APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-1019

John Teets

Plaintiffs-Appellants

v.

Great-West Life & Annuity Insurance Company

Defendants-Appellees

AARP; AARP Foundation; American Council of Life Insurers

Amici Curiae

Appeal from United States District Court
for the District of Colorado
(D.C. No. 1:14-CV-02330-WM-NYW)

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Before MATHESON, BACHARACH, and McHUGH, Circuit Judges.

MATHESON, Circuit Judge.

Great-West Life Annuity and Insurance Company ("Great-West") manages an investment fund that guarantees investors will never lose their principal or the interest they accrue. It offers the fund to employers as an investment option for their employees' retirement savings plans, which are governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq.

John Teets—a participant in an employer retirement plan—invested money in Great-West's fund. He later sued Great-West under ERISA, alleging Great-West breached a fiduciary duty to participants in the fund or that Great-West was a nonfiduciary party in interest that benefitted from prohibited transactions with his plan's assets.

After certifying a class of 270,000 plan participants like Mr. Teets, the district court granted summary judgment for Great-West, holding that (1) Great-West was not a fiduciary and (2) Mr. Teets had not adduced sufficient evidence to impose liability on Great-West as a nonfiduciary party in interest. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

Great-West is a Colorado-based insurance company that provides "recordkeeping, administrative, and investment services to 401(k) plans." Aplt. App., Vol. II at 149. It qualifies as a service provider—a "person providing services to [a] plan"—under ERISA. *See* ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B).

Mr. Teets participated through his employment in the Farmer's Rice Cooperative 401(k) Savings Plan ("the Plan"). Under the Plan, employees contribute to their own retirement accounts and choose how to allocate their contributions among the investment options offered. When employees invest in a particular fund, they become "participants" in that fund. Great-West contracts with the Plan and other comparable employer plans to offer the investment fund that is the subject of this case. Great-West is not in a contractual relationship with participants.

In this section, we first provide an overview of the ERISA legal framework governing this appeal. We then detail the factual background of the case and the proceedings in the district court.

A. Statutory Background

1. ERISA Protections Against Benefit Plan Mismanagement

ERISA regulates employee benefit plans, including health insurance plans, pension plans, and 401(k) savings plans. It is a "comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (quotations omitted). It governs employers that create and administer benefit plans as well as third parties that provide services for plans. S*ee* 29 U.S.C. § 1002(1), (4), (14), (16).

ERISA seeks to protect employees against mismanagement of their benefit plans. *See Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 15 (1987) ("The focus of the statute thus is on the administrative integrity of benefit plans."). "[T]o ensure that employees will not be left empty-handed," *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996), ERISA imposes fiduciary duties on those responsible for plan management and administration. *See* ERISA §§ 404, 406, 29 U.S.C. §§ 1104, 1106. "Congress commodiously imposed fiduciary standards on persons whose actions affect the amount of benefits retirement plan participants will receive." *John Hancock Mut. Life*

Ins. Co. v. Harris Tr. & Sav. Bank, 510 U.S. 86, 96 (1993) ("*Harris Trust*").

2. ERISA Fiduciaries

a. Establishing fiduciary status – named and functional fiduciaries

Under ERISA, a party involved in managing a benefit plan takes on fiduciary obligations in one of two ways. *See In re Luna*, 406 F.3d 1192, 1201 (10th Cir. 2005). First, the instrument establishing a plan must specify at least one fiduciary—typically the employer or a trustee—that will have the "authority to control and manage the operation and administration of the plan." ERISA § 402(a), 29 U.S.C. § 1102(a). These are "named fiduciaries." *See Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1498 (10th Cir. 1995) (defining "named fiduciary"). Second, a party not named in the instrument can nonetheless be a "functional fiduciary" by virtue of the authority the party holds over the plan. *See Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833, 837 (9th Cir. 2018) ("*Transamerica Life Insurance*"); *David P. Coldesina, D.D.S., P.C., Emp. Profit Sharing Plan & Tr. v. Estate of Simper*, 407 F.3d 1126, 1132 (10th Cir. 2005) ("*Coldesina*") (describing the "functional" approach to evaluating fiduciary status). Under § 3(21)(A) of ERISA,[1] a party becomes a functional fiduciary when

[1] We refer to the relevant portions of ERISA by the section number of the Act. ERISA is codified at 29 U.S.C. § 1001 et seq. We provide the corresponding U.S. Code sections for ease of reference.

> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A) (emphasis added).[2]

Functional fiduciaries' obligations are limited in scope: "Plan management or administration confers fiduciary status only to the extent the party exercises *discretionary* authority or control." *Coldesina*, 407 F.3d at 1132. And they must actually exercise their authority or control over the plan's assets.[3] *Leimkuehler v. Am.*

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[2] Section 3(21)(A) lists three bases for a party to be a functional fiduciary. Because Mr. Teets rests his fiduciary status argument on only the first one, Aplt. Br. at 17, we have italicized that part of the provision here.

[3] ERISA § 3(21)(A) creates functional fiduciary status for those who exercise "discretionary authority or discretionary control" in the management of a plan or who exercise "authority or control" over plan assets. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Although only one of these clauses uses the modifier "discretionary," the parties use these phrases interchangeably and do not ask us to distinguish between them. *See* Aplt. Br. at 18 (stating both that "'to the extent' [Great-West] wields '*any* discretionary authority or discretionary control'

United Life Ins. Co., 713 F.3d 905, 914 (7th Cir. 2013) (explaining that a decision not to exercise control over a plan's assets does not confer fiduciary status). Any alleged breach of a functional fiduciary's obligations must arise out of an exercise of that authority or control. *See id.* at 913; *Assocs. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 569 (7th Cir. 1991).

As the following discussion illustrates, although named fiduciaries and functional fiduciaries obtain fiduciary status in different ways, they are bound by the same restrictions and duties under ERISA.[4]

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over the plan or its assets, it owes fiduciary duties" and "[t]he 'authority or control' inquiry is complicated in many cases"); Aplee. Br. at 15 ("The test of Great-West's fiduciary status is whether Great-West exercises authority or control over a plan or plan assets . . . ."); Aplee. Br. at 31 ("Great- West's 'compensation' thus is not determined at its own discretion . . . ."). Because the parties do not argue otherwise, we assume without deciding that the difference in these clauses does not affect the functional fiduciary analysis in this case.

[4] Courts occasionally also use the term "plan fiduciaries" to distinguish plan-affiliated fiduciaries (typically named fiduciaries) from fiduciaries that are third parties. *See, e.g.*, *Hecker v. Deere & Co.*, 556 F.3d 575, 586 ("We see nothing in the statute that requires plan fiduciaries to include any particular mix of investment vehicles in their plan."); *Zang and Others Similarly Situated v. Paychex, Inc.*, 728 F. Supp. 2d 261, 271 (W.D.N.Y. 2010) (explaining that a service provider is not a functional fiduciary if "the appropriate plan fiduciary in fact makes the decision to accept or reject the change" (quoting Dept. of Labor Advisory Op. 97-16A, 1997 WL 277979, at *5 (May 22, 1997))). The term "plan fiduciary," however, can be somewhat misleading. Third parties, such as service providers, that qualify as functional fi-

b. Fiduciary duties and prohibited transactions

Section 404 of ERISA imposes general duties of loyalty on fiduciaries, requiring them to "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries" and "for the exclusive purpose of . . . [1] providing benefits as to participants and their beneficiaries; and [2] defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1).

In addition to imposing general duties, ERISA prohibits fiduciaries from engaging in certain specific transactions. First, it restricts transactions between plans and fiduciaries. Under § 406(b)(1), a fiduciary may not "deal with the assets of the plan in his own interest or for his own account." 29 U.S.C. § 1106(b)(1). Second, ERISA restricts transactions between fiduciaries and non-fiduciary third parties, referred to as "parties in interest." The latter can include service providers. *See* ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B). Under § 406(a), a fiduciary may not allow a plan to engage in a transaction the fiduciary knows or should know is (1) a "sale or exchange, or leasing, of any property between the plan and a party in interest"; (2) "lending of money or other extension of credit between the plan and a party in interest"; (3) "furnishing of goods, services, or facilities between the plan and a party in interest"; (4) "transfer to, use by or for the benefit of, a party in interest, of any assets of the plan"; or (5)

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duciaries are also fiduciaries *of a plan*, and the relevant ERISA provisions use "fiduciary" as a catch-all term that does not distinguish between named fiduciaries and functional fiduciaries. *See, e.g.*, ERISA § 404(a), 29 U.S.C. § 1104(a).

"acquisition, on behalf of the plan, of any employer security or employer real property in violation of [§] 1107(a)." 29 U.S.C. § 1106(a)(1)(A)-(E).

If a fiduciary engages in one of these prohibited transactions under § 406, ERISA's civil enforcement provision, § 502, allows plan participants to sue the fiduciary "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan" or "to obtain other appropriate equitable relief." ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). Fiduciaries can avoid liability for a prohibited transaction if they qualify for certain exemptions under § 408 of ERISA.

3. ERISA Non-Fiduciary Parties in Interest and Prohibited Transactions

Although parties in interest have no fiduciary obligations to a plan or its participants, the Supreme Court has read § 502(a)(3) to allow a suit against a party in interest for its participation in a prohibited transaction. *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241 (2000) ("*Salomon*") ("[Section] 502(a)(3) admits of no limit . . . on the universe of possible defendants."). A party in interest is liable if it "had actual or constructive knowledge of the circumstances that rendered the transaction unlawful"—that is, prohibited under § 406(a). *Id.* at 251. We discuss this standard in detail below.

B. Factual Background

1. The Key Guaranteed Portfolio Fund

a. Overview

Great-West offers an investment product called the Key Guaranteed Portfolio Fund ("KGPF"). The KGPF is a stable-value fund. It "guarantees capital preservation." Aplt. App., Vol. II at 150. This means KGPF participants will never lose the principal they invest or the interest they earn, which is credited daily to their accounts. *Id.* The KGPF was one of 29 investment options the Farmer's Rice Cooperative Plan's fiduciaries chose to offer participants like Mr. Teets.

b. Great-West's management of the KGPF and the Credited Interest Rate

Great-West deposits the money that participants have invested in the KGPF into its general account. That account, in turn, is invested in fixed-income instruments such as treasury bonds, corporate bonds, and mortgage-backed securities. Great-West employs a self-described "conservative investment strategy." *Id.* at 157, 173. Its investments earn lower interest rates than some higher-risk instruments or funds.

Money invested in the KGPF earns interest at the "Credited Interest Rate" (the "Credited Rate"). Under the contracts it executes with employer plans, Great-West sets the Credited Rate quarterly, announcing the new rate at least two business days before the start of each quarter. Its contract with Mr. Teets's Plan provides, "Interest earned on the Key Guaranteed Portfolio Fund value is compounded daily to the effective annual interest rate. The interest rate to be credited to the Group Contractholder [the Plan] will be determined by [Great-West] prior to the last day of the previous calendar quarter." Aplt. App., Vol. I at 129. "The effective annual interest rate will never be less than 0%." *Id.*

Great-West retains as revenue the difference between the total yield on the KGPF's monetary instruments and the Credited Rate, also known as the "margin" or the "spread." Some portion of the margin goes toward Great-West's operating costs. Great-West publicly discloses an administrative fee of .89 percent, but claims that figure does not capture all the costs associated with maintaining the KGPF. Great-West retains as profit whatever portion of the margin exceeds its costs. The parties dispute the total KGPF-associated profit Great-West has earned, but all agree that as of 2016 it was greater than $120 million.

The Credited Rate dropped from 3.55 percent before the financial crisis in 2008 to 1.10 percent in 2016. During that time, the Credited Rate increased only once, in 2013. At the same time, Great-West's margin remained relatively constant, between approximately two and three percent.[5]

[5] This figure is drawn from a report Mr. Teets's expert prepared at the summary judgment stage. Great-West does not disclose its margins as a matter of course.

c. Exiting the KGPF

Plans may terminate their relationship with Great-West based on changes to the Credited Rate. If they do, Great-West "reserves the right to defer payment" of participants' KGPF money back to the plan—presumably to reinvest with another provider—"not longer than 12 months."[6] *Id.* There is no evidence Great-West has ever exercised the option to impose that waiting period.

Participants who have placed their money in the KGPF may withdraw their principal and accrued interest at any time without paying a fee. Great-West does, however, prohibit plans offering the KGPF from also offering any other stable value funds, money market funds, or certain bond funds—in other words, products with comparable risk profiles.[7]

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[6] The KGPF is offered to participants in defined contribution retirement plans. In such plans, either the employee participant or the employer (or both) contribute funds to a participant's retirement account. *See* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 Yale L.J. 451, 456 (2004). In a 401(k) plan, one type of defined contribution plan, participants typically allocate the funds in their own accounts. *Id.* at 484. It is thus not clear that the Plan in this case invested any of its own funds into the KGPF. But according to the Plan contract, if the Plan terminates its relationship with Great-West and stops offering the KGPF, the Plan can opt to have the total of the participants' accounts paid to it, presumably for reinvestment in another fund.

[7] Our review of the record supports this statement, and counsel for Great-West admitted as much at oral argument. Oral Arg. at 28:30-28:55.

C. Procedural Background

Mr. Teets sued Great-West in the United States District Court for the District of Colorado on behalf of all employee benefit plan participants who had invested in the KGPF since 2008, as well as those participants' beneficiaries. The district court certified the class under Federal Rule of Civil Procedure 23(b)(3). *See Teets v. Great-West Life & Annuity Ins. Co.*, 315 F.R.D. 362, 374 (D. Colo. 2016). At certification, the class included approximately 270,000 KGPF participants spread across more than 13,000 plans.[8] *Id.* at 369. None of the plans' named fiduciaries is a named plaintiff or a member of the class.

1. Mr. Teets's ERISA Claims

Mr. Teets alleged three ERISA violations. His first two claims alleged Great-West had violated ERISA's fiduciary duty provisions. First, Mr. Teets claimed that Great-West had breached its general duty of loyalty under § 404 by (1) setting the Credited Rate for its own benefit rather than for the plans' and participants' benefit, (2) setting the Credited Rate artificially low and retaining the difference as profit, and (3) charging excessive fees. Second, he claimed that Great-West, again acting in its fiduciary capacity, had engaged in a prohibited transaction under § 406(b) by "deal[ing] with the assets of the plan in [its] own interest or for [its] own account." 29 U.S.C. § 1106(b).

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[8] The class period runs "until the time of trial." *Teets*, 315 F.R.D. at 374.

As a prerequisite to bring both of these claims, Mr. Teets alleged that Great-West is an ERISA fiduciary because it exercises authority or control over the quarterly Credited Rate and, by extension, controls its compensation. The district court limited its review of these two fiduciary duty claims by addressing only this prerequisite—that is, whether Mr. Teets had sufficiently established Great-West's fiduciary status. Because the court found that Great-West was not a fiduciary, it did not address whether Great-West had breached any fiduciary obligations. Great-West's fiduciary status is thus the focus of our review of Mr. Teets's fiduciary duty claims.

Mr. Teets's third claim, raised in the alternative, was based on Great-West's having non-fiduciary status. He alleged that Great-West was a non-fiduciary party in interest to a non-exempt prohibited transaction under § 406(a) insofar as it had used plan assets for its own benefit.

On all three claims, Mr. Teets sought declaratory and injunctive relief and "other appropriate equitable relief," including restitution and an accounting for profits. Aplt. App., Vol. I at 37.

2. Summary Judgment Ruling

After discovery, the parties filed cross-motions for summary judgment. The district court denied Mr. Teets's motion and granted summary judgment for Great-West. It disposed of Mr. Teets's first two claims at the same time, concluding that Great-West was not acting as a fiduciary of the Plan or its participants. It held that Great-West's contractual power to choose the Credited Rate did not render it a fiduciary under ERISA because participants could "veto" the chosen rate by withdrawing their money from the KGPF. *Id.* at 99. As to Great-West's ability to set its own compensation, the court held that Great-West did not have control over its compensation and thus was not a fiduciary because the ultimate amount it earned depended on participants' electing to keep their money in the KGPF each quarter.[9]

The district court also granted summary judgment on Mr. Teets's third claim, concluding that Great-West was not liable as a non-fiduciary party in interest because Mr. Teets had failed to establish a genuine dispute as to whether Great-West had "actual or constructive knowledge of the circumstances that rendered the transaction unlawful." *Id.* at 105 (quoting *Salomon*, 530 U.S. at 251). Mr. Teets timely appealed.

Our review thus focuses on (1) whether Great-West is a functional fiduciary because it "exercises . . . authority or control" over Plan assets, ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), when its sets the Credited Rate or it compensation; and (2) whether, if Great-West is not a fiduciary, it is liable as a non-fiduciary party in interest for its participation in a transaction prohibited under ERISA.

We will add further factual and procedural background as it becomes relevant.

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[9] Having concluded Great-West was not an ERISA fiduciary, the district court did not address whether, if it were a fiduciary, its conduct would amount to a breach of its duties.

D. Summary Judgment Background

"We review a grant of summary judgment de novo, applying the same legal standard as the district court." *Coldesina*, 407 F.3d at 1131. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). We view the evidence and draw reasonable inferences in the light most favorable to the nonmoving party. *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1124 (10th Cir. 2005).

"The movant bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." *Libertarian Party of N.M. v. Herrera*, 506 F.3d 1303, 1309 (10th Cir. 2007) (citing *Celotex*, 477 U.S. at 323). A movant that does not bear the burden of persuasion at trial may satisfy this burden "by pointing out to the court a lack of evidence on an essential element of the nonmovant's claim." *Id.* (citing *Celotex*, 477 U.S. at 325).

"If the movant meets this initial burden, the burden then shifts to the nonmovant to set forth specific facts from which a rational trier of fact could find for the nonmovant." *Id.* (quotations omitted). To satisfy this burden, the nonmovant must identify facts "by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Id.* (citation omitted). These facts "must establish, at a minimum, an inference of the presence of each element essential to the case." *Bausman v. Interstate Brands Corp.*, 252 F.3d 1111, 1115 (10th Cir. 2001).

