C), and 1106(b), by "causing the Plans to be invested in the Affiliated Funds, and causing the Plans to pay, directly or indirectly, investment management and other fees in connection therewith [to] parties in interest" with respect to the Plans, specifically the investment manager for the Affiliated Funds, which was a BofA affiliate. (JA8:3120 (TAC ¶110)). Committee Defendants caused these transactions to occur "by failing to remove or replace the Affiliated Funds as Plan investment vehicles at each of the Committee meetings that occurred periodically during each year of the Removal Class period." (JA8:3120 (TAC ¶111)). Count III is brought

for BofA's participation in these prohibited transactions as plan sponsor, as well as its participation in fiduciary breaches.

The District Court stated "[r]eading such allegations in the light most favorable to them, plaintiffs contend that when defendants selected bank affiliated funds for inclusion in the 401(k) Plan, such inclusion violated ERISA." (JA7:2995). This statement is inaccurate. The District Court is not only ***not*** reading the allegations "in the light most favorable to" Plaintiffs, it is ignoring the plain language of the TAC. Count I could not be clearer in stating that its basis is Defendants' actions within the limitations period. Nowhere does it even reference the act of selecting bank affiliated funds. And Count III is only referencing the prohibited transactions and breaches stated in other counts. Hence, for the same reasons discussed with respect to Count II, Counts I and III are timely.[11]

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[11] The District Court's suggestion that Plaintiffs previously argued that Counts I and III would be untimely absent fraud or concealment, (JA7:2996), is inaccurate. In support of its claim the District Court contended:

> ...plaintiffs previously argued that 'absent fraud or concealment those claims are untimely....' Plaintiffs' Brief in Opposition to Defendants' First Motion for Summary Judgment on Statute of Limitations Grounds (#199), at p. 2, n. 2.

(JA7:2996). But the District Court is quoting Plaintiffs' brief out of context. The full context of Plaintiffs' statement is: "To the extent the SAC might be interpreted to also assert claims for improper initial selection of the Affiliated Funds, Plaintiffs acknowledge that absent fraud or concealment those claims are untimely." (JA2:747 n. 2). Thus, Plaintiffs were only arguing (at that time) that claims relating to the initial selection of the funds were untimely absent fraud or

The District Court cites two unreported district court decisions from other circuits in support of its holding: *Leber v. Citigroup*, 2010 WL 935442 (S.D.N.Y. Mar. 16, 2010) and *Figas v. Wells Fargo & Co.*, No. 08-4546 (D. Minn. Apr. 6, 2010). (JA7:2997-98). It states in conclusory fashion that these courts were rejecting "an identical" argument. *Id.* As noted above, the *Leber* court has made clear in a subsequent opinion that it was not addressing an identical argument, and in particular it was not addressing claims for failure to remove the funds within the limitations period. The *Figas* opinion is similarly distinguishable. Plaintiffs in that case also did not allege separate claims for failure to remove funds within the limitations period. (*See Figas,* No. 08-4546 (D. Minn.), Dkt. No. 177, ¶¶86-95 (available through PACER)).

III. ISSUE 2: THE DISTRICT COURT ERRED IN FINDING THAT COUNT IV WAS UNTIMELY BECAUSE THE LAST ACT CONSTITUTING THE BREACH OCCURRED WITHIN THE LIMITATIONS PERIOD

Count IV is brought for Defendants' fiduciary breaches in the initial selection of BofA-affiliated funds as investment options in the 401(k) Plan. Plaintiffs argued in their opposition brief below that this claim is timely because of ERISA's provision that a fiduciary breach cause of action accrues on "the date of

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concealment. They also vigorously argued in the same brief that the SAC also asserted claims for failure to remove the Affiliated Funds, and Plaintiffs were in no way asserting that those failure to remove claims were untimely absent fraud or concealment.

the last action which constituted a part of the breach or violation," 29 U.S.C. §1113(1)(A). (JA7:2797-98). These funds were first made available as investment options to many Plan participants only on August 7, 2000. (Attachment 1 to Dkt. No. 251, 2d Moore Decl., Ex. 10 at 1 (indicating that when the Plan was created on July 1, 2000 from the merger of the BankAmerica and NationsBank plans, former NationsBank employees had a freeze period on new investments through August 6, 2000)). Offering these funds to participants constitutes the last act of the fiduciary breach in selecting them for the Plan. It is only once the funds were offered to participants, and assets invested in them, that any actual loss to the Plan or participants could be incurred, so it was only then that the breach was completed. Before the funds were offered, any breach was only hypothetical. Hence, the initial selection claims accrued on August 7, 2000, which is within six years of the filing of the complaint (August 7, 2006).[12]

The District Court rejected this argument in a footnote. (JA7:2981 n. 4). This footnote contains several errors. First, the District Court stated that Plaintiffs were making this argument "for the first time" in their opposition brief — thereby implying it should have been made sooner. However, it is well settled that a

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12 See, e.g., *Finley v. Dun & Bradstreet*, 471 F.Supp.2d 485, 493 (D.N.J. 2007) (ERISA fiduciary breach misrepresentation action accrued on date of last misrepresentation and was thus timely); *Framingham Union Hosp. v. Travelers Ins.*, 721 F. Supp. 1478 (D. Mass. 1989) (ERISA fiduciary breach action accrued when effect of failure to disclose ceased, and was thus timely).

Plaintiff is not required to plead around an affirmative defense, see, e.g., *Jones v. Bock*, 549 U.S. 199, 211-17 (2007), so Plaintiffs' opposition brief was exactly the correct place to raise the argument.

Second, the District Court states that the argument "contradicts a prior representation to the court" that Count IV would be timely only in the event of fraud or concealment. (JA7:2981 n. 4). This statement ignores Plaintiffs' justification, presented in their Opposition Brief, that their change of position was a result of newly discovered evidence indicating the Selection Class Funds were made available to many participants only on August 7, 2000. (JA7:2797-98).

Further, the District Court incorrectly contended that "plaintiffs pled in their TAC that those selections occurred more than six years before the filing of this action in August 2006" citing TAC ¶128. TAC ¶128 states:

> Committee Defendants acted to add the ten Selection Class Funds as investment options in the 401(k) Plan on or about the following dates: nations MidCap index fund, December 1999; all other Selection Class Funds, June 15, 1999.

(JA8:3123). This allegation simply and accurately describes facts regarding the dates on which Committee Defendants approved the addition of these funds to the 401(k) Plan. It makes no statement regarding their legal significance, and makes no statement or implication that the entire breach was complete on the dates indicated. Thus, the District Court's interpretation not only violated its duty to make inferences on behalf of the non-movant, but once again ignores what the

complaint actually says.

Finally, the District Court makes a bald factual error when it inaccurately states in conclusory fashion, with no analysis, and without even naming the funds it is referencing that "the court cannot find this to be a real and material issue of fact as some plaintiffs actually invested in such funds before August 2000." (JA7:2981 n. 4 (citing "Barrett Decl., Ex. 3A, at DAVID00301-02 [JA4:1660-61]; Ex. 7A, at STACH00268-69 [JA5:1850-51]")). The documents to which the Court cites are account statements for two of the named plaintiffs. The account statements do indicate that those Plaintiffs invested, e.g., in an investment fund called the "Large Cap Stock Index." And one of the removal class funds is the "Nations LargeCap Index Fund." (JA8:3085-86 (TAC ¶8)). However, despite the superficial similarity in name, the fund listed on the account statement is in fact an entirely different fund. That fund was not a mutual fund, but a collective trust that was terminated as an investment option in the 401(k) Plan before the inception of the Class Periods at issue here. (*See* JA8:3184, ¶52 and documents cited therein (indicating that the collective trust options in the pre-merger BofA 401(k) Plan, including the "Large Cap Stock Index", would all be terminated once the post-merger 401(k) Plan, which is the plan at issue here, came into being). Further proof that the funds listed on the account statements are not the funds of which Plaintiffs' complain is that one of the funds of which they complain, the Nations

MidCap Index Fund, had an inception date of April 2, 2000. (JA5:2187). The account statements to which the court cites are for the period January 1 to March 31, 2000. Hence, the "Mid Cap Stock Index" referred to on the account statements cannot possibly be one of the removal class funds since that mutual fund did not even exist at that time.

