Nos. 12-2060/12-3794

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RONALD TUSSEY, ET AL.,

Plaintiffs-Appellees,

v.

FIDELITY MANAGEMENT TRUST COMPANY
AND FIDELITY MANAGEMENT & RESEARCH COMPANY,

Defendants-Appellants.

On Appeal From The United States District Court
For The Western District of Missouri
Hon. Nanette K. Laughrey, District Judge

OPENING BRIEF FOR DEFENDANTS-APPELLANTS FIDELITY MANAGEMENT TRUST COMPANY AND FIDELITY MANAGEMENT & RESEARCH COMPANY

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CORPORATE DISCLOSURE STATEMENT

Fidelity Management Trust Company and Fidelity Management & Research Company are both wholly-owned subsidiaries of FMR LLC, a private company.

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RULE 28A(i)(1) SUMMARY AND ORAL ARGUMENT REQUEST

Plaintiffs-appellees are participants in two 401(k) plans sponsored by their employer, defendant-appellant ABB, Inc. Defendant-appellant Fidelity Management Trust Company ("FMTC") provided certain administrative services for the plans. The district court found that FMTC and defendant-appellant Fidelity Management & Research Company (collectively "Fidelity") breached fiduciary duties under the Employee Retirement Income Security Act ("ERISA") because of the way Fidelity handled income from money known as "float." The factual record concerning Fidelity's practices is undisputed, and those practices were, as a matter of law, consistent with ERISA, settled finance and property law, the parties' contract, and everyday commercial practice. They therefore were not a breach of fiduciary duty. The court also rejected Fidelity's statute of limitations argument in a ruling that conflicts directly with precedents of sister circuits. Finally, the court held Fidelity jointly and severally liable with ABB for a $13.5 million attorneys fees award, even though that award almost entirely involved fees related to claims that were unsuccessful as against Fidelity. Any fee award against Fidelity was required to be limited to the claims on which plaintiffs prevailed against Fidelity.

Fidelity believes oral argument would materially assist the Court in understanding the legal errors underlying the float, limitations, and attorneys fees rulings. Fidelity requests twenty minutes to present its arguments.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 29 U.S.C. § 1132(e) and 28 U.S.C. § 1331 because this is an action for breach of fiduciary duties under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(2) and (3).

This Court has jurisdiction under 28 U.S.C. § 1291 because the appeal is from final judgments entered by the district court on March 31, 2012, and November 2, 2012. Fidelity timely filed notices of appeal on April 30, 2012 and November 16, 2012.

INTRODUCTION

This appeal, as to Fidelity, is straightforward. Fidelity prevailed on the myriad theories asserted against ABB and Fidelity together, but was held separately liable for a distinct activity—the disposition of income earned on money moving to and from investment options made available to participants in a 401(k) plan sponsored by ABB.[1] This money in transit is known as "float."

Two types of float are at issue. The first involves the money contributed by ABB or participants to purchase shares in the mutual funds and other investment options in the ABB Plan.[2] As a matter of federal securities law and undisputed

[1] ABB offered two plans, but because there is no difference between them for purposes of Fidelity's float practices, they are referred to as the "Plan."

[2] Most of the investments made available to ABB Plan participants were mutual funds, but other types of securities were available as well. The mutual

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fact, the Plan became the owner of the shares as of 4 p.m. ET on the day the contributions were made. But because determining the amount of money to be directed to each individual investment option involved complex recordkeeping functions, the money could not be transferred until the next day. During that overnight period, the money was held in a single omnibus account "for the benefit of the investment options." Fidelity Defs. App. ("FDA") 257. The account moneys were invested overnight, and the income from those investments was distributed to the investment options. The district court held that distributing the money to the investment options was improper because the court deemed the Plan to be the owner of the money overnight—and thus entitled to the overnight earnings—even though the Plan *already owned the shares* the money was used to purchase, and even though the delivery of the money was *legally irrevocable*. In the court's view, that is, the Plan simultaneously owned both the shares and the money irrevocably paid to purchase them. That view is as contrary to law as it is to common sense.

The second type of float involves an even simpler, more familiar practice: everyday check-writing. When a participant requested a cash withdrawal from the Plan, the participant could elect to receive either an electronic funds transfer or a

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funds and other securities available to participants in the ABB Plan are referred to collectively as the "investment options."

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written check. The judgment below holds Fidelity liable—albeit with literally no discussion of the issue—for failing to pay interest on the check amounts *while they remained uncashed*. That conclusion, again, is at odds with routine commercial practice, not to mention settled finance law: anybody who receives a check expects to be paid only *the face value of the check*, not additional interest accrued before the check is cashed. A check is a claim to a specified sum of money—it is not an interest-bearing investment vehicle.

Recognizing the underlying simplicity of the transactions at issue here is the key to understanding the basic legal errors in the judgment against Fidelity. The judgment against Fidelity is infected by other errors as well—a failure to find the claims barred by the statute of limitations, a damages award unsupported by the evidence (which was generated by plaintiffs in support of a different float-related liability theory that failed at trial), and an attorneys fees award that improperly imposes on Fidelity liability for fees related to claims on which Fidelity prevailed. The Court need not reach those errors, however, if it simply recognizes and applies two settled principles of property and commercial law: (1) a person who has bought, irrevocably paid for, and received a product generally does not simultaneously own both the product and the money paid to purchase it, and (2) a person is not entitled to interest on an uncashed check. Courts look to ordinary notions of property rights to determine whether an asset is owned by an ERISA

plan, and these ordinary principles compel the conclusion that the float here did not belong to the ABB Plan.

The district court's failure to recognize and apply those principles has already had effects beyond the $1.7 million judgment against Fidelity in this case. Earlier this month, other plaintiffs filed a massive copycat class action seeking to give collateral estoppel effect to the judgment below as to Fidelity's handling of float in *all* of its 401(k)-plan service relationships nationwide. *See Kelley v. Fid. Mgmt. Trust Co.*, No. 13-10222 (D. Mass. filed Feb. 5, 2013). Fidelity believes the *Kelley* plaintiffs' collateral-estoppel claim is meritless,[3] but its very existence illustrates the broader stakes involved here. The judgment against Fidelity should be reversed.

STATEMENT OF THE ISSUES

1. Two questions of law concerning Fidelity's float practices are presented:

a. Whether the ABB Plan was legally entitled to income earned on overnight investments of float where, as a matter of ordinary property rights, settled banking law, and everyday commercial practice, neither the float nor the float income belonged to the Plan.

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[3] As explained below, among other things, the issue was not fully developed because plaintiffs raised their current float-related theory only *after* trial, and the decision below does not even discuss one of the principal grounds on which Fidelity was held liable.

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b. Whether Fidelity was permitted to use float income to offset banking costs incurred in its handling of float, where the parties' agreement and ERISA authorized Fidelity to charge the Plan for those costs.

Assocs. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co., 941 F.2d 561 (7th Cir. 1991)

Kalda v. Sioux Valley Physician Partners, Inc., 481 F.3d 639 (8th Cir. 2007)

Faber v. Metro. Life Ins. Co., 648 F.3d 98 (2d Cir. 2011)

29 U.S.C. § 1101(b)(1)

2. Whether ERISA's six-year statute of repose bars plaintiffs' challenge to Fidelity's float practices, which were instituted more than six years before the complaint was filed.

David v. Alphin, --- F.3d ---, 2013 WL 142072 (4th Cir. Jan. 14, 2013)

Adamson v. Armco, Inc., 44 F.3d 650 (8th Cir. 1995)

Phillips v. Alaska Hotel & Rest. Emps. Pension Fund, 944 F.2d 509 (9th Cir. 1991)

Angell v. John Hancock Life Ins. Co., 421 F. Supp. 2d 1168 (E.D. Mo. 2006), *aff'd*, 223 F. App'x 527 (8th Cir. 2007)

29 U.S.C. § 1113

3. Whether the district court erred in adopting an award of float-related damages that is unsupported by the trial evidence and contrary to the court's own factual findings.

Henry v. Champlain Enters., Inc., 445 F.3d 610 (2d Cir. 2006)

Harms v. Cavenham Forest Indus., Inc., 984 F.2d 686 (5th Cir. 1993)

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4. Whether Fidelity may be held liable for attorneys fees incurred to prosecute liability theories on which Fidelity prevailed.

Jenkins v. Missouri, 127 F.3d 709 (8th Cir. 1997)

Griffin v. Jim Jamison, Inc., 188 F.3d 996 (8th Cir. 1999)

Delcastillo v. Odyssey Resource Mgmt., Inc., 431 F.3d 1124 (8th Cir. 2005)

Geissal v. Moore Med. Corp., 338 F.3d 926 (8th Cir. 2003)

STATEMENT OF THE CASE

Fidelity was the recordkeeper for a 401(k) plan offered by ABB, Inc., Fidelity's co-defendant at trial. Plaintiffs represent a class of participants in the ABB Plan. They claim that ABB and Fidelity each breached fiduciary duties allegedly owed under ERISA. The district court rejected almost all the claims against Fidelity, but the court did rule that Fidelity breached its duties by failing to credit the Plan with income earned on money known as "float." The court awarded plaintiffs $1.7 million in damages from Fidelity. It also awarded plaintiffs $13.5 million in attorneys' fees, holding Fidelity jointly and severally liable with ABB for the entire award.