"Where, as here, we are presented with cross-motions for summary judgment, we must view each motion separately, in the light most favorable to the non-moving party, and draw all reasonable inferences in that party's favor." *United States v. Supreme Ct. of N.M.*, 839 F.3d 888, 906-07 (10th Cir. 2016) (quotations omitted).

II. Discussion

Mr. Teets argues that (A) Great-West is a fiduciary because it has the authority to set the Credited Rate each quarter and, by extension, to determine its own compensation; and (B) even if Great-West is not a fiduciary, it is nonetheless liable as a party in interest because it benefitted from a transaction prohibited under ERISA.

A. Fiduciary Duty Claims—Great-West's Fiduciary Status

The threshold question for the two fiduciary duty claims is whether Great-West is a functional fiduciary under ERISA. Mr. Teets argues it is because Great-West exercises "authority or control" over the Plan or its assets by changing the Credited Rate without plan or participant approval. Aplt. Br. at 17-19, 25-26. He also contends Great-West has sufficient control over its own compensation to render it an ERISA fiduciary. We conclude that Mr. Teets did not make an adequate showing in response to Great-West's summary judgment motion to support these points.

The following discussion describes the pertinent legal background, summarizes the district court's ruling, and analyzes the evidence of Great-West's authority in relation to plans and participants.

1. Legal Background

As noted above, a service provider can be a functional fiduciary under § 3(21)(A) of ERISA when it exercises authority or control over plan management or plan assets. *See* 29 U.S.C. § 1002(21)(A). Courts consider an employee benefit plan contract—like the one between Mr. Teets's Plan and Great-West—to be an asset of the plan, such that a service provider's authority or control over the plan contract can give rise to fiduciary status. *See Chicago Bd. Options Exch., Inc. v. Conn. Gen. Life Ins. Co.*, 713 F.2d 254, 260 (7th Cir. 1983) ("*CBOE*") ("[T]he policy itself is a plan asset."); *accord* ERISA § 401(b)(2), 29 U.S.C. § 1101(b)(2) (providing that a contract for a guaranteed-benefit policy is an asset of the plan to which it is issued).

The case law points to a two-step analysis to determine whether a service provider is a functional fiduciary when a plaintiff alleges it has acted to violate a fiduciary duty.[10] First, courts decide whether the service provider's alleged action conformed to a specific term of its contract with the employer plan. By following the terms of an arm's-length negotiation, the service provider does not act as a fiduciary. *See, e.g.*, *Schulist v. Blue Cross of Iowa*, 717 F.2d 1127, 1132 (7th Cir. 1983) (holding service provider was not fiduciary where its compensation was established through successive negotiations). Second, if the service provider took unilateral action beyond the specific terms of the contract respecting the management of a plan or its assets,[11] the service provider is a fiduciary unless the plan or perhaps the participants in the plan (see below) have the unimpeded ability to reject the service provider's action or terminate the relationship with the service provider. *See, e.g.*, *Midwest Cmty. Health Serv., Inc. v. Am. United Life Ins. Co.*, 255 F.3d 374, 377-78 (7th Cir. 2001) (holding service provider was fiduciary

[10] This court has not decided any cases to determine whether a service provider exercised discretionary authority or control beyond the terms of a negotiated contract.

Accordingly, we must look outside the Tenth Circuit for guidance. Although our review includes cases dealing with pension and insurance plans in addition to 401(k) plans like Mr. Teets's, the lessons we draw from these cases about functional fiduciary status apply to the various types of benefit plans subject to ERISA regulation.

[11] Ministerial tasks alone do not qualify a service provider for fiduciary status. *See Olson v. E.F. Hutton & Co.*, 957 F.2d 622, 625 n.3 (8th Cir. 1992) ("It is well established that one who performs only ministerial tasks is not cloaked with fiduciary status."); *see also* 29 C.F.R. § 2509.75-8 (2018) (listing examples of ministerial actions that do not qualify as "discretionary authority or discretionary control respecting management of [a] plan").

when it could make changes to plan contract without plan approval and would assess a fee for plans withdrawing funds).

Thus, to establish a service provider's fiduciary status, an ERISA plaintiff must show the service provider (1) did not merely follow a specific contractual term set in an arm's-length negotiation; and (2) took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decision.

a. Arm's length negotiation of contract terms

When a service provider adheres to a specific contract term that is the product of arm's-length negotiation, courts have held that the service provider is not a fiduciary. *Schulist* provides a useful example. 717 F.2d at 1132. In *Schulist*, a service provider won a contract to administer an employer's health care plan by submitting the winning bid—the lowest premium price—in a competitive bidding process. *Id.* at 1129. During the first year of operating under the contract, premium payments resulted in a large surplus. *Id.* The parties agreed to a lower premium for the second year, but the surplus returned. In the third year, the parties negotiated a new contract whereby any surplus would be returned to the plan. *Id.* The employer's trustees sued the service provider for breach of contract and breach of fiduciary duty. *Id.* at 1130. The Seventh Circuit concluded that the service provider was not a fiduciary because, during the initial auction and at every subsequent renewal, "[the insurer] entered into an arm's length bargain presumably governed by competition in the marketplace." *Id.* at 1132.

A service provider similarly does not owe a fiduciary duty regarding its compensation when compensation is fixed during an arm's-length negotiation. In *Transamerica Life Insurance*, for example, the Ninth Circuit held that the manager of an employee retirement plan was not an ERISA fiduciary as to its compensation because the plan contract set the manager's compensation at a fixed percentage of the plan's assets, and it also provided a specific schedule for fees the manager could collect. 883 F.3d at 836; *see also F.H. Krear & Co. v. Nineteen Named Trs.*, 810 F.2d 1250, 1254-55, 1259 (2d Cir. 1987) (holding service provider was not a fiduciary when the contract that defined the amount of its compensation was the product of an arm's-length negotiation).

b. Unilateral decisions regarding plan or asset management

When a service provider acts with authority or control beyond the contract's specific terms, the service provider may be a fiduciary. And when the plan or the plan participants cannot reject the service provider's action or terminate the contract without interference or penalty, the service provider is a functional fiduciary. *See, e.g.*, *Charters v. John Hancock Life Ins. Co.*, 583 F. Supp. 2d 189, 199 (D. Mass. 2008) (holding service provider was fiduciary where plan attempting to terminate contract faced "built-in" monetary penalties). Fiduciary status turns on whether the service provider can force plans or participants to accept its choices about plan management or assets. *See, e.g.*, *CBOE*, 713 F.2d at 260 (finding fiduciary status where service provider "determined what type of investment the Plan must make"). The cases discussed in this section address whether plans faced impediments to rejecting service providers' actions.

In some cases, the service provider's unilateral decision changes a term of the plan contract. For example, in *CBOE*, a service provider provided investment services for an employee retirement benefit plan. *Id.* at 255-56. Under the contract, contributions made on behalf of each plan participant were deposited into an individual account. *Id.* at 256. The service provider announced that it was going to restructure the investment options it provided to the plan by creating a new account for each participant and annually transferring 10 percent of the balance from the participant's original account to the new one, which was supposed to yield a higher rate of return. *Id.* This "unilateral" restructuring effectively amended the original terms of the contract. *Id.* If the plan disagreed with this approach and sought to terminate the contract and withdraw its participants' funds to reinvest them elsewhere, the service provider could limit the plan's withdrawal of funds to 10 percent of the total balance per year, effectively requiring 10 years to withdraw all of the funds. *Id.* The Seventh Circuit held that this restriction "lock[ed] [the plan] in" and made the service provider a functional fiduciary. *Id.* at 260.

In other cases, the contract may "grant[] [a service provider] discretionary authority" over an aspect of plan or asset management. *Ed Miniat, Inc. v. Globe Life Ins. Grp., Inc.*, 805 F.2d 732, 737 (7th Cir. 1986). In those cases, too, the service provider's discretionary decision making—though authorized by contract—is "cabined by ERISA's fiduciary duties" unless plans or participants can freely reject the service provider's choices or terminate the contract. *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 422 (3d Cir. 2013). For example, in *Ed Miniat*, the service provider contracted with an employer to provide investment services for an employee insurance plan. Under the plan contract, the employer paid premiums to make life insurance available to employees upon their retirement. *See* 805 F.2d at 733-34. The service provider had the "apparent unilateral right to reduce the rate of return" it paid on the employer's contributions. *Id.* at 734. Before it issued any insurance under the plan, the service provider reduced the rate of return from 10 percent to 4 percent (the lowest value allowed by the contract) and increased premiums. *Id.* When the employer sought to terminate the contract, the service provider refused to reimburse half of the premiums the employer had paid. The Seventh Circuit held the service provider was a fiduciary, reasoning that it had the power to unilaterally amend the contract. *Id.* at 738.[12]

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[12] *See also Midwest Cmty. Health Serv., Inc.*, 255 F.3d at 377 (holding that service provider was a fiduciary when it reserved the right to change terms without plan or participant approval and would assess a

In contrast to the foregoing cases holding a service provider to be a fiduciary, when plans and participants have a "meaningful opportunity" to reject a service provider's unilateral decision, courts have held the service provider is not a fiduciary. *Charters*, 583 F. Supp. 2d at 199. For example, in *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009), the Seventh Circuit declined to impose fiduciary duties on a fund manager that was retained to advise a plan on which investment options to include in the plan. *Id.* at 578, 584. It reasoned that the plan contract gave the plan, not the fund manager, "final say on which investment options [would] be included." *Id.* at 583; *see Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co.*, 768 F.3d 284, 295 (3d Cir. 2014) ("*John Hancock*") (holding no fiduciary relationship arose from service provider providing suggested list of funds where "trustees still exercised final authority over what funds would be included").

In *Zang and Others Similarly Situated v. Paychex, Inc.*, the employee benefit plan selected mutual funds to offer its participants from a list composed by a service provider. 728 F. Supp. 2d 261, 263 (W.D.N.Y. 2010). The

fee upon withdrawal of funds); *Charters*, 583 F. Supp. 2d at 198-99 (recognizing fiduciary duty where employee benefit plan sponsor faced "built-in penalties" for transferring assets to a different account or cancelling its contract if it was dissatisfied with how service provider exercised its contractual right to substitute investment options); *Rosen v. Prudential Ret. Ins. & Annuity Co.*, 718 F. App'x 3, 5 (2d Cir. 2017) ("[F]iduciary status attaches to the party empowered to make unilateral changes to the investment menu by its contractual arrangement with the plan.").

service provider "reserve[d] the right to modify" the list of mutual funds the plan selected. *Id.* The contract required at least 60 days' notice of a proposed modification and an opportunity for the plan to reject the change or terminate the contract. *Id.* at 263-64. The court held that the service provider's ability to amend the list of available mutual funds did not give rise to fiduciary status because the contract gave the plan the ultimate say over whether the change would take effect. *Id.* at 271 n.6 ("Paychex could not force the employer to accept any particular deletion or substitution.").

The foregoing analysis applies to determining whether a service provider's control over its own compensation may make it a fiduciary. A contract might give a service provider "control over factors that determine the actual amount of its compensation." *Krear*, 810 F.2d at 1259. If the service provider exercises unilateral control over those factors, it can be a fiduciary. In *Pipefitters Local 636 Insurance Fund v. Blue Cross and Blue Shield of Michigan*, the Sixth Circuit held an insurer was a fiduciary as to its compensation. 722 F.3d 861 (6th Cir. 2013). State law required the service provider to pay one percent of its total income to the state, and its contract with the plan entitled it to pass along that cost to the plan. *Id.* at 864 (detailing provision allowing "any cost transfer subsidies or surcharges ordered by the State Insurance Commissioner . . . [to] be reflected in the . . . Amounts Billed"). But "the state did not fix the rate that Defendant charged *each customer*, and crucially, neither did the [contract] between Plaintiff and Defendant." *Id.* at 867 (emphasis added). Because the contract "in no way cabin[ed] [the provider's] discretion" to decide how much of the fee to collect from each plan, the court held the service provider was an ERISA fiduciary. *Id.*[13]

2. District Court Ruling

a. Change to the Credited Rate

The district court held that Great-West is not a fiduciary when it sets the Credited Rate. It acknowledged that "in some sense," Great-West "undoubtedly" exercises some control when it sets the Credited Rate. Aplt. App., Vol. I at 92. But the court recognized "a number of cases favoring the theory that a pre-announced rate of return prevents fiduciary status from attaching to the decision regarding the what [sic] rate to set, at least when the plan and/or its participants can 'vote with their feet' if they dislike the new rate." *Id.* "Thus," the court stated, "if the all the [sic] circumstances of the alleged ERISA-triggering decision show that the defendant does not have power to force its decision upon an unwilling objector, the

[13] *See also Abraha v. Colonial Parking, Inc.*, 243 F. Supp. 3d 179, 186 (D.D.C. 2017) (exercise of contractual authority to change from a flat per-participant fee to a percentage-of-contributions fee was an exercise of discretion over service provider's own compensation and therefore subject to ERISA fiduciary obligations); *Golden Star, Inc. v. Mass Mut. Life Ins. Co.*, 22 F. Supp. 3d 72, 80-82 (D. Mass. 2014) (insurer had discretion to set a "management fee" anywhere between zero and one percent and therefore was a fiduciary); *Glass Dimensions, Inc. ex rel. Glass Dimensions, Inc. Profit Sharing Plan & Tr. v. State St. Bank & Tr. Co.*, 931 F. Supp. 2d 296, 304 (D. Mass. 2013) (bank had discretionary authority to set a "lending fee" anywhere from zero to 50 percent and was therefore a fiduciary).

defendant is not acting as an ERISA fiduciary with respect to that decision." *Id.* at 98. The court discussed this issue separately as it concerned plans and participants.

First, as to Great-West's ability to bind plans to its Credited Rate decisions, the district court rejected Mr. Teets's argument that plans cannot readily withdraw from the KGPF because Great-West has a right to impose a waiting period of up to one year. The court stated, "This is not an argument that the Court can consider in the present posture. The Contract does not *mandate* a one-year waiting period, so whether it would actually be imposed in any particular instance is speculative." *Id.* at 99.

Second, as to individual participants' ability to reject the Credited Rate, the district court concluded that participants do have a "real ability" to reject Great-West's choice of the Credited Rate by withdrawing their funds from the KGPF without fee or penalty. *Id.* Although it had "given serious thought to" the argument that participants cannot easily withdraw from the KGPF because Great-West prohibits plans from offering other comparable investment products, the court concluded that imposing a fiduciary duty on that basis would "introduce[] a host of other considerations individual to each participant." *Id.* As a result, it would be "too attenuated" to say that a given participant could not reject the Credited Rate each quarter. *Id.*

b. Control over compensation

The district court also concluded Great-West is not a fiduciary as to setting its compensation. Although it acknowledged that a service provider's control over compensation factors can give rise to fiduciary obligations, the court said this principle "has only been applied in cases where the alleged fiduciary has some form of direct contractual authority to establish its fees and other administrative charges, or has authority to approve or disapprove the transactions from which it collects a fee." *Id.* at 100.

The court also reasoned that Great-West does not have control over its compensation because, even though it could use the Credited Rate to "influence its possible margins," the ultimate amount it earns depends on whether participants elect to keep their money in the KGPF each quarter. *Id.* at 101.

3. Analysis

Mr. Teets argues that Great-West's ability to set the Credited Rate renders it an ERISA fiduciary because neither the Plan nor its participants can reject changes to the Credited Rate.[14] He focuses on Great-West's (1) contractual right to impose a 12-month waiting period on

[14] The parties do not dispute that changing the Credited Rate is the kind of decision that might qualify Great-West for fiduciary status. Changing the rate of return on participants' investments cannot fairly be considered "ministerial" in the same way that calculating benefits or maintaining records can. *See In re Luna*, 406 F.3d at 1205 (holding

withdrawing plans and (2) prohibition on plans' offering comparable investment options to participants. We conclude that Mr. Teets has not adduced sufficient evidence to create an issue of material fact as to whether either of the foregoing has prevented plans or participants from rejecting a change in the Credited Rate.

Mr. Teets separately argues that Great-West's control over the Credited Rate gives it control over its compensation and thereby renders it an ERISA fiduciary. We conclude that because Great-West does not have unilateral authority or control over the Credited Rate, it also lacks such control over its compensation. We therefore affirm the district court's summary judgment ruling that Great-West is not a functional fiduciary.

a. Change to the Credited Rate

The contract between the Plan and Great-West does not set a Credited Rate or prescribe a Credited Rate formula. Instead, it authorizes Great-West to set the Credited Rate on a quarterly basis without input from the Plan or its participants. Accordingly, the Credited Rate is not the product of an arm's-length negotiation, and Great-West's fiduciary status therefore depends on whether the Plan or its participants can reject a change in the Credited Rate. To make that determination, we address Great-West's (1) right to impose a 12-month waiting period on

that an employer's duty to make plan contributions pursuant to collective bargaining agreement was ministerial); 29 C.F.R. § 2509.75-8 (listing examples of ministerial functions). On the contrary, it is exactly the kind of action that would "affect the amount of benefits retirement plan participants will receive." *Harris Tr.*, 510 U.S. at 96.

departing plans and (2) prohibition on plans offering comparable investment options to their participants.

i. Potential 12-month waiting period for withdrawing plans

As discussed above, a service provider's unilateral decision regarding management of a plan or its assets can give rise to functional fiduciary status if the service provider can prevent or penalize plans for withdrawing funds from the service provider or terminating the contract. *See, e.g.*, *CBOE*, 713 F.2d at 260; *Charters*, 583 F. Supp. 2d at 199. When Great-West changes the Credited Rate, its contractual option to delay a plan's ability to receive funds from the KGPF upon termination of the contract, if exercised, may make it a fiduciary.

Mr. Teets contends that Great-West, like service providers held to be fiduciaries in *CBOE*, *Ed Miniat*, and *Midwest Community Health*, has "unhampered discretion" under ERISA because it has "the ability"—even if never used—"to force plans to accept the Credited Rate for up to a year." Aplt. Reply Br. at 7 (quotations omitted); *see* Aplt. Br. at 21-23.

