No. _______

In The

Supreme Court of the United States

CHARLES E. WHITE, JR., JOHN P. JACOBS, VERLAN D. HOOPES, NORA L. PENNINGTON, JAMES A. RAY, AND JEANNETTE A. FINLEY, individually and as representatives of a class of similarly situated persons of the Chevron Employee Savings Investment Plan,

Petitioners,

v.

CHEVRON CORPORATION AND ESIP INVESTMENT COMMITTEE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX

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TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Ninth Circuit, *White, et al. v. Chevron Corp., et al.*, No. 17-16208 (Nov. 13, 2018) 1

Order Granting Motion to Dismiss First Amended Complaint of the United States District Court for the Northern District of California, *White, et al. v. Chevron Corp., et al.*, No. 4:16-cv-00793-PJH (May 31, 2017) 5

Order of the United States Court of Appeals for the Ninth Circuit, *White, et al. v. Chevron Corp., et al.* No. 17-16208 (Jan. 3, 2019).......................... 55

Amended Complaint, *White, et al. v. Chevron Corp., et al.*, No. 4:16-cv-00793-PJH (Sept. 30, 2016).... 57

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16208

D.C. No. 4:16-cv-00793-PJH

MEMORANDUM*

Filed November 13, 2018
Molly C. Dwyer, Clerk
U.S. Court of Appeals

CHARLES E. WHITE, Jr.; et al.,

Plaintiffs-Appellants,

v.

CHEVRON CORPORATION and ESIP
INVESTMENT COMMITTEE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, Chief Judge, Presiding

Argued and Submitted October 19, 2018
San Francisco, California

Before: HAWKINS and HURWITZ, Circuit Judges, and EATON,** Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** Richard K. Eaton, Judge of the United States Court of International Trade, sitting by designation.

Appellants (collectively, "White") appeal the district court's Rule 12(b)(6) dismissal of their amended complaint for failure to state a claim. White sought relief under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq*. White maintains that the amended complaint alleged sufficient facts to support a reasonable inference that appellees (collectively, "Chevron") breached their fiduciary duties of loyalty and prudence to the beneficiaries of Chevron's retirement plan, and engaged in a prohibited transaction. We have jurisdiction under 28 U.S.C. § 1291, and affirm.

1. Dismissal of a complaint is appropriate if it fails to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). That is, "the complaint must allege 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *In re Century Aluminum Co. Securities Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Where there are "two possible explanations, only one of which can be true and only one of which results in liability, plaintiff[] cannot offer allegations that are 'merely consistent with' [its] favored explanation but are also consistent with the alternative explanation." *In re Century Aluminum Co. Securities Litig.*, 729 F.3d at 1108 (quoting *Iqbal*, 556 U.S. at 678) (emphasis added). "Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, . . . in order to render plaintiffs' allegations plausible within the meaning of *Iqbal* and *Twombly*." *Id.* (citing *Twombly*, 550 U.S. at 554).

2. Applying the plausibility standard here, the facts alleged, viewed in the light most favorable to White, were insufficient to support a plausible inference of breach of the duty of loyalty, breach of the duty of prudence, or

that a prohibited transaction took place. Rather, as to each count, the allegations showed only that Chevron could have chosen different vehicles for investment that performed better during the relevant period, or sought lower fees for administration of the fund. None of the allegations made it more plausible than not that any breach of a fiduciary duty had occurred. *See In re Century Aluminum Co. Securities Litig.*, 729 F.3d at 1108. Thus, we hold that White failed to state a claim for breach of fiduciary duty.

3. We also hold that the prohibited transaction claim was time-barred because the transaction alleged to have violated the statute—hiring Vanguard—is alleged to have occurred in 2002, and this action was not commenced until 2016. *See* 29 U.S.C. § 1113. In light of the foregoing, White's derivative cause of action alleging that Chevron failed to monitor third parties also fails.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 16-cv-0793-PJH

ORDER GRANTING MOTION TO DISMISS FIRST AMENDED COMPLAINT

CHARLES E. WHITE, et al.,

Plaintiffs,

v.

CHEVRON CORPORATION et al.,

Defendants.

Defendants' motion to dismiss the first amended complaint came on for hearing before this court on January 18, 2017. Plaintiffs appeared by their counsel Jamie L. Dupree, James Redd, and Heather Lea, and defendants appeared by their counsel Catalina J. Vergara. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS the motion.

INTRODUCTION

This is a case brought as a proposed class action, under ERISA § 502(a)(2), (3), 29 U.S.C. § 1132(a)(2), (3), alleging breach of fiduciary duty. Plaintiffs filed the complaint on February 17, 2016. On August 29, 2016, the court granted defendants' motion to dismiss the complaint for failure to state a claim, with leave to amend. Plaintiffs filed the first amended complaint ("FAC") on September 30, 2016.

Plaintiffs are participants in the Chevron Employee Savings Investment Plan ("the Plan" or "the ESIP Plan") – a § 401(k) defined contribution, individual account, employee pension benefit plan under 29 U.S.C.

§ 1002(2)(A) and § 1002(34).[1] FAC ¶¶ 1-3, 8-9, 13-18, 25. As of December 31, 2014, the Plan had over $19 billion in total assets and more than 40,000 participants with account balances. FAC ¶ 12.

Defendants are Chevron Corporation, the ESIP Investment Committee (the "Investment Committee"), and 20 DOEs (alleged to be "current and former members of the Investment Committee). FAC ¶¶ 19-24. Chevron Corporation is the Plan Sponsor and Plan Administrator, and is the sole named fiduciary of the Plan, with the authority to control and manage the operation of the Plan, which includes the authority to designate one or more actuaries, accountants, or consultants as fiduciaries to carry out its responsibilities under the Plan. FAC ¶¶ 19-20. The duties that have not been delegated are carried out on behalf of Chevron Corporation by its directors, officers, and employees, including the Investment Committee. FAC ¶ 20.

The Investment Committee is a group of Chevron Corporation executives who are responsible for establishing and maintaining the Plan's Investment Policy Statement ("IPS"), which provides the criteria for selecting, monitoring, and removing Plan investment options. FAC ¶ 21. The members of the Investment Committee are the General Manager of Benefit Plan Investments, the Manager of Reporting and Control, and the Investment Strategist from Chevron Corporation's

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[1] A "defined contribution plan" is a plan in which "employees and employers may contribute to the plan, and the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999), quoted in *Anderson v. DHL Ret. Pension Plan*, 766 F.3d 1205, 1207-08 n.1 (9th Cir. 2014); *see also Tibble v. Edison Int'l* ("*Tibble II*") 135 S.Ct. 1823, 1826 (2015); 29 U.S.C. § 1002(34).

Treasury Department. *Id.* The Investment Committee was not named a fiduciary in the Plan document, but plaintiffs allege that it is nonetheless a fiduciary under 29 U.S.C. § 1002(21)(A) because it has and exercises discretionary authority and control over the administration of Plan investments and investment-related expenses. FAC ¶ 22.

BACKGROUND FACTS

During the proposed class period, which began on February 17, 2010, the Plan offered a broad range of investment options for participants, who, pursuant to the Plan's IPS, bear sole responsibility "to make his or her own investment decisions." IPS, Exh. J to Declaration of Catalina J. Vergara in support of motion to dismiss original complaint ("1st Vergara Decl."), at 1. While the mix of investments varied over the years comprising the proposed class period, as of December 31, 2014, the Plan offered participants a choice of 13 Vanguard mutual funds, 12 Vanguard collective trust target-date funds, three non-Vanguard mutual funds, a Dodge & Cox fixed-income separate account, a State Street collective trust, and a Chevron common stock fund. FAC ¶ 27.

Plaintiffs allege that defendants "caused the Plan's investment lineup to remain largely unchanged" since 2002. FAC ¶ 28. But that assertion is contradicted by other allegations showing that during the proposed class period, defendants moved certain funds to different share classes, added funds, and removed funds, *see* FAC ¶¶ 28, 79-80, 82-84, 86, 101, 102, 109; as well as by the Plan's judicially noticeable IRS Form 5500s for the years 2010-2014, *see* Defs' Request for Judicial Notice ("RJN") in support of motion to dismiss FAC; Declaration of Catalina J. Vergara in support ("2nd Vergara Decl.") ¶¶ 6-10 & Exhs. D-H thereto; Defs' RJN in support of motion to dismiss original complaint; 1st Vergara Decl. ¶¶ 7-11, Exhs. G-I.

Participants could also choose to allocate up to 50% of the funds invested in their accounts among additional investments offered through Vanguard Brokerage Services, which included several thousand mutual funds from Vanguard and other companies. *See* 2nd Vergara Decl. & Exhs. D-H; 1st Vergara Decl. & Exhs. G-I; IPS at 6.

In addition to selecting the funds in the Plan's investment lineup, defendants also chose Vanguard to serve as the Plan's recordkeeper. FAC ¶ 29. Plaintiffs allege that Vanguard mutual funds cast proxy votes on behalf of their shareholders for the securities in their portfolio, and that Vanguard "typically votes its proxies 'as a block' to ensure 'the same position being taken across all of the funds.'" FAC ¶ 32 (citation omitted).

Plaintiffs assert that in voting its proxies, Vanguard "overwhelmingly" supports "management sponsored proposals regarding executive compensation and matters of corporate governance of companies in the Standard & Poor's 500-stock index." FAC ¶ 33. They also claim that "[i]n the past year," Vanguard rejected 100% of shareholder-sponsored proposals seeking to require appointment of an independent chairman of the company's board." FAC ¶ 34. Plaintiffs allege that in casting these proxy votes, Vanguard generally either abstains or votes against proposals requesting financial information regarding risks of climate change to a company or other environmental issues. FAC ¶ 35. Plaintiffs contend that Vanguard "holds" $13 billion of Chevron stock, which makes it the largest institutional holder of Chevron stock, and that Vanguard has consistently voted in favor of Chevron management proposals and against Chevron shareholder-originated proposals. FAC ¶¶ 36-39.

Plaintiffs claim that "conflicts of interest" arose from the fact that Vanguard both owned significant amounts of Chevron stock, and also was doing business with

Chevron as the Plan's investment provider. FAC ¶ 40. They assert that defendants could at any time have hired "a pure recordkeeper to provide the same level of services to Plan participants to avoid an arrangement 'infected by conflicts of interest.'" *Id.*

Plaintiffs assert that defendants breached their fiduciary duties in choosing certain funds in the Plan lineup, and in failing to monitor those funds that were selected for the Plan lineup. First, as in the original complaint, plaintiffs assert that the Vanguard Prime Money Market Fund (the "Money Market Fund") – the Plan's sole conservative capital preservation investment option – was an imprudent choice because of its low return starting in 2008. FAC ¶¶ 41-46. Plaintiffs claim that stable value funds[2] generally outperform money market funds, and that in this case a stable value fund would have been a more prudent choice than a money market fund. FAC ¶¶ 46-70.

Second, plaintiffs allege that a number of the funds in the Plan lineup – including Vanguard funds – imposed unreasonably high investment management fees, including fees that were excessive compared to lower-cost share classes of identical mutual fund options. FAC ¶¶ 79-92. Plaintiffs assert further that certain non-Vanguard funds charged excessive fees compared to what would have been charged for "separate accounts"

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[2] A "stable value fund" is an investment fund in which the principal does not fluctuate in value. Stable value funds are typically invested in safe, short-term instruments such as Treasuries, guaranteed investment contracts, and certificates of deposit. Investors placing money in stable value funds are more concerned about avoiding loss of principal than earning potentially higher rates of return from stocks and bonds that also come with higher volatility. J.Downes & J.E. Goodman, *Dictionary of Finance and Investment Terms* (Barron's, 9th ed. 2014); *see also* FAC ¶¶ 47-48.

tailored to the Plan, FAC ¶¶ 93-105; and that certain non-Vanguard funds charged excessive fees compared to "collective trusts," FAC ¶¶ 106-110.

Plaintiffs allege that the Plan's recordkeeping fees were excessive because Chevron failed to monitor and control the amount of asset-based revenue sharing fees Vanguard received, and failed to investigate obtaining recordkeeping and investment management services available from other Plan service providers. *See* FAC ¶¶ 125-126. They also allege that in enabling Vanguard to generate significant revenue from revenue sharing (based on having placed Plan participants in higher-cost funds) Chevron made it possible for Vanguard to offer lower-cost or below-cost services to Chevron for its non-qualified corporate plans, which they claim created a conflict of interest because Chevron used the same recordkeeper for its 401(k) plan. FAC ¶¶ 127-128.

Third, plaintiffs allege that the Vanguard Group, the Plan's recordkeeper, charged excessive fees during the time period it had a revenue-sharing arrangement with Chevron, although they also concede that recordkeeping paid out of revenue sharing is not a per se violation of ERISA's fiduciary requirements. *See* FAC ¶¶ 112-126. They assert, however, that if recordkeeping is paid for with revenue sharing from asset-based charges, there is a "potential" for excessive recordkeeping fees when assets or contributions increase, and that fiduciaries thus have duty to monitor revenue-sharing amounts to make sure that any increase in assets does not result in excessive recordkeeping fees. FAC ¶¶ 117-120.

Fourth, plaintiffs allege that Chevron breached its fiduciary duty by imprudently retaining the Artisan Small Cap Value Fund (ARTVX) as an investment option. They claim that this fund "paid an extremely high amount of revenue sharing to Vanguard," and that "retaining

this fund in the Plan drove an extremely high amount of revenue sharing to Vanguard." FAC ¶ 130. Plaintiffs assert that this fund significantly underperformed its benchmark, and that Chevron failed to monitor its performance and should have removed it earlier than April 2014, when they did remove it. FAC ¶¶ 131-140.

In addition, plaintiffs allege that the Chevron defendants breached their duty to act in accordance with the Plan documents in failing to comply with the Plan's IPS with regard to their choices of the Plan's investment options, in particular, the selection of the Money Market Fund in lieu of a stable value fund, and failure to monitor it, FAC ¶¶ 42, 43, 45, 67-69, 154, and the retention of the ARTVX Fund past the date they removed it from the Plan lineup, and failure to monitor it during that time period, FAC ¶¶ 131, 139, 170. Plaintiffs assert that "[f]iduciaries who are responsible for plan investments governed by ERISA must comply with the plan's written [IPS], insofar as those written statements are consistent with the provisions of ERISA[,]" and that failure to follow a written IPS constitutes a breach of fiduciary duty. FAC ¶ 144 (citing *Cal. Ironworkers Field Pension Trust v. Loomis Sayles & Co.*, 259 F.3d 1036, 1042 (9th Cir. 2001)).

In sum, plaintiffs contend that the value of their 401(k) retirement accounts – and those of other Plan participants – would have been significantly higher had defendants acted more prudently and chosen funds with higher returns or lower administrative and management fees (or both). They assert that the Plan fiduciaries are personally liable to make good to the Plan any losses resulting from the alleged breaches of fiduciary duty.

Plaintiffs assert six causes of action in the FAC: (1) a claim of breach of duties of loyalty/prudence, and failure to comply with the IPS, under 29 U.S.C. § 1104(a), in

connection with the selection of a money market fund instead of a "stable value fund;" (2) a claim of breach of duties of loyalty/prudence under 29 U.S.C. § 1104(a), based on unreasonable investment management fees; (3) a claim of breach of duties of loyalty/prudence under 29 U.S.C. § 1104(a), based on excessive administrative fees charged by the Vanguard Group, Inc. (the Plan's recordkeeper); (4) a claim of breach of duties of loyalty/prudence under 29 U.S.C. § 1106(a), based on causing the Plan to engage Vanguard as recordkeeper – alleged to be a "prohibited transaction" constituting an exchange of property between the Plan and a party in interest; (5) a claim of breach of duties of loyalty/prudence, and failure to comply with the IPS, under 29 U.S.C. § 1104(a), in connection with failing to remove the ARTVX Fund from the Plan lineup before they did remove it; and (6) a claim of breach of fiduciary duty by failing to monitor fiduciaries. *See* FAC ¶¶ 153-179. Defendants now seek an order dismissing the FAC pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

CLAIMS OF BREACH OF FIDUCIARY DUTIES UNDER ERISA § 404(a)

Under ERISA, plan fiduciaries are charged with the duty of loyalty, the duty of prudence, the duty to diversify investments, and the duty to act in accordance with the documents and instruments governing the plan. 29 U.S.C. § 1104(a)(1). Plaintiffs allege that the Chevron defendants breached the first, second, and fourth of these.

In accordance with the duty of loyalty, "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries[ ] and defraying reasonable expenses of administering the plan." *Id.* § 1104(a)(1)(A). As defined in the Restatement (Third)

of Trusts, which is helpful in "determining the contours of an ERISA fiduciary's duty," *Tibble II*, 135 S.Ct. at 1828, the duty of loyalty prohibits trustees from "engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests." Rest. (Third) of Trusts § 78 (2007).

ERISA also requires that plan fiduciaries use "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *Id.* § 1104(a)(1)(B); *see also Tibble II*, 135 S.Ct at 1828 (citing *Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459, 2465 (2014)). Under this "prudent person" standard, courts must determine "whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983); *see also Pension Benefit Guar. Corp. ex rel. St. Vincent v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 716 (2nd Cir. 2013) (prudence analysis focuses on fiduciary's "conduct in arriving at an investment decision, not on its results, and ask[s] whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment").

This duty of prudence extends to both the initial selection of an investment and the continuous monitoring of investments to remove imprudent ones. *Tibble II*, 135 S.Ct. at 1828-29. The Uniform Prudent Investor Act confirms that "[m]anaging embraces monitoring" and that a trustee has "continuing responsibility for oversight of the suitability of the investments already made." *Id.* at 1828 (citation omitted). Further, "[w]hen the trust estate includes assets that are inappropriate as trust

investments, the trustee is ordinarily under a duty to dispose of them within a reasonable time." *Id.* (citation omitted).

Finally, plan fiduciaries are required to act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter." 29 U.S.C. § 1104(a)(1)(D). However, the duty of prudence "trumps the instructions of a plan document." *Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459, 2467 (2014).

DISCUSSION

A. Legal Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the legal sufficiency of the claims alleged in the complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). To survive a motion to dismiss for failure to state a claim, a complaint generally must satisfy only the minimal notice pleading requirements of Federal Rule of Civil Procedure 8, which requires that a complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). However, a complaint may be dismissed under Rule 12(b)(6) for failure to state a claim if the plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to state a claim for relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 558-59 (2007); *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013).

While the court is to accept as true all the factual allegations in the complaint, legally conclusory statements, not supported by actual factual allegations, need not be accepted. *Ashcroft v. Iqbal*, 556 U.S. 662,

678–79 (2009); *see also In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id.* at 679. Where dismissal is warranted, it is generally without prejudice, unless it is clear the complaint cannot be saved by any amendment. *Sparling v. Daou*, 411 F.3d 1006, 1013 (9th Cir. 2005).

In addition, while the court generally may not consider material outside the pleadings when resolving a motion to dismiss for failure to state a claim, it may consider matters that are properly the subject of judicial notice. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005); *Lee v. City of L.A.*, 250 F.3d 668, 688-89 (9th Cir. 2001); Fed. R. Evid. 201(b). Additionally, the court may consider exhibits attached to the complaint, *see Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989), as well as documents referenced extensively in the complaint and documents that form the basis of a the plaintiff's claims. *See Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007); *No. 84 Employer-Teamster Jt. Counsel Pension Tr. Fund v. America W. Holding Corp.*, 320 F.3d 920, 925 n.2 (9th Cir. 2003). The court "may take judicial notice on its own," and "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c).

Here, defendants request that the court take judicial notice of several Plan-related documents, including IRS Form 5500 filings for the Chevron Employee Savings Investment Plan ("ESIP"), submitted to the U.S.

Department of Labor; a February 2012 Chevron ESIP participant newsletter entitled "Change is Coming to the ESIP: Your Wealth;" a U.S. Government Accountability Office Report ("GAO Report") dated March 2011, entitled *401(k) Plans: Certain Investment Options and Practices that May Restrict Withdrawals Not Widely Understood*; an August 2016 Vanguard newsletter entitled *Money Market Reform and Stable Value: Considerations for Plan Fiduciaries*; a July 2012 article by Karen P. LaBarge for Vanguard, entitled *Stable Value Funds: Considerations for Plan Sponsors*; a summary prospectus for the Vanguard Windsor II Investor Shares ("VWNFX"), dated February 24, 2011; a Morningstar report regarding equity ownership of Chevron stock as of September 30, 2016; and the 2011 instructions for IRS Form 5500. *See Defs' RJN*; Exhs. A-L to 2nd Vergara Decl. Plaintiffs do not oppose the request or otherwise claim that the documents are inaccurate, and the court finds that judicial notice is appropriate.

B. Defendants' Motion

Defendants argue generally that the FAC realleges the same claims of breach of fiduciary duty as in the original complaint, but still fails to plead cognizable claims. They contend that even with the substantial increase in length from the original complaint, none of the amendments is materially different from the original insufficient allegations, with the exception of the new "prohibited transaction" cause of action, and none cures the deficiencies that the court found required dismissal of all causes of action asserted in the original complaint. Thus, they argue, the FAC should be dismissed for failure to state a claim.