STATEMENT OF FACTS

A. Background On 401(k) Plans And The ABB Trust Agreement

Employees who chose to participate (and former employees who chose to remain) in the ABB 401(k) Plan (referred to as Plan "participants") made pre-tax contributions to the Plan from their salaries or wages. FDA303. ABB made

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additional contributions on the participants' behalf, and the contributions were then allocated to individual participants' accounts within the ABB Plan. ABB's Pension Review Committee selected a lineup of investment options—here, mostly mutual funds—that were made available to participants, and participants selected from that lineup the particular options into which their accounts were to be invested. (As a technical matter, the Plan itself owned the investments, on behalf of the participants.) FDA303-04.

Operation of a 401(k) plan requires a multitude of administrative services, including maintenance of participants' accounts, tracking account balances, processing participants' investment elections, providing investor communications and statements, facilitating withdrawals, and tax reporting. ABB retained Fidelity to provide those services (and others). The terms and conditions pursuant to which these services were to be provided were set forth in a contract called a Trust Agreement. FDA434-35, 441-43 (Trust Agreement § 5(a)-(b), (e); Schedule A); FDA304. In the provision of the Trust Agreement that governs "Compensation and Expenses," ABB and Fidelity explicitly agreed that "[a]ll expenses of the Trustee [Fidelity] relating directly to the acquisition and disposition of investments constituting part of the Trust ... shall be a charge against and paid from the appropriate Plan participants' accounts." FDA435 (Trust Agreement § 6). In other sections, the Trust Agreement confirmed that the assets in the Plan consisted of

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contributions made by participants "less the payments that are made by the Trustee as provided herein," FDA424 (Trust Agreement § 1), and that Fidelity could "pay … reasonable expenses and compensation from the Trust" for "legal, accounting, clerical, and other assistance" if not already funded by ABB, FDA433 (Trust Agreement § 4(k)(vii)).

B. Procedural And Factual Record On Float

1. *Plaintiffs' Evolving Float Theories*

At their core, plaintiffs' claims against Fidelity and ABB challenged the decisions about which investment options to offer participants as part of the 401(k) Plan lineup. Plaintiffs alleged that ABB acted imprudently and disloyally by offering in the lineup certain funds that plaintiffs deemed to be higher-cost (along with concededly low-cost options), which plaintiffs claimed caused the Plan to incur unlawfully excessive costs. FDA89 (Am. Compl. ¶ 2). Plaintiffs also asserted that Fidelity should be held liable for decisions about that investment lineup and the resulting fees. FDA332, 350-51. The district court rejected all of those theories against Fidelity. *Id.*

Plaintiffs also ultimately pursued a separate fiduciary breach theory wholly specific to Fidelity, *viz.*, that Fidelity improperly handled "float" income. *See infra* at 11. That theory was not set forth in the operative complaint. Its only reference to float income was a statement that alleged, for class certification purposes, a

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common issue regarding whether defendants "[f]ailed to capture profits available to the Plan because of its size from such activities as securities lending and use of interest on float." FDA95 (Am. Compl. ¶ 30(B)(iv)). That allegation addressed *ABB's* duties to negotiate on behalf of the Plan, but it asserted no claim regarding *Fidelity's* handling of the float income itself. The district court's order certifying a plaintiff class did not identify an alleged float-handling breach as a common issue to be tried.

It was only in opposing Fidelity's motion for summary judgment that plaintiffs first suggested in a pleading that Fidelity either kept float income for itself, or used it to pay for banking expenses Fidelity was allegedly supposed to bear.[4] In their trial brief, plaintiffs similarly asserted that Fidelity had decided to invest float overnight and to use the income earned "to pay itself for doing so." FDA184. In other words, plaintiffs were asserting that Fidelity kept the float for itself.

That theory collapsed at trial. As explained in greater detail below, the record showed without contradiction—*and the district court found as a matter of fact*—that Fidelity did not keep any float income for itself, but instead first used the income to pay float-account fees, then allocated the remainder to the

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[4] FDA582-83; *see also* Otto Report (Dkt. No. 269, Decl. Exh. 3), at 23-27; Witz Report (Dkt. No. 265, Decl. Exh. 1), at 4-5.

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investment options in which the Plan was invested. *See infra* at 14-15. Although neither plaintiffs nor their experts previously had even acknowledged that the investment options received the float income net of fees, plaintiffs *after* trial for the first time addressed that reality, in a document to which Fidelity was not permitted a reply. Plaintiffs' new theory was that allocating float income to the investment options was a misuse of that income, because it should have been allocated directly to participants' Plan accounts. FDA206, 211.

Although plaintiffs finally addressed the actual use of float income after trial, their damages evidence at trial was still based on their failed theory that Fidelity kept the float income. Plaintiffs' only witness at trial to address float, their damages expert Albert Otto, based his testimony on the false assumption that all of the float income was retained by Fidelity.[5] Otto thus testified that a total of $1,294,388 in float income was generated during the class period through ABB Plan transactions, and that that amount in turn could have been invested to produce approximately $400,000 more in earnings for the Plan. FDA380; 292-95. The approximately $1.7 million total became the basis for the court's award of damages.

[5] Otto conceded that this was merely an assumption on his part, which he made because he did not know "where [the float earnings] went." FDA297-98.

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2. <u>*Undisputed Trial Record On Float*</u>

This case involves two types of float: "depository" float and "redemption" float. The trial record on Fidelity's practices concerning these two types of float was wholly uncontradicted—the only issues presented in this appeal are the legal implications of those practices. The sole fact witness on float was Fidelity's Vice President of Enterprise Reconciliation and Control, Brigitte Gentile, who described how float income was generated and how it was used.

a. *"Depository" Float*

When ABB or a participant made a contribution, the contribution was invested in the Plan investment options selected by the participant. Fidelity was responsible for receiving the contribution and facilitating the purchase of shares in the selected investment option. When Fidelity received a timely purchase order,[6] Fidelity was required under the Trust Agreement to credit the participant's Plan account with the purchased shares as of 4 p.m. that day. FDA264-65, 426-28 (Trust Agreement § 4(d)(i), 4(e)(iii)(a)). As a result, the Plan (the actual owner of the investments, as noted above) received any gain in the share price from that moment forward, as well as any dividends or capital gains available to shareholders on the purchase date. FDA285, 289-90. The Plan thus became owner

[6] A purchase order was timely when it was received by 4 p.m. ET, which was market closing time. FDA261.

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of a selected investment option as of the "trade date" (the date the order was placed, *see* FDA263-64). FDA285.

For example, if a timely order was made on behalf of participant Smith by 4:00 p.m. on April 1, designating his contribution for investment in the Standard Fund, Smith's Plan account became owner of Standard Fund shares as of April 1. If Standard Fund shares were eligible for a dividend on April 1, Smith's account received the dividend. If the value of Standard Fund increased, Smith's account received that increase. In short, all the benefits of share ownership accrued to Smith's account as of April 1.[7]

A vast amount of administrative work was required to determine how much money from all of Fidelity's recordkept plans was to be directed to each investment option.[8] That effort occurred overnight, and the next day (April 2 in the example above) monies were transferred into separate bank accounts owned by each mutual fund company or other investment option. During that period—after

[7] Unlike stocks, the value of which can change from moment to moment, mutual funds are priced just once a day, at 4 p.m. ET. Accordingly, the key moment for ownership of a mutual fund is 4 p.m. If Smith's account owns Standard Fund as of 4 p.m. on April 1, and the value of Standard Fund increases from $10/share from 4 p.m. on April 1 to $12/share as of 4 p.m. on April 2, the fact that Smith's account owned the fund as of 4 p.m. on April 1 means that the account enjoyed the $2/share increase in value. *See*, *e.g.*, *SEC v. Pentagon Capital Mgmt.*, 844 F. Supp. 2d 377, 419 (S.D.N.Y. 2012).

[8] Gentile detailed at trial the enormity of the recordkeeping work. FDA259-61, 267-68.

the Plan became the owner of the investment option shares but before the next-day transfer to individual funds' accounts—the moneys were deposited in a bank account, called a "Depository Account," registered to Fidelity on behalf of the investment options. FDA264, 267-68, 367. The overnight moneys are referred to as "depository float." Because the work of determining how much to send to each investment option required overnight processing, the bank account was necessarily an "omnibus" account, comprising all the contributions to all of the investment options.

Fidelity invested the overnight Depository Account balance in repurchase agreements, and the following business day (here, April 2) the principal was returned to that account and from there transferred to accounts for the particular investment options. FDA275-77. Any income generated through the overnight investment was disposed of in two ways. The income first was used to pay the banking fees for float accounts.[9] Any remaining income then was allocated to the investment options in proportion to their share of the overnight account balance. FDA279-80, 281-82.[10]

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[9] Bank fees include "the expenses you would find in a normal commercial bank setup," such as "maintenance fees, transaction fees so like wires, [and] electronic funds transfers." FDA280.