Great-West argues that its contractual option to delay the return of a departing plan's funds does not establish fiduciary status. Aplee. Br. at 29. It relies on ERISA's text, which confers fiduciary status on a service provider only to the extent it "exercises any discretionary authority or discretionary control" over a plan or its assets. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A); *see also*

Leimkuehler, 713 F.3d at 911 (declining to recognize fiduciary status where service provider "reserve[d] the right to make substitutions to the funds" but "ha[d] never exercised this contractual right in a way that could give rise to a claim").

We agree with Great-West that its contractual option to impose a 12-month waiting period on plan withdrawal is different from the penalties and fees that gave rise to fiduciary status in the cases cited by Mr. Teets. In those cases, the penalties either had been or were certain to be enforced on the plans. *See, e.g.*, *Ed Miniat*, 805 F.2d at 734 (service provider actually "deducted 'front end load' charges" upon contract cancellation); *Midwest Cmty. Health Serv., Inc.*, 255 F.3d at 375 (service provider "would assess a withdrawal or 'surrender charge' and make an 'investment liquidation adjustment'" upon withdrawal); *Charters*, 583 F. Supp. 2d at 191 (plan was "subject to administrative charges" and "termination fees" upon cancellation or transfer of funds). In other words, the service providers' rights to impose penalties in those cases had been or were certain to be "exercised." *See* ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). But in this case, a plan's attempt to terminate its KGPF contract in response to a change in the Credited Rate does not trigger the waiting period. Great-West must exercise its option to impose it.

We are not aware of any case finding fiduciary status under § 3(21)(A) of ERISA based on a service provider's unexercised contractual option to restrict or penalize withdrawal. But even if a potential restriction or penalty could make Great-West a fiduciary, it cannot do so in this case. This is so because Mr. Teets not only has provided no evidence that Great-West has ever imposed the waiting period on a plan's withdrawal, he has provided no evidence that even the potential of Great-West's imposing a waiting period has affected any plan's choice to continue with or withdraw from the KGPF contract. More than 3,000 plans have terminated the KGPF as a plan offering during the class period. Mr. Teets has not provided a single example showing the potential waiting period has deterred any of the 13,000 plans represented by participants in the class from withdrawing from the KGPF. Unlike in *CBOE*, there is no evidence a plan has actually been or is likely to be locked in to a Credited Rate for up to 12 months. *See* 713 F.2d at 260. Without any evidence that Great-West has exercised its right or that the right has deterred any plan from exiting the KGPF, summary judgment in favor of Great-West on this issue was appropriate.[15]

[15] In his opposition to Great-West's motion for summary judgment, Mr. Teets raised other penalties Great-West imposes on a departing plan. For example, he stated:

> The default "cessation option" under [Great-West's contract with the Plan] is the "participant maintenance option," in which Great-West continues to hold participants' money in the KGPF until it is all transferred or distributed by the participants. . . . Further, the Contract provides for a "Contract Termination Charge" if the Contract is terminated before Great-West's recovery of all Start-Up Costs.

ii. Prohibition on comparable investment options for participants

We next turn to whether plan participants—the class members in this case—can reject the quarterly Credited Rate by withdrawing from the KGPF. When Great-West moved for summary judgment contesting fiduciary status, it argued that "[t]he evidence shows that" when it changes the Credited Rate, "participants, not Great-West, have the 'final say' on whether any Credited Interest Rate will apply to their investments in the [KGPF]." Aplt. App., Vol. II at 176. Great-West contended that this was so because participants who have invested in the KGPF "can reject any new Credited Interest Rate by transferring their accounts out of the [KGPF] at any point, without penalty." *Id.*; *see also id.* at 151, 282-83.[16]

Aplt. App., Vol. II at 283. But Mr. Teets did not raise this argument on appeal until his rebuttal at oral argument. Oral Arg. at 38:20-39:27. It is therefore waived. *See United States v. Dahda*, 852 F.3d 1282, 1292 n.7 (10th Cir. 2017) ("[I]ssues raised for the first time at oral argument are considered waived." (quotations omitted)), *aff'd*, 138 S. Ct. 1491 (2018).

[16] To support its argument, Great-West pointed to paragraph 15 of its statement of material facts, which asserted, in part, "Participants who allocate money to the [KGPF] can withdraw that money, both principal and any accrued earnings, at any time—even prior to the expiration of the 90-day guarantee period—without paying any fee or incurring any penalty." Aplt. App., Vol. II at 151. Paragraph 15, in turn, cited to the contract between the Plan and Great-West, which states that "[a]mounts may be transferred from the Participant's account balance in the Key Guaranteed Portfolio Fund at any time," Aplt. App., Vol. I at 129, and to other evidence allegedly establishing

In response, Mr. Teets made two arguments, both unavailing.

First, he disagreed that Great-West's fiduciary status may turn on whether participants can freely withdraw from the KGPF.[17] He repeats this contention on appeal: "participants' ability to 'accept' or 'reject' Great-West's Credited Rate decision is legally irrelevant." Aplt. Reply Br. at 9. It is not clear to us why Mr. Teets would take this position, but if this were his only argument and we have understood it properly, he would have effectively conceded that participants' ability to leave the KGPF, impeded or unimpeded, has no effect on whether Great-West is a fiduciary.

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that participants' withdrawals from the KGPF were "unrestricted." Aplt. App., Vol. II at 151.

Unlike the concurrence, we think this was enough for Great-West, the "party seeking summary judgment," to "inform[] the district court" of why "it believe[d]" there was an "absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). As described below, Mr. Teets, after being put on notice that he needed to "present evidence opposing the argument[]" that participants could freely leave the KGPF, *see Bonney v. Wilson*, 817 F.3d 703, 710 (10th Cir. 2016), responded only by pointing to Great-West's policy against competing funds without showing that it restricted withdrawal.

[17] Mr. Teets asserted, "Great-West does not cite a single case supporting its contention that a service provider to an individual account defined contribution plan can avoid fiduciary status merely because participants have the ability to invest in or divest from the product offered by the service provider, and Plaintiff is aware of no such case." Aplt. App., Vol. II at 299-300.

Second, Mr. Teets argued, alternatively, in his opposition to summary judgment, that Great-West is a fiduciary because "Great-West precludes plans from offering alternative low-risk investments alongside the KGPF" and therefore participants are not free to leave. Aplt. App., Vol. II at 301. He noted that when his Plan contracted with Great-West, it agreed that no stable value fund—effectively, no fund with a similar risk profile—would be offered that is comparable to the KGPF. *Id.* at 292-93, 301. As a result, "participants who divest from the KGPF in response to a change in Credited Rate are forced to alter the risk profile of their retirement accounts." *Id.* at 301. It follows, he asserted, that Great-West is a fiduciary as to setting the Credited Rate. *See id.*

Mr. Teets's opposition to summary judgment on this alternative ground lacked supporting law or facts. He has not cited, and we have not found, a case in which a court has deemed a service provider to be a fiduciary based on participants' lack of alternative investment options, or on anything other than imposing a penalty or fee for withdrawal. Moreover, Mr. Teets has not cited, and we have not found, a case finding fiduciary status based solely on restrictions on participants' ability to leave a fund.[18]

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[18] Although service providers in the life insurance context have been held to be ERISA fiduciaries in their dealings with beneficiaries—as opposed to plans—these cases do not help Mr. Teets. *Vander Luitgaren v. Sun Life Assurance Co. of Canada*, 966 F. Supp. 2d 59 (D. Mass 2012), provides a useful illustration. In that case, a service provider administering a life insurance policy was held to be an

Even if the ability of participants to reject service provider actions is relevant to the fiduciary status, Mr. Teets failed to provide factual support to counter Great-West's assertion in district court that participants can freely transfer their money out of the KGPF. *See id*. at 176. He pointed only to Great-West's policy against competing funds. He adduced no evidence that this policy forced participants to accept a Credited Rate or that they felt effectively locked in to the KGPF. *See CBOE*, 713 F.2d at 260.

Like the 12-month waiting period's potential effect on plans, the restriction on competing investment options may impede participants from exiting the KGPF. But as with the waiting period, Mr. Teets offered no evidence that the competing fund provision has affected any of the 270,000 participants' decisions to stay with or leave the KGPF. Mr. Teets has not even alleged that the competing fund provision has affected his own choice about participation in the KGPF.

In sum, in response to Great-West's contention that it should receive summary judgment because the plan participants are free to leave the KGPF after a change in the Credited Rate, Mr. Teets said (1) the participants' freedom to leave the KGPF is not relevant to fiduciary status

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ERISA fiduciary when it paid benefits to a plaintiff beneficiary using a retained-asset account and had unilateral control over the rate of return on the account. *Id.* at 61-62, 70. But even if life insurance beneficiaries (who do not themselves pay for life insurance) were analogous to 401(k) plan participants (who invest their own money in various funds), the plaintiff in *Vander Luitgaren* could not have cancelled his relationship with the service provider without suffering a penalty—namely, losing the potential benefits under the life insurance policy.

and (2) if it were, Great-West is a fiduciary because the limit on competing funds restricted participants' ability to leave. The first point seems to concede the issue to Great-West. On the second, Mr. Teets failed to provide legal support or "'set forth specific facts' from which a rational trier of fact could find" in his favor. *Libertarian Party of N.M.*, 506 F.3d at 1309 (citing *Celotex*, 477 U.S. at 323).

* * *

Summary judgment on the issue of Great-West's authority or control over the Credited Rate was proper.

b. Control over compensation

Mr. Teets's failure to show Great-West has authority or control over the Credited Rate means he cannot show Great-West has authority or control over its compensation.[19] Great-West argues, and Mr. Teets does not contest, that its compensation is a function not only of the Credited Rate, but also of "(1) the willingness of plans and

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[19] A Department of Labor ("DOL") rule cited by Great-West appears to suggest that Great-West's margin may not be compensation at all: "For purposes of [the reasonable compensation] exemption, the 'spread' is not treated as compensation." Final Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24, 81 Fed. Reg. 21147, 21167 & n.62 (Apr. 8, 2016). The rule is somewhat ambiguous, however. It also states that "compensation" under § 408(b)(2) includes "indirect compensation received from any source other than the plan or IRA in connection with the recommended transaction," *id.* at 21167, which could conceivably include the money Great-West earns on KGPF investments. We do not resolve this tension and instead conclude that even if Great-West's margin were compensation, Mr. Teets has not shown that Great-West has sufficient control over it to be a fiduciary.

participants to accept the Credited Interest Rates that Great-West offers; and (2) the performance of the volatile financial markets in which Great-West invests its general account." Aplee. Br. at 31. Of these variables, Mr. Teets contends Great-West has control over the Credited Rate. He acknowledges any control Great-West has over its compensation "will always be cabined by external realities and limitations like the market's actual performance. . . . And plans and participants entering and leaving the [KGPF] will have some impact on the total amount of Great-West's compensation." Aplt. Br. at 26 n.7. But, he argues, "when Great-West exercises its authority to set the Credited Rate, it also determines the amount of its own compensation." *Id.* at 26.

Mr. Teets's argument that Great-West exercises authority or control over its compensation because it exercises authority or control over the Credited Rate is self-defeating. As we have already discussed, Mr. Teets has not shown that Great-West has discretion over the Credited Rate. It follows that Great-West similarly lacks discretion or control over its compensation. *Accord Insigna v. United of Omaha Life Ins. Co.*, No. 8:17CV179, 2017 WL 6884626, at *4 (D. Neb. Oct. 26, 2017) (finding a service provider did not exercise control over its compensation where its compensation was "too attenuated" from its choice of monthly interest rate). Accordingly, summary judgment was proper on Mr. Teets's claims of fiduciary liability.[20]

B. Non-Fiduciary Prohibited Transaction Claim

Having affirmed summary judgment that Great-West is not a fiduciary, we turn to whether the district court properly granted summary judgment to Great-West on

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[20] Great-West also argued in the district court that it was not a fiduciary because ERISA's guaranteed-benefit policy ("GBP") exemption covers the KGPF. A GBP is "an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer." ERISA § 401(b)(2)(B), 29 U.S.C. § 1101(b)(2)(B). A key feature of GBPs is that they "allocate[] investment risk to the insurer." *Harris Tr.*, 510 U.S. at 106. For plans incorporating GBPs, ERISA provides that "the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer." § 1101(b)(2). A company that issues a GBP cannot become a functional fiduciary by exercising authority or control over plan funds because the funds are not plan assets under the statute.

The district court found the KGPF allocates risk to Great-West because it guarantees participants' principal and all earned interest and because Great-West fixes the rate of return in advance. Accordingly, it could not be a fiduciary in its administration of the assets participants allocated to the KGPF. The court concluded that the GBP exemption did not free Great-West of all fiduciary obligations because the "*contract* by which the insurer obtained [participants'] contributions remains a part of the plan," and Great West's management of the contract (as opposed to the money) could be subject to fiduciary duties. Aplt. App., Vol. I at 91-92 (emphasis added).

On appeal, Great-West does not contend the GBP exemption shields it from fiduciary status.

Mr. Teets's non-fiduciary party-in-interest claim. Because Mr. Teets failed to carry his burden to show that he qualified for "appropriate equitable relief" under ERISA § 502(a)(3), we affirm summary judgment for Great-West.[21]

1. Legal Background – ERISA

Section 406(a) of ERISA lists transactions that are prohibited between fiduciaries and non-fiduciary parties in interest. 29 U.S.C. § 1106(a). Section 408(b) recognizes exemptions to the prohibitions in § 406(a). 29 U.S.C. § 1108(b). Section 502(a)(3) authorizes participants to bring civil suits to obtain equitable relief for violations of ERISA. 29 U.S.C. § 1132(a)(3). We describe these provisions below and discuss how they apply to fiduciaries and to non-fiduciary parties in interest, such as Great-West.

a. Prohibited transactions under ERISA § 406(a)

Section 406(a) of ERISA prohibits fiduciaries like the Farmer's Rice Cooperative from engaging in certain transactions with "part[ies] in interest," such as service providers like Great-West. 29 U.S.C. §§ 1106(a), 1002(14)(B). The transactions listed in § 406(a) "create some bright-line rules, on which plaintiffs are entitled to

[21] The parties spent most of their summary judgment briefing in district court on the fiduciary duty claims and devoted limited attention to this claim. Great-West's motion, Mr. Teets's opposition, and Great-West's reply each addressed the non-fiduciary claim in less than three pages. Aplt. App., Vol. II at 181-83, 316-18, 366-68. As explained below, Mr. Teets's cursory treatment of this claim prevents him from overcoming summary judgment.

rely." *Allen v. GreatBanc Trust Co.*, 835 F.3d 670, 676 (7th Cir. 2016). Congress enacted § 406(a)'s "per se violations," *Chao v. Hall Holding Co.*, 285 F.3d 415, 441 n.12 (6th Cir. 2002), to bar transactions "deemed likely to injure the . . . plan." *Salomon*, 530 U.S. at 242 (quotations omitted). Violation of § 406(a) can lead to liability for fiduciaries or non-fiduciary parties in interest. *See id.* at 241.

Under § 406(a), a fiduciary may not allow a plan to engage with a non-fiduciary party in interest in a transaction that the fiduciary knows or should know is (1) a "sale or exchange, or leasing, of any property between the plan and a party in interest"; (2) "lending of money or other extension of credit between the plan and a party in interest"; (3) "furnishing of goods, services, or facilities between the plan and a party in interest"; (4) "transfer to, or use by or for the benefit of a party in interest, of any assets of the plan"; or (5) "acquisition, on behalf of the plan, of any employer security or employer real property in violation of [§] 1107(a)." 29 U.S.C. § 1106(a)(1)(A)-(E). On its face, § 406(a) covers wide swaths of plan activity. But as the following section explains, certain § 406(a) transactions are exempt from ERISA liability under § 408(b).

The § 406(a)[22] prohibition most relevant to this case is the "transfer to, or use by or for the benefit of a party

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[22] Although Mr. Teets's amended complaint alleged Great-West also violated § 406(b), that violation was premised on Great-West's acting as a fiduciary. Section 406(b) prohibits fiduciaries from benefitting

in interest, of any assets of the plan." *Id.* § 1106(a)(1)(D).[23]

b. Exemptions under ERISA § 408(b)

Although § 406(a) broadly delineates prohibited transactions, § 408(b) provides exemptions for parties engaged in those transactions. 29 U.S.C. § 1108(b). "ERISA plans engage in transactions nominally prohibited by § [406] all the time, while also taking steps to comply with ERISA by relying on one or more of the many exceptions under § [408]." *Fish v. GreatBanc Tr. Co.*, 749 F.3d 671, 685-86 (7th Cir. 2014). These exemptions allow plans to do

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from transactions with their plans, and § 406(b) claims can only be brought against fiduciaries. *See* 29 U.S.C. § 1106(b).

[23] Great-West contends Mr. Teets forfeited his argument that Great-West was a party to a prohibited transaction under § 406(a) because he relied upon different subsections of that statute to support his theory of liability in the district court. In the district court, Mr. Teets argued Great-West engaged in a prohibited transaction when it "use[d] . . . a plan asset . . . for [its] benefit," invoking § 406(a)(1)(D). Aplt. App., Vol. II at 217. He then stated in his opening brief that "Section [406](a) generally prohibits parties in interest from 'furnishing . . . services' to a plan," paraphrasing § 406(a)(1)(C). Aplt. Br. at 41. His reply brief explains that his opening brief "plainly refers to activity prohibited by Section [406](a)(1)(A) and (D)," and that he merely "quoted [§ 406(a)(1C)] as an *example*." Aplt. Reply Br. at 19 (citations omitted). At oral argument, counsel for Mr. Teets stated the prohibited transaction at issue was Great-West's use of plan assets for its own benefit, as prohibited under § 406(a)(1)(D). Oral Arg. at 0:58-2:19. Mr. Teets thus has consistently contended that Great-West conducted a prohibited transaction under § 406(a)(1)(D) and has not forfeited that argument. We evaluate his non-fiduciary liability claim based on that provision.

business with parties in interest if certain conditions are met. ERISA § 408(b), 29 U.S.C. § 1108(b).

