UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

ANTHONY ABBOTT et al., *Plaintiffs*, vs. LOCKHEED MARTIN CORP. et al., *Defendants*.	No. 06-cv-701-MJR-DGW

PLAINTIFFS' TRIAL BRIEF

Plaintiffs submit this trial brief of legal issues that guide the Court's trial of this case.

I. Outline of the case

This is a certified class action under the Employee Retirement Income Security Act of 1974 (ERISA) for breach of fiduciary duties in the management of two defined contribution 401(k) Plans administered by Defendants Lockheed Martin Corporation ("LMC") and Lockheed Martin Investment Management Company ("LMIMCo"). See Doc. 367 (certification of two classes); Doc. 403 (certification of third class); 29 U.S.C. §1132(a)(2). Plaintiffs contend that Defendants breached their duties of loyalty and prudence under 29 U.S.C. §1104(a)(1)(A)–(B) by (1) causing the Plans to pay excessive administrative expenses, (2) mismanaging the Plans' Stable Value Fund (SVF) in a way that caused losses to participants compared to what Plaintiffs contend they would have gotten under proper management; and (3) mismanaging the Plans' Company Stock Funds (CSF) in a way that caused losses to participants compared to what Plaintiffs contend they would have gotten under proper management. Plaintiffs seek to compel Defendants to make good to the Plans the losses resulting from these breaches, as required by 29 U.S.C. §1109(a). The class periods for these claims are (1) September 11, 2000 through December 22, 2008 for the excessive administrative expenses clam, (2) September 11, 2000 through September 30, 2006 for the SVF claim, and (3) August 1, 2002 through December 22, 2008 for the CSF claim. Doc. 367; Doc. 403. Plaintiffs seek individually to recover the Plans' losses from the CSF breach for the time period for which the Court rejected Plaintiffs' proposed subclass—September 11, 2000 through July 31, 2002. Doc. 367 at 23–25; 29 U.S.C. §§1132(a)(2); 1109(a).

II. ERISA's statutory duties.

The statutory fiduciary duties principally at issue in this action are ERISA's duties of loyalty and prudence, set forth in 29 U.S.C. §1104(a)(1)(A)–(B):

> (a) Prudent man standard of care.
> (1) Subject to §§ 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
> (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; [and]
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]

Section 1104(a)(1) imposes "strict standards of trustee conduct[.]" *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2465 (2014)(quoting *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc*., 472 U.S. 559, 570 (1985)). These duties "are those of trustees of an express trust—the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982). Fiduciaries are obligated to "act with complete and undivided loyalty to the beneficiaries of the trust and with an eye single to the interests of the participants and beneficiaries." *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984) (citations and quotations omitted); see also *Keach v. U.S. Trust Co.*, 419 F.3d 626, 635 (7th Cir. 2005).

A fiduciary in breach of these duties is subject to the remedies provided in 29 U.S.C. §1109(a):

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary,

> and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary[.]

Any participant in an ERISA-governed plan is authorized to prosecute an action on behalf of his plan, having equal authority with the U.S. Secretary of Labor and a plan fiduciary:

> (a) Persons empowered to bring a civil action.
> A civil action may be brought—... (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under § 1109 of this title[.]

29 U.S.C. §1132(a)(2).

III. Procedural and objective prudence and the shifting burdens of proof.

"In order to prevail on a claim for breach of fiduciary duty under ERISA, a plaintiff must prove (1) that defendants are plan fiduciaries; (2) that defendants breached their fiduciary duties; and (3) that their breach caused harm to the plaintiffs." *Kannapien v. Quaker Oats Co.*, 507 F.3d 629, 639 (7th Cir. 2007)(citing *Jenkins v. Yager*, 444 F.3d 916, 924 (7th Cir. 2006)). In this case, defendants concede they are fiduciaries, so the only legal issues in dispute are whether defendants breached their fiduciary duties and whether that breached caused harm to the Plans on whose behalf Plaintiffs are suing.

