GROOM LAW GROUP

Proprietary Funds Litigation
Groom Law Group, Chartered

Updated as of: June 2019

No.	Case Name	Motion to Dismiss	Motion for Class Certification	Motion for Summary Judgment	Allegations/Noteworthy Items	Settlement/Judgment
First Circuit						
1.	*Gordan et al. v. Mass Mutual Life Ins. Co. et al.*, No. 13-cv-30184 (D. Mass.) Filed 11/5/13 by Schlichter, Bogard & Denton, LLP Judge Michael A. Ponsor	3/30/15: **DENIED** in light of the potential reversal of the Ninth Circuit's decision in *Tibble v. Edison*. 7/2/15: Defendant filed a renewed motion to dismiss. Before the motion was resolved, the parties moved for preliminary approval of class settlement.	6/22/16: **CERTIFIED**.		Current and former participants in the MassMutual Thrift Plan challenge the Plan's investment in separate accounts and a fixed income (general account) option. According to Plaintiffs, 36 of the Plan's 38 investment options are proprietary products, 22 of the proprietary products are advised by Mass Mutual affiliates and the rest are sub-advised by a third party. Plaintiffs claim that MassMutual selected and retained proprietary funds to earn unreasonable compensation, without a prudent process. As related to fees, the complaint alleges that, under the Plan document, MassMutual was required to the pay the administrative fees for the Plan. Plaintiffs assert that fees paid by the Plan (and related MassMutual profits) were greater than those paid by other MassMutual clients who were offered institutional options with graduated, declining fee schedules and that the sub-advisory fees were a fraction of the MassMutual fees for investment funds (and the Plan could have contracted directly with sub-advisors for less). The complaint further alleges that the Plan could have invested in lower priced, alternative investment products like institutional priced mutual funds, exchange traded funds, bank collective trusts since and less expensive, non-proprietary mutual funds (e.g., Vanguard). Plaintiffs also assert that some of the proprietary products failed to meet the Investment Policy Statement performance standards. As to recordkeeping services, plaintiffs	11/3/16: Settlement **APPROVED**. The parties' class settlement requires the Defendants to deposit $30.9M into a Litigation Settlement Fund. In addition, Defendants agree to engage an independent consultant to evaluate and make recommendations on the fixed investment structure; to ensure that participants are not charged more than $35 per participant for recordkeeping services; and to ensure all investment options comply with the Plan's Investment Policy Statement, among other forms of non-monetary relief.

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					claim that an asset based fee is inappropriate and that the Plan fiduciaries failed to engage in a competitive bidding process for such services. Plaintiffs also focus on the CEO's role in setting the terms of the group annuity contract. They assert that the amount and structure of the fees were unreasonable and they otherwise object to certain terms of the contract that prohibit MassMutual from amending the Plan if it would have an adverse effect on MassMutual's administrative procedures or financial experience. As for the fixed account (general account), the complaint alleges that (1) the investment caused 40% of the Plan's assets to be exposed to undiversified risk; (2) the risk charge and fees exceeded comparable products, (3) fee deductions and spread earnings were not disclosed to participants, (4) the guarantee of an interest rate is fraudulent, (5) similarly plans invested in synthetic GICs with multiple wrappers; and (6) the investment provided working capital for MassMutual to pay claims.	
2.	*Bilewicz v. FMR LLC*, No. 13-cv-10636 (D. Mass.) Filed 3/19/13 by Bailey & Glasser LLP Consolidated with *Yeaw v. Fidelity* case on 7/10/14 Judge Denise J. Casper	10/1/13: Filed. Before the motion was resolved, the parties settled.			Plan participants brought suit alleging that the Plan's investment exclusively in 160 Fidelity Funds resulted in significantly higher fees than those carried by comparable funds and that it was implausible that the selection of these funds could have been the result of appropriate fiduciary analysis. Plaintiffs allege that (a) the Plan had too many fund options which, among other things, meant that the Plan could not take advantage of break points in fee schedules; (b) new Fidelity Funds were added for the purpose of propping up or seeding those funds (with new funds having less than three years and often less than one year track record);	10/14/14: Settlement **APPROVED**. Fidelity agreed to make a payment of $12 million ("Settlement Fund"). Fidelity also agreed to make certain changes to the plan, which will be in effect for at least two years following the amendment: • The Plan will make available a wide selection of both Fidelity and non-Fidelity mutual funds.

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					(c) the Plan's position in the funds was too large (more than 5%, and some funds had less than $75 million under management); (d) lower cost target date funds should have been used instead of the Freedom Funds, which sub-invest in actively managed mutual funds; (e) the fees for the investment options were excessive for a "mega plan" and the fiduciaries should have considered other investment options such as collective funds and separately managed accounts.	• The Plan will also continue to offer: (i) the Fidelity Freedom Funds – Class K as the Plan's qualified default investment alternative; and (ii) Fidelity's portfolio advisory service, Portfolio Advisory Services at Work (PAS-W). PAS-W will continue to be offered at no cost to participants. • Fidelity is increasing auto-enrollment for eligible employees from 3% to 7% of eligible compensation, and will default current participants who are currently deferring below 7% to 7% of eligible compensation. Fidelity will apply its match to those increased contributions. In addition: • The Plan shall provide that revenue sharing attributable to non-Fidelity mutual funds shall be credited to participants in the same way as revenue attributable to Fidelity mutual funds and collective trusts pursuant to the eighth amendment

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						to the 2005 restatement of the Plan is credited to participants. This revision to the Plan shall remain in effect for at least three years. • Fidelity may select an independent fiduciary to provide such authorization as may be required by PTE 2003-39. All costs borne by the independent fiduciary, up to $50,000, shall be borne by the Settlement Fund. • After payment of all fees, costs, expenses and incentive payments, the remaining settlement amount shall be allocated among the settlement class members as described in the settlement agreement (after class counsel fees, costs and expenses, and service payments are paid from the Settlement Fund). • Plaintiffs agreed to release the defendants and other parties, and provide covenants not to sue relating to any claims arising out of or relating in any way to the subject matter of the actions or the new plan lineup.

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3.	*Yeaw v. FMR LLC*, No. 14-cv-10035 (D. Mass.) Filed 1/7/14 by Bailey & Glasser LLP Judge Denise J. Casper				Participants in Fidelity's defined contribution plan, sponsored by Fidelity (a wholly-owned subsidiary of FMR), brought this action against Fidelity, the Fidelity Retirement Committee, and other Plan fiduciaries. Fidelity serves as a recordkeeper for thousands of defined contribution plans, including its own profit sharing plan (the plan at issue here). Fidelity allows retirement plans for which they provide recordkeeping services to invest in funds established and managed by the recordkeeper as well as funds established and managed by other, unaffiliated companies. Plaintiffs allege that the defendants violated their duties to 1) act solely in the interests of the Plan and its participants; 2) defray the expenses of Plan administration; and to 3) be prudent with assets. Plaintiffs alleged that the Fidelity Plan did not receive a single dollar in revenue-sharing recapture, despite the Plan's ability to obtain the most favorable revenue-sharing recapture arrangements based on its large size, among other things. Plaintiffs also alleged that had the Plan entered into an arms-length relationship with Fidelity pursuant to an agreement negotiated by a prudent and unconflicted fiduciary, the Plan would have paid a participant fee annually substantially lower than the market fee for such services. Plaintiffs conclude that Fidelity caused its own Plan to give over $88 million to Fidelity through Fidelity's control over the Plan's selection of investments and service-providers. Plaintiffs also allege that defendants engaged in prohibited transactions with Plan assets. As fiduciaries of the Plan, Fidelity and the Retirement Committee caused the Plan to contract for services to the Plan with a party in interest and paid Fidelity far in excess of reasonable compensation for providing services.	10/14/14: Settlement **APPROVED**. *See Bilewicz v. FMR LLC* for information regarding the approval of settlement.

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4.	*Brotherston, et al. v. Putnam Investments, LLC, et al.*, No. 15-cv-13825 (D. Mass) Filed 11/13/15 by Nichols Kaster, consolidated with *Ellis, et al. v. Fidelity Management Company*) Judge William G. Young No. 17-1711 (1st Cir.) filed 7/17/17	3/9/16: **GRANTED in part** as to defendant Neary. 4/7/16: **DENIED**. Citing First Circuit case law, the Court concluded that "in factually complex ERISA cases like the instant ones, dismissal is often inappropriate," and that plaintiffs' complaints "allege facts sufficient to state plausible claims."	12/8/16: **CERTIFIED**.	3/3/17: Parties' cross-MSJs **DENIED** as to fiduciary breach, failure to monitor, and equitable relief claims. 3/30/17: **JUDGMENT** for Defendants on prohibited transaction claims. The court held that because the challenged fees were paid out of mutual fund assets, they did not constitute "plan assets." Separately, the management fees that Putnam mutual funds paid to Putnam were not unreasonable, as Plaintiffs cited no relevant case law showing that range of mutual fund expense ratios or average management fees were unreasonable. 6/19/17: **JUDGMENT** for Defendants on all remaining counts. Evidence of self-dealing alone was insufficient to prove breach of fiduciary duty of loyalty. Plaintiffs also failed to prove loss, as they could not point to specific fiduciary breach that generated alleged losses. 10/15/18: **VACATED in part** and **REMANDED**. *Brotherston v. Putnam Investments, LLC*, No. 17-1711, 2018 WL 4958829 (1st Cir. Oct. 15, 2018). Vacated	Plaintiffs allege that Defendants included only Putnam proprietary mutual funds in the Plan's investment lineup, which "costs Plan participants millions of dollars in excess fees every year." They further claim that Defendants failed to adequately monitor the investments and remove poorly performing ones, and included "untested" funds with "no track record."	

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				as to the judgment against Plaintiffs on their prohibited transaction claim and remanded for the district court to reconsider whether the requirement of PTE 77-3(d) was satisfied in light of revenue sharing payments Putnam made to other plans. "In considering whether, by not receiving the benefit of such payments, the Plan was treated any less favorably on net than other comparably situated plans, the district court should consider, among other things, the administrative fees paid by Putnam, as well as any fees paid by the Plan itself. The district court should not consider the discretionary contributions made by Putnam to Plan participants." Additionally, district court incorrectly found that Plaintiffs failed to make a prima facie showing of loss. Thus, district court opinion vacated as to judgment against Plaintiffs on their prudence claim. Remanded for the district court to complete the bench trial in order to definitively decide whether Putnam breached the duty of prudence and, if so, to decide whether Plaintiffs have shown a loss to the Plan and, if so, to decide whether		

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				Putnam can meet its burden of showing that the loss most likely would have occurred even if Putnam had been prudent in its selection and monitoring procedures. All other rulings affirmed.		
5.	*Velazquez v. Massachusetts Financial Services Company et al.*, No. 17-cv-11249 (D. Mass.) Filed 07/07/17 by Block & Leviton LLP Judge Rya W. Zobel	7/19/18: **GRANTED in part** and **DENIED in part**. Plaintiff's allegations that Defendants collected excessive fees for proprietary funds and failed to remove those funds in favor of cheaper alternatives were sufficient to state a claim for breach of fiduciary duty. However, certain prohibited transaction and equitable relief claims dismissed. Plaintiff subsequently amended her Complaint.			Plaintiff alleges that Massachusetts Financial Services Company ("MFS") loaded its 401(k) plan primarily with proprietary mutual funds, generating high plan costs. Plaintiff also alleges that MFS failed to select the least expensive share class available for the plan's designated investment alternatives, failed to investigate the use of separate accounts and collective trusts as alternatives to mutual funds, and failed to monitor and control recordkeeping expenses. Finally, Plaintiff alleges that MFS failed to remove poorly performing investments from the plan in breach of its fiduciary duties.	5/10/19: Settlement in principle reached; expected to finalize a comprehensive settlement agreement within 35 days of notice.
6.	*In re: G.E. ERISA Litigation*, No. 17-cv-12123 (D. Mass) Filed 10/30/17 by Hutchings, Barsamian, Cross and Mandelcorn, LLP Judge Indira Talwani	4/25/18: Filed.			Plaintiffs allege that GE loaded its 401(k) plan with proprietary mutual funds, reaping millions of dollars in fee income. These funds allegedly performed poorly, charged high fees, or both, costing participants tens of millions of dollars in losses. 100% of the plan's actively managed funds were affiliated with GE.	10/4/18: Voluntarily **DISMISSED**.
7.	*Moitoso, et al. v. FMR LLC, et al.*, No. 18-cv-12122 (D. Mass)		5/7/19: **CERTIFIED**.		Plaintiffs allege that Defendants breached their fiduciary duties by promoting Fidelity's mutual fund business at the expense of Plan participants. Defendants allegedly loaded the Plan exclusively with Fidelity-affiliate investments without	