Underlying the arguments in plaintiffs' opposition is an assertion that the court erred in its analysis and rulings in the August 29, 2016 order dismissing the original

complaint. As such, it appears to be a procedurally improper motion for reconsideration. For example, plaintiffs contend that the court erroneously required plaintiffs to plead highly detailed factual allegations of the deficiencies in the process by which defendants failed to discharge their fiduciary duties, in order to state their claims. Plaintiffs assert that they should not be required to plead more facts than they did in the original complaint, because it is defendants – not plaintiffs – who have access to the "inside information" necessary to make out the claims in detail. Nevertheless, plaintiffs argue, their breach of fiduciary duty claims are now clearly plausible, as they have alleged "substantial additional detailed facts" in support of their six causes of action in the FAC, demonstrating that whatever fiduciary process defendants engaged in was "inadequate."

1. Claims of breach of duty of loyalty

In the original complaint, plaintiffs alleged that defendants breached their fiduciary duty of loyalty in connection with the selection of a money market fund instead of a stable value fund; with regard to the selection of fund options with high administrative and investment-management expenses; and with regard to the failure to replace the ARTVX Fund prior to the date they actually did so.

In the order dismissing the original complaint, the court noted that plaintiffs had alleged throughout the complaint that defendants had breached their fiduciary duties of "loyalty and prudence." The court noted that ERISA § 404(a) distinguishes the duty of loyalty from the duty of prudence; and found that as to the duty of loyalty, the complaint pled no facts sufficient to raise a plausible inference that defendants had engaged in self-dealing or had taken any of the actions alleged for the purpose of benefitting themselves or a third-party entity with

connections to Chevron Corporation, at the expense of Plan participants, or that they had acted under any actual or perceived conflict of interest in administering the Plan. *See* Aug. 26, 2016, Order ("Order") at 8-9.

Defendants argue that the claims of breach of the duty of loyalty should be dismissed for the reasons stated in the August 26, 2016 Order. They contend that, with the exception of the claim regarding the selection of fund options with high administrative expenses, plaintiffs have added no new allegations sufficient to state a claim, and that with regard to that claim, they have alleged no facts showing any "conflict" on the part of the fiduciaries.

In the FAC, plaintiffs allege that defendants breached their "duties of loyalty and prudence" in connection with the selection of a money market fund instead of a stable value fund (first cause of action), *see* FAC ¶ 154; with regard to the selection of funds with unreasonably high management fees and funds with excessive administrative fees (second and third causes of action), *see* FAC ¶¶ 158, 162; and with regard to the failure to replace the ARTVX Fund prior to the date they actually did so (fifth cause of action), *see* FAC ¶¶ 170-171. Each of these four causes of action is alleged in a purely summary and conclusory fashion, and, as in the original complaint, plaintiffs do not distinguish between "prudence" and "loyalty."

Nor do plaintiffs do so in the section of the FAC entitled "Facts Common to All Counts," at least with regard to the first, second, and fifth causes of action. For example, with regard to the selection of the money market fund instead of a stable value fund, plaintiffs allege that "Chevron imprudently and disloyally . . . failed at any time in the past six years to meaningfully investigate the prevailing and persisting economic circumstances and evaluate the prudence of retaining the Money Market Fund as the Plan's *only* conservative investment option

. . . ." FAC ¶ 68. Indeed, the gist of the allegations is that by offering the money market fund as the Plan's only conservative, capital preservation option, from February 2010 to December 31, 2015, defendants breached the duty of prudence. *See*, *e.g.*, FAC ¶ 70. They allege no facts supporting a claim of breach of the duty of loyalty.

Second, with regard to the allegations of unreasonable investment management fees, plaintiffs allege, for example, that defendants "imprudently and disloyally" provided Plan participants with the more expensive share class of certain funds (instead of a cheaper identical investment). FAC ¶ 79. They also allege that defendants "imprudently and disloyally" offered non-Vanguard mutual funds that charged far higher fees than the fees Vanguard charges for similar investments. FAC ¶ 89. However, these allegations do not distinguish between the duty of prudence and the duty of loyalty, and plaintiffs allege no facts showing a breach of the duty of loyalty.

Third, with regard to defendants' failure to remove the ARTVX Fund from the Plan lineup prior to April 2014, plaintiffs do not allege any facts sufficient to state a plausible claim of breach of the duty of loyalty. Indeed, most of the allegations regarding the ARTVX fund do not relate to the duty of loyalty, as distinguished from the duty of prudence. *See*, *e.g.*, FAC ¶¶ 131-134, 139. The only allegation that appears to relate to the duty of loyalty is that "retaining this fund in the Plan drove revenue to Vanguard." *See* FAC ¶ 130.

However, this new allegation that defendants were motivated to retain the ARTVX Fund until April 2014 (despite poor performance in 2012 and 2013) in order to drive more revenue-sharing money to Vanguard for its recordkeeping role, allegedly in compensation for its proxy-voting policy, is contradicted by materials on

which plaintiffs rely. Beginning in 2012 (and before the time plaintiffs claim defendants should have removed the ARTVX Fund from the Plan lineup), all revenue sharing from ARTVX was rebated to the Plan. The 2012 recordkeeping agreement that plaintiffs submitted with their opposition states, "Effective January 1, 2012, an administrative fee reimbursement equal to the amount of all fund subsidies (of any kind) received by Vanguard attributable to a plan's investment in the non-Vanguard funds are to be credited to the applicable Plan." Declaration of Heather Lea, Exh. 6 at 7.

And even if Vanguard had continued to receive ARTVX revenue-sharing, plaintiffs do not and cannot allege that there were no equivalent small-cap funds paying just as much. Plaintiffs provide no factual basis for their speculation that Plan fiduciaries tolerated ARTVX's alleged underperformance for the purpose of benefitting Vanguard. In short, they allege no facts showing a breach of the duty of loyalty.

Finally, with regard to the claim of excessive administrative fees in connection with Vanguard's role as the Plan's recordkeeper, most of the lengthy allegations appear to relate to the purported breach of the duty of prudence. *See*, *e.g.*, FAC ¶¶ 113, 116, 117, 120, 125, 126. Plaintiffs have added the allegation that unlike Plan recordkeeping services, which are paid for by Plan participants, the expenses of administering the corporate plans Chevron maintained for its executives were borne by Chevron; and they assert, on "information and belief," that Vanguard provided "discounted recordkeeping services" for the non-qualified corporate plans sponsored by Chevron for its executives. FAC ¶ 127.

Plaintiffs claim that Vanguard was able to provide this benefit to Chevron because of "the significant amount of revenue sharing [it] generated from having

Plan participants invested in higher cost share classes of its mutual funds as well as other Vanguard investments." *Id.* "At a minimum," plaintiffs allege, "Chevron's enabling its largest shareholder, Vanguard, to receive millions of dollars of excessive compensation from employees' assets paid for recordkeeping the 401(k) plan, positioned Vanguard to be able to offer lower cost or below cost services to Chevron for its corporate plans[,]" which in turn, plaintiffs claim, "placed Chevron in a position of conflict of interest by using the same recordkeeper for the 401(k) plan." *Id.* Plaintiffs assert that

> [t]he revenue sharing arrangement for recordkeeping services paid to Vanguard authorized by Chevron benefitted Vanguard, a third-party entity providing services to Chevron, at the Plan's expense because Vanguard's mutual funds, including those offered in the Plan, are collectively among Chevron's largest shareholders capable of exercising tremendous influence relating to matters of Chevron's corporate governance, executive compensation, and environmental policies through proxy voting.

FAC ¶ 128.

Essentially, plaintiffs contend that Vanguard's practice of regularly voting in favor of Chevron on shareholder resolutions motivated defendants to retain Vanguard as the Plan's recordkeeper on a no-bid basis. *See* FAC ¶ 127. And they claim that choosing the higher-revenue-sharing Vanguard investments furthered this "scheme" to benefit Vanguard in return for Vanguard's favorable voting of its large holding of Chevron stock. *See* FAC ¶ 128.

This attempt to allege breach of the duty of loyalty fails, because the allegations that Chevron had its own interests and the interests of Vanguard at heart, rather than the interests of the Plan participants, are entirely

speculative, and unsupported by any facts, other than "facts" alleged on information and belief or based on pure conjecture. Further, as defendants argue in their motion, even had plaintiffs alleged that Vanguard's proxy voting standards or its arrangement with the non-qualified plans influenced Chevron to retain Vanguard or to inflate the Plan's recordkeeping fees, their theories of "conflict" would still be fundamentally inconsistent with the facts alleged in the FAC – facts that show that, despite any purported "conflict," Chevron repeatedly took actions to reduce Vanguard's fees over the class period, *see*, *e.g.*, FAC ¶ 80 (moving to lower-cost share class), ¶ 123 (recordkeeping fee of $23/participant as of January 1, 2015).

Plaintiffs have alleged no facts showing that the Plan fiduciaries were aware of Vanguard's allegedly "pro-management" voting position, or that it influenced Chevron's retention of Vanguard in any way. As defendants note in their motion, Vanguard, which plaintiffs' counsel has lauded as the "gold standard" in other similar actions (where Vanguard was not the recordkeeper), is a significant shareholder in just about every public company, simply because of its outsized role in index fund investing. Plaintiffs plead no facts showing that Vanguard did anything unique with respect to Chevron; to the contrary, they allege that Vanguard took pro-management positions for *all* companies across the S&P 500, and as a block, across all of its funds, *see* FAC ¶¶ 32-33, regardless of whether it provided retirement services to such companies.

Nor do plaintiffs plausibly plead facts showing a quid pro quo. They allege "on information and belief" that Vanguard provided discounted services to seven non-qualified Chevron plans "due to the significant amount of revenue sharing Vanguard generated from having Plan participants invested in higher cost share classes of its

mutual funds as well as other Vanguard investments," FAC ¶ 127, but this is unsupported by facts sufficient to state a claim for breach of the duty of loyalty.

In short, the court finds that the allegations that Chevron had illicit motives to drive higher recordkeeping fees to Vanguard – that the administration of the Plan was infected by "conflict of interests" resulting from Chevron's relationship with Vanguard – are insufficient to state a claim. In particular, plaintiffs allege no facts showing any benefit to Chevron resulting from the Plan's arrangement with Vanguard that Chevron would not have received even absent any such relationship.

2. Claims of breach of duty of prudence

a. Selection of money market fund in lieu of stable value fund

In the first cause of action, plaintiffs allege that defendants acted imprudently in failing to investigate "the merits" of the Money Market Fund as the Plan's sole conservative investment option, and in failing to investigate the availability of alternative conservative investment options available to the Plan – in particular, a stable value fund, which plaintiffs assert would have provided participants a low-risk investment with a predictable higher rate of return. FAC ¶ 154.

Plaintiffs assert that stable value funds, generally, have a higher rate of return than money market funds. *See* FAC ¶¶ 41-70. Among other things, they allege that defendants failed to consider the Money Market Fund's return to Plan participants as compared to readily available alternatives, which assertion they base on the claim that "when taken together, the superiority of stable value funds over the past ten years" under both lower risk and higher rate of return are clear. FAC ¶ 54.

Plaintiffs also allege that defendants "failed to conduct a prudent process for determining whether the Money Market Fund should have been the sole conservative investment option" in the Plan, which assertion they claim is supported by interest rates over the past eight years, comments in "respected investment management literature," requirements of the IPS, and the "near collapse of money market funds in 2008." FAC ¶ 69(a)-(I).

Defendants argue that this cause of action fails to state a claim, for the reasons set forth in the August 29, 2016 Order. There, the court noted that the IPS required that "[a]t least one fund will provide for a high degree of safety and capital preservation," directed that "all Plan options must be liquid and daily-valued," and promoted participant flexibility in allocating the funds in their accounts. Order at 13-14. The court found that the complaint did not set forth sufficient facts to show a breach of the duty of prudence in connection with defendants' selection of the money market fund as the "capital preservation option," and concluded that offering a money market fund as one of an array of investment options along the risk/reward spectrum more than satisfied the duty of prudence, and was consistent with the IPS guidance. Order at 13-14.

The court found further that plaintiffs had pled no facts showing that the Plan fiduciaries failed to evaluate whether a stable value fund or some other option would provide a higher rate of return and/or failed to evaluate the relative risks and benefits of money market funds vs. other capital preservation options. Order at 14. Finally, the court found that plaintiffs' almost total reliance of the relative performance of stable value and money market funds over the previous six years was an improper hindsight-based challenge to the Plan fiduciaries' decision-making.

As noted above, plaintiffs again summarily allege that defendants failed to employ appropriate methods to assess the comparative merits of money market and stable value funds, *see* FAC ¶ 154, but offer no facts in support of that contention. Instead, plaintiffs have amended the complaint by adding more of the same allegations previously found to be insufficient – primarily allegations emphasizing that money market funds have yielded lower returns than stable value funds over the purported class period. *See*, *e.g.*, FAC ¶¶ 42-45, 54-60, 65, 69b-d. They allege no new facts showing defendants failed to conduct a prudent process for determining whether the Money Market Fund should have been the sole conservative investment option in the Plan lineup.

A fiduciary may reasonably select an investment alternative in view of its different risks and features, even if that investment option turns out to yield less than some other option. No fiduciary selecting a plan's "safe" option can foresee whether the risks associated with stable value investment will come to fruition, and a fiduciary may reasonably choose to avert those risks in favor of a safer alternative. The materials plaintiffs rely on in the FAC, such as the 2011 GAO Report, *see* Exh. A to 2nd Vergara Decl., reinforce this point, as they cite the risks, restrictions, and other downsides of stable value funds, and also reflect the fact that there is not always a large performance gap between stable value funds and money market funds.

Similarly, the 2016 Vanguard newsletter, "Money Market Reform and Stable Value: Considerations for Plan Fiduciaries," FAC ¶ 61 n.31, *see also* Exh. B to 2nd Vergara Decl., states that "[a]lthough the performance gap between stable value and money market funds may make stable value appear attractive today, that gap may narrow in the future as interest rates are expected to increase from their historically low levels." And the

July 2012 article by Karin LaBarge, "Stable Value Funds: Considerations for Plan Sponsors," FAC ¶¶ 65, 69d, *see also* Exh. C to 2nd Vergara Decl., states that "should interest rates rise sharply, money market funds' yields might be higher, over the short term, than those of stable value funds."

Without more, the mere act of offering Plan participants a money market fund over a stable value fund as an option providing "a high degree of safety and capital preservation" is not a fiduciary breach. Indeed, as the court noted in the August 29, 2016, Order, the Ninth Circuit previously rejected an imprudence claim predicated on a plan fiduciary offering "a short-term investment fund . . . rather than a stable value fund." *See* Order at 11 (citing *Tibble v. Edison Int'l* ("*Tibble I*") 729 F.3d 1110, 1136 (9th Cir. 2013), *vacated on other grounds*, 135 S.Ct. 1823 (2015)).

Here, however, instead of relying on the Ninth Circuit, plaintiffs cite an unpublished decision from the Northern District of Texas, *Ortiz v. Am. Airlines, Inc.*, C-16-151 (N.D. Tex. Nov. 18, 2016). Plaintiffs contend that the court in *Ortiz* "found even fewer detailed allegations to clearly state a claim of fiduciary breach[,]" and they further assert that "[t]he allegations so clearly stated a breach, that the court rejected as inadequate a settlement *agreed to by the plaintiffs' attorneys*" (emphasis added by plaintiffs). It is clear, however, that the adequacy of the pleadings was not at issue, and that the court's focus was on the provisions of the proposed settlement.[3] Thus, *Ortiz* is not relevant here.

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[3] In *Ortiz*, the plan participants challenged the fiduciaries' choice of a credit union demand deposit fund in lieu of a stable value fund, as the "capital-preservation" investment option in the participants' 401(k) retirement plan. Defendants filed Rule 12(b)(6) motions to dismiss, but before the oppositions were due, the parties

As the court previously held in the August 29, 2016, order, "[w]ithout some facts that raise an inference of imprudence in the selection of the money market fund – apart from the fact that stable value funds may provide a somewhat higher return than money market funds – plaintiffs have failed to state a claim." Order at 14. The return of money market funds may at certain time periods be lower than the return of stable value funds, but that does not change the fact that stable value funds take greater risks than money market funds by investing in longer-term securities, as explained by defendants in their motion and detailed in the 2011 GAO Report cited in the FAC.

ERISA requires only that the Plan offer some type of low-risk capital preservation option. There is no *per se* rule that a § 401(k) Plan must include a stable value fund as a capital preservation option, even if, in some years, a stable-value fund might outperform some other type of fund. The court agrees with defendants that the FAC does not allege facts sufficient to state a claim of breach of the duty of prudence in connection with defendants'

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engaged in private mediation and executed a memorandum of understanding regarding settlement. The plaintiffs then filed a motion for preliminary approval of the settlement and the settlement class.

In the order at issue, the court requested further briefing regarding the adequacy of the monetary payment, the relationship between the release and the claims being settled, and certain other provisions in the proposed judgment and proposed notice. The court offered the parties the option of redrafting the settlement agreement and a "rethinking of their wishes as to the contents of the proposed court documents" along with the filing of supplemental information. The court added that if the parties did not "wish to tackle those projects," they could advise the court and the court would dispose of the litigation in the usual fashion, starting with denying the motion for preliminary approval and setting a briefing schedule for motions to dismiss.

selection of a money market fund as the low-risk capital-preservation investment option in the Plan investment lineup.

In particular, the FAC pleads no facts showing that the fiduciaries failed to consider a stable value fund, or showing that the process by which the fiduciaries chose the funds was somehow flawed or imprudent. As plaintiffs are unable to allege any facts showing that the Plan fiduciaries failed to consider the advantages and disadvantages of various types of capital preservation funds before deciding to offer a money market fund to Chevron Plan participants, the court finds that the allegation that defendants failed to offer a stable value fund fails to state a claim for breach of fiduciary duty.

b. Management fees

In the second cause of action, plaintiffs allege that defendants acted imprudently in selecting plan options that charged unreasonably high annual management fees in light of the availability of far lower-cost versions of the same investments and alternative funds for the Plan. FAC ¶ 158.

In the August 29, 2016 Order, the court found that the original complaint alleged no facts that were suggestive of imprudent action in connection with this claim. The court noted that while plaintiffs appeared to be challenging the entire lineup of funds, the challenge was primarily based on speculation that Plan fiduciaries "could have" provided identical, though lower-cost, versions of the funds, or "could have" had the same advisers manage the same funds in a separate account, or "could have" structured the investments differently. Order at 21.

The court noted that fiduciaries have latitude to value investment features other than price (and indeed are required to do so). *See* Order at 18-19 (citing *Loomis*

v. Exelon, 658 F.3d 667, 670 (7th Cir. 2011); *Renfro v. Unisys Corp.*, 671 F.3d 314, 326-27 (3rd Cir. 2011); *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009)). The court also noted that courts have dismissed claims that fiduciaries are required to offer institutional over retail-class funds, or are required to offer a particular mix of investment vehicles, as well as claims that fiduciaries were imprudent in failing to offer cheaper funds. *See* Order at 19-20 (citing *Tibble I*, 729 F.3d at 1135; *Loomis*¸ 658 F.3d at 670-72; *Renfro*, 671 F.3d at 326-28; *Hecker*, 556 F.3d at 586).

The court found further that the facts as pled reflected that the Plan fiduciaries had provided a diverse mix of investment options and expense ratios for participants, and that the breadth of investments and range of fees the Plan offered participants fit well within the spectrum that other courts have held to be reasonable as a matter of law. Order at 19-20. Finally, the court found it inappropriate to compare distinct investment vehicles solely by cost, since their essential features differ so significantly. In particular, the court noted, mutual funds have unique regulatory and transparency features, which make any attempt to compare them to other investment vehicles such as collective trusts and separate accounts an “apples-to-oranges” comparison. Order at 21-22.

In the FAC, as in the original complaint, plaintiffs propose three theories as to why the Plan’s investment management fees were unreasonable – that the fiduciaries imprudently offered non-Vanguard mutual fund options when they could have selected comparable Vanguard funds at a lower expense; that the fiduciaries imprudently selected mutual fund share classes with higher expense ratios than other available share classes in the same funds; and that the fiduciaries imprudently offered mutual funds when the Plan could have used

less expensive institutional products, such as collective trusts or separate accounts. *See* FAC ¶¶ 71-110.

Defendants argue that despite having been given an opportunity to plead additional facts in support of this claim, plaintiffs instead opted to stand on their original, deficient allegations. Defendants assert that apart from two editorial alterations and changes to paragraph numbering, plaintiffs' allegations regarding the fiduciaries' offering of non-Vanguard mutual funds and failure to offer institutional products are identical to the allegations in the original complaint (comparing Cplt ¶¶ 56-50 with FAC ¶¶ 90-92; Cplt ¶¶ 60-77 with FAC ¶¶ 93-110).

