IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 12-2056; 12-2060; 12-3794; 12-3875

RONALD TUSSEY, CHARLES FISHER, and TIMOTHY PINNELL,
as representatives of a class consisting of participants in the
PRISM Plan for Employees of ABB Inc. and in the Represented
PRISM Plan for Represented Employees of ABB Inc.
Plaintiffs-Appellees,

v.

ABB INC., JOHN W. CUTLER, JR., PENSION REVIEW COMMITTEE OF ABB INC., PENSION AND THRIFT MANAGEMENT GROUP OF ABB INC., , EMPLOYEE BENEFITS COMMITTEE OF ABB INC. (COLLECTIVELY "THE ABB DEFENDANTS"), FIDELITY MANAGEMENT TRUST COMPANY, and FIDELITY MANAGEMENT & RESEARCH COMPANY,
Defendants-Appellants.

Appeals from the United States District Court
For the Western District of Missouri
Hon. Nanette K. Laughrey

BRIEF FOR ABB APPELLANTS

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

This is a big case by any standard. It was tried over a period of sixteen days. The transcript is 3,859 pages long. The court found the ABB defendants liable under ERISA and imposed damages against them in the amount of $35.2 million. The court later assessed an additional $13.5 million in attorneys' fees and costs against all defendants.

The court's merits ruling is replete with legal error. For example, the court relied almost exclusively on (and repeatedly misconstrued) a single document that had no effect under ERISA. It found a fiduciary breach based on conduct that was clearly time-barred. The court simply inferred a breach of the duty of loyalty to Plan participants without affirmative evidence to sustain it and in the face of substantial proof to the contrary. It awarded $21.8 million on a claim unsupported by any evidence of loss causation. The court applied the wrong legal standard for determining the recordkeeping fees that resulted in the remaining $13.4 million in damages assessed and, in imposing those damages, relied on an expert opinion that was junk science.

Forty minutes per side for oral argument in this Court is rare, but the ABB defendants make that request here because of the many glaring mistakes below and the unjustifiable outcome (ABB recognizes that its allotted time must be shared with the Fidelity defendants).

CORPORATE DISCLOSURE STATEMENT

Defendant ABB Inc. is an indirect subsidiary of ABB Ltd. Shares of ABB Ltd. are traded on the Swiss and Stockholm Stock Exchanges. American Depositary Shares of ABB Ltd. are traded on the New York Stock Exchange. ABB Inc. has no subsidiaries or affiliates that have issued shares to the public.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over the subject matter in this ERISA case pursuant to 29 U.S.C. § 1132(e) and 28 U.S.C. § 1331. The court ruled on the merits of this case by order entered March 31, 2012. *Tussey v. ABB Inc.*, 2012 WL 1113291 (W.D.Mo. Mar. 31, 2012) (Addendum A [hereinafter "A"]). The clerk entered judgment on that date (ABB Separate Appendix ["ASA"] 190-91). ABB filed its notice of appeal from that judgment on April 30, 2012 (ASA 192-94). On May 3, 2012, the Clerk of this Court notified counsel that ABB's and Fidelity's appeals on the merits (12-2056 and 12-2060) had been consolidated and that a briefing schedule would be established after disposition of pending post-judgment motions in the district court (ASA 195-99). The district court granted plaintiff's motion for attorneys' fees and costs on November 2, 2012. *Tussey v. ABB Inc.*, 2012 WL 5386033 (W.D.Mo. Nov. 2, 2012) (Addendum B [hereinafter "B"]). Again, the clerk entered judgment that same day (ASA 200). ABB filed its notice of appeal from that judgment on November 30, 2012 (ASA 201-04). This appeal is from a final judgment that disposes of all parties' claims. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the Investment Policy Statement was binding on ABB.

   Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995)

   Christensen v. Harris County, 529 U.S. 576 (2000)

   Cigna Corp. v Amara, – U .S. – , 131 S. Ct. 1866 (2011)

   Jensen v. SIPCO, Inc., 38 F.3d 945 (8th Cir. 1994)

2. Whether the court erred in failing to afford discretion to the ABB fiduciaries, particularly in construing the IPS.

   Johnston v. Paul Revere Life Ins. Co., 241 F.3d 623 (8th Cir. 2001)

   Barker v. Ceridian Corp., 193 F.3d 976 (8th Cir. 1999)

   Carr v. Anheuser-Busch Cos., 2012 WL 6685323 (8th Cir. Dec. 21, 2012)

   Armstrong v. LaSalle Bank Nat'l Ass'n, 446 F.3d 728 (7th Cir. 2006)

3. Whether the evidence, taken as a whole, demonstrated that ABB breached its duty of loyalty and whether injunctive relief on that basis was proper.

   Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105 (2008)

   Hackett v. Standard Ins. Co., 559 F.3d 825 (8th Cir. 2009)

4. Whether the claim of imprudence in replacing Wellington with Freedom was time-barred.

   Librizzi v. Children's Mem'l Med. Ctr., 134 F.3d 1302 (7th Cir. 1998)

   David v. Alphin, 2013 WL 142072 (4th Cir. Jan. 14, 2013)

   Larson v. Northrop Corp., 21 F.3d 1164 (D.C. Cir. 1994)

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999)

5. Whether replacing the Wellington Fund with the Freedom Funds violated the IPS.

   Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915 (8th Cir. 1994)

6. Whether the mapping of Wellington into Freedom resulted in a "Prohibited Transaction."

   Lockheed Corp. v. Spink, 517 U.S. 882 (1996)

   Amato v. Western Union Int'l, 773 F.2d 1402 (2d Cir. 1985)

   Blanton v. Anzalone, 760 F.2d 989 (9th Cir. 1985)

   Brock v. Citizens Bank, 841 F.2d 344 (10th Cir. 1988)

7. Whether the court erred in assessing damages on the mapping claim.

   Howell v. Motorola, Inc., 633 F.3d 552 (7th Cir. 2011)

   Nelson v. Hodowal, 512 F.3d 347 (7th Cir. 2008)

   Brown v. Medtronic, Inc., 628 F.3d 451 (8th Cir. 2010)

   Brosted v. Unum Life Ins. Co., 421 F.3d 459 (7th Cir. 2005)

8. Whether ABB's offering of a broad range of investment options to the Plan participants, including low-priced funds, bars the claim of unreasonable recordkeeping fees.

   Hecker v. Deere & Co., 556 F.3d 575 (7th Cir. 2009)

   Loomis v. Exelon Corp., 658 F.3d 667 (7th Cir. 2011)

   Renfro v. Unisys Corp., 671 F.3d 314 (3d Cir. 2011)

9. Whether ABB violated the statutory or IPS provisions relating to recordkeeping fees.

    29 U.S.C. § 1104(a)(1)

    Hecker v. Deere & Co., 556 F.3d 575 (7th Cir. 2009)

10. Whether ABB was prudent, procedurally and/or objectively, in its consideration of recordkeeping fees.

    Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915 (1994)

    Herman v. Mercantile Bank, N.A., 143 F.3d 419 (8th Cir. 1998)

    Hecker v. Deere & Co., 556 F.3d 575 (7th Cir. 2009)

    Jensen v. SIPCO, Inc., 38 F.3d 945 (8th Cir. 1994)

11. Whether the expert opinion upon which the court relied in assessing damages on the recordkeeping fee claim was reliable and admissible.

    Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993)

    Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748 (8th Cir. 2006)

    General Elec. Co. v. Joiner, 522 U.S. 136 (1997)

    Robinson v. GEICO Gen. Ins. Co., 447 F.3d 1096 (8th Cir. 2006)

12. Whether the attorneys' fee award should be set aside and, if not, whether it should be substantially reduced.

    Antolik v. Saks, Inc., 463 F.3d 796 (8th Cir. 2006)

    Fish v. St. Cloud State Univ., 295 F.3d 849 (8th Cir. 2002)

    Emery v. Hunt, 272 F.3d 1042 (8th Cir. 2001)

    Little Rock Sch. Dist. v. Arkansas, 674 F.3d 990 (8th Cir. 2012)

STATEMENT OF THE CASE

Plaintiffs and their class are participants in two essentially identical 401(k) defined contribution plans governed by ERISA, 29 U.S.C. §§ 1001, et seq. Plaintiffs filed this case on December 29, 2006 (ASA 1, 137). The class was certified on December 3, 2007. *Tussey v. ABB Inc.*, 2007 WL 4289694 (W.D.Mo. Dec. 3, 2007). Plaintiffs alleged that the ABB Defendants breached their fiduciary duties by selecting imprudent investment options for the participants and by imposing excessive fees upon the Plan. They also contended that the use of "revenue sharing" to compensate Fidelity for its recordkeeping services was a breach of the duties of prudence and loyalty (ASA 151-54).

Prior to trial, defendants moved under *Daubert* to exclude the testimony and opinions of two of plaintiffs' experts (Confidential ABB Supplementary Appendix ["C-ASA"] 1-237). The court summarily denied that motion (Dec. 7, 2009 Tr. at 20). After a sixteen day bench trial, the court ruled that ABB breached its fiduciary duties in administering the Plan and awarded $ 35.2 million in damages under ERISA § 1132(a)(2) to plaintiffs and their class. *Tussey v. ABB Inc.*, 2012 WL 1113291 (W.D.Mo. Mar. 31, 2012).

The court's findings of fiduciary breach were based upon its interpretation of an ABB Investment Policy Statement ("IPS") as a binding Plan document under ERISA § 1104(a)(1)(D). The court concluded that ABB breached its fiduciary duties by removing Vanguard's Wellington Fund as an investment option and by "mapping" the participants' Wellington monies into the Fidelity Freedom Funds, resulting in damages of $21.8 million to the class. The court decided that the Plan recordkeeping fees were excessive by $13.4 million and assessed additional damages in that amount. 2012 WL 1113291 (A **36, 37). As injunctive relief, the court ordered that ABB utilize a competitive bidding process to select a new recordkeeper and that it not use a Plan recordkeeper to provide any corporate services to ABB. (*Id*. *39). On November 2, 2012, the court awarded plaintiffs and the class another $12,947,747.68 in attorneys' fees and $489,985 in costs. *Tussey v. ABB Inc.*, 2012 WL 5386033 (W.D.Mo. Nov. 2, 2012). ABB filed timely notices of appeal on April 30, 2012 and November 30, 2012 (ASA 192-94, 201-04).