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	Filed 10/10/18 by Nichols Kaster, PLLP Judge William G. Young				investigating whether participants would have been better served by investments managed by unaffiliated companies. Additionally, Defendants allegedly offered investment options that were inappropriate due to their poor performance, high fees, lack of diversification, or speculative nature.	
8.	*Price v. Eaton Vance Corporation, et al.*, No. 18-cv-12098 (D. Mass) Filed 10/5/18 by Sanford Heisler Sharp, LLP Judge William G. Young				Plaintiff alleges that Defendants breached their fiduciary duties and engaged in prohibited transactions and self-dealing by using the plan as a "test laboratory and vehicle for self-gain." Eaton Vance allegedly filled the plan with proprietary funds and reaped significant advisory fees that were higher than what Eaton Vance charges outside clients. Eaton Vance also allegedly offered participant more expensive share classes than what were available to the public. Eaton Vance funds had a limited track record and allegedly underperformed. Finally, Eaton Vance allegedly skimmed fees for performing unnecessary services.	5/22/19: Settlement – preliminarily approved, with final settlement approved no later than 10/5/19.
Second Circuit						
9.	*Leber v. Citigroup, Inc.*, No. 07-cv-09329 (S.D.N.Y.) Filed 10/17/07 by McTigue & Porter LLP Judge Sidney H. Stein No. 17-3978 (2d Cir.) filed 2/13/18	3/16/10: **GRANTED in part** and **DENIED in part**. 2010 WL 935442 (S.D.N.Y. Mar. 16, 2010). The Court found that Plaintiffs validly stated a plausible claim for breach of fiduciary duty insofar as they alleged that the defendants acted imprudent by steering Plan assets to Citigroup affiliated mutual funds with higher (allegedly 200% above market) investment advisory fees than those of competing funds. The Court additionally agreed with the plaintiffs that the issue of timeliness of the action could	11/27/17: **CERTIFIED**. 2/13/18: Defendants appealed class certification to Second Circuit.	9/30/14: Defendant's MSJ **DENIED** on the issue of timeliness because defendants failed to demonstrate pursuant to 29 U.S.C. § 1113 that plaintiffs had "actual knowledge" of the alleged breaches.	Participants in Citigroup's in-house 401(k) plan challenge (1) the selection of investment products (mutual funds, GICs, and a stable value fund) offered by Citigroup-related entities and (2) the purchase of trustee and record-keeping services from Citigroup-related entities. The complaint alleges that the Plan could have paid lower fees and reaped greater investment returns had the defendants chosen investments and service providers unaffiliated with Citigroup.	

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		not be resolved on a motion to dismiss. However, the Court dismissed the prohibited transaction allegations some breach of fiduciary duty claims finding that the complaint: (1) alleges the very type of activity that the § 406 exemptions expressly allows to occur, and makes no allegations to support a finding that the conduct of the fiduciaries fell beyond the exemption and thus would be actionable; (2) contains no allegations that the services provided were unnecessary to the operation of the Plan, that unreasonable compensation was paid, or that there was anything wrong or improper with the selection of CitiStreet other than the fact that it was an affiliated service provider, which by itself is not actionable; (3) includes no allegation that the defendants acted "on behalf of" either Citigroup or CitiStreet, or that Citigroup or CitiStreet was a party with interests "adverse" to those of the Plan; and				

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		(4) contains nothing beyond a bare assertion that Citigroup "knew or should have known" that the defendants "were breaching their duties," which standing alone, does not rise to the level of a plausible claim for relief. The defendants filed a motion for summary judgment on 1/10/12, arguing that plaintiff's claims are time-barred because they had actual knowledge more than three years before following suit. Specifically, defendants argued that participants were informed of the relevant funds that were offered, the affiliations of the entities, and the fees and expenses charged by the funds.				
10.	*Richards-Donald and Deprima, et al. v. Teachers Insurance and Annuity Association of America, et al.*, No. 15-cv-08040 (S.D.N.Y.) Filed 10/13/15 by Bailey & Glasser LLP Judge P. Kevin Castel		5/15/17: **CERTIFIED**.		Plaintiffs brought a class action lawsuit against Defendants, whom they allege were all officers or employees of TIAA or an affiliated entity. Plaintiffs claim that Defendants breached their fiduciary duties by forcing the Plans exclusively into investments managed by TIAA or an affiliated entity, and also selecting and retaining TIAA as a recordkeeper, which charged excessive fees that benefitted TIAA, and that TIAA has "profited handsomely" from these arrangements. Plaintiffs also allege that Defendants engaged in prohibited transactions each time the Plans paid fees to TIAA in connection with the Plans' investment in a	10/20/17: Settlement **APPROVED**. $5M settlement fund. TIAA will add ten non-proprietary investment options, rebate revenue sharing from non-proprietary funds to participants, add access to thousands of additional non-proprietary funds, and provide various changes to plan menus proposed by Plaintiffs. TIAA will also

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					TIAA-affiliated investment options and for recordkeeping fees.	retain an independent investment consultant to advise its investment committee and enhance its investor education program for participants.
11.	*Moreno and O'Halloran v. Deutsche Bank Americas Holding Corp., et al.,* No. 15-cv-09936 (S.D.N.Y.) Filed 12/21/15 by Nichols Kaster, PLLP Judge Lorna G. Scholfield	10/13/16: **GRANTED in part** and **DENIED in part**. Plaintiffs' claims were not barred by three-year statute of limitations because Complaint alleged that they did not have actual knowledge of comparison of plan costs and investment performance until shortly before filing suit. Nor were claims barred by six-year statute of limitations, as prohibited transaction claims involved ongoing shareholder service fees (not simply initial decision to include proprietary funds in plan). Plaintiffs sufficiently alleged fiduciary breach by specifically alleging that process used by plan fiduciaries to select and maintain investment options was "tainted by failure of effort, competence, or loyalty." Finally, Defendants had not sufficiently argued that prohibited transaction exemptions applied. Complaint dismissed against certain Defendants whom Plaintiffs did not sufficiently	9/5/17: **CERTIFIED**.	6/6/18: Defendants' MSJ **GRANTED in part** and **DENIED in part**. Motion denied as to fiduciary breach claims because Plaintiffs were not required to prove that breach resulted in investments that were objectively imprudent. Instead, Plaintiffs merely had to prove that losses resulted from Defendants' breach. However, motion granted as to prohibited transaction claims. Deutsche Bank satisfied elements of PTE 77-3 because it offered the Plan shares in its mutual funds at a price and on terms at least as favorable as it offered shares to other investors in those mutual funds.	Participants of the Deutsche Bank Matched Savings Plan brought a class action complaint against the Plan's fiduciaries for breach of fiduciary duties and engaging in prohibited transactions and unlawful self-dealing. Specifically, Plaintiffs claim that the Plan imprudently invested over $300 million in the Deutsche Equity 500 Index Fund (which mimics the S&P 500 index), even though the fees for that index fund were eleven times higher than a comparable index fund from Vanguard and had the identical mix of investments. This investment cost Plan participants millions of dollars in investment management fees that went directly into Deutsche Bank's pocket. Plaintiffs also allege that the Plan had hundreds of millions of dollars invested in other actively-managed proprietary funds that had significantly higher fees than comparable funds and a track record of poor performance. Plaintiffs claim that Deutsche Bank ranked among the worst-performing mutual fund companies in the U.S. and various proprietary funds within the Plan consistently underperformed their benchmark indices. Plaintiffs further claim that not a single defined contribution plan other than the Plan included these funds among its investment offerings. Plaintiffs further allege that Defendants compounded their imprudence by failing to procure the least expensive available share class for several mutual funds within the Plan. For instance, Defendants retained so-called institutional shares	3/1/19: Settlement **APPROVED** for $21.9 million. 3/7/19: Additional approval of litigation fees, $6,570,000, plus $759,779.30 in litigation expenses, $106,536 in settlement administration expenses, and $10k incentive awards for each of the five named plaintiffs.

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		allege were fiduciaries (no investment advice).			with expense ratios of 0.71% and 0.69%, respectively, even though otherwise identical R6 shares of the same funds had lower expense ratios of 0.60% and 0.62%. Finally, Plaintiffs allege that Defendants failed to investigate the use of separate accounts and collective trusts as alternatives to mutual funds, even though they are typically less expensive and offer the same types of investments.	
12.	*In re M&T Bank Corporation Litigation*, No. 16-cv-00375 (W.D.N.Y.) Filed 05/11/16 by Nichols Kaster, PLLP Consolidated with *Allen*, No. 16-cv-00704, and recaptioned *In re M&T Bank Corporation Litigation*. Judge Frank P. Geraci, Jr.	9/11/18: **GRANTED in part** and **DENIED in part**. Breach of fiduciary duty claim dismissed as to Wilmington Trust because Plan stated that Committee had complete discretion to select investment options, not Wilmington Trust. Proprietary funds allegation not barred by statute of limitations because there was no indication that Plaintiffs had actual knowledge of comparable funds fees and performance. Allegation that Defendants selected retail share class funds over less expensive, otherwise identical institutional funds was sufficient to state a claim, as was claim that Defendants selected particular mutual funds over less expensive, indistinguishable alternatives. "Knowing participation" claim dismissed because Plaintiffs did not sufficiently allege	3/25/19: Motion to certify.		Plaintiffs alleged that Defendants included a variety of proprietary M&T funds (8 out of 23 total investment options) "known for extraordinarily high fees and chronic underperformance." Defendants also allegedly failed to investigate the use of T. Rowe Price collective trusts and separate accounts instead of mutual funds that carry higher fees in order to receive greater revenue sharing payments, and also allegedly failed to use the lowest share class of several mutual funds in the Plan.	

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		that Company Defendants assisted or helped conceal fiduciary breaches by other fiduciaries.				
13.	*Andrus et al. v. New York Life Insurance Company et al.*, No. 16-cv-05698 (S.D.N.Y.) Filed 07/18/16 by Nichols Kaster, PLLP Judge Katherine Polk Failla		6/15/17: **CERTIFIED**.		Plaintiffs alleged that Defendants used the Employee Plan and Agents' Plan to promote proprietary MainStay mutual funds, which they allege carry high fees.	6/15/17: Settlement **APPROVED**. $3M settlement fund. $50,000 administration costs.
14.	*Bekker v. Neuberger Berman Group LLC*, No. 16-cv-06123 (S.D.N.Y.) Filed 08/02/16 by Bailey & Glasser LLP Judge Laura Taylor Swain	9/27/18: **GRANTED in part** and **DENIED in part**. Plaintiff's allegations that Defendants offered poorly performing affiliated fund with assets overwhelmingly invested by sponsoring plan were insufficient to plausibly support inference that an objectively prudent and loyal fiduciary would have acted differently and ceased offering the fund. Prohibited transaction claim survived motion to dismiss because burden rests with Defendants to prove exemption. Claims against plan sponsor dismissed because plan document explicitly assigned fiduciary duties to investment committee. Limited discovery permitted on statute of limitations defense.		*See* MTD.	Defendants allegedly breached their fiduciary duties "by forcing the Plan into investments managed by Neuberger or an affiliated entity, which charged excessive fees that benefited Neuberger and the managers of the proprietary funds." Plaintiffs also claim Defendants engaged in prohibited transactions with a person whose interests are adverse to the interests of the Plan and participants.	