The § 408(b) exemption pertinent to this case allows parties in interest to provide "services necessary for the establishment or operation of the plan"—otherwise prohibited under § 406(a)—so long as "no more than reasonable compensation is paid therefor." 29 U.S.C. § 1108(b)(2).[24]

c. *Non-fiduciary party-in-interest liability for prohibited transactions*

To be liable for a § 406(a) prohibited transaction, a non-fiduciary party in interest such as Great-West must have engaged in such a transaction and "have had actual or constructive knowledge of the circumstances that rendered the transaction unlawful." *Salomon*, 530 U.S. at 251. "Those circumstances, in turn, involve a showing that the *plan fiduciary*, with actual or constructive knowledge of the facts satisfying the elements of a § 406(a) transaction, caused the plan to engage in the transaction." *Id.* But as discussed above, even if the plaintiff can prove these § 406(a) elements, the party in interest may not be

[24] As discussed in more detail in footnote 16 above, DOL rules suggest the compensation that Mr. Teets claims was unreasonable—the margin Great-West retained after paying participants according to the Credited Rate—is not "compensation" at all for purposes of § 408(b).

liable if it qualifies for a § 408(b) exemption.[25] *See* 29 U.S.C. § 1108(b)(2); *Salomon*, 530 U.S. at 251.

d. Appropriate equitable relief

In addition to satisfying the requirements of *Salomon*, a plaintiff bringing suit against a non-fiduciary party in interest must show that equitable relief can be granted. ERISA's civil enforcement provision, § 502(a)(3), allows a "participant, beneficiary, or fiduciary" to bring a civil suit "to enjoin any act or practice" that violates ERISA or "to obtain other appropriate equitable relief . . . to redress such violations." 29 U.S.C. § 1132(a)(3). Satisfying § 502(a)(3) functions as an element of the ERISA claim. If a plaintiff cannot demonstrate that equitable relief is available, the suit cannot proceed. For example, in *Central States, Southeast & Southwest Areas Health & Welfare Fund v. Gerber Life Insurance Co.*, 771 F.3d 150 (2d Cir. 2014), the Second Circuit affirmed dismissal of a plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(6) because it failed to seek appropriate equitable relief. *Id.* at 154-58; *see also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 206 (2002) ("The question presented is whether § 502(a)(3) of [ERISA] authorizes this action by petitioners . . . ."); *accord Pender v. Bank of Am. Corp.*, 788 F.3d 354, 361-65

[25] The parties dispute whether the plaintiff or the non-fiduciary party in interest bears the burden of establishing the party in interest's eligibility for a § 408(b) exemption. We need not resolve this dispute because we affirm the district court's grant of summary judgment as to Mr. Teets's non-fiduciary claim on another ground.

(4th Cir. 2015) (treating the § 502(a)(3) inquiry as a threshold requirement at summary judgment stage).

In the remainder of this section we explain (1) how the Supreme Court has interpreted the scope of § 502(a)(3), (2) the requirement that plaintiffs seeking equitable restitution under § 502(a)(3) identify a specific *res*[26] from which they seek to recover, (3) the modification of that requirement for claims seeking the restitutionary remedies of accounting for profits and disgorgement of profits, and (4) the effect of a defendant's commingling assets with the plaintiff's property on the availability of equitable relief.

i. Scope of equitable relief under § 502(a)(3)

The Supreme Court has interpreted "appropriate equitable relief" under § 502(a)(3) to include equitable remedies that only historical courts of equity were empowered to award. It has excluded remedies typically available in historical courts of law, such as compensatory damages.

In *Mertens*, the Supreme Court said that § 502(a)(3) of ERISA encompasses "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." 508 U.S. at 256. "[A]t common law, the courts of

[26] The Latin term "*res*" generally refers to an "object, interest, or status, as opposed to a person." *Res*, Black's Law Dictionary (10th ed. 2014). In the trust context, it denotes the property that is the subject matter of a trust. *See id.*; *Begier v. I.R.S.*, 496 U.S. 53, 70 (1990) ("[N]o trust exists until a res is identified." (Scalia, J., concurring)).

equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust." *Id.* "[T]here were many situations . . . in which an equity court could 'establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.'" *Id.* (quoting 1 Spencer W. Symons, *Pomeroy's Equity Jurisprudence* § 181 at 257 (5th ed. 1941)). But "appropriate equitable relief" does not encompass all forms of "relief a court of equity [would be] empowered to provide in the particular case at issue, including ancillary legal remedies." *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 660 (2016) (quotations omitted). Instead, it includes remedies that could be awarded only by equity courts. *See Mertens*, 508 U.S. at 258 ("Regarding 'equitable' relief in § 502(a)(3) to mean 'all relief available for breach of trust at common law' would . . . deprive of all meaning the distinction Congress drew between . . . 'equitable' and 'legal' relief."). Thus, "legal remedies—even legal remedies that a court of equity could sometimes award—are not 'equitable relief' under § 502(a)(3)." *Montanile*, 136 S. Ct. at 661.

Certain remedies can be equitable or legal, depending on the circumstances. "Equitable remedies 'are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing . . . rather than a right to recover a sum of money generally out of the defendant's assets.'" *Id.* at 658-59 (alteration in original) (quoting 4 Symons, § 1234 at 694). "[T]he fact that . . . relief takes the form of a money payment does not remove it from the category of traditionally equitable relief." *CIGNA Corp v. Amara*, 563 U.S. 421, 441 (2011).

ii. Tracing requirement for equitable restitution

Payment of restitution, which Mr. Teets seeks, can be equitable or legal. *See Knudson*, 534 U.S. at 212. A plaintiff can recover equitable restitution, "ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."[27] *Id.* at 213. In those circumstances, "[a] court of equity could . . . order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner." *Id.* Accordingly, "[f]or

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[27] The *Salomon* Court explained a constructive trust:

> Whenever the legal title to property is obtained through means or under circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same . . . .

530 U.S. at 250-51 (quoting *Moore v. Crawford*, 130 U.S. 122, 128 (1889)); *see also* 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 4.3(1) at 587 (2d ed. 1993) ("In the constructive trust case the defendant has legal rights in something that in good conscience belongs to the plaintiff. The property is 'subject to a constructive trust.'").

An equitable lien "is simply a right of a special nature *over* the thing . . . so that the very thing itself may be proceeded against in an equitable action." *Montanile*, 136 S. Ct. at 659 (alteration in original) (quoting 4 Symons, § 1233 at 692). An equitable lien can arise out of a contract between the parties or can be "imposed, not as a matter of contract, but to prevent unjust enrichment." 1 Dobbs, § 4.3(3) at 601. In such a case, the equitable lien "is essentially a special, and limited, form of the constructive trust." *Id.*

restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214.

In contrast, when the plaintiff cannot "assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him," the plaintiff has a right to *legal* restitution. *Knudson*, 534 U.S. at 213 (quoting 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 4.2(1) at 571 (2d ed. 1993)). Such claims are considered legal because the plaintiff is seeking "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." *Id.* (quoting Restatement (First) of Restitution § 160 cmt. a (Am. Law Inst. 1937)); *accord Montanile*, 136 S. Ct. at 659 (describing "a personal claim against the wrongdoer" as "a quintessential action at law"). As we have explained, under § 502(a)(3), legal restitution is not available for ERISA claims.

iii. Modified tracing requirement for accounting and disgorgement of profits

Accounting for profits (also referred to as an "accounting") and disgorgement of profits are forms of restitution. *See Knudson*, 534 U.S. at 214 n.2 ("[A]n accounting for profits [is] a form of equitable restitution."); *Tull v. United States,* 481 U.S. 412, 424 (1987) ("An action for disgorgement of improper profits . . . is a remedy only for restitution.").[28] "The ground of this liability is unjust enrichment." 1 Dobbs, § 4.3(5) at 611. A court order for an accounting or disgorgement of profits allows the plaintiff to "recover a judgment for the profits due from use of his property," *id.* at 608, and thus "holds the defendant liable for his profits, not for damages," *id.* at 611.

The tracing requirement described above for equitable restitution also applies to accounting and disgorgement of profits but may be modified in certain limited circumstances. *See Knudson*, 534 U.S. at 214 n.2. "If, for example, a plaintiff is entitled to a constructive trust on a particular property held by the defendant, he may also recover profits produced by the defendant's use of that property, even if he cannot identify a particular *res* containing the profits sought to be recovered." *Id.*; *Pender*, 788 F.3d at 364[29]; 1 Dobbs, § 4.3(5) at 614 ("If the accounting seeks to recover a fund that has been traced, so that

[28] S*ee also Edmonson*, 725 F.3d at 419 ("[D]isgorgement and accounting for profits are essentially the same remedy." (citing Restatement (Third) of Restitution and Unjust Enrichment § 51(4) & cmt. a (Am. Law Inst. 2011))).

[29] In *Pender*, the Fourth Circuit held that retirement plan participants seeking disgorgement of profits satisfied § 502(a)(3)'s "appropriate equitable relief" requirement. 788 F.3d at 365. The participants invested in a retirement plan managed by their employer. The employer offered participants the option to transfer existing investments into a new account that, unlike the original account, guaranteed they would not lose their principal. *See id.* at 358. The new account appeared to allow participants to select from a list of investment options with declared rates of return, but in reality, the employer invested par-

it is in effect a constructive trust on a fund of money, the case might be classed as an equitable suit.").

To qualify for this remedy in equity, the plaintiff still must show entitlement "to a constructive trust on particular property held by the defendant" that the defendant used to generate the profits. *Knudson*, 534 U.S. at 214 n.2; *see also In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 579 F.3d 220, 238 (3d Cir. 2009) ("[P]laintiffs cannot recover under [an accounting or a disgorgement of profits] theory without first identifying the profit generating property or money wrongly held by [the defendant]."); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. SACV 15-1614-JLS (JCGx), 2016 WL 4507117 (C.D. Cal. Aug. 5, 2016).[30] Accordingly, without a particular profit-generating *res*, a claim for payment out of the defendant's general assets is a request for legal

ticipants' money in higher-return instruments and pocketed any returns leftover after paying participants according to the declared rates. *Id.* at 358-59. The IRS declared the transfers unlawful and the participants sued under ERISA for disgorgement of the employer's profits. *Id.* at 358. The Fourth Circuit held the participants could bring their claims under § 502(a)(3) of ERISA because they were "seek[ing] profits generated using assets that belonged to them." *Id.* at 365.

[30] In *Urakhchin*, participants in a 401(k) retirement plan sought under § 502(a)(3) to recover profits from non-fiduciary defendants who allegedly "improperly receive[d] Plan assets as profits at the expense of the Plan and its beneficiaries." 2016 WL 4507117, at *2. The court dismissed the complaint, explaining that the complaint was missing an allegation that the plaintiffs would "be able to trace the exact transactions and entities related to each fiduciary breach, and thus [that] the property is sufficiently traceable for purposes of an equitable restitution claim." *Id.* at *8.

relief rather than for equitable accounting or disgorgement of profits and cannot be awarded under § 502(a)(3).

iv. Commingled funds and traceability

If a defendant disposes of all of the particular property that allegedly should belong to the plaintiff under equitable principles, the plaintiff no longer has a specifically identifiable *res*. The Supreme Court said in *Montanile* that § 502(a)(3) does not authorize "a suit to attach the [defendant's] general assets" as a substitute for the previously identifiable property. 136 S. Ct. at 655; *see also Knudson*, 534 U.S. at 213-14. *Montanile* further recognized "that commingling a specifically identified fund—to which a lien attached—with a different fund of the defendant's did not destroy the lien. Instead, that commingling allowed the plaintiff to recover the amount of the lien from the entire pot of money." 136 S. Ct. at 661. In other words, "[t]he person whose money is wrongfully mingled with money of the wrongdoer does not thereby lose his interest in the money, . . . but he acquires an interest in the mingled fund." Restatement (First) of Restitution § 209 cmt. a (Am. Law Inst. 1937).

2. Additional Procedural Background

Because we review summary judgment based on the "materials adequately brought to the attention of the district court by the parties," *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir.1998), we recount Mr. Teets's response to Great-West's summary judgment motion. We then summarize the district court's ruling.

a. Great-West's motion for summary judgment on the non-fiduciary claim and Mr. Teets's response

Great-West's sole argument for summary judgment on Mr. Teets's non-fiduciary claim was that he did not seek "appropriate equitable relief" available under ERISA. Great-West contended that Mr. Teets was seeking "as damages the margin on Great-West's general account assets" and claimed he "[could not] point to any evidence that Great-West's general account investment returns form a specifically-identifiable *res* that properly can be traced to any plan." Aplt. App., Vol. II at 182-83.

Mr. Teets did not attempt to rebut Great-West's argument by identifying the funds in Great-West's possession that generated the alleged profits he sought to recover. In his response, Mr. Teets stated that accounting and disgorgement of profits are recognized forms of equitable relief, *id.* at 317, and that "disgorgement of profits does not require the recovered funds to be traceable to a *res* or particular funds." *Id.* at 318.

b. District court ruling

The district court started with whether equitable relief was a possible remedy for Mr. Teets's claim and whether summary judgment could be granted because it was not. It recognized that "an order to pay money, even if functionally equivalent to a judgement awarding damages, qualifies as 'appropriate equitable relief' in some ERISA cases." Aplt. App., Vol. I at 102. Citing *Knudson*, 534 U.S. at 212-21, the court explained that an accounting for profits could be one such type of monetary equitable relief. But the court ultimately declined to decide whether the relief Mr. Teets requested was equitable, pointing to the hazy "distinction between money-awarding remedies at law and money-awarding remedies in equity." *Id.* at 104.

Instead, the district court granted summary judgment for Great-West on a ground Great-West had not raised in its motion, concluding that Mr. Teets had not adduced sufficient evidence of Great-West's liability for its participation in a prohibited transaction. *Id.* at 106-08. The court rejected Mr. Teets's argument that *Salomon* required him to show only that Great-West as a party in interest had knowledge of "facts satisfying the elements" of ERISA § 406(a). *Id.* at 105-06. The court compared *Salomon*'s description of the knowledge that defendant *fiduciaries* must have to be liable—"facts satisfying the elements of a § 406(a) transaction," *Salomon*, 530 U.S. at 251—with *Salomon*'s requirement that defendant *non-fiduciary parties in interest* have knowledge of the "circumstances that render the transaction unlawful," observing that the latter "appears aimed at exploring not just knowledge of the underlying facts, but knowledge of their potential unlawfulness." Aplt. App., Vol. I at 106. Accordingly, the court concluded that Mr. Teets must prove that Great-West, as a non-fiduciary party in interest, "knew or should have known that the transaction violated ERISA." *Id.* at 107. Because Mr. Teets "ha[d] not attempted to make this showing," his claim could not survive summary judgment. *Id.*

3. Analysis

To prevail on his non-fiduciary claim, Mr. Teets must show, among other things, that he seeks equitable relief under § 502(a)(3) of ERISA. We conclude summary judgment was properly granted because Mr. Teets failed to identify the particular property in Great-West's possession over which he can "assert title or right to possession." *Knudson*, 534 U.S. at 213. He therefore failed to meet his burden to demonstrate the relief he seeks is equitable under § 502(a)(3).

a. Summary judgment standard—review of materials presented to district court

When this court reviews a district court's grant of summary judgment, "we conduct that review from the perspective of the district court at the time it made its ruling, ordinarily limiting our review to the materials adequately brought to the attention of the district court by the parties." *Adler*, 144 F.3d at 671. The district court may "go beyond the referenced portions" of the plaintiffs' evidentiary materials, "but is not required to do so." *Id.* at 672.

This court also may "more broadly review the record on appeal," but we ordinarily do not do so because "we, like the district courts, have a limited and neutral role in the adversarial process, and are wary of becoming advocates who comb the record of previously available evidence and make a party's case for it." *Id.*; *see SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1513 (10th Cir. 1990) (holding that the court of appeals "need not 'sift through' the record to find [the appellant's] evidence" in the absence of citations in the appellant's brief). "Thus, where the burden to present such specific facts by reference to exhibits and the existing record was not adequately met below, we will not reverse a district court for failing to uncover them itself." *Adler*, 144 F.3d at 672.

b. Waiver of request for injunction

Mr. Teets did not preserve an argument that his amended complaint's request for an injunction satisfies § 502(a)(3)'s allowance for suits seeking "to enjoin any act or practice" that violates ERISA. 29 U.S.C. § 1132(a)(3). His amended complaint asked the court to "[e]njoin Defendant from further prohibited transactions," Aplt. App., Vol. I at 38, which appears to satisfy § 502(a)(3). But Mr. Teets failed to rely on this remedy to overcome summary judgment.

Mr. Teets has not mentioned injunctive relief in any filing since the amended complaint. When prompted by Great-West's motion, he relied on other remedies—namely, accounting and disgorgement of profits. Great-West's motion stated not only that Mr. Teets could not satisfy the "appropriate equitable relief" standard, but also that "the relief Plaintiff seeks is not available under [§ 502(a)(3)]" at all. Aplt. App., Vol. II at 181. In response, Mr. Teets did not mention an injunction, instead asserting only that he sought "Appropriate Equitable Relief," and even quoting that distinct portion of the statute. *Id.* at 316-17.

Even if Mr. Teets had done enough in the district court to preserve his argument that his request for an injunction satisfied § 502(a)(3), he has abandoned any such argument on appeal. In this court, Mr. Teets argues that "ERISA provides [him] a remedy for Great-West's violation," but he never mentions the injunction. Aplt. Br. at 50. He explains, "Restitution of property and disgorgement are the central remedies Mr. Teets seeks here." Aplt. Reply Br. at 26.[31]

Thus, although § 502(a)(3) authorizes injunctive relief, Mr. Teets did not rely on this form of relief to contest summary judgment, and he does not even do so on appeal. He has waived this basis to overcome summary judgment. *See Tran v. Trs. of State Colls. in Colo.*, 355 F.3d 1263, 1266 (10th Cir. 2004) ("Issues not raised in the opening brief are deemed abandoned or waived." (quotations omitted)); *see also Paycom Payroll, LLC v. Richison*, 758 F.3d 1198, 1203 (10th Cir. 2014) (holding appellant had waived challenge to one element of copyright infringement claim by urging district court to rule on a separate element).