For example, defendants assert that plaintiffs continue to claim that the Plan fiduciaries acted imprudently by failing to choose the lowest share class for certain mutual funds by not choosing cheaper Vanguard funds, *see* FAC ¶¶ 71-78, 90-92; and that they have attempted to augment this theory by alleging that certain of the higher-cost funds did not offset recordkeeping or administrative costs, *see* FAC ¶ 81. However, defendants contend, these new allegations add nothing, as plaintiffs still fail to recognize that price is but one investment feature that fiduciaries are required to consider and weigh in making investment decisions, and that fiduciaries have latitude to value investment features other than price.

Defendants argue that while plaintiffs continue to allege that Chevron selected high-priced share classes of mutual funds despite the availability of lower-cost share classes of those same funds, FAC ¶ 76, and that alternative structures, such as separate accounts, might have reduced fees, FAC ¶¶ 93-96, it is irrelevant that other funds might offer lower expense ratios in situations such as this, where a plan offers a diversified array of investment options. Defendants assert that to prevail

on this claim, plaintiffs must plead facts supporting a strong inference that defendants failed to weigh the costs and benefits of offering the retail-share classes, the non-Vanguard funds, or mutual funds other than other investment vehicles. They contend that since plaintiffs have failed to do this, this cause of action should be dismissed.

In opposition, plaintiffs argue that this cause of action is not a challenge to the selection and maintenance of the Plan's "mix and range of investment options" or a challenge to "the entire lineup of funds," as the court indicated in the previous order. Rather, plaintiffs contend, the FAC addresses specific funds for which defendants had available lower-cost options but instead opted to go with the higher-cost options that were otherwise "the same investment pools in all material respects."

Plaintiffs assert that ten of the Vanguard mutual funds and the three non-Vanguard mutual funds (out of 31 total investment options in the Plan lineup, as of December 2014), provided the exact same mutual fund investment in lower-fee share classes designed expressly for large institutional investors such as the Plan (citing FAC ¶¶ 79, 89, 27). They contend that providing participants with the more expensive share class of a mutual fund without good reason is a recognized breach. In support of this proposition, they cite *Tibble I*, 729 F.3d at 1138-39.

In that portion of the decision, the Ninth Circuit addressed the defendant's argument on cross-appeal that "the district court had erred in concluding – after a three-day bench trial and months of post-trial evidence and briefing – that the company had been imprudent in deciding to include retail-class shares of three specific mutual funds in the Plan menu." *Id.* at 1137. However, rather than holding that providing participants with the more expensive share class of a mutual fund without

good reason is a recognized breach, as plaintiffs assert here, the Ninth Circuit found that "[t]he basis of liability was not the mere inclusion of retail-class shares, as the court had rejected that claim on summary judgment. Instead, beneficiaries prevailed on a theory that [the company] has failed to investigate the possibility of institutional-share class alternatives." *Id.*

This court also previously found that *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009), on which plaintiffs continue to rely, does not support plaintiffs' claim, because the claim regarding the selection of retail-class mutual funds in that case was accompanied by allegations that the funds paid kickbacks to the plan's trustee in exchange for including the funds in the plan. *See* Order at 21 (citing *Braden*, 588 F.3d at 590, 594-95). Plaintiffs appear to be attempting to match the allegations in *Braden* by suggesting that defendants were compensating Vanguard for its publicly disclosed policy of passively voting securities in favor of management positions. However, this assertion is unsupported by allegation of any facts, and is thus entirely speculative.

It bears repeating that the test of prudence is whether the fiduciaries, "at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." *Donovan*, 716 F.2d at 1232, *quoted in Calif. Ironworkers*, 259 F.3d at 1043. The court must ask whether the fiduciary engaged in a reasoned decisionmaking process, consistent with that of a "prudent [person] acting in like capacity." 29 U.S.C. § 1104(a)(1)(B). Here, the FAC does not allege any facts sufficient to create a plausible inference that Chevron failed to investigate the merits of the retail-class funds allegedly included in the Plan lineup, or failed to engage in a reasoned decisionmaking process in selecting the funds.

Again complaining about the August 29, 2016 Order, plaintiffs assert that the court improperly held that defendants' change to lower fund classes was proof of a prudent process. What the court actually found, however, was that the allegation that the fiduciaries changed the investment options from year to year supports an inference that the fiduciaries were monitoring the investments, and also that the breadth of investments and range of fees in this case fit within the spectrum of what other courts have found reasonable. *See* Order at 20.

Plaintiffs also point to allegations that six of the non-Vanguard mutual funds provided arrangements for the investments managers of those funds to manage the same investments in the Plan's own separate account at published rates that were lower than mutual fund rates, and could have been negotiated even lower. *See* FAC ¶¶ 97-102. Plaintiffs note that defendants did in fact negotiate a separate account arrangement with one of those managers in 2012, reducing the management fee by half. *See* FAC ¶ 102. Plaintiffs also cite to allegations in the FAC that Vanguard provided a "collective trust version" of 13 of the mutual funds, FAC ¶¶ 106-110, but that defendants selected the higher cost version of the target date funds in 2013 and did not move to the lower-cost collective trusts until 2015, FAC ¶ 109.

Plaintiffs contend that all these allegations show that there were specific alternatives available to the Plan which were in substance the same investments with the same investment managers, but at a lower cost, and that defendants either rejected them or ignored them in favor of more expensive versions of the same investments. Plaintiffs contend that these allegations are not a "broadside" against retail-class mutual funds as categorically imprudent, and are not vague allegations of some lower-cost but different investments available

somewhere in the market. They assert that the allegations are sufficient to plausibly suggest that *any* fiduciary process was "inadequate" – if not "tainted by failure of effort, competence, or loyalty" (citing *Braden*, 588 F.3d at 596).

Plaintiffs continue to argue that defendants have an obligation to provide an alternative explanation for the selection of higher-cost share classes for certain funds (which would appear to shift the burden to defendants). However, plaintiffs themselves have already offered an explanation. For example, plaintiffs allege in the FAC that prior to March 31, 2012, "Vanguard received 10 bps of internal revenue sharing on the retail (Investor) share class Vanguard mutual funds" in order to pay for recordkeeping. *See* FAC ¶ 120; *see* also Pltfs' Opp. at 20 (detailing 10 bps recordkeeping credit for investor class shares of Vanguard funds); 2nd Vergara Decl., Ex. K at 4 (explaining that the change to fixed recordkeeping fees will result in the implementation of cheaper share classes)). This provides an "obvious, alternative explanation" for why the Chevron Plan included retail share classes of certain funds – those share classes paid the Plan's recordkeeping expenses before the Plan's fiduciaries negotiated a flat, per-participant fee in 2012 in exchange for moving to the cheaper, institutional share classes.

This court noted in the prior order that ample authority holds that merely alleging that a plan offered retail rather than institutional share classes is insufficient to carry a claim for fiduciary breach. *See* Order at 19. Plaintiffs apparently wish to relitigate that issue, as they once again argue that their identification of specific alternative investment options distinguishes their facts from the facts in *Loomis*, *Renfro*, and *Hecker*. Yet plaintiffs do not make clear what distinction follows from identifying particular funds in the Plan lineup that

marketed share classes cheaper than those offered – particularly when plaintiffs have acknowledged that the more expensive share classes paid for Vanguard's recordkeeping services.

The court agrees with defendants that the FAC fails to allege facts sufficient to state a claim of breach of the duty of prudence in connection with defendants' selection of funds with allegedly higher management fees over funds with lower management fees. The new allegations simply provide comparisons between funds that were in the Plan lineup and funds that plaintiffs claim were less expensive. However, what is still missing from the FAC are factual allegations sufficient to create a plausible inference that defendants' process of selecting funds and their monitoring of the funds was imprudent.

The FAC pleads no facts regarding any process for choosing funds, and no facts relating to investigations into the appropriateness of various funds. The sole basis for this claim is the assertion that there were allegedly lower-cost institutional-class funds available that could have been substituted for certain higher-cost retail-class funds that defendants selected. The court previously ruled that merely alleging that a Plan offers retail-class rather than institutional-class funds is insufficient to state a claim for breach of the duty of prudence, as fiduciaries have latitude to value investment features other than price, and indeed are required to do so, and ERISA does not require fiduciaries to "scour the market to find and offer the cheapest possible funds." *See* Order at 18-20.

c. Administrative fees

In the third cause of action, plaintiffs allege that defendants acted imprudently in causing the Plan to pay excessive administrative fees to Vanguard during the portion of the proposed class period when the revenue-

sharing arrangement for recordkeeping expenses was in effect (February 2010 to March 2012) "through uncapped and unmonitored revenue sharing from Plan investment options and in failing to put Plan administrative services out for competitive bidding on a regular basis, at least every three years." FAC ¶ 162.

Plaintiffs allege that the Plan's recordkeeping fees were excessive in part because defendants failed to monitor the amount of asset-based revenue sharing fees Vanguard received, and failed to investigate "obtaining recordkeeping and investment management services on an open architecture, unbundled basis to ensure Plan service providers were not receiving unreasonable compensation as Plan assets increased." FAC ¶ 125. They allege "on information and belief" that Chevron has never engaged in a competitive bidding process to ensure that the Plan paid reasonable fees for the services provided." FAC ¶ 126.

In dismissing the original complaint, the court found that this cause of action failed to state a claim. *See* Order at 22-27. Defendants argue that this cause of action still fails to state a claim. In the FAC, as in the original complaint, plaintiffs focus on Vanguard's receipt of recordkeeping compensation via revenue sharing from the Plan's mutual fund investments. *See* FAC ¶¶ 111-129. Defendants note that plaintiffs acknowledge that nothing in ERISA prohibits such revenue-sharing arrangements. *See* FAC ¶ 117.

Defendants contend, however, that plaintiffs continue to allege that the Plan fiduciaries acted imprudently by compensating Vanguard for administrative services exclusively through revenue sharing, rather than on a fixed per-participant basis, particularly as Plan assets grew. *See* FAC ¶¶ 111-115, 125. They note that plaintiffs also repeat their claim that Plan fiduciaries

improperly failed to solicit competitive bids from other recordkeepers. FAC ¶¶ 120, 126.

Defendants argue that the FAC fails to allege facts sufficient to support an inference that the Plan's fiduciaries acted imprudently in failing to monitor fees as Plan assets grew. Moreover, they assert, this court has already held that any such inference would conflict with (1) plaintiffs' admissions that the Plan fiduciaries renegotiated the recordkeeping arrangement with Vanguard four years ago, entering into the kind of flat-fee arrangement that plaintiffs claim should have been the agreement all along; and (2) judicially noticeable Plan filings showing that defendants moved to less expensive share classes of at least four funds even during the 2010-2011 period, prior to the renegotiation. *See* Order at 26.

Similarly, defendants argue, the allegations suggesting there was some requirement to solicit competitive bids has "no legal foundation." *See* Order at 26 (noting that nothing in ERISA compels periodic competitive bidding). Defendants assert that at its core, this claim alleges nothing more than a conclusory assertion that fees under a revenue-sharing arrangement are necessarily excessive and unreasonable, *see* Order 25, which they contend cannot sustain plaintiffs' imprudence claim.

As for plaintiffs' new allegations relating to the fees allegedly paid under the revenue-sharing arrangement and a supposed "conflict" that plaintiffs contend clouded the Plan fiduciaries' oversight of recordkeeping fees, *see* FAC ¶¶ 118-124, defendants contend that these allegations do nothing to save plaintiffs' claim. For example, defendants contend that the allegations regarding the recordkeeping fees allegedly paid by the Plan in 2010 and 2011 do not support an inference of breach of the duty of prudence, as plaintiffs have supported it by offering a "guess" as to the per-participant dollar amount for the Plan's

recordkeeping arrangement with Vanguard for 2011 and 2012, in the hope that this guess will show imprudence. *See* FAC ¶¶ 120-122.

Defendants argue that plaintiffs' guess is not a well-pleaded factual assertion, particularly since it is undermined by judicially noticeable public filings, materials referenced in the FAC, and even other allegations within the FAC. Defendants point to the allegations that the recordkeeping fees were $167 to $181 in 2010 and 2011, and that those figures are the sum of (1) the direct compensation to Vanguard reported on the Plan's Form 5500s; and (2) purported revenue sharing levels from the funds, expressed in basis points. *See* FAC ¶ 122. However, defendants assert, the court need not credit those calculations.

First, defendants argue, the "direct compensation" data reported in the Form 5550s includes fees for services other than recordkeeping. Schedule C to the Plan's Form 5500s discloses direct Plan compensation to Vanguard (and other third parties) – *e.g.*, the Form 5500 for 2011 discloses $2,158,730 in direct compensation to Vanguard that year. *See* 2nd Vergara Decl., Ex. E, at 6. However, the Service Codes on that same Schedule C show that this compensation was not only for recordkeeping services, but also for directed trustee services, participant-level investment advisory services, securities brokerage services, participant loan processing, and investment management fees paid indirectly by the participants. Defendants contend that plaintiffs have lumped all of these fees together and label them "recordkeeping" fees, even though most have nothing to do with recordkeeping.

Second, defendants argue that plaintiffs' "internal revenue sharing" numbers are invalid. Plaintiffs allege that "Vanguard received 10 bps of internal revenue sharing on the retail (Investor) share class Vanguard

mutual funds," FAC ¶ 120, and that "the estimated revenue sharing or indirect compensation Vanguard received from its proprietary Investor share mutual fund options," FAC ¶ 122. Defendants assert that the judicially noticeable Summary Prospectuses for the retail mutual funds offered by the Plan before 2012 delineate fund fees, but break them down into "Management Expenses" and "Other Expenses" (citing, *e.g.*, Vergara Decl., Ex. I, VWNFX 2011 Summary Prospectus at 3 (stating "Total Annual Fund Operating Expenses" are 35 basis points, comprising 33 basis points of "Management Expenses" and 2 basis points of "Other Expenses")). Nowhere, defendants argue, are any "internal revenue sharing" expenses listed or broken out, and nowhere do plaintiffs provide the source of these numbers.

Third, defendants argue that the Plan's Form 5500s show that the Plan offered the Institutional share class of the Vanguard Balanced Index in 2010 and 2011, at zero basis points, rather than the Investor share class plaintiffs wrongly allege was offered, at plaintiffs' estimate of 10 basis points. *See* Vergara Decl., Exh. D, 2010 Form 5500 at 34; Exh. E, 2011 Form 5500 at 35. They claim that plaintiffs thus presumably included 10 basis points for that fund (instead of zero) in calculating revenue sharing. They add that plaintiffs' assertion that the revenue sharing arrangements are "exceedingly opaque," FAC ¶ 124, constitutes a concession on the part of plaintiffs that their own estimates lack foundation. Defendants argue that the allegations regarding the amount of the recordkeeping payments need not be accepted by the court, because they are nothing more than conclusory, unwarranted speculations.

Fourth, defendants contend that plaintiffs' "cherry-picking" of recordkeeping fees for two specific years fails to support an inference that the Plan fiduciaries acted imprudently. They argue that there are no facts pled in the

FAC from which the court could plausibly infer that the overall compensation paid to Vanguard for recordkeeping services over the term of the agreement – inclusive of prior periods when Plan assets were considerably lower – was excessive. They contend that even were it true that the Plan's asset-based fee arrangement resulted in higher recordkeeping fees in 2010 and 2011 (at least when measured on per-participant, dollar basis), this ignores that asset-based fee arrangements will naturally fluctuate as asset levels rise and fall.

Fifth, defendants argue that, like other allegations in the FAC, allegations re plaintiffs' recordkeeping fees function only in hindsight. They contend that even if the court accepts as true the allegation that the Plan's 2010 and 2011 asset-based fees for Vanguard's recordkeeping services were higher than fixed per-participant recordkeeping rates available in the market for the same package of services, this does not support the inference that Plan fiduciaries must have known the Plan's assets would increase substantially in 2010 and 2011, and the fees (when converted from asset-based percentages to dollars per participant) along with them.

Defendants contend that there is even less support for the inference that the Plan fiduciaries therefore followed an improper process when continuing the asset-based fee arrangement with Vanguard in 2010 and 2011. Defendants note that the Third Circuit in *Renfro* upheld dismissal when faced with allegations very similar to those raised by these plaintiffs in the FAC (citing *Renfro*, 671 F.3d at 326-28).

Finally, defendants reiterate, plaintiffs' own allegations reveal that the Plan fiduciaries were monitoring recordkeeping fees and reduced those fees during the period in question by moving to lower fee share classes and renegotiating recordkeeping fees effective March 31,

2012 (citing FAC ¶¶ 79, 125); *see also* Order at 26 (finding that these changes plausibly suggest that defendants were monitoring recordkeeping fees).

In opposition, plaintiffs argue that the FAC pleads "detailed new allegations" sufficient to show that Vanguard charged excessive administrative fees (citing FAC ¶¶ 113, 116-123, 125). They point to FAC ¶ 113, where they allege that Vanguard's own chart shows an annual fee rate of $22-$25 per participant. *See* Lea Decl. Exh. 6. With regard to defendants' contention that plaintiffs' estimate of the amount of the total per-participant compensation is little more than a "guess," plaintiffs point to allegations in FAC ¶ 122 that defendants allowed Vanguard to take $167-$181 per participant from the Plan in 2010 and 2011, well above even the $30.50 fee Vanguard ultimately agreed to when defendants finally eliminated the revenue-sharing arrangement.

As for the amount of the direct compensation reported to the Department of Labor, plaintiffs take issue with defendants' argument that the payments were allocated among different "codes," and were not all directed at revenue-sharing payments. Plaintiffs contend that the fact that "most" of the codes were not for recordkeeping does not mean that "most" of the dollars were not payment for recordkeeping. Plaintiffs claim that because defendants do not disclose that information to plaintiffs, and because plaintiffs are not in a position to determine how much of the total payment actually went to recordkeeping, it is improper for defendants to try to shift the burden to plaintiffs to allege facts that are based on information that is totally within defendants' control. In plaintiffs' view, "all or nearly all of that amount in fact is recordkeeping compensation" (citing FAC ¶¶ 122-124) – although they point to no facts supporting that theory.

Plaintiffs add that even if their calculations have overestimated Vanguard's compensation by half, the result still exceeds that $30.50 per-participant recordkeeping fee that Vanguard agreed to after defendants eliminated the revenue-sharing agreement. According to plaintiffs, this demonstrates that defendants "likely failed to monitor Vanguard's compensation and allowed Vanguard to be overcompensated."

As for defendants' assertion that plaintiffs' calculations regarding the revenue-sharing Vanguard received are "made up," plaintiffs note that defendants concede that revenue-sharing agreements are "exceedingly opaque," but again complain that defendants are still demanding that plaintiffs state the exact amount of revenue sharing Vanguard received. Plaintiffs contend that the basis for their 10-basis point fee is not "an opaque summary prospectus," but that it comes from "a variety of sources," including defendants' own recordkeeping agreement with Vanguard (Lea Decl. ¶ 7, Exh. 6 at 16); and 17 charts showing revenue-sharing payments from various funds offered as investment options in the Plan.

The court finds that the FAC fails to state a claim of breach of the duty of prudence in connection with the recordkeeping arrangement in that existed from February 2010 to February 2012. The court previously ruled that any claim alleging that Vanguard's recordkeeping fees were excessive failed to state a claim because plaintiffs failed to allege what those fees were and how they were excessive. *See* Order at 27; June 22, 2016 Hearing Transcript ("TR.") at 35.

In an attempt to address this deficiency, plaintiffs have estimated the amount of Vanguard's incremental compensation for recordkeeping services in 2010 and 2011, and have compared that guess to the fees Chevron negotiated with Vanguard in 2012, after a substantial

increase in plan assets. *See* FAC ¶ 125. Plaintiffs' opposition confirms that this "estimate" has no factual basis, and that plaintiffs also concede that the source of their per-participant estimate includes a number of other fees paid to Vanguard that are unrelated to recordkeeping, and that they do not know what portion of the total fees actually relate to recordkeeping.

Even apart from the flaws in plaintiffs' guesswork on the amount of recordkeeping fees in 2010 and 2011 and the non-existent "conflicts," plaintiffs' claim still fails, as it boils down to an assertion that Chevron should have foreseen that the market would go up – and that Plan assets would increase as a result – and renegotiated its asset-based fee arrangement sooner than March 2012.

To reiterate, the question in a claim for breach of the duty of prudence is whether the challenged decision was imprudent at the time the fiduciaries made the decision. *See, e.g., Tibble I*, 729 F.3d at 1136. Plaintiffs offer no facts supporting their suggestion that the Plan's fiduciaries should have anticipated an increase in Plan assets such that asset-based fees should have been abandoned as early as 2010 or 2011 – rather than in 2012. Moreover, the FAC does not allege that Vanguard (or any other recordkeeper) would have accepted the fees set out in the 2012 agreement any sooner. Instead, plaintiffs assert that "Chevron could have and should have either obtained a readily- available flat fee for recordkeeping services or capped the amount of revenue sharing to ensure that excessive amounts were returned to the Plan." FAC ¶ 125.