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15.	*Patterson v. Morgan Stanley*, No. 16-cv-06568 (S.D.N.Y.) Filed 08/19/16 by Sanford Heisler LLP Judge Richard J. Sullivan	11/22/17: Filed.			Plaintiffs allege that Defendants selected and retained high-cost, poorly performing mutual funds, some of which were managed by Morgan Stanley, "without thoroughly investigating whether Plan participants would be better served by investments managed by unaffiliated companies."	
16.	*Allen v. M&T Bank Corporation et al.*, No. 16-cv-00704 (W.D.N.Y.) Filed 09/01/16 by Kessler Topaz Meltzer & Check, LLP Judge Frank P. Geraci, Jr. Consolidated with *Habib*, No. 16-cv-00375 and recaptioned *In re M&T Bank Corporation Litigation*.				Plaintiffs allege that Defendants breached ERISA fiduciary duties by retaining proprietary funds in the Plan despite the availability of lower cost and better performing investment options, and by failing to offer collective trusts as investment options despite their lower fees.	
17.	*Beach v. JPMorgan Chase Bank et al.*, No. 17-cv-00563 (S.D.N.Y) Filed 01/25/17 by Kessler Topaz Meltzer & Check, LLP Judge Jesse M. Furman Consolidated with *Orellana*, No. 17-cv-01575 (S.D.N.Y.), *Monaghan*, No. 17-cv-02315 (S.D.N.Y.), and *Stirsman*, No. 17-cv-01707 (S.D.N.Y.)	3/29/18: **GRANTED in part** and **DENIED in part** (reasons stated orally).	10/1/18: Filed. 6/11/19: **CERTIFIED**. Class: participants in or beneficiaries of plan, at any time between 1/25/11 and present, whose accounts were part of stated funds.		Plaintiffs allege that plan fiduciaries breached their duties of loyalty and prudence by retaining unduly expensive plan investment options managed by JPMorgan affiliates. These investment options were both unreasonably expensive and performed poorly, leading participants to pay higher than necessary fees. Plaintiffs also allege that Defendants engaged in prohibited transactions by conferring a windfall on an affiliate.	

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18.	*Orellana v. JPMorgan Chase & Co. et al.*, No. 17-cv-01575 (S.D.N.Y.) Filed 03/02/17 by Robbins Geller Rudman & Dowd, LLP Judge Jesse M. Furman Consolidated with *Beach*, No. 17-cv-00563 (S.D.N.Y.)				Allegations similar to those in *Beach*, No. 17-cv-00563 (S.D.N.Y.), and therefore consolidated with that case. All future filings made in *Beach*.	
19.	*Monaghan v. JPMorgan Chase & Co. et al.*, No. 17-cv-02315 (S.D.N.Y) Filed 03/30/17 by Levi & Korinsky, LLP Judge Jesse M. Furman Consolidated with *Beach*, No. 17-cv-00563 (S.D.N.Y.)				Allegations similar to those in *Beach*, No. 17-cv-00563 (S.D.N.Y.), and therefore consolidated with that case. All future filings made in *Beach*.	
20.	*Stirsman v. JPMorgan Chase Bank, N.A. et al.*, No. 17-cv-01707 (S.D.N.Y.) Filed 03/08/17 by Keller Rohrback, LLP Judge Jesse M. Furman Consolidated with *Beach*, No. 17-cv-00563 (S.D.N.Y.)				Allegations similar to those in *Beach*, No. 17-cv-00563 (S.D.N.Y.), and therefore consolidated with that case. All future filings made in *Beach*.	

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Third Circuit						
21.	*Mehling v. New York Life Insurance Company*, No. 99-cv-05417 (E.D. Pa.) Filed 11/1/99 by Sprenger & Lang Judge Bruce W. Kauffman	3/29/01: **GRANTED in part** and **DENIED in part**. The Court granted the motion to dismiss plaintiffs' prohibited transaction claims. Defendants had cited Prohibited Transaction Exemption 77-3, which specifically exempts from the restrictions of Section 406 "the acquisition and sale of shares of a . . . 'mutual fund' by an employee benefit plan which covers employees of the mutual fund or the mutual fund's investment adviser or principle underwriter, or an affiliate thereof." PTE 77-3 applies so long as a plan does not: 1) pay any fees to the investment adviser except via the investment company's payment of its standard advisory and other fees; 2) pay a redemption fee to any party other than the investment company itself; 3) pay a sales commission; or 4) have dealings with the investment company on terms that are less favorable than between the investment company and any other shareholder. In Advisory Opinion 98-06A, the DOL cautioned that even if the acquisition of the mutual			Participants of the in-house 401(k) Plan sponsored by New York Life Insurance Company alleged that the Plan fiduciaries' investment of Plan assets within an affiliated investment product constituted a per se violation of ERISA's prohibited transaction rules. Plaintiffs contended that defendants: (1) defrauded the Plans by using Plan assets to seed, subsidize, and sustain New York Life's new line of institutional mutual funds; (2) desired to use Plan assets as seed money for the mutual funds rather than use the company's own assets to pay the "high start-up expenses and risk associated with creating a family of mutual funds"; (3) propped up those underperforming funds when the market so demanded, such as by pumping money into a particular fund so as to keep it from collapsing after outsiders had fled the fund; and (4) invested Plan assets in untested, poorly performing institutional mutual funds despite knowing that plans of that size can obtain direct, expert money management at a fraction of the cost of even the most inexpensive mutual fund.	**SETTLED**. $14M settlement fund.

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		fund shares was exempt by reason of PTE 77-3, a decision motivated by the intent to generate seed money that facilitates the marketing of the mutual fund may leave the plan fiduciary liable for any loss resulting from such breach of fiduciary responsibility. The Court concluded that, since plaintiffs did not allege that the fees paid by the Plans failed to comply with the requirements of PTE 77-3 or that the Plans had dealings with the funds on terms that were less favorable than those that are offered to other shareholders, the conditions of PTE 77-3 were met and defendants were exempt from a section 406 claim. The Court allowed the breach of fiduciary duty claims under section 404(a) to proceed. 163 F. Supp.2d 502 (E.D. Pa. 2001).				
22.	*Stevens v. SEI Investments Co.*, No. 18-cv-4205 (E.D. Pa.) Filed 9/28/18 by Nichols Kaster, PLLP Judge Nitza Ileana Quiñones Alejandro				Plaintiff alleges that Defendants breached their fiduciary duties under ERISA by imprudently selecting and monitoring the plan's investment options and by retaining affiliated investment products in the plan when doing so was not warranted by their merits relative to non-proprietary alternatives. Specifically, Plaintiff alleges SEI-affiliated investment options within the plan have consistently generated lower net returns for investors than investment options with the same	

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					objectives available outside of SEI. Plaintiff alleges that there was no reason other than self-interest for Defendants to offer solely SEI-affiliated options within the plan.	
Fourth Circuit						
23.	*David et al. v. Alphin, et al.*, No. 07-cv-00011 (W.D.N.C.) Filed 8/7/06 by William G. Bertain, Esq. Judge Max. O. Cogburn, Jr. No. 11-2181 (4th Cir.) filed 10/20/2011	12/15/08: Partial motion to dismiss **GRANTED**. Court dismissed all claims against or on behalf of the defined benefit plan on standing grounds.		12/29/10: **GRANTED** defendants' motion for summary judgment on grounds that claims were time barred. Dismissed the remaining claims. 1/14/13: **AFFIRMED** by Fourth Circuit	Plaintiffs challenge the fiduciaries of Bank of America's in-house 401(k) and defined benefit pension plans for their use of affiliated mutual fund products. Plaintiffs specifically contended that: (1) Defendants invested in funds managed by Bank of America affiliates that generated millions of dollars in fees for Bank of America, and charged fees that were six times the rate of competitors fees, were not attractive to arms-length investors, and were suffering from market timing and late trading problems; (2) without the "critical mass" or "seed money" provided by the Plans' investment in the affiliated funds, Bank of America would not have been able to attract other investors to its funds and maintain an investment management business; and (3) even if defendants can prove that the transactions are exempt from section 406, ERISA's prudence and loyalty fiduciary duties were breached. The investments at issue were added to the Plans no later than 1999. 1/14/13: The Fourth Circuit affirmed the District Court's dismissal of the claims related to Bank of America's defined benefit plan on standing grounds. The Fourth Circuit noted that a participant in a defined benefit plan has an interest in fixed future payments only (rather than the assets of the pension fund), and that alleged misconduct by administrators of a defined benefit plan does not	

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					affect such an entitlement unless the misconduct creates a risk of default by the entire plan. The Fourth Circuit also upheld the District Court's 9/22/11 grant of summary judgment to defendants, agreeing with the District Court that plaintiffs' remaining claims concerning the 401(k) plan were time-barred by ERISA's six-year statute of limitations: Prohibited Transactions: Plaintiffs argued that the Plan fiduciaries committed prohibited transactions under ERISA section 406 each time they failed to remove or replace the affiliated funds from the lineup. The Court disagreed, finding that that a decision to continue an investment was not a "transaction" that could be proscribed by section 406 and noting that "the alleged prohibited transactions and breach could only be based on the initial selection of the funds." Breaches of Fiduciary Duty: Plaintiffs argued that Plan fiduciaries had violated their duty of prudence by "failing to remove" the allegedly imprudent affiliated investments. The Fourth Circuit affirmed the District Court's disagreement with this argument, pointing out that the complaint did not allege that the affiliated funds became imprudent during the limitations period—rather, the complaint centered only upon the attributes of the investments that existed at the time of their initial selection, i.e. alleged poor performance and high fees. As a result, the Fourth Circuit upheld the District Court's ruling that plaintiffs' claims were "simply another challenge to the initial selection of the funds to begin with." Because the funds were selected prior to the relevant six-year limitations period, the Fourth Circuit agreed with the District Court that these claims for fiduciary breach were time-barred.	

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24.	*Franklin v. First Union Corp.*, 84 F. Supp. 2d 720 (E.D. Va. 2000) Filed 5/5/99 by Sprenger & Lang, Judge Richard L. Williams			Cross-motions for summary judgment on certain claims were ruled upon on 2/17/00, although there was no ruling on any of the fee-related or affiliated fund claims.	The lawsuit arose from a 1997 merger of Signet Bank into First Union Corporation. As part of the merger, all participant assets within the Signet Bank in-house plan were "mapped" into investment vehicles within the First Union plan, all of which were First Union proprietary funds. Former Signet employees filed the initial lawsuit (No. 99-cv-344) against First Union, alleging in part that the First Union plan fiduciaries had breached their fiduciary duties by discontinuing any non-proprietary investment options within the plan. The second lawsuit (No. 99-cv-610) similarly alleged that First Union's lack of non-proprietary options amounted to self-dealing and improper inurement of plan benefits. Plaintiffs contended that defendants improperly: (1) used participants' contributions as seed money to start or grow new funds affiliated with First Union; (2) charged participants excessive fees and expenses while outside investors received fee waivers and discounts; and (3) included First Union's poorly performing mutual funds as investment options in the plan.	3/22/01: **SETTLED**. $26M settlement fund. Plaintiffs recognized that the claims they had brought were novel. Defense counsel speculated that it would be very difficult for plaintiffs to show that a financial firm must hand over money management to a competitor, but, on the other hand, that the amount potentially at issue was significant.
25.	*Sims, et al. v. BB&T Corporation*, No. 15-cv-00732 (M.D.N.C.) Filed 9/4/15 by Nichols Kaster, PLLP Judge Catherine C. Eagles Consolidated with *Smith, et al. v. BB&T Corporation, et al.*, 15-cv-00841 (M.D.N.C.) Note: GLG represented BB&T Defendants.	4/16/16: **DENIED** (reasons not stated).	8/28/17: **CERTIFIED**.	6/26/18: BB&T Defendants' MSJ **GRANTED in part** and **DENIED in part**. Six-year statute of limitations barred certain claims. Claim that BB&T advanced its own financial interests by failing to ask for rebate of fees to the Plan survived MSJ, as factual issues persisted. Underperformance and excessive fee claims also survived MSJ due to factual issues. Judgment for BB&T on common stock fund claim, as there was no	Plaintiffs filed a class action regarding the BB&T Corporation 401(k) Savings Plan, alleging self-dealing and imprudent decision-making in the management of BB&T's retirement Plan. BB&T is the Plan's sponsor, recordkeeper, custodian, and primary investment manager. According to Plaintiffs, Defendants included in the Plan high-cost mutual funds run by BB&T's wholly-owned subsidiary, Sterling Capital, which pays revenue sharing to BB&T. According to Plaintiffs, the revenue sharing costs are two to three times greater than the costs BB&T actually incurs to provide plan services.	5/6/19: Settlement **APPROVED**. $24 million settlement fund. Included: attorneys' fees of $8 million, $1.1 million for litigation costs, and each of 10 representative plaintiffs receive up to $20k. Agreement requires defendants to solicit requests for proposals and hire independent consultant to evaluate plan's investment options. Must