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[31] The reply brief elaborates on the remedies Mr. Teets sought in the district court, but injunctive relief is conspicuously absent: "Great-West claims Mr. Teets sought only an accounting for profits below. This is incorrect: he also specifically requested 'disgorge[ment],' 'constructive trust,' 'equitable lien,' and 'restitution.'" Aplt. Reply Br. at 26 n.11 (alteration in original) (citation omitted) (quoting Aplt. App., Vol. I at 38).

c. Failure to specify particular profit-generating property

Mr. Teets's amended complaint requested monetary relief in the form of (1) disgorgement of the profits Great-West obtained through knowing participation in prohibited transactions; (2) imposition of a constructive trust or equitable lien on funds Great-West received through those transactions; and (3) "other appropriate equitable relief," including restitution and an accounting for profits. Aplt. App., Vol. I at 38.

As discussed above, to be eligible for "appropriate equitable relief" in the form of restitution, Mr. Teets must show that Great-West possesses particular property that rightfully belongs to him. *Knudson*, 534 U.S. at 213. For an accounting or disgorgement of profits, he still must show that Great-West possesses particular property over which he can "assert title or right to possession," though the profit generated from the property need not be contained in a specifically identifiable *res*. *See id.* at 213, 214 n.2.

Great-West may possess such "particular property," but Mr. Teets failed to identify any such property in his response to Great-West's summary judgment motion. *Id.* at 213. In its motion, Great-West argued that the report prepared by Mr. Teets's damages expert showed that Mr. Teets sought "as damages the margin on Great-West's general account assets." Aplt. App., Vol. II at 182. Great-West asserted that Mr. Teets "[could not] point to any evidence that Great-West's general account investment returns form a specifically-identifiable *res* that properly can be traced to any plan." *Id.* at 183. In response, Mr. Teets did not attempt to identify the funds in Great-West's possession that rightfully belonged to him—that is, the funds that generated the unlawful profits he sought to recover. Instead, he made a legal argument that "disgorgement of profits does not require the recovered funds to be traceable to a *res* or particular funds." *Id.* at 318. As explained below, his legal argument was wrong.

As a result, the district court was left to guess what particular property Mr. Teets would assert (1) rightfully belonged to him and (2) was used to generate unlawful profits. It might have been, to borrow Great-West's phrasing, the "amounts [participants] contributed to the plans," which are "automatically credited to the accounts of individual participants." *Id.* at 167. Or it might have been, as the district court assumed, "the margin Defendant earned on Fund contributions." Aplt. App., Vol. I at 103. It could also have been any "compensation" Great-West retained beyond an amount that was "reasonable" in relation to its services under ERISA § 408(b). *See* Aplt. Br. at 45-50; 29 U.S.C. § 1108(b)(2). But Mr. Teets neither identified the property or *res* nor explained why it would qualify for equitable relief.

d. Mr. Teets's arguments fail

Mr. Teets's primary argument, both in the district court and on appeal, *see* Aplt. App., Vol. II at 318, is that ERISA does not require him to point to a specific *res* to be eligible for disgorgement as an equitable remedy. First, he contends that *Salomon* "endorsed" disgorgement of profits as an equitable remedy under ERISA.

Aplt. Br. at 51-52. Second, he argues that trust law treatises and restatements confirm that accounting and disgorgement of profits are equitable remedies, even without an identifiable *res*. *Id.* at 52-53. He states, "[W]hen a third-party transferee takes with knowledge of the breach"—here, when Great-West participates in a prohibited transaction—"'the seller takes the purchase money subject to the trust and can be compelled to restore it.'" *Id.* at 52 (quoting Austin W. Scott & William F. Fratcher, *Law of Trusts* § 291.1 (4th ed. 1989)). Furthermore, under such a framework, if "the transferee has disposed of the property, the beneficiary can charge him with *the value* of the property." *Id.* (quoting Scott & Fratcher, § 291.2); *accord* Restatement (Second) of Trusts § 291 (Am. Law Inst. 1959). Mr. Teets thus contends that he may sue Great-West for any funds Great-West obtained through its participation in a prohibited transaction, including profits, and can recover a "*money judgment* as to the balance," even if it is not identifiable. Aplt. Br. at 53 (quoting George G. Bogert, George T. Bogert & Amy Morris Hess, *Law of Trusts & Trustees* § 868 (2018)).

Mr. Teets's argument overlooks how the Supreme Court has limited the remedies available under § 502(a)(3). As stated above, the fact that equity courts at common law could award a particular remedy does not mean the remedy is necessarily equitable for purposes of ERISA. Rather, "legal remedies—even legal remedies that a court of equity could sometimes award—are not 'equitable relief' under§ 502(a)(3)." *Montanile*, 136 S. Ct. at 661.

Mr. Teets relies on authorities that discuss what remedies an equity court could award for a breach of trust, not whether those remedies are legal or equitable in nature. As the *Salomon* Court stated:

> [W]hen a trustee in breach of his fiduciary duty to the beneficiaries transfers trust property to a third person, the third person takes the property subject to the trust . . . . The trustee or beneficiaries may . . . maintain an action for restitution of the property (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of the third person's profits derived therefrom.

530 U.S. at 250. But unless the profits Mr. Teets seeks to recover were generated from particular property over which Mr. Teets can "assert title or right to possession," *Knudson*, 534 U.S. at 213, an order to disgorge them is a legal remedy, even if a court sitting in equity would have had jurisdiction to order that remedy. And a legal remedy is not allowed under § 502(a)(3).

Mr. Teets also argues that his attempt to recover from the commingled profits in Great-West's general account does not bar equitable relief. This assertion, however, skips a critical step to establish appropriate equitable relief under § 502(a)(3)—namely, identifying the property that Great-West has commingled with its other assets. He has not specified the assets he alleges were commingled with Great-West's general account to generate the profits he seeks to disgorge, which is fatal to his claim under § 502(a)(3). *See In re Unisys Corp.*, 579 F.3d at 238 (holding that because "plaintiffs [were] unable to identify 'money or property . . . belonging in good conscience' to them and clearly 'trace[able] to particular funds or property in the defendant's possession,' they [could not] recover profits from [defendants] as a form of equitable relief." (second and third alterations in original) (citation omitted) (quoting *Knudson*, 534 U.S. at 213)). As a result, summary judgment was proper.

III. Conclusion

Great-West was entitled to summary judgment on both the fiduciary and nonfiduciary claims. Because Mr. Teets has not provided evidence that contractual restrictions on withdrawal from the KGPF actually constrained plans or participants, Great-West does not act as an ERISA fiduciary when it sets the KGPF's Credited Rate each quarter. As a result, it also lacks sufficient authority or control over its compensation to render it a fiduciary. As to liability as a party in interest, Great-West was entitled to summary judgment because Mr. Teets failed in the district court to carry his burden of showing that the relief he sought was equitable.[32]

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[32] Because we affirm the grant of Great-West's summary judgment motion, we also conclude the district court properly denied Mr. Teets's motion for summary judgment. *See Phila. Indem. Ins. Co. v. Lexington Ins. Co.*, 845 F.3d 1330, 1336 n.4 (10th Cir. 2017).

We grant the parties' motions to seal their appellate briefs and appendices in light of their submission at the court's request of publicly-available redacted versions of those filings.

Teets v. Great-West Life & Annuity Insurance Co., No. 18-1019 BACHARACH, J., concurring.

I join virtually all of the majority's thoughtful and persuasive opinion. I respectfully disagree only with the majority's analysis in Part II(A)(3)(a)(ii), which discusses the policy that allegedly prohibits plan sponsors from offering other low-risk funds alongside Great-West's own Key Guaranteed Portfolio Fund ("KGPF"). *See* Maj. Op. at 29–32. Although I agree that Great-West is entitled to summary judgment on these claims, I do not believe that Mr. Teets bore the burden to present the evidence discussed in the majority opinion.[1]

1. Mr. Teets had no burden to allege specific facts to counter a basis for summary judgment that Great-West had not raised.

The majority reasons that Mr. Teets failed to set forth specific facts showing that participants had been forced to accept a credited interest rate or had felt locked into the KGPF. But Great-West had not moved for summary judgment on this basis.

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[1] The majority also notes that Mr. Teets can point to no case "in which a court has deemed a service provider to be a fiduciary based on participants' lack of alternative investment options, or on anything other than imposing a penalty or fee for withdrawal." Maj. Op. at 31. I too have found no such case. But I also have not found any cases rejecting participant choice as a theory of liability. So this appears to be a question of first impression. The absence of case law on this theory suggests only that it is novel, not that it should be rejected.

A nonmovant opposing summary judgment is "obligated only to present evidence opposing the arguments made in the respondents' summary judgment motion." *Bonney v. Wilson*, 817 F.3d 703, 710 (10th Cir. 2016). This obligation arises only when the nonmovant is "alerted by the [moving party] below that such evidence had to be shown in order for her to avoid summary judgment." *Tavery v. United States*, 32 F.3d 1423, 1427 n.5 (10th Cir. 1994); *see id.* ("When a party moves for summary judgment on ground A, his opponent is not required to respond to ground B—a ground the movant might have presented but did not." (quoting *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989))). When a nonmovant lacked such an obligation in district court, it is "unfair" to rely on the absence of supporting evidence as a basis for summary judgment. *Bonney*, 817 F.3d at 710. To do so would amount to an entry of summary judgment *sua sponte*, which is appropriate only when the non-moving party was "on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).

I don't think that Mr. Teets received such notice. In its motion for summary judgment, Great-West did not argue that Mr. Teets lacked evidence that he or other participants had felt restricted or that they would have invested in alternative low-risk funds but for Great-West's noncompete policy. Great-West instead urged

- the absence of a contractual provision that prohibited the offering of competitive funds (*see* Appellant's App'x, vol. II, at 353) and

- a marketplace theory of nonliability (that plan sponsors—not Great-West—are responsible for choosing the funds to offer) (*id.* at 155).

Thus, I would not fault Mr. Teets for failing to present evidence on how the non-compete policy had affected participants' behavior.

2. Great-West does not incur a fiduciary duty based on the plan sponsor's decision to offer the KGPF even if the plan sponsor's decision would have prevented the offering of competitive funds.

I would instead affirm the grant of summary judgment based on Great-West's marketplace theory of nonliability. In advancing this theory, Great-West argued that although it could decide on the terms that it would be "willing to offer an investment product, it [could not] compel the plan to accept the investment option on those terms over alternatives available in the marketplace." Appellant's App'x, vol. II, at 160. As a result, Great-West contended that it could not incur a fiduciary duty for a plan sponsor's decision to offer the KGPF rather than competing funds.

I agree with Great-West. As alleged by Mr. Teets, the policy serves only to prevent plan sponsors from offering the KGPF if competing funds are also offered;[2] the alleged policy does not affect the availability of Great-West's general investment platform if the plan sponsor

[2] Although the record does not reveal the origin of the non-compete policy, Mr. Teets has not alleged that Great-West imposes the policy without the plan sponsors' knowledge and consent.

had chosen to offer competing funds in lieu of the KGPF. So if plan sponsors decide that the KGPF is uncompetitive because of its credited interest rate or the noncompete policy, plan sponsors can freely replace the KGPF with other comparable investment options.

Mr. Teets responds that Great-West acts as a fiduciary because he cannot personally choose between the KGPF and other competing low-risk funds. But this response blames Great-West for the decision-making of Mr. Teets's plan sponsor. Plan sponsors need not offer participants (1) multiple funds in the same asset class or (2) any stable-value fund.[3] Thus, Mr. Teets's theory assumes that plan sponsors would choose to offer competing funds in the absence of the alleged policy.

Even if this theory were otherwise valid, Mr. Teets has not alleged that his plan sponsor would make this choice. Great-West urged summary judgment by asserting that plan sponsors are solely responsible for choosing appropriate portfolios and that Mr. Teets's plan sponsor had selected the funds based on "independent recommendation and/or evaluation." Appellant's App'x, vol. II, at 155. In response, Mr. Teets contended that his plan sponsor couldn't offer competing funds alongside the KGPF,

[3] In a regulation interpreting ERISA, the Department of Labor defines plan sponsors' responsibility to offer at least three investment options with "materially different risk and return characteristics" that "enable the participant or beneficiary by choosing among them to achieve a portfolio with aggregate risk and return characteristics at any point within the range normally appropriate for the participant or beneficiary." 29 C.F.R. § 2550.404c-1(b)(3)(i)(B).

but this contention does not address whether his plan sponsor wanted to offer competitors' funds.

Mr. Teets assumes that plan sponsors would act as he wishes; but plan sponsors are not parties, and Mr. Teets points to no evidence that Great-West influences plan sponsors' selection of investments. Mr. Teets has thus failed to set forth specific facts contesting Great-West's argument for summary judgment based on a marketplace theory of nonliability. *Celotex Corp.*, 477 U.S. at 324.

Mr. Teets instead complains that his plan sponsor offered the KGPF by itself rather than include other competitive funds. But Great-West cannot become a fiduciary based on the plan sponsor's selection of investment options. I would thus reject Mr. Teets's effort to pin fiduciary status on Great-West's conditioning of its offer to the plan sponsor.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martinez

Civil Action No. 1:14-CV-02330-WJM-NYW

John Teets

Plaintiffs-Appellants

v.

Great-West Life & Annuity Insurance Company

Defendants-Appellees

ORDER ON PENDING MOTIONS

Plaintiff John Teets ("Plaintiff") brings this lawsuit against Defendant Great-West Life & Annuity Insurance Company ("Defendant") for Defendant's alleged breaches of its various duties under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq*. The Court has certified this lawsuit as a class action encompassing all participants in, and beneficiaries of, certain retirement plans that had invested in a particular stable-value fund offered by Defendant (described in detail below). *See Teets v. Great-West Life & Annuity Ins.*

Co., 315 F.R.D. 362, 374 (D. Colo. 2016) ("*Teets II*"). Generally speaking, Plaintiff claims that Defendant has profited from this fund in a manner that violates ERISA.

Currently before the Court is Defendant's Motion for Summary Judgment (ECF No. 181 (public entry); ECF No. 169 (supporting brief under Restricted Access)), and also Plaintiff's Motion for Partial Summary Judgment (ECF No. 182 (public entry); ECF No. 175 (supporting brief under Restricted Access)). Defendant has filed an unopposed motion for oral argument on the parties' motions for summary judgment. (ECF No. 217.) The Court finds, however, that the parties' six merits briefs, along with a submission of supplemental authority (ECF No. 241), an amicus brief (ECF No. 178-1), and a response to the amicus brief (ECF No. 208), are more than enough to assist the Court in making its decision. Thus, the oral argument motion will be denied.

As for the motions themselves, Defendant's will be granted and Plaintiff's denied for the reasons explained below. The fourth pending motion in this case, Defendant's Motion to Decertify Class (ECF No. 180 (public entry); ECF No. 164 (supporting brief under Restricted Access)), will accordingly be denied as moot.[1]

[1] Most of the briefs and exhibits filed in support of or opposition to the various motions have been filed under Restricted Access. In this order, the Court has endeavored to respect trade secrets. Nonetheless, having weighed the parties' confidentiality interests against the public's right of access, the Court finds that any Restricted material quoted or summarized below does not qualify for Restricted Access to

I. Facts

The following facts are undisputed unless attributed to a party, or otherwise noted.

Plaintiff, a California resident, was a participant in the Farmers' Rice Cooperative 401(k) Savings Plan ("Plan"), a retirement plan sponsored by the Farmer's Rice Cooperative. (ECF No. 169 at 11, ¶¶ 1–2.)[2] The Plan contracted with Defendant for Defendant's recordkeeping, administrative, and investment services. (*Id.* at 17, ¶ 30.) The named fiduciaries of the Plan ("Plan Fiduciaries"), who are not parties to this lawsuit, selected the investment options available to Plan participants such as Plaintiff. (*Id.* ¶ 32.) The Plan Fiduciaries selected, in total, twenty-nine investment options with a variety of risk and return characteristics. (*Id.* ¶ 33.)

One of the investment options made available to Plaintiff and other Plan participants, and in which Plaintiff invested, was the Great-West Key Guaranteed Portfolio Fund ("Fund"). (*Id.* at 18, ¶ 34.) As the Fund's full name

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the extent quoted or summarized, particularly given the need to provide a proper, publicly available explanation of the Court's decision. *See* D.C.COLO.LCivR 7.2; *cf. Lucero v. Sandia Corp.*, 495 F. App'x 903, 913 (10th Cir. 2012) ("The strongest arguments for [public] access [to court records] apply to materials used as the basis for a judicial decision of the merits of the case, as by summary judgment." (internal quotation marks omitted)).

[2] All ECF page citations are to the page number in the ECF header, which does not always match the document's internal pagination, particularly in documents with prefatory material such as a table of contents.

suggests, it is operated by Defendant. (*Id.* at 12, ¶ 7.) Formally speaking, the Plan entered into "a Group Fixed Deferred Annuity Contract" ("Contract") with Defendant, which establishes the terms on which Defendant offers the Fund to, and administers contributions to the Fund for, the Plan and its participants. (ECF No. 175 at 7, ¶ 2; *see generally* ECF No. 179-1.) The major features of the Fund, as provided for in the Contract, are as follows:

- A guarantee to preserve principal and, once earned, interest. (ECF No. 169 at 12–14, ¶¶ 8–9, 13, 16.)
- An interest rate, not to drop below 0%, that Defendant determines ahead of each coming quarter and then guarantees for the duration of that quarter ("Credited Rate"). (Id. ¶¶ 9–10, 12; ECF No. 179-1 at 15.)
- No fees or charges assessed against participants who withdraw any portion of their Fund balances (principal and/or accrued interest) at any time, including in the middle of a quarter. (ECF No. 169 at 13–14, ¶¶ 15–16.)
- The Plan's ability to leave the Fund (i.e., cease to offer it as an investment option to participants) without any surrender charge or market-value penalty, with the caveat that Defendant can delay transferring the Plan's Fund balance to the Plan

> for up to one year. (Id. at 14, ¶ 19.)[3] During this one year, Plan participants may still withdraw their individual balances without fees or charges. (Id.)