STATEMENT OF FACTS

The PRISM (for ABB salaried employees) (ASA 205-272) and a smaller Represented PRISM (for hourly employees) (ASA 273-348) are defined contribution plans under § 401(k) of the Internal Revenue Code. The two Plans (collectively "the Plan") are functionally identical, differing only with respect to participant eligibility (A *1). In a 401(k) defined-contribution plan, participants are responsible for deciding how to allocate the assets in their individual account among the various investment options or funds offered under the Plan. In other words, all investment decisions are made individually by the 14,000 participants themselves (Trial Tr. Vol. 5 at 1014 [“5:1014”]).

Participation in the Plan is voluntary (5:1005-07). Each participant decides whether or not to contribute to the Plan, which options to invest in, and how much to invest in those options. As the district court stated, “participants retain the autonomy to choose from any of the investments offered on the platform” (A *9), and “participants can direct their contributions to be invested in any of the investment options pre-selected by ABB to be on the Plan’s investment platform” (A *1). At retirement, the participant is entitled to the balance in his or her individual account (ASA 243). That amount is directly dependent on the performance of the participant’s investments, net of fees, and the amount of the employer’s matching contributions. The Plan has “open architecture,” i.e. the investment options it offers come from a variety of different sources (14:3256).

ABB is the Plan sponsor. Its board of directors appoints a three-member Employee Benefits Committee (“EBC”) to oversee its employee benefits programs (A *1). The board and EBC have sole authority to amend or modify the Plan (ASA 251; Addendum C [hereinafter “C”], at 10). As Plan Administrator, EBC also has absolute discretion in the construction and interpretation of the Plan (ASA 225, 229; C-8). The Pension Review Committee (“PRC”) is responsible for monitoring Plan investments and recommending investment changes to the EBC

(ASA 225; C-8). The Pension and Thrift Management Group ("PTM"), which since 1999 has been led by its Director, John Cutler, acts as the staff of PRC (A *1). PRC conducted quarterly and annual meetings, at which it reviewed the performance of the Plan's funds in detail. The voluminous materials provided to PRC prior to their meetings of February 23, 2001 and September 29, 2004 are illustrative (See, e.g., 5:979-984; ASA 511-681, 682-73).

Fidelity Management Research Company ("FMR") is the investment adviser to the Fidelity mutual funds offered under the Plan (ASA 354, 377). Fidelity Management Trust Co. ("FMT" and, together with FMR, "Fidelity") is the directed trustee of the trust that holds the Plan assets (ASA 354). FMT also provides recordkeeping and administrative services to the Plan and its participants (ASA 363-64). These services include maintaining participant account balances, sending account statements, daily valuations, participant loans, preparing year-end Plan documents, and communications to participants regarding investment options (14:3240; ASA 370-72). After a competitive bidding process, ABB chose FMT as the Plan's recordkeeper in 1995, primarily because it was superior in terms of its service and technology innovations (1:258-59, 271). The Plan is partially "bundled" – that is, Fidelity (through FMT) was recordkeeper for all of the funds in the Plan and was also investment manager (through FMR) for some of them (10:2400).

At Appendix VI, the Plan expressly identifies the full menu of available investment options, and participant investments are restricted to those funds (ASA 237, 271-72; C-11, 12). All additions or changes to the Plan's investment options have been accomplished by Plan amendment (10:2201). The Trust Agreement ("TA"), at § 4(b), limits the type of investments that FMT, as trustee, can make (ASA 354; C-13). At Schedules A and C, the TA identifies the investment funds permitted by the Plan (ASA 370, 377). Like the Plan, the TA also requires amendments in order to change the menu of investment options (ASA 354). Fidelity has no right to change the Plan's investment options. It does not exercise discretion in carrying out its duties but instead follows the instructions of ABB and its participants (ASA 354-362).

In 2000, a year after Mr. Cutler was hired, ABB made three major changes. These changes related to the adoption of an Investment Policy Statement ("IPS") (ASA 488-494, 495-501; C-1 through 7), the type and number of investment options offered to the participants, and the method of compensating FMT for its recordkeeping services. Mr. Cutler recommended and drafted the IPS (4:866; 5:991; 12:2758-59). PRC adopted it at its May 23, 2000 meeting (1:151-52; ASA 483-86). A key purpose of the IPS was "to provide plan participants with a wide range of investment options that spanned the risk-return spectrum" (5:997, 1034; ASA 484). Mr. Cutler thought there were holes in the investment options and that the platform needed to be expanded (5:996). Neither the Plan nor the TA ever mention, much less incorporate, the IPS (ASA 205-272, 273-348, 349-465).

The IPS contemplates investment options in each of three categories or tiers – managed allocation, passively-managed and actively-managed (ASA 496-97). The three tier structure is intended to attract all different kinds of participants (11:2478-79). The "managed allocation" Tier 1 is intended for Plan participants "unwilling or unable to make a personal asset allocation decision." (5:1040; ASA 496; C-2). These are called "target date" funds. They are dynamically managed to diversify a participant's portfolio across different funds. A manager performs the asset allocation for the participant and re-balances it to become more conservative as the participant nears retirement (4:895; 10:2387). At its November 14, 2000 meeting, PRC chose the Fidelity Freedom Funds to populate Tier 1 (5:1044; ASA 516). Mr. Cutler favored Freedom because of its "glide path": how the asset allocation changes as the retirement date specified by the fund approaches (5:1046). These balanced funds (stocks and bonds) replaced the Vanguard Wellington Fund, also a balanced fund but static rather than dynamic in nature (9:1970-71; 12:2762).

ABB decided to "map" Wellington into Freedom (5:1063). Mapping is a default option for participants who fail to make an allocation decision regarding their assets in a fund that is being removed as an investment option (5:1062-63).

Participants are free to move their assets to other funds if they don't like the default option (13:3019). Freedom was subsequently placed on ABB's watch-list for performance reasons but was removed after its performance improved (4:913, 5:1118). The IPS performance criteria never warranted Freedom's removal from the platform (10:2295-96, 2396). Many comparable Plans offer Freedom (10:2392). Freedom had a higher amount of assets under management than any other target-date fund complex (10:2390).

The passively-managed Tier 2 is for participants who "wish to establish and maintain their own asset allocation . . . without active management risk" (ASA 496; C-2). Tier 2 offerings allow participants to create diversified portfolios at a low cost (5:1048; 11:2479). The funds chosen for Tier 2 at PRC's November 14, 2000 meeting were four index funds from Barclay's Global Investors ("BGI") (ASA 508). These funds are very inexpensive (5:1028-29; 12:2764-69), costing the participants as little as three basis points annually (3/100 of 1% of the participant's asset value in that fund) (5:1028-29, 1090-91; ASA 842-43).

Tier 3 is intended for participants who "wish to take an active management risk and the associated potential for higher return." (5:1052; ASA 497; C-3). Tier 3 thus consists of actively managed mutual funds. Populating the third tier required a major overhaul of the Plan's lineup. In connection with the Plan's redesign in 2000, PRC removed two Fidelity funds and added ten new funds. Of those ten new funds, only one was a Fidelity fund. Of the 23 funds offered following the Plan redesign, only four were Fidelity funds (ASA 508-10, 789; C-14).

In 2000, ABB also made changes in the compensation to FMT for its recordkeeping services. There are three methods for pricing 401(k) plan recordkeeping services – flat dollar per participant fees, asset-based fees, and some combination of the two (6:1299). In contrast to the flat dollar uniform charge, revenue sharing is a portion of the mutual fund's "expense ratio," a percentage of the mutual fund assets which rise or fall with the performance of the underlying fund (A *2) and with the participants' allocation of their contributions in that fund. Revenue sharing consists of payments from mutual fund investment managers to the recordkeeper in consideration for doing the recordkeeping work that those fund managers would otherwise have to perform themselves (10:2403-05; A **2, 8).

Revenue sharing, sometimes called "alliance rebates" (4:912; 5:1095; 12:2795) comes out of the total expense ratio charged to the Plan by the fund manager. Revenue sharing is common (6:1304; A **9, 15, 16, 26). In plans where participants pay for recordkeeping, 78.5% pay for recordkeeping services through revenue-sharing, while 21% pay through hard-dollar charges to participant accounts (10:2398-99).

The total expense ratio represents the bottom-line for the participants because it includes all the fees charged to them. Mr. Cutler and PTM monitored the total expense ratio (1:189; 4:861, 936; 10:2223-24). The fund prospectuses sent to the participants disclosed the total expense ratio and described the fund's performance net of all expenses (3:630; 5:1091-92; 10:2373-75).

An outside consultant advised ABB to adopt revenue sharing as its method for recordkeeping compensation. The rationale was that, unlike flat dollar per participant fees, revenue sharing is driven by participant choice (2:313). A participant who does not invest in a revenue sharing mutual fund does not pay revenue sharing at all. Revenue sharing is both progressive (those with higher account balances pay more) and a form of risk-sharing (the recordkeeper bears the loss in a declining market) (10:2407-09). It is also intended to incentivize lower-paid employees to participate (10:2226). Starting in 2000, the hard dollar per participant fee was reduced to zero for the PRISM and to $8 per participant (paid by ABB itself) for the Represented PRISM (2:305). With these changes, revenue sharing became the primary source of compensation to FMT for its recordkeeping services (10:2222-23).

During the relevant period, the Plan had about $1.5 billion in assets and more than 14,000 participants (5:1014; ASA 555). The uncontroverted evidence was that ABB's total plan costs – inclusive of all recordkeeping and investment management fees paid by Plan participants – were consistent with those borne by similar 401(k) plans (ASA 800-07). Similarly, the Plan's mutual fund options had expense ratios less than the Morningstar average for these categories of investment options (11:2502-06; 13:3111-14). Participant fees in the redesigned Plan ranged from 3 to 162 basis points, depending upon the mutual fund chosen (7:1481-82; ASA 792-93, 795-96; C-15).