Finally, even were plaintiffs' recordkeeping claim viable, it would still fail because it is time-barred. ERISA's statute of limitations requires that an action be filed no more than 'three years after the earliest date on which the Plaintiff had actual knowledge of the breach

or violation." 29 U.S.C. § 1113. Here, the FAC challenges the reasonableness of administrative fees charged prior to March 31, 2012, and includes allegations only as to the fees allegedly paid in 2010 and 2011. *See* FAC ¶¶ 120-122, 124.

At the very latest, plaintiffs were aware of the allegedly excessive recordkeeping fee arrangement in February 2012, when they received the detailed disclosure from Chevron regarding the transition from a revenue-sharing fee agreement for Vanguard's recordkeeping services to a flat fee arrangement. That disclosure indicted that many administrative fees were previously covered by higher expenses on certain mutual funds in the Plan and that a quarterly administrative fee would replace the prior structure; and it also listed the precise "before" and "after" fees of every investment affected by the change. Thus, because plaintiffs had actual knowledge of the facts underlying their claim more than three years before they commenced this action, the third cause of action is untimely and fails as a matter of law.

Plaintiffs argue that the Chevron disclosure serves only to undercut defendants' argument that plaintiffs had actual knowledge of the administrative fees paid to Vanguard under the revenue-sharing agreement. Plaintiffs cite to the first section of this communication, which states in effect that every mutual fund offered by the Plan charges participants an "investment management fee" which varies depending on how much each participant has invested, and which is deducted directly from the fund's investment returns rather than appearing as a separate charge on the participant's statement. Plaintiffs assert that it is implausible for defendants to argue that a Plan communication which in effect states that the participants cannot see the revenue sharing fees paid to Vanguard can also establish that plaintiffs had "actual knowledge" that those hidden fees were excessive.

Plaintiffs argue that this February 2012 communication demonstrates that plaintiffs could not have known the amount of compensation paid to Vanguard – much less whether it was excessive. Moreover, they assert, defendants' "actual knowledge" argument is not properly directed, as plaintiffs' claim is not merely based on the fact that Vanguard was paid through revenue-sharing, but rather that defendants failed to monitor that revenue-sharing and allowed the Plan to overpay Vanguard. Plaintiffs contend that defendants have provided no evidence showing that plaintiffs had actual knowledge of those facts. Thus, they assert, ERISA's three-year statute of limitations does not bar any of their claims.

The court finds that this cause of action is time-barred. The FAC challenges the reasonableness of the administrative fees charged by the Plan during the period from February 2010 through March 31, 2012. *See* FAC ¶¶ 120-122, 124. Plaintiffs received a detailed disclosure from Chevron in February 2012, stating that a portion of Vanguard's mutual fund investment management fees had previously been used to cover plan administrative expenses; that administrative expenses would now be covered by a flat quarterly fee; that as a result, some Vanguard funds would convert to lower-cost share classes; and that non-Vanguard mutual funds which paid Vanguard a portion of the investment management fee for recordkeeping would rebate that money to participants. *See* 2nd Vergara Decl. Exh. K.

As for plaintiffs' argument that this disclosure was inadequate to comprise "actual knowledge" because the gravamen of their claim is that defendants failed to monitor revenue sharing, plaintiffs plead no facts supporting this claim of failure to monitor. Moreover, the 2012 disclosure establishes that the Plan fiduciaries were monitoring revenue sharing, and negotiating to change the revenue sharing paid to Vanguard. Further,

the allegations in the FAC offer no facts beyond what was already available to plaintiffs in the 2012 newsletter.

Plaintiffs' argument is inconsistent. They contend, for purposes of avoiding the statute of limitations, that they lacked sufficient detail in 2012 to state a claim, and at the same time claim that the same level of detail known to them in 2012 and alleged in the FAC is sufficient to defeat defendants' motion to dismiss. The court finds that the claim is time-barred under 29 U.S.C. § 1113(2), as plaintiffs possessed the same actual knowledge in 2012 that is the basis of their claim today.

With regard to the argument regarding the recordkeeping fees in 2010 and 2011, plaintiffs' allegations are little more than guesses, and are either invalid or relatively incomprehensible, for the reasons argued by defendants. Most importantly, none of the allegations are sufficient to support an inference that the overall compensation paid to Vanguard was excessive, particularly given that the fees were based on the asset levels, and there was no way to know before the fact what the asset levels in 2010 and 2011 would be. There are no facts showing that the fiduciaries acted imprudently at the time.

d. Claim re delay in removing the ARTVX Fund

In the fifth cause of action, plaintiffs allege that defendants breached their duty of prudence, including the duty to monitor Plan investments, and also breached the terms of the IPS, by providing and failing to remove as a Plan investment option the Artisan Small Cap Value Fund ("ARTVX Fund"), despite the fund's underperformance compared to its benchmark, peer group, and similar lower-cost investment alternatives. FAC ¶ 170. Defendants removed the fund from the Plan lineup in April 2014.

Plaintiffs assert that the ARTVX fund significantly underperformed its benchmark (the Russell 2000) for four out of the five years preceding its removal, and that it ranked in the bottom 1/10th of the Morningstar category ranking for 1-, 3-, and 5-year periods between March 2010 and March 2014. FAC ¶¶ 132-133. Plaintiffs claim that defendants should have removed this fund – which had been part of the Plan lineup since 2003 – earlier than April 2014. *See* FAC ¶¶ 134-140.

Defendants argue that this cause of action fails to state a claim. In the original complaint, plaintiffs alleged that in addition to imposing an excessive fee structure, the ARTVX Fund significantly underperformed its benchmark and alternatives available to the Plan, such that a prudent fiduciary would have removed it before the Plan fiduciaries acted to do so. The court found that this cause of action did not plead facts sufficient to state a claim. *See* Order at 31. Rather, the court found, the allegations were sufficient to create a plausible inference that the Plan fiduciaries were attentively monitoring the Fund, as they removed it in April 2014, and did so while it was still outperforming its benchmark on a long-term trailing basis. *See id.*

The court also found that plaintiffs' characterization of the fund's performance included a substantial period after the defendants had removed the fund, and that plaintiffs appeared to concede that the period of "consistent" underperformance did not begin until "around 2012." Order at 31. The court reiterated that poor performance, standing alone, is not sufficient to create a reasonable inference that plan fiduciaries failed to conduct an adequate investigation – either when the investment was selected or as its underperformance emerged – and that ERISA requires a plaintiff to plead some other indicia of imprudence. *Id.*

In the FAC, plaintiffs again allege that the ARTVX Fund was one of the most expensive offered to Plan participants. They assert that the IPS requires careful and continuous monitoring of the performance of each Plan investment option, and that here, despite the fact that the ARTVX Fund underperformed its benchmark (Russell 2000), and consistently ranked at the bottom of its peer group for 15 of 17 consecutive quarters, defendants retained the ARTVX Fund as a Plan investment until April 1, 2014. Plaintiffs allege further that there were numerous prudent alternatives to this low-performing fund available to the Plan. FAC ¶¶ 132-138.

Defendants argue, however, that plaintiffs simply continue to allege – and only with the benefit of hindsight – that the fund's allegedly "dismal" performance is enough to state a claim. Defendants contend that, as the court previously noted, the common practice of retaining investments through periods of under-performance as part of a long-range investment strategy is plainly permitted. *See* Order at 31-31. Defendants argue that plaintiffs' hindsight judgments of the Plan fiduciaries' monitoring process, including allegations regarding investments that would have made more money than the ARTVX fund, are thus insufficient to state a claim. *See* Order at 32.

In opposition, plaintiffs argue that the FAC alleges sufficient facts to show that the ARTVX Fund performed poorly for several years, and that there were other, better-forming alternatives that the Plan fiduciaries could have offered Plan participants. They note that the IPS requires careful and continuous monitoring of the performance of each Plan investment option, and argue that a Plan investment must be removed if it fails to meet an investment strategy objective or if the investment strategy of the fund is no longer appropriate for the plan.

Plaintiffs contend that the ARTVX Fund's underperformance is well-documented in the FAC, and that there were many reasonable and prudent alternatives to this poorly performing fund. They assert that they have alleged sufficient facts to state a claim that defendants acted imprudently in failing to remove the ARTVX fund earlier than they did.

The court previously held that to state a viable claim, plaintiffs must plead some other objective indicia of imprudence. *See* Order at 31. The court agrees with defendants that the fifth cause of action fails to state a claim that the Plan fiduciaries were imprudent in failing to remove the ARTVX Fund from the Plan lineup sooner than they did. Plaintiffs continue to base this claim solely on the fact that the Fund did not perform well, which approach the court has already rejected. *See* Order at 31-32. This cause of action was adequately disposed of in the August 29, 2016 Order, *see* Order at 27-32, and plaintiffs have not added any new facts sufficient to save it.

3. Claim re "prohibited transactions"

In the fourth cause of action, plaintiffs assert a new claim – that by engaging Vanguard to serve as the Plan's recordkeeper, defendants "caused the Plan to engage in a transaction that they knew or should have known constituted a direct or indirect furnishing of services between the Plan and a party in interest" in violation of ERISA § 406, 29 U.S.C. § 1106(a)(1). FAC ¶¶ 166-167. Specifically, plaintiffs allege that defendants caused the Plan to engage in a transaction that they knew or should have known constituted an exchange of property between the Plan and a party in interest, which is prohibited by § 1106(a)(1)(A), or a direct or indirect furnishing of services between the Plan and a party in interest, prohibited by § 1106(a)(1)(C), and/or a

transfer of Plan assets to a party in interest, prohibited by § 1106(a)(1)(D). *See* FAC ¶ 167.

Defendants argue that this newly-added cause of action fails to state a claim and must be dismissed. First, defendants note that ERISA creates an exemption from "prohibited transactions" by explicitly permitting a plan to contract or make "reasonable arrangements with a party in interest for . . . services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C. § 1108.

Second, defendants contend that plaintiffs' new "prohibited transaction" claim is barred by ERISA's six-year statute of repose, 29 U.S.C. § 1113, for claims of breach of fiduciary duty. Here, defendants assert, plaintiffs are explicit about the transaction they purport to be prohibited – it is "causing the Plan to engage Vanguard to be the Plan's recordkeeper." FAC ¶ 166-167; *see also* FAC ¶ 28 ("Chevron selected Vanguard as the Plan's recordkeeper" in 2002). Thus, defendants assert, this new cause of action is time-barred.

In opposition, plaintiffs do not respond to the argument that ERISA explicitly permits a plan to contract for "services necessary for the establishment or operation of the plan." Rather, they focus on the question whether the claim is time-barred. They assert that the "duty to monitor," which was recognized by the Supreme Court in the 2015 decision in *Tibble II*, applies equally to transactions under § 1106 (citing *In re Northrop Grumman Corp. ERISA Litig.*, 2015 WL 10433713 at *25-26 (C.D. Cal. Nov. 24, 2015)).

Plaintiffs contend that their "prohibited transaction" claim concerns the agreement under which defendants hired Vanguard to serve as the Plan's recordkeeper, which they assert resulted in Vanguard receiving excessive

compensation for its services. They point to *Northrup Grumman*, where the court concluded, in ruling on defendants' motion for summary judgment, that "[g]iven the fiduciaries' continuing duty to avoid transactions violating the duty of loyalty, plaintiffs can argue that each payment pursuant to [a prohibited transaction] during the limitations period constituted a breach of fiduciary duty and a prohibited transaction." *Id.*, 2015 WL 10433713 at *26. Based on this, plaintiffs argue that the "prohibited transaction" claim is timely.

The court agrees with defendants that the fourth cause of action fails to state a claim. Chevron selected Vanguard as the Plan's recordkeeper in 2002, FAC ¶ 28, and the complaint in this case was filed in 2016. Unlike a claim for breach of fiduciary duty, which turns on the prudence of the decisionmaking process, a violation of § 1106 occurs when a fiduciary takes a particular action with respect to a Plan. It makes no sense to assert a claim of duty to monitor a past occurrence, and the Ninth Circuit has opined that there is no such thing as a "continuing" prohibited transaction – as the plain meaning of "transaction" is that it is a point-in-time event. *See Wright v. Ore. Metallurgical Corp.*, 360 F.3d 1090, 1101 (9th Cir. 2004).

Thus, the cited ruling in *Tibble II* is inapplicable as it tethered to the "duty to monitor" incorporated into § 1104's duty of prudence, not the "prohibited transactions" element of § 1106, even where the alleged prohibited transaction is the mere retention of a third-party service provider more than six years prior to the claim. *See Tibble II*, 135 S.Ct. at 1828-29.

The *In re Northrup Grumman* decision is also inapposite, as there is no allegation here of "annual proposals that set forth a schedule of services" that Vanguard would provide each year. *See id.*, 2015 WL

10433713 at *26. Rather, plaintiffs allege only that engaging Vanguard in 2002 was a prohibited transaction. Plaintiffs have offered no theory as to how a continuing duty to monitor affects a static decision made 14 years prior to the claim that plaintiffs have asserted.

4. Claim re failure to comply with "duty to monitor" fiduciaries

In the sixth cause of action, plaintiffs allege that "to the extent that any of Chevron Corporation's fiduciary responsibilities were delegated to another fiduciary, Chevron's monitoring duty included an obligation to ensure that any delegated tasks were being performed prudently and loyally." FAC ¶ 176. Plaintiffs claim that Chevron failed to monitor its appointees and their fiduciary process. FAC ¶ 177.

Defendants argue that this cause of action fails to state a claim. They note that plaintiffs have not revised this cause of action since the court ruled on the prior motion to dismiss, and contend that this unrevised "duty to monitor" claim remains both derivative and flawed, as the court held in the order dismissing the original complaint. *See* Order at 33-34.

In opposition, plaintiffs make the same argument they made in opposition to the motion to dismiss this cause of action as pled in the original complaint – that because the FAC states valid causes of action for breach of fiduciary duty, the derivative claim must also survive dismissal. They add that because they lack the "inside information" regarding how defendants actually monitored the fiduciaries, they cannot be expected to allege such facts in the complaint.

As both plaintiffs and defendants agree, this claim is derivative. Because none of the other causes of action

states a claim, the sixth cause of action must also be dismissed.

CONCLUSION

In accordance with the foregoing, the court finds that defendants' motion must be GRANTED. With regard to the claims for breach of the duty of loyalty (first, second, third, and fifth causes of action), the FAC fails to allege facts sufficient to raise a plausible inference that defendants took any actions for the purpose of benefitting themselves or some third party with connections to Chevron, at the expense of Plan participants, or that they acted under any actual or perceived conflict of interest.

With regard to the claims of breach of the duty of prudence, the FAC fails to state a claim for the reasons set forth above. The derivative claim of failure to monitor fiduciaries fails because the FAC does not state a claim for breach of fiduciary duty.

Because plaintiffs have failed to correct the deficiencies identified by the court in its prior order, and because the sole new claim fails for the reasons set forth in this order, the court finds that further leave to amend would be futile. The dismissal is WITH PREJUDICE.

IT IS SO ORDERED.

Dated: May 31, 2017

/s/ Phyllis J. Hamilton

PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16208

D.C. No. 4:16-cv-00793-PJH Northern District of California, Oakland

ORDER

Filed January 3, 2019
Molly C. Dwyer, Clerk
U.S. Court of Appeals

CHARLES E. WHITE, JR.; JOHN P. JACOBS; VERLAN D. HOOPES; NORA L. PENNINGTON; JAMES A. RAY; JEANNETTE A. FINLEY, individually and as representative of a class of similarly situated persons of the Chevron Employee Savings Investment Plan,

Plaintiffs-Appellants,

v.

CHEVRON CORPORATION; ESIP INVESTMENT COMMITTEE,

Defendants-Appellees.

Before: HAWKINS and HURWITZ, Circuit Judges, and EATON,[*] Judge.

Judge Hurwitz has voted to deny the petition for rehearing en banc, and Judges Hawkins and Eaton so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

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[*] Richard K. Eaton, Judge of the United States Court of International Trade, sitting by designation.

The petition for rehearing en banc, Dkt. 47, is **DENIED**.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. 4:16-cv-00793-PJH

AMENDED COMPLAINT
CLASS ACTION
DEMAND FOR JURY TRIAL
JUDGE PHYLLIS J. HAMILTON

CHARLES E. WHITE, JR., JOHN P. JACOBS, VERLAN D. HOOPES, NORA L. PENNINGTON, JAMES A. RAY, AND JEANNETTE A. FINLEY, individually and as representatives of a class of similarly situated persons of the Chevron Employee Savings Investment Plan,

Plaintiffs,

v.

CHEVRON CORPORATION, EIP INVESTMENT COMMITTEE, AND JOHN DOES 1–20.

Defendants.

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1. Plaintiffs Charles E. White, Jr., John P. Jacobs, Verlan D. Hoopes, Nora L. Pennington, James A. Ray, and Jeannette A. Finley, individually and as representatives of a class of participants and beneficiaries in the Chevron Employee Savings Investment Plan ("Plan"), bring this action under 29 U.S.C. §§1132(a)(2) and (3) on behalf of the Plan against Defendants Chevron Corporation, the ESIP Investment Committee, and John Does 1–20 for breach of fiduciary duties.

2. Today, 401(k) defined contribution plans, in which the employee's retirement assets are at risk of high fees and underperformance, have become America's primary retirement system, departing from traditional defined benefit (pension) plans where the employer assumes the risk.[1] With over $19 billion in assets as of December 31, 2014, the Plan is what is known as a "jumbo" plan and is the 13th largest 401(k) plan in the United States—larger than 99.99% of the more than 620,000 401(k) plans offered to participants based on plan assets.[2] The marketplace for 401(k) retirement plan services is established and competitive. Multi-billion dollar defined contribution plans, like the Plan, wield tremendous bargaining leverage, and can readily obtain high-quality investment management and administrative services at a very low cost.

3. Defendants, as fiduciaries to the Plan, are obligated to act for the exclusive benefit of participants and beneficiaries—Chevron employees and retirees—without self-interest, and to make sure fees are reasonable. These duties are the "highest known to the

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[1] Nancy Trejos, *Retirement Wreck*, Washington Post (Oct. 12, 2008), available at http://www.washingtonpost.com/wp-dyn/content/article/2008/10/11/AR2008101100177.html.

[2] As of December 31, 2010, the Plan had $15 billion in assets and was the 12th largest 401(k) plan in the United States.

law" and must be performed with "an eye single to the interests of the participants and beneficiaries." *Donovan v. Bierwirth*, 680 F.2d 263, 271, 272 n.8 (2d Cir. 1982). Instead of using the Plan's bargaining power to benefit participants and beneficiaries, Defendants selected and retained high-cost and poor-performing investments compared to alternatives available to such an enormous plan and caused the Plan, and hence participants, to pay unreasonable expenses for administration of the Plan. By failing to act solely in the interest of Plan participants, causing the Plan to pay unreasonable expenses for administration and recordkeeping services, and selecting and retaining high-cost and poor-performing investments compared to available alternatives, Defendants breached their fiduciary duties of loyalty and prudence, and engaged in transactions expressly prohibited by ERISA.[3]

4. To remedy these fiduciary breaches, Plaintiffs, individually and as representatives of a class of participants and beneficiaries in the Plan, bring this action on behalf of the Plan under 29 U.S.C. §§1132(a)(2) and (3) to enforce Defendants' personal liability under 29 U.S.C. §1109(a) to make good to the Plan all losses resulting from each breach of fiduciary duty and restore to the Plan any profits made through Defendants' use of the Plan's assets. In addition, Plaintiffs seek to reform the Plan to comply with ERISA and to prevent further breaches of ERISA's fiduciary duties and other such equitable or remedial relief for the Plan as the Court may deem appropriate.

JURISDICTION AND VENUE

5. This Court has exclusive jurisdiction over the subject matter of this action under 29 U.S.C. §1132(e)(1)

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[3] The Employee Retirement Income Security Act, 29 U.S.C. §§1001–1461

and 28 U.S.C. §1331 because it is an action under 29 U.S.C. §1132(a)(2) and (3), for which federal district courts have exclusive jurisdiction under 29 U.S.C. §1132(e)(1).

6. This district is the proper venue for this action under 29 U.S.C. §1132(e)(2) and 28 U.S.C. §1391(b) because it is the district in which the subject Plan is administered, where at least one of the alleged breaches took place, and where at least one defendant may be found. All Defendants are subject to nationwide service of process under 29 U.S.C. §1132(e)(2).

INTRADISTRICT ASSIGNMENT

7. Under Local Rule 3-2(c) and (d), assignment to the San Francisco or Oakland Division is proper because it is the division in which Plan is administered, where at least one of the alleged breaches occurred, and where Defendant Chevron Corporation is located.

PARTIES

The Chevron Employee Savings Investment Plan

8. The Plan is a defined contribution, individual account, employee pension benefit plan under 29 U.S.C. §1002(2)(A) and §1002(34).