In addition, although apparently not required by the Contract, Defendant has always announced the coming quarter's Credited Rate two business days in advance of that quarter. (*Id.* at 12, ¶ 11.)

Defendant has always fulfilled the Fund's guarantees. Investors have never suffered a loss of principal on their monies allocated to the Fund, and Defendant has always credited Fund participants with the Credited Rate. (*Id.* at 14, ¶¶ 17–18.) During the time period relevant to this lawsuit, the Credited Rate has been as high as 3.55% and as low as 1.1%. (*Id.* at 18, ¶ 38.)

Although every Plan participant invested in the Fund owns his or her individual Fund balance, participants' contributions are not maintained in segregated accounts. Rather, Defendant deposits those contributions into its general account, *i.e.*, the account from which it satisfies all obligations to holders of all policies, be they traditional life insurance policies, investment contracts such as the Fund, or otherwise. (*Id.* at 14–15, ¶¶ 21–22.) Defendant

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[3] Plaintiff notes that some retirement plans offer the Fund with a contract rider that allows the plan to terminate and obtain the entire plan balance immediately, subject to a market value charge. (ECF No. 193 at 7, ¶ 19 and cited evidence.) No party points to such a rider in the Contract at issue here.

invests its entire general account in fixed income instruments and seeks to earn a return on those investments. (*Id.* ¶ 22.)

Fund contributions are considered a part of what Defendant calls the "MLTN portfolio," which is not a separate account but rather "an 'internal allocation of assets'" that Defendant uses to track the yield on investments made with Fund contributions and contributions to related products. (ECF No. 175 at 7–8, ¶¶ 7–8.) Defendant attempts to earn revenue for itself on the MLTN portfolio. (*Id.* at 8, ¶ 15.)

After deducting expenses of offering the portfolio products, the Credited Rate is the most significant factor in determining whether Defendant will realize revenue for itself on the MLTN portfolio. (*Id.* ¶ 13.) This revenue—the difference between the portfolio's net investment yield and the Credited Rate—is known as the "margin" or the "spread." (*Id.* ¶ 14.) Defendant sets the Credited Rate with an eye toward the margin it will earn based on that Credited Rate (*id.* at 12, ¶ 37), although it considers other factors as well, such as competitors' rates and other budget targets (*id.* at 13–14, ¶¶ 40, 43).

Although apparently not a feature of the Contract, Plaintiff claims that Defendant in practice prohibits retirement plans that offer the Fund from offering any fund that Defendant deems to be competing, such as another stable-value fund. (ECF No. 193 at 16, ¶ 26.)

II. Legal Standard

Summary judgment is warranted under Federal Rule of Civil Procedure 56 "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986). A fact is "material" if, under the relevant substantive law, it is essential to proper disposition of the claim. *Wright v. Abbott Labs., Inc.*, 259 F.3d 1226, 1231–32 (10th Cir. 2001). An issue is "genuine" if the evidence is such that it might lead a reasonable trier of fact to return a verdict for the nonmoving party. *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997).

In analyzing a motion for summary judgment, a court must view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In addition, the Court must resolve factual ambiguities against the moving party, thus favoring the right to a trial. *See Houston v. Nat'l Gen. Ins. Co.*, 817 F.2d 83, 85 (10th Cir. 1987).

III. Analysis

Plaintiff asserts three claims for relief. Claims One and Two are inapplicable to Defendant unless Defendant is an ERISA fiduciary. (*See* ECF No. 47 ¶¶ 34–49.) Claim Three is potentially applicable regardless of whether Defendant is an ERISA fiduciary. (*See id.* ¶¶ 50–57.) Plaintiff has moved for summary judgment on the question of liability as to all three claims, and has also moved against all of Defendant's affirmative defenses, leaving only damages for trial. Defendant has cross-moved for summary judgment on all three of Plaintiff's claims.

The analysis below will first address whether Defendant is an ERISA fiduciary (Part III.A), and then whether Defendant may still be liable as a nonfiduciary (Part III.B).

A. Fiduciary Liability

1. The GBP Exception

a. In General

At the center of Claims One and Two is the allegation that Defendant failed to comply with ERISA's requirements for fiduciaries of plan assets. Under ERISA, a person is a "fiduciary with respect to a[n employee benefit] plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets * * * or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). A fiduciary is required to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and * * * for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan . . . ." *Id.* § 1104(a)(1)(A).

Defendant's primary summary judgment argument is that it is not a fiduciary with respect to the Fund because ERISA contains an exemption for a "guaranteed benefit policy" ("GBP"), meaning "an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer." 29 U.S.C. § 1101(b)(2)(B). The GBP exemption itself reads as follows: "In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer." *Id.* § 1101(b)(2). Defendant believes that Fund investments satisfy the GBP exemption, and so, in Defendant's view, it has no fiduciary responsibility toward Plaintiff when administering the Fund.

For reasons explained below, Defendant is correct that the Fund is a GBP. However, Defendant vastly overstates the scope of the GBP exemption. Thus, the Fund's status as a GBP turns out to be irrelevant.

b. The Court's Decision on this Question at the Motion-to-Dismiss Phase

Defendant's argument that the Fund enjoys GBP status largely tracks the argument it advanced in a Rule 12(b)(6) motion at the outset of this case. (*See* ECF No. 22.) The Court denied that motion, reasoning that it raised "questions of fact more appropriate for consideration on summary judgment." *Teets v. Great-West Life & Annuity Ins. Co.*, 106 F. Supp. 3d 1198, 1203 (D. Colo. 2015) ("*Teets I*"). Although not spelled out in detail in the

Court's opinion, the parties' cited case law convinced the Court that this case could turn on how Defendant administered the Contract in practice, regardless of its terms. *See, e.g.*, *Assocs. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 567 (7th Cir. 1991) ("*Adolescent Psychiatry*"); *Ferry v. Mut. Life Ins. Co. of New York*, 868 F. Supp. 764, 770 (W.D. Pa. 1994).

Through discovery, the parties have now developed evidence of Defendant's practices. Thus, it is appropriate to revisit Defendant's Rule 12(b)(6) argument, now re-urged through its summary judgment motion.

c. *Application of* Harris Trust *to Facts as Developed through Discovery*

The Supreme Court's most instructive case regarding the GBP exception is *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86 (1993) ("*Harris Trust*"). Again, a GBP is "an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer." 29 U.S.C. § 1101(b)(2)(B). "Notably," the Supreme Court said of this definition, "the [GBP] exemption is not available to 'any' insurance contract that provides for guaranteed benefits but only 'to the extent that' the contract does so." *Harris Trust*, 510 U.S. at 97. Thus, a contract's various "component parts" often must be examined separately to understand whether each one meets the GBP test. *Id.* at 102. "A component fits within the [GBP] exclusion," the Supreme Court held, "only if it allocates investment risk to the insurer. Such an allocation is present when the insurer provides a genuine guarantee of an aggregate amount of benefits payable to retirement plan participants and their beneficiaries." *Id.* at 106. As to any component of a contract governing

> funds in excess of those that have been converted into guaranteed benefits[,] these indicators are key [to determining whether the investment risk rests on the insurer]: the insurer's guarantee of a reasonable rate of return on those funds and the provision of a mechanism to convert the funds into guaranteed benefits at rates set by the contract.

Id.

The undisputed facts regarding the Contract's terms, and regarding Defendant's actual performance under the Contract, show that the Contract allocates investment risk to Defendant because Defendant provides a genuine guarantee of benefits payable to plan participants. In particular, the Contract genuinely guarantees the all principal contributed by Plan participants and all earned interest (which is credited daily). Moreover, the Contract genuinely guarantees the Credited Rate for the quarter in which the Credited Rate is operative. As to that latter feature specifically, the Contract "resemble[s] nothing so much as a series of fixed annuities, each one [quarter] in duration." *Adolescent Psychiatry*, 941 F.2d at 567.[4] Thus, Defendant bears the risk of market fluctuations that might reduce the value of, or the interest generated from, the securities into which Fund money is invested. Plan participants bear none of this risk. Consequently, the Contract, at least as to the foregoing components, is a GBP.

2. Discretion to Set the Credited Rate

Ultimately, however, the GBP exception does not get Defendant where it wants to go. That is because the exception, by its terms, is quite limited: "In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer." 29 U.S.C. § 1101(b)(2). Admittedly it may take several readings to understand this opaque language, but

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[4] In the Court's order on Defendant's Rule 12(b)(6) motion, the Court noted Defendant's heavy emphasis on *Adolescent Psychiatry* but stated, "While persuasive, [*Adolescent Psychiatry*] predates *Harris Trust*, and is not binding in this Circuit. Instead, the Court must decide this case under binding Supreme Court precedent." *Teets I*, 106 F. Supp. 3d at 1203 n.2. Having thoroughly reviewed *Adolescent Psychiatry* again in this summary judgment posture, the Court is convinced that the Seventh Circuit was applying essentially the same test that the Supreme Court later endorsed in *Harris Trust*, namely, an examination of which party principally bears the investment risk. This Court cannot say whether the Supreme Court would have agreed with the Seventh Circuit's application of that test to the facts before it, but the Seventh Circuit at least engaged in the correct inquiry. Even so, *Adolescent Psychiatry* does not go as far as Defendant wishes. *See infra* n.8.

the meaning eventually becomes clear, particularly with the background understanding that life insurers have generally placed the proceeds used to purchase annuities into their general accounts, investing that money alongside all other money the life insurer has received:

> [T]he serious ramifications of classifying general account assets as [ERISA] plan assets are quite clear.
>
> As a fiduciary, a life insurance company would be required under ERISA to manage its [entire] general account . . . solely in the interest of participants and beneficiaries of employee benefit plan contractholders and for the exclusive purpose of providing benefits to such participants and beneficiaries. However, . . . the assets in the general account are derived from all classes of an insurer's business (i.e., life insurance, health insurance and annuities), and the principal functions which an insurer must perform in managing its business (the selection and control of risks, the investment and management of assets to support obligations with respect to such risks, and the distribution and allocation of surplus among policyholders) require the insurer to consider the interests of all of its contract holders, creditors and shareholders. Therefore, the application of ERISA's exclusive benefit rule would place an insurer in an untenable position of divided loyalties. Indeed, such a standard of conduct would directly

> conflict with the scheme of state insurance regulation which is designed to assure that an insurer maintain equity among its various constituencies.

Stephen H. Goldberg & Melvyn S. Altman, *The Case for the Nonapplication of ERISA to Insurers' General Account Assets*, 21 Tort & Ins. L.J. 475, 476–77 (1986) ("Goldberg & Altman") (footnotes omitted). The GBP exception was thus "intended to free insurance companies from the potential conflict between managing plan assets for the benefit of participants and beneficiaries, on one hand, and, on the other, the operation of the insurer's general account which requires the equitable spreading of risks among all policy holders." *Mogel v. UNUM Life Ins. Co. of Am.*, 547 F.3d 23, 27 (1st Cir. 2008).[5]

Parsing this out, then, the only effect of the GBP exception, if it applies, is to free the insurer from the requirement to manage its general account solely for the benefit of ERISA plan participants whose contributions reside in the general account. Stated differently, the GBP exception essentially prohibits a plaintiff from claiming

[5] Plaintiff criticizes this portion of *Mogel* because it relies on a district court decision that in turn relies on the Goldberg & Altman article, which Plaintiffs says was "presented to and rejected by the Supreme Court in *Harris Trust*." (ECF No. 206 at 14 n.10.) But the Supreme Court only rejected certain of Goldberg & Altman's interpretations of potentially ambiguous language regarding the GBP exception, and certain policy arguments found in that article. The Supreme Court did not reject Goldberg & Altman's basic statement of the purpose of the GBP exception. Goldberg & Altman and *Mogel* are actually helpful to Plaintiff in that regard.

that the insurer breached its fiduciary duty by making imprudent choices when investing plan participants' contributions. But the contract by which the insurer obtained those contributions remains a part of the plan, and the insurer may still have fiduciary responsibilities in administering that contract. *See id.* (the GBP exception "does not alter the fiduciary duties imposed on an insurer with respect to the management and administration of a plan as opposed to the oversight of investment policy").

a. Discretion as to Credited Rate Itself

Plaintiff claims, correctly, that regardless of the GBP exception, the Contract is still part of the Plan and Defendant may have fiduciary responsibilities when it makes discretionary decisions regarding the Contract, such as setting the Credited Rate. (ECF No. 175 at 20–24.) To this, Defendant responds that the decision to set the Credited Rate is not an instance of "discretionary authority," "discretionary . . . control," or "discretionary responsibility" that would trigger ERISA fiduciary status. *See* 29 U.S.C. § 1002(21)(A)(i) & (iii). This is so, according to Defendant, because it does not have "the 'final say'" on whether the Credited Rate will actually apply given that participants can withdraw their money from the Fund at any time without fees or charges. (ECF No. 189 at 24–28.)

ERISA, by its terms, does not appear to turn on which party has the "final say." Rather, it speaks in terms of exercising "authority" or "control" or "responsibility," which—in some sense—Defendant undoubtedly does when it sets the Credited Rate. But Defendant is correct that there are a number of cases favoring the theory that a pre-announced rate of return prevents fiduciary status from attaching to the decision regarding the what rate to set, at least when the plan and/or its participants can "vote with their feet" if they dislike the new rate.[6]

The first such case is *Chicago Board Options Exchange, Inc. v. Connecticut General Life Insurance Co.*, 713 F.2d 254 (7th Cir. 1983) ("*CBOE*"). There, the insurance company administered a "Guaranteed Account" that, similar to the Fund, guaranteed principal and credited interest at a rate announced in advance. *Id.* at 256. The insurance company later decided to exercise unilateral authority under its contract to force participants to transfer their contributions from the Guaranteed Account into a new "Guaranteed Account B." *Id.* The amount of those forced transfers was 10% of the Guaranteed Account balance each year for the next ten years, which corresponded with another contractual provision that allowed the insurance company to prevent further withdrawals after 10% of an account had been withdrawn in a single year. *Id.* The plaintiff believed that the insurance company had intentionally set up Guaranteed Account B and mandated 10% transfers to trigger the withdrawal restriction and more-or-less freeze the guaranteed funds for the benefit of the insurance company. *Id.*

The plaintiff sued, arguing that the insurance company had breached its fiduciary duties under ERISA by

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[6] As will become clear below, none of these cases arises from the Tenth Circuit. The parties have not cited, nor has the Court located, any relevant Tenth Circuit authority on this question—or, for that matter, any substantive question raised in the parties' briefs.

unilaterally amending the contract in favor of the insurance company. The Seventh Circuit's held that the plaintiff had stated a viable ERISA claim, and in the process created a distinction on which Defendant now relies:

> For our purposes the relevant question is whether the power to amend the contract constitutes the requisite "control respecting . . . disposition of [plan] assets." 29 U.S.C. § 1002(21)(A). Had [the plaintiff] simply given Plan assets to [the insurance company] and said, "Invest this as you see fit and we will use the proceeds to pay retirement benefits," [the insurance company] would clearly have sufficient control over the disposition of Plan assets and be a fiduciary under ERISA. *Because [the insurance company] guaranteed the rate of return in advance for the Guaranteed Accounts, that is not the case here.* Nevertheless, the policy itself is a Plan asset, and [the insurance company's] ability to amend it, and thereby alter its value, is not qualitatively different from the ability to choose investments. By locking [the plaintiff] into the Guaranteed Accounts for the next 10 years [the insurance company] has effectively determined what type of investment the Plan must make. In exercising this control over an asset of the Plan, [the insurance company] must act in accordance with its fiduciary obligations.

Id. at 260 (emphasis added; certain citations omitted). The clear import of the italicized language is the assumption that announcing the rate of return in advance excuses the insurance company from fiduciary responsibilities as to that rate, and that such discretion over a pre-announced rate of return is *not* equivalent to amending the contract, nor qualitatively the same as the ability to choose investments.

The next helpful decision is *Midwest Community Health Service, Inc. v. American United Life Insurance Co.*, 255 F.3d 374 (7th Cir. 2001). Somewhat similar to *CBOE*, the insurance company in *Midwest Community* had contractual authority to make unilateral changes to certain aspects of the retirement plan. *Id.* at 375. Also, if the plan sponsor wanted to terminate the insurance company, it would be assessed certain charges and "adjustments" to the plan balance. *Id.* Eventually, the insurance company exercised its unilateral authority in a way that displeased the plan sponsor, and the sponsor sued, claiming that the ability to unilaterally amend the contract was an act that must comport with ERISA fiduciary standards. *Id.* at 375–76. Citing *CBOE*, among other cases, the Seventh Circuit agreed: "Here, [the insurance company] exercised its discretionary authority to amend the [relevant contract] and altered the contract's value." *Id.* at 379. By negative implication, then, *Midwest Community* affirms that a seemingly discretionary decision under a contract with different features (such as the supposition in *CBOE* regarding pre-announced interest rates) might not be subject to fiduciary requirements.

Another useful decision is *Charters v. John Hancock Life Insurance Co.*, 583 F. Supp. 2d 189 (D. Mass. 2008). In *Charters*, the insurance company controlled which investment options would be made available to plan participants, and in particular, had the authority to force a substitution—*i.e.*, to transfer all investments in one fund to a different fund. *Id.* at 198. The insurance company argued that it was not a fiduciary when forcing those substitutions because the plan sponsor could reject that substitution. *Id.* The district court disagreed because the sponsor's only real way to reject a substitution would be to terminate the relationship with the life insurance company and find a different administrator. *Id.* at 198–99. Moreover, in choosing to terminate, the sponsor would be subject to a termination fee and various administrative charges. *Id.* at 199. "Because of the built-in penalties, [the sponsor] did not have *a meaningful opportunity to reject substitutions*," and the insurance company was therefore not relieved of fiduciary status when making substitutions. *Id.* (emphasis added). *Charters*, by negative implication, supports Defendant's position that a meaningful opportunity to reject a decision removes that decision from ERISA scrutiny.