In discharging their statutory duties to a plan, fiduciaries must engage in procedural prudence, which means they must "employ[] the appropriate methods to investigate the merits of the investment and to structure the investment" —usually referred to as procedural prudence. *Jenkins*, 444 F.3d at 927 (quoting *Eyler v. C.I.R.*, 88 F.3d 445, 454 (7th Cir. 1996)(quoting *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984)); see also *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917–18 (8th Cir. 1995)(quoting *Katsaros*). This is a test of "how the fiduciary acted viewed "from the perspective of the 'time of the [challenged] decision' rather than from the 'vantage point of hindsight.'" *Roth*, 16 F.3d at 918 (quoting *Katsaros*, 744 F.2d at 279). "Under this standard, a fiduciary is obligated to investigate all decisions that will affect the pension plan, and must act in the best interests of the beneficiaries." *Id.* (quoting *Schaefer v. Arkansas Medical Society*, 853 F.2d 1487, 1491 (8th Cir. 1988)). Under Seventh Circuit law in a recent 401(k) excessive fee case, a failure "to balance the relevant factors and make a reasoned decision as to the preferred course of action—under circumstances in which a prudent fiduciary would have done so is a breach of the prudent man standard of care." *George v. Kraft Foods Global, Inc.*, 641 F.3d 786, 796 (7th Cir. 2011). Merely "engag[ing] in discussions"—even extensive ones—is not enough to discharge the duty of prudence; instead, there must be record evidence showing "that they actually determined whether the costs" of a particular course of action "outweighed the benefits, or vice versa." *Id*. at 795. If an investment's structure resulted from "inertia" rather than "a deliberate decision", the fiduciary has failed to discharge its duty of prudence. *Id*. at 796.

Because Defendants are held to the standard that a prudent person "acting in a like capacity and *familiar with such matters* would use in the conduct of an enterprise of a like character and with like aims", §1104(a)(1)(B)(emphasis added), they are effectively held to the standard of a "prudent expert." See *Katsaros*, 744 F.2d at 279 ("A trustee's lack of familiarity with investments is no excuse"). Thus, a fiduciary who lacks the requisite expertise has a "duty to seek outside assistance." *Id.*; *Tatum v. RJR Pension Inv. Comm.,* 761 F.3d 346, 358 (4th Cir. 2014)(duty of procedural prudence may require "seeking outside legal and financial expertise"). A fiduciary's *subjective* good faith, then, is no defense: "a pure heart and an empty head are not enough." *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007)(citation omitted). A fiduciary who does not consider the factors a prudent expert would have considered necessarily has breached his duty of procedural prudence.

In the context of the Plans' SVF, Defendants' subjective beliefs about potential risks of stable value instruments, unsupported by any quantitative analysis, are insufficient to demonstrate procedural prudence if a prudent individual with expertise in stable value products and charged with managing this over $2 billion account would have conducted a more thorough investigation and analysis.

Similarly, a fiduciary who selects a unitized structure for the Plans' CSFs because it provided "administrative convenience" to some participants, aside from having failed to act for the exclusive purpose of providing benefits, also has not been procedurally prudent if a prudent fiduciary managing such a $6 billion account would have analyzed the harm to participants from continued low-yielding cash holdings and the unitized structure and weighed the costs and benefits compared to a more direct ownership approach. See, e.g., *George*, 641 F.3d at 796–98. With regard to recordkeeping fees, a fiduciary's mere consideration of surveys—even getting advice from independent consultants—as to the reasonableness of recordkeeping fees is insufficient where a prudent fiduciary would have solicited competitive bids for recordkeeping services. See, e.g., *id.* at 798–99. A prudent fiduciary must ensure plan recordkeeping fees are reasonable by considering all sources of the recordkeeper's compensation from plan investments and leverage the plan's size to reduce fees. *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014); Reasonable Contract Or Arrangement Under Section 408(b)(2) – Fee Disclosure, 72 Fed.Reg. 70988, 70989 (Dec. 13, 2007) ("plan fiduciaries need information concerning all compensation to be received by the service provider[.]"); DOL Adv. Op. 97-15A[1].