SUMMARY OF ARGUMENT

Without any ERISA case law to support its ruling, the district court made ABB's Investment Policy Statement the centerpiece of its decision. Its stated basis for doing so was an agency interpretive bulletin dealing with a different subject matter. The IPS is not an ERISA plan document and is not legally binding because it was never included in the Plan.

ERISA defines fiduciary status in terms of discretion, but the court afforded none to ABB. Mr. Cutler, who drafted the IPS, certainly knew his intent better than anyone else, but the court expressed superior knowledge of its meaning. Inexplicably, the court found that Mr. Cutler chose to repeatedly violate the IPS at the same time that he was preparing it.

ABB did not breach its duty of loyalty to the participants. It did nothing intended to favor either itself or Fidelity at the participants' expense. ABB had a major financial stake in the Plan that would have been eroded by permitting excessive fees. Far from favoring Fidelity, ABB repeatedly burned holes in Fidelity's wallet. The court's contrary conclusions rested on unwarranted inferences inconsistent with the record as a whole.

The court erroneously assessed fiduciary liability against ABB for removing Wellington as an investment option, replacing it with Freedom, and mapping participant assets from Wellington to Freedom. The court thought far more of this claim than plaintiffs ever did. The issue was not pleaded (ASA 139-172). The first time it was raised was in one of plaintiffs' expert's reports (C-ASA 169-195). Their counsel never mentioned it during closing argument – and for good reason. The claim was time-barred – the alleged fiduciary acts occurred more than six years (the statute of repose period) prior to the filing of this case, and everything else that happened within that six-year period was ministerial or otherwise non-fiduciary conduct. Even if the IPS were a binding plan document, the challenged decisions did not violate it. The court rejected the choice of Freedom because ABB, in its view, did not engage in a "winnowing process." Yet the IPS, the alleged source for this requirement, demanded nothing of the kind. Nor did the mapping of Wellington into Freedom result in a "prohibited transaction" under ERISA § 1106(a)(1)(D): there was no "transaction," no "plan assets" and no "transfer or use" of assets for the benefit of ABB, the alleged party-in-interest.

There was no basis for the $21.8 million in damages on the mapping claim. In adopting that number offered by plaintiffs' expert, the court failed to recognize that mapping was merely a default option and that participants remained free to change their asset allocations at any time. In fact, mapping into funds like Freedom now falls within a statutory safe-harbor from fiduciary liability. There was no loss causation because the right of participant choice prevented any actionable losses and because the alleged damages measured the wrong things.

The court applied the wrong test in determining that recordkeeping fees were excessive. As a matter of law, a plan fiduciary cannot be liable for unreasonable fees when it offers a mix of different types of funds sufficient to allow participants to choose low-cost investment options. Ignoring the Circuit precedent that so holds, the court engaged instead in a battle of experts about what amount of fees was "reasonable" – a method that leaves plan fiduciaries subject to litigation hindsight, no matter what they do.

On the recordkeeping fee issue, the court fashioned a "deliberative process" requirement for revenue sharing nowhere found in the statute, industry practice, or the IPS, and it misconstrued key provisions of the IPS related to revenue sharing and the use of bargaining power. The court concluded that ABB was imprudent in failing to find out how much revenue sharing Fidelity received, even though there was no evidence that participants do or should care about such cost components.

Their only concern is with the total expenses that they pay. There was no basis for the $13.4 million in damages on the fee issue. That calculation was based entirely upon unreliable expert testimony – subjective, undocumented, and unverifiable – that may as well have been pulled out of thin air.

ARGUMENT

Standard of Review

A determination that a breach of fiduciary duty occurred is a legal ruling reviewed *de novo*. *Herman v. Mercantile Bank, N.A.*, 137 F.3d 584, 586 (8th Cir. 1998). This Court also reviews *de novo* the district court's interpretation of ERISA plan documents. *Kitterman v. Coventry Health Care of Iowa, Inc.*, 632 F.3d 445, 448 (8th Cir. 2011).

In an appeal from a bench trial, this Court reviews the trial court's findings of fact for clear error, but its conclusions of law are subject to *de novo* review. *Cooper Tire & Rubber Co. v. St. Paul Fire & Marine Ins. Co.*, 48 F.3d 365, 369 (8th Cir. 1995). Mixed questions of law and fact that require the consideration of legal concepts and the exercise of judgment about the values underlying legal principles are also reviewed *de novo*. *Id*.

A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, based on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Hayes v. Invesco, Inc.*, 907 F.2d

853, 856 (8th Cir. 1990). Failure to consider or misinterpretation of important evidence is error. *Id*. at 858. Findings contrary to the only testimony presented on a question may properly be considered clearly erroneous. *Barker v. Ceridian Corp.*, 193 F.3d 976, 981 (8th Cir. 1999). While the prevailing party is entitled to the benefit of all reasonable inferences, it is not entitled to the benefit of unreasonable inferences. *United Fire & Cas. Ins. Co. v. Garvey*, 419 F.3d 743, 746 (8th Cir. 2005). A reasonable inference is one which may be drawn from the evidence without resort to speculation. *McGreevy v. Daktronics, Inc.*, 156 F.3d 837, 840-41 (8th Cir. 1998).

"[C]redibility determinations are not sacrosanct." *Wilson v. Lambert*, 789 F.2d 656, 658 (8th Cir. 1986). "[A] trial judge may not insulate his [or her] findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness." *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 575 (1985). *See Norwest Capital Mgmt. & Trust Co. v. United States*, 828 F.2d 1330, 1337 (8th Cir. 1987).

This Court applies an abuse of discretion standard in reviewing the trial court's decision to admit or exclude expert testimony. *General Elec. Co. v. Joiner*, 522 U.S. 136, 138-39 (1997). The same standard applies to the trial court's ultimate conclusions regarding the expert testimony. *Kumho Tire Co. v.*

Carmichael, 526 U.S. 137, 152 (1999). Review is *de novo* where the district court fails to perform a *Daubert* analysis and merely articulates a one-sentence conclusion. *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 760 (7th Cir. 2010). The method of calculating damages is reviewed *de novo*; the calculations pursuant to the method are reviewed for clear error. *Peabody v. Davis*, 636 F.3d 368, 373 (7th Cir. 2011).

A. POINTS RELATED TO BOTH MAPPING AND FEE CLAIMS

1. The Investment Policy Statement, Upon Which The District Court Relied For Its Decision, Was Not A Plan Document And Was Thus Not Binding On ABB.

The court essentially acknowledged that ABB's conduct would be perfectly fine in the usual case, but then concluded that the IPS made it unlawful here. For instance, after conceding that revenue sharing is commonly used to pay for recordkeeping services and that evaluating the total expense ratio is the normal method for determining the reasonableness of recordkeeping fees, "the Court finds that such inquiries are not sufficient as to the PRISM Plan because of the IPS" (A *15). The court's treatment of the mapping issue was also entirely based upon its interpretation of the IPS (A **22, 23). So the threshold issue here is whether the IPS is legally binding upon ABB. If not, the judgment must be reversed, and this Court need go no further.

ERISA § 1102(a)(1) states that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." Section 1102(b)(3) requires that the written instrument include (i) a procedure for making amendments and (ii) a procedure for identifying those who have authority to amend it. The plan sponsor (the employer), like a trust's settlor, creates the basic terms and conditions of the plan, executes a written instrument that contains them and provides a procedure in that instrument for making amendments. *Cigna Corp. v. Amara*, – U.S. – , 131 S. Ct. 1866, 1877 (2011).

Once a company sponsoring a plan has adopted an amendment procedure, it must follow that procedure. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). *See Alliant Techsystems, Inc. v. Marks*, 465 F.3d 864, 872 (8th Cir. 2006) (refusing to decide whether plan administrator adhered to terms of its own internal policy because there was "no evidence that the Plan documents incorporat[ed] [that] policy"). A statement not incorporated into the written plan instrument does not become part of the plan. *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 949 (8th Cir. 1994).

This bright-line between decisions made pursuant to a "coherent amendment procedure" and other decisions is necessary so that those administering the Plan on a day-to-day basis can know what is legally binding and what is not. *Schoonejongen*, 514 U.S. at 82. The district court, however, paid no heed to the

Supreme Court's directive about how to distinguish plan from non-plan documents.

The PRC, which adopted the IPS, lacked authority to amend the Plan. Article 12 of the Plan gave the board and EBC sole authority "to amend or modify the Plan at any time" (ASA 251; C-10). No plan amendment could take effect until the board or EBC voted to adopt the amendment, prepared the written amendment, and had it executed (10:2198-2200). Because PRC rather than the Board or EBC adopted the IPS and because the Plan was never amended to include it, the IPS is not a Plan document and was thus not a proper basis for imposing fiduciary liability upon ABB.

In the face of these unmet Plan amendment requirements, the court fell back upon a Department of Labor interpretative bulletin (A **14-15 (citing to 29 C.F.R. § 2509.94-2)) – a slender reed upon which to rest its decision. The bulletin was not the product of notice-and-comment rulemaking and thus lacks the force of law; it is "entitled to respect" only to the extent that its reasoning has "the power to persuade." *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Center for Special Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 701 n.4 (8th Cir. 2012); *St. Mary's Hosp. v. Leavitt*, 416 F.3d 906, 914 (8th Cir. 2005).

The bulletin is unpersuasive in the context of this case. It merely addresses the circumstance in which a fiduciary delegates authority to *an external investment* *manager*. 29 C.F.R. § 2509.94-2. It makes sense to bind such a contract counter-party. That is what contracts do: bind those who are otherwise not bound. But it makes no sense to bind a plan fiduciary in the same way. That would mean either that the fiduciary is perpetually bound and has no discretion to change the IPS, no matter how inappropriate its provisions may become over time; or that, if it changes the IPS without a corresponding Plan amendment, it will have violated ERISA.