9. The Plan is established and maintained under a written document in accordance with 29 U.S.C. §1102(a).

10. The Plan provides for retirement income for Chevron employees. That retirement income depends on contributions made on behalf of each employee by his or her employer, deferrals of employee compensation and employer matching contributions, and on the performance of investment options net of fees and expenses exclusively controlled by the fiduciaries of the Plan.

11. Chevron Corporation established a trust to hold participant and employer contributions and such other earnings, income and appreciation from Plan investments less payments made by the Plan's trustee to carry out the purposes of the trust and Plan in accordance with 29 U.S.C. §1103(a).

12. As of December 31, 2014, the Plan had over $19 billion in total assets and over 40,000 participants with account balances.

Plaintiffs

13. Charles E. White, Jr. resides in Los Angeles, California, and is a participant in the Plan under 29 U.S.C. §1002(7) because he and his beneficiaries are eligible to receive benefits under the Plan.

14. John P. Jacobs resides in Benicia, California, and is a participant in the Plan under 29 U.S.C. §1002(7) because he and his beneficiaries are eligible to receive benefits under the Plan.

15. Verlan D. Hoopes resides in Willis, Texas, and is a participant in the Plan under 29 U.S.C. §1002(7) because he and his beneficiaries are eligible to receive benefits under the Plan.

16. Nora L. Pennington resides in Houston, Texas, and is a participant in the Plan under 29 U.S.C. §1002(7) because she and her beneficiaries are eligible to receive benefits under the Plan.

17. James A. Ray resides in Midland, Texas, and is a participant in the Plan under 29 U.S.C. §1002(7) because he and his beneficiaries are eligible to receive benefits under the Plan.

18. Jeannette A. Finley resides in Spring, Texas, and is a participant in the Plan under 29 U.S.C. §1002(7)

because she and her beneficiaries are eligible to receive benefits under the Plan.

Defendants

19. Chevron Corporation is a for-profit domestic corporation organized under Delaware law with its principal place of business in San Ramon, California. Chevron Corporation is the Plan Sponsor and Plan Administrator under 29 U.S.C. §1002(16)(A)(i) and (B)(i). Under Sections 14.2 and 14.3 of the Plan and 29 U.S.C. §1102(a), Chevron Corporation is the sole named fiduciary of the Plan with the authority to control and manage the operation of the Plan, with all powers necessary to enable it properly to carry out such responsibilities, including the selection and compensation of the providers of administrative services to the Plan and the selection, monitoring, and removal of the investment options made available to participants for the investment of their contributions and provision of their retirement income. In its capacity as fiduciary, Chevron Corporation makes such rules, regulations and computations and takes whatever action is necessary to administer the Plan in accordance with ERISA.

20. Under Section 14.5 of the Plan, by written agreement between the parties, Chevron Corporation may designate one or more actuaries, accountants or consultants as fiduciaries to carry out its responsibilities under the Plan. The duties and responsibilities of Chevron Corporation under the Plan that have not been delegated are carried out by its directors, officers and employees, including the ESIP Investment Committee, acting on behalf of and in the name of Chevron Corporation and not as individual fiduciaries.

21. Upon information and belief, Chevron has appointed the General Manager of Benefit Plan

Investments, Manager of Reporting & Control, and Investment Strategist from its Treasury Department to constitute the ESIP Investment Committee ("Investment Committee"). The Investment Committee is responsible for establishing and maintaining the Investment Policy Statement ("IPS") for the Plan, which provides the criteria for selecting, monitoring, and removing Plan investment options. The Investment Committee is responsible for, among other duties: establishing, maintaining, and reviewing the IPS; ensuring compliance with ERISA and other state and federal laws, regulations, and rulings that impact the Plan's investment process; selecting, monitoring, and removing Plan investment options, maintaining a "watch/monitor list" for Plan investment options and taking appropriate action if an option is no longer appropriate to be offered to participants; ensuring the fees and expenses paid to service providers are reasonable; and selecting, monitoring, and removing service providers, including the Plan's trustee, investment consultant, investment adviser, and broker-dealer.

22. Although not named as a fiduciary in the Plan document, the Investment Committee is a fiduciary to the Plan under 29 U.S.C. §1002(21)(A) because it has and exercises discretionary authority and control over the administration of Plan investments, exercises discretionary authority and control over Plan assets, and has discretionary authority and responsibility over the administration of Plan investments and investment-related expenses.

23. Plaintiffs are currently unaware of the identities of the current and former individual members of the Investment Committee during the time in suit. Those individuals are collectively named as John Does 1–20. Plaintiffs will substitute the real names of the John Does when Plaintiffs know them.

24. Because the Chevron individual entities and Investment Committee members have acted as alleged herein as the agents of Chevron Corporation, and/or co-fiduciaries, all defendants are collectively referred to hereafter as Chevron.

FACTS APPLICABLE TO ALL COUNTS

Plan Investments

25. In a defined-contribution plan, participants' retirement benefits are limited to the value of their own individual accounts, which is determined solely by employee and employer contributions plus the amount gained through investment in the options made available in the plan, less expenses. *See* 29 U.S.C. §1002(34). Accordingly, poor investment performance and unreasonable fees can significantly impair the value of a participant's account. Over time, even seemingly small differences in fees and performance can result in vast differences in the amount of savings available at retirement. *See, e.g.*, U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 1–2 (Aug. 2013) (illustrating impact of expenses with example in which 1% difference in fees and expenses over 35 years reduces participant's account balance at retirement by 28%).[4]

26. Chevron controls the investment options in which Plan participants can invest their retirement savings.

27. As of December 31, 2014, Chevron offered 13 Vanguard mutual funds, Vanguard collective trust target date funds, three non-Vanguard mutual funds, a Dodge & Cox fixed income separate account, a State Street collective trust, and a Chevron common stock fund.

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[4] Available at http://www.dol.gov/ebsa/pdf/401kfeesemployee.pdf.

Plan Investments	Assets
Vanguard Small Cap Index Fund	$ 201,776,000
Vanguard REIT Index Fund	$ 80,556,000
Vanguard Emerging Market Stock Index Fund	$ 66,563,000
Vanguard Institutional Index Fund	$ 1,663,356,000
Vanguard Total Bond Market Index Fund	$ 1,142,242,000
Vanguard Prime Money Market Fund	$ 966,234,000
Vanguard PRIMECAP Fund	$ 949,148,000
Vanguard Developed Markets Index Fund	$ 633,963,000
Vanguard Windsor II Fund	$ 648,507,000
Vanguard Total Stock Market Index Fund	$ 634,123,000
Vanguard Extended Market Index Fund	$ 561,767,000
Vanguard Short-Term Bond Fund Index	$ 254,181,000
Vanguard World Stock Fund	$ 40,623,000
Neuberger Berman Genesis Fund	$ 281,272,000
American Funds EuroPacific Growth Fund	$ 261,643,000
Artisan Mid Cap Fund	$ 213,237,000
Vanguard Target Date Retirement Trust Income	$ 38,925,000
Vanguard Target Date Retirement Trust 2010	$ 37,170,000
Vanguard Target Date Retirement Trust 2015	$ 124,606,000
Vanguard Target Date Retirement Trust 2020	$ 237,874,000
Vanguard Target Date Retirement Trust 2025	$ 161,244,000
Vanguard Target Date Retirement Trust 2030	$ 68,136,000
Vanguard Target Date Retirement Trust 2035	$ 45,105,000

Plan Investments	Assets
Vanguard Target Date Retirement Trust 2040	$ 37,587,000
Vanguard Target Date Retirement Trust 2045	$ 27,568,000
Vanguard Target Date Retirement Trust 2050	$ 14,956,000
Vanguard Target Date Retirement Trust 2055	$ 4,148,000
Vanguard Target Date Retirement Trust 2060	$ 2,478,000
SSgA Inflation Protected Bond Index	$ 14,805,000
Dodge & Cox Income Fund	$ 296,960,000
Chevron Common Stock Fund	$ 8,870,850,000

28. Chevron caused the Plan's investment lineup to remain largely unchanged for 14 years—since 2002—the same year Chevron selected Vanguard as the Plan's recordkeeper. The static nature of Plan investment options since 2002 is easily illustrated by comparing the number of years each mutual fund currently being offered have been in the Plan.

Investment	Years in Plan
Chevron Common Stock Fund	2002 – present
Vanguard 500 / Institutional Index Fund	2002 – present
Vanguard Total Bond Market Index Fund	2002 – present
Vanguard Prime Money Market Fund	2002 – present
Vanguard PRIMECAP Fund	2002 – present
Vanguard Developed Markets Index Fund	2002 – present
Vanguard Windsor II Fund	2002 – present
Vanguard Total Stock Market Index Fund	2002 – present
Vanguard Extended Market Index Fund	2002 – present
Vanguard Short-Term Bond Fund Index	2012 – present
Vanguard World Stock Fund	2013 – present
Vanguard Target Retirement Trust Funds	2013 – present
Vanguard Small Cap Index Fund	2014 – present
Vanguard REIT Index Fund	2014 – present
Vanguard Emerging Market Stock Index Fund	2014 – present

Chevron's Proxy Voting Considerations in Selecting Vanguard as Plan Recordkeeper

29. In addition to selecting investments to be included in the Plan, Chevron also controls the selection of Plan service providers. And Chevron selected Vanguard to serve as the Plan's recordkeeper while having also selected Vanguard mutual funds to comprise the majority of the Plan's investment lineup.

30. The SEC requires every mutual fund to file an annual report of how the mutual fund's proxies were voted on corporate proposals. *See*, U.S. Securities and Exchange Commission, Mutual Fund Proxy Voting Records and Policies, (Jan. 18, 2005).[5] At a summary

[5] Available at https://www.sec.gov/investor/pubs/mfproxyvoting.htm.

level, the public filings identify every corporate proposal the mutual fund voted on and whether the proposal was sponsored by the corporation's management or by its shareholders.

31. Vanguard's founder has publicly criticized the "tacit conspiracy" between fund managers and corporate executives described as an arrangement "in which managers don't openly collude with CEOs, but merely rubber-stamp every one of their governance proposals and oppose every shareholder one." *See* John C. Bogle, *John Bogle on the Future of Investing: The Rise of the Shareholders*, WALL ST. J. (Jul. 7, 2014)[6]; Lewis Braham, *Vanguard's Climate-Change Dismissal*, BARRON'S (Aug. 6, 2016).[7]

32. Vanguard mutual funds cast proxy votes on behalf of their shareholders for the securities in their portfolios. *See*, *e.g.*, Vanguard's proxy voting guidelines.[8] And Vanguard typically votes its proxies "as a block" to ensure "the same position being taken across all of the funds". *Id.* With more than $3 trillion in assets under management and the tremendous amount of voting influence represented by its holdings, Vanguard is regarded as "one of the most powerful forces in Corporate America". Braham, *Vanguard's Climate-Change Dismissal.*

33. Analysis of the public proxy voting records demonstrate management-sponsored proposals regarding executive compensation and matters of

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[6] Available at http://www.wsj.com/articles/john-bogle-on-the-future-of-investing-the-rise-of-the-shareholders-1404765274.

[7] Available at http://www.barrons.com/articles/vanguards-climate-change-dismissal-1470459744.

[8] Available at https://about.vanguard.com/vanguard-proxy-voting/voting-guidelines/.

corporate governance of companies in the Standard & Poor's 500-stock index are "overwhelmingly supported" by Vanguard. *See* Gretchen Morgenson, *Your Mutual Fund Has Your Proxy, Like It or Not*, N.Y. Times (Sep. 23, 2016).[9] Mutual funds provided by large fund families "often avoid challenging management on executive pay and corporate governance because they want to be included in corporate-defined contribution benefit plans" meaning "these giant mutual fund operators don't just own shares in many big companies; they also do business with them." *Id.*

34. In the past year Vanguard mutual funds voted in favor of management-sponsored executive pay proposals 98.1% of the time. Moreover Vanguard rejected *100%* of shareholder-sponsored proposals seeking to require a company's board to be led by an independent chairman. Morgenson, *Your Mutual Fund Has Your Proxy, Like It or Not*. Vanguard's voting record "stand[s] in contrast to some other big fund managers". *Id.* For example, in the past year AXA Investment Managers cast the votes authorized by its $760 billion of assets in favor of 100% of proposals requiring an independent chairperson. *Id.* RBC Global Asset Management cast the votes authorized by its $300 billion in assets in favor of 97.5% of such proposals. *Id.*

35. Vanguard's voting history is also distinguished from that of similarly sized fund families on matters relating to climate change, an issue of particular applicability to companies such as Chevron. "Invariably, Vanguard either abstains or votes against" proposals requesting "reports detailing the financial risks of climate change to a company, or set greenhouse-gas emission goals". *See* Braham, *Vanguard's Climate-*

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[9] Available at http://www.nytimes.com/2016/09/25/business/your-mutual-fund-has-your-proxy-like-it-or-not.html.

Change Dismissal. Vanguard's "proxy voting guidelines are dismissive of environmental proposals" typically sponsored by shareholders seeking to quantify the financial and environmental costs associated with a company's operations. *Id.* Indeed, Vanguard rejected a 2015 Chesapeake Energy shareholder proposal asking the company to add a director with an environmental science degree to avoid fracking spills and to publish a climate change report. *Id.* Vanguard rejected this shareholder proposal despite Chesapeake Energy having 669 spill violations between 2009 and 2013—the most of any company analyzed by the National Resources Defense Council over the same period. *Id.* In the words of a financial industry journalist published by Barron's last month:

> Why not be in favor of proposals that would demand companies quantify and contain those costs? One answer could be Vanguard's significant conflicts of interest. It not only invests in utility and energy companies, but manages money for them in their 401(k) plans, collecting millions of dollars in fees in the process.

Id.

36. As of June 30, 2016, Vanguard holds 124,845,759 shares ($13 billion) of Chevron stock, making it the largest institutional holder of Chevron's publicly traded stock.[10] As the largest institutional holder of Chevron's stock Vanguard's mutual funds have consistently voted in favor of Chevron's management proposals while consistently voting against or abstaining from voting on proposals sponsored by Chevron shareholders.

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[10] Morningstar, Chevron Equity Ownership: Institutions, available at http://investors.morningstar.com/ownership/shareholders-overview.html?t=CVX®ion=USA&culture=en_US.

37. Data compiled by Proxy Insight, a data analytics firm that tracks proxy voting records filed with the SEC, shows Vanguard's fund families' decidedly pro-management voting on Chevron corporate resolutions. For example, in 2015 and 2016, 100% of the more than 40 Vanguard mutual funds voting on Chevron proposals voted in favor of each Chevron management proposal, including an advisory vote to ratify Chevron's named executive officers' compensation.[11] *See e.g.*, Vanguard Institutional Index Funds' 2015 Form N-PX[12] and Vanguard Institutional Index Funds' 2016 Form N-PX.[13] In contrast, several large fund families voted against the same executive compensation proposal, including AXA Investment Managers, because, according to the voting rationale disclosed by AXA Investment Managers in support of its vote against Chevron's 2016 executive compensation proposal, the "Remuneration Policy [is] not aligned with long-term shareholder interests".[14] Similar rationale was provided by BMO Global Asset Management in its vote against Chevron's 2015 executive compensation proposal:

> Compensation remains entirely discretionary which makes it difficult for shareholders to assess the degree of alignment between executive pay and the investor experience. The plan's structure and

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[11] A total of 27 management-sponsored proposals were voted on by shareholders and institutions voting by proxy over the same period.

[12] Available at https://www.sec.gov/Archives/edgar/data/862084/000093247115007129/institutionalindexfunds0870.htm.

[13] Available at https://www.sec.gov/Archives/edgar/data/862084/000093247116014325/institutionalindexfunds0870.htm.

[14] See AXA Investment Manager Proxy Voting Records for Chevron's May 25, 2016 annual meeting, accessible through http://vds.issproxy.com/SearchPage.php?CustomerID=2281.

> pay-for-performance results are not sufficiently strong…Furthermore, the remuneration committee should not allow vesting of incentive awards for below median performance. Moreover, a larger percentage of the equity awards should be tied to performance conditions.[15]

38. The slate of proposals presented at Chevron's 2015 and 2016 annual meeting included a total of 17 shareholder proposals, and 100% of the more than 40 Vanguard funds voting on the shareholder proposals voted against or abstained from voting on each of them, including shareholder proposals to: adopt quantitative greenhouse gas goals for Chevron products and operations (Proposal 6 in 2015 and 2016); require a report on the result of Chevron's efforts to minimize hydraulic fracturing impacts (Proposal 9 in 2015 and Proposal 10 in 2016); and require a report on Chevron's lobbying and payments policy (Proposal 5 in 2015 and 2016). Again, AXA Investment Managers along with many large fund families including BMO Global Asset Management voted in favor of these shareholder proposals. Vanguard's proxy voting guidelines described as "dismissive" of shareholder climate change proposals are not accepted by other large fund managers as in the best interest of its shareholders. For example, BMO Global Asset Management's rationale for voting on behalf of its shareholders and in favor of the 2015 and 2016 shareholder proposals requiring a report on Chevron's efforts to minimize hydraulic fracturing impacts was as follows:

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[15] BMO Global Asset Management's Proxy Voting Records for Chevron's May 27, 2015 Annual meeting, accessible through http://vds-staging.issproxy.com/SearchPage.php?CustomerID=3660&StagingPassword=TRiTenpXpo.

> The company should report on possible risks and opportunities arising from processes used to extract natural gas from shale. There are concerns that serious environmental and public health risks have not been addressed thoroughly and may be subject to more stringent regulation in future.[16]

39. Based on the publicly available data compiled by Proxy Insight, which dates back to 2013, Vanguard fund families have voted in favor of each management-sponsored proposal and voted against or abstained from voting on each shareholder-sponsored proposal. *See e.g.*, Vanguard Institutional Index Funds' 2013 Form N-PX[17] and Vanguard Institutional Index Funds' 2014 Form N-PX.[18]

40. At the time Chevron hired Vanguard as the Plan's recordkeeper and at any time thereafter, Vanguard could have hired a pure recordkeeper to provide the same level of services to Plan participants to avoid an arrangement "infected by conflicts of interest" due to the fact that Vanguard not only owned significant amounts of Chevron stock, but was already doing business with Chevron as the Plan's investment provider. *See* Morgenson, *Your Mutual Fund Has Your Proxy*, *Like it Or Not*, *supra* ¶34.

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[16] BMO Global Asset Management's Proxy Voting Records for Chevron's May 27, 2015 annual meeting and Chevron's May 25, 2016 annual meeting, accessible through http://vds-staging.issproxy.com/SearchPage.php?CustomerID=3660&StagingPassword=TRiTenpXpo.http://vds-staging.issproxy.com/SearchPage.php?CustomerID=3660&StagingPassword=TRiTenpXpo.

[17] Available at https://www.sec.gov/Archives/edgar/data/862084/000093247113007976/institutionalindexfunds0870.htm.

[18] Available at https://www.sec.gov/Archives/edgar/data/862084/000093247114006601/institutionalindexfunds0094.htm.

I. The imprudent money market mutual fund.

41. The Vanguard Prime Money Market Fund (the "Money Market Fund") is an SEC-registered money market mutual fund *designed for retail investors*, not giant institutional investors seeking to protect the principal value of their investment while generating current income.[19] "[T]he [Money Market] Fund's income is based on short-term interest rates", and is subject to "[i]ncome risk, which is the chance that the [Money Market] Fund's income will decline because of falling interest rates." *Id.* The Money Market Fund invests in short-term securities with a dollar weighted average maturity of 90 days or less. *Id.* As the Department of Labor explained:

> Money market accounts are actually mutual funds that invest in short term (typically 90 days or less), fixed income securities. As such, they are often *considered as cash equivalents…most often used as parking accounts for money waiting to be invested in other instruments*, as sweep accounts for the collection of dividends, or by very risk averse investors.[20]

42. The Plan has offered the Money Market Fund to its participants for over 14 years and short-term interest rates in the United States have been at or near zero percent since the global financial crisis of 2008.[21]

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[19] Vanguard Prime Money Market Fund Prospectus, Form N-1A (Dec. 23, 2009), available at https://www.sec.gov/Archives/edgar/data/106830/000093247109001994/mmreserves485b.htm.

[20] U.S. Dep't of Labor, *Study of 401(k) Plan Fees and Expenses*, §2.4.4 (Apr. 13, 1998), available at http://www.dol.gov/ebsa/pdf/401krept.pdf.

[21] Vanguard, Money Market Reform and Stable Value: Considerations for Plan Fiduciaries, Vanguard Commentary, at 5 (Aug. 2016), available at https://institutional.vanguard.com/iam/pdf/ISGSVMM.pdf?cbdForceDomain=true.