[10] A similar process was used for the omnibus Redemption Account described below. Because float income net of account fees was allocated to the investment options, and the accounts were registered on behalf of the investment

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It is undisputed that Fidelity earned no fee for the handling and investment of float, and received no portion of the float earnings. FDA285-87.

b. *"Redemption" Float*

"Redemption float" involved the other side of the investment process, when checks were written to participants who requested withdrawals from the Plan. When a participant terminated his participation (a full distribution), or obtained a loan or other withdrawal (a partial distribution), shares of the investment options owned in his account had to be sold (or "redeemed") to generate the cash. When a participant made a timely request for a withdrawal—say, on May 1—the redemption was determined to take place on that date (also called the "trade date"). FDA272. On the next day (May 2), that money was transferred to a "Redemption Account," which was another omnibus bank account registered on behalf of all investment options in Fidelity recordkept plans. FDA272. That same day (May 2), Fidelity calculated and withheld any taxes that were due the IRS and the states for the share redemption (FDA273), and then printed a check to the participant, written on funds in the Redemption Account. FDA654. When the participant cashed his check, he received only the face amount of the check. Consistent with

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options, Fidelity generally did not try to track account fees on a plan-by-plan basis. Fidelity did, however, perform a rough estimate of the fees attributable to servicing the ABB Plan, solely for the purpose of this case. Fidelity estimated that all such fees in all accounts totaled $550 per month during the class period. FDA279, 280, 282-83.

ordinary banking practice, the participant did *not* receive any additional amount for interest or overnight investment income earned during the time the check remained uncashed. As the 2003 Magellan Prospectus in the record explicitly advised: "You will not receive interest on amounts represented by uncashed redemption checks." FDA523, 526. Participants also had the option of requesting payment electronically, in which case the funds would be transferred after deduction of taxes on the same or the next business day. FDA273-74.[11]

The funds in the Redemption Account (like the funds in the Depository Account) were invested overnight, and each following business day the principal was returned to the Redemption Account. FDA277-78. Income generated from overnight investments was handled the same way Depository Account income was handled: the income was first used to pay bank fees for the account, and any remaining income was allocated pro rata to the investment options. *See supra* at 14.

Plaintiffs made no suggestion Fidelity delayed in any way in issuing checks. When a participant elected to receive a check, the participant himself controlled how long the check remained uncashed. FDA273-74.

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[11] Fidelity used two forms of electronic disbursements—wires and electronic funds transfers ("EFTs"). FDA273-74. The technical distinctions between them are not material here.

Again, it is undisputed that Fidelity did not earn any fee for the handling and investment of redemption float, and did not receive any portion of redemption float earnings. *See supra* at 15.

3. *Trial Court Float Ruling*

As noted above, plaintiffs' claims focused predominantly on the selection of investment options in the ABB Plan lineup and the resulting compensation for Fidelity. *See also infra* at 49 & n.20. The district court rejected all of those claims with respect to Fidelity, holding that Fidelity had no fiduciary authority over the selection of investment options or the resulting level of its compensation. FDA332, 349-51.[12]

The court did hold, however, that Fidelity had and breached distinct fiduciary duties in its handling of float and float income. According to the court, float was a "plan asset"—i.e., property owned by the Plan—and ERISA requires that plan assets be used exclusively to benefit the Plan. 29 U.S.C. § 1104(a)(1)(A). Fidelity breached that duty, the court held, by using float to earn overnight income that was distributed to Plan investment options, rather than to the Plan itself. FDA373. The court also concluded that Fidelity improperly "used float income for its own benefit" by using float income in the first instance to pay for the fees of the

[12] The Third and Seventh Circuits had previously held that Fidelity was not a fiduciary for these purposes in nearly identical cases brought by the lead attorneys for plaintiffs here. *See Renfro v. Unisys Corp.*, 671 F.3d 314, 323-25 (3d Cir. 2011); *Hecker v. Deere & Co.*, 556 F.3d 575, 583-84 (7th Cir. 2009).

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float-related bank accounts. FDA372. The court ruled that those account expenses "should have been borne by Fidelity" (*id.*), apparently on the theory that the Trust Agreement limited Fidelity to one specified form of compensation, so that using float to defray bank fees allowed Fidelity to increase its effective compensation beyond the amount authorized by the Trust Agreement. FDA370.

As to depository float, the court held that money used to purchase shares remained a Plan asset even after the Plan became an owner of the shares that the money was spent to purchase, and even after the money had been transferred to the Depository Account belonging to the investment options. FDA370-71. The court based this conclusion on the premise that "no actual exchange of Plan assets for investment shares occurr[ed] until" the next day. FDA371. Because it believed the money in the Depository Account was a Plan asset, the court further concluded that "the returns from investing Plan Assets in overnight securities" also belonged to the Plan. *Id.*

The district court's ruling on "redemption float" is more opaque. The court's findings of fact discuss the income earned on redemption float while a participant held a check written on funds in the Redemption Account without cashing it (FDA368), but the court's conclusions of law do not address redemption float at all.

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The court nevertheless held Fidelity liable for damages as to both types of float. The court ruled that plaintiffs had established "a prima facie case of loss to the Plan" resulting from Fidelity's use of float income. FDA379. The court adopted the calculations of plaintiffs' expert, Albert Otto, who concluded that the "total amount of float income generated by ... Plan assets" was $1,294,388, and lost investment opportunity created "total losses of $1.7 million." FDA380. The bulk of that damage came from the redemption float ignored in the court's conclusions of law, since redemption float was earned over multiple days while checks remained uncashed—an average of 22 days—in contrast to depository float, which was earned only on one-night investments. FDA293-95.

C. Attorneys Fees Award

Although the court held Fidelity liable for just $1.7 million in damages—compared to the $676.1 million plaintiffs originally sought from Fidelity and ABB jointly, and compared to the $35.2 million awarded against ABB—the court held Fidelity jointly and severally liable with ABB for the entirety of the attorneys fees and costs incurred by plaintiffs ($13.5 million total, roughly eight times the compensatory damages awarded against Fidelity). Joint and several liability was appropriate despite the distinct fiduciary breaches at issue, the court held, because "[n]on-prevailing defendants are generally held jointly and severally liable for attorneys fees and costs, regardless of an individual defendant's degree of

culpability." FDA402. Further, plaintiffs' initial *claims* were "'extremely inter-related, arising out of the same transaction or occurrence or series of occurrences and sharing common questions of law and fact,'" and in defending against those claims, ABB and Fidelity "each played a substantial role in the litigation and presented a joint legal defense, advancing many of the same arguments." *Id.*

SUMMARY OF THE ARGUMENT

I. A. Float was not a Plan asset, and thus Fidelity was not required to credit the Plan with income earned on overnight investments of float. It is undisputed that Fidelity was paid nothing for the float process: it received no fees for managing the float, and it received none of the float earnings.

1. *Depository Float.* When an order was placed to purchase shares in a Plan investment option, the participant's account owned the shares as of 4 p.m. ET that day, as required by the Trust Agreement and federal securities law. There is no legal or practical sense in which the money used to purchase the shares belonged to the Plan once that money was irrevocably transferred to an account owned by the investment options, and once the participants' accounts in exchange received the benefits of share ownership. Because depository float was not an asset belonging to the Plan, earnings on the float did not belong to the Plan either.

2. *Redemption Float.* The court's conclusions of law did not even address redemption float, which is enough to compel reversal of the judgment and damages

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award on that issue. But there is no need to remand because redemption float was not a Plan asset as a matter of law. When a participant requested a withdrawal from the Plan, shares in his account were sold ("redeemed") and the proceeds were deposited in the Redemption Account registered on behalf of the investment options. The participant received, at his election, either an electronic transfer or a paper check written on Redemption Account moneys. Under standard banking law and everyday commercial practice, the payee of a check does not receive interest on the amount of the check while it remains uncashed. The check gave the participant a contractual right to payment, not an ownership interest in Redemption Account assets. Accordingly, if the bank failed (as many did during the class period) or otherwise misdirected the funds, the participant would not lose any assets, but would still have a contractual right to payment for the redeemed shares. Because participants did not bear the risks of ownership (i.e., loss of Redemption Account assets), they were not entitled to the benefits of ownership (i.e., earnings on Redemption Account assets).

B. Even if float income was a plan asset, the Trust Agreement expressly authorized Fidelity to use that income in the first instance to defray banking costs associated with the float accounts. Section 6, in particular, explicitly provided that Fidelity could charge Plan accounts for costs incurred in acquiring and disposing

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of investment option shares. That provision and others refute the court's conclusion that Fidelity had contracted to bear those expenses itself.

II. Plaintiffs' float-related claims are barred by ERISA's six-year statute of repose. The challenged float practices were implemented more than six years before this lawsuit was filed, as set forth by plaintiffs' own expert. ERISA does not recognize a "continuing violations" theory, and thus plaintiffs cannot rely on the continuing application of longstanding float practices to continuously "re-trigger" the limitations period.

III. The damages award is legally defective in two respects.

A. The award overlooks the undisputed fact that because the ABB Plan was an investor in the Plan's investment options, the Plan already received monetary benefits from Fidelity's allocation of float income to those investment options. Compelling Fidelity to re-allocate float income to the Plan would give it a double-counting windfall. And because one-third of the Plan was invested in an investment option owned *only* by the Plan, *all* of the float earnings allocated to that option already went to the Plan itself. The Plan's damages thus were overstated by at least a third. The award must be remanded for recalculation to account for the float income already received by the Plan.

B. The damages award also ignores the withholding of taxes from the amounts paid by check to participants for their share redemptions. That

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withholding was not included in the amounts maintained in the Redemption Account to support the checks. The testimony supporting the award wrongly assumed it was, resulting in a second significant overstatement of the principal amounts on which the damages calculation was based.

IV. Although the district court held that Fidelity was not liable for ABB's breaches, the court nevertheless held Fidelity jointly and severally liable with ABB for the entire $13.5 million attorneys fees award. Not only does that award hold Fidelity liable for fees roughly eight times the amount of plaintiffs' recovery from Fidelity, but it holds Fidelity liable for fees incurred to prosecute claims *on which Fidelity prevailed*. The court expressly held that Fidelity did not cause or participate in ABB's breaches. Fidelity thus cannot be held liable for the attorneys fees related to those breaches. Fidelity can be held liable only for the fees incurred to prove the narrow, float-related breach claim—a claim that had nothing to do with the lineup-related claims on which ABB was held liable.