In any event, ABB did not appoint an external investment manager to make fund selections. Again, PRC made the fund selections, and Fidelity could not do so (4:939). Indeed, the TA provided that Fidelity "shall have no responsibility for the selection of investment options." (ASA 354, 361-63). *California Ironworkers Field Pension Trust v. Loomis Sayles & Co.*, 259 F.3d 1036, 1042 (9th Cir. 2001), relied on by plaintiffs below, arose in the same context as the bulletin – an external investment manager to whom fund selections are delegated – and thus, like the bulletin, is inapplicable here.

Declaring a document never incorporated into the Plan to be a plan document anyway is bad policy. Significantly, nothing in ERISA requires an IPS at all. In adopting the IPS, Cutler and the PRC were trying to do the right thing, i.e. to provide a framework for operating the Plan (4:867). The court's conclusion that the ABB fiduciaries are liable for eight-figure damages from failing to follow a document never required in the first place is a classic example of no-good-deed-goes-unpunished. The court's decision clearly discourages plan fiduciaries from adopting investment policy statements.

The court's decision to elevate the IPS to plan document status has perverse consequences as well. The Plan was amended to remove Wellington as an option and to add Freedom (A *25; ASA 377, 271; C-11, 12). So the deletion of Wellington and the addition of Freedom became hard-wired into the Plan document. These plan amendment decisions are non-fiduciary in nature and cannot give rise to fiduciary liability. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996). As a result of these amendments, the ABB fiduciaries had a duty not to offer Wellington and a duty to continue to offer Freedom. ERISA § 1104(a)(1)(D); Restatement Third of Trusts § 91 (2007) (duty of prudence is ordinarily supplanted by mandatory terms of a trust). The court recognized that fiduciaries are obliged to abide by the Plan documents. Indeed, its erroneous characterization of the IPS as a Plan document was its precise basis for concluding that ABB had to follow it. Yet the court imposed $21.8 million in damages against ABB for doing precisely what the Plan required. The court's decision means that fiduciaries must follow the IPS – which is not a plan document – but must not follow the Plan itself.

2. The Court Erred In Failing To Afford Discretion To The ABB Fiduciaries, Especially In Construing The IPS.

The court agreed that "[d]iscretion is the 'benchmark for fiduciary status under ERISA' pursuant to the explicit wording of [ERISA § 1002(21)(A)]. *Johnston v. Paul Revere Life Ins. Co.*, 241 F.3d 623 (8th Cir. 2001)." (A *4). Because fiduciaries must "balance[e] competing interests under conditions of uncertainty," their decisions are entitled to substantial deference. *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006); *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 7 (1st Cir. 2009).

Despite paying lip service to fiduciary discretion, the court afforded none to ABB. Its opinion is a *de novo* substitution of the court's own views for those bodies legally charged with the actual exercise of discretion. Critically, the court gave no deference to the drafter's interpretation of the IPS. *Barker*, 193 F.3d at 981 (meaning of ambiguous plan document should be ascertained from "extrinsic evidence of the settlor's intent"). Indeed, Mr. Cutler prepared the IPS in 2000 – contemporaneously with the very decisions that, according to the court, violated its terms. It is as if the court believed Mr. Cutler and PRC adopted the IPS in order to violate it!

Interpretation of the Plan was also subject to an abuse-of-discretion rather than a *de novo* standard because the Plan document itself gave discretionary authority to the Plan Administrator. *Firestone Tire & Rubber Co. v. Bruch*, 489

U.S. 101 (1989); *Conkright v. Frommert*, 559 U.S. ___, 130 S. Ct. 1640, 1646 (2010); *Carr v. Anheuser-Busch Cos.*, 2012 WL 6685323, at *5 (8th Cir. Dec. 21, 2012). The Plan document gave EBC, as Plan Administrator, "sole and absolute discretion . . . to take . . . actions with respect to questions arising in connection with the Plan, including . . . the construction and interpretation of the terms of the Plan." (ASA 225, 229; C-8). The court ignored all of that.

In keeping with its *de novo* approach, the court used lowest cost as the only proper criterion for offering a fund (A *13), even though "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)," *Hecker v. Deere & Co*, 556 F.3d 575, 586 (7th Cir. 2009), *reh'g denied*, 569 F.3d 708, and even though ABB considered Fidelity's high performance and quality of service to be of great importance (1:260; 2:313-14). The court interpreted "lowest cost *of participation*" in Plan § 5 to mean "lowest expense ratio" (A *27), even though Mr. Cutler testified without contradiction that choosing a lower cost in particular instances might cause the cost *to all plan participants* to increase (4:870-72) (emphasis added).

The recognized benefits of revenue sharing are "progressivity" and "risk-sharing" (9:2063-64; 10:2407-09), but in ABB's case the court gave those factors no weight (A **11, 13). The court failed to recognize that asset-based fees, such as revenue sharing, align the interests of the participants and the recordkeeper because the recordkeeper has an incentive to see plan assets increase. The court also assumed Plan participants would prefer to compensate the recordkeeper through a per participant flat fee, even though there are very good reasons why that may not be so. *Loomis v. Exelon Corp.*, 658 F.3d 667, 672-73 (7th Cir. 2011). The court's substitution of its views for those of the ABB fiduciaries infected its entire analysis.

No reported ERISA case smothers the discretion of Plan fiduciaries the way this decision does. If judges can micro-manage plans by singling out these sorts of decisions as a fiduciary breach – e.g. whether a fund should have been replaced, whether offering a fund that did not provide the lowest possible cost – then any plan, no matter how well-managed or well-performing, is subject to suit. The court's interference with fiduciary discretion also raises an important question: Why would anyone be willing to serve as a 401(k) plan fiduciary when her conduct and motives can be so easily second-guessed and then repudiated by federal judges? It is always possible, in hindsight, to find something the fiduciary did not do and then say she should have done it. Lawyers sometimes do that. Judges should not.

3. The ABB Fiduciaries Did Not Breach Their Duty of Loyalty To The Plan Participants, And The Court's Grant of Injunctive Relief Was Unwarranted.

The court misconceived the nature and effect of a conflict-of-interest under ERISA. Its analysis implied that certain business arrangements, such as bundling of investment management and recordkeeping services through a single provider, is either a *per se* fiduciary breach or at least that the defendant bears the burden of proving no breach. But mutual funds themselves are bundled products. Mutual fund investors invariably purchase investment management and recordkeeping services together, with notice of fees through the funds' prospectuses. A bundled plan arrangement allows the 401(k) investor to view plan investment selections in the same way he does his personal non-plan investments – with no separate charge broken out for recordkeeping. Furthermore, even the presence of a true conflict-of-interest does not automatically trigger liability. A conflict should be "weighed as a factor," but it does not change the court's abuse-of-discretion standard for reviewing fiduciary conduct. *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 111 (2008); *Hackett v. Standard Ins. Co.*, 559 F.3d 825, 830 (8th Cir. 2009).

But there was no conflict, and the court clearly erred in concluding otherwise. Whether the alleged conflict was expressed in terms of ABB favoring itself or in favoring Fidelity, the court relied on unwarranted inferences (*i.e.* speculation) rather than proof. For instance, there was no evidence to support its conclusion that ABB elected revenue sharing in lieu of a flat dollar fee in order to shift recordkeeping fees to – and then to conceal those fees from – the participants (A *11). ABB would have saved only about $8,000 per year by eliminating the $8 per participant charge it paid in connection with the 1,000 or so members of the represented PRISM (2:352). It was in ABB's self-interest to prevent excessive fees. ABB paid more than $200 million in matching contributions to the Plan (10:2337-38; ASA 794). It would be senseless to pour that kind of money into the Plan, only to see it wiped out by excessive fees. Likewise, there is no basis to conclude that ABB breached its duty of loyalty in order to save $8,000, when it could have saved far more simply by reducing the matching formula.

There was likewise no evidence – only inferences that the evidence did not permit – showing that ABB supported the interests *of Fidelity* at the expense of the participants. If ABB had such a purpose, it sure had a funny way of accomplishing it:

(1) From and after 2001, the assets in the Plan and the average account balance per participant each increased. At the same time, however, Fidelity's compensation from the Plan declined by more than half (6:1271-72; 7:1527-28; 15:3529; ASA 912).

(2) The Magellan Fund had been Fidelity's leading moneymaker in the Plan (6:1246). Sixty-five percent of the participants and twenty-seven percent of

the Plan assets had been invested in Magellan (ASA 583). Yet ABB removed Magellan from the Plan platform for reasons of underperformance (5:1125-26; ASA 784, 790).

(3) Because a significant number of Plan participants had invested in Magellan (2:483), Fidelity demanded an $11 flat per participant per year fee from ABB to make up for its loss. But ABB refused that demand, and Fidelity received nothing in return (2:474; 3:580; 4:819; 10:2238-39; 15:3518, 3527-28).

(4) Not long after Magellan was removed, PRC watch-listed and ultimately removed the Fidelity Equity Income II Fund (5:1110). That fund held as much as $176 million in Plan assets, the second largest total of any mutual fund on the platform (ASA 690).

(5) In connection with the Plan redesign in 2000, ABB removed the Fidelity Equity Index Fund from the platform and substituted the four BGI index funds in its place (ASA 508). Two of the four investment options removed in 2000 were Fidelity Funds (ASA 789; C-14). Only one of the ten new actively-managed mutual funds added in the Plan's 2000 re-design was a Fidelity fund (ASA 509-10). Only three of the eighteen mutual funds on the platform were Fidelity funds (ASA 787).

(6) From 2000 to 2008, ABB added twelve new funds to the platform, only one of which was a Fidelity fund. Two of the eight funds removed during that period were Fidelity (ASA 798).

(7) Assets were mapped out of Fidelity funds, not just into them. For instance, the Fidelity Retirement Money Market Fund was mapped into the Plan's Income Fund (ASA 521).

(8) For two reasons, Fidelity would not necessarily benefit from asset-based fees. First, there was always the possibility of a declining market (exactly what began in the fall of 2008). Second, participants were always free to place their contributions in funds that had no revenue sharing arrangement (7:1633-34).

(9) Of the thirty funds Fidelity identified for ABB to consider, only one ever made it onto the Plan platform (13:3133-34; ASA 797).