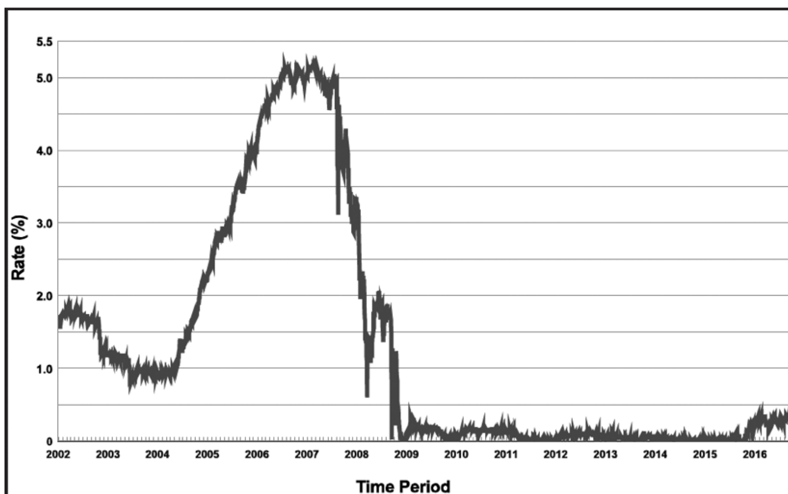
Yet despite the prevailing economic circumstances of the past eight years—*more than half of the time the Money Market Fund has been in the Plan*—and the IPS charging them with "[u]nderstanding the risk and return characteristics of each option", Chevron has failed and refused to evaluate the income risk posed to Plan participants performance of the Money Market Fund and engage in an analysis of investment alternatives capable of "provid[ing] Members and Beneficiaries with investment options that seek maximum current income that are consistent with preservation of capital and liquidity" as mandated by the IPS.

43. "[T]he primary question is whether the fiduciaries, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." *Tibble v. Edison Int'l*, 729 F.3d 1110, 1136 (9th Cir. 2013)(citing *Cal. Ironworkers Field Pension Tr. v. Loomis Sayles & Co.*, 259 F.3d 1036, 1043 (9th Cir. 2001)). Because any method used by Chevron to evaluate and monitor Plan investments must comply with the IPS, which requires it to "understand[] the risk and return characteristics" of each Plan investment, they would have, acting as prudent and loyal fiduciaries, removed the Money Market Fund from the Plan or, alternatively, provided a reasoned decision as to why providing this investment *specifically designed for retail investors*, *disproportionately affected by low short-term interest rates*, *and thus*, *failing to provide meaningful retirement income*, is in keeping with their duties under ERISA and those ascribed to them under the IPS.

44. The following chart shows the daily three-month nominal federal interest rates as published by the United States Department of the Treasury. [22] The three month

[22] United States Department of the Treasury, Resource

nominal federal interest rates chart is an appropriate proxy for investment returns of money market funds, particularly given that the average maturity of the Money Market Fund's underlying investments was 90 days. *See supra* ¶41. As the three-month nominal federal interest rate plummeted to *zero percent* in 2008 (a more than 500 basis point freefall from its peak), the strictly regulated short-term nature of the Money Market Fund's underlying investments guaranteed that Plan participants' retirement savings would be diminished on a net-inflation basis.[23]



45. Chevron's failure and refusal to employ appropriate methods to investigate the merits of the Money Market Fund is emphasized by the fact that the short-term interest remained—*for more than seven years*— at lows never before reached while being offered as a Plan investment. Stated differently, the amount of

Center, available at https://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/Historic-LongTerm-Rate-Data-Visualization.aspx.

[23] One basis point ("bp") is equal to 1/100th of one percent (or 0.01%).

income the Money Market Fund was able to generate for Plan participants had never been lower than when short term interest rates fell to 0% in September 2008. And because short-term interest rates have remained at historic lows ever since, Chevron has never in the past six years needed the benefit of hindsight to discharge its duties under ERISA or the IPS with respect to the Money Market Fund because the precise nature of the Money Market Fund's underlying investments guarantees the same result would obtain if Chevron's review occurred in any of the last *seven years*.

46. Because Chevron failed and refused to employ appropriate methods to investigate the merits of the Money Market Mutual Fund after years of near-zero short-term interest rates, Plan participants holding investments in the Money Market Fund had their retirement savings diminished on an inflation-adjusted basis. The only Plan investments available to participants seeking greater-than-inflation return on their investment were higher risk options in the Plan with no guarantee of capital preservation and liquidity. *See infra* ¶54. Chevron could have offered Plan participants a conservative, capital preservation investment option that provided meaningful retirement income had they simply inquired with their longtime investment provider, Vanguard, about available alternatives to the Money Market fund, including the stable value funds Vanguard has offered to defined contribution plans since 1989.[24] Moreover, there are many other reputable stable value managers and wrap contract providers available in the marketplace who are equally capable of providing a stable value fund or similar investment option for the Plan, including T. Rowe Price,

[24] Vanguard Retirement Savings Trust Fund Fact Sheet, available at https://institutional.vanguard.com/iippdf/pdfs/FS34.pdf. The lower-cost Vanguard Retirement Savings Trust II was available as of 2001. See https://institutional.vanguard.com/iippdf/pdfs/FS338.pdf.

MetLife, Galliard Capital Management, Inc., Dwight Asset Management (renamed GSAM Stable Value, LLC), and Prudential, among others.

47. Stable value funds are recognized alternatives to money market funds and are a common investment in large defined contribution plans. In fact, they are designed specifically for use in such plans as a conservative, capital preservation investment. "Stable value must be considered a triumph of financial engineering" and "designed to offer [defined contribution] plan participants the greatest yield consistent with protection of principal possible in the benefit plan environment." Paul J. Donahue, *Stable Value Re-examined*, 54 Risks and Rewards 26, 26 (Aug. 2009).[25] Stable value funds typically invest in high-quality short- to intermediate-term fixed income investments—typically through synthetic investment contracts (also referred to as "wrap" contracts) in which the fund directly owns the underlying investments. Stable value funds purchase wrap contracts from insurance companies or banks.

48. Stable value funds distinguish themselves from money market funds by providing a stable crediting rate of interest less vulnerable to the high income risk posed by money market funds by fluctuations in short-term interest rates. "Because they hold longer-duration instruments, [stable value funds] generally outperform money market funds, which invest exclusively in short-term securities." *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 806 (7th Cir. 2013); *see also* Paul J. Donahue, *Plan Sponsor Fiduciary Duty for the Selection of Options in Participant-Directed Defined Contribution Plans and the Choice Between Stable Value and Money Market*, 39 Akron L. Rev. 9, 24 (2006) (in contrast to money market funds, stable value funds "can invest in

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[25] Available at http://www.soa.org/library/newsletters/risks-and-rewards/2009/august/rar-2009-iss54-donahue.pdf.

longer-term financial instruments", and thus, "Stable Value Funds simply outperform Money Market Funds").

49. Unlike money market funds whose underlying securities must satisfy the SEC's short-term maturity and liquidity guidelines, *e.g.*, 17 C.F.R. § 270.2a-7, stable value funds are managed without such limitations to short term investment vehicles and are therefore better suited than money market funds to provide meaningful returns to their investors in any economic environment.

> Unlike money market funds, which are governed by regulations meant to allow them to meet demands for cash that can arise for any reason, unconstrained by the restrictions of a pension plan or tax considerations, stable value shapes its investment policy to recognize the liquidity restraints imposed on DC plan participants by plan design and tax law.

Donahue, *Stable Value Re-examined*, at 26.

50. Because money market funds are designed for and offered to retail investors seeking a liquid, cash equivalent investment vehicle, money market fund portfolios contain large amounts of cash to ensure sufficient funds are available to satisfy frequent investor-directed withdrawals. In contrast, stable value funds are only offered to retirement plans with participants having longer term investment horizons and are therefore subject to far less frequent participant directed transactions. Consequently, stable value funds can utilize longer duration investments to provide greater returns than money market mutual funds, yet with the same guarantee of principal and accumulated interest and liquidity. Unlike money market funds, stable value funds also provide an extra layer of guarantee—guaranteed interest rates over fixed periods (usually six months)—

whereas money market mutual funds provide no guaranteed interest rate.

51. Even during the period of market turbulence in 2008, "stable value participants received point-to-point protection of principal, with no sacrifice of return[.]"Donahue, *Stable Value Re-examined*, at 28. Over the same period, the same was not true of many money market mutual funds, which declined in value below $1 and yielded no interest.

52. The United States Government Accountability Office's report *401(k) Plans: Certain Investment Options and Practices that May Restrict Withdrawals Not Widely Understood* indicates, "during 2007 and 2008, many money market funds experienced severe financial difficulties from exposure to losses from debt securities[.]"[26] On September 16, 2008, the oldest money market fund in the United States with over $60 billion in assets, the Reserve Primary Fund, "stopped satisfying redemption requests and formally instituted withdrawal restrictions on all investors[.]" *Id.*

53. Money market funds nearly collapsed due to the financial crisis and required corporate and government intervention to save them. Money Market Fund Reform, 74 Fed.Reg. 32688, 32691–94 (proposed July 8, 2009). The Treasury Department and the Federal Reserve Board of Governors had to intervene repeatedly to stabilize and provide liquidity to the short-term markets in which money market funds invested. *Id.* at 32692–94. The failures of money market funds during this time "precipitated a potentially calamitous failure of the U.S. economy

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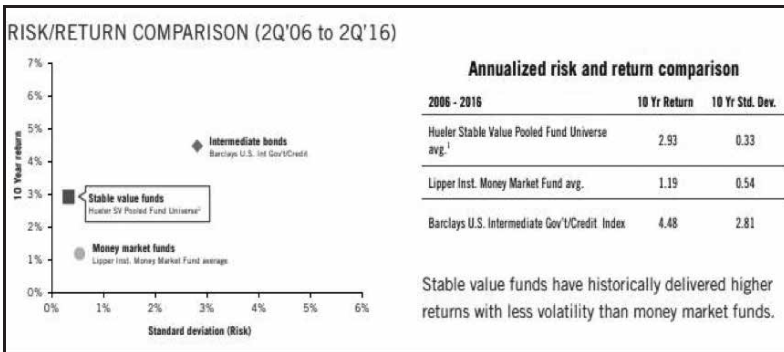
[26] Gov't Accountability Office, *401(k) Plans: Certain Investment Options and Practices that May Restrict Withdrawals Not Widely Understood*, Report to the Chairman, Special Committee on Aging, U.S. Senate, at 21 (Mar. 2011), available at http://www.gao.gov/new.items/d11291.pdf.

and triggered massive and unprecedented government intervention." William A. Birdthistle, Breaking Bucks In Money Market Funds, 2010 WIS. L. REV. 1155, 1180.

54. Chevron did not weigh and consider equally the Money Market Fund's risk *and* return to Plan participants as compared to readily available alternatives because when taken together, the superiority of stable value funds *over the past ten years* under both criteria are clear. The lower risk (lower standard deviation) and higher returns of a stable value fund compared to a money market fund are shown graphically below.[27]



Annualized risk and return comparison

2006 - 2016	10 Yr Return	10 Yr Std. Dev.
Hueler Stable Value Pooled Fund Universe avg.[1]	2.93	0.33
Lipper Inst. Money Market Fund avg.	1.19	0.54
Barclays U.S. Intermediate Gov't/Credit Index	4.48	2.81

Stable value funds have historically delivered higher returns with less volatility than money market funds.

55. The superiority of stable value funds' risk vs. return profile compared to money market funds extends well beyond the ten-year period identified above. Over the period January 1989 through December 2009, stable value returns "exhibited both a higher mean and lower volatility than either money market or intermediate–term government/credit bond returns."[28] The graph below

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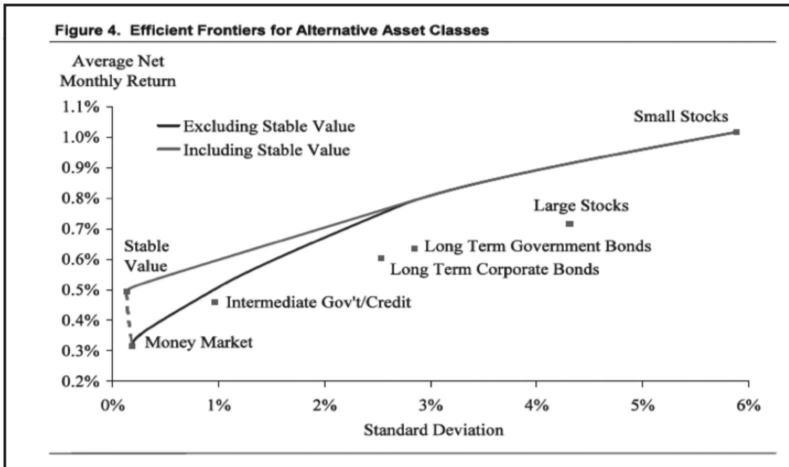
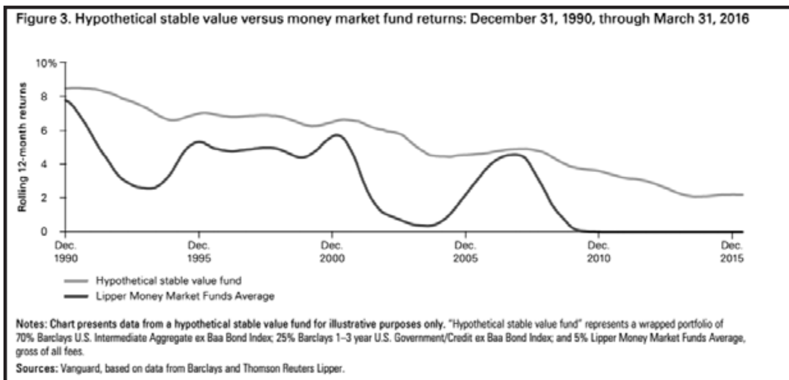
[27] See Galliard Capital Management, Inc., *How Do Stable Value Fund Compare with Money Market Funds?*, available at www.galliard.com/LiteratureRetrieve.aspx?ID=66271.

[28] David F. Babbel and Miquel A. Herce, *Stable Value Funds: Performance to Date*, SSRN WORKING PAPER SERIES, at 12 (Jan. 1, 2011), available at http://www.stern.nyu.edu/sites/default/files/assets/documents/uat_024414.pdf.



56. By offering the Money Market Fund for the past 14 years, Chevron makes clear its failure to recognize any duty to "[t]o provide Members and Beneficiaries with investment options that seek maximum current income". Over the *past 25 years*, from 1990 to March 31, 2016, money market mutual funds have produced significantly less retirement income than stable value funds, as recognized by the Plan's primary service provider, Vanguard, in the below chart.[29]



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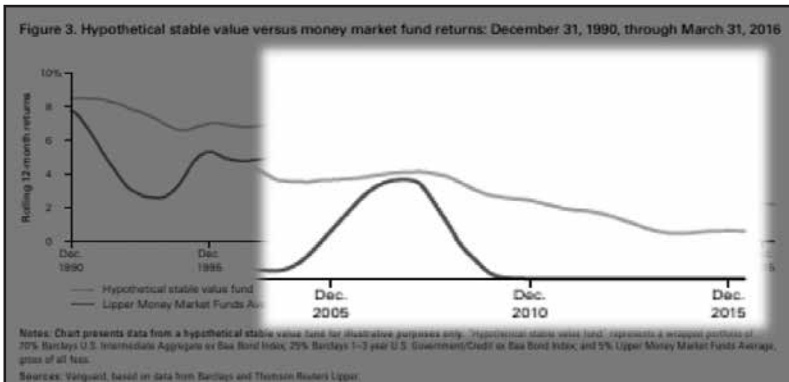
[29] Vanguard, *Money Market Reform and Stable Value: Considerations for Plan Fiduciaries*, at 5.

See also, MetLife, *2015 Stable Value Study: A Survey of Plan Sponsors, Stable Value Fund Providers and Advisors*, at 7(2015)(stable value returns were "*more than double*" the returns of money market funds from 1988 to 2015, and, thus, "have outperformed money market returns over the last 25 years.") [30] Vanguard further notes: "with interest rates *near zero* since the global financial crisis, the difference between stable value and money market returns has *been significantly exaggerated compared to historical norms*." Vanguard, *Money Market Reform and Stable Value: Considerations for Plan Fiduciaries*, at 5(emphasis added).

57. Absolutely no hindsight is or has ever been required of Chevron to determine the imprudence of the Money Market Fund compared to available alternatives because the chasm between the current income provided by the Money Market Fund and this alternative investment has existed *every single day of the past six years*.



58. Every investment offered in a defined contribution plan must be prudent.

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[30] Available at https://www.metlife.com/assets/cao/institutional-retirement/plan-sponsor/stable-value/Stable-Value-Vs-Money-Market/2015_StableValueStudyWebFinal.pdf.

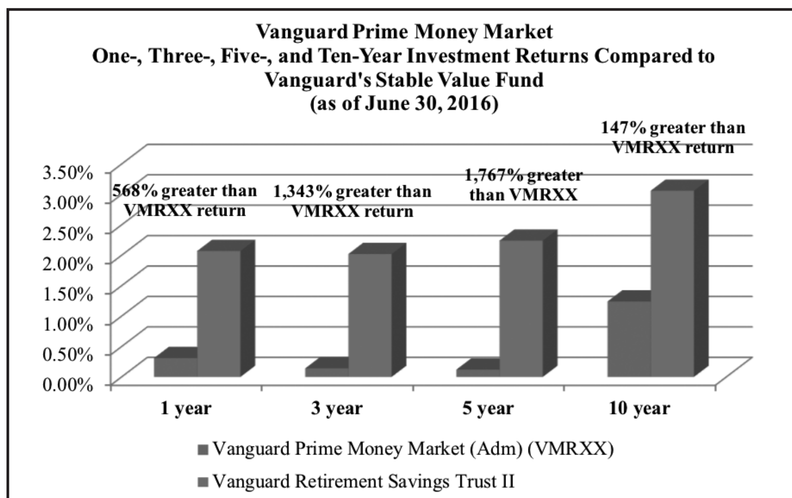
> A fiduciary cannot avoid liability for offering imprudent investments merely by including them alongside a larger menu of prudent investment options. Much as one bad apple spoils the bunch, *the fiduciary's designation of a single imprudent investment* offered as part of an otherwise prudent menu of investment choices amounts to a breach of fiduciary duty, both the duty to act as a prudent person would in a similar situation with single-minded devotion to the plan participants and beneficiaries, as well as the duty to act for the exclusive purpose of providing benefits to plan participants and beneficiaries.

Pfeil v. State St. Bank & Tr. Co., 671 F.3d 585, 597 (6th Cir. 2012)(emphasis added)

59. Even if prudent at one time, Chevron has a continuing duty to monitor all Plan investments, including the Money Market Fund, to make sure an investment remains prudent. *Tibble v. Edison, Int'l*, 135 S. Ct. 1823, 1829 (2015). Interest rates on short-term funds have been extremely low for years. A prudent monitoring of the Money Market Fund as a Plan investment would have concluded the Money Market Fund was not a prudent Plan investment option and had not been for many years, at least since 2010. The importance of the continuing monitoring of the Money Market Fund is emphasized by the fact that Chevron did not provide Plan participants with an alternative conservative investment option.

60. Chevron's failure to investigate the merits and continued offering of the Money Market Fund as the Plan's *only* conservative, capital preservation investment option is inexcusable for the additional reason that identifying an alternative capable of providing participants "maximum current income" and capital preservation and liquidity did not require it to scour the market because,

as noted above, Vanguard, the Plan's service provider since 2002, has offered a stable value fund since 1989. Vanguard's stable value fund has greatly outperformed the Money Market Fund over one-, three-, five-, and ten-year periods.



61. Vanguard has specifically acknowledged SEC regulations and average maturity restrictions in identifying *only* retail investors, not investors in a jumbo plan such as Chevron's, as eligible for its Money Market Fund as compared to its stable value offerings for which *only* defined contribution plan participants are eligible.[31]

[31] Vanguard, *Money Market Reform and Stable Value: Considerations for Plan Fiduciaries*, at 3.