Plaintiffs bear the burden of providing procedural imprudence "and a prima facie case of loss to the plan." *Roth*, 16 F.3d at 917 (citing *Martin v. Feilen*, 965 F.2d 660, 671). After satisfying that burden, "the burden of persuasion shifts to the fiduciary to prove that the loss was

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[1] http://www.dol.gov/ebsa/programs/ori/advisory97/97-15a.htm

not caused by ... the breach of duty." *Id.*; see also *Tatum*, 761 F.3d at 362 (citing other cases); *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995). "It is generally recognized that one who acts in violation of his fiduciary duty bears the burden of showing that he acted fairly and reasonably." *Tatum*, 761 F.3d at 363 (quoting *Brink v. DaLesio*, 667 F.2d 420, 426 (4th Cir. 1982)). This is a "long-recognized" and "well-established approach", based on the common law of trusts. *Id.* at 362 (quoting Restatement (Third) of Trusts § 100, cmt. f (2012), and Bogert & Bogert, The Law of Trusts & Trustees § 871 (2d rev. ed. 1995 & Supp. 2013)), 363. ERISA's fiduciary standards derive from the same common law of trusts. *Central States*, 472 U.S. at 570.

To meet their burden, defendants must prove that the action they took was "objectively" or "substantively" prudent—meaning that, despite their "imprudent decision-making process,… a hypothetical prudent fiduciary *would* have made the same decision anyway." *Tatum*, 761 F.3d at 363; *Roth*, 16 F.3d at 919; see also *Peabody v. Davis*, 636 F.3d 368, 375 (7th Cir. 2011)("a prudent investor would not have remained so heavily invested" as defendants); *Fish v. GreatBanc Trust Co.*, 749 F.3d 671, 680 (7th Cir. 2014)("courts examine both the process used by the fiduciaries to reach their decision as well as an evaluation of the merits", quoting *Eyler*, 88 F.3d at 455). This requires a determination that a prudent fiduciary *likely* would have done what defendants did, as opposed to the more speculative determination of whether *any* fiduciary *could* have done the same thing under "even the most remote possibilities." *Tatum*, 761 F.3d at 365 (quoting *Knight v. C.I.R.*, 552 U.S. 181, 187–88, 192 (2008)). Of course, participants may be "harmed by a fiduciary's substantive decision precisely because the fiduciary violated ERISA by failing to comply with its procedural obligations." *Fish*, 749 F.3d at 681–82.

This difficult standard is imposed on breaching fiduciaries because, "*Courts do not take* *kindly to arguments by fiduciaries who have breached their obligations that, if they had not done this, everything would have been the same*." *Tatum*, 761 F.3d at 365 (quoting *In re Beck Indus., Inc*., 605 F.2d 624, 636 (2d Cir. 1979),emphasis added). "When a plaintiff has established a fiduciary breach and a loss, courts tend to conclude that the breaching fiduciary was liable." See *id.* at 366 (citing *Peabody*, 636 F.3d at 375, among others). Indeed, "imprudent conduct will usually result in a loss to the fund, a loss for which [the fiduciaries] will be monetarily penalized." *Brock v. Robbins*, 830 F.2d 640, 647 (7th Cir. 1987).

IV. The duty of prudence requires a fiduciary to maximize investment returns.

ERISA fiduciaries are obligated to pursue the "exclusive purpose" of "providing benefits to participants and their beneficiaries" while "defraying reasonable expenses of administering the plan." *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2468 (2014)(quoting 29 U.S.C. §§1104(a)(1)(A)(i), (ii)). The term "benefits" refers "to the sort of *financial* benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries", but "does not cover nonpecuniary benefits[.]" *Id*. (emphasis added). Thus, a prudent person managing an enterprise with the "character" and "aims" of a 401(k) plan seeks "(1) to *maximize* retirement savings for participants while (2) avoiding *excessive* risk." See *id*. at 2467–68 (rejecting argument that fiduciaries may manage plans for purpose of achieving additional nonpecuniary goal; emphasis added). A fiduciary who fails to maximize retirement benefits for participants based on unsubstantiated fears that an alternative course involves an unquantified, incremental degree of risk has not acted prudently. See *Tatum*, 761 F.3d at 366 ("Although risk is a relevant consideration in evaluating a divestment decision, risk cannot in and of itself establish that a fiduciary's decision was objectively prudent.").