(10) Cutler decided to watch-list the Freedom Funds over Fidelity's objection (14:3211).

(11) The Plan had "open architecture" that did not require offering any of Fidelity's proprietary mutual funds (14:3256).

The only explanation ever offered as to *why* ABB would want Fidelity to receive excessive revenue sharing was as an alleged *quid pro quo* for low-ball pricing of Fidelity's defined benefit, health and welfare, and HR/payroll services ("TBO plans"). That was the sole basis for the court's unwarranted injunction requiring ABB to take steps to procure a new recordkeeper (A *39). Under this "cross-subsidization" theory, ABB supposedly decided to saddle the participants with excessive revenue sharing in return for a bribe from Fidelity in the form of price breaks on the TBO plans, the expenses for which were borne by ABB. Yet every single witness involved in pricing talks testified there were never even any discussions about doing that (2:320-22; 3:560; 4:791, 816-17, 822; 10:2298; 13:3054, 3077, 3086; 14:3346-47). The uncontroverted evidence was that Fidelity suffered losses on the TBO plans not because it offered below-market prices but because its costs were too high to be competitive (13:3040-41, 3048, 3050).

The losses Fidelity sustained on the TBO plan contracts relative to its profits from the Plan refute the *quid pro quo* theory. Fidelity's operating losses on the TBO plans were four times higher than its profits from the Plan. In 2006, its TBO losses were ten times its profit from the Plan (14:3355-56; 15:3523-24). It would have been folly for Fidelity to enter into and maintain a cross-subsidization arrangement for the purpose of incurring staggering losses (14:3357). While Fidelity did provide free services to ABB on some small, non-qualified plans, that work was *de minimis* (6:1438, 14:3309-12; 15:3542-44). Finally, the court found that ABB did not even know about Fidelity's "cross-subsidization" until May 12, 2005 (A *38). Thus, on the basis of the court's own reasoning, ABB could have had no incentive to stick the participants with excessive Plan fees when it removed Wellington and added Freedom in 2000.

Braden v. Wal-Mart Stores, Inc., 588 F.3d 585 (8th Cir. 2009), a case sparingly cited by the district court, does not change any of this. *Braden* dealt with pleadings, not proof. In fact, this Court recognized that, despite what the plaintiff alleged about "kickbacks" and other conduct in breach of the duty of loyalty, the actual proof might well reflect "lawful reasons [why defendants] chose the challenged investment options" and that defendants "could have chosen funds with higher fees for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility." 588 F.3d at 596.

B. POINTS RELATED TO MAPPING CLAIM ONLY

4. The Mapping Claim Was Barred By The Six-Year Statute of Repose.

ERISA § 1113 requires that fiduciary breach claims be brought within six years after the "date of the last action which constituted a part of the breach or violation." This provision is a statute of repose, activated by the timing of the defendants' conduct rather than by plaintiffs' injury or knowledge of wrongdoing. *Larson v. Northrop Corp.*, 21 F.3d 1164, 1171-72 (D.C. Cir. 1994). Absent fraudulent concealment (not an issue here), § 1113 is "an absolute barrier" to actions brought more than six years after the alleged breach. *Radford v. General Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998).

Because plaintiffs filed this action on December 29, 2006 (ASA 1, 137), any claims based on pre-December 29, 2000 conduct are time-barred. PRC had decided to remove Wellington and to add Freedom by the time of its November 2000 meeting (ASA 485, 508). So the decision to replace Wellington with Freedom was clearly made more than six years prior to the filing of this case.

But the court concluded that the "final" decision to remove Wellington and to add Freedom occurred within the six-year statute – specifically, that the process of adding Freedom was not "initiated until approximately February 15, 2001; that the mapping of Wellington into Freedom did not occur until March 30, 2001"; and that "the final fiduciary acts were the execution of the mapping and the execution of the Trust Agreement amendments" (A *25).

But all of that was *non-fiduciary* conduct. Section 1113 speaks of "the date of the last action which constituted a part of the breach or violation," *i.e.* the final *fiduciary* action. Only fiduciary conduct can constitute "a part of the breach or violation." The "selection itself" is the accrual date under § 1113. *David v. Alphin*, – F.3d –, 2013 WL 142072, at *13 (4th Cir. Jan. 14, 2013). "An adverse decision whose effect is deferred gives rise to a claim when the decision is made, not when the effect is felt." *Librizzi v. Children's Mem'l Med. Ctr.*, 134 F.3d

1302, 1306 (7th Cir. 1998); *Larson*, 21 F.3d at 1169-74 ("last act" constituting a breach of fiduciary duty under ERISA was the termination of a pension plan, not the subsequent failure to pay pension benefits). The Plan amendments, under the court's own analysis, were not fiduciary acts (A *26). Again, they are matters of plan design, not plan administration, and are thus non-fiduciary in nature. *Hughes Aircraft*, 525 U.S. at 444; *Lockheed*, 517 U.S. at 890.

The court stated that the year 2000 PRC decisions were subject to reconsideration (A *25), but that is true of every decision. "ERISA does not make actionable a fiduciary's failure to undo what has been done . . . ." *David v. Alphin*, 817 F. Supp. 2d 764, 779 (W.D.N.C. 2011), *aff'd*, 2013 WL 142072 (4th Cir. Jan. 14, 2013). Otherwise "the time never runs out." *Librizzi*, 134 F.3d at 1307.

The actual mapping or physical transfer of monies between investment options was ministerial, non-fiduciary activity. It involved no exercise of discretion, as required by ERISA § 1002(21)(A). The fiduciary decision had already been made. 29 C.F.R. § 2509.75-8. Administrative acts taken to carry out PRC's decisions "should not obscure the principle that limitations periods normally commence when the [entity's] decision is made." *Delaware State Coll. v. Ricks*, 449 U.S. 250, 261 (1980).

5. Replacing Wellington With Freedom Did Not Violate The IPS.

The mapping issue begins with the de-selection of Wellington that was so roundly condemned by the court (A **18, 20, 22-23). There is no ERISA decision anywhere, however, in which a fiduciary has been tagged with liability for *failing to offer* a particular product. This is the only case in which any court has mandated the offering of a specific investment option. Steve Pomerantz, plaintiffs' expert on the mapping issue, conceded that ABB could have eliminated Wellington for any reason and that its removal was not imprudent (9:1972-73; C-ASA 229). Unsurprisingly, therefore, the court could not and did not invoke ERISA for its conclusion that the de-selection of Wellington decision was a fiduciary breach.

So the court looked to the IPS. But even if the IPS were a plan document, the removal of Wellington did not violate its terms. The IPS nowhere states that underperformance is the only basis for removing a fund. On its face, the IPS leaves open other reasons for a fund's removal – e.g. "change in a fund's portfolio manager," "change in ownership," or "other changes at the fund . . . that might cause PTM to loose [sic] confidence in a fund manager's ability to continue to add value for plan participants." (ASA 490).

With no support from the IPS, the court rested upon a credibility determination (as if lack of credibility could be the basis for a cause of action), based upon the testimony of Pomerantz and the minutes of a PRC meeting (A

**17-21). Pomerantz claimed that Wellington's performance had been "stellar" (since he expressed no such opinion in his expert report, ABB objected, but the court nonetheless admitted it) (8:1810-12). Accepting his conclusion, the court then rejected the statement in the May 2000 PRC minutes that Wellington had been suffering from "deteriorating performance" (A *22).

But Pomerantz admitted his conclusion about Wellington's "stellar" performance was based upon an index that was *not* the benchmark ABB actually used (9:1973-74). The IPS states that "[e]ach investment manager's portfolio will be evaluated against a relevant market benchmark *selected by PTM* in collaboration with the investment manager" (ASA 490) (emphasis added). So the Plan fiduciaries, not plaintiffs' experts or the court, had the exclusive authority to determine a fund's appropriate benchmark. In fact, as of June 2000, Wellington was underperforming ABB's benchmark (the Wellington Composite Index) on a rolling three and five-year basis. (9:1974; 11:2703-04). ABB also had the discretion to determine that the "static" Wellington Fund was unnecessary in light of the move to "dynamic" target-date funds under the Plan's re-design (12:2762-64). Significantly, the Department of Labor has blessed these target-date funds. DOL Investor Bulletin, "Target Date Retirement Funds," www.dol.gov/ebsa/pdf/TDFInvestorBulletin.pdf ("These [target-date] funds are designed to make investing for retirement more convenient by automatically changing your investment mix or asset allocation over time").

The same May 2000 PRC meeting minutes state that the removal of Wellington would allow participants to "be empowered to create their own balanced fund using either actively or passively managed core fund offerings" (ASA 485). The court said that couldn't have been true because, by their very nature, the "dynamic" Freedom Funds effectively made that decision for them (A *20). But Freedom had not been selected for the Plan platform in May 2000. It wasn't chosen until the November 14, 2000 PRC meeting (ASA 508). In view of the Plan's expansion of investment options in 2000, even Pomerantz agreed that participants could have effectively re-created Wellington by spreading their money across options other than Freedom (8:1857-58).

In repudiating the choice of Freedom as the target-date fund, the court emphasized that Mr. Cutler did not go through a "large winnowing process" (A *17). The court referred to this alleged "winnowing" requirement at least six times (A **18, 20, 21, 22). This was an invented mandate, nowhere to be found in the IPS. In any event, the elaborate selection process demanded by the court would have been impossible in the case of these dynamic, target-date funds. In November 2000, when ABB selected Freedom, target-date funds were a new concept (9:1974), and there were only three such funds available in the market.

ABB considered them all (4:897-98; 5:1045; 10:2389-90). Despite its demand for a "winnowing process," the court inconsistently stated that "[I]n 2000, there were not that many lifecycle funds, or target dated funds, in the market" (A *18).

There was no evidence that ABB decided to remove Wellington or to add Freedom for any disloyal purpose. If lining Fidelity's pockets were the motivation, ABB would have added more than one Fidelity fund among the ten new mutual funds in the 2000 re-design. If the purpose was to funnel monies to Fidelity, ABB would not have eliminated the Fidelity Equity Index Fund and the Fidelity Retirement Money Market Fund at the same time that it added Freedom (C-14).