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				evidence that unitary structure constituted fiduciary breach, nor did Plaintiffs show that they suffered any losses due to incorrect information. Finally, judgment for BB&T on certain prohibited transaction claims, as inclusion of proprietary funds met exemption under PTE 77-3.	Plaintiffs further allege that Defendants' failed to remove poorly performing investments from the Plan, in breach of their fiduciary duties. Plaintiffs specifically point to the BB&T Large Cap Fund and argue that it has been performing poorly relative to its benchmark. Plaintiffs also allege that defendants mismanaged the Plan's fixed investments by using a money market fund instead of a stable value fund that allegedly would have increased the return on assets without an increase in risk. Plaintiffs further allege that defendants retained the Plan's investment in a BB&T deposit account, despite its low yields and the availability of superior investment alternatives. Based on this conduct, Plaintiffs assert claims against Defendants for breach of the fiduciary duties of loyalty and prudence (count one), engaging in prohibited transactions with a party in interest (count two) and a plan fiduciary (count three), and unlawful inurement of plan assets to the benefit of an employer (count four).	participate in ERISA fiduciary training.
26.	*Feinberg v. T. Rowe Price Group, Inc. et al.*, No. 17-cv-00427 (D. Md.) Filed 02/14/17 by McTigue Law, LLP Judge Marvin J. Garbis	8/20/18: **DENIED**. Plaintiffs allegations relating to the use of more expensive retail funds rather than commercial funds, chronic underperforming funds, and seeding were sufficient to state a claim for fiduciary breach, as Plaintiffs provided specific examples, not merely conclusory statements. All other claims permitted to proceed.	5/17/19: **CERTIFIED**, with stipulations of (1) Defendant's consent to filing of second amended complaint, (2) claims against individual defendants Alderson, Bernard, Gitlin, Kennedy, Linehan, Rogers, Stromberg, Veiel and Wiese are dismissed w/o prejudice, and (3) listed members agree to cooperate in discovery.		Plaintiff alleges that Defendants breached their fiduciary duties by offering only T. Rowe Price's own in-house investment funds in its 401(k) plan, providing windfall profits. Defendants allegedly did not consider non-proprietary alternatives. They also allegedly failed to monitor fees and performance. Finally, Plaintiff alleges that Defendants offered higher cost retail class versions of their mutual funds, not institutional share classes.	
Fifth Circuit						

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27.	*Main et al. v. American Airlines Inc. et al.*, No. 16-cv-00473 (N.D. Tex.) Filed 04/15/16 by Nichols Kaster, PLLP Judge Reed C. O'Connor	3/31/17: **GRANTED in part** and **DENIED in part**. Breach of fiduciary duty of loyalty claims were allowed to proceed, as Plaintiffs alleged that Defendants continued to offer proprietary funds even after its independent fiduciary ceased to be involved. Moreover, federal rules permitting affiliated investment options did not preclude breach of fiduciary duty claim because rules did not address extent of fees. Plaintiffs' duty of prudence claims were contingently dismissed, as it was not imprudent to offer mutual funds instead of other lower cost alternatives. All other claims allowed to proceed.	2/21/18: **CERTIFIED**.		Plaintiffs allege that Defendants breached ERISA fiduciary duties by populating about half of the Plan investment lineup with affiliated American Beacon funds until the fall of 2015, when the Plan was overhauled and the American Beacon funds were removed. Those funds, Plaintiffs claim, were imprudent choices since they carried high fees and underperformed. Defendants allegedly also failed to investigate the use of separate accounts and collective trusts, which have lower fees.	2/21/18: Settlement **APPROVED**. $22M settlement fund.
Sixth Circuit						
28.	*In re Regions Morgan Keegan ERISA Litigation*, 692 F. Supp. 2d 944 (W.D. Tenn. 2010) Filed 3/31/08 by Stember Feinstein Doyle & Payne, LLC Judge Samuel H. Mays, Jr.	3/9/10: **GRANTED in part** and **DENIED in part**. *See* 692 F.Supp.2d 944. The Court denied Defendants' motion to dismiss the excessive fee breach of fiduciary duty and prohibited transactions claims. The Court concluded that Plaintiffs' breach of fiduciary duty claims were plausible because they had alleged that Defendants (1) fail[ed] to implement a prudent and adequate procedure for			The complaint was brought against the fiduciaries of the Regions Financial 401(k) Plan and a predecessor plan. Plaintiffs allege that certain "RMK Select Funds" charged unreasonably high fees and expenses. Plaintiffs claim that the fiduciaries failed to engage in a prudent and adequate process for evaluating, selecting and monitoring the investment options. Plaintiffs allege that the Plan should not have invested in the retail share class of the proprietary products and that the Plan's investments should have included passively managed funds. According to Plaintiffs, the RMK Select Funds also underperformed less expensive alternatives.	12/29/14: Settlement **APPROVED**. $22.5M settlement fund.

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		evaluating, selecting and monitoring fund investment options and for ensuring that reasonably priced, prudent investment options were selected; (2) through this failed procedure, selected funds that "had expense ratios in some cases upwards of six times the expense ratios for readily available comparable funds"; and (3) offered retail class shares in several of the RMK Select Funds, despite the ability to obtain institutional class shares. As to the prohibited transaction claims, the Court ruled that it could not decide on a motion to dismiss whether the requirements of PTE 77-3 were satisfied and that the complaint otherwise adequately alleged a factual basis for asserting claims under section 406(a)(1)(C) and 406(a)(1)(D).				
28.	*Sims v. First Horizon National Corp.*, No. 08-cv-02293 (W.D. Tenn.) Filed 5/9/08 by Stember Feinstein Doyle Payne & Kravec LLC Judge S. Thomas Anderson	9/30/09: **GRANTED**. *See* 2009 WL 3241689. Amended Complaint subsequently filed.	6/3/11: **GRANTED in part** and **DENIED in part**.		Participants in the First Horizon National Corporation Savings Plan brought suit alleging that the Defendants breached their duties by selecting funds that generated fees for First Horizon instead of following a prudent selection process and by failing to provide complete and accurate information regarding investment options, including its own products.	9/13/12: Settlement **APPROVED**. $6M settlement fund, 15% of which was allocated to the excessive fee subclass (85% was attributable to a company stock fund subclass).

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29.	*Matthews Pease v. Jackson National Life Insurance Company*, No. 17-cv-00284 (W.D. Mich.) Filed 03/29/17 by Viviano, Pagano & Howlett, PLLC Judge Janet T. Neff				Plaintiff alleges that Jackson National breached its fiduciary duties of loyalty and prudence and engaged in prohibited transactions by selecting high-cost proprietary investment products for the Jackson National 401(k) Plan. This allegedly generated millions of dollars in fees that greatly exceeded what the Plan otherwise would have paid for comparable low-cost non-proprietary investment products.	4/23/19: Settlement **APPROVED**. $4.5 million settlement fund.
30.	*Karpik v. Huntington Bancshares Incorporated*, No. 17-cv-01153 (S.D. Ohio) Filed 12/29/17 by Barkan Meizlish Handelman Goodin DeRose Wentz, LLP Judge Michael H. Watson	3/23/18: Filed.			Plaintiff alleges that Defendants breached their fiduciary duties by allowing the Huntington 401(k) plan to offer proprietary mutual funds as investment options. These funds allegedly performed poorly and generated excessive fees. Plaintiff also alleged it was per se imprudent for Huntington to offer a money market fund rather than a stable value fund.	
Seventh Circuit						

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31.	*Martin v. Caterpillar, Inc.*, No. 07-cv-01009 (C.D. Ill.) Filed 9/11/06 by Schlichter Bogard & Denton LLP Judge Joe Bill McDade	9/25/08: **DENIED**. *See* 45 Employee Benefits Cas. 1631. However, the Court held that Defendants did not breach their fiduciary duties by "failing to make disclosures regarding revenue sharing" that were "not required by the statutory scheme promulgated by Congress and enforced by the DOL."			In addition to revenue sharing, Plaintiffs complain that fiduciaries selected imprudent Preferred Group retail mutual funds as eleven of the Plans' thirteen investment options (the Caterpillar Stock Fund and an equity index mutual fund completed the menu); squandered the Plans' immense bargaining power, based on their billions of dollars of assets, by including retail mutual funds as Plan investment options when superior investments were available at lower prices in the wholesale investment marketplace; included, as Plan investment options, shadow index funds, which charged excessive fees for active management while structuring their portfolios to replicate index funds in terms of investment mix and fees; allowed the Plans to pay excessive fees for administrative services, including but not limited to recordkeeping services; and included as the Plans' investment options imprudent actively managed investment options whose performance net of fees did not exceed that of similar investments, including passive i.e., index) investments.	8/12/10: Settlement **APPROVED**. $16.5M settlement fund. Also, for a settlement period of two years (which may be extended to four years upon a material breach of the agreement), Caterpillar agreed to: (1) not engage any investment consultant as an investment manager for the Plans; (2) provide certain annual disclosures to participants regarding administrative and investment fees; (3) not offer retail mutual funds, except those available through the Plans' brokerage windows; (4) generally limit the cash holding in the company stock fund to 1.5 percent; (5) stop paying for recordkeeping fees as a percentage of plan assets; and (6) conduct a request for proposals process for recordkeeping services when the current recordkeeping contract with Hewitt Associates expires.

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32.	*Nolte v. CIGNA Corp.*, No. 07-cv-02046 (C.D. Ill.) Filed 2/26/07 by Schlichter Bogard & Denton LLP Judge Harold A. Baker	8/9/10: Defendant Prudential filed a motion for judgment on the pleadings. Prudential asserted that judicial opinions support the principle that service providers (like themselves) do not bear ERISA fiduciary responsibility for deciding the fees at which they will offer investment products and services in the marketplace. Additionally, Prudential asserted that the fourth amended complaint lacks any plausible allegations to justify an exception to the aforementioned principle. On 12/9/10, the Court stayed Prudential's motion, finding that there are genuine issues of material fact that must be resolved through discovery.			Participants in CIGNA's in-house 401(k) plan allege several claims related to affiliated investment products, including that Plan fiduciaries and investment manager (1) undertook a long campaign of self-interested and prohibited transactions by using and retaining subsidiaries to serve as the Plan's investment manager and primary service provider, and thereby generating revenues and profits for the benefits of defendants; (2) caused the Plan to include investment options with fees and expenses that were unreasonable and excessive, for the benefit of defendants; (3) imprudently selected and retained CIGNA's separate accounts and income funds as Plan investment options; (4) improperly invested Plan assets into Defendants' general account, imposing excessive and undiversified risk; and (5) used Plan assets so as to increase the ongoing revenues and profits of their business.	10/15/13: Settlement **APPROVED**. $35M settlement fund. CIGNA Defendants also agreed to a variety of changes to plan administration, including: (a) removing Plan investment advisors affiliated with CIGNA, (b) removing service providers more than 5% owned by any Plan fiduciary, (c) removing retail mutual fund options from lineup, (d) obtain an independent consultant's review of stable value investments, and (e) conduct an RFP competitive bidding process for Plan recordkeeping services.
Eighth Circuit						
33.	*Gipson v. Wells Fargo*, No. 07-cv-01970 (D.D.C.); transferred to *Figas v. Wells Fargo & Company et al.*, No. 08-cv-04546 (D. Minn.) Filed 11/1/07 by McTigue & Porter LLP Judge John D. Bates Judge Paul A. Magnuson	3/13/09: **GRANTED in part** and **DENIED in part**. Claims in the amended complaint sufficiently stated a claim on which relief could be granted. The Court also found that Gipson did not have standing to bring her claims because she was no longer employed by Wells Fargo and took a lump sum distribution of her 401(k)	9/1/10: **CERTIFIED**	4/6/10: **GRANTED** as to Plaintiffs' section 406 claim, holding that the claim was time-barred under ERISA's six-year limitations period. The Court found that Plaintiffs had actual knowledge of the alleged breach (here, the Plan's investments in Wells Fargo-controlled funds) by 2003 at the latest, when the Wells	Complaint against fiduciaries of Wells Fargo's in-house 401(k) plan, contending that: (1) defendants put their own interests ahead of those of the plan by choosing investment products and pension plan services offered and managed by Wells Fargo subsidiaries and affiliates that generated substantial revenues for Wells Fargo at a great cost to the plan and offered mediocre returns; and (2) the funds charged significantly higher fees than comparable funds.	8/9/11: Settlement **APPROVED**. $17.5M settlement fund.