IV. PLAINTIFFS' CLAIMS ARE NOT BARRED BY ERISA'S ACTUAL KNOWLEDGE PROVISION

In the proceedings below, Defendants argued that Plaintiffs' claims are barred by the actual knowledge exception to ERISA's statute of limitations, 29 U.S.C. §1113, "to the extent that they are based on Defendants' failure to remove the funds prior to August 7, 2003 [three years before the complaint was filed]". (JA3:1020). This was not an argument that Plaintiffs' claims were barred *in toto*, but only to the extent they concerned conduct "prior to August 7, 2003." The District Court never ruled on this argument because it found that Plaintiffs' claims were barred *in toto* by ERISA's six-year limitations period. In the event the actual knowledge issue is raised in the alternative by Defendants or this Court considers it *sua sponte*, Plaintiffs address it below.

A. Count II is not Barred by ERISA's Actual Knowledge Provision

1. Legal Background of ERISA's Actual Knowledge Provision

ERISA's "six year [limitations] period reflects Congress' determination to impress upon those vested with the control of pension funds the importance of the

trust they hold. Thus, Congress evidently did not desire that those who violate the trust could easily find refuge in a time bar." *Brock v. Nellis*, 809 F.2d 753, 754 (11th Cir. 1987). ERISA's three-year actual knowledge limitations period is an "exception" to this six-year period, *id.,* and it "sets a high standard for barring claims against fiduciaries prior to the expiration of the section's six-year limitations period," *Montrose Medical Group v. Bulger*, 243 F.3d 773, 787 (3d Cir. 2001) (quotation marks omitted). Accordingly, courts "interpret[] the actual knowledge requirement stringently." *Id* (quotation marks omitted). To have actual knowledge "it is not enough that [a plaintiff] had notice that something was awry; he must have had specific knowledge of the actual breach of duty upon which he sues." *Brock*, 809 F.2d at 755.

This Court has yet to interpret the meaning of "actual knowledge of the breach or violation" in ERISA's statute of limitations, 29 U.S.C. §1113(2). *Browning v. Tiger's Eye Benefits Consulting*, 313 Fed.Appx. 656, 661 (4th Cir. 2009). However, as noted above, in this Circuit ERISA is to be interpreted liberally to protect plan participants and deter fiduciary breaches. Thus, Plaintiffs respectfully submit this Court should adopt the reasonable interpretation of ERISA's actual knowledge provision that is most protective of plan participants: that actual knowledge "requires a showing that plaintiffs actually knew not only of the events that occurred which constitute the breach or violation but also that those

events supported a claim of breach of fiduciary duty or violation under ERISA." *Id.* at 660 (quoting *Int'l Union v. Murata Erie N. Am.*, 980 F.2d 889, 900 (3d Cir. 1992)). This interpretation has been adopted by both the Third and Fifth circuits. *Id*. In any event, as discussed below, Plaintiffs lacked actual knowledge under any of the circuits' interpretations of that provision because they lacked actual knowledge of key facts.

Moreover, in an unpublished disposition, this Court has noted two key principles regarding ERISA's actual knowledge provision: (i) "it is plainly apparent that actual knowledge must be distinguished from constructive knowledge," so "knowledge of facts cannot be attributed to plaintiffs who have no actual knowledge of them," *id.* at 661 (quotation marks omitted); (ii) "there cannot be actual knowledge of a violation...unless the plaintiff knows the essential facts of the transaction or conduct constituting the violation," *id.* (quotation marks omitted). From point (ii) it follows that "ERISA requires actual knowledge of all of the elements of the violation alleged." *Meyer v. Berkshire Life Ins.*, 128 F.Supp.2d 831, 838 (D. Md. 2001) (quotation marks omitted), *aff'd* 372 F.3d 261 (2004).

In complex cases of imprudent investment, this Court has found that claims are timely and that the plaintiffs lacked actual knowledge. In *Meyer v. Berkshire Life Ins.*, 372 F.3d 261 (4th Cir. 2004), the Court affirmed both the holding and

reasoning of the district court that found, after trial, that plaintiffs lacked actual knowledge of imprudent investment claims, *id.* at 267.[13] The *Meyer* plaintiffs, two physicians, brought fiduciary breach claims alleging that the investment manager for their 401(k) Plan had failed to diversify plan assets and placed them almost exclusively in low return investments, had churned the account, and had overloaded the account with life insurance policies. *Meyer*, 250 F.Supp.2d at 550. The district court found the plaintiffs lacked actual knowledge more than three years before the complaint was filed, emphasizing: (i) "the doctors were not financially astute; the evidence established, in fact, that the doctors retained Berkshire so they would not have to deal with the pension plans themselves"; (ii) some of the financial documents shown to the physicians were objectively confusing; and (iii) the meetings between the physicians and Berkshire were short and provided minimal information. *Id.* at 569.

2. Three Principal Reasons Plaintiffs' Lacked Actual Knowledge

Count II alleges Defendants breached their duties of prudence and loyalty by failing to remove the Affiliated Funds. Plaintiffs do not deny that they were aware that these funds were not removed from the 401(k) Plan during the class period,

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13 The *Meyer* district court had previously denied defendants' motion for summary judgment on timeliness grounds, finding that the question presented factual issues best resolved at trial. *Meyer*, 128 F.Supp.2d at 840.

but much more is required to have actual knowledge of the breach upon which they sue, as is discussed next.

a. Plaintiffs Lacked Knowledge of the Process Employed in Monitoring the Funds

It is well settled that in determining whether fiduciaries breached their ERISA duties in making an investment decision, courts look not to the subsequent investment results or performance, but to the adequacy of the *process* the fiduciaries employed in arriving at the investment decision. *DiFelice v. U.S. Airways*, 497 F.3d 410, 420 (4th Cir. 2007) (in evaluating the ERISA prudence requirement, "a court must ask whether the fiduciary engaged in a reasoned decisionmaking process, consistent with that of a 'prudent man acting in a like capacity' "); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996) ("[C]ourts measure [ERISA's] 'prudence' requirement according to an objective standard, focusing on a fiduciary's conduct in arriving at an investment decision, not on its results, and asking whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment"). Furthermore, "[b]ecause the fiduciary's obligation is to exercise care prudently and with diligence 'under the circumstances then prevailing,' 29 U.S.C. §1104(a)(1)(B), his actions are not to be judged from the vantage point of hindsight." *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006) (internal quotation marks omitted).

Because knowledge of the process fiduciaries employed at the time is essential for ascertaining whether they breached their duties, courts have held that with respect to investment-related breach claims, ERISA plaintiffs "must have been aware of the process utilized by [the fiduciary] in order to have had actual knowledge of the resulting breach of fiduciary duty." *Maher v. Strachan Shipping*, 68 F.3d 951, 956 (5th Cir. 1995); see also *Brown v. Am. Life Holdings,* 190 F.3d 856, 859 (8th Cir. 1999) ("if the fiduciary made an *imprudent* investment, actual knowledge of the breach would usually require some knowledge of how the fiduciary selected the investment"). Hence, in a case similar to this one, *George v. Kraft Foods Global*, 674 F.Supp.2d 1031 (N.D. Ill. 2009), the court found that Plaintiffs lacked actual knowledge of those claims explaining that "mere knowledge of the presence of these funds as Plan investment options" did not provide plaintiffs with actual knowledge of imprudent selection because "for example, merely knowing that the fund was an investment option does not provide plaintiffs with the 'essential facts of the transaction or conduct' of the fund selection process that they claim is deficient". *Id.* at 1044.