The decision that most clearly favors Defendant is *Zang v. Paychex, Inc.*, 728 F. Supp. 2d 261 (W.D.N.Y. 2010). This was another case about service provider's[7] allegedly unilateral control over investment options made

[7] The defendant in *Zang* was not a life insurance company, but provided the same services as the life insurance companies in the cases discussed above.

available to plan participants. *Id.* at 262–64. The district court found, however, that the service provider was contractually required to give the plan sponsor at least sixty days' notice of a proposed change in that regard, and a right to reject the change or terminate the agreement. *Id.* at 271. In practice, the right to reject really only amounted to a right to terminate and move the plan's business elsewhere. *Id.* at 271 n.6. Nonetheless, the district court stated that the arrangement "does not bespeak fiduciary status on the part of [the service provider]." *Id.* at 271.[8]

Plaintiff attempts to portray the foregoing cases either as favoring him in some way, or as distinguishable on their facts. (*See* ECF No. 175 at 24; ECF No. 206 at 12 &

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[8] To the list of cases supporting its view, Defendant would likely add *Adolescent Psychiatry*. That case is generally helpful for the notion that a pre-announced rate of return can be analogized to a series of fixed annuities. *See* 941 F.2d at 567. However, that analogy only permitted the Seventh Circuit to conclude that the GBP exception applied, meaning only that the insurance company "was not holding its entire investment portfolio [*i.e.*, the investments in its general account] as the [retirement plan's] fiduciary." *Id.* at 568. "Still," the court went on, "the [investment vehicle in question] was an asset of [the retirement] plan. If [the insurance company] had discretionary authority over that instrument, [it is an] ERISA fiduciar[y]." *Id.* That is precisely the argument Plaintiff makes here. Surprisingly, however, the plaintiff in *Adolescent Psychiatry* did *not* claim that the decision setting the pre-announced interest rate was a matter of discretionary authority subject to ERISA. Rather, the plaintiff focused on the insurance company's unilateral authority to amend other terms of the contract. *Id.* at 569. Thus, *Adolescent Psychiatry* provides little guidance on whether pre-announced interest rates are themselves subject to fiduciary scrutiny.

n.7, 11–12.) Plaintiff's distinctions are not persuasive, and notably, Plaintiff does not argue that any of these cases was wrongly decided. Certain other cases, which Plaintiff favors, are nonetheless worth discussing.

The first is *Ed Miniat, Inc. v. Globe Life Insurance Group, Inc.*, 805 F.2d 732 (7th Cir. 1986). There, the insurance company had an "apparent unilateral right" to reduce credited interest to a specified floor and increase the amount of the required annual premium to a specified maximum. *Id.* at 734 (internal quotation marks omitted). The insurance company eventually exercised both powers, prompting the plan sponsor to terminate its contract with the insurance company. *Id.* That, in turn, prompted the insurance company to withhold "more than half of the premiums paid by plaintiffs to fund the plan" as an exit fee. *Id.* (internal quotation marks omitted). The insurance company argued that its choices to decrease the interest rate and increase the annual premium were part of its bargained-for authority under the contract, and therefore not subject to ERISA scrutiny. *Id.* at 737. The Seventh Circuit disagreed: "No discretion is exercised when an insurer merely adheres to a specific contract term. When a contract, however, grants an insurer discretionary authority, even though the contract itself is the product of an arm's length bargain, the insurer may be a fiduciary." *Id.* Borrowing language from *CBOE*, the Seventh Circuit went on to hold that the insurance company's power "does not appear to be qualitatively different from the ability to choose investments." *Id.* at 738.

Ed Miniat's appeal to Plaintiff's is plain, but *Ed Miniat* is ultimately unhelpful to Plaintiff's cause, for several reasons. First, *Ed Miniat* quotes in full, without a hint of disapproval, the passage from *CBOE* stating that a preannounced, guaranteed rate of return excuses the insurance company from fiduciary responsibilities as to that rate. *Id*. at 737–38. Thus, it indirectly reaffirms the portion of *CBOE* on which Defendant relies. Second, *Ed Miniat* had not progressed beyond the motion to dismiss phase, which is why the insurance company's unilateral rights were described as "apparent." Here, the nature of Defendant's contractual rights and how Defendant has exercised them has been established through discovery. Third, *Ed Miniat* contains no discussion of the ability to protest changes or exit without paying a fee (the allegations established that the insurance company charged an enormous exit fee). Thus, for present purposes, *Ed Miniat* establishes—correctly, in this Court's view—that the mere fact of discretion embodied in an arms-length, bargained-for contract does not mean that ERISA's fiduciary duties are *per se* excused as to exercises of such discretion. But that general principle does not answer the question of whether ERISA fiduciary duties govern a discretionary choice that the affected party may reject.

The other decision of note is *Pipefitters Local 636 Insurance Fund v. Blue Cross & Blue Shield of Michigan*, 722 F.3d 861 (6th Cir. 2013). This was a dispute about a state-mandated fee that a health insurer passed on to employers offering that insurer's health plan. *Id*. at 863–65. The health insurer argued that it was "merely act[ing] as a 'pass-through' [to the state] and not as a fiduciary." *Id*.

at 866. However, the health insurer did not charge the fee to all participating employers, and the plan contract did not set forth any method by which the fee would be calculated and passed on. *Id.* at 866–67. Thus, the insurer "necessarily had discretion in the way it collected [the fee]," and was therefore an ERISA fiduciary in making fee-related decisions. *Id.* at 867.

Pipefitters, even more than *Ed Miniat*, is too factually dissimilar to provide guidance here. In particular, *Pipefitters* says nothing about the "final say" theory reflected in *CBOE*, *Midwest Community*, *Charters*, and *Zang*. The Court is persuaded that those cases correctly state the scope of ERISA. Thus, if the all the circumstances of the alleged ERISA-triggering decision show that the defendant does not have power to force its decision upon an unwilling objector, the defendant is not acting as an ERISA fiduciary with respect to that decision.

Plaintiff argues, however, that even this standard is not satisfied. Plaintiff's first argument in this regard is that none of Defendant's cases specifically discuss individual plan participants' (*i.e.*, the employees') ability to reject the insurance company's decision. Rather, these cases focus on the plan sponsor's (*i.e.*, usually, the employer's) ability to reject the decision. (ECF No. 193 at 23–24.) Plaintiff is correct, but Plaintiff does not explain why this is a distinction with a difference. Nor does the Court perceive a meaningful distinction. ERISA does not impose obligations on retirement plans purely for those plans' sake, but because Congress was concerned with *plan participants'* welfare. Plan participants' "veto" authority is therefore as relevant as plan sponsors' authority.

Plaintiff also argues that the Plan itself cannot easily withdraw from the Fund because the Contract imposes a waiting period of up to one year. (ECF No. 206 at 12.) This is not an argument that the Court can consider in the present posture. The Contract does not *mandate* a one-year waiting period, so whether it would actually be imposed in any particular instance is speculative. And the decision itself whether to impose it might be separately challengeable as an exercise of ERISA discretion.

Finally, Plaintiff argues that Plan participants actually face significant barriers to divesting from the Fund because the Fund is the only stable value product Defendant will permit as to plans its services. (ECF No. 193 at 25.) The Court has given serious thought to this contention, but notes that it introduces a host of other considerations individual to each participant (*e.g.*, investment time horizon and overall preferred risk profile). Thus, the Court finds that this presents too attenuated a basis to say that a Plan participant has no real ability to reject Defendant's Credited Rate.

b. Discretion as to Defendant's Own Compensation

Plaintiff additionally asserts that Defendant breached its fiduciary duties because, by setting the Credited Rate, Defendant controlled the margin and in turn controlled its own compensation. (ECF No. 175 at 24–25.) Plaintiff is correct that, "after a person has entered into an agreement with an ERISA-covered plan, the agreement may give it such control over factors that determine the actual amount of its compensation that the person thereby becomes an ERISA fiduciary with respect to that compensation." *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1259 (2d Cir. 1987). But, although broad-sounding, it appears this principle has only been applied in cases where the alleged fiduciary has some form of direct contractual authority to establish its fees and other administrative charges, or has authority to approve or disapprove the transactions from which it collects a fee. *See Pipefitters*, 722 F.3d at 867 (insurer had complete discretion in how to collect from plans the money needed to pay a state-mandated fee); *Abraha v. Colonial Parking, Inc.*, 243 F. Supp. 3d 179, 186 (D.D.C. 2017) (exercise of contractual authority to change from a flat per-participant fee to a percentage-of-contributions fee was an exercise of discretion over service provider's own compensation, and therefore subject to ERISA fiduciary obligations); *Golden Star, Inc. v. Mass Mut. Life Ins. Co.*, 22 F. Supp. 3d 72, 80–81 (D. Mass. 2014) (insurer had contractual discretion to set a "management fee" between zero and 1%; fact question existed as to whether it ever exercised such discretion); *Glass Dimensions, Inc. ex rel. Glass Dimensions, Inc. Profit Sharing Plan & Tr. v. State St. Bank & Tr. Co.*, 931 F. Supp. 2d 296, 304 (D. Mass. 2013) (bank had discretionary authority to set a "lending fee" anywhere from zero to 50%); *Charters*, 583 F. Supp. 2d at 197 (insurer was a fiduciary because it had complete discretion to set an "administrative maintenance charge," up to a specified maximum, levied against certain plan accounts); *Sixty-Five Security Plan v. Blue Cross & Blue Shield*, 583 F. Supp. 380, 387–88 (S.D.N.Y. 1984) (insurer's compensation was a percentage of claims paid, and insurer had discretion whether to pay a claim; therefore, insurer was a fiduciary as to its own compensation). Accordingly, these cases are inapposite to the present circumstances.

Moreover, the Court agrees with Defendant that it is

> not an ERISA fiduciary as to its own compensation because it does not control what its plan-related compensation will be. To be sure, by determining what Credited Rates to offer, [Defendant] can influence its possible margins if plans and their participants invest in the Fund at those guaranteed rates. But its compensation (if any) depends on participants investing their accounts at those Credited Rates, and—because the Credited Rates are stated in advance and participants are free to withdraw their investments at any time without penalty—participants can reject a Credited Rate before it ever applies.

(ECF No. 189 at 29–30 (footnote omitted).) The Court accordingly rejects Plaintiff's argument that it may hold Defendants to fiduciary standards under the theory that Defendant sets its own compensation.

* * *

For all of the foregoing reasons, summary judgment is appropriate against Plaintiff on his Claims One and Two.

B. Nonfiduciary Liability (Claim Three)

Even if Defendant is not an ERISA fiduciary, it may still be a "party in interest"—meaning, among other things, "a person providing services to [an employee benefit] plan." 29 U.S.C. § 1002(14)(B). Plaintiff's Claim Three alleges that Defendant can still be liable as a party in interest for essentially all the relief Plaintiff seeks under Claims One and Two, as follows.

ERISA establishes that "[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect * * * use by or for the benefit of a party in interest[] of any assets of the plan." 29 U.S.C. § 1106(a)(1)(D). Moreover, the Supreme Court held in *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000) ("*Salomon*"), that the party in interest on the receiving end of such a transaction may be liable under ERISA if it "had actual or constructive knowledge of the circumstances that rendered the transaction unlawful." *Id.* at 251.

Given this, Plaintiff argues

> [t]here can be no dispute that [Defendant] used the Contract (which is a plan asset) to set the Credited Rate, collect contributions and pay interest to plan participants at the Credited Rate, and retain the margin. By permitting [Defendant], a party in interest, to use a plan

> asset [for Defendant's own benefit, *i.e.*, by retaining the margin], the plans' fiduciaries [such as the non-party Plan Fiduciaries in this case] violated [29 U.S.C. § 1106(a)]. Even if [Defendant] [is] not a fiduciary, it is liable for its participation in this prohibited transaction.

(ECF No. 175 at 31 (certain citations omitted).) Plaintiff specifically represents that he seeks "disgorgement of profits" from Defendant, which Plaintiff claims to be equivalent to "an 'accounting for profits.'" (ECF No. 193 at 41.)

Plaintiff's equitable label for the monetary relief it seeks flows from the fact that ERISA does not permit a court to award damages *per se*, but instead authorizes a court "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to [award] other appropriate equitable relief." 29 U.S.C. § 1132(a)(3). What qualifies as "other appropriate equitable relief" has snarled litigants and judges for years. It is nonetheless established that an order to pay money, even if functionally equivalent to a judgment awarding damages, qualifies as "appropriate equitable relief" in some ERISA cases, depending on the circumstances. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212–21 (2002) ("*Knudson*").

As relevant to this case, one of those forms of money-based equitable remedies is an accounting for profits. *Id.* at 214 n.2. An accounting for profits (often shortened simply to an "accounting") "is a restitutionary remedy based upon avoiding unjust enrichment. In this sense it reaches monies owed by a fiduciary or other wrongdoer, including profits produced by property which in equity and good conscience belonged to the plaintiff." 1 Dan B. Dobbs, *Law of Remedies* § 4.3(5), at 608 (2d ed. 1993). Plaintiff believes that the margin Defendant earned on Fund contributions are profits that belong in equity and good conscience to him and his fellow class members.

Defendant does not argue that it is not a party in interest. Defendant also does not contest Plaintiff's assertion that a plan sponsor's choice to offer the Fund, knowing that Defendant would retain margin for itself, is a prohibited transaction under 29 U.S.C. § 1106(a). And, somewhat surprisingly, Defendant does not argue that Plaintiff's theory appears very close to imposing liability on Defendant for matters negotiated before becoming the Plan's service provider—a theory of liability that various courts have rejected. *See, e.g.*, *Hecker v. Deere & Co.*, 556 F.3d 575, 583 (7th Cir. 2009); *F.H. Krear*, 810 F.2d at 1259; *see also Salomon*, 530 U.S. at 252 (noting but not resolving a "concern that ERISA should not be construed to require counterparties to transactions with a plan to monitor the plan for compliance with each of ERISA's intricate details").

Defendant's primary counterargument, rather, is that an accounting is only considered an equitable remedy when pursued against a fiduciary; and, says Defendant, an ERISA plaintiff seeking an accounting must identify a specific *res* that a defendant wrongfully holds—as opposed to claiming a right to money, from whatever source defendant might obtain it. (ECF No. 211 at 22–24.) Defendant has cited one unpublished district court decision that comes out clearly in its favor. *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2016 WL 4507117, at *8 (C.D. Cal. Aug. 5, 2016) (holding that a plaintiff bringing an accounting claim against a nonfiduciary must be able to identify specific, traceable funds in the defendant's possession).

This is a complicated issue, in part because the distinction between money-awarding remedies at law and money-awarding remedies in equity was already hazy during the era of separate law and equity courts, and has not since achieved more clarity. *See, e.g.*, *Knudson*, 534 U.S. at 212 ("[N]ot all relief falling under the rubric of restitution is available in equity. In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity."); *id.* at 214 (noting the "fine distinction between restitution at law and restitution in equity"). Luckily, the Court need not now resolve the question because the Court finds Defendant's alternative argument persuasive.[9]

[9] For the record, however, the Court notes certain authority that both parties have overlooked. When the Supreme Court decided in *Salomon* that a nonfiduciary party in interest could potentially be liable for a transaction in violation of 29 U.S.C. § 1106(a), it was heavily influenced by the law of trusts, including the "settled" principle that a "trustee or [the trust's] beneficiaries may . . . maintain an action for restitution of [wrongfully transferred] property (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of *the third person's profits derived therefrom*." 530 U.S.

Separate from its claim that Plaintiff does not seek "appropriate equitable relief," Defendant argues that Plaintiff simply has not made out a claim for nonfiduciary liability under the standard established in *Salomon*. (ECF No. 189 at 40–41.) Again, under that decision, the party in interest on the receiving end of a prohibited transaction may be liable under ERISA if it "had actual or constructive knowledge of the circumstances that rendered the transaction unlawful." 530 U.S. at 251. And "[t]hose circumstances, in turn, involve a showing that the *plan fiduciary*, with actual or constructive knowledge of the facts satisfying the elements of a [29 U.S.C. § 1106(a)] transaction, caused the plan to engage in the transaction." *Id.* (emphasis in original). Defendant's argument is correct, as demonstrated by Plaintiff's failure to distinguish these two elements of a nonfiduciary liability claim.

Quoting *Salomon*, Plaintiff claims "there is no genuine dispute that [Defendant] had 'actual or constructive knowledge of the *facts*' underlying its violation of [29 U.S.C. § 1106(a)(1)(D)]." (ECF No. 206 at 18 (emphasis supplied by Plaintiff).) But Plaintiff's quote is misdirected. "Actual or constructive knowledge of the facts" comes from *Salomon*'s articulation of what a party must prove about the *plan fiduciary*, specifically, "actual or constructive knowledge of the facts satisfying the elements of a [29 U.S.C. § 1106(a)] transaction." 530 U.S. at

at 250 (emphasis added). This is dicta, strictly speaking. It nonetheless suggests that the distinctions Defendant draws about the availability of an accounting remedy (fiduciary vs. nonfiduciary, traceable *res* vs. otherwise) are not distinctions the Supreme Court would deem meaningful, given the trust law sources on which it has previously relied.

251. In other words, as against a plan fiduciary offering the Fund, it appears it would be enough to prove the fiduciary's actual or constructive knowledge that Defendant retains Fund-generated margin for itself (presuming, given Defendant's failure to contest it, that allowing Defendant to retain the margin is a prohibited transaction). The Court may assume that the record before it establishes at least this much beyond a genuine dispute (although, again, the Plan Fiduciaries are not parties to this lawsuit). But that is not the same standard to which *Salomon* holds the nonfiduciary party in interest. As to those parties (in this case, Defendant), *Salomon* requires "actual or constructive knowledge of the circumstances that rendered the transaction unlawful." 530 U.S. at 251.