STANDARD OF REVIEW

In an appeal from a civil bench trial, the trial court's "conclusions of law are subject to de novo review," and the Court also reviews de novo "[m]ixed questions of law and fact that require the consideration of legal concepts and the exercise of judgment about the values underlying legal principles." *Cooper Tire & Rubber Co. v. St. Paul Fire & Marine Ins. Co.*, 48 F.3d 365, 369 (8th Cir. 1995). Although

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the Court "review[s] the trial court's findings of fact for clear error," *id.*, no findings of historical fact concerning Fidelity's float-handling practices are in dispute here. There are only questions of law concerning the legal implications of those practices and the application of ERISA's limitations period, and those legal questions are reviewed de novo. *Id.*

The "amount of damages entered in a non-jury case is a finding of fact," reviewed for clear error. *Gonzalez v. United States*, 681 F.3d 949, 952 (8th Cir. 2012) (quotation omitted).

The attorneys fee ruling is reviewed for abuse of discretion, *see Fair Isaac Corp. v. Experian Info. Solutions, Inc.*, 650 F.3d 1139, 1152 (8th Cir. 2011), and "a district court by definition abuses its discretion when it makes an error of law," *Coffey v. Comm'r*, 663 F.3d 947, 951 (8th Cir. 2011); *see Plouffe v. Ligon*, 606 F.3d 890, 894 (8th Cir. 2010) (Colloton, J., concurring).

ARGUMENT

I. FIDELITY DID NOT BREACH ANY FIDUCIARY DUTY IN ITS HANDLING OF FLOAT INCOME

The district court held that Fidelity breached fiduciary duties to the Plan in its handling of float income in both the Depository and Redemption Accounts. The court was wrong on both counts. Contrary to the district court's decision, the float in the Depository Account was not a Plan asset, as a matter of law. As a consequence, income derived from that account also was not a Plan asset, and thus

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Fidelity had no fiduciary duty in the distribution of that income. With respect to float earned in the Redemption Account, the district court's failure to offer any legal analysis of the issue alone requires the Court to reverse the judgment (and associated damages) as to redemption float. In any event, float in the Redemption Account also was not a Plan asset, as a matter of law, and thus Fidelity again had no fiduciary duty with respect to the distribution of earnings on that Account.

The court also erred as a matter of law in holding that Fidelity violated the Trust Agreement by using float income to defray the expenses of the bank accounts. To the contrary, the Trust Agreement expressly authorized Fidelity to charge Plan accounts for expenses that were, like these banking expenses, directly related to the purchase and redemption of shares in Plan investment options.

A. Depository Float And Redemption Float Were Not Plan Assets

1. *Depository Float*

The district court's entire analysis of depository float rests on the premise that the Plan owned the money in the omnibus, overnight Depository Account, because "no actual exchange of Plan assets for investment shares" occurred until the next day, when the money was actually transferred to the individual accounts of the investment options. FDA370-71. That premise is wrong as a matter of law. As of 4:00 p.m. on the day money was deposited into the Depository Account, the

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Plan became the legal owner of the shares, entitled to dividends paid that day and the benefit of share increases from that moment on.

The Trust Agreement by its terms determined when a share purchase was completed. Section 4(d)(i) provided that the purchase was made, and shares exchanged, on *the day the contribution was received*. FDA426. And the trial record established without contradiction that Fidelity followed that mandate, making the Plan the owner of shares in the selected investment option as of 4:00 p.m. on the trade date, giving the Plan the benefit of any dividends to which shareholders were eligible as of that date. FDA257-58. Contrary to the district court's holding, in other words, the "actual exchange of Plan assets for investment shares" did not occur the day *after* the contribution was made. It occurred the *same* day. It is true that the investment option did not receive the money in its individual account until the next day, but by then the Plan already owned its shares.

Indeed, federal securities law *required* that the Plan be treated as a shareowner on the trade date, rather than the following day. As of 4:00 p.m. on the trade date, the purchase of the mutual funds shares was irrevocable as a matter of law—it is a violation of the Investment Company Act to place a purchase order for shares at the 4 p.m. price and then cancel the purchase after 4 p.m. *See* 17 C.F.R. § 270.22c-1. This prohibition on "late trading" is a core principle of mutual-fund

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law. *SEC v. Pentagon Capital Mgmt.*, 844 F. Supp. 2d 377, 418 (S.D.N.Y. 2012) ("the line with regard to late trading is and was startlingly bright"); Proposed Plan of Distribution, *In re Ritchie Capital Mgmt. L.L.C.*, SEC Admin. Proc. 3-12947 (July 8, 2008) (citing Order, *In the Matter of Ritchie Capital Mgmt. LLC*, Admin File No. 3-12947 (Feb. 5, 2008)). As of 4 p.m., the purchaser cannot undo the sale and clawback the money, but it has the full benefit of share ownership. *Cf. Cidale v. United States*, 475 F.3d 685, 686-88 (5th Cir. 2007) (applying tax law to hold that plaintiff had taxable beneficial ownership of shares when she exercised an option to purchase stock and had the "right to sell, vote, and pledge the shares, and to receive dividends").

Once the Plan became the owner of the shares, it was no longer also the owner of the money used to purchase them. The Seventh Circuit addressed this specific point in the context of an ERISA challenge to retention of float where the plan received the benefits of ownership a week before the money ultimately reached the investment option in question (an annuity). *See Assocs. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 569 (7th Cir. 1991). As the Seventh Circuit held in *Associates*, where the plan's administrator "began crediting [the plan] with interest from the day that the funds were received," the plan had no claim to "the value of the float" subsequently earned on that money. *Id.* In *Associates*, the employer sent contributions designated for the purchase of an

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annuity to a trust administrator who that same day (1) began crediting the contribution with interest, and (2) wired the money to a bank. The bank kept and earned interest on that money for up to a week before it actually purchased the annuity. *See id.* at 564. But because the administrator credited the plan's account with the investment on the day of the contribution—even though the actual purchase of the investment instrument was not made until up to a week later—the Seventh Circuit held that the float did not belong to the plan. *See id.* at 565, 569. The same principle applies here: the Plan is credited with share-ownership as of 4:00 p.m. on the trade date, and thus cannot claim the float income thereafter.

The same result follows from the rule that "plan assets" should be defined consistently with "ordinary notions of property rights." *Kalda v. Sioux Valley Physician Partners, Inc.*, 481 F.3d 639, 647 (8th Cir. 2007); *accord Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 106 (2d Cir. 2011). There is no "ordinary notion of property rights" in which a purchaser is entitled to own both the item he has purchased (such as mutual-fund shares) and the money he has spent to purchase it. Of course, a seller of goods can agree to allow the purchaser to retain the funds and pay later—any sale on credit reflects such an agreement. But nothing in this record suggests that the ABB Plan was entitled to "buy now and pay later."[13] To the

[13] Plans and service providers can negotiate for different float income arrangements, including an agreement to provide the plan with income earned on float. Such an agreement would be the economic equivalent of a "buy now, pay

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contrary, the moneys were irrevocably transferred on the date identified by the Trust Agreement as the date of the "purchase," and they were transferred not to a Plan account, but to an account registered on behalf of the investment options. FDA258, 272.

The registration of the Depository Account on behalf of the investment options had meaningful consequences. An owner of property not only enjoys its benefits, but also bears the risk of its loss. *See In re Qualia Clinical Serv., Inc.*, 441 B.R. 325, 330-31 (B.A.P. 8th Cir. 2011) ("true sale" of property occurs only where risk of loss transferred) (citing cases); *Calloway v. Comm'r*, 691 F.3d 1315, 1329-30 (11th Cir. 2012) (similar); *Freede v. Comm'r*, 864 F.2d 671, 676 (10th Cir. 1988) ("Risk of loss often has been used as an indicia [sic] of an ownership interest."); *Steel Improvement & Forge Co. v. Comm'r*, 314 F.2d 96, 98 (6th Cir. 1963) (beneficial owner of stock is "party who bears the operating risks of the business and stands to benefit from profits or suffer detriment from losses"). During the class period here, which encompassed the financial crisis, approximately 200 banks failed. *See* Fed. Deposit Ins. Bank Corp., Failed Bank List, www.fdic.gov/bank/individual/failed/banklist.html (Feb. 20, 2013). Bank errors and defalcations are also hardly unknown. But because the Plan did not own

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later" arrangement, in allowing the plan to simultaneously own the shares while also enjoying the benefits of the money used to purchase them. There was no such agreement or understanding here.

the Depository Account, it was insulated from the risk of loss from failure, theft, or mistake—the Plan already owned the shares. The district court could not properly deem the Plan to be retroactively entitled to earnings from an account when it never bore any risk of losing the assets in that account.

ERISA § 401(b) expressly provides that "[i]n the case of a plan which invests in any security issued by a [mutual fund], the assets of such plan shall be deemed to include such security but shall not, solely by reason of such investment, be deemed to include any assets of such [mutual fund]." 29 U.S.C. § 1101(b)(1). In other words, when a plan invests in 10 shares of a mutual fund on behalf of a participant, the "investment" is *the shares themselves*, which become plan assets. But the plan's "investment" does *not* include the underlying assets of the mutual fund itself, including money paid to the fund in exchange for shares. As the Seventh Circuit explained in *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009), § 401(b) means that "assets of the mutual funds" in which plans invest "are not assets of the Plans." *Id.* at 584.