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		upon her departure. Thus, the action was re-captioned with Figas (another member of the putative class) as the named Plaintiff.		Fargo funds were included in the Plan's lineup. The Court rejected Plaintiffs' "continuing violation" theory, finding that Plaintiff had cited no authority adopting the "continuing violation" theory to violations of section 406.		
34.	*Krueger v. Ameriprise Financial*, No. 11-cv-02781 (D. Minn.) Filed 9/28/11 by Schlichter Bogard & Denton LLP Judge Susan Richard Nelson	11/20/12**: GRANTED in part** and **DENIED in part**. Denied as to nearly all claims, granted only as to the plaintiff's unjust enrichment claim.		3/20/14: Defendants' MSJ **GRANTED in part** and **DENIED in part** based on ERISA's three-year statute of limitations period applicable when the plaintiff has actual knowledge of the breach or violation. The Court ruled that plaintiffs' prohibited transaction claims were time barred because, in the Eighth Circuit, a participant's knowledge of the transaction is enough to start the clock on the limitations period. The Court found that, through the SPD and fund prospectuses distributed to participants, plaintiffs had knowledge of the challenged transactions (the investment in proprietary products and associated fees) more than three years before filing suit. The Court, however, denied Defendants' motion with respect to Plaintiffs' breach of fiduciary claims based on the selection, retention and monitoring of the plan's investment options,	In their first amended complaint, Plaintiffs contend that Ameriprise Financial, Inc. selected investments for the Ameriprise 401(k) Plan that were poorly rated, unduly expensive, and underperformed prudent investment options, yet provided millions of dollars in revenue to Ameriprise and its subsidiaries. Plaintiffs also contend that: (1) Ameriprise profited at its employees' expense by having the 401(k) Plan's recordkeeping performed by an Ameriprise subsidiary and, after selling that business to Wachovia, using Wachovia as the Plan's recordkeeper in exchange for kickbacks paid to Ameriprise; (2) Ameriprise's actions cost its employees millions of dollars in unnecessary fees and expenses, nearly all of which went to Ameriprise; (3) the inferior Ameriprise mutual funds cost Ameriprise employees millions more in lost investment returns; and (4) Defendants managed the Plan in a self-interested manner in breach of the strict fiduciary duties imposed on them by ERISA. On 11/20/12, the Court granted Defendant's motion to dismiss only as to one claim.	7/13/15: Settlement **APPROVED**. $27.5M settlement fund. The settlement also included non-monetary compensation, including an agreement that Ameriprise will conduct an RFP competitive bidding process for recordkeeping and investment consulting services and will pay fees to the Plan recordkeeper on a flat fee or fee-per-participant basis.

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				including allegations relating to the seeding of new investment options. The Court concluded that the plaintiffs' claims were premised on a theory the defendants did not engage in a prudent selection process and it found that there existed an issue of fact as to what plaintiffs knew about the selection process more than three years before filing suit. The Court further ruled that plaintiffs' prohibited transaction claim related to the sale of the recordkeeping business to Wachovia was time-barred because plaintiffs knew more than three years before commencing the action that Ameriprise had a recordkeeping affiliate, the recordkeeper received fees from the Plan's investments, and the recordkeeping business had been sold (although the terms of the sale were not disclosed). Because plaintiffs' breach of fiduciary duty claim related to the sale of the recordkeeping business was based on the same set of facts as the prohibited transaction claim, the Court similarly concluded that the	<u>Fiduciary Claim:</u> With respect to Plaintiffs' claim for fiduciary breaches in connection with the selection of affiliated investment options, the Court found that Plaintiffs had plausibly alleged that Ameriprise breached its duties by selecting affiliated options with fees that were excessive compared to those of comparable mutual funds, other share classes, or separate accounts. The Court disagreed with Ameriprise's reliance on *Hecker* and *Renfro*, noting that Plaintiff's complaint centered upon the fiduciaries' selection of high-priced affiliated funds, rather than retail funds over wholesale funds. <u>Prohibited Transaction:</u> The Court also allowed Plaintiffs' prohibited transaction claims under ERISA section 406 to continue, finding that the allegation that Ameriprise had (a) engaged in self-interested transactions, (b) profited from those transactions at the expense of participants, and (c) paid more than reasonable compensation to parties-in-interest, was enough to state a claim under section 406. <u>Excessive Recordkeeping Fees/Revenue Sharing:</u> The Court also refused to dismiss the claim alleging that Ameriprise caused the Plan to pay excessive fees to the Plan recordkeeper (an Ameriprise subsidiary), and received unlawful kickbacks via revenue sharing from Wachovia (which purchased the recordkeeping subsidiary). The Court excused the absence of relevant data in Plaintiffs' complaint (i.e. the amount of recordkeeping fees, the services provided, or how the fees were excessive in light of those services), noting that Plaintiffs could pursue this data in discovery. <u>Unjust Enrichment:</u> The only claim the Court dismissed was one for federal common law unjust enrichment to recover overpayments from the Plan resulting from the alleged fiduciary breaches. In	

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				breach of fiduciary claim was time-barred.	dismissing the claim, the Court noted that ERISA's enforcement mechanism (section 502) was exclusive and did not provide for common law remedies not specifically enumerated in the statute. Plaintiffs filed a second amended complaint on 10/29/13, alleging breaches of the duties of loyalty and prudence, failure to monitor fiduciaries, prohibited transactions between the Plan and a party in interest, a prohibited transaction by acting on behalf of the Plan and Ameriprise, breach of fiduciary duties due to the sale of Ameriprise's recordkeeping arm to Wachovia, Ameriprise's knowing participation in fiduciary breaches and prohibited transactions, charging excessive recordkeeping fees due to the "float," and fraud and concealment. Finally, the Court addressed Plaintiffs' claims that the revenue sharing and float paid to the recordkeeper resulted in the payment of excessive and unreasonable fees and that the Plan fiduciaries failed to engage in a prudent process for evaluating the reasonableness of the recordkeeping fees. The Court dismissed Plaintiffs' prohibited transaction claim finding the plaintiffs received more than three years before commencing the action SPDs and prospectuses that detailed the affiliation between Ameriprise, the funds, and the recordkeeper and disclosed the fact that the investments paid recordkeeping fees. The court allowed plaintiffs to proceed with their breach of fiduciary duty claims challenging the process that defendants' used to select the plan's recordkeeper and evaluate and determine the recordkeeping fee.	
35.	*Adedipe v. U.S. Bank National Association et al.*, No. 13-cv-02687 (D. Minn.)	11/21/14: **GRANTED in part** and **DENIED in part** motion to dismiss/motion for		*See* Motion to Dismiss.	Participants in the U.S. Bancorp. Pension Plan brought a class action against the Plan's fiduciaries (the Investment Committee, Compensation	

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	Filed 09/30/13 by Zimmerman Reed, PLLP Judge Joan N. Ericksen No. 16-1928 (8th Cir.)	partial summary judgment. Plaintiffs made a sufficient showing of constitutional standing because Defendants' actions plausibly caused a risk of default brought about by the losses incurred by an underfunded Plan. The Court dismissed claims regarding the adoption of Defendants' equity strategy and rejected Plaintiffs' continuing violation theory. Defendants also argued that the affiliated funds claims are time-barred because the Plan's investments in affiliated funds occurred more than six years before the filing of the complaint. The Court disagreed on the grounds that Defendants allowed investment of the Plan's assets in affiliated mutual funds during the relevant time period; however, the Court dismissed claims as to Defendant Nuveen because they were released by the Plan in September of 2013 (but the claims could still be asserted against Defendant U.S. Bank). 12/29/15: **GRANTED** motion to dismiss for lack of standing. The Court said that Defendants mischaracterized their motion for dismissal as			Committee, Board of Directors, FAF Advisors, a subsidiary of U.S. Bank, and U.S. Bank Nuveen Asset Management as successor in interest to FAF Advisors) alleging that Defendants breached their fiduciary duties and engaged in prohibited transactions. Plaintiffs' claims are based on allegations that Defendants (a) failed to diversify the Plan's investments by investing virtually 100% of the Plan's assets in equities; (b) retained a subsidiary of U.S. Bank to act as the Plan's investment advisor, despite having evidence that the subsidiary had fraudulently manipulated portfolios and adopted and maintained a risky and imprudent investment strategy; and (c) engaged in prohibited transactions by purchasing equity securities designed to benefit defendants rather than Plan participants. Plaintiffs allege that Defendants' actions caused the Plan to lose over $1.1 billion in assets which resulted in underfunding of the Plan. 10/12/17: **AFFIRMED**. *Thole v. U.S. Bank, Nat'l Ass'n*, 873 F.3d 617 (8th Cir. 2017). Participants lacked standing to bring ERISA claims. Because the plan had become overfunded during the litigation, there was no actual injury to the plan or to participants. The district court also did not abuse its discretion in denying participants' motion for attorney fees under ERISA.	

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		one involving "standing," when the issue was really if the case is moot because the plan is now overfunded. The Court dismissed the case on mootness grounds and found that there was no allegation of continuing misconduct, and any concerns about potential future misconduct are too speculative.				
36.	*Anderson v. Principal Life Insurance Company et al.*, No. 15-cv-00119 (S.D. Iowa) Filed 4/7/15 by Bailey & Glasser LLP Judge John A. Jarvey		11/13/15: **CERTIFIED**.		Plaintiff alleged that Defendants breached their fiduciary duties by utilizing affiliated investment advisers. These advisers hired subadvisers who performed the essential portfolio work while Defendant Principal retained most of the investments fees, generating an alleged kickback. Plaintiff alleged that Defendants retained Principal investment products because Principal's officers benefitted financially from the fees. Plaintiff also alleged excessive administrative fees.	11/13/15: Settlement **APPROVED**. $3M settlement fund. Defendants also agreed to reduce administrative expense by 50% and to include unaffiliated index funds as options in the plan.
37.	*Wildman et al. v. American Century Services, LLC et al.*, No. 16-cv-00737 (W.D. Mo.) Filed 06/30/16 by Nichols Kaster, PLLP Chief Judge Greg Kays	2/27/17: **DENIED**. Plaintiffs' claims were not barred by three-year statute of limitations, as Plaintiffs did not have actual knowledge of fees of comparable funds. The Complaint also stated a claim for fiduciary breach because Plaintiffs' allegation that fiduciaries limited plan's investment lineup to proprietary funds created an inference that fiduciaries used an imprudent and disloyal process to manage the plan. The same was true for Plaintiffs' allegations that	12/6/17: **CERTIFIED**.	2/27/17: Defendants' MSJ **GRANTED in part** and **DENIED in part**. Granted as to claims made by plaintiffs who had signed valid waivers of ERISA claims in exchange for severance benefits, because their claims arose after they executed the waivers. For certain plaintiffs, however, at least some claims arose before executing waivers, so those claims survived summary judgment. 5/22/18: Defendants' MSJ **GRANTED in part** and	Plaintiffs allege that Defendants violated ERISA fiduciary duties by using the Plan "as an opportunity to promote American Century's mutual fund business and maximize profits at the expense of the Plan and its participants," causing the participants millions of dollars in excess fees. Defendants also allegedly failed to use the least expensive available share class, caused the plan to pay excessive recordkeeping costs, and failed to monitor investment options and remove poorly performing ones.	

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		fiduciaries did not investigate lower-cost alternatives and that the plan's recordkeeping costs were excessive. Finally, Plaintiffs sufficiently pled prohibited transactions because Defendants could not show that exemption requirements were met.		**DENIED in part**. Factual issues precluded summary judgment on fiduciary breach claims. Judgment for Defendants on certain prohibited transaction claims because fees paid from mutual fund assets were not fees paid out of plan assets. Finally, PTE 77-3 negated Plaintiffs' claims relating to decision to pay recordkeeper per-participant fee.		
38.	*McDonald v. Edward D. Jones & Co., L.P.*, No. 16-cv-01346 (E.D. Mo.) Filed 08/19/16 by Bailey Glasser LLP and Izard Kindall & Rabbe LLP Judge Rodney W. Sippel	1/26/17: **GRANTED in part** and **DENIED in part**. Granted as to Defendant Jones Financial Companies, L.L.L.P. because Plaintiff failed to allege that the entity was a plan fiduciary. All other claims allowed to proceed. Named Plaintiff sought relief on behalf of the plan, so she had standing to sue even though she did not personally invest in proprietary funds. Plaintiff's claims were also not time-barred, as she alleged she had no actual knowledge of fiduciary breach until shortly before filing Complaint. 3/27/18: MTD Amended Complaint **DENIED**. Amended Complaint sufficiently asserted the particular roles that each Defendant played in alleged misconduct.	12/13/19: **CERTIFIED** for purpose of settlement.		Plaintiff alleges that Defendants populated the Plan with investment options of its "Preferred Partners" and other investment managers with corporate relationships with Edward Jones, and also caused the Plan to pay excessive recordkeeping and administration fees. Plaintiff claims that Defendants select the investment options because they pay sales fees and revenue sharing in return for being included in the plan investment lineup. Defendants also allegedly offered the American Funds Money Market Fund instead of a stable value fund that would have received a better return. Defendants also allegedly failed to consider index fund alternatives that carried lower fees.	4/22/19: Settlement **APPROVED**. $3.175 million settlement fund.