Plaintiff appears to interpret "circumstances that rendered the transaction unlawful" as establishing a standard no different from "facts satisfying the elements of a [29 U.S.C. § 1106(a)] transaction." Or, in the context of this case, Plaintiff assumes that simple knowledge that Defendant retains Fund-generated margin is enough to satisfy both elements of a nonfiduciary liability claim. The Court cannot agree. Although *Salomon* was not purporting to write a statute or a jury instruction, the Court discerns significant differences between the language used to describe the requisite knowledge of a plan fiduciary and the requisite knowledge of a nonfiduciary party in interest.

As to a plan fiduciary, "facts satisfying the elements of a [29 U.S.C. § 1106(a)] transaction" seems plainly aimed at requiring only a knowledge of basic facts, particularly that the party in interest will use plan property for its own gain. This would be consistent with "the great weight of authority" holding that § 1106(a) violations are essentially strict liability offenses. *Chao v. Hall Holding Co.*, 285 F.3d 415, 442 n.12 (6th Cir. 2002). But, as to a nonfiduciary party in interest, the standard is "circumstances that rendered the transaction unlawful." Particularly in contrast to the fiduciary standard, this language appears aimed at exploring not just knowledge of the underlying facts, but knowledge of their potential unlawfulness. Indeed, the Supreme Court announced this standard specifically in the context of noting the limits of third-party liability. The entire relevant passage is as follows:

> It also bears emphasis that the common law of trusts sets limits on restitution actions against defendants other than the principal "wrongdoer." Only a transferee of ill-gotten trust assets may be held liable, and then only when the transferee (assuming he has purchased for value) knew or should have known of the existence of the trust and the circumstances that rendered the transfer in breach of the trust. Translated to the instant context, the transferee must be demonstrated to have had actual or constructive knowledge of the circumstances that rendered the transaction unlawful. Those circumstances, in turn, involve a showing that the *plan fiduciary*, with actual or constructive knowledge of the facts satisfying

> the elements of a § 406(a) transaction, caused the plan to engage in the transaction.

Salomon, 530 U.S. at 251 (emphasis in original).

Requiring a heightened showing as to nonfiduciary parties in interest is also consistent with the treatises the Supreme Court relied upon in *Salomon* to conclude that such parties may be liable in some circumstances. *See id.* at 250–51 (analyzing treatises); *cf. Knudson*, 534 U.S. at 217 (endorsing many of the same treatises as guides to determining whether a form of relief is legal or equitable). For example, section 284 of Restatement (Second) of Trusts (cited in *Salomon*, 530 U.S. at 250), states that a third party "is under no liability to the beneficiary [of the trust]" where the third party is "not knowingly taking part in an illegal transaction [involving trust property]." And section 291 of the same Restatement (also cited in *Salomon*, 530 U.S. at 250) similarly requires that the third party must "take[] [trust property] with notice of the breach of trust" before the party "can be compelled * * * to restore it to the trust, together with the income which he has received from the property."[10]

[10] The Third Restatement, which was published after *Salomon*, is even more direct on these points. *See* Restatement (Third) of Trusts § 108 (2012) ("(1) A third party is protected from liability in dealing with or assisting a trustee who is committing a breach of trust if the third party does so without knowledge or reason to know that the trustee is acting improperly. * * * (3) In dealing with a trustee, a third party need not: (a) inquire into the extent of the trustee's powers or the pro-

Accordingly, an ERISA plaintiff cannot rely solely on the knowledge that would satisfy a fiduciary's liability for a prohibited transaction to likewise hold a nonfiduciary party in interest liable for that transaction. Rather, the plaintiff must show that the defendant knew or should have known that the transaction violated ERISA. Plaintiff has not attempted to make this showing, but has instead continually asserted only that the undisputed facts show Defendant had the basic knowledge necessary to make a *fiduciary* liable. (*See* ECF Nos. 175 at 31; ECF No. 206 at 17–18.) Thus, Plaintiff's Claim Three fails as a matter of law and summary judgment in Defendant's favor is appropriate.[11]

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priety of their exercise . . . ."); *id.* cmt. d ("Knowledge of and compliance with the powers and duties of the trusteeship are responsibilities of the trustee, whose fiduciary obligations are enforceable by the beneficiaries.").

[11] In *Salomon*, the Supreme Court noted a "conflict of authority in non-ERISA cases" on "[t]he issue of which party, as between the party seeking recovery and the defendant-transferee, bears the burden of proof on whether the transferee is a purchaser for value and without notice." 530 U.S. at 251 n.3. That issue was "not currently before [the Court]," and so it did not resolve it. *Id.* Nor has this Court located any later authority resolving the conflict. However, it is immaterial here. Plaintiff has asserted nonfiduciary liability as a specific claim for relief (Claim Three), and it would be rare indeed for any plaintiff to be able to assert a cause of action and then throw all the burden on the defendant to disprove it. Moreover, Plaintiff's briefs repeatedly argue that Defendant bears the burden of proof on certain questions (*see* ECF No. 175 at 5, 31–32, 35, 41; ECF No. 193 at 4, 24 n.7, 26, 33), but Plaintiff nowhere argues that Defendant bears the burden of proof on Claim Three. Accordingly, Plaintiff has forfeited any argument that the burden of proof for Claim Three rests on Defendant.

IV. Conclusion

For the reasons set forth above, the Court ORDERS as follows:

1. Defendant's Motion for Summary Judgment (ECF No. 181) is GRANTED;
2. Plaintiff's Motion for Partial Summary Judgment (ECF No. 182) is DENIED;
3. Defendant's Motion to Decertify Class (ECF No. 180) is DENIED AS MOOT;
4. Defendant's Unopposed Motion to Schedule Oral Argument (ECF No. 217) is DENIED;
5. The Final Trial Preparation Conference scheduled for April 27, 2018, and the bench trial scheduled to begin on May 14, 2018, are both VACATED;
6. The Clerk shall enter judgment in favor of Defendant and against Plaintiff and the Class, and shall terminate this case; and
7. Defendant shall have its costs upon compliance with D.C.COLO.LCivR 54.1.

Dated this 14th day of December, 2017.

BY THE COURT:

/s/

William J. Martinez
United States District Judge

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martinez**

Civil Action No. 1:14-CV-02330-WJM-NYW

John Teets

Plaintiffs-Appellants

v.

Great-West Life & Annuity Insurance Company

Defendants-Appellees

FINAL JUDGMENT

PURSUANT TO and in accordance with Fed. R. Civ. P. 58(a), all Orders entered during the pendency of this case, and the Order On Pending Motions, entered by the Honorable William J. Martínez, United States District Judge, on December 14, 2017, it is

ORDERED that

1. Defendant's Motion for Summary Judgment (ECF No. 181) is GRANTED;
2. Plaintiff's Motion for Partial Summary Judgment (ECF No. 182) is DENIED;

3. Defendant's Motion to Decertify Class (ECF No. 180) is DENIED AS MOOT.

IT IS FURTHER ORDERED that Final Judgment is entered in favor of Defendant and against Plaintiff and the Class, and this case is terminated.

IT IS FURTHER ORDERED that Defendant shall have its costs upon compliance with D.C.COLO.LCivR 54.1

Dated at Denver, Colorado this 14th day of December, 2017.

BY THE COURT:
Jeffrey P. Colwell, Clerk

By: /s/ Deborah Hansen
Deborah Hanson, Deputy Clerk

APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

No. 18-1019
D.C. No. 1:14-CV-02330-WJM-NYW)
(D. Colo.)

John Teets

Plaintiffs-Appellants

v.

Great-West Life & Annuity Insurance Company

Defendants-Appellees

AARP; AARP Foundation; American Council of Life Insurers

Amici Curiae

ORDER

Before MATHESON, BACHARACH, and McHUGH, Circuit Judges.

This matter is before the court on the appellant's *Petition for Panel Rehearing and Rehearing En Banc.*

Upon consideration, the request for panel rehearing is denied by the original panel members. The panel has, however, made small *sua sponte* clarifications to the original opinion at pages 24 through 28. That amended version is attached to this order. The Clerk is directed to file the clarified decision *nunc pro tunc* to the original filing date of March 27, 2019.

In addition, the *Petition* was circulated to all members of the court who are in regular active service and who are not recused. *See* Fed. R. App. P. 35(a). As no member of the original panel or the full court called for a poll, the request for en banc reconsideration is likewise denied.

Entered for the Court

/s/

Elisabeth A. Shumaker, Clerk

APPENDIX E

1. 29 U.S.C. 1106(a) provides:

(a) **Transactions between plan and party in interest** Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employersecurity or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

2. 29 U.S.C 1108(b) provides:

(b) **Enumeration of transactions exempted from section 1106 prohibitions**

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees (within the meaning of section 414(q) of Title 26) in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured. A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of Title 26.

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 1107(d)(6) of this title), if--

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 1107(d)(5) of this title).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if--

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is--

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if--

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if--

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 1344 of this title (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of subchapter III.

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 1411 of this title.

(12) The sale by a plan to a party in interest on or after December 18, 1987, of any stock, if--

(A) the requirements of paragraphs (1) and (2) of subsection (e) are met with respect to such stock,

(B) on the later of the date on which the stock was acquired by the plan, or January 1, 1975, such stock constituted a qualifying employer security (as defined in section 1107(d)(5) of this title as then in effect), and

(C) such stock does not constitute a qualifying employer security (as defined in section 1107(d)(5) of this title as in effect at the time of the sale).

(13) Any transfer made before January 1, 2026, of excess pension assets from a defined benefit plan to a retiree health account in a qualified transfer permitted under section 420 of Title 26 (as in effect on July 31, 2015).

(14) Any transaction in connection with the provision of investment advice described in section 1002(21)(A)(ii) of this title to a participant or beneficiary of an individual account plan that permits such participant or beneficiary to direct the investment of assets in their individual account, if--

(A) the transaction is--

(i) the provision of the investment advice to the participant or beneficiary of the plan with respect to a security or other property available as an investment under the plan,

(ii) the acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice, or

(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with an acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice; and

(B) the requirements of subsection (g) are met.

(15)

(A) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a party in interest (other than a fiduciary described in section 1002(21)(A) of this title) with respect to a plan if--

(i) the transaction involves a block trade,

(ii) at the time of the transaction, the interest of the plan (together with the interests of any other plans maintained by the same plan sponsor), does not exceed 10 percent of the aggregate size of the block trade,

(iii) the terms of the transaction, including the price, are at least as favorable to the plan as an arm's length1 transaction, and

(iv) the compensation associated with the purchase and sale is not greater than the compensation associated with an arm's length1 transaction with an unrelated party.

(B) For purposes of this paragraph, the term "block trade" means any trade of at least 10,000 shares or with a market value of at least $200,000 which will be allocated across two or more unrelated client accounts of a fiduciary.

(16) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a party in interest if--

(A) the transaction is executed through an electronic communication network, alternative trading system, or similar execution system or trading venue subject to regulation and oversight by--

(i) the applicable Federal regulating entity, or

(ii) such foreign regulatory entity as the Secretary may determine by regulation,

(B) either--

(i) the transaction is effected pursuant to rules designed to match purchases and sales at the best price available through the execution system in accordance with applicable rules of the Securities and Exchange Commission or other relevant governmental authority, or

(ii) neither the execution system nor the parties to the transaction take into account the identity of the parties in the execution of trades,

(C) the price and compensation associated with the purchase and sale are not greater than the price and compensation associated with an arm's length1 transaction with an unrelated party,

(D) if the party in interest has an ownership interest in the system or venue described in subparagraph (A), the system or venue has been authorized by the plan sponsor or other independent fiduciary for transactions described in this paragraph, and

(E) not less than 30 days prior to the initial transaction described in this paragraph executed through any system or venue described in subparagraph (A), a plan fiduciary is provided written or electronic notice of the execution of such transaction through such system or venue.

(17)

(A) Transactions described in subparagraphs (A), (B), and (D) of section 1106(a)(1) of this title between a plan and a person that is a party in interest other than a fiduciary (or an affiliate) who has or exercises any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of section 1002(21)(A)(ii) of this title) with respect to those assets, solely by reason of providing services to the plan or solely by reason of a relationship to such a service provider described in subparagraph (F), (G), (H), or (I) of section 1002(14) of this title, or both, but only if in connection with such transaction the plan receives no less, nor pays no more, than adequate consideration.

(B) For purposes of this paragraph, the term "adequate consideration" means--

(i) in the case of a security for which there is a generally recognized market--

(I) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934, taking into account factors such as the size of the transaction and marketability of the security, or

(II) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of the party in interest, taking into account factors such as the size of the transaction and marketability of the security, and

(ii) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by a fiduciary or fiduciaries in accordance with regulations prescribed by the Secretary.

(18) **Foreign exchange transactions**

Any foreign exchange transactions, between a bank or broker-dealer (or any affiliate of either), and a plan (as defined in section 1002(3) of this title) with respect to which such bank or broker-dealer (or affiliate) is a trustee, custodian, fiduciary, or other party in interest, if--

(A) the transaction is in connection with the purchase, holding, or sale of securities or other investment assets (other than a foreign exchange transaction unrelated to any other investment in securities or other investment assets),

(B) at the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arm's length1 foreign exchange transactions between unrelated parties, or the terms afforded by the bank or broker-dealer (or any affiliate of either) in comparable arm's-length foreign exchange transactions involving unrelated parties,

(C) the exchange rate used by such bank or broker-dealer (or affiliate) for a particular foreign exchange transaction does not deviate by more than 3 percent from the interbank bid and asked rates for transactions of comparable size and maturity at the time of the transaction as displayed on an independent service that reports rates of exchange in the foreign currency market for such currency, and

(D) the bank or broker-dealer (or any affiliate of either) does not have investment discretion, or provide investment advice, with respect to the transaction.

(19) **Cross trading**

Any transaction described in sections 1106(a)(1)(A) and 1106(b)(2) of this title involving the purchase and sale of a security between a plan and any other account managed by the same investment manager, if--

(A) the transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available,

(B) the transaction is effected at the independent current market price of the security (within the meaning of section 270.17a-7(b) of title 17, Code of Federal Regulations),

(C) no brokerage commission, fee (except for customary transfer fees, the fact of which is disclosed pursuant to subparagraph (D)), or other remuneration is paid in connection with the transaction,

(D) a fiduciary (other than the investment manager engaging in the cross-trades or any affiliate) for each plan participating in the transaction authorizes in advance of any cross-trades (in a document that is separate from any other written agreement of the parties) the investment manager to engage in cross trades at the investment manager's discretion, after such fiduciary has received disclosure regarding the conditions under which cross trades may take place (but only if such disclosure is separate from any other agreement or disclosure involving the asset management relationship), including the written policies and procedures of the investment manager described in subparagraph (H),

(E) each plan participating in the transaction has assets of at least $100,000,000, except that if the assets of a plan are invested in a master trust containing the assets of plans maintained by employers in the same controlled group (as defined in section 1107(d)(7) of this title), the master trust has assets of at least $100,000,000,

(F) the investment manager provides to the plan fiduciary who authorized cross trading under subparagraph (D) a quarterly report detailing all cross trades executed by the investment manager in which the plan participated during such quarter, including the following information, as applicable: (i) the identity of each security bought or sold; (ii) the number of shares or units traded; (iii) the parties involved in the cross- trade; and (iv) trade price and the method used to establish the trade price,

(G) the investment manager does not base its fee schedule on the plan's consent to cross trading, and no other service (other than the investment opportunities and cost savings available through a cross trade) is conditioned on the plan's consent to cross trading,

(H) the investment manager has adopted, and cross-trades are effected in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program, and that include a description of the manager's pricing policies and procedures, and the manager's policies and procedures for allocating cross trades in an objective manner among accounts participating in the cross-trading program, and

(I) the investment manager has designated an individual responsible for periodically reviewing such purchases and sales to ensure compliance with the written policies and procedures described in subparagraph (H), and following such review, the individual shall issue an annual written report no later than 90 days following the period to which it relates signed under penalty of perjury to the plan fiduciary who authorized cross trading under subparagraph (D) describing the steps performed during the course of the review, the level of compliance, and any specific instances of non-compliance.

The written report under subparagraph (I) shall also notify the plan fiduciary of the plan's right to terminate participation in the investment manager's cross-trading program at any time.

(20)

(A) Except as provided in subparagraphs (B) and (C), a transaction described in section 1106(a) of this title in connection with the acquisition, holding, or disposition of any security or commodity, if the transaction is corrected before the end of the correction period.

(B) Subparagraph (A) does not apply to any transaction between a plan and a plan sponsor or its affiliates that involves the acquisition or sale of an employer security (as defined in section 1107(d)(1) of this title) or the acquisition, sale, or lease of employer real property (as defined in section 1107(d)(2) of this title).

(C) In the case of any fiduciary or other party in interest (or any other person knowingly participating in such transaction), subparagraph (A) does not apply to any transaction if, at the time the transaction occurs, such fiduciary or party in interest (or other person) knew (or reasonably should have known) that the transaction would (without regard to this paragraph) constitute a violation of section 1106(a) of this title.

(D) For purposes of this paragraph, the term "correction period" means, in connection with a fiduciary or party in interest (or other person knowingly participating in the transaction), the 14-day period beginning on the date on which such fiduciary or party in interest (or other person) discovers, or reasonably should have discovered, that the transaction would (without regard to this paragraph) constitute a violation of section 1106(a) of this title.

(E) For purposes of this paragraph--

(i) The term "security" has the meaning given such term by section 475(c)(2) of Title 26 (without regard to subparagraph (F)(iii) and the last sentence thereof).

(ii) The term "commodity" has the meaning given such term by section 475(e)(2) of Title 26 (without regard to subparagraph (D)(iii) thereof).

(iii) The term "correct" means, with respect to a transaction--

(I) to undo the transaction to the extent possible and in any case to make good to the plan or affected account any losses resulting from the transaction, and

(II) to restore to the plan or affected account any profits made through the use of assets of the plan.

3. 29 U.S.C. 1132(a)(3) provides:

(a) **Persons empowered to bring a civil action**

A civil action may be brought –

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;