A mutual fund's assets are not assets of a plan that invests in the fund any more than Apple Inc.'s Cupertino headquarters is an asset of a plan that invests in Apple stock. Like any other Apple investor, the plan can claim as its own asset only its Apple shares and any dividends they pay. So too for a plan that invests in a mutual fund. As of 4:00 p.m. on the trade date, the mutual fund shares become

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assets of the plan, and the plan no longer can claim any ownership interest in the money used to purchase them. Indeed, the late-trading rule *prohibits* the plan from canceling the sale and re-claiming the money. *See supra* at 26-27.

The authorities cited by the district court do not hold to the contrary. The court relied chiefly on the Seventh Circuit's decision in *George v. Kraft Foods Global, Inc.*, 641 F.3d 786 (7th Cir. 2011), for the proposition that float income is a Plan asset because it "consists of interest earned from Plan assets in the various bank accounts." FDA371. But *George* did not involve depository float—it involved redemption float, and the assets in the account *were* plan assets: "As applied to the present case, float refers to funds that remained on deposit at State Street pending clearance of a check written on Plan assets." *George*, 641 F.3d at 800. *George* says nothing about whether depository float here is a Plan asset. *George* certainly did not (and could not) tacitly overrule the Seventh Circuit's previous decision in *Associates* that a plan that contributes money to a trust in exchange for a security has no claim to float income once the plan is credited with ownership of the security. *See United States v. Bauer*, 626 F.3d 406, 409 (8th Cir. 2010) ("to the extent our decisions in *Shafer* and *Morris* are inconsistent, *Shafer* is first in time and controls"); 7th Cir. Local R. 40(e).

The district court also erred in relying on a Department of Labor ("DOL") regulation providing that "[w]hen a plan invests in another entity, the plan's assets

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include its investment." 29 C.F.R. § 2510.3-101(a)(2); *see* FDA271. That regulation actually confirms that depository float is *not* a plan asset. The regulation simply reiterates ERISA § 401(b), discussed above, and thus it states that while plan assets include the plan's "investment" in the other entity, "the plan's assets ... do not, solely by reason of such investment, include any of the underlying assets of the entity." *Id.*[14] Accordingly, like the statutory provision, the regulation makes clear that the Plan assets include the shares of the other entity once they have been purchased, but not the money irrevocably transferred to the entities' omnibus Depository Account to make the purchase.

Because the ABB Plan had no ownership interest in the Depository Account moneys, overnight income earned on those moneys was not a Plan asset, and Fidelity thus did not owe the Plan any fiduciary duty in its handling of that income.

2. <u>*Redemption Float*</u>

The district court likewise erred in its redemption float ruling. As explained above, *supra* at 19, most of the court's damages award was based on redemption float, but nowhere does the court's legal analysis actually state that—much less

[14] The regulation does provide that assets of *non*-mutual-fund investment vehicles in the Plan may constitute plan assets under certain circumstances. *See* 29 C.F.R. § 2510.3-101(a)(2)(i), (ii). Neither the district court nor the plaintiffs addressed whether those circumstances were satisfied for the few non-mutual-fund options in the ABB Plan. But the point is irrelevant in any event: the one non-mutual fund investment option that received significant contributions was entirely owned by the Plan, and thus the Plan benefitted dollar-for-dollar from its pro rata share of the net float income. *See infra* at 45-46.

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explain why—Fidelity breached any duty in its handling of redemption float income. The absence of any legal analysis of redemption float is itself enough to compel reversal of the judgment against Fidelity, at least as to liability and damages for redemption float. *See Macheca Transp. Co. v. Phila. Indem. Co.*, 463 F.3d 827, 832 (8th Cir. 2006); *Younts v. Fremont Cnty.*, 370 F.3d 748, 754 (8th Cir. 2004).

But there is no need to remand for resolution of this issue. Under "ordinary notions of property rights," *Kalda*, 481 F.3d at 647, the Plan had no ownership interest in the Redemption Account, and thus no right to income from that account. As discussed, that account was registered on behalf of the investment options. FDA271-72. The Plan thus bore no risk of account failure and consequent loss of underlying account moneys. *See supra* at 29. If the Plan or participants were entitled to income on uncashed checks because the Plan owned the underlying account assets, then a failure of the bank holding the account (or a loss of funds due to embezzlement or misdirection of proceeds) could have wiped out the Plan's assets—a risk that was far from hypothetical during the class period, as noted above, *supra* at 29. But neither the Plan nor the participants faced any such risk.

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And because they did not bear the risk of ownership in the Redemption Account, they were not entitled to the benefit of ownership either.[15]

When a participant requested a withdrawal, shares in a Plan investment option (or options) were redeemed in order to generate the cash, the proceeds were deposited in the investment options' Redemption Account, and the participant had the option to be paid either by electronic transfer or by check written on Redemption Account assets. FDA274.[16] Until the check was cashed, the participant did not yet own the funds, did not bear the risk of loss, and had no right to collect interest. As a matter of black-letter commercial law, the payee of an uncashed check has no title in or right to interest on the account funds. "Because delivery of an ordinary, uncertified check is only conditional payment … the check vests no title or interest in the payee as to funds on deposit in the drawer's bank

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[15] This is not to say that the Redemption Account (and the Depository Account) could *only* be structured such that assets underlying them were not plan assets. *See In re Halpin*, 566 F.3d 286, 290 (2d Cir. 2009) (parties were "free to contractually provide for some other result" that could have rendered the assets in question plan assets). A different structure would raise different questions, especially concerning the risk of loss. What matters for present purposes is that the Plan here bore neither the risks nor the benefits of ownership in the float accounts.

[16] That structure distinguishes this case from *George*, cited by the court below in its discussion of depository float. *See supra* at 31. In *George*, the payor of the checks was the *plan itself*, and the court thus assumed that the checks at issue were written on plan assets. 641 F.3d at 800. Here the checks were written on the *investment options'* account. *George* did not consider the question presented here: whether a plan owned assets in an account belonging to another entity—an entity that bore all the risk of loss, paid all the account fees, and was the payor on the checks.

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account and the check is deemed revocable by the drawer until it is paid." Richard B. Hagedorn & Henry Bailey, *Brady on Bank Checks* ¶ 4.05 (rev. ed. A.S. Pratt 2012); *see* U.C.C. § 3-112(a) ("[u]nless otherwise provided in the instrument, (i) an instrument is not payable with interest"). The 2003 Fidelity Magellan Fund prospectus in the record reflects Fidelity's disclosure of this basic principle. FDA526 ("You will not receive interest on amounts represented by uncashed redemption checks.").

As Gentile observed with respect to her own bank account, "if I write a check to somebody and it takes them a long time to cash it, I'm not going to pay them interest on that money." FDA290. There is no situation in which a person who receives a check in exchange for a transfer of goods (here, the sale of shares) would expect to earn interest from the payor before cashing it—particularly where the participant had the option of receiving an electronic transfer in the first instance. *Cf. Anderson v. Comm'r*, T.C. Memo. 1995-8, 1995 WL 9181, at *16 (Tax Ct. Jan. 11, 1995) (concluding that "maximizing interest income" was not a priority for petitioner who, "on many occasions ... held checks for months before depositing them into his savings accounts" and kept other checks "for about 18

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months, without earning interest, before the checks were used to buy various certificates of deposit"). An uncashed check is not an investment vehicle.[17]

The suggestion that *the Plan* owns the money while *a participant's* check is uncashed is even more untenable. Indeed, many of the checks—certainly many of the largest ones—would have involved "full distributions," i.e., distributions for participants who were terminating participation and hence withdrawing all their money. Plaintiffs below did not cite any authority for the proposition that a 401(k) plan owns the cash supporting a check written to a *former* participant while the check remains uncashed.

The district court's redemption float ruling, which is "as inexplicable as it is unexplained," *Felkner v. Jackson*, 131 S. Ct. 1305, 1307 (2011), must be reversed.

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[17] The Second Circuit addressed a similar situation in *Faber v. Metropolitan Life Insurance Co.*, 648 F.3d 98 (2d Cir. 2011). In that case, an insurer deposited plan participants' death benefits into a general account and provided each participant with a checkbook to make account withdrawals. As here, plaintiffs contended that the "portion of the funds" in the account attributable to each participant's benefit, "as well as any profits MetLife makes by investing those funds," were "plan assets." *Id.* at 105. The Second Circuit—following the reasoning of an amicus brief filed by the DOL—held that the account funds were not plan assets because participants had only a contractual claim to them, not a property-ownership interest: "[U]nder ordinary notions of property rights, this relationship involves MetLife simply as a debtor and the beneficiary-turned-account holder simply as a creditor—a relationship fundamentally different from an ERISA fiduciary relationship with its panoply of discretionary authority and responsibility." *Id.* at 106. Accordingly, plan participants had no entitlement to income the insurer earned by investing account assets. *Id.* at 104.

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B. The Trust Agreement Did Not Require Fidelity To Bear The Expenses Of The Float Accounts

Because the investment options were the beneficial owners of the float-related bank accounts and received the earnings on those accounts, the investment options also paid the bank account fees necessary to generate those earnings. FDA257a.[18] In other words, it was the parties who bore the costs of each account (the fees and risk of loss) who received the accounts' benefits (the earnings). And because the Plan did not own the float, the question whether float income should have been used to pay float-account fees should be beside the point: the float did not belong to the Plan, so the disposition of float income was of no consequence to the Plan. The district court, however, held to the contrary that float and float income belonged to the Plan, which led to a second holding, *viz.*, that Fidelity improperly used float income to pay float-account fees. FDA370.