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39.	*Meiners v. Wells Fargo & Company et al.*, No. 16-cv-03981 (D. Minn.) Filed 11/22/16 by Lockridge Grindal Nauen P.L.L.P. Judge Franklin L. Noel No. 17-2397 (8th Cir.)	5/26/17: **GRANTED**. Plaintiff did not sufficiently allege fiduciary breach because Vanguard funds were not a proper comparison point for performance—the funds performed differently because they entailed different investment strategies. The same was true for the funds' fees. Plaintiff only pointed to two cheaper funds, which was akin to alleging that Wells Fargo did not choose the cheapest fund. Finally, selection of an affiliated option as the default plan option was insufficient to allege fiduciary breach without more. 6/22/17: Appealed to Eighth Circuit. 8/3/18: **AFFIRMED**. *Meiners v. Wells Fargo & Co.*, 898 F.3d 820 (8th Cir. 2018). Plaintiff did not plead sufficient facts showing that target-date funds underperformed, as Plaintiff only alleged that one comparable fund with a different investment strategy performed better. Nor did Plaintiff sufficiently allege that target-date funds charged excessive fees, as			Plaintiff alleges that Defendants engaged in self-dealing and imprudent investing of Wells Fargo 401(k) plan assets by investing billions of dollars in Wells Fargo's own proprietary target date funds. Defendants allegedly did so systematically by defaulting certain participant contributions into Wells Fargo target date funds and by encouraging participants to purchase the funds though a check-the-box enrollment feature. These funds were allegedly excessively costly and consistently underperformed Vanguard funds.	**DISMISSED**.

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		existence of cheaper funds did not necessarily mean that fund was too expensive in the market generally.				
40.	*Wayman v. Wells Fargo & Company*, No. 17-cv-05153 (D. Minn.) Filed 11/17/17 by Kessler, Topaz, Meltzer & Check, LLP Judge Patrick J. Schiltz	2/13/18: Voluntarily **DISMISSED**.			Plaintiffs alleges that Defendants breached their fiduciary duties of prudence and loyalty by (1) including higher cost and poorly performing proprietary investment options in the Wells Fargo 401(k) plan, (2) failing to negotiate lower fees, (3) maintaining a proprietary money market fund in the plan alongside a better performing and cheaper stable value fund, and (4) failing to switch to cheaper and better performing investment options.	
41.	*Lechner v. Mutual of Omaha Insurance Company*, No. 18-cv-00022 (D. Neb.) Filed 1/25/18 by Berger, Montague Law Firm Judge Joseph F. Bataillon	6/26/18: Filed. 12/31/18: **DENIED**. Court found plausible claim of breach of fiduciary duty and breach of duty of loyalty. Additionally, claims were within statute of limitations, as Mutual renewed and amended its agreement with United and at least 5 other reviews took place during 6-year time period. Also sufficiently alleged that fiduciary knowingly concealed misconduct, and ERISA limitation period was tolled.			Plaintiff alleges that Defendants violated their fiduciary duties by including propriety investment funds as options in United of Omaha's 401(k) plan, causing the plan to pay excessive fees to United of Omaha. These funds included several proprietary target date funds, which charged plan participants more than non-plan investors. Plaintiff alleges that Defendants included other proprietary investment options that paid significant fees relative to non-proprietary options.	
42.	*Nelsen et al. v. Principal Global Investors Trust Company et al.*, No. 18-cv-00115 (S.D. Iowa) Filed 4/16/18 by Newkirk Zwagerman, P.L.C.	1/24/19: **GRANTED in part** and **DENIED in part**. GRANTED: Dismissed claim that Defendants breached fiduciary duty by selecting imprudent investments, because			Plaintiffs allege that Defendants breached their fiduciary duties by investing 401(k) plan target-date fund assets exclusively in Principal's proprietary index funds, which allegedly charged higher fees than comparable indices. The proprietary index funds also allegedly performed poorly. Fiduciaries of other target-date funds allegedly invested	

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	Judge Stephanie M. Rose	Defendants were not fiduciaries during those times. DENIED: Defendants were sufficiently acting as fiduciaries with respect to monitoring investments. AND barred to extent that Defendants may have breached that duty BEFORE 4/16/12.			underlying holdings in non-proprietary index funds, contrary to Principal's practice.	
Ninth Circuit						
43.	*Kanawi v. Bechtel Corp.*, No. 06-cv-05566 (N.D. Cal.) Filed 9/11/06 by Schlichter Bogard & Denton LLP Judge Charles R. Breyer	5/15/07: **DENIED**. (a) Plaintiff adequately pled non-disclosure; (b) ERISA § 404(c) defense is an affirmative defense that cannot be used on motion to dismiss; and (c) Plaintiffs adequately alleged that Bechtel was a plan fiduciary.	10/10/08: **CERTIFIED**.	11/3/08: Plaintiffs' MSJ **DENIED** on self-dealing claims. Defendants' MSJ **GRANTED in part** and **DENIED in part**. In granting judgment on the merits for the breach of fiduciary duty claims, the Court found that the Plan committee met regularly to discuss investment options and to consider alternatives, they obtained advice from independent consultants and the performance of the funds was competitive with industry standards. The Court also noted that Plaintiffs cited no authority for the proposition that the Plan was entitled to the proceeds from the sale of FIA. The Court allowed Plaintiffs to proceed with a prohibited transaction claim based on the plan's payment	Plaintiffs allege that Fremont Investment Advisors ("FIA") – an entity alleged to have originated from Bechtel's investment advisory and management division – was responsible for: selecting, monitoring, evaluating, and terminating investment managers for the investment options; negotiating agreements with the investment managers; and managing its own proprietary funds, some of which were included as the plan's investment options. Plaintiffs argue that FIA received undisclosed revenue sharing payments from Plan service providers that FIA selected, and that this constituted a series of prohibited transactions. Plaintiffs also argue that the Plan is entitled to some of the proceeds from the sale of FIA to a third party.	3/1/11: Settlement **APPROVED**. $18.5M settlement fund. In addition, for a period of three years, Bechtel agreed to (1) continue not to use for the Plan investment managers or service providers owned by Bechtel or any member of the Bechtel Trust & Thrift Plan Committee; (2) engage a service provider to prepare an annual disclosure to all current Plan participants regarding fees charged to their Plan accounts; (3) not offer retail mutual funds as investment options in the Plan; (4) continue not to pay Plan recordkeeping fees on a percentage of asset bases; and (5) conduct a competitive bidding process for Plan recordkeeping

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				of FIA's fees, but dismissed the prohibited transaction claims to the extent the fees were paid by Bechtel.		contract in 2012.
44.	*Urakhchin v. Allianz Asset Management of America, L.P., et al.*, No. 15-cv-01614 (C.D. Cal.) Filed 10/7/15 by Nichols Kaster, PLLP Judge Josephine L. Staton	8/5/16: **GRANTED in part** and **DENIED in part**. Granted as to plaintiffs' third claim for equitable relief ERISA section 1132(a)(3), which it dismissed without prejudice, and denied it as to all remaining claims. As an initial matter, the court found that Plaintiffs had standing since, taken as a whole, their claims "involve Defendants' alleged practice of selecting and retaining Allianz-affiliated investments solely to benefit the Allianz family, rather than considering lower-cost, unaffiliated options for the benefit of Plan participants," and thus the harm allegedly suffered relates to the management and fund selection process, which Plaintiffs had standing to challenge. The court also held that Defendants' affirmative defense that the claims were time barred was "not obvious on the face of the complaint," since Defendants had not identified any publicly available data showing that pre-2013 fees were lower than the public information from 2013-14. Finally, the Court found that	6/15/17: **CERTIFIED**.		Plaintiffs filed a class action complaint alleging that the Plan's fiduciaries and several participating employers in the Plan breached their fiduciary duties and for illegal inurement of Plan assets to an employer in violation of 29 U.S.C. § 1103. Specifically, Plaintiffs allege that the Plan's fiduciaries used the Plan as an opportunity to promote the Allianz Family's mutual fund business and maximize profits at the expense of the Plan and its participants. Defendants allegedly failed to investigate whether the Plan and its participants would be better served by investments managed by unaffiliated companies and instead selected high-cost proprietary mutual funds as investment options. These proprietary funds, according to Plaintiffs, have little or no track record. Moreover, Plaintiffs claim, the Plan's fiduciaries have a pattern and practice of adding new and unproven mutual funds as investment options within the Plan shortly after the new funds are launched, and even use the Plan's default investment option as a mechanism for providing seed money to these funds. Plaintiffs allege that these new and untested funds have consistently underperformed. Plaintiffs assert claims for breach of fiduciary duties of loyalty and prudence and for unlawful inurement of plan assets to the benefit of an employer when AAM entities were paid investment management fees "as a result of the Plan's investments in Allianz Family mutual funds."	2/20/18: Settlement **APPROVED**. $12M settlement fund. The plan will retain an unaffiliated investment consultant to evaluate annually the plan's investment lineup.

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		whether Defendants had breached fiduciary duties was a question of fact inappropriate to resolve at the motion to dismiss stage, and that Plaintiffs had adequately pled a claim for failure to monitor. The court granted Defendants' motion as to Plaintiffs' claim for restitution in disgorgement. Citing *Great-West* and other Supreme Court precedent, the Court held Plaintiffs had failed to allege "that any of the money sought to be disgorged can be traced to particular funds or property in the Defendants' possession"				
45.	*Cryer v. Franklin Resources, Inc. et al.*, No. 16-cv-04265 (N.D. Cal.) Filed 07/28/16 by Bailey & Glasser LLP and Izard Kindall & Raabe LLP Judge Claudia Wilken Consolidated with *Fernandez*, No. 17-cv-06409 (N.D. Cal.)	1/17/17: **DENIED** both MTD and MSJ. With respect to MSJ, Plaintiff's covenant not to sue did not preclude claim for fiduciary breach, as Plaintiff brought suit on behalf the plan and its participants, not himself. As for MTD, the fact that ERISA permits the offering of proprietary funds did not preclude claim for fiduciary breach, as Plaintiff's claim alleged excessive fees, not mere offering of proprietary funds. Moreover, court would not resolve at MTD stage factual question as to	7/26/17: **CERTIFIED**.		Plaintiff alleges Defendants breached their fiduciary duties by causing the Plan to invest in funds offered and managed by Franklin Templeton when better-performing, lower-cost funds were available, in order to benefit Franklin Templeton's investment management business. Consolidated with *Fernandez*, No. 17-cv-06409 (N.D. Cal.)	

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		whether comparable, better-performing alternatives existed. 4/6/18: **DENIED** both MTD and MSJ. Again, covenant not to sue did no preclude claim for fiduciary breach. As for MTD, Plaintiff alleged sufficient facts supporting fiduciary breach claim. Additionally, prohibited transaction claims were not time-barred merely because Defendants first offered mutual funds outside of the limitations period, as limitations period was renewed each year that Defendants agreed to adopt same investments and fees. Finally, Plaintiff was not required to plead specific facts about fiduciary's internal processes because those facts are typically in the exclusive possession of fiduciary.				
46.	*Dorman v. Charles Schwab Corporation, et al.*, No. 17-cv-00285 (N.D. Cal.) Filed 1/19/17 by Schneider Wallace Cottrell Konecky Wotkyns LLP Judge Claudia Wilken No. 18-15281 (9th Cir.)	1/18/18: **DENIED**. Mandatory arbitration provision was unenforceable, as plaintiff bringing § 502(a)(2) claim on behalf of plan cannot waive right to sue without plan's consent. Appealed to Ninth Circuit. No. 18-15281.			Plaintiff alleges that Defendants breached their fiduciary duties and engaged in prohibited transactions by including their own affiliated investment products as options within the plan and by providing their own services to the plan. Defendants allegedly reaped significant fees and profits in doing so.	