Even if Freedom had failed the IPS performance criteria, that would not necessarily have triggered its removal from the platform. All the IPS required was a formal review and recommendation to the PRC when the fund's performance was "significantly" below its benchmark (ASA 498). In any event, Freedom did meet those performance criteria (9:2045-48; 10:2295-96). Pomerantz conceded that Freedom was outperforming the ABB benchmark (9:2045-48). There is something radically wrong in ruling that ABB owes $21.8 million in underperformance damages for a fund that met the IPS performance criteria.

The court also ignored the sound reasons for maintaining Freedom and mapping Wellington into Freedom. Freedom is a popular and widely-used target date fund (10:2390) – not some unsafe or speculative venture. Nearly 40% of comparably-sized 401(k) plans offer Freedom (10:2392). Moreover, while the "balanced fund" (equity and fixed-income) in the lineup had been Wellington, the "balanced funds" after its removal were Freedom (5:1063; 9:1971). The court found that ABB's stated desire to map one balanced fund into another balanced fund was not credible (A *20). But it would have been reckless for ABB to have mapped Wellington monies into non-balanced funds that ignored these investors' preference.

Lastly, the court reasoned *ex post* that "between 2000 and 2008, the Wellington Funds outperformed the Freedom Funds" (A *21). But fiduciary conduct is not judged in hindsight. The test is "how the fiduciary acted viewed from the perspective of the time of the challenged decision rather than from the vantage-point of hindsight." *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994). It is always possible after the fact to identify investment options with disappointing performance. The court's approach invites litigation on this basis as well.

6. The ABB Defendants Did Not Engage In Any "Prohibited Transaction."

The court found that the involvement of Cutler, ABB's John Sackie, and the PRC in the mapping decision created a "prohibited transaction" under ERISA § 1106(a)(1)(D) because the mapping reduced ABB's fee payments for the

Represented PRISM (A *23). Like the claim of imprudence under § 1104, the prohibited transaction claim was barred by the statute of limitations set forth in § 1113. *Browning v. Tiger's Eye Benefits Consulting*, 313 F. App'x 656, 660 (4th Cir. 2009); *Blanton v. Anzalone*, 760 F.2d 989, 991 (9th Cir. 1985).

Apart from that, there was no "prohibited transaction." Section 1106 is narrowly interpreted. *Amato v. Western Union Int'l*, 773 F.2d 1402, 1417 (2d Cir. 1985) (broad interpretation of the transactions prohibited by § 1106 bars plaintiff's claim), *abrogated on other grounds by Mead Corp. v. Tilley*, 490 U.S. 714, 721 (1989). Only those transactions that fall within the "specific list of dealings proscribed" by § 1106 are prohibited. *Brock v. Citizens Bank*, 841 F.2d 344, 347 (10th Cir. 1988). Congress did not intend an expansive interpretation of § 1106, particularly because of the sweeping requirements of prudence and loyalty in § 1104. *Evans v. Bexley*, 750 F.2d 1498, 1500 n.3 (11th Cir. 1985) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 270 (2d Cir. 1982)).

Section 1106(a)(1)(D) proscribes a "transaction" that constitutes a "transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." The court's attempt to create a § 1106(a)(1)(D) violation from the mapping and reduction of ABB's expense obligations in the Represented PRISM is the proverbial square peg in the round hole. First, there was no "transaction" in the sense that § 1106(a)(1) uses it – no "sale," "exchange" or "leasing" of property –

subsection (A); no "lending of money" or "extension of credit" – subsection (B); no "furnishing of goods, services or facilities" – subsection (C); no "acquisition . . . of any employer security or employer real property" – subsection (E). As the Supreme Court stated in rejecting another § 1106(a)(1)(D) claim, "[t]hese [prohibited transactions] are commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length." *Lockheed*, 517 U.S. at 892-93. Nothing like that was involved here.

Second, there was no use of "plan assets." The assets of mutual funds like Wellington and Freedom are not "plan assets." ERISA § 1101(b)(1) provides that mutual fund assets are not "plan assets." *Hecker*, 556 F.3d at 584. The Department of Labor has acknowledged that as well. DOL Advisory Opinion 2009-04A (Dec. 4, 2009).

Third, under the court's own description, there was no "transfer" of any "assets" "to or used by or for the benefit of" ABB. Indeed, there was no transfer to or use by ABB of anything. The transfer of assets was from one fund (Wellington) to another (Freedom). ABB received and used no assets, and no assets ever left the Plan. Under the court's theory, ABB merely paid about $8,000 per year less in expenses.

7. The Court's Damage Award of $21.8 Million Was Based On a Misunderstanding Of The Plan And Of Mapping.

Another egregious error in the court's mapping analysis was its adoption of the $21.8 million in damages calculated by Pomerantz. According to him, that number represented the difference between the "final wealth" in Freedom as of December 2007 and what it would have been had the mapping never happened (i.e. what it would have been had Wellington remained in place) (8:1849).

Pomerantz thus assumed that, absent the alleged breach, participants invested in Wellington would have maintained that same investment for the next seven years (9:1970-71) and that, after the mapping took place, they would have maintained their same investment in Freedom without ever making any changes (8:1849). These assumptions disregard both the principle of participant choice so fundamental to 401(k) plans and the reality of how mapping works.

Participant choice is a central principle of defined contribution plans. E. Zelinsky, *The Defined Contribution Paradigm*, 114 Yale L.J. 451, 478 (2004). As another of plaintiffs' experts recognized, participant choice determines the volume of assets in the Plan, their allocation, and the amount of Fidelity's compensation (7:1633-34). The Plan allows the participants to direct their contributions to "any or all the funds specified" on the Plan platform, and it provides that "[a] Participant may . . . change his designated investment formats for his prospective contributions at any time" (ASA 237; C-9). Plan participants have the sole, unfettered right to change the funds in their accounts at any time (13:3019). *Howell v. Motorola, Inc.*, 633 F.3d 552, 569 (7th Cir. 2011) ("Plan participants were entitled throughout the class period . . . to move their dollars away from the Motorola Stock Fund into a different fund on a daily basis; anyone concerned by the downward trend that persisted for some time could have done so (and it is probable that many did).").

Mapping did not eliminate participant choice. As plaintiffs' counsel pointed out, it is a default option (2:353; 8:1809-10). Participant contributions were directed to Freedom only if they failed to make an investment election (5:1062-63; 11:2681; ASA 536). Having a default option is a necessity. Some participants, for whatever reason, don't like making investment decisions. That is the very reason target-date funds such as Freedom were designed. Significantly, the Department of Labor has approved target-date funds as Qualified Default Investment Alternatives ("QDIA") for participants who do not make their own investment decisions (10:2388-89). *See* DOL Regulation Relating to Qualified Default Investment Alternatives in Participant-Directed Individual Account Plans, www.dol.gov/ebsa/newsroom/fsQDIA. For more than 60% of plans, target-date funds are the default option (11:2681).

A statute and its implementing regulations now confirm that there is no fiduciary liability for mapping into target-date funds like Freedom. The Pension

Protection Act of 2006 created a statutory safe harbor from any loss, or by reason of any breach, caused by a participant whose assets are defaulted into a QDIA. 29 U.S.C. § 1104(c)(5); 29 C.F.R. 2550.404c-5(b)(1). "An example" of a QDIA eligible for this protection is "'a targeted-retirement-date' fund or account." 72 F.R. 60452, 60479 (2007). This protection is available whenever there is "any . . . failure of a participant to provide investment instruction." *Id.* at 60453; *Bidwell v. University Med. Ctr., Inc.*, 685 F.3d 613, 618 (6th Cir. 2012). While not retroactive, these provisions are a clear expression of legislative and administrative intent that fiduciaries be immune from liability for doing what ABB did here.

All participants were free to re-allocate their Wellington assets elsewhere within the platform. Even if they did allow those assets to default to Freedom, they could move them to another fund(s) at any time (1:170-71). As a result, there is a big-time loss causation problem here. Under ERISA § 1109(a), fiduciaries are only liable "to make good to [the] plan any losses to the plan *resulting from* each such breach." (emphasis added). A court cannot "focus solely on the alleged loss without reference to its cause." *Brown v. Medtronic, Inc.*, 628 F.3d 451, 457-58 (8th Cir. 2010). Defendants are entitled to judgment as a matter of law under ERISA when plaintiffs fail to establish loss causation. *Brosted v. Unum Life Ins. Co.*, 421 F.3d 459, 466-67 (7th Cir. 2005). "And without loss causation there is no liability." *Nelson v. Hodowal*, 512 F.3d 347, 351 (7th Cir. 2008). Pomerantz improperly assumed a class of catatonic participants unable to make the independent investment decisions that ERISA and the Plan afforded them.

Moreover, if mapping into Freedom was the breach, then Pomerantz applied the wrong measure of damages. The correct measure would be the difference between the performance of Freedom (the actual world) to the performance of the fund to which Wellington *should* have been mapped (the "but for" world). *See*, *e.g.*, *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985). Pomerantz didn't even attempt to do that. Likewise, if the fiduciary breach was mapping, then damages could only accrue from dollars actually mapped. But Pomerantz included *all* Freedom asset values as of December 2007 in his calculation (8:1849; C-ASA 188). As a result, he had to have included underperformance associated with transactions in Freedom made after the mapping was completed. There was no basis to charge ABB with losses sustained from the participants' voluntary investment decisions after the mapping occurred.

C. POINTS RELATED TO FEE CLAIM ONLY

8. The Plan's Offering of A Broad Range of Investment Options From Which Participants Could Select Low-Priced Funds Bars The Claim of Unreasonable Recordkeeping Fees.

The ruling below crashes headlong into *Hecker*, *Loomis* and *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011). Like this case, *Hecker* and *Renfro* involved challenges to Fidelity recordkeeping compensation, particularly revenue sharing. Like this case, *Hecker* and *Renfro* involved a bundled arrangement, with FMR as investment advisor for the mutual funds offered as investment options and FMT as trustee and recordkeeper.