Even if the court was correct in holding that float income did belong to the Plan, it erred in holding that Fidelity was prohibited from charging the Plan for the account fees incurred to generate that income. As an initial matter, and as the district court recognized, ERISA itself does not prohibit the use of plan assets to pay bank account fees. ERISA expressly permits a fiduciary to use the "'assets of a plan'" for the purpose of "'defraying reasonable expenses of administering the

[18] Mechanically, Fidelity deducted the fees from the earnings, and paid to the investment options the remaining earnings. FDA257a.

plan.'" FDA372 (quoting 29 U.S.C. § 1103(c)(1)); *see* 29 U.S.C. § 1104 ("a fiduciary shall discharge his duties with respect to a plan … for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan"). The district court further acknowledged that the bank account fees in question were, at least in part, "expenses for ... administering the Plan." FDA370. Accordingly, even if the float were a Plan asset, the use of float income to defray bank expenses would have been permissible under ERISA itself.

The district court held, however, that the *Trust Agreement* prohibited Fidelity from using float income to defray plan expenses, because the court read the Agreement as requiring those expenses to be "borne by Fidelity." FDA372. The court reached that conclusion by construing the Agreement to specify only one particular source of compensation for Fidelity, so that by using float income to defray plan expenses, Fidelity in effect increased its de facto compensation by avoiding expenses it was required to bear itself. FDA370-72.

The district court's interpretation of the Trust Agreement, which this Court reviews *de novo*, *see Kitterman v. Coventry Health Care of Iowa, Inc.*, 632 F.3d 445, 448 (8th Cir. 2011), is simply wrong. Although the Trust Agreement provides that Fidelity will receive certain income through "revenue sharing," *see* FDA446-47 (Trust Agreement Schedule B), that is only one of several sources of

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compensation authorized by the Agreement. For example, the same schedule also entitles Fidelity to specified "Annual Participant Fee[s]" and "Loan Fee[s]" for its services. FDA446.

In addition, and most relevant here, the section of the Trust Agreement that governs "Compensation and Expenses" explicitly provides that "[a]ll expenses of the Trustee relating directly to the acquisition and disposition of investments constituting part of the Trust ... shall be a charge against and paid from the appropriate Plan participants' accounts." FDA435 (Trust Agreement § 6). This provision thus *requires* the Plan to bear all expenses directly related to the "acquisition and disposition of investments." Section 4(k)(vii) of the Agreement further provides that Fidelity may "pay … reasonable expenses and compensation from the Trust" for "legal, accounting, clerical, and other assistance" not funded by ABB. FDA433. And § 1 of the Trust Agreement further provides that the assets in the Plan consist of contributions made by participants "less the payments that are made by the Trustee as provided herein." FDA424. Section 1 thus confirms Fidelity's authority to deduct from Plan assets payments for the expenses specified in §§ 6 and 4. In short, even if the float were a Plan asset, the Trust Agreement specifically authorized Fidelity to use Plan assets to pay for the bank account fees.

There is no basis for disregarding the plain terms of the Trust Agreement. The district court certainly did not "'give[] effect' to 'all parts of the contract,'"

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Kitterman, 632 F.3d at 449—it ignored all the foregoing provisions. Nor did the court read each provision of the Trust Agreement "consistently with the others and as part of an integrated whole." *Id.* The revenue-sharing compensation provided on Schedule B is not the only relevant provision, contrary to the central premise of the court's ruling. The provisions more relevant to the charging of expenses are §§ 1, 4, and 6, none of which the court addressed. Because those provisions unambiguously authorized Fidelity to charge Plan accounts for expenses directly related to the acquisition and disposition of shares in Plan investments, the district court erred as a matter of law in holding that Fidelity breached the Agreement—and hence its fiduciary duties—by using float income to pay the expenses of the bank accounts used to facilitate those transactions.

II. PLAINTIFFS' CLAIMS ARE BARRED BY ERISA'S SIX-YEAR STATUTE OF LIMITATIONS

Even if Fidelity had breached a duty with respect to float, plaintiffs' claims would still be barred by ERISA's six-year statute of repose. "ERISA contains an express statute of limitations that bars breach of fiduciary duty claims after the earlier of six years from the breach or three years from the date that plaintiff acquires actual knowledge of the breach." *Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 858-59 (8th Cir. 1999). The six-year provision, ERISA § 413, bars fiduciary-duty claims brought more than six years after "the last action which constituted a part of the breach or violation." 29 U.S.C. § 1113(1). This provision

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has been characterized as a "statute of repose" because it "begins running 'when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted.'" *David v. Alphin*, --- F.3d ---, 2013 WL 142072, at *10 (4th Cir. Jan. 14, 2013); *see Radford v. Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998) ("As a statute of repose, § 413 serves as an absolute barrier to an untimely suit."). The provision reflects Congress's "judgment … that when six years has passed after a breach or violation, and no fraud or concealment occurs, the value of repose will trump other interests, such as a plaintiff's right to seek a remedy." *Larson v. Northrop Corp.*, 21 F.3d 1164, 1172 (D.C. Cir. 1994).

This Court and others have rejected the suggestion that ERISA permits the assertion of a "continuing violation" theory that, in effect, would continuously re-trigger the limitations period. *See Adamson v. Armco, Inc.*, 44 F.3d 650, 653-54 (8th Cir. 1995) (rejecting "continuing violation" argument in context of an ERISA claim); *Angell v. John Hancock Life Ins. Co.*, 421 F. Supp. 2d 1168, 1175-76 (E.D. Mo. 2006) (repetition of an "identical act" does not restart limitations period), *aff'd*, 223 F. App'x 527 (8th Cir. 2007); *see also Alphin*, 2013 WL 142072, at *11 ("we find untenable Appellants' contention that their claims are timely because Appellees' failure to remove the affiliated funds at every committee meeting constituted a new 'prohibited transaction,' and thus, a breach of fiduciary duty"); *Phillips v. Alaska Hotel & Rest. Emps. Pension Fund*, 944 F.2d 509, 520-21 (9th

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Cir. 1991) (where "breaches are of the same kind and nature," limitations period does not re-start with each repeated breach). Rather, when the conduct at issue involves the continued application or effect of a particular practice, the limitations period is triggered once the fiduciary takes the "last action" necessary to adopt the practice. *See Alphin*, 2013 WL 142072, at *11.

Here, the district court recognized that "Plaintiffs' claims may not be based on breaches that occurred prior to December 29, 2000" (FDA315), but it failed to apply the provision properly. Plaintiffs' float claim challenges float-income practices that Fidelity instituted much more than six years before the complaint was filed. Plaintiffs' own expert Albert Otto submitted calculations addressing Fidelity's float practices back to 1995—more than a decade before plaintiffs filed suit. FDA295-96 (explaining that he calculated float damages going back to 1995). Plaintiffs' claims accordingly are barred by ERISA's six-year statute of repose.[19]

[19] Plaintiffs might be differently situated if they alleged that there was some material change in circumstances affecting the float practices, and that Fidelity's failure to respond to those circumstances was a new breach of duty. *Alphin*, 2013 WL 142072, at *12 ("Appellants have not claimed that the bank-affiliated funds *became* imprudent … during the limitations period. … The TAC makes clear that the challenge to the prudence of the funds … is based on attributes of the funds that existed at the time of their initial selection …."). But plaintiffs have never suggested that Fidelity's float practices were proper when first implemented and then became unlawful at some later point because of changed circumstances.

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III. EVEN ASSUMING FIDELITY BREACHED ITS FIDUCIARY DUTIES WITH RESPECT TO FLOAT, THE DISTRICT COURT'S AWARD OF DAMAGES CANNOT BE SUSTAINED

Even assuming Fidelity's liability for its longstanding float practices is established and not time-barred, the court's award of $1.7 million in float-related damages is legally flawed, because it fails to account for the direct and substantial financial benefit the Plan already received from the allocation of float income to the investment options in which the Plan invested. The damages award also overlooks significant tax withholdings from Plan distributions.

These are not technical objections to the exact precision of a damages calculation. The point here is that plaintiffs made no effort at all—even a rough approximation—to avoid double-counting the Plan's receipt of float income benefits or to estimate tax withholdings. These fundamental, material errors require remand of the damages award for further proceedings necessary to identify the Plans' actual losses.

A. The Damages Award Ignores The Monetary Benefits Conferred On The Plan By Allocation Of Float Income To Plan Investment Options

The district court calculated its award of damages on the basis of testimony by plaintiffs' damages expert Albert Otto, who concluded that during the class period, the Depository Account and Redemption Account together generated $1,294,388 in float income, which in turn could have been invested to generate

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approximately $400,000 in additional earnings for the ABB Plan. FDA380; *see* FDA292-95. That testimony, however, was elicited in support of a *different liability theory*, namely, that Fidelity simply took all of the income from the float accounts for itself. FDA292 (explaining that he was asked to calculate "the amount of float on the ABB PRISM Plan participants' money that was used by Fidelity"). Otto expressly conceded that he did not know where the float income went. *See supra* note 5. On that liability theory, it may have been logical for an expert to assume, for purposes of calculating damages, that the Plan received no benefit at all from float income, because the assumption followed directly from the liability theory itself.

At trial, however, it was established without contradiction that Fidelity did *not* take the float income for itself. *See supra* at 15. Plaintiffs thus retreated *after* trial to a different theory, *viz.*, that Fidelity misused float income by offsetting the bank account fees and then allocating the remainder to the investment options. But at trial, they never revised their damages theory to reflect the fact that float income actually was distributed to Plan investment options.