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		Plaintiff subsequently amended his Complaint. 9/20/18: **GRANTED in part** and **DENIED in part**. Proprietary fund claim dismissed because it was not sufficient for Plaintiff to allege that Defendants offered a single proprietary fund with a cheaper, better performing alternative; fiduciaries can value other features aside from price. Stable value fund claim also dismissed, as ERISA does not require plan to offer stable value fund. Allegation that self-directed brokerage system was too complex was also insufficient to state a claim. Prohibited transaction claim permitted to proceed. 2/8/19: **GRANTED in part** and **DENIED in part**. Granted as to all counts except part of I, III, and IV. Denied as to Count I, alleging breach of fiduciary duty resulting from imprudence and disloyalty in deficient process of selecting Schwab SVF replacements. Denied as to counts III and IV. III: Board of Directors' failure to monitor fiduciaries. IV: Breach of co-fiduciary claim because sufficiently alleged that party had				

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		knowledge of imprudent/disloyal acts.				
47.	*Baird v. BlackRock Institutional Trust Company, N.A. et al.*, No. 17-cv-01892 (N.D. Cal.) Filed 04/05/17 by Feinberg, Jackson, Worthman & Wasow, LLP Judge Haywood S. Gilliam, Jr.	11/8/17: Filed.	6/3/19: Filed.	11/8/17: Filed (alternative to MTD).	Plaintiff alleges that Defendants breached their fiduciary duties by selecting and retaining for BlackRock's 401(k) plan high-cost, poor-performing, proprietary options with excessive layers of hidden fees. This excessive fund "layering scheme" allegedly permitted BlackRock to "cannibalize" employee returns.	
48.	*Fernandez v. Franklin Resources, Inc.*, No. 17-cv-06409 (N.D. Cal.) Filed 11/02/17 by Izard, Kindall & Raabe, LLP Judge Claudia Wilken	4/6/18: **DENIED**. Plaintiff sufficiently pled breach of fiduciary duty by alleging that proprietary funds underperformed compared to similar funds in the market, employed unsuccessful managers, and received poor ratings. Plaintiff's prohibited transaction claims were not time-barred because Defendants had an ongoing duty to monitor investments, thus re-triggering the limitations period.	7/11/18: **CERTIFIED**.	4/6/18: Defendants' MSJ **DENIED**. Plaintiff's suit not barred by covenant not to sue because a plan participant cannot settle a § 502(a)(2) breach of fiduciary duty claim seeking relief on behalf of the plan without the consent of the plan.	Plaintiffs alleges that Defendants breached their fiduciary duties and engaged in prohibited transactions by causing the plan to invest in proprietary funds managed by Franklin Templeton when better-performing and lower-cost funds were available. Plaintiff further alleges that Defendants were motivated to do so because the funds were managed by, paid fees to, and generated profits for Franklin Templeton and its subsidiaries.	
49.	*Haskins et al. v. Gen. Elec. Co.*, No. 18-cv-10234 (D. Mass) Filed 9/26/17 by Sanford Heisler Sharp, LLP Judge Indira Talwani				Plaintiffs allege that Defendants violated their fiduciary duties by selecting and retaining poor-performing proprietary mutual funds as investment options in GE's 401(k) plan when superior options were available. Additionally, Defendant GE Asset Management did not actively manage one particular fund's assets and instead hired multiple sub-advisers to manage the fund, allegedly causing GE to retain a fee it had not earned.	

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	Consolidated with *In re: G.E. ERISA Litigation*, No. 17-cv-12123 (D. Mass)					
Tenth Circuit						
50.	*Kilpatrick v. Great-West Life and Annuity Insurance Company et al.*, No. 15-cv-01927 (D. Colo.) Filed 9/4/15 by Bailey & Glasser LLP Magistrate Judge Kristen L. Mix				Plaintiff filed a class action complaint alleging that the Plan trustees (which are officers and employees of Great-West or its subsidiaries or affiliates) breached their fiduciary duties and engaged in prohibited transactions by causing Great-West to receive millions of dollars, directly or indirectly, from the Plan for recordkeeping and administrative services. Plaintiff alleges that the trustees caused the Plan to invest tens of millions of dollars in various pooled separate accounts and collective trusts established and managed by Great-West subsidiaries and affiliates. The Plan at issue is a 401(k) defined contribution profit sharing plan sponsored by Great-West, The Plan offers various investment options, including many investment options established and managed by Great-West. The Committee and the trustees are responsible for selecting, reviewing, and removing Plan investments and service providers. Plaintiff argues the Plan has paid Great-West millions of dollars in investment management fees. The trustees caused the Plan to make payments to Great-West by choosing and maintaining Great-West as recordkeeper to the Plan and by choosing and maintaining investment funds in the Plan established and managed by Great-West affiliates. The trustees also allegedly caused the Plan to use TD Ameritrade, Inc. as the broker for a "brokerage window" in the Plan. TD Ameritrade received direct compensation from the Plan, from participants via trades made through the brokerage window, and revenue sharing from funds purchased	9/16/16: **JUDGMENT** on the pleadings for Defendants. Plaintiff, as a former participant, lacked standing to bring claims seeking disgorgement of profits. Former participants may have standing to seek recovery of "losses to the plan," the Court found, since they presumably would be seeking lots benefits to which they were entitled. By contrast, the Court held that Plaintiff had only alleged that she sought disgorgement of compensation that Great-West had received.

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					through the brokerage window. Accordingly, TD Ameritrade is a party in interest to the Plan. The fiduciaries for the Putnam Retirement Plan, a plan offered to employees of Putnam Investments, LLC ("Putnam"), an affiliate of Great-West, also used TD Ameritrade for brokerage services for that plan. TD Ameritrade received direct compensation from the Putnam Retirement Plan, from participants via trades made through the brokerage window, and revenue sharing from funds purchased through the brokerage window. TD Ameritrade uses Great-West as a recordkeeper for its own employee benefit plan. According to Plaintiffs, the arrangements between the Great-West, Putnam, and TD Ameritrade with respect to their plans and services give rise to a plausible inference that there is a prohibited quid pro quo agreement that Great-West and TD Ameritrade would use their respective services.	
51.	*Schapker v. Waddell & Reed Financial, Inc. et al.*, No. 17-cv-02365 (D. Kan.) Filed 06/23/17 by Foulston Siefkin LLP Judge Julie A. Robinson	2/22/18: **DENIED**. Because Plaintiff was not aware of specific process used to select investment options, she did not have actual knowledge of fiduciary breach and therefore did not trigger statute of limitations. The same was true for prohibited transaction claims. Plaintiff also sufficiently pled fiduciary breach claim because she presented an extensive list of allegedly comparable funds and made other allegations giving rise to a plausible claim the Defendants' selection process was flawed. Finally, Plaintiff sufficiently pled prohibited transaction claims			Plaintiff alleges that Defendants breached their fiduciary duties or engaged in prohibited transactions by forcing the WR Financial 401(k) plan almost exclusively into investments managed by WR Financial or its affiliates, which charged excessive fees and performed worse than comparable options. Plaintiff also alleges that Defendants should not have selected proprietary fund as default investment option under the plan. Finally, Defendants allegedly should have concentrated assets so as to leverage plan assets to drive down fees.	4/8/19: Settlement **APPROVED**. $4,875,000 settlement fund.

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		by alleging that Defendants included proprietary funds for specific purpose of enriching affiliates.				
52.	*Birse v. CenturyLink, Inc. et al.*, No. 17-cv-02872 (D. Colo.) Filed 11/30/17 by Franklin D. Azar & Associates, PC-Aurora Judge Christine M. Arguello	5/16/18: Filed. 3/20/19: Magistrate judge recommended granting motion to dismiss. **GRANTED** motion to dismiss without prejudice; however, third amended complaint was filed. 4/3/19: Filed as to third amended complaint.	10/12/18: Filed. 3/26/19: Denied as moot, pursuant to third amended complaint. Note: new date to file motion to certify class is 7/15/19.		Plaintiff alleges that Defendants breached their fiduciary duty of prudence by retaining an underperforming proprietary fund as the only large cap stock investment option in the CenturyLink 401(k) plan. The fund's underperformance was "virtually guaranteed" because its use of five active managers could not realistically outperform the market.	
Eleventh Circuit						
53.	*Dupree v. Prudential*, No. 99-cv-08337 (S.D. Fla.) Filed 4/30/99 by Connerton & Ray Judge Adalberto Jordan				Former Prudential employees alleged that the fiduciaries of the company's in-house 401(k) plan caused the plan to pay investment management fees and insurance-related "risk charge" fees to a Prudential affiliate (which managed an annuity contract offered as an option within the Plan) in violation sections 404 and 406 of ERISA. Specifically, plaintiffs challenged the acquisition of an annuity contract known as "PruPar" that was issued by Prudential to its own retirement Plan, as well as the investment of that Plan's assets in investment strategies managed by Prudential affiliates.	8/7/07: **JUDGMENT** for Defendants on all counts. 2007 WL 2263892 (S.D. Fla. Aug. 10, 2007). Prohibited Transaction Claims: The District Court found that the Plan's payment of investment management fees was exempted from the prohibitions of section 406 by statutory exemptions under ERISA. Specifically, the Court found that the investment management fees were "necessary for the administration of the plan" and thus were exempted under ERISA section 408(b)(2). In view of the extensive due diligence record, however, the Court

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						determined that the fees were reasonable compared to the industry, the fiduciaries' actions were taken primarily for the purpose of benefitting the Plan, and the fiduciaries exercised an appropriate level of diligence and prudence. The due diligence taken by the fiduciaries included: (a) investment strategies were extensively reviewed, including the credentials and track record of the investment managers, the fees, the expected performance, and the investment philosophy to be followed; (b) both a strategic and tactical asset allocation plan was in place; (c) the portfolio manager prepared detailed quarterly reports for the fiduciary; (d) individual investments were reviewed on a daily basis by comparing each investment's performance to its benchmark return; (e) an annual, and ongoing, review of the fees were conducted; (f) an outside consultant also conducted an annual survey of the fees and compared such against other large pension plans. The Court also found that the Plan's payment of "risk charges" was exempted

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						under ERISA section 408(b)(5), which allows a fiduciary to obtain for the Plan an affiliated annuity contract if the Plan pays "no more than adequate consideration" for such a contract. Finding the amount of the "risk charges" to be reasonable and "adequate," the Court held that the section 408(b)(5) exemption applied. Finally, the Court held that the Plan's payment of investment management fees to affiliated pooled investment funds was exempted by ERISA section 408(b)(8), finding that Plaintiffs had not introduced any evidence to show that these fees were unreasonable. Fiduciary Breach Claims: While the Court recognized that reliance on a class exemption from the prohibited transactions rule does not relieve a defendant of its fiduciary duties under section 404, the Court found that the Prudential Defendants had not breached section 404 fiduciary duties. In rejecting the claim for fiduciary disloyalty, the Court also found that where a fiduciary takes action that arguably

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						benefits both plan and non-plan interests, the incidental benefit is permissible as long as the primary purpose and effect of the action is to benefit the plan.
54.	*Fuller v. SunTrust Banks, Inc.*, No. 11-cv-00784 (N.D. Ga.) Filed 3/11/11 by McTigue & Veis LLP No. 12-16217 (11th Cir.) filed 12/5/12 No. 14-13789 (11th Cir.) filed 8/21/14 After case was consolidated with *Brown* and *Stargell*, recaptioned *In re SunTrust Banks, Inc. 401(k) Plan Affiliated Funds ERISA Litigation*, No. 11-cv-00784 (N.D. Ga.) Judge Orinda D. Evans	3/20/12: **GRANTED in part** and **DENIED in part**. Prohibited Transactions: The Court dismissed as time-barred the majority of Plaintiff's claim alleging prohibited transactions in connection with the Plan fiduciaries' selection of affiliated STI Classic funds. Rejecting Plaintiff's continuing-violation theory, the Court held that the date upon which the limitations period began to accrue would have been the date the fund was added to the lineup. All but one STI Classic fund—the STI Classic International Equity Fund—was added to the lineup prior to the beginning of this period on 4/9/04. With respect to this remaining fund, the Court dismissed the prohibited transaction claim on standing grounds. Breach of Fiduciary Duties: The Court denied the motion to dismiss with respect to the claim alleging that Defendants breached duties of loyalty and prudence by	6/27/18: **CERTIFIED**.	5/2/18: Defendants' MSJ **GRANTED** on all claims arising before 3/11/05. ERISA's six-year statute of repose applied to Plaintiffs' fiduciary breach claims because statue of repose was not subject to equitable tolling. 3/29/19: Motion **GRANTED** against Defendant Ridgeworth Capital Management as no mutual agreement/arrangement existed between them and SunTrust, none of the employees qualified as fiduciaries, and respondeat superior was not a viable argument. 5/6/19: Filed.	Participant in SunTrust's in-house 401(k) plan contend that Plan fiduciaries violated ERISA through their inclusion of affiliated mutual funds in the Plan's lineup. Specifically, Plaintiff alleged that the Plan fiduciaries committed prohibited transactions under section 406 of ERISA by selecting and retaining two SunTrust-affiliated "STI Classic" mutual funds. Plaintiff also allege that defendants breached fiduciary duties under section 404 by selecting and retaining these mutual funds in SunTrust's own interests, despite the funds' high costs and poor performance. Also alleged were violations of section 404 and 406 related to the "mapping" of a subsidiary's 401(k) plan to the SunTrust 401(k) plan. 2/24/16: The court granted Defendants' unopposed motion to reopen the case and consolidate it with the *Stargel v. SunTrust Banks, Inc.* and *Brown v. SunTrust Banks, Inc. et al.* pending before the same court.	