V. Calculating losses to the Plans.

The Court has bifurcated the proof of total plan losses to the SVF and CSF classes until after deciding whether defendants breached their fiduciary duties and the benchmark by which to calculate plan losses. Doc. 428 (granting Doc. 423). The "measure of loss applicable under ERISA requires a comparison of what the Plan actually earned with what the Plan would have earned but for the fiduciary breach." *Peabody*, 636 F.3d at 373 (quotation and edit marks omitted, quoting *Bierwirth*, 754 F.2d at 1056). The "straightforward approach" to calculating plan losses as to imprudent investment options is comparing "the return on the improper investments with that of a reasonably prudent alternative investment[.]" *Leigh v. Engle*, 858 F.2d 361, 367 (7th Cir. 1988); *Evans v. Akers*, 534 F.3d 65, 74 (1st Cir. 2008).

"When precise calculations are impractical, trial courts are permitted significant leeway in calculating a reasonable approximation of the damages suffered." *Cal. Ironworkers, Field Pension Trust v. Loomis Sayles & Co*., 259 F.3d 1036, 1047 (9th Cir. 2001) (citing *Sutton v. Earles*, 26 F.3d 903, 918 (9th Cir. 1994)). "Where several alternative investment strategies were equally plausible, the court should presume that the funds would have been used in the most profitable of these." *Bierwirth*, 754 F.2d at 1056; *Dardaganis v. Grace Capital Inc*., 889 F.2d 1237, 1244 (2d Cir. 1989)(court "should presume that, but for the breach, the funds would have been invested in the most profitable of the alternatives and that the errant fiduciary bears the burden of proving that the fund would have earned less than this amount"). Any doubts should be resolved against the fiduciaries. *Cal. Ironworkers*, 259 F.3d at 1047; see also *Leigh*, 727 F.2d at 138 ("resolve doubts in favor of the plaintiffs"). "This is nothing more than application of the principle that, once a breach of trust is established, uncertainties in fixing damages will be resolved against the wrongdoer." *Leigh*, 727 F.2d at 138; *Sec'y of U. S. DOL v. Gilley*, 290 F.3d 827, 830 (6th Cir. 2002)(joining Second, Eighth, and Ninth Circuits "in holding that, to the extent that there is any ambiguity in determining the amount of loss in an ERISA action, the uncertainty should be resolved against the breaching fiduciary.”).

In addition to awarding damages, the Court is free to impose “such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.” 29 U.S.C. §1109(a).

VI. Defenses no longer at issue in this case.

Defendants have previously asserted two defenses that are no longer at issue in this case. First, Defendants have contended that 29 U.S.C. §1104(c) [ERISA §404(c)] may provide them a defense to or “safe harbor” from Plaintiffs’ SVF and CSF claims. See Doc. 333 at 20, ¶¶9–10; Doc. 146 at 26–28. The Seventh Circuit has affirmed that §1104(c) provides no defense to imprudent selection of investment options. *Howell v. Motorola Inc.*, 633 F.3d 552, 567 (7th Cir. 2011). Defendants concede this is no longer a valid defense in this case. Doc. 436 at 3 n.1.

Second, Defendants have repeatedly asserted that Plaintiffs have no standing to assert the SVF and CSF claims. Doc. 146 at 23–24; Doc. 333 at 20, ¶4. The Court previously rejected Defendants’ standing arguments. Doc. 226 at 13–14. The Seventh Circuit also rejected these standing arguments. *Abbott v. Lockheed Martin Corp*, 725 F.3d 803, 807–09 (7th Cir. 2013). The Seventh Circuit specifically rejected Defendants’ effort to “use the hindsight acquired as the claims in this case have evolved to find that there was never jurisdiction over the case to begin with.” *Id.* at 808–09. So also the Court should reject any further attempts by Defendants to argue lack of standing at trial.

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Respectfully submitted,

/s/ Jerome J. Schlichter
Jerome J. Schlichter
Schlichter Bogard & Denton LLP
100 South Fourth Street
St. Louis, MO 63102
120 W. Main Street, Suite 208
Belleville, IL 62220
314-621-6115 Fax: 314-621-7151

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2014, I served this document on all parties via the Court's CM/ECF system.

/s/ Jerome J. Schlichter