Similarly, here, Plan participants, including Plaintiffs, have no access to or knowledge of the substance of the Committee's deliberations, (JA8:3037-38 (Tr. at 68:9-69:20)), so they lack actual knowledge of the process used, especially what the Committee considered, or failed to consider, in monitoring and failing to

remove the Affiliated Funds during the relevant period. (JA2:891-901, ¶4(a)-(f) of each of three affidavits). The named Plaintiffs have affirmed this lack of knowledge in affidavits. *Id*. As courts inside and outside of this Circuit have noted, "the disclosure of a transaction that is not inherently a statutory breach of fiduciary duty cannot communicate the existence of an underlying breach." *Meyer v. Berkshire Life Ins.*, 250 F.Supp.2d 544, 550 (D. Md. 2003), *aff'd* 372 F.3d 261 (4th Cir. 2004) (ellipses and quotation marks omitted; quoting *Fink v. Nat'l Sav. & Trust*, 772 F.2d 951, 957 (D.C.Cir.1985)). Failing to remove the Affiliated Funds from the Plan was not inherently a statutory breach of ERISA's fiduciary duties of prudence or loyalty, so Plaintiffs did not have actual knowledge. As the DOL explained regarding actual knowledge in an amicus brief filed in a similar case involving allegations that single-equity funds offered in a 401(k) Plan were imprudent and had unreasonable fees:

> Specifically, **knowledge of the single-equity funds alone would not have afforded the Plaintiffs knowledge of the "care, skill, prudence, and diligence under the circumstances then prevailing" used by the Defendants in offering these funds**. 29 U.S.C. §1104(a)(1)(B). Mere knowledge of their existence would not have informed the Plaintiffs whether the Defendants took such steps to "minimize the risk of large losses" as investigating alternative investments, analyzing the risks created by the single-equity funds, or continuously monitoring the investments, some or all of which plaintiffs would have needed to know to establish a claim of procedural imprudence. 29 U.S.C. §1104(a)(1)(C)....
>
> Similarly, **knowledge of the fee charges could not have provided the Plaintiffs with the knowledge necessary to deduce whether**

> **such rates were the product of a prudent process**. There is no indication...that the plan documents reveal in any way whether the fiduciaries analyzed the fees, investigated other fee structures, negotiated the fees they paid, attempted to negotiate lower fees, undertook to monitor the fee rates as compared to changes in competitive fee rates, or considered the comparative advantages of mutual funds over lower-cost investment structures. Absent an awareness of some or all of these facts, the Plaintiffs lacked knowledge of all the facts necessary to establish the procedural aspect of their claim of excessive fees.

(JA2:877-78 (bold emphasis added) (Amicus Brf. of Sec'y of Labor Sup. Pls.-Appellants, *Young v. GM Inv. Mgt. Corp.*, 325 Fed.Appx. 31 (2d Cir. 2009) (hereinafter "*Young* Amicus")[14]).[15] As the agency with principal responsibility for enforcement and administration of ERISA's fiduciary standards, the DOL's views in interpreting ERISA, including those expressed in *amicus curiae* briefs, are entitled to deference.[16]

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14 The Court of Appeals decided the case on other grounds, so it never ruled upon the arguments advanced by the Secretary of Labor.

15 Courts have distinguished the requirements for what plaintiffs must know to file a complaint from the actual knowledge standard, and noted that the standard for filing a complaint is considerably weaker. *See Caputo v. Pfizer,* 267 F.3d 181, 195 (2d Cir. 2001) (the presentment of a pleading to the court certifies only that the allegations "have evidentiary support or...are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery" (quoting Fed. R. Civ. P. 11(b)(3))). Thus, there is no inconsistency with the law or ERISA in finding that Plaintiffs' lacked actual knowledge of the breach upon which they sued when they filed the complaint because they lacked knowledge of Defendants' fiduciary process. *See id.*

16 See *Mass. v. Morash*, 490 U.S. 107, 116-18 (1989) (deferring to DOL's

b. *Plaintiffs Lacked Actual Knowledge,* inter alia*, of Whether the Fees Were Excessive or the Performance Poor*

Courts have noted that the material facts a plaintiff needs to know to possess actual knowledge of his claim "could include necessary opinions of experts" *Caputo v. Pfizer*, 267 F.3d 181,193 (2d Cir. 2001) (quotation marks omitted); *Cetel v. Kirwan Fin. Group*, 460 F.3d 494, 511 (3d Cir. 2006) (same); *Maher v. Strachan Shipping*, 68 F.3d 951, 954 (5th Cir. 1995) (same).

This case provides an excellent example of how opinions of experts can be necessary to possess actual knowledge of a claim. A critical element of Plaintiffs' claim in Count II is that Defendants failed to remove the funds despite their high fees and poor performance, and despite the ready availability of lower cost and better performing alternatives. Thus, to have actual knowledge of this claim a Plaintiff would have to know at least:

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interpretation of the phrase "employee welfare benefit plan" in ERISA); *Marcella v. Capital Dist. Physicians' Health Plan, Inc.*, 293 F.3d 42, 48 (2d Cir. 2002) (deferring to DOL's interpretation of ERISA's definition of "employer"). Interpretations of statutes and regulations made by the agency with responsibility for their enforcement and administration, even though they lack the force of law and are not subject to the requirements of notice and comment rule making, are entitled to judicial deference to the extent they have "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944); *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360, 365 (4th Cir. 2000). This deference applies to agency interpretations expressed in *amicus curiae* briefs. *See Auer v. Robbins*, 519 U.S. 452, 447-58, 462-63 (1997) (applying *Chevron* deference to DOL's legal interpretation expressed in *amicus curiae* brief).

i. The amount of fees charged by the Affiliated Funds.

ii. That the fees charged by the Affiliated Funds were unreasonably high compared to other investment options that could have been selected for the 401(k) Plan.

iii. The historical performance of the Affiliated Funds.

iv. That the historical performance of the Affiliated Funds was poor compared to other investment options that could have been selected for the 401(k) Plan.

But only someone with considerable investment expertise, knowledge of the investment options available to institutional investors such as 401(k) plans, and with the skill to know how to compare funds to appropriate benchmarks, would be able to make a reasonable judgment on these matters. Doubtless, if this case proceeds to trial, both sides will pay investment experts tens of thousands of dollars to opine on such matters. The named Plaintiffs here are relatively low-level bank employees, all of whom consider their knowledge of investments to be quite limited (JA2:891-901, ¶¶2-3 of each of three affidavits). They have attested to their lack of knowledge, more than three years before the complaint was filed, of (ii) and (iv) in their affidavits (as well as (i), which is discussed in the next section). (JA2:891-901). Hence, Plaintiffs lacked actual knowledge of their claims. *See* cases cited above and *Meyer v. Berkshire Life Ins.*, 250 F.Supp.2d 544, 569 (D. Md. 2003), *aff'd* 372 F.3d 261 (4th Cir. 2004) (finding that Plaintiffs' lack of investing sophistication supported a finding of lack of actual knowledge of investment-related breach).

The DOL similarly noted in the *Young* amicus, while arguing that plaintiffs lacked actual knowledge of similar claims of excessive mutual fund fees, that:

> **the substantive prudence of the fee payments turned on...material facts that could not be evident from the fees themselves or the plan documents.** For example, nothing in the fees themselves revealed whether the fiduciaries could have paid lower fees for the same level of risk or rate of return or what similarly situated fiduciaries paid in fees for comparable investments. Nor did the fees themselves reveal the purpose for which the fiduciaries [s]elected the mutual funds as opposed to other investment options or lower-cost mutual funds, or how such funds fit within their larger investment strategy. **Without such information, the Plaintiffs had no context within which to judge the merits of the fee rates and..."actually know" that the fees were imprudent in violation of...404(a)(1)**.

(JA2:879-80 (emphasis added)).

c. *Plaintiffs Lacked Knowledge of the Amount of Fees, the Funds' Affiliation with BofA, and the Funds' Performance*

Even the basic facts that Plaintiffs would require for actual knowledge of their claims — such as (i) the amount of the Affiliated Funds' fees and (ii) the fact that the Affiliated Funds were proprietary BofA funds — were not disclosed or were inadequately disclosed to participants. Defendants did not enter in the record in the proceedings below a single document that was provided to participants that disclosed the fees and expense ratios of the Affiliated Funds. The only way participants could obtain such information was by requesting copies of the funds'

prospectuses. (JA3:1004-05, ¶¶21, 24).[17] Plaintiffs' counsel have been involved in many of these types of cases, and they have not previously encountered any 401(k) Plan in which expense ratio information was not provided to participants up front.[18] This fact suggests Defendants did not want participants to know just how expensive the Affiliated Funds were.

Furthermore, the call-center protocol if participants requested such information gave them the runaround. Call center representatives were instructed to first refer participants to the SPDs, which did not contain fee information, and then to lengthy mutual fund prospectuses, which were not distributed to participants unless they requested them. (JA8:3045 (transcript at 104:9-22); JA8:3072). It is therefore not surprising that Plaintiffs have stated in their

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[17] There was no dispute below that during the class period participants were not provided with fund fee information but could only obtain it if they requested it. Either misunderstanding or ignoring the record, the District Court matter-of-factly and inaccurately stated "it is undisputed that since at least 2000, the 401(k) Plan has provided plaintiffs and all Plan participants with disclosures about the Plan, including the funds included in the Plan and related fees." (JA7:2983). Plaintiffs repeatedly emphasized below that participants were not provided with information about fees. (*See, e.g.*, JA7:2774).

[18] Indeed, recognizing that participants need such information to understand their plans' investment options, new DOL regulations mandate detailed fee and performance disclosures to participants. *See* 75 Fed. Reg. 64,910-46 (Oct. 20, 2010) ("Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans"). A model comparative chart with such information developed by the DOL in conjunction with the new regulations spans four pages and is an appendix to the regulation. (JA7:2817-20).

affidavits that they did not have knowledge of the amount of fees charged by the Affiliated Funds during the relevant period. (JA2:891-901, ¶4(j) of each of three affidavits).[19]

That Plaintiffs lacked sufficient information to have actual knowledge is confirmed by Callan Associates, which was an investment advisor to the CBC, (JA2:840-41). Callan was asked in 2003 to review the Plan structure and assess the appropriateness of Plan investment options. (*Id.* & JA8:3014-15 (11/12/03 Minutes); JA8:3227-28). In October 2003, a Callan employee engaged in the review e-mailed BofA employees stating that she was unable to determine whether the fees charged by the Affiliated Funds were reasonable based upon publicly available information. (JA8:3214). She wrote to them requesting:

> A detailed break-down of the total expense ratio for each fund, including any plan administrative fees that are applied to the NAV's [net asset values]. We're trying to understand what the investment management fee is that is being paid for each fund, versus the component of expense devoted exclusively to offsetting plan

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19 In early 2000, there was a one-time disclosure of the amount of fees charged by two of the Affiliated Funds prior to the inception of the Removal Class Period. (*See* JA6:2701). But that of course is no substitute for timely information about fund expenses during the class period, especially since expense ratios and fees are variable and should decrease as assets under management increase. *See* John P. Freeman, Stewart L. Brown, & Steve Pomerantz, *Mutual Fund Advisory Fees: New Evidence and a Fair Fiduciary Duty Test*, 61 OKLA.L. REV. 83, 97 (2008). Only if Plaintiffs had timely expense information could they have actual knowledge that the fees were high and not competitive with similar funds at the time.

> administrative expense. **Without this breakdown, it is difficult to determine if the investment management fees participants are paying are within industry norms.**

Id. (emphasis added). If investment professionals such as Callan Associates could not determine from public sources whether the fees were reasonable and whether there was a breach by offering them, it strains credulity to suggest that Plaintiffs had actual knowledge of such facts.

In addition, the affiliation between the Affiliated Funds and BofA was disclosed in a misleading and confusing manner. The disclosure that Defendants' referenced in the proceedings below, (JA3:1004, ¶22 (citing Terry Decl., Ex. 5 at BOA-DAVID-UR-00736094 [JA3:1350])), is in fine print at the bottom of the page after the discussion of all the funds. It is preceded by the statement "Nations Funds distributor: Stephens Inc., which is not affiliated with Bank of America, N.A., is not a bank and securities offered by it are not guaranteed by any bank or insured by the FDIC. Stephens Inc., member NYSE, SIPC." *Id.* The next paragraph states simply "Banc of America Advisors, Inc., an affiliate of Bank of America, N.A., performs investment advisory and other services for Nations Funds, and receives fees for such services." *Id.* This juxtaposition seems intentionally designed to confuse. The first statement indicates that the Nations Funds distributor is *not* affiliated with BofA, while the second fine print statement, if participants read that far, suggested an affiliation. Moreover, the statement of

affiliation merely suggests that a BofA affiliate performed some services for Nations Funds in exchange for payment. That type of transient affiliation is not the basis of Plaintiffs' claim. Plaintiffs have claimed that these were "BoA Funds" that were proprietary, in-house funds, that were wholly offered and managed by BofA affiliates, who received all the profits generated. (JA8:3084-85 (TAC ¶7)). Furthermore, in at least one instance BofA directed that participants be told that "the funds are not affiliated with the Bank but are managed by a Bank affiliate."[20] It is thus unsurprising that Plaintiffs have affirmed they lacked knowledge that the Affiliated Funds were proprietary BofA funds. (JA2:891-901, ¶4(k) of each of three affidavits).

Furthermore, the performance information provided to participants was not consistent. Although participants were told that they were investing in mutual funds, they actually invested in unitized funds that held cash and mutual fund shares. (JA8:3031-34 (Tr. at 58:9-61:8)). The actual performance of the Plan funds differed from that of the underlying mutual funds. *Id.* at 60:1-61:8. Thus, a participant reviewing the performance of his or her investment in a Plan fund would see performance that varied from the publicly reported performance. *Id.* Further, the corporate intranet site through which many participants could access

20 JA8:3053; *see also* JA8:3028-29 (Tr. at 55:2-56:15).

information about the funds was often out of date. (*Id.* at 106:6-108:19; JA8:3075).

Since even the most basic of information for their claims was either not provided to them or was provided in an objectively confusing manner, Plaintiffs lacked actual knowledge. *See Meyer*, 250 F.Supp.2d at 569 (finding plaintiffs lacked actual knowledge of investment improprieties where "the financial documents shown to the [plaintiffs] were objectively confusing").

B. Counts I and III, Alleging that Defendants caused the Plan to Engage in Prohibited Transactions, are not Barred by ERISA's Actual Knowledge Provision

Plaintiffs lacked actual knowledge of their prohibited transaction claims, Counts I and III, for two reasons.

First, a key allegation supporting those claims is non-satisfaction of the conditions for exemption of the transaction under DOL's Prohibited Transaction Exemption 77-3, 42 Fed. Reg. 18734 (Apr. 8, 1977) ("PTE 77-3"). (JA8:3120-21 (TAC ¶113)). PTE 77-3 exempts purchases or sales of mutual fund shares by an affiliated ERISA plan only if certain conditions are met, including "dealings between the plan and the investment company...or any affiliated person..., are on a basis no less favorable to the plan than such dealings are with other shareholders of the investment company." *Id.* at 18735. The TAC alleges this condition is not satisfied because other shareholders were treated better than the Plan: e.g. in a

scandal first revealed by Attorney General Eliot Spitzer, the hedge fund Canary Capital was permitted to late trade and market time the Affiliated Funds. (JA8:3101-02, 3120-21 (TAC ¶¶59-60, 113)).

Courts have held that such an allegation is necessary to state a claim for prohibited transactions of this type. In dismissing a similar claim that did not allege non-satisfaction of the conditions, one court held:

> **The complaint alleges the very type of activity that the exemption expressly allows to occur** — the investment by a plan in its affiliated mutual funds on the terms generally available to other investors. It makes no allegations to support a finding that the conduct fell beyond the exemption and accordingly would be actionable under section 406. ..... **Accordingly, plaintiffs provide no plausible basis for presuming their claims will be actionable under section 406 and they therefore fail to state a claim**.

Leber v. Citigroup, No. 07-9329, 2010 WL 935442 at *10 (S.D.N.Y. Mar. 16, 2010); *see also Mehling v. New York Life Ins.*, 163 F.Supp.2d 502, 510 (E.D. Pa. 2001) (dismissing similar claim where "Plaintiffs do not allege that the fees paid by the Plans are not in compliance with the requirements of PTE 77-3").

Thus, for the named Plaintiffs to have actual knowledge of all elements of their claim, they would have to know, at a minimum, the facts underlying the argument that the exemption was not satisfied, i.e. the market timing scandal. However, Plaintiffs did not have knowledge of this more than three years before the complaint was filed, i.e. before August 7, 2003. (JA2:891-901, ¶4(i) of each of three affidavits). Moreover, it would have been almost impossible for them to

have known since the first public revelation, Eliot Spitzer's claim that such illegal activity had occurred, was not until September 3, 2003. (JA2:774, ¶5; JA2:778-79).[21]

That Plaintiffs would have had to have known that the exemption was not satisfied to have actual knowledge of a claim is supported by BofA's own statements regarding the legality of its conduct. Doubtless relying on the exemption, in multiple communications, BofA told anyone who asked that it was entirely proper for the Plan to invest in proprietary funds.[22] Thus, BofA itself took the position that there was no illegality based on the fact of the transaction itself.

A second reason Plaintiffs' lacked actual knowledge is that they lacked actual knowledge of another element of the prohibited transaction claim: that the investment manager of the Affiliated Funds was a party in interest to the Plan. The status of party in interest to a plan is specifically defined under ERISA, *see* 29 U.S.C. §1002(14), and is explicitly made an element of a prohibited transaction

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21 *See also* Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J.L.& PUB. POL'Y 639, 662-65 (2010) (mutual fund market timing and late trading revelations began on September 3, 2003 with Spitzer announcement).

22 *See, e.g.*, JA7:2710 ("there is nothing in ERISA to suggest that Congress intended to preclude financial institutions from making their own investment products available to their in-house plans"); JA7:2721; JA8:3053, 3061, 3078, 3141.

claim, 29 U.S.C. §1106(a)(1)(A), (C). The definition of party in interest with respect to an affiliate is:

> The term "party in interest" means, as to an employee benefit plan—
>
> * * * *
>
> (G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—
>
> (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,
> (ii) the capital interest or profits interest of such partnership, or
> (iii) the beneficial interest of such trust or estate,
>
> is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E) [which sections refer to plan fiduciaries and employers, i.e. plan sponsors, et al.]

29 U.S.C. §1002(14). There is absolutely no record evidence and no reason to believe that Plaintiffs had any knowledge that the investment adviser for the Affiliated Funds met any of these conditions. The only disclosure Defendants have pointed to merely stated that the adviser was an "affiliate". That would be true if BofA merely had some sort of profit sharing arrangement or owned 40% of the voting stock. Hence, it is apparent that Plaintiffs lacked actual knowledge of facts necessary to establish the elements of the prohibited transaction claims.

C. Count IV, Alleging Breach in the Initial Selection of the Affiliated Funds, is not Barred by ERISA's Actual Knowledge Provision

For reasons similar to those discussed with respect to Count II, Plaintiffs lacked actual knowledge of the fiduciary breach alleged as the basis of Count IV.

In particular, they lacked knowledge of the process Defendants employed in selecting those funds.

V. ISSUE 3: THE DISTRICT COURT ERRED IN DISMISSING ALL CLAIMS WITH PREJUDICE RATHER THAN PERMITTING PLAINTIFFS AN OPPORTUNITY TO AMEND THE COMPLAINT

In dismissing Plaintiffs' claims with prejudice, the District Court stated that "the court has allowed plaintiffs three opportunities to amend their Complaint to address issues raised by defendants." (JA7:2977). As noted above, this statement is inaccurate. In fact, the first amendment was as of right, the second was by consent, and only the third required court approval.

The District Court erred in dismissing Plaintiffs' complaint with prejudice. The District Court's ruling created novel legal principles, never proclaimed by any prior court opinion to Plaintiffs' knowledge, in at least two respects: (i) that a fiduciary only has an obligation to remove an imprudent investment if there has been a material change in the investment, (JA7:2997, 3003-04), and (ii) that in the circumstances of this case Plaintiffs did not have standing to assert claims with respect to Plan losses from investments in the Columbia Quality Plus Bond Fund because they did not personally invest in this fund, (JA7:3004-06).

At the end of oral argument Plaintiffs' counsel expressly requested leave to amend in the event the court established the principle stated in (i) above.[23] Plaintiffs also should have been given the opportunity to add an additional plaintiff who invested in the Columbia Quality Plus Bond Fund to cure the District Court's standing objection. "The standard for dismissing a complaint with prejudice is high: dismissal *with prejudice* is warranted only when a trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Belizan v. Hershon*, 434 F.3d 579, 583 (D.C.Cir.2006) (internal quotation marks omitted). As the District Court did not make, and could not have made, such a finding, it therefore erred in dismissing the complaint with prejudice. *See id.* (district court erred in dismissing complaint with prejudice where it failed to explain why allegations of additional facts could not cure the defects found in the complaint); *Ostrzenski v. Seigel,* 177 F.3d 245, 252-53 (4th Cir.1999) (rather than dismiss a complaint with prejudice, a plaintiff should "be given every opportunity to cure a formal defect in his pleading[,] ... even though the court doubts that plaintiff will be able to overcome the defects" (internal quotation marks and citations omitted)); *see also Matrix Capital Mgt.*

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23 "if the Court were to...establish a standard that plaintiffs were affirmatively required to allege changed circumstances in the complaint, we are prepared to do so, and would ask that we be allowed to amend -- that the court not dismiss the monitoring claim [i.e. Count II] with prejudice." (JA7:2974, ll. 16-20).

Fund v. BearingPoint, 576 F.3d 172, 194 (4th Cir. 2009) (district court abused its discretion in denying post-judgment request to amend).

VI. JUDGE CONRAD ERRED IN DISMISSING THE PENSION PLAN CLAIMS FOR LACK OF STANDING

A. Background

The District Court, Judge Robert Conrad, Jr. presiding, erred in dismissing Plaintiffs' Pension Plan claims. Plaintiffs alleged in the SAC (the operative complaint at the time of Judge Conrad's ruling) that Defendants: (1) engaged in prohibited transactions when they caused the Pension Plan to invest in BofA-affiliated mutual funds (Count I); and (2) breached their fiduciary duties of prudence and loyalty by investing the Pension Plan in such funds to benefit the Bank (Count II). (JA1:141-43, ¶¶75-84).

The District Court granted Defendants' motion to dismiss those claims, holding that because the Pension Plan is a defined benefit plan whose participants are entitled to fixed minimum periodic payments, "the purportedly improper and excessive fees did not harm Plaintiff's interests in or benefits under the Pension Plan" and "any recovery by the Plaintiffs would have absolutely no effect on the Plaintiffs' entitlement to benefits." (JA2:644-45).[24]

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[24] The District Court attributed great significance to the fact that the Pension Plan is a defined benefit plan that "is obligated to pay a fixed level of benefits to its participants upon retirement." *Harley v. Zoesch*, 413 F.3d 866, 868 (8th Cir. 2005);

The District Court misapprehended and misapplied the law of standing because: (1) the Pension Plan suffered an injury and ERISA expressly authorizes Plaintiffs to represent the Pension Plan; (2) trust law and ERISA provide standing to sue self-dealing fiduciaries without requiring proof of economic harm; (3) Plaintiffs suffered personal economic injuries; and (4) Plaintiffs suffered injuries in the form of statutory violations.

B. Plaintiffs have Article III Standing.

As a threshold matter, it is undisputed that, as participants in the Pension Plan, Plaintiffs have statutory standing to assert claims against Defendants on behalf of the Pension Plan under ERISA, 29 U.S.C. §1132(a)(2). Indeed, a suit under ERISA §1132(a)(2) can only be brought on behalf of a plan and only by one of the enumerated persons (not by a plan or an employer).

The Supreme Court has established a three-part test for constitutional standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *accord Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 268 (4th Cir. 2011). Plaintiffs first must have suffered "an injury-in-fact," meaning "an invasion of a legally protected interest." *Lujan*, 504 U.S. at 560 (citations omitted) (internal quotation marks omitted). "Second, there must be a causal connection between the injury and

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see also LaRue v. DeWolff, Boberg & Assocs., 552 U.S. 249, 250 n.1 (2008); *Wilmington Shipping v. New Eng. Life Ins.*, 496 F.3d 326, 328 n.2 (4th Cir. 2007).

the conduct complained of....” *Id.* And third, “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* at 561 (internal quotation marks omitted). Plaintiffs satisfy all of the requirements for Article III standing, only the first and third of which are arguably at issue.[25]

1. Plaintiffs Satisfy Article III Injury Requirements.

a. Plaintiffs Have Standing to Sue for Injuries to the Pension Plan.

It is undisputed that Plaintiffs have pled a loss to the Pension Plan, inasmuch as the truth of Plaintiffs’ loss allegations must be assumed for purposes of this appeal. ERISA explicitly authorizes Plaintiffs to sue for that injury. *See* ERISA, 29 U.S.C. §1132(a)(2). Thus Plaintiffs possess the same kind of representational standing as a trustee, fiduciary, or assignee.

Article III allows a plaintiff to sue for injury to another even if the plaintiff personally has no stake in the outcome of the case, provided (1) there has been an injury to another; (2) the relief sought will remedy that injury; and (3) the plaintiff has the legal authority to bring the claim in place of the injured other. *See Sprint Commc’ns v. APCC Servs.*, 554 U.S. 269, 274-75 (2008). Thus an assignee holding legal title to another party’s claim has constitutional standing to pursue the

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[25] There is no question that the injury to Plaintiffs and to the Pension Plan was “fairly traceable” to Defendants’ investment decisions. *See Piney Run Pres. Ass’n*, 268 F.3d at 263 (quotation marks omitted).

claim, *even if the assignee has agreed to remit all litigation proceeds to the assignor*. *See id.* Far from being remarkable,

> federal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit. Trustees bring suit to benefit their trusts; guardians ad litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; executors bring suit to benefit testator estates; and so forth.

Id. at 287-88.

Plaintiffs in this case clearly satisfy the *Sprint* standard. They brought suit on behalf of the Pension Plan to recover losses suffered by the Plan. Plaintiffs are entitled to bring suit by a Congressionally-established legal relationship, ERISA, 29 U.S.C. §1132(a)(2), which authorizes suits by the Secretary of Labor, participants, beneficiaries, and fiduciaries. *See id.* Congress did not differentiate between these persons for purposes of standing. Rather, all four share "the common interest" "in the financial integrity of the plan." *Mass. Mut. Life Ins. v. Russell*, 473 U.S. 134, 142 n.9 (1985) (discussing §1132(a)(2)). If anything, a plan participant has more at stake than a trustee or fiduciary because the participant's benefits are paid from the trust.

Requiring personal injury (and redress) for a litigant to establish representational standing would effectively nullify the doctrine, which rests on injury and redress to the represented person. Indeed, if personal injury were

required of trustees and fiduciaries, they would not have standing to sue because they suffer no economic injury from a loss to the plan.

In attempting to distinguish *Sprint* based on the fact that "[t]he Plaintiffs in this case are not assignees standing on behalf of an assignor who has contractually assigned his rights", (JA2:644), the District Court focused on a distinction without a difference. If a plaintiff has Article III standing to pursue a claim assigned by contract, a person expressly authorized by Congress to pursue a claim, such as Plaintiffs here, must have standing. *See United Food & Commercial Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 557 (1996) ("particular relationships (recognized either by common-law tradition *or by statute*), are sufficient to rebut the background presumption...that litigants may not assert the rights of absent third parties" (emphasis added; footnotes omitted)).

At a November 2011 argument, Justice Scalia flatly rejected elevating contractual relationships over statutory ones, stating "a concrete interest can be created by Congress instead of being created by a contract," and, asking skeptically, "if you become a trustee by contract you get one result, but if you are a trustee [by statute]…somehow the situation changes?"[26] Indeed, Justice Scalia has

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26 *See First Am. Fin. v. Edwards* (No. 10-78), transcript available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-708.pdf (hereinafter "*First Am. Tr.*") at 19.

long-espoused the view that a plaintiff will "always" have standing when he is "the very *object* of a law's requirement or prohibition." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983). Plan participants, like Plaintiffs here, are the "very object of ERISA" inasmuch as Congress conferred standing on them to sue to protect their benefits and their plans.

b. Plaintiffs Have Standing to Sue for Self-Dealing Transactions Absent Direct Economic Injury to Themselves or the Pension Plan.

Trust law has long-recognized that a beneficiary has standing to sue the trustee for breach of the duty of loyalty even if the beneficiary does not claim the trustee's breach caused pecuniary harm to the trust. Under the so-called "no-further-inquiry rule," a beneficiary need simply establish the trustee engaged in self-dealing or acted under a conflict of interest.[27] A court may award

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[27] *See Restatement (Third) of Trusts* §78 cmt. b (stating that under the no further-inquiry rule "it is immaterial that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee"); Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. CORP. L. 565, 573 (2003) ("Under the no-further-inquiry rule, even if the self-dealing transaction is objectively fair, the beneficiaries need only show the existence of the trustee's self-interest in order to prevail. Once the beneficiaries prove the fact of self-dealing, there is 'no further inquiry' and the transaction is voided" (footnote omitted)); Mark L. Ascher, et al., *Scott and Ascher on Trusts* § 17.2 (5th ed. 2010) ("[A] trustee who has violated the duty of loyalty is liable without further inquiry into whether the breach has resulted

disgorgement of profits, removal of the fiduciary, or other relief even if the beneficiary shows no economic harm to himself or the trust.

Federal courts have long adjudicated suits where the plaintiff sought relief from a breach of the fiduciary duty of loyalty without economic harm. *See, e.g.*, *Michoud v. Girod*, 45 U.S. 503, 557 (1846) (applying the no-further-inquiry rule to void a sale tainted by an executor's conflict); *Robertson v. Chapman*, 152 U.S. 673, 681 (1894) ("The law will not, in such a case, impose upon the principal the burden of proving that he was in fact injured, and will only inquire whether the agent has been unfaithful in the discharge of his duty").

ERISA embodies these principles. *See Varity Corp. v. Howe*, 516 U.S. 489 (1996) (fiduciary provisions of ERISA are derived from the common law of trusts). ERISA [29 U.S.C. §1104] requires that fiduciaries act "solely in the interest of participants." Indeed, in enacting ERISA Congress was greatly motivated by "misuse and mismanagement of plan assets." *Mass. Mut. Life Ins.*, 473 U.S. at 140 n.8. ERISA, 29 U.S.C. §1106 goes even further, imposing a *per se* bar on self-dealing transactions and eliminating the "advance approval" exception to the no-further-inquiry rule. *Donovan v. Cunningham,* 716 F.2d 1455, 1464-65 (5th Cir. 1983) (citing *Cutaiar v. Marshall,* 590 F.2d 523, 529 (3d Cir. 1979)).

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in any actual benefit to the trustee...[or] whether the breach has caused any actual harm to either the trust or its beneficiaries").

Participants can sue self-dealing fiduciaries for disgorgement of profits or seek other equitable relief without showing a loss. *See Mass. Mut. Life Ins.*, 473 U.S. 134; *Cutaiar*, 590 F.2d at 530; *Freund v.Marshall & Ilsley Bank,* 485 F. Supp. 629, 637 (D. Wis. 1979) (citing *Marshall v. Kelly,* 465 F. Supp. 341, 354 (W.D. Okla. 1979)). For example, in *Chao v. Linder*, No. 05-3812, 2007 WL 1655254 (N.D. Ill. May 31, 2007), the court rejected defendants' argument that they could not be held liable unless the plaintiff could establish that the transactions caused harm to the plan:

> We do not agree that harm to the plan must be shown. The *per se* nature of the [29 U.S.C. §1106] prohibitions cuts against the need-to-show harm to the plan. "Even in the absence of bad faith, or in the presence of a fair and reasonable transaction, [§1106(b)] establishes a blanket prohibition of certain acts, easily applied, in order to facilitate Congress' remedial interest in protecting employee benefit plans.

Id., at *8 (quoting *Lowen v. Tower Asset Mgt.,* 635 F. Supp. 1542, 1553 (S.D.N.Y. 1987)).

Most recently, at a November 2011 oral argument, several Supreme Court justices appeared to recognize the long-settled proposition that a beneficiary may sue a trustee for self-dealing or conflicts absent economic injury to himself or the trust.[28]

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28 *First Am. Tr.* at 6 (Ginsberg, J. (in restitution and unjust enrichment cases, plaintiff does not need to prove harm)); *id.* at 19, 30 (Scalia, J. (Supreme Court does not require injury in fact for breaches of trust in most cases, and asking if the

c. Plaintiffs Suffered Personal Injuries from the Pension Plan's Losses.

Plaintiffs were personally injured by Defendants' imprudent and conflicted investment decisions in violation of ERISA, 29 U.S.C. §§1104, 1106. Defendants' actions diminished the Pension Plan's assets, increasing the risk that the Plan would fail and that Plaintiffs' retirement benefits would not be paid as promised.

Plaintiffs are entitled to receive a periodic, fixed payment from the Pension Plan. The District Court, however, wrongly concluded this "guarantee" (subject to default) means a defined benefit plan participant suffers no injury to his interests in the plan or to his benefits from excessive fees. (JA2:644-45).[29]

Injury does not require an actual reduction in Plaintiffs' pension payments. So long as a defined benefit plan participant has suffered an injury to his interest in the plan, he has suffered an injury sufficient for Article III standing. *Wilmington Shipping v. New England Life Ins.*, 496 F.3d 326, 334-35 & n. 8 (4th Cir. 2007). In

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no-injury rule applies outside of trust or agency law)); *id.* at 31 (Roberts, C.J. (injury presumed in trust cases alleging self-dealing)); *id.* at 35-36 (Breyer, J. ("loads of examples" in trust and fiduciary cases where no showing of injury required)).

[29] The courts' reliance on *Glanton v. AdvancePCS*, 465 F.3d 1123, 1125 (9th Cir. 2006), was misplaced. *Glanton* involved a healthcare plan where premiums were paid on a periodic basis by the employer. There were no trust assets. Here, we have a multi-billion dollar retirement trust established for the benefit of hundreds of thousands of participants to provide retirement benefits for many decades. The financial health of the Pension Plan matters to participants just as much as the health of a river matters to those who fish, swim, and paddle in it. *See generally Friends of the Earth v. Laidlaw Envtl. Serv.*, 528 U.S. 167 (2000).

Wilmington Shipping, the plaintiff was a defined benefit plan participant who could choose to receive a lump-sum payment of pension benefits in lieu of receiving periodic payments over time. The lump-sum payment was an optional form of benefit; the value of benefit received by the plaintiff did not change according to the form of benefit. The plaintiff lost the right to choose a lump-sum payment once the Pension Benefit Guarantee Corporation assumed control of the insolvent plan. This Court held that his loss constituted an injury-in-fact. *See id.* (holding that the alleged injury "satisfie[d] Article III's injury-in-fact requirement" because "loss of [the plaintiff's] right to a lump-sum benefit" was "a concrete personal injury" sufficient to provide the plan participant with constitutional standing). The Court found that an injury-in-fact existed despite the fact that the plaintiff suffered no decrease in the amount of his benefits.

Thus any reduction in the Pension Plan's assets injured Plaintiffs because "every asset [in the plan] will fund the participant[s'] pension[s]." *Bendaoud v. Hodgson*, 578 F.Supp.2d 257, 264 (D. Mass. 2008). Any reduction in the Pension Plan's assets necessarily depletes the assets available to pay benefits, increases the risk of a Plan default, and diminishes Plaintiffs' prospects of receiving full retirement benefits. *See id.* Although "[m]isconduct by the administrators of a defined benefit plan [ordinarily] will not affect an individual's entitlement to a defined benefit," such misconduct nevertheless has an adverse effect on that

entitlement if "it *creates or enhances* the risk of default by the entire plan." *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 249, 255 (2008) (emphasis added). During oral argument in *LaRue*, Justice Breyer, speaking of a defined benefit plan, said:

> one might compare plan assets to diamonds in a safe deposit box. Suppose there is a defined benefit plan in which 1,000 participants are each owed a diamond on retirement. The plan holds 1,000 diamonds in a single safe deposit box. One day, a fiduciary steals one of the diamonds. Now there are 1,000 participants, but only 999 diamonds, meaning that each participant's share in the plan has been diminished by one-tenth of one percent. This is a small interest, to be sure, but cognizable—and one suffered by every participant. And...it makes perfect sense that when any one participant sues over the breach of duty, it is to recover the missing diamond, rather than that plaintiff's interest of 1/1,000 of a diamond.

Bendaoud, 578 F.Supp.2d at 264 n.7 (citing Transcript of Oral Argument at 39, *LaRue*, 552 U.S. 248 (No. 06-856)). The analogy applies whether or not there are more diamonds than participants because every participant has an interest in the overall number of diamonds, and *any diminishment* of the number of diamonds increases the risk that the participants will not receive their future payout as promised. *See Benadoud*, 578 F.Supp.2d at 264 ("[T]he participant has a small interest in every asset held by the plan, since every asset will fund the participant's pension.... If a plan fiduciary breaches his duty and impairs the value of a defined benefit plan asset, then every participant in the plan is harmed according to his or her interest in the asset").

Thus, Plaintiffs suffer harm when the Pension Plan's assets are diminished, *however slight* the increase in risk to their promised benefits. *See id.* at 264 ("If a plan fiduciary breaches his duty and impairs the value of a defined benefit plan asset, *then every participant in the plan is harmed according to his or her interest in the asset*: *that harm, though small, increases the risk that the employee's ultimate benefit will be underfunded*." (emphasis added)). Magnitude of harm is irrelevant for standing purposes. *See Valley Forge Christian Coll v. Ams. United for Separation of Church & State*, 454 U.S. 464, 497 (1982). Indeed, "the claimed injury need not be large, an identifiable trifle will suffice," *Friends of the Earth v. Gaston Copper Recycling*, 204 F.3d 149, 156 (4th Cir. 2000) (quotation marks omitted), as will "even a small probability of injury," *Vill. of Elk Grove Vill. v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993).

Further, a plaintiff has constitutional standing to sue even if the plaintiff has not demonstrated an actual out-of-pocket loss. In *Gollust v. Mendell*, 501 U.S. 115 (1991), the Supreme Court held that an "attenuated" financial stake in the outcome of the litigation was sufficient to find Article III standing. *See id.* at 124-27. Plaintiffs have a much stronger financial interest in their eventual pension payments than the plaintiff in *Gollust* with only an "attenuated" stake.[30]

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30 The District Court cursorily dismissed *Gollust's* relevance to this case, contending that because it involved investor rights to bring claims, it did not apply

Thus, the inquiry here is whether Defendants' ERISA violations increased the *risk* that the Plan would *at some point* default on its obligations. *See Benadoud*, 578 F.Supp.2d at 264. To hold otherwise is to grant immunity to Defendants that Congress did not intend. If defined benefit plan participants are denied the ability to sue under ERISA §1132(a)(2) until a breach causes a reduction in benefits, claims will become time-barred before benefits are reduced and fiduciaries will be permitted to violate ERISA with impunity. Such a result would eviscerate congressional intent to prohibit "misuse and mismanagement of plan assets."[31] *Mass. Mut. Life Ins. v. Russell*, 473 U.S. 134, 140 n.8, 142 (1985).

d. Plaintiffs Have Standing to Enforce Their Statutory Rights.

Even if Plaintiffs lack standing for other purposes, Plaintiffs nevertheless may sue to enforce the legal rights vested in them by statute: the right to ensure that the Pension Plan is operated in accordance with law, that fiduciaries discharge their duties with care, skill, prudence, loyalty, and diligence, and that fiduciaries do not engage in self-dealing.

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to ERISA participants in a defined benefit plan. (JA2:644). *Gollust* stands for the larger point that even an "attenuated" financial stake in the outcome is sufficient for standing purposes.

[31] For these reasons, the Eighth Circuit's 2-1 opinion in *Harley v. Minn. Mining & Mfg.*, 284 F.3d 901 (8th Cir. 2002) was wrongly decided.

The Supreme Court has long recognized that plaintiffs have constitutional standing to bring suit to enforce statutorily created legal rights. *See Lujan*, 504 U.S. at 578; *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973); *see also Long Term Care Partners v. United States*, 516 F.3d 225, 242 (4th Cir. 2008) (Williams, C.J., concurring in part and dissenting in part). This is true "even though no injury would exist without the statute." *Linda R.S.*, 410 U.S. at 617 n.3.

The same is true under ERISA.[32] ERISA §1132(a)(2) is not limited to suits that "entail at least some risk to plan assets," but "casts a wider net" by "empower[ing] beneficiaries [participants, or fiduciaries] to bring a civil action to redress *any* violation of the statute's fiduciary requirements." *Fin. Inst. Ret. Fund v. Office of Thrift Supervision*, 964 F.2d 142, 148-49 (2d Cir. 1992); *see also Bendaoud*, 578 F.Supp.2d at 264 ("ERISA creates an actionable statutory

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32 *See Cent. States Se. & Sw. Health & Welfare Fund v. Merck-Medco Managed Care*, 433 F.3d 181, 199 (2d Cir. 2005); *Horvath v. Keystone Health Plan E,* 333 F.3d 450, 456 (3d Cir. 2003); *Fin. Inst. Ret. Fund v. Office of Thrift Supervision*, 964 F.2d 142, 149 (2d Cir. 1992); *cf. Larson v. Northrop Corp.*, 21 F.3d 1164, 1171 (D.C. Cir. 1994) (in analyzing ERISA's statute of limitations, finding that "a plaintiff need not suffer harm (i.e., be denied pension benefits) before he becomes entitled to bring an action [for an alleged breach of fiduciary duty] under 29 U.S.C. §1104(a).").

entitlement to prudent, loyal management of funds in each participant." (citing 29 U.S.C. §1132(a)(2)).[33]

2. Plaintiffs' Injuries are Likely to be Redressed by a Favorable Outcome in this Litigation.

Plaintiffs also satisfy the redressability requirement for Article III standing.[34] ERISA §1109(a) provides that a breaching fiduciary is responsible for making the plan whole for any losses caused by that fiduciary (including restoring profits) and is subject to "such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. §1109(a).

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33 Pending before the Supreme Court is a case asking whether, under a different statutory scheme, a statutory violation without any economic harm to the plaintiff may create Article III standing. *See generally First Am. Fin. v. Edwards* (No. 10-78). *Edwards* involves the Real Estate Settlement Procedures Act of 1974 ("RESPA"), which in relevant part prohibits the payment of fees or kickbacks in exchange for business referrals and forbids any charge made or received for a real estate settlement service if services are not actually rendered to the customer. *See* 12 U.S.C. §2607. Although the plaintiff in *Edwards* was not charged excessive fees, she sued Defendants for entering into an agreement that contemplated fees in violation of RESPA and sought statutory penalties. The Ninth Circuit held that the plaintiff had constitutional standing because RESPA established a cause of action for a *per se* violation of the statute, and there was nothing in the statute or its legislative history limiting claims to cases with actual overcharges. *See Edwards v. First Am.*, 610 F.3d 514 (9th Cir. 2010). Although *Edwards* involves a different statutory scheme and, therefore, provides little meaningful guidance to this case, questions by some of the Justices, as noted above, suggest that they believe trust law permits standing in conflict of interest contexts even absent economic harm.

34 The District Court conflated injury with redressability, holding that because there were no injuries, Plaintiffs cannot be awarded any redress from this litigation. (JA2:644-45).

Plaintiffs' injuries (and the injury to the Pension Plan) are likely to be redressed by restoration of Pension Plan losses, disgorgement of ill-gotten gains and profits thereon, and injunctive relief, including but not limited to the removal of fiduciaries, reforms to the administration of the Pension Plan, training for fiduciaries, or the appointment of independent fiduciaries, any or all of which provide the redress for Plaintiffs' injuries necessary for constitutional standing.

CONCLUSION

For these reasons, the District Court's ruling should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed.R.App.P. 32(a)(7)(B) as modified by this Court's November 30, 2011 order (Dkt. No. 40) permitting a brief not in excess of 20,000 words. The foregoing brief contains 19,644 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Word 2007 for Windows XP.

Dated: December 21, 2011

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 21, 2011, a copy of **Appellants' Brief** was served via the court's electronic filing system onthe following:

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