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		retaining the STI Classic funds. The Court analyzed the timeliness of the claim under both ERISA's six- and three-year statute of limitations. The Court noted that an ERISA breach of fiduciary duty claim is barred if brought more than six years after the "last action which constituted a part of the breach or violation." Having already established that Plan fiduciaries had selected most funds at issue prior outside of this six-year period, the Court identified that Plaintiffs had also alleged breach through the Defendants' ongoing duty to monitor. The Court refused to dismiss this claim in light of the six-year limitations period, noting that this factual issue could not be resolved on a motion to dismiss. The Court next considered whether ERISA's three-year limitations period applied, which bars claims under section 404 if brought more than three years after the plaintiff acquires "actual knowledge of the breach or violation." The Court noted that Plaintiff was regularly sent information on the fees and performance of the affiliated investment options as part of regular ERISA disclosures. Plaintiff thus had				

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		"actual knowledge" of the facts underpinning their claim, and the Court applied the three-year limitations period to exclude any actions of fiduciaries occurring before 4/10/07. The claim was still allowed to survive, however, as Plaintiff had alleged that Defendants failed to adequately monitor and/or replace the funds during the three-year limitations period (i.e. at each quarterly trustee's meeting). Also allowed to proceed was a derivative claim under section 404 against the chairman of the compensation committee (which had the power to appoint plan trustees). <u>Mapping-Related Claims:</u> The Court went on to dismiss the mapping-related claims under sections 404 and 406, finding that Plaintiff lacked standing to challenge this merger and that, in any event, Plaintiff had not alleged that Defendants' decision to map the fund contributed in any way to the fund's allegedly high fees and poor performance. 10/30/12: Second MTD **GRANTED**. Remaining claims dismissed because the Court had precluded Plaintiff				

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		from pursuing any claims that had arose before 4/10/07, and the sole named Plaintiff had no investments within the Plan after 2005. 2/26/14: **AFFIRMED** by Eleventh Circuit. The Court concluded that the claims were time-barred under ERISA's six-year statute of limitations. The claims were based on allegations relating to the initial decision to use the proprietary funds as Plan investments more than six years before the complaint was filed and, with regard to Plaintiff's theory that Defendants thereafter failed to remove the funds, Plaintiff did not allege that a material change in circumstances had occurred. The Eleventh Circuit rejected a continuing violation theory. The Eleventh Circuit also held that the district court erred when it dismissed the Plaintiff's claims based on ERISA's three-year limitations period when Plaintiff has actual knowledge of the breach or violation. The Eleventh Circuit ruled that to have actual knowledge, a plaintiff must have specific knowledge of the actual breach. The Eleventh Circuit				

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		found that Defendants did not establish that the documents that they relied upon to establish actual knowledge had been provided to Plaintiff.				
55.	*Stargell v. SunTrust Banks, Inc.*, No. 12-cv-03822 (N.D. Ga.) Filed 3/11/11 by McTigue & Veis LLP Consolidated with *Fuller* and *Brown* matters on 2/24/16 After case was consolidated with *Brown* and *Fuller*, recaptioned *In re SunTrust Banks, Inc. 401(k) Plan Affiliated Funds ERISA Litigation*, No. 11-cv-00784 (N.D. Ga.) Judge Orinda D. Evans	03/08/13: Filed.	01/25/13: Filed.		Lawsuit brought by different plaintiff than in *Fuller*; substantially similar claims are alleged in both cases. 08/07/13: The District Court dismissed the lawsuit. The Court concluded that the plaintiff did not allege that performance of the funds or the advisory fees changed after the initial selection of the proprietary fund investment options more than six years before the complaint was filed. With regard to the prohibited transaction claims, the Court ruled that a failure to sell investments in a retirement plan is not a "transaction" for purposes of ERISA's prohibited transaction rules. The Court also concluded that the plaintiff lacked standing to assert claims regarding proprietary funds in which she had not invested. 9/8/15: Unopposed motion to re-open case. *See Fuller v. SunTrust*, above.	
56.	*Pledger et al. v. Reliance Trust Co., et al.*, No. 15-cv-04444 (N.D. Ga.) Filed 12/22/15 by Schlichter, Bogard & Denton, LLP Judge Orinda D. Evans	3/7/17: **GRANTED in part** and **DENIED in part**. Plaintiffs sufficiently alleged claim for fiduciary breach by alleging that Reliance's funds charged additional management and administrative fees and that Reliance's funds drastically underperformed comparable alternatives. Plaintiffs sufficiently pled unreasonable or excessive	6/1/17: Filed.	6/8/18: Insperity Defendants' MSJ filed. 6/8/18: Reliance's MSJ filed. 3/28/19: **GRANTED in part** and **DENIED in part**. Granted with respect to Count I claim regarding breach of prudence in retaining Horizon Funds; Count II, excessive admin fees; Count IV, failing to	Participants and beneficiaries in the Insperity 401(k) Plan brought an action against Defendants, alleging that the Plan has over $2 billion in assets, giving the Plan tremendous bargaining power to demand low-cost services. However, instead of acting in the exclusive best interest of participants, Reliance Trust allegedly selected and retained high-cost and poorly performing investments, including its own proprietary investments, compared to available institutional alternatives, to benefit itself and the other Defendants. Plaintiffs also claim Defendants allowed Insperity's proprietary recordkeeping subsidiary to receive excessive	

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		fees by alleging that Insperity failed to negotiate subsidiary's compensation, failed to monitor revenue sharing, and failed to obtain rebates of excessive compensation. Plaintiffs also sufficiently pled unreasonable investment management fees by alleging that Defendants' selection of funds with excessive fees was an act of self-dealing. However, claims based upon initial selection of recordkeeper were time-barred and dismissed. Court also dismissed claim that Defendants should have used stable value fund rather than low-yielding money market fund.		properly monitor fiduciaries; and Count VI, engaging in self-dealing. Denied as to Defendant Reliance Trust Co. and Insperity Holdings: Count I breach of duty of loyalty and prudence in the addition of Horizon Funds, and Count III, containing unreasonable fees where cheaper versions were available. Also, Count V against Insperity Holdings with respect to monitoring of Reliance Trust.	compensation to drive revenues and profits to themselves at the expense of Plan participants. In addition, the complaint alleges breaches of fiduciary duties against the Plan's discretionary trustee, Reliance Trust, concerning its imprudent investment decisions, including the decision to offer its own proprietary investments. These alleged breaches substantially reduced the retirement assets of the Plan participants. The excessive investment management and recordkeeping fees, as well as the performance losses from investing in overly expensive funds, allegedly cost participants millions of dollars of their retirement savings. The complaint also claims that the Insperity 401(k) Plan failed to solicit competitive bids from outside recordkeepers, allowing Insperity Retirement Services to receive excessive recordkeeping fees. The complaint also alleges that Insperity and Reliance Trust chose mutual funds and collective trusts with high expenses and poor performance, excluding lower-cost share classes of the identical mutual fund investments. The complaint further accuses Insperity Holdings, Inc. of breaching its fiduciary duties by failing to adequately monitor its appointee, Reliance Trust. As a consequence of this breach, the Plan suffered substantial losses, through excessive fees and underperforming investments.	
57.	*Diego Cervantes v. Invesco Holding Company Inc., et al.*, No. 18-cv-02551 (N.D. Ga.) Filed 5/24/2018 by Johnson Fistel, LLP	7/25/18: Filed. 10/5/18: Filed motion to dismiss amended complaint.	Note: Filed as class action complaint.		Plaintiff alleges that Defendants breached their fiduciary duties and committed prohibited transactions by loading Invesco's 401(k) plan with proprietary investment options that performed worse and/or had higher fees than comparable alternatives. Plaintiff also alleges that the plan offered too many investment options and confused participants. Additionally, several investment	

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	Judge Amy Totenberg				options allegedly exposed participants to undisclosed liquidity risk, as those funds invested in another proprietary fund that artificially inflated its net value.	
D.C. Circuit						
58.	*Brown v. SunTrust Banks*, No. 14-cv-01090 (D.D.C.) Filed 6/27/14 by McTigue Law LLP After case was consolidated with *Fuller* and *Stargell* cases, recaptioned *In re SunTrust Banks, Inc. 401(k) Plan Affiliated Funds ERISA Litigation*, No. 11-cv-00784 (N.D. Ga.) Judge Orinda D. Evans	10/9/14: Filed.			Class action brought against SunTrust Banks, Inc., the SunTrust Benefits Plan Committee, the SunTrust Benefits Finance Committee, and the committees' individual members, and the Plan's investment advisor. Plaintiffs allege that several SunTrust proprietary funds should have been removed because they had an extended history of poor performance, and the performance did not justify the high management fees charged by these funds. Plaintiffs claim that if the 401(k) had offered comparable funds by Vanguard, participants would have earned roughly $92 million more for their retirement (Plaintiffs claim the fiduciaries did eventually remove the affiliated funds and all SunTrust proprietary mutual funds from the investment lineup and offered Vanguard investment funds instead). Plaintiffs allege breach of fiduciary duty against the committee Defendants for (i) selecting SunTrust-affiliated funds without considering alternatives or otherwise engaging in a prudent and loyal selection process, and (ii) failing to prudently and loyally fulfill their duty to monitor funds in the 401(k) Plan. Plaintiffs specifically allege that the committee defendants pursued SunTrust's, rather than the participants', interests. Plaintiff asserts breach of fiduciary duty claims against the committee defendants in connection with their 401(k) Plan investment options and selection of a particular fund. Specifically, plaintiffs allege that the committee defendants removed unaffiliated funds as investment vehicles, but never removed	

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					affiliated funds until the inception of the litigation, did not remove poorly performing funds from the Plan lineup despite repeated warnings, and employed a conflicted advisor, RidgeWorth (subsidiary and investment advisor). Plaintiffs also claim the committee defendants did not follow any systematic process for monitoring the performance or prudence of the 401(k) Plan investment options for a number of years and, when they did adopt a systematic monitoring process, it was flawed. Plaintiffs allege that the committee defendants were repeatedly warned by outside advisers regarding the affiliated funds, but the committee defendants overruled this recommendation or engaged in "benchmark shifting". Plaintiffs also allege a breach of fiduciary duty in the selection a particular fund which would increase RidgeWorth's fees. Plaintiffs assert RidgeWorth was conflicted when it came to recommending or evaluating any of the affiliated funds in the investment lineup since it served as the investment advisor to all of those funds and received fees proportional to the amount of assets invested in those funds. 9/8/15: Unopposed motion to re-open case. *See Fuller v. Suntrust*, above.	
59.	*D'Ann M. Patterson v. The Capital Group Companies, Inc., et al.*, No. 17-cv-04399 (C.D. Cal.) Filed 6/13/17 by Keller Rohrback L.L.P. Judge Dale S. Fischer	1/23/18: **GRANTED**. Plaintiff did not plead facts that plausibly suggested fees were unjustified. Fiduciaries "need not choose the cheapest fees available to the exclusion of all other considerations." Plaintiff also did not sufficiently plead prohibited transaction claims because Defendants met conditions of exemption			Plaintiff alleged that Defendants breached their fiduciary duties by offering unduly expensive, affiliated investment options under the Capital 401(k) plan. Defendants allegedly failed to properly evaluate and monitor these investment options for both reasonable costs and performance levels through an impartial or prudent process. Participants also allegedly paid excessive fees for investing in affiliated funds.	

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		permitting affiliated investment funds.				