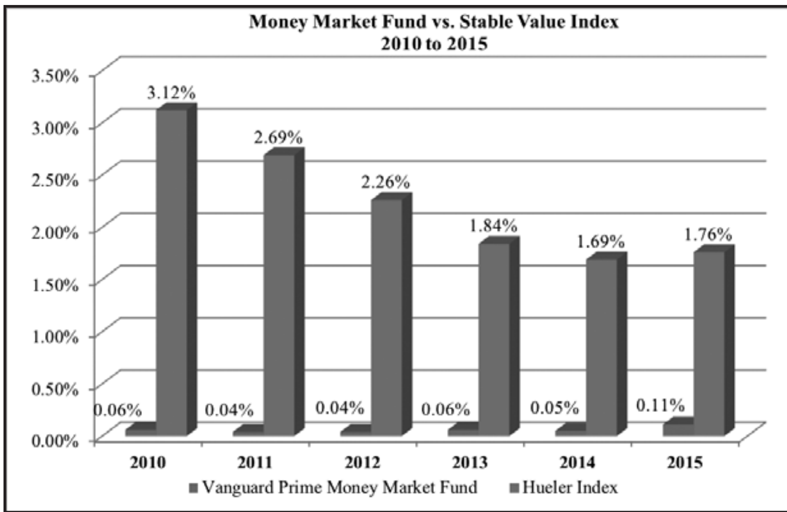
Figure 1. Comparing Vanguard money market and stable value fund options

	Vanguard Prime Money Market Fund*	Vanguard Federal Money Market Fund†	Vanguard Treasury Money Market Fund†	Vanguard Retirement Savings Trusts††
Underlying securities	High-quality commercial paper, certificates of deposit, bankers' acceptances, short-term securities issued by U.S. Treasury and agencies of U.S. government, and repurchase agreements collateralized by such securities.	Short-term securities issued by U.S. Treasury and agencies of U.S. government, and repurchase agreements collateralized by such securities.	Invests solely in short-term securities issued by U.S. Treasury.	Short- to intermediate-term synthetic contracts backed by high-quality-credit fixed income investments issued by insurance companies and banks and traditional investment contracts.
Credit quality	First tier—100%.	First tier—100%.	First tier—100%.	U.S. government: 44.2%; Aaa–A: 55.8%.
Average maturity	54 days.	53 days.	58 days.	2.7 years.
Risk-exposure profile	• Income/interest rate risk. • Manager risk. • Credit risk. • Industry concentration risk.	• Income/interest rate risk. • Manager risk. • Credit risk.	• Income/interest rate risk. • Manager risk.	• Income/interest rate risk. • Plan-event risk. • Credit risk. • Manager risk.
Effective October 14, 2016:				
SEC fees and gates policy applies?	Yes	No	No	No
Stable or floating NAV?	Stable	Stable	Stable	Stable
Eligible investors	Only investors designated as "retail" investors.	All investors.	All investors.	DC plan participants.

* See corresponding note on risk for this fund on the back cover.
† See corresponding note on risk for this fund on the back cover.
†† See corresponding note on risk for this fund on the back cover.
Notes: Vanguard Retirement Savings Trusts are bank collective trusts, not money market funds, and therefore not subject to SEC rules on money market funds.
DC = defined contribution.
Source: Vanguard, as of March 31, 2016.

62. Chevron is not and never has been limited to researching or selecting Vanguard investments for inclusion in the Plan. Hueler Analytics is the industry standard for reporting returns of stable value funds which it does in an index called The Hueler Analytics Pooled Fund Comparative Universe ("Hueler Index"). Hueler data represents a benchmark of the return of a typical stable value fund that was available to the Plan. The returns of the funds in the Hueler Index have far exceeded the returns of the Money Market Fund in the Plan, as shown below.[32]

[32] For the Vanguard money market fund from 2010 to 2012, the Investor share class (VMMXX) investment returns were used. For 2013 to 2015, the Institutional share class (VMRXX) investment returns were used.



63. As the graph illustrates, stable value funds, as represented by the Hueler Index, dramatically outperformed the Plan's Money Market Fund—*up to 67 times* (1.69%–3.12%) the return of the Money Market Fund.

64. The comparison between the Money Market Fund's performance over the past six years compared to the stable value benchmarks demonstrates the "income risk" repeatedly identified to Chevron by Vanguard. During a time period in which short-term interest rates remained at their post-2008 historic lows, the Money Market Fund was expected to fail, and did fail to provide meaningful retirement income because it merely earned, on an annual basis, 0.11%—11/100th of a percent—at its highest and as low as 0.04%—4/100th of a percent. See *infra* ¶62. That microscopically low return did not even beat the rate of inflation during that time period, which means Plan participants were losing ground year after year, as they would be expected to from the Money Market Fund's return in the years before 2008.

65. A comparison of Hueler Index returns over the preceding 10, 15 and 20 years reflect the consistent and dramatic of outperformance of stable value funds as compared to money market mutual funds. *See* Karin Peterson LaBarge, *Stable value funds: Considerations for plan sponsors*, VANGUARD RESEARCH, at 4(July 2012) (the Hueler Index demonstrates stable funds have "outperformed money market funds every year since 1990").[33]

66. As a result of the recognized benefits of stable value funds, over 80% of plan sponsors offer a stable value fund. MetLife, *2015 Stable Value Study: A Survey of Plan Sponsors, Stable Value Fund Providers and Advisors* at 5 (2015).[34] Moreover, if plan participants are only to be offered one conservative investment option, the merits of offering a stable value fund or similar fund over a money market fund are clear, and have been set forth in investment literature for many years.

> The reasons for stable value's growing acceptance are clear; in terms of the risk/return profile, many believe stable value funds are superior to almost any other conservative investment option, particularly money market funds. Historically, the higher yields available from stable value, compared with money market funds, have been of such magnitude as to lead to significant differences in retirement accumulations. If the choice must be made between these two conservative options, then plan sponsors would do well to remember

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[33] Available at https://pressroom.vanguard.com/nonindexed/7.23.2012_Stable_Value_Funds.pdf.

[34] Available at https://www.metlife.com/assets/cao/institutional-retirement/plan-sponsor/stable-value/Stable-Value-Vs-Money-Market/2015_StableValueStudyWebFinal.pdf.

> that most anything a money market fund can do, a stable value fund can do better.

Christopher B. Tobe, *The Consultants Guide to Stable Value*. 7 J. INV. CONSULTING 1, 91 (Summer 2004).

> Stable Value Fund or Money Market Fund is a universal example of Plan Sponsor exercise of option selection, because of the requirement of a liquid, low volatility fund. In the context of a DC Plan, Stable Value has an absolute superiority to Money Market, *as any reasonable due diligence investigation would make clear. The choice of a Money Market Fund instead of a Stable Value Fund meaningfully decreases Participant wealth and is a clear violation of a Plan Sponsor's duty to select options as a prudent expert*. Participants who were offered only Money Market Funds have a right to recover the difference in lost income from Plan Sponsors as damages due to a breach of fiduciary duty…Participants with [defined contribution] assets invested stable value *have every reason to be grateful to their employers for making it available.*

Donahue, *Plan Sponsor Fiduciary Duty for the Selection of Options in Participant-Directed Defined Contribution Plans and the Choice Between Stable Value and Money Market*, at 25–26 (emphasis added).

67. Chevron's duty to ensure the prudence of the Money Market Fund is in no way excused by the fact it is designated as the Plan's only conservative capital preservation investment option. The IPS places equal emphasis on the Plan fiduciaries' duty to "[u] nderstand[] the risk and return characteristics of each investment option" and requires "provid[ing] Members and Beneficiaries with investment options that seek maximum current income that are consistent with

preservation of capital and liquidity". These requirements are aligned with the standards applicable to a loyal and prudent fiduciary under ERISA's fiduciary standards (29 U.S.C. §1104(a)(1)). *See Pfeil*, 671 F.3d at 597. Fiduciary responsibilities include "screen[ing] investment alternatives and to ensure that imprudent options are not offered to plan participants." *Howell v. Motorola*, Inc., 633 F.3d 552, 567 (7th Cir. 2011). As the Supreme Court confirmed, a fiduciary's "duty of prudence involves a continuing duty to monitor investments and remove imprudent ones[.]" *Tibble*, 135 S. Ct. at 1829.

68. Chevron imprudently and disloyally, and in violation of the IPS, failed at any time in the past six years to meaningfully investigate the prevailing and persisting economic circumstances and evaluate the prudence of retaining the Money Market Fund as the Plan's *only* conservative investment option with a guarantee of capital presentation and to come to a reasoned decision as to whether an alternative to the Money Market Fund, including a stable value fund or similar fund, would "provide Members and Beneficiaries with investment options that seek maximum current income that are consistent with preservation of capital and liquidity" as required by the IPS and ERISA. In its monitoring of Plan investments, Chevron failed to monitor the Money Market Fund and determine its prudence as a Plan investment option under the prevailing and persisting economic circumstances and weigh the benefits of alternatives to the Money Market Fund, including a stable value fund, or come to a reasoned decision as to why providing the Money Market Fund was in compliance with its duties under the IPS and ERISA, in the interest of Plan participants and their beneficiaries, and consequently failed to remove the imprudent Money Market Fund as a Plan investment option.

69. Many facts demonstrate that Chevron failed to conduct a product process for determining whether the Money Market Fund should have been the sole conservative investment option allowed in the Plan. Among others referred to in this complaint, they are as follows:

a. The Department of Labor study of plan fees and expenses, *supra* ¶41, stated that money market funds are used as "parking accounts" waiting to be invested in other investments. Since more than $875 million was in the Money Market Fund as of December 31, 2010, Chevron knew that Plan participants were using the Money Market Fund for more than parking their retirement savings, and specifically as a long-term investment vehicle.

b. Short term interest rates have been at historic lows for the last 8 years—since 2008. Thus, Chevron has known that the Money Market Fund would return virtually nothing and far less than inflation, thereby causing participants to *lose* income in real terms year after year. *See supra* ¶41.

c. Even if interest rates had not been ultra low for the last 8 years, it was well known that money market funds have dramatically underperformed stable value funds for the last 25 years, in times of high and low interest rates, and most of the time by 2-3%. *See supra* ¶56.

d. Respected investment management literature has for many years documented the safety, security, lesser risk, and the poor returns of money market funds and the benefits of stable value funds compared to money market funds as retirement vehicles. *See supra* ¶¶56, 66 (citing MetLife, *2015 Stable Value Study*); *see also supra* ¶61,

n.31 (citing Vanguard, *Money Market Reform and Stable Value*); *see also supra ¶*65(citing LaBarge, *Stable value funds: Considerations for plan sponsors*); *see also supra* ¶66 (citing Tobe, *The Consultants Guide to Stable Value* and Donahue, *Plan Sponsor Fiduciary Duty for the Selection of Options in Participant-Directed Defined Contribution Plans and the Choice Between Stable Value and Money Market*).

e. The IPS required Chevron to provide "investment options that seek *maximum* current income that are consistent with preservation of capital and liquidity".(emphasis added). Instead of complying with the IPS, Chevron provided only one such investment, and that investment provided the most *minimal* income, and in real terms, a negative income compared to inflation.

f. Recognizing that Plan participants were using the Money Market Fund as a long term investment vehicle rather than just a temporary "parking account", Chevron could have limited the amount of money an individual could hold in the Money Market Fund as some 401(k) plans do with company stock, but Chevron failed to do so.

g. Apart from the period prior to 2008, from 2008 to the present, the United States Treasury Resource Center has documented virtually 0% interest rates for 90-day money market-like instruments for that eight year period, meaning that Chevron was on notice that Plan participants invested in the Money Market Fund would not obtain a meaningful long-term retirement asset. *See supra* ¶¶44, 47.

h. The near collapse of money market funds in 2008 and the United States Treasury Department and

Federal Reserve Board of Governors' intervention to stabilize them amply demonstrated the risk of money market funds. *See supra* ¶¶52-53.

i. Money Market Funds have greater risk than stable value funds while providing lower returns. *See supra* ¶¶54–55.

All of these facts demonstrate that Chevron was imprudent in its use and retention of the Money Market Fund in the Plan in violation of ERISA.

70. Chevron's failure and refusal to employ proper methods to investigate and evaluate the relative risks and benefits to Plan participants by offering the Money Market Fund as the Plans only conservative, capital preservation investment option compared to available alternatives, and failure to come to a reasoned decision for continuing to offer the Money Market Fund as the Plan's only conservative, capital preservation option, from February 2010 to December 31, 2015 was a breach of ERISA's duties of prudence. The Hueler Index—the stable value industry's benchmark—demonstrates Chevron has caused the Plan and Chevron employees and retirees to lose over $143 million in retirement savings, and participants continue to suffer such losses to the present because Chevron continues to provide the Money Market Fund.[35]

II. Unreasonable investment management fees from excessively high-priced investment options.

71. Academic and financial industry literature shows the importance of low fees in selecting investments. Numerous scholars have demonstrated that high

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[35] Plan losses have been brought forward to present value using the investment returns of the Hueler Index to compensate participants who have not been reimbursed for their losses.

expenses are not correlated with superior investment management. Indeed, funds with high fees on average perform worse than less expensive funds even on a *pre-fee basis*. Javier Gil-Bazo & Pablo Ruiz-Verdu, *When Cheaper is Better: Fee Determination in the Market for Equity Mutual Funds*, 67 J. Econ. Behav. & Org. 871, 873 (2009); see also Jill E. Fisch, *Rethinking the Regulation of Securities Intermediaries*, 158 U. Pa. L. Rev. 1961, 1993 (2010)(summarizing numerous studies showing that "the most consistent predictor of a fund's return to investors is the fund's expense ratio").

> [T]he empirical evidence implies that superior management is not priced through higher expense ratios. On the contrary, it appears that the effect of expenses on after-expense performance (even after controlling for funds' observable characteristics) is more than one-to-one, which would imply that low-quality funds charge higher fees. Price and quality thus seem to be inversely related in the market for actively managed funds.

Gil-Bazo & Ruiz-Verdu, *When Cheaper is Better*, at 883.

72. Even if an individual high-cost mutual fund exhibits market-beating performance over a short period of time, studies demonstrate that outperformance during a particular period is not predictive of whether a mutual fund will perform well in the future. Laurent Barras et al., *False Discoveries in Mutual Fund Performance: Measuring Luck in Estimated Alphas*, 65 J. Fin. 179, 181 (2010); Mark M. Carhart, *On Persistence in Mutual Fund Performance*, 52 J. Fin. 57, 57, 59 (1997) (measuring thirty-one years of mutual fund returns and concluding that "persistent differences in mutual fund expenses and transaction costs explain almost all of the predictability in mutual fund returns"). However, the *worst-performing* mutual funds show a strong, persistent tendency to

continue their poor performance. Carhart, *On Persistence in Mutual Fund Performance*, at 57.

73. To the extent managers show any sustainable ability to beat the market, the outperformance is nearly always dwarfed by mutual fund expenses. Eugene F. Fama & Kenneth R. French, *Luck Versus Skill in the Cross-Section of Mutual Fund Returns*, 65 J. Fin. 1915, 1931–34 (2010); Russ Wermers, *Mutual Fund Performance: An Empirical Decomposition into Stock-Picking Talent, Style, Transaction Costs, and Expenses*, 55 J. Fin. 1655, 1690 (2000). Accordingly, investment costs are of paramount importance to prudent investment selection, and a prudent investor will not select higher-cost actively managed funds without a documented process to realistically conclude that the fund is likely to be that extremely rare exception, if one even exists, that will outperform its benchmark index over time, net of investment expenses.

74. It is a simple principle of investment management that the larger the size of an investor's available assets, the lower the investment management fees as a percentage of assets the investor can obtain in the market. Thus, large retirement plans have substantial bargaining power to negotiate low fees for investment management services.

75. Jumbo retirement plans, such as the Plan, have much more bargaining power to negotiate low fees for investment management services than even large plans. For example, lower-cost institutional share classes of mutual funds compared to high-priced retail shares are readily available to giant institutional investors, like the Plan, or even smaller asset holders, that meet minimum investment amounts for these share classes.

76. Chevron selected high-priced share classes of mutual funds despite the availability of lower-cost share classes of those mutual funds holding underlying investments *identical* to those held by the more expensive

share class. Chevron also failed to adequately investigate and to offer non-mutual fund alternatives, such as collective trusts and separately managed accounts offered by the same investment manager of the Plan's mutual fund option. Prudent fiduciaries of large retirement plans know that these investment vehicles are readily available to them and can be obtained on behalf of the Plan to provide participants the same investment style and with the same portfolio manager as a mutual fund option, but at a fraction of the cost. Each mutual fund in the Plan charged fees far in excess of the rates Chevron could and should have obtained for Plan participants given the enormous amount of Plan assets.

A. Excessive fees compared to lower-cost share classes of the Plan's identical mutual fund options.

77. Fiduciaries of large retirement plans have a duty to leverage the substantial bargaining power derived from the amount of their plan's assets to obtain lower fees through lower-cost institutional share classes for investment management services.

> The fiduciaries also must consider the size and purchasing power of their plan and select the share classes (or alternative investments) that a fiduciary who is knowledgeable about such matters would select under the circumstances. In other words, the "prevailing circumstances"—such as the size of the plan—are a part of a prudent decision-making process. The failure to understand the concepts and to know about the alternatives could be a costly fiduciary breach.

Fred Reish, *Classifying Mutual Funds*, PLANSPONSOR (Jan. 2011).[36]

[36] Available at http://www.plansponsor.com/MagazineArticle.aspx?id=6442476537.

78. Dave Burns, the senior ERISA consultant and manager in Vanguard Strategic Retirement Consulting has recommended fiduciaries be aware of and regularly investigate the availability of less expensive share classes for investment options.

> Fiduciaries should also be aware that some funds offer different share classes with higher or lower expense ratios, and it may be prudent to select a less expensive share class if one is available. We've seen court cases where the fiduciaries had chosen good investments, but they could have selected a less expensive share class for their plan. For example, the Supreme Court is currently reviewing a case called *Tibble v. Edison International*, where this is a key issue.

Dave Burns, From Committees to Costs: 5 Key Areas of Fiduciary Focus (Mar. 20, 2015).[37]

i. *Vanguard mutual funds*

79. From February 2010 until on or about April 1, 2012, Chevron imprudently and disloyally provided participants the more expensive share class of the following mutual funds, even though the identical investment was available to the Plan at a much lower cost:

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[37] Available at https://institutional.vanguard.com/VGApp/iip/site/institutional/researchcommentary/article/InvComFiveFidFocus

Plan Investments	Plan's Fee	Plan's Assets[38]	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Vanguard Institutional Index (Instl) (VINIX)	5 bps	$932,407,000	Vanguard Institutional Index (InstlPlus) (VIIIX)	2.5 bps	50%
Vanguard Prime Money Market (Inv) (VMMXX)	23 bps	$887,679,000	Vanguard Prime Money Market (Instl) (VMRXX)	9 bps	156%
Vanguard Total Bond Market Index (Instl) (VBTIX)	7 bps	$784,852,000	Vanguard Total Bond Market Index (InstlPlus) (VBMPX)	5 bps	40%
Vanguard PRIMECAP (Inv) (VPMCX)	45 bps	$510,536,000	Vanguard PRIMECAP (Adm) (VPMAX)	36 bps	25%
Vanguard Developed Markets Index (Inv) (VDMIX)[39]	22 bps	$445,309,000	Vanguard Developed Markets Index (Instl) (VIDMX)	7 bps	214%
Vanguard Windsor II (Inv) (VWNFX)	35 bps	$404,193,000	Vanguard Windsor II (Adm) (VWNAX)	27 bps	30%
Vanguard Total Stock Market Index (Instl) (VITSX)	5 bps	$234,970,000	Vanguard Institutional Total Stock Market Index (InstlPlus) (VITPX)	2.5 bps	50%

[38] Plan assets as of January 2010. For the Vanguard Extended Markets Index Fund, Plan assets as of January 2011.

[39] Effective April 4, 2014, the Vanguard Developed Markets

Plan Investments	Plan's Fee	Plan's Assets[38]	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Vanguard Extended Market Index (Instl) (VIEIX)	8 bps	$373,100,000	Vanguard Extended Market Index (InstlPlus) (VEMPX)	6 bps	33%
Vanguard GNMA (Inv) (VFIIX)[40]	23 bps	$216,992,000	Vanguard GNMA (Adm) (VFIJX)	11 bps	109%
Vanguard Balanced Index (Inv) (VBINX)[41]	26 bps	$292,601,000	Vanguard Balanced Index (Instl) (VBAIX)	8 bps	225%

Index merged with the Vanguard Tax-Managed International Fund. Following the merger, the ticker symbol for the Investor class was changed from VDMIX to VDVIX, Institutional class from VIDMX to VTMNX, and Institutional Plus from VDMPX to VDIPX.

[40] The Vanguard GNMA Fund was removed as of April 1, 2012.

[41] Upon information and belief, the Investor share class was offered until April 1, 2012.

80. The lower-cost shares of these mutual funds were available to the Plan many years before Chevron moved to lower-cost share classes for the Vanguard mutual funds in 2012.