As the court correctly found, the float income, net of banking expenses, was allocated directly to the investment options that chose to receive it. FDA369-70. The float income therefore increased the asset value of those options, to the benefit of all investors in them—including the ABB Plan. Because Otto was unaware that

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Plan investment options actually received float income, his calculations of the Plan's losses did not and could not account for the receipt of that income and the resulting increase in the value of Plan investment options.

Plaintiffs might now argue that participants' benefit was diluted, since non-Plan investors in a given fund also would have benefited from the allocation of float income to the fund. But plaintiffs never raised that objection before, during, or even after trial, and thus it cannot be asserted here. *See Quinn v. St. Louis Cnty.*, 653 F.3d 745, 752 n.6 (8th Cir. 2011); *St. Paul Fire & Marine Ins. Co. v. Compaq Computer Corp.*, 539 F.3d 809, 824 (8th Cir. 2008). And if plaintiffs *had* raised it below, it would have confirmed that the Plan's actual losses were much lower than what Otto calculated, since he simply assumed (incorrectly) that the Plan received no benefit whatsoever from Fidelity's distribution of float income. A reasoned calculation of the dilution effect would require at least an estimate of the proportion of the Plan's investment in each option, the amount of income attributable to that investment, and so on.

Even on the existing trial record, however, it is clear that the dilution effect did *not* exist for the option with the largest percentage of Plan investment—the ABB Income Fund, which accounted for fully one-third of total investments by the Plan. FDA364. The ABB Plan was the *only* investor in the Income Fund (FDA363-64), and thus when the Income Fund received its share of float income,

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the Plan necessarily received 100% of the value of that income. As to the Income Fund, that is, allocation of float income to the investment option (which the court found improper) and allocation of the float income to the Plan (which the court held was required) were the same thing. In other words, the ABB Plan suffered *no damage at all* from Fidelity's ostensibly wrongful allocation of float income to the ABB Income Fund. Accordingly, the damages award must, at a minimum, be reduced by one-third, to reflect the non-injurious allocation of float income to the ABB Income Fund.

"The aim of ERISA is to make the plaintiffs whole, but not to give them a windfall." *Henry v. Champlain Enters., Inc.*, 445 F.3d 610, 624 (2d Cir. 2006) (Sotomayor, J.) (quotation omitted). The current award gives the Plans the benefit of float income already allocated to options in which they were invested, and then compels Fidelity to give the Plan the *same float income* all over again. The award is thus "a double-recovery windfall—a result abhorred by ERISA." *Harms v. Cavenham Forest Indus., Inc.*, 984 F.2d 686, 693 (5th Cir. 1993); *see Sunder v. U.S. Bancorp Pension Plan*, 586 F.3d 593, 600 (8th Cir. 2009); *Hawkeye Nat'l Life Ins. Co. v. AVIS Indus. Corp.*, 122 F.3d 490, 502 n.7 (8th Cir. 1997).

B. The Damages Award Ignores Tax Withholding In The Redemption Account

In addition to ignoring the float income already distributed to Plan investment options, the damage award fails to take into account the tax

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withholding that applied to Plan distributions. Otto testified that he calculated float income in part by determining the amount of Plan distributions in a given year and applying interest based on the assumption that the distributions were held in the redemption account for 22 days—the average time it took for participants to present their distribution checks. FDA288-93. But federal taxes were withheld from distributions on the same day that checks were written to participants. The Redemption Account float thus did not include tax withholdings, and no float income was earned on those amounts. FDA271-72, 277-78. Otto simply failed to remove the tax withholding amounts from his float income calculations, rendering the resulting award unambiguously in excess of the actual loss incurred by the Plan. Given the level of tax rates, failing to account for tax withholdings was a significant error. Damages must be recalculated without the tax withholding amounts.

IV. JOINT AND SEVERAL LIABILITY FOR ATTORNEYS FEES IS IMPROPER WHERE, AS HERE, THE DEFENDANTS WERE NOT JOINTLY AND SEVERALLY LIABLE ON THE MERITS

Although the district court recognized that Fidelity did not participate in, and could not be held jointly and severally liable for, ABB's lineup-related breaches, the court nonetheless held Fidelity jointly and severally liable with ABB for the entire attorneys fees award of $13.5 million. That award is indefensible. It is based almost entirely on time and effort accrued to litigate the lineup-related

claims as to which Fidelity *unambiguously prevailed*. As a matter of law, the court was required to limit any fee award against Fidelity to the limited, float-related breach claims on which plaintiffs actually prevailed.

In contrast to civil-rights cases, there is no presumption under ERISA favoring an award of fees to a prevailing plaintiff. *See Martin v. Ark. Blue Cross & Blue Shield*, 299 F.3d 966, 972 (8th Cir. 2002). Rather, ERISA expressly authorizes a court to award fees to "either party," 29 U.S.C. § 1132(g)(1), if the court determines that the party achieved "some degree of success on the merits," *Deckard v. Interstate Bakeries Corp.*, 2013 U.S. App. LEXIS 1663, at *18 (8th Cir. Jan. 25, 2013) (quoting *Hardt v. Reliance Standard Life Ins.*, 130 S. Ct. 2149, 2158 (2010)). Once that "some degree of success" prerequisite is satisfied, a court may exercise its discretion to award the party fees—or to deny them—based on a list of non-exhaustive factors. *Id.* at *18-19 (citing *Hardt*, 130 S. Ct. at 2158 n.8); *see McDowell v. Price*, 2012 U.S. Dist. LEXIS 147854, at *37 (E.D. Ark. Sept. 6, 2012) (once court determines "that the fee claimant has achieved some degree of success on the merits," court then "must determine whether an award of fees is appropriate" by considering factors).

Plaintiffs here did achieve "some degree of success on the merits" against Fidelity, but only on the float-related theory. That limited success paled in comparison to Fidelity's overwhelming success in defeating plaintiffs' efforts to

hold Fidelity liable for all of the alleged plan-lineup-related breach theories. By every conceivable measure, plaintiffs spent almost of their time before, during, and after trial trying to hold Fidelity and ABB jointly liable for alleged plan-lineup-related breaches, seeking $676.1 million for those breaches (Pomerantz Report (Dkt. No. 271, Decl. Exh. 2), at 21), as compared to the $1.7 million they claimed as damages from the float-related breach.[20] As against Fidelity, not a penny of plaintiffs' fees on the lineup-related claims benefitted the class—they achieved not *some* success, but *no success at all*. As the court succinctly found: "Fidelity is not liable for ABB's [lineup-related] fiduciary breaches." FDA332.

Given Fidelity's overwhelming success on the merits of plaintiffs' lineup-related theories, Fidelity would have been justified in pursuing fees itself. The court instead awarded fees to *plaintiffs*, but without cabining the award to the limited success they achieved on their distinct, narrow, 13th-hour float-related breach theories. Even if the court had discretion to impose a fee award limited to their work on the successful float-related theory, it was legally required to do just that—limit the award to their work on that theory.

[20] Their complaint did not assert a float theory at all; the parties' summary judgment papers and trial briefs mentioned float in only 27 pages out of 697 total (4%), and the parties' post-trial submissions addressed float in only 13 paragraphs out of 343 total (4%).

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A. A Court Cannot Award Fees For Unsuccessful Claims Under ERISA When They Are Separable From Successful Claims

When an attorney's work on a successful claim is unrelated to the work on an unsuccessful claim, "no fee may be awarded for services on the unsuccessful claim." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1986). In this Court's words, "if any issues on which the plaintiff lost are unrelated to those on which [the plaintiff] won, the unrelated issues must be treated as if they were separate cases and *no fees can be awarded*." *Jenkins v. Missouri*, 127 F.3d 709, 716 (8th Cir.1997) (emphasis added); *see Griffin v. Jim Jamison, Inc.*, 188 F.3d 996, 998 (8th Cir. 1999) (instructing court on remand to identify and disallow hours spent on unsuccessful claims); *White v. Martin*, 290 F. Supp. 2d 986, 991 (D. Minn. 2003) (denying fees related to unsuccessful claim).

Even where the unsuccessful claims cannot be finely separated from the successful claims, the court still cannot simply impose all the fees incurred on both sets of claims. The court instead must "tailor[] the fee to reflect a relationship to the results obtained." *Shrader v. OMC Aluminum Boat Grp., Inc.*, 128 F.3d 1218, 1221 (8th Cir. 1997); *see Delcastillo v. Odyssey Resource Mgmt., Inc.*, 431 F.3d 1124, 1132 (8th Cir. 2005) (ordering reduction in fee award to reflect claimant's limited success against the party); *Geissal v. Moore Med. Corp.*, 338 F.3d 926, 934 (8th Cir. 2003) (same).

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It is especially important to avoid awarding attorneys fees on unsuccessful claims in ERISA cases. *See Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984) (fee award must be "consistent with the purposes of ERISA"). Whereas civil-rights employment statutes exist solely to protect employees, a core objective of ERISA was to "create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Conkright v. Frommert*, 130 S. Ct. 1640, 1649 (2010) (quotation omitted) (alterations in original). Thus, as in the Copyright Act, "the policies served by [ERISA] are more complex, more measured, than simply maximizing the number of meritorious suits." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 525-26 (1994) (addressing Copyright Act fees). Awarding fees for unsuccessful claims not only imposes the immediate cost of the fee, it also incentivizes plaintiffs to litigate tenuous and overbroad theories in the first place, directly defeating ERISA's core objective of reducing plan litigation expenses.