These decisions collectively hold that plan fiduciaries cannot be liable for excessive fees where, as here, participants in a self-directed 401(k) retirement savings plan that offers many different investment options with a broad array of fees can direct their contributions across different cost options as they see fit. The test is whether the Plan has "a reasonable range of investment options with a variety of risk profiles and fee rates." *Renfro*, 671 F.3d at 327. Just like the terms of the Plan itself, these cases are grounded on the principle of participant choice in defined contribution plans. Moreover, *Hecker* and its progeny provide an ascertainable and certain standard that fiduciaries and courts can understand and follow – in contrast with what happened here: a hindsight battle of experts over what constitutes a "reasonable fee," resolved by a judicial credibility determination.

The Plan unquestionably met the *Hecker* standard. The three-tier structure allowed participants to choose their asset allocation (Tier 2 index funds and Tier 3 mutual funds) or not to choose at all (Tier 1 target-date funds). That structure was attractive to all different types of participants: the target-date funds for those unwilling or unable to make asset allocation decisions on their own; the passively-managed index funds for those who want a well-diversified portfolio at very low cost; the actively managed mutual funds for those willing to take on more risk for the possibility of a higher reward. With the 2000 revised lineup, there were 17 Tier 3 actively managed mutual funds (5:1139; 12:2770-73), four Tier 2 passive funds, and the Tier 1 Freedom funds (ASA 789; C-14). Because of the Plan's size, ABB was able to obtain the BGI index funds at a low price, including one with an expense ratio of only three basis points (5:1028-29, 1090-91; ASA 842-43). Even apart from the BGI funds, expenses ratios covered a broad range from five to 162 basis points (*See* ASA 795; C-15). Any participant motivated by low cost could easily achieve that goal. The court simply ignored the many cost alternatives available to Plan participants.

9. ABB Did Not Violate The Statutory or IPS Provisions Relating to Fees.

The court repeatedly found that revenue sharing is common and acceptable practice in the 401(k) industry (A **9, 15, 16, 26). It also found that ABB used revenue sharing to pay for recordkeeping (A **3, 16). Yet the court condemned ABB's use of revenue sharing because it failed to engage in a "deliberative process for determining why such a choice is in the Plan's and participants' best interest." (A *16).

Once more, neither the statute nor the case law imposes any such duty. To the contrary, ERISA § 1104(a)(1)(B) measures the discharge of the duty of care against an industry standard: "of an enterprise of a like character and with like aims." There is no evidence that anyone within the 401(k) industry that so widely uses revenue sharing conducted such a "deliberative process" before adopting that practice, and no other court has ever imposed such a duty upon an ERISA fiduciary. Again, a fiduciary need not "scour the market to find and offer the cheapest possible fund." *Hecker*, 556 F.3d at 586.

So the court once again fell back on the IPS (A *15). It concluded that the IPS imposed a duty upon ABB to obtain rebates from revenue sharing for the benefit of the participants. But the requirement for "alliance rebates" couldn't do that because, as the court recognized, that phrase was merely a synonym for revenue sharing itself (A *8).

The court next focused on the IPS statement that alliance rebates, i.e. revenue sharing, be used to "offset or reduce" administrative costs (ASA 491), construing that phrase to require ABB to obtain rebates from revenue sharing for the Plan or its participants (A *13). That was illogical: alliance rebates cannot mean both revenue sharing and rebates from revenue sharing. The court also disregarded the critical word "or". Whether or not it "reduce[d]" administrative costs, revenue sharing did "offset" those costs because it was a means of paying for them (5:1095). It is undisputed that the use of revenue sharing is the reason the Plan was no longer required to pay hard dollar per participant fees. Even plaintiffs' expert conceded that ABB used revenue sharing to "completely *offset* the fees" (7:1479) (emphasis added). The handbook upon which he relied talks about revenue sharing as an "offset" to the Plan's recordkeeping and administrative costs (7:1469-70).

The court then looked to a different IPS provision to impose its duty to obtain rebates – the one stating that "[t]o the extent possible, ABB will use the purchasing power afforded by the size of the plan assets to reduce the cost to participants of providing the PRISM plans' investment options" (ASA 490). This provision falls under the heading "Criteria for Selecting Investment Options." (ASA 489). It says nothing about recordkeeping costs and is more properly construed to address investment management fees. In any event, ABB did use the purchasing power afforded by the size of the Plan assets to reduce participant costs. For example, the BGI index funds, with their low expense ratios, are available only because of the size of the Plan's assets (5:1027-28; 12:2768-69). Institutional classes of some mutual funds have also been offered, and the load fees often charged to retail investors have been waived (5:1027-28, 1090-91). Non-Plan investors would not have enjoyed these cost reductions (5:1027-28, 1155; 12:2769). The popular and inexpensive Income (or Stable Value) Fund is unavailable outside the Plan, and it offers participants a higher rate of return and lower volatility than is available in the general marketplace (5:1010-11; 12:2756-57).

The IPS says only that ABB is to use the Plan's size "to the extent possible." Using its existing relationship, ABB was able to secure rebates from one mutual fund manager, T. Rowe Price, on a grandfathered basis (5:1096-97). But when ABB asked Fidelity for rebates, Fidelity said no (4:918). Fidelity generally doesn't give rebates (14:3321; 15:3480-81). That is not surprising. ABB could not commit any portion of the $1.4 billion in its Plan in return for lower recordkeeping prices from Fidelity without breaching the Plan requirement that the participants themselves choose where their money will be invested. In addition, fund expenses for a recordkeeper become higher as the number of participants grow. *Loomis*, 658 F.3d at 672.

10. ABB Was Procedurally and Objectively Prudent in Its Consideration of Fees.

ERISA § 1104(a)(1)(B) yields two separate inquiries: (1) the process by which a fiduciary reached a decision ("procedural prudence"); and (2) the objective reasonableness of the decision ("objective prudence"). Fiduciaries are insulated from liability if they satisfy *either* test. *Roth*, 16 F.3d at 917-19.

Procedural prudence "focuses on the fiduciary's conduct preceding the challenged decision." *Roth*, 16 F.3d at 917-18. It looks to whether the fiduciaries employed appropriate methods to investigate the merits of the investment.

Katsaros v. Cody, 744 F.2d 270, 279 (2d Cir. 1984). By contrast, under the objective prudence test, fiduciaries are not liable, regardless of the process they used, if their decision was objectively reasonable. *Roth*, 16 F.3d at 919; *Herman v. Mercantile Bank, N.A.*, 143 F.3d 419, 421 (8th Cir. 1998). This is so even if the challenged decision actually was motivated by self-dealing. *Wsol v. Fiduciary Mgmt. Associates Inc.*, 266 F.3d 654, 657 (7th Cir. 2001) ("Despite the disreputable character of East-West and the scandalous provenance of its relationship with FMA, the fund received the best execution at the same cost that it would have incurred had FMA hired a choir of heavenly angels as introducing brokers. . . .").

ABB was procedurally prudent. It had a rigorous fund selection process, whereby PRC considered the average expense ratio of the funds being reviewed, their Morningstar ratings, assets in the funds, three year prior performance, and volatility (5:1068-74). PRC began with the average expense ratios for the funds under consideration and eliminated all funds above that average (5:1070). By definition, the expense ratio for any mutual fund had to be below the average in order to remain in the mix (*Id.*).

The court decried ABB's failure to inquire about how much of Fidelity's total fee for investment management and recordkeeping consisted of revenue sharing (A *15). But the total expense ratio is all that matters. The buyer of a desk doesn't ask the salesperson what a drawer costs. Similarly, Mr. Cutler considered the reasonableness of fees in their totality, not in their component parts (4:857). The total expense ratio is what was netted out in determining a fund's performance against its benchmark (10:2373-75). It was what the participant paid, and it is what ABB reasonably monitored (4:936; 11:2510). *Hecker*, 556 F.3d at 586, is also dispositive on this issue:

> "Deere disclosed to the participants the total fees for the funds and directed the participants to the fund prospectuses for information about the fund-level expenses. This was enough. The total fee, not the internal, post-collection distribution of the fee, is the critical figure for someone interested in the cost of including a certain investment in her portfolio and the net value of that investment."

ERISA does not require disclosure of revenue sharing. *Hecker v. Deere & Co.*, 496 F. Supp. 2d 967, 974 (W.D.Wis. 2007), *aff'd*, 556 F.3d 575 (7th Cir. 2009). The DOL regulations were not amended until October 2010 to require disclosure of the fact (not the amount) of revenue sharing. 75 F.R. 64910 (2010). Thus there could be no duty to make such disclosures prior to the trial that occurred in January 2010. This Court has concluded that an entity and plan governed by ERISA need not provide more information than the statute and DOL require. *Jensen*, 38 F.3d at 952.

ABB was objectively prudent as well. It is uncontroverted that the expense ratios of the Plan's investment options, including Freedom, were below their

Morningstar category average (11:2502-05; 13:3106-14; ASA 792-93, 795-96). The total Plan cost was right down the middle (ASA 913).

11. There Was No Basis For The Award of Damages On the Fee Claim Because It Was Predicated Upon The Wholly Unreliable Testimony of Plaintiffs' Expert.

The court's conclusion that ABB caused the Plan to pay $13.4 million in excessive recordkeeping fees rested entirely on the testimony of plaintiffs' expert Al Otto (A *36). The court erroneously adopted his $70 "limit of reasonableness" as the benchmark for concluding that Plan fees were excessive.

First, the court abused its discretion by declining to consider ABB's motion under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). We are aware that this court has "relax[ed]" *Daubert's* application for bench trials. *David E. Watson, P.C. v. United States*, 668 F.3d 1008, 1015 (8th Cir. 2012). But "relax" does not mean "eliminate." The reliability determination for expert testimony must still be made at some point. *Metavante*, 619 F.3d at 760.

The court failed to do that here. Prior to trial, ABB moved to exclude the testimony of Otto (and Pomerantz) as unreliable under *Daubert* (C-ASA 1-237), but the court summarily and without analysis rejected the motion. The court merely stated, at the conclusion of a telephonic conference, that: "I believe these are matters for the court to consider in terms of weighing the evidence as opposed to finding that the evidence is so unreliable that it should not even be considered.

Of course, in addition, this is a bench trial." (Dec. 7, 2009 Tr. at 20.) The court then denied all motions to exclude expert testimony: "The next thing I want to do is I want to rule all of the *Daubert* motions, and I'm denying all of them." *Id.*

Daubert demands that the court find the expert testimony be the product of reliable principles and methods and that the expert applied the principles and methods reliably to the facts of the case. *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 757-58 (8th Cir. 2006). "When a district court fails to consider an essential *Daubert* factor, such as reliability, it has abused its discretion." *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 608 (7th Cir. 2006). By failing to make any determination that Otto's testimony was reliable, the court abdicated its *Daubert* responsibilities.

Expert testimony is admissible only if "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Otto admitted that his methodology was not scientific (6:1299, 1344-45; 7:1488). According to him, pricing of services in the 401(k) industry is "built on relationships," and a determination of reasonableness is "very much experience based" (6:1299, 1344-45).

Otto based his "limit of reasonableness" on two subjective and non-verifiable sources: (1) a handful of conversations with unidentified industry colleagues, never memorialized, during which he suggested fees he thought might be reasonable; and (2) his own experience in conducting RFPs for a few clients during 2003 (6:1379, 1385-86; 13:2932-33). Otto formulated a benchmark for 2003 and then used that to derive reasonable fees for a *13-year* period. In doing so, he used a "trend-line" from a conference handout that some third person gave him (6:1330-33, 1396-1400; ASA 884-897). He also considered certain projects he was involved in during 2006 and 2007, where the winning bidders were $15-20 above his limit of reasonableness (6:1396-97).

Incredibly, Otto kept no notes or worksheets detailing what was said in his conversations with these unidentified industry colleagues (6:1379-80). There is no documentary evidence of any analysis he performed based on this exercise. His methods cannot be tested (6:1345; 13:2933-34). Apart from his own say-so, there is really no evidence these conversations ever occurred.

Otto also derived his "limit of reasonableness" from work he did for a few of his own clients in 2003. He couldn't recall the range of prices offered by the various vendors in the 2003 RFPs that he reviewed, and he no longer has access to the worksheets that would allow him to reconstruct those prices (6:1387). In any event, his own clients' fees exceeded his "limit," and his own published works contain estimates of expected fees significantly higher than his "limit." (6:1390-93, 1407; 13:2946).

He made mistakes as well. For the first nine months of 2007, Otto calculated total administrative fees at $120 per Plan participant. Yet, for the last quarter of that year, the same category inexplicably rose to $238 (6:1363-65). His "limit" did not include many of the services Fidelity provided to the Plan, e.g. trust services, custody of assets, merging plans acquired through corporate acquisitions, communication with participants (6:1374-78).

Faced with such problems, Otto attempted to validate his "limit" by purporting to compute administrative fees for twelve comparable plans from public records (6:1412-15.) But more than half of these comparators paid fees that exceeded his limit (6:1425-27). His analysis assumed that the non-mutual fund asset managers in these plans would not share revenue with the recordkeeper (6:1427-28), but he assumed the contrary in performing similar work for these same lawyers on other cases (6:1428-30.) His estimates of the fees these twelve plans paid would have been much higher had he used the same methodology he employed in these other cases (6:1429-30).

Based purely on expediency, Otto also made inconsistent estimates of the fees paid by the same plan. In another case where he was claiming the fees paid by that defendant's plan were too high, he estimated those fees at $90-$116 per participant (7:1495). But in this case, where he was trying to show the ABB Plan paid too much, Otto claimed the plan fees of the defendant in that other case were just $45-$50 per participant (7:1493-94). His own source materials indicated that the average total industry cost for recordkeeping, administration, and core services in 2003, his benchmark year, was approximately $140 per participant per year – or nearly double his limit of reasonableness (6:1401-02).

Otto's methodology was junk science that had no place in the courtroom. *Robinson v. GEICO Gen. Ins. Co.*, 447 F.3d 1096, 1100 (8th Cir. 2006); Peter W. Huber, Galileo's Revenge: Junk Science in The Courtroom (1991). He "did not offer the results of any testing to demonstrate that his theory was accurate." *Smith v. Cangieter*, 462 F.3d 920, 924 (8th Cir. 2006). His methodology was unreliable in every respect: (1) undocumented; (2) subjective; (3) incapable of being tested or replicated; and (4) glaring errors. A court should not permit, much less adopt, opinion evidence that is "connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner*, 522 U.S. at 146.

Knowing that Otto's methodology did not pass muster, the court came up with three documents to support him (A *36). But a flawed methodology doesn't become reliable just because the result matches a few data points in a universe of documents.

The court looked first to the Texa$aver Plan – a government plan, not an ERISA plan, subject to different requirements and fiduciary standards (10:2326). While it did rebate revenue sharing to participants, the Texa$aver Plan ended up with higher total fees per participant than the ABB Plan because its participants had to pay directly for recordkeeping themselves (10:2401, 2414-17). Depending on the account balance, participant fees in the Texa$aver Plan could be nearly four times higher than the ABB Plan fees calculated by Otto (11:2713). Given the opportunity to question Dr. Starks on this very point, the court stated that "[the Texa$aver Plan is] more expensive, and the ABB [Plan] is cheaper." (10:2416-17). Nevertheless, in its decision, the court inexplicably reached the opposite conclusion.

The court also pointed to an internal Fidelity draft fee analysis as back-up for Otto. It construed that draft to mean that "as compared to other plans serviced by Fidelity Trust, a Plan with the same number of participants as the PRISM Plans would generate $70 per-participant in revenue for Fidelity Trust." (A *12). Not so. The "trend line" numbers on the draft reflected only recordkeeping fees paid by unbundled plans serviced by Fidelity for basic recordkeeping services that exclude services ABB enjoyed (14:3368). That is an apples-to-oranges comparison because the Plan fee is bundled (3:681-83; 14:3365-69). Because of this flaw, the draft graph does not appear in the final document presented to Fidelity management (14:3365; 15:3432-33). Yet the court found the draft to be probative and gave no weight to the final (A *12).

Finally, the court looked to a document from ABB consultant Mercer (A *12; ASA 898-911). The plans described in the Mercer draft were very different from ABB's. They contained the employer's own stock as an investment option. Because there is no cost involved in using the employer's own stock, a plan like ABB's that does not offer company stock will appear to have a higher expense ratio (11:2704-05). The plans referred to in the Mercer draft were also larger and thus had economies of scale. *Id.* Finally, it is impossible to compare these plans against the ABB Plan without knowing the asset allocations and choices made by their participants (*Id.*).

D. ATTORNEYS' FEES

12. The Attorneys' Fee Award Should Be Reversed Outright Or, At The Very Least, Substantially Reduced.

The award of substantial attorneys' fees should be reversed when, as a result of the appeal, plaintiffs are no longer prevailing parties. *Antolik v. Saks, Inc.*, 463 F.3d 796, 803 (8th Cir. 2006).

In the event of something other than an outright merits reversal, however, this Court should substantially reduce the fee award. ERISA § 1132(g)(1) only allows a "reasonable" fee. Courts have a duty to "guard against overgenerosity in the award of attorneys' fees and expenses." *Jorstad v. IDS Realty Trust*, 643 F.2d 1305, 1312 (8th Cir. 1981). In granting plaintiffs $12,947,747 in attorneys' fees, the court committed at least two critical errors that caused the award to be excessive.

First, the court used as its lodestar a blended rate of $514.60 per hour (B *4). That was a national rate rather than the local market rate. But it is well-settled that the reasonable hourly rate "is usually the ordinary rate for similar work in the community where the case has been litigated." *Fish v. St. Cloud State Univ.*, 295 F.3d 849, 851 (8th Cir. 2002). It is "the place where the case was tried." *Farmers Coop. Co. v. Senske & Son Transfer Co.*, 572 F.3d 492, 500 (8th Cir. 2009). Expert analysis revealed that, based on median billing rates for lawyers of comparable experience in this region, the aggregate fees for the 45 plaintiffs' attorneys who recorded time on this case would have been $5,293,026.70 – less than half of what the court actually awarded (C-ASA 257, 352-53).

The court's justification for its national rate was that this was complex litigation requiring special expertise. But that is not the test. A non-local rate is reasonable only when the plaintiff (i) in fact uses non-local counsel and (2) demonstrates that, despite diligent, good faith efforts, he was unable to find local counsel able and willing to take the case. *Emery v. Hunt*, 272 F.3d 1042, 1048 (8th Cir. 2001). Where experienced local counsel is available, the lodestar cannot be based upon national, specialized, or any other alternative rates. *Little Rock Sch. Dist. v. Arkansas*, 674 F.3d 990, 997-98 (8th Cir. 2012). Plaintiffs did not meet this standard. They did use local counsel; their law firm is in St. Louis. They did not even attempt to prove inability to find competent local counsel – no doubt because they actually used such counsel.

Second, the blended rate used by the court included substantial time for twelve lawyers who never entered an appearance and who performed low-level work – routine document review, deposition summaries and database management. The market rate for that type of work was $150 per hour (ASA 255-56). One study discloses that this type of work could be compensated at a rate of $40 per hour. D. Degnan, *Accounting For The Costs of Electronic Discovery*, 12 Minn. L.J Sci. & Tech. 151, 164 (2011). Yet the court lumped these document review attorneys into the $514 blended rate that was applied to every plaintiffs' lawyer who touched the file. A total of 4,829 hours were recorded by these document review attorneys (C-ASA 337). Based solely on the difference between the $514 lodestar and the $150 market rate for these attorneys, the fee award was excessive by $1,757,756.

CONCLUSION

For all the reasons stated, the judgments below should be reversed outright.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B), F.R.A.P., as it contains 13,897 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

Undersigned counsel further certifies that this brief complies with the typeface requirements of Rule 32(a)(5) F.R.A.P., and Circuit rule 32(b) and the type style requirements of Rule 32(a)(6), F.R.A.P., as it has been prepared in a 14-point proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I certify on February 25, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system on the following counsel:

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