Lower-Cost Identical Mutual Fund	**Inception date**
Vanguard Institutional Index (Instl Plus)	7/6/1997
Vanguard Prime Money Market (Instl)	10/2/1989
Vanguard Total Bond Market Index (Instl Plus)	2/5/2010
Vanguard PRIMECAP (Adm)	11/11/2001
Vanguard Developed Markets Index (Instl)[42]	1/22/2010
Vanguard Windsor II (Adm)	5/13/2001
Vanguard Balanced Index (Instl)	11/30/2000
Vanguard Extended Market Index (Instl Plus)	1/13/2011
Vanguard Institutional Total Stock Market Index (Instl Plus)	5/30/2001
Vanguard GNMA (Adm)	2/11/2001

Furthermore, four of the higher-cost Vanguard mutual funds, *e.g.*, the Vanguard Institutional Index (Instl), the Vanguard Total Bond Market Index (Instl), the Vanguard Total Stock Market Index (Instl), and the Vanguard Extended Market Index (Instl), *did not pay any internal revenue sharing* to Vanguard purportedly to offset any recordkeeping and administrative costs. *See infra* ¶¶119, 120. Thus, no rational basis can plausibly exist to excuse Chevron's failure to investigate the lower-cost and otherwise identical share classes for these funds at

[42] The lower-cost Institutional Plus share class (6 bps) was available as of December 2, 2010.

a minimum or to offer them instead of the higher-priced but otherwise identical share classes for these funds.

ii. *Artisan Small Cap Value Fund*

82. From February 2010 to April 1, 2014 Chevron provided the Artisan Small Cap Value Fund (Investor) (ARTVX) as a Plan investment option. As of February 1, 2012, Artisan provided the *exact same investment* in an Institutional class share (APHVX), which charged 99–100 bps in annual fees, compared to 122–124 bps for the Investor class shares, which were the shares in the Plan. Thus, the identical fund with the same manager, same stocks, and same asset allocation placed in the Plan by Chevron had over 23% higher fees. Chevron removed this mutual fund in April 2014.

iii. *Artisan Mid Cap Fund*

83. From February 2010 through February 13, 2015 Chevron provided the Artisan Mid Cap Fund (Investor) (ARTMX) as an investment option. Since July 3, 2000, Artisan provided the *exact same investment* in an Institutional class share (APHMX), which charged 95–97 bps in annual fees, compared to 120–123 bps for the Investor class shares, which were the shares in the Plan. Thus, the identical fund with the same manager, same stocks, and same asset allocation placed in the Plan by Chevron had over 26% higher fees. Chevron removed this mutual fund in February 2015.

iv. *Neuberger Berman Genesis Fund*

84. From February 2010 through February 13, 2015 Chevron provided the Neuberger Berman Genesis Fund (Institutional) (NBGIX) as a Plan investment option. As of March 15, 2013, Neuberger Berman provided the *exact same investment* in an R6 class share (NRGSX), which charged 78 bps in annual fees, compared to 85

bps for the Institutional class shares, which were the shares in the Plan. Thus, the identical fund with the same manager, same stocks, and same asset allocation placed in the Plan by Chevron had over 8% higher fees. Chevron removed this mutual fund in February 2015.

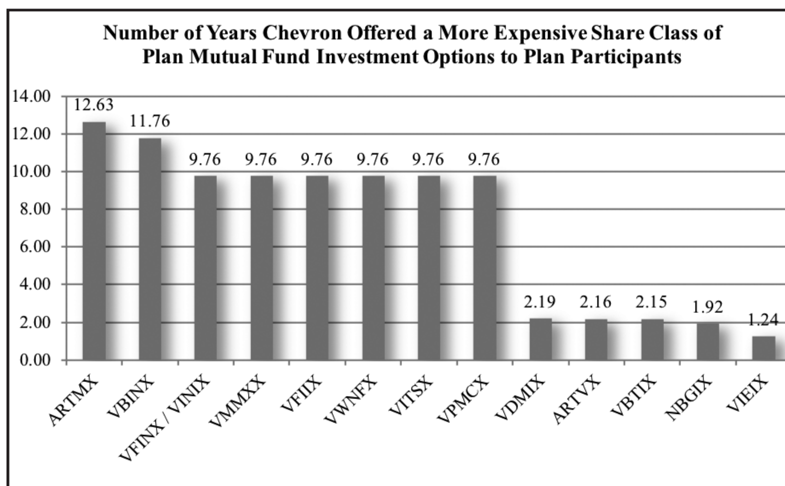
85. Even though Chevron switched to the less expensive but otherwise identical share class of the Plan's Vanguard mutual funds on April 1, 2012, many years after those share classes were available to the Plan, inexplicably, and to the Plan's detriment, Chevron failed to do the same with the above non-Vanguard funds when cheaper share classes continued to be available to the Plan.

86. Chevron provided the lowest-cost share class of the American Funds EuroPacific Growth Fund since February 2010, yet inexplicably did not do so (and apparently failed to consider doing so) for the Plan's other mutual funds, at a significant cost to the Plan.

87. Plan participants paid far higher fees for certain Plan investments than were reasonable for an enormous plan of Chevron's size, which resulted in receiving lower returns on their retirement investments, and fewer retirement assets to build for the future, than they would have obtained had Chevron performed its fiduciary duties. Even though Chevron imprudently offered several higher cost share classes of mutual funds despite the ready availability of lower cost share classes of otherwise identical mutual funds, raising a challenge as to each imprudent investment is not tantamount to challenging the structure of the defined contribution plan's entire investment lineup because ERISA requires fiduciaries to ensure each investment is prudent. *See Pfeil*, 671 F.3d at 597; *see also Howell*, 633 F.3d at 567.

88. Below is a chart showing the number of years Chevron caused a more expensive share class of a Plan

mutual fund to be offered to Plan participants despite the Plan qualifying for a less expensive, and otherwise identical, mutual fund offered by the same provider.[43]



89. Because Chevron imprudently and disloyally provided participants the much more expensive versions of the Plan's same mutual fund options during these dates, Plan participants lost over $21 million, including over $2.1 million on the non-revenue sharing Vanguard mutual funds, of their retirement savings through unnecessary expenses.[44]

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[43] July 1, 2002 is used as the date of inclusion for Plan investment options since it reflects the date the Employees Thrift Plan of Texaco, Inc. was merged into the Chevron Corporation Profit Sharing / Savings Plan to form the ChevronTexaco Employee Savings Investment Plan. Plan investment data was taken from Form 11-Ks filed with the SEC beginning with the fiscal year ending December 31, 2002. Available at https://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0000093410&type=11-k&dateb=&owner=exclude&count=100.

[44] Plan losses have been brought forward to the present value using the investment returns of the S&P 500 Index to compensate participants who have not been reimbursed for their losses. This is

B. Excessive fees for non-Vanguard funds compared to other mutual funds.

90. Besides being much higher than the fees of identical institutional share classes of the same mutual funds, the fees charged by certain non-Vanguard mutual funds in the Plan are far higher than fees Vanguard charges for similar investments.

90. The Plan previously offered the Artisan Small Cap Value Fund and the Artisan Mid Cap Fund. Each of these mutual funds held over $100 million in assets. These mutual funds were up to *14 times* more expensive than available Vanguard alternatives in the same investment style.

Plan Mutual Fund Option	Plan's Fee	Lower-Cost Mutual Fund	Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Artisan Small Cap Value Fund (Inv) (ARTVX)	122 bps	Vanguard Explorer Value Fund (VEVFX) (active)	59 bps	107%
		Vanguard Small Cap Value Index Fund (Instl) (VSIIX) (passive)	8 bps	1425%
Artisan Mid Cap Fund (Inv) (ARTMX)	122 bps	Vanguard Mid Cap Growth Fund (VMGRX) (active)	54 bps	126%
		Vanguard Mid Cap Growth Index Fund (Adm) (VMGMX) (passive)	10 bps	1120%

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because the excessive fees participants paid would have remained in Plan investments growing with the market.

Had the amounts invested in the Plan's non-Vanguard mutual funds instead been invested in the lower-cost Vanguard mutual funds in the same investment styles, Plan participants would not have lost millions of dollars in their retirement savings through excessive fees.

C. Excessive fees compared to separate accounts.

93. Massive retirement plans are not limited to choosing mutual funds as investment options. Such plans, including those with assets over $500 million, can hire investment advisers directly to manage separate accounts tailored for the plan within plan-specific investment parameters and separately negotiated, low fees and can even use the same investment managers as mutual funds with the same investment style in a separate account set up for the plan. Use of such accounts greatly reduces the cost of investing with the same adviser compared to a mutual fund.

94. According to the United States Department of Labor, separate accounts, which require a minimum investment of $15 million to $25 million per account, can "commonly" reduce "[t]otal investment management expenses" to "*one-fourth of the expenses incurred through retail mutual funds*." U.S. Dep't of Labor, *Study of 401(k) Plan Fees and Expenses*, at §2.4.1.3 (emphasis added).

95. The Plan had assets in excess of $10 billion at all relevant times, and over $19 billion as of December 31, 2014. The smallest plan investment from 2010 through 2015 had $37 million. Thus, the Plan had ample assets to enable Chevron to look into and provide separate account alternatives to the mutual funds it provided in the Plan.

96. Separate accounts have numerous advantages over mutual funds in a 401(k) plan. These include: the ability to negotiate lower fees; ability to avoid marketing fees built into retail mutual funds; control by the fiduciaries over investment guidelines; tailored investments to fit the demographics of the work force; and ability to avoid holding significant cash for shareholder redemptions that occur much more frequently in retail mutual funds than in retirement accounts.[45] In a mutual fund, all investors are charged the same fee, and investors have no ability to modify the fund's investment guidelines, which are set by the fund's investment adviser. In a separate account, the plan sponsor can negotiate the best possible fee for the plan, using its bargaining power.

i. *Artisan Mid Cap Fund*

97. From February 2010 through February 13, 2015 Chevron provided participants the Artisan Mid Cap Fund. That mutual fund charged extremely high annual fees of 120–123 bps. Plan participants invested $62–$214 million of their retirement assets in that fund. Based on published rates alone before negotiation for lower rates readily available for plans of Chevron's size, the Plan could have had the same advisers manage the same funds in a separate account for the Plan at a cost of 50–60 bps, less than half the cost. A prudent and loyal fiduciary could have negotiated an even lower management fee given the Plan's total assets and assets invested in Artisan funds, which could have been as low as 31 bps.

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[45] Unlike mutual fund shareholders, 401(k) participants rarely make trades in their account—less than one trade per year. Olivia Mitchell, Gary Mottola, Stephen Utkus, and Takeski Yamaguchi, *The Inattentive Participant: Portfolio Trading Behaviors in 401(k) Plans*, at 17–18 (June 2006), available at http://www.mrrc.isr.umich.edu/publications/Papers/pdf/wp115.pdf.

Thus, Plan participants paid almost 300% more than readily available fees.

ii. *Artisan Small Cap Value Fund*

98. From February 2010 through April 1, 2014 Chevron provided participants the Artisan Small Cap Value Fund. That mutual fund charged extremely high annual fees of 122–124 bps. Plan participants invested $154–$188 million of their retirement assets in that fund. Based on published rates alone before negotiation for lower rates readily available for plans of Chevron's size, the Plan could have negotiated below the published 100 bps fee for that management given the Plan's total assets and assets invested in Artisan funds, which could have been as low as 31 bps. Thus, Plan participants paid almost 300% more than readily available fees.

iii. *Neuberger Berman Genesis Fund*

99. From February 2010 through February 13, 2015 Chevron provided participants the Neuberger Berman Genesis Fund, a small cap growth fund. That mutual fund charged annual fees of 85–87 bps. Plan participants invested $142–$322 million of their retirement assets in that fund. Based on published rates alone before negotiation for lower rates readily available for plans of Chevron's size, the Plan could have had the same advisers manage the same fund in a separate account for the Plan at a cost of 70–74 bps given the Plan's total assets and assets invested in Neuberger Berman fund. A prudent and loyal fiduciary could have negotiated an even lower management fee given the Plan's total assets and assets invested in the Neuberger Berman fund, which could have been as low as 26 bps. Thus, Plan participants paid almost 230% more than readily available fees.

iv. *American Funds EuroPacific Growth Fund*

100. Since February 2010, Chevron has provided participants the American Funds EuroPacific Growth Fund as a Plan investment option. That mutual fund charged annual fees of 49–51 bps. Plan participants invested $187–$280 million of their retirement assets in that fund. The Plan could have had the same advisers manage the same fund in a separate account for the Plan for 21 bps given the Plan's total assets and assets invested in this fund. Thus, Plan participants paid almost 140% more than readily available fees.

v. *Blackrock Small Cap Growth Fund*

101. From February 2010 until April 1, 2012 Chevron provided participants the Blackrock Small Cap Growth Fund. That mutual fund charged annual fees of 81–85 bps. Plan participants invested $37–56 million of their retirement assets in that fund. The Plan could have had the same advisers manage the same fund in a separate account, and negotiated an even lower management fee given the Plan's total assets and assets invested in the Blackrock fund, which could have been as low as 30 bps. Thus, Plan participants paid almost 175% more than readily available fees.

vi. *Dodge & Cox Income Fund*

102. From February 2010 until May 31, 2012 Chevron provided participants the Dodge & Cox Income Fund. That mutual fund charged annual fees of 43 bps. Plan participants invested $125–$230 million of their retirement assets in that fund. As of May 31, 2012, Chevron replaced this mutual fund with an identical separate account, which charged 17 bps, much less than half the fee of the mutual fund. There is no legitimate reason why Chevron could not have provided this separate account version of the same investment since

February 2010. In fact, Chevron finally converted the Plan's Dodge & Cox Income Fund investment from a mutual fund to a separate account in 2012, at significantly lesser expense savings to participants, yet it failed to do so and failed to even seriously consider doing so for any of the Plan's other mutual funds, in violation of its fiduciary duty. Thus, Plan participants paid almost 300% more than readily available fees until Chevron provided the separate account version.

103. Had the Plan obtained separate accounts with expenses of one-fourth the costs of the retail shares, the Plan's expenses would have been reduced dramatically.

Retail Share of Plan's Funds	**Retail Fee**	**Separate Account rate as per DOL: 1/4 of the cost of retail**	**Plan's Fee**	**Plan's Excess Cost**
Artisan Small Cap Value Fund (Inv) (ARTVX)	122 bps	31 bps	122 bps	294%
Artisan Mid Cap Fund (Inv) (ARTMX)	122 bps	31 bps	122 bps	294%
American Funds EuroPacific Growth Fund (A) (AEPGX)	84 bps	21 bps	50 bps	138%
Neuberger Berman Genesis Fund (Inv) (NBGNX)	103 bps	26 bps	85 bps	227%
Dodge & Cox Income Fund (DODIX)	43 bps	11 bps	43 bps	291%
Blackrock Small Cap Growth Fund (A) (CSGEX)	119 bps	30 bps	82 bps	173%

104. The above-referenced separate accounts offered by the Plan's mutual fund advisers only represent a fraction of separate accounts that were available to the Plan in similar investment styles. Other investment management firms offered separate accounts in the same investment styles at a much lower cost than the Plan's mutual funds.

105. Chevron's failure to select separate accounts for the Plan's investments instead of retail and institutional share class mutual funds caused Plan participants to lose millions of dollars of their retirement savings due to unreasonable expenses throughout the relevant time period.

D. Excessive fees compared to collective trusts.

106. Collective trusts also provide much lower investment management fees than the Plan's mutual funds, and in some instances, separate accounts. Collective trusts are a common investment vehicle in large 401(k) plans, and are accessible even to midsize plans with $100 million or more in total plan assets, an amount which is a tiny fraction of the size of the Chevron plan.

107. Vanguard offers low-cost collective trust funds to qualified retirement plans in several asset styles, including large cap domestic equities, small cap equities, international equities, and target date funds.

i. *S&P 500 Index Fund*

108. For an investment in the S&P 500® index, for example, Vanguard offers the collective trust Vanguard Employee Benefit Index, which is comparable to the Plan's Vanguard Institutional Index mutual fund, in that both are S&P 500® index funds. The collective trust version has much lower fees and hence better

performance than the mutual fund equivalent. This collective trust alternative has been available since September 30, 1985.

ii. *Target Date Funds*

109. On April 1, 2013, Chevron placed Vanguard's target date funds known as the Target Retirement Trust I Funds in the Plan. Although those funds were collective trusts, Chevron could have provided participants lower-cost versions of these same collectives trusts in the Retirement Trust Plus series. The Target Date Retirement Trust I Funds charged 25% more in annual fees than the Retirement Trust Plus Funds (6 bps vs. 8 bps). However, Chevron did not begin providing participants the Trust Plus Funds until 2015.

110. By providing participants more expensive versions of the otherwise identical Vanguard target date investments and the S&P 500® index fund, Chevron caused participants to lose significant amounts in their retirement savings due to unreasonable expenses.

III. Excessive administrative fees.

111. The Vanguard Group, Inc. is the Plan's recordkeeper under an agreement entered into with Chevron Corporation. Vanguard Fiduciary Trust Company is the Plan trustee under an agreement entered into with Chevron Corporation. The Vanguard entities are hereafter collectively referred to as "Vanguard". Vanguard has served in these roles throughout the time in suit.

112. Recordkeeping is a service necessary for every defined contribution plan. The market for recordkeeping is highly competitive. There are numerous vendors in the marketplace who are equally capable of providing a high level of service to a large 401(k) plan like the

Plan and will readily respond to a request for proposals. The cost of recordkeeping services depends on the number of participants, not on the amount of assets in the participant's account. Thus, the cost of providing recordkeeping services to a participant with a $100,000 account balance is the same for a participant with $1,000 in her retirement account. And plans with large numbers of participants are decidedly advantaged in obtaining the lowest costs for their participants through economies of scale: a plan with 50,000 participants can negotiate a much lower per participant fee for recordkeeping services than a plan with 1,000 participants.

113. Because the amount of assets in a given participant's account does not determine the costs of recordkeeping that same account, prudent fiduciaries of defined contribution plans negotiate recordkeeping on a fixed-dollar, per-participant basis as opposed to compensating the recordkeeper as a percentage of plan assets. By doing so plan fiduciaries protect their employees and retirees from overpaying for the same recordkeeping service simply because of an increase in his or her retirement account whether due to diligent contributions or gains on already-invested retirement dollars. Exhibit 5: Compensation and Payment Schedule to Vanguard's own recordkeeping agreement for Plan recordkeeping services confirms the declining per-participant fee as the number of participants with account balances increases.

ESIP Headcount-Based Fee Rate Variability – By Headcount	
Headcount Range	**Annual Fee Rate**
Below 26,001	Renegotiate[1]
26,001 – 32,000	$25 per part
32,001 – 39,000	$24 per part
39,001 – 43,000	$23 per part
43,001 – 47,000	$23 per part
47,001 – 52,000	$22 per part
Over 52,000	Renegotiate[1]

114. Mutual funds have thousands of shareholders and the expense ratio for those funds includes within it a portion for recordkeeping those thousands of shareholders' accounts. However, since a 401(k) plan invests in a mutual fund as a single investor, the mutual fund has only one account to recordkeep. The plan recordkeeper tracks the account of each plan participant. In these circumstances, some mutual funds engage in a practice known as revenue sharing.

115. In a revenue sharing arrangement, a mutual fund or other investment vehicle directs a portion of the annual expense ratio—the asset-based fees it charges to investors—to the 401(k) plan's recordkeeper, putatively for providing recordkeeping and administrative services for the mutual fund. It is axiomatic that the compensation paid to a recordkeeper under a revenue sharing arrangement increases or decreases in direct proportion to the portion of fees shared with it from the plan's mutual funds. Thus, where there exists a retail (more expensive) and institutional (less expensive) offering of the *same* mutual fund, plan recordkeepers receive more compensation if the plan offers its participants the retail share class.

116. Because revenue sharing arrangements, if used to pay recordkeeping costs, compensate recordkeepers on an asset-basis that is in no way tied to the value of services provided to the plan or the recordkeeper's costs

in providing same, plan fiduciaries must, at a minimum: (1) calculate the amount of recordkeeping compensation paid through revenue sharing; (2) determine whether the recordkeeper's pricing is competitive; and (3) adequately leverage the plan's size to reduce fees, including recordkeeping fees. *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014). In order to make an informed assessment as to whether a recordkeeper is receiving no more than reasonable compensation for the services provided to a plan, the responsible fiduciary must identify *all* fees, including recordkeeping fees and other sources of compensation, paid to the service provider. Reasonable Contract Or Arrangement Under Section 408(b)(2), 72 Fed.Reg. 70988, 70989 (Dec. 13, 2007)("plan fiduciaries need information concerning all compensation to be received by the service provider").

117. Plaintiffs do not contend that recordkeeping paid out of revenue sharing is a per se violation of ERISA's fiduciary requirements or illegal *per se*. The cost of recordkeeping is the same regardless of a participant's balance, and recordkeepers in the market will readily provide quotes on a flat fee per-participant basis. However, if recordkeeping is paid for with revenue sharing from asset-based charges, there is a potential for excessive recordkeeping fees when assets or contributions increase. This potential includes the market growth of stock prices. Thus, fiduciaries must carefully and regularly monitor revenue sharing amounts to make sure that increased size of assets does not result in excessive recordkeeping fees when converted to a per-participant rate. That requires fiduciaries to divide the total recordkeeping fees by the number of participants to obtain the flat per-participants charge those revenue sharing fees have produced and compare that to the market rate to determine whether they are reasonable. *See Tussey*, *supra*, where the fiduciaries breached

their duties by failing to monitor and control the plan's recordkeeping fees as the amount of revenue sharing payments grew over time. If excessive, the fiduciaries must make sure the excessive amount is rebated to the plan.

118. *Prudent Practices for Investment Stewards* handbook defines the Global Fiduciary Standard of Excellence, initially published in April 2003, that was derived from a prior publication (*Prudent Investment Practices*) co-produced by the Foundation for Fiduciary Studies and the American Institute of Certified Public Accountants. This publication was written by Fiduciary 360, the identity brand for three related entities: the Foundation for Fiduciary Studies, the Center for Fiduciary