B. The Unsuccessful Lineup-Related Theories Were Easily Separable From The Float-Related Theories

The unsuccessful lineup-related breach theories against Fidelity here were easily separable from the successful float-related breach theories. Indeed, the breach theories had nothing to do with each other. If ABB had engaged in a completely different process for selecting options for its Plan lineup, Fidelity's

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float practices would have been unaffected. And if Fidelity had engaged in completely different float practices, ABB's investment-selection process would have been unaffected. The only connection between the theories was the contractual relationship between Fidelity and ABB, and the fact that plaintiffs happened to assert the distinct breach theories in a single action. The theories were addressed in separate sections of the parties' summary judgment papers, expert reports, trial briefs, and post-trial proposed findings and conclusions. The trial testimony concerning Fidelity's float practices was proffered distinctly by one witness (Gentile), and one damages expert for plaintiffs spent a brief, discrete period of time at trial discussing float damages. Because the comparatively small amount of time plaintiffs' counsel spent on their successful float-related breach theory would have been easily separable from the rest of their work, the court was required to impose on Fidelity only liability for fees related to the float-related work.

The court, however, did not even try to separate the work on the distinct breach theories. Nor did the court otherwise limit the award against Fidelity to reflect plaintiffs' very limited success, as would be required if the successful float-

related work could not be adequately separated from the unsuccessful lineup-related work.[21]

Instead the court simply pronounced that Fidelity would be jointly and severally liable for the entire award, mainly on the theory that "plaintiffs' claims against defendants [were] 'extremely inter-related, arising out of the same transaction or occurrence or series of occurrences and sharing common questions of law and fact.'" FDA402. But while the lineup-related theories may have been largely inter-related, plaintiffs *lost* every one of those theories as to Fidelity. The successful float-related theory, by contrast, was *not* inter-related in any way with the failed lineup-related theories—the theories did not "aris[e] out of the same transaction or occurrence or series of occurrences" or "shar[e] common questions

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[21] Methods other than hour-by-hour attribution of work to specific theories can be employed to restrict a fee award as required to reflect limited success. For example, the award against Fidelity could have been reduced to reflect the proportion between the limited recovery from Fidelity and plaintiffs' overall recovery. *See Finkel v. Triple A Grp., Inc.*, 708 F. Supp. 2d 277, 291 n.23 (E.D.N.Y. 2009). Under that metric, Fidelity would have been liable for approximately 4.6% of the total fee award, since Fidelity's damages liability of $1.7 million was 4.6% of the $36.9 million overall damages award. The award against Fidelity also could have been reduced to reflect the proportion between plaintiffs' limited success against Fidelity and the overall claims and damages they sought to establish against Fidelity. *See Geissal*, 338 F.3d at 935-36. On that approach, Fidelity would have been liable for a smaller percentage of plaintiffs' total fees, reflecting their recovery against Fidelity ($1.7 million) compared to the total damages sought from Fidelity in the litigation (originally $676.1 million, or $378.6 million after the court limited their damages to six years prior to filing suit, FDA235 ¶ 91).

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of law and fact." Fidelity's liability for the float-related breaches was factually and legally independent of ABB's liability for the lineup-related breaches, and vice-versa.

For the same reasons, it is also beside the point that Fidelity and ABB "each played a substantial role in the litigation," "presented a joint legal defense," and "advanc[ed] many of the same arguments." FDA402. As to the issues on which they presented a joint defense and advanced the same arguments, Fidelity won, without exception. The parties did *not* present a "joint legal defense" or make the "same arguments" on float, because that issue had nothing to do with ABB's lineup-related practices. The distinct "substantial role" Fidelity played in defending against the distinct float-related claims at most might justify a fee award against Fidelity addressed *solely to those claims*, but Fidelity's role in successfully defending itself against the joint lineup-related claims cannot justify making Fidelity pay fees related to those claims.[22]

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[22] The district court also ignored the extent to which the "joint defense" presented by Fidelity and ABB was compelled by the court itself. In fact, ABB and Fidelity attempted to present separate defenses at all stages of the litigation, cooperating and coordinating only to the extent necessary to avoid duplication. *See*, *e.g.*, FDA154-60, 164-67, 170-72 (separately identifying witnesses and issues in pre-trial memo); FDA300-01 (advising court that ABB and Fidelity "tried to … cooperate in logistics and presentation and not duplicate," but "we do have some pretty distinct issues"). But as trial approached, the district court *ordered* ABB and Fidelity to present a "joint legal defense" in certain key respects. *See* FDA147 (allocating "Defendants collectively" half the trial time); FDA300-01 (giving

Neither the district court nor plaintiffs have cited a single precedent imposing joint-and-several fee liability in circumstances like this. Courts instead have imposed joint-and-several fee liability only where the defendants were held liable for a common or unitary course of conduct, or for imposing a common injury. *See*, *e.g.*, *Walker v. HUD*, 99 F.3d 761, 773 (5th Cir. 1996) (defendants jointly liable on merits under consent decree for conduct imposing "single indivisible injury"); *PM Grp. Life Ins. Co. v. W. Growers Assurance Trust*, 953 F.2d 543, 549 (9th Cir. 1992) (holding two plans jointly liable for damages, fees, and costs arising from their "collective intransigence"); *United Steel Workers of Am. v. ASARCO, Inc.*, 2008 WL 3540152, at *1 (D. Ariz. Aug. 12, 2008) (joint fee liability because plaintiffs prevailed against both defendants on claims involving facts and legal theories common to both defendants); *Essex v. Randall*, 2006 WL 83424, at *1 (D. Md. Jan. 11, 2006) (joint fee liability because the "nature of the injury is singular and was caused by the dereliction of both defendants"). By contrast, when the defendants "are not joint tortfeasors … the district court should apportion the amounts of attorneys' fees owed" by some measure that reflects each

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defendants collectively the same page limit on proposed findings of fact and conclusions of law as plaintiffs).

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defendant's individual liability to the plaintiffs. *Dean v. Gladney*, 621 F.2d 1331, 1340 (5th Cir. 1980).[23]

The cases cited by the district court do not suggest otherwise. In *Hendrickson v. Branstad*, 934 F.2d 158 (8th Cir. 1991), the defendants were state and county officials who were held collectively liable for various juvenile detention and jailing practices. *Id.* at 160. The district court allocated ninety percent of the fee award against the state officials, and this Court affirmed, based on the "interrelated nature of the claims against the state and county officials, the primary culpability of the state officials, and counsel's devotion of only ten percent of their time seeking relief from county officials." *Id.* at 164. The conduct in *Riverside v. Rivera*, 477 U.S. 561 (1986), was entirely unitary—all the claims arose from the allegedly unlawful dispersal by police of a single private in-home party. *Id.* at 571. Likewise, in *Walter v. Clarion Mortgage Capital, Inc.*, 2010 WL 1170136 (W.D. Mo. Mar. 23, 2010), the "successful claims against Defendants" were "extremely inter-related, arising out of the same transaction or occurrence or series of occurrences and sharing common questions of law and fact." *Id.* at *2.

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[23] Indeed, even when defendants *are* held jointly liable for unitary or common conduct, courts generally apportion fees when there are differing degrees of culpability. *See*, *e.g.*, *Jenkins v. Missouri*, 838 F.2d 260, 266-67 (8th Cir. 1988) (affirming allocation of fees among defendants based in part on "the defendants' relative degrees of culpability" for a constitutional violation), *aff'd*, 491 U.S. 274 (1989); *Miller v. Moore*, 169 F.3d 1119, 1126 (8th Cir. 1999) ("the district court should have taken into account 'the defendants' relative degrees of culpability'").

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This Court's decision in *Concord Boat Corp. v. Brunswick Corp.*, 309 F.3d 494 (8th Cir. 2002), is even more off point. In that case, this Court ordered a joint-and-several award of *costs*—not fees—against non-prevailing *plaintiffs*. The plaintiffs there all "asserted common theories of liability," they all sought the "same powerful equitable relief," and they all lost completely. *Id.* at 497. *Concord* provides no support for making a defendant liable for attorneys fees related to distinct claims on which the defendant *prevailed* completely.[24] Nor does *Fenster v. Tepfer & Spitz, Ltd.*, 301 F.3d 851 (7th Cir. 2002), which is yet another case involving a common issue as to which all three parties lost. *Id.* at 860 ("all three appellants continuously argued positions that were not substantially justified; some positions bordered on frivolous"). The same is true for *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999), and *Doe v. Nixon*, 2011 WL 3962669 (E.D. Mo. Aug. 25, 2011)—in both cases, the defendants were government officials jointly responsible for the same conduct and same injury, i.e., enforcement of an unconstitutional statute. *Carhart*, 192 F.3d at 1152; *Nixon*, 2011 WL 3962669, at *7.

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[24] Further, the *Concord* Court observed only that "[j]oint and several liability for *costs* is the general rule unless equity otherwise dictates," in part because of the strong preference under Federal Rule of Civil Procedure 54(d) for ensuring that a prevailing party recovers all its costs. *Id.* (emphasis added). The Court suggested no such "general rule" of joint-and-several liability for *fees*, as to which there is no similar preference.

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This case is nothing like the foregoing cases. The district court itself found that Fidelity was not responsible for ABB's lineup-related breaches, which in turn had nothing to do with the float-related breaches for which Fidelity ultimately was held liable. Fee liability cannot be imposed on Fidelity for the distinct, lineup-related theories on which Fidelity completely prevailed.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,987 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Fed. R. App. 32(a)(5) & (6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

3. The electronic brief has been scanned through a virus detection program (Symantec) before it was filed on the Court's electronic filing system.

Dated: February 25, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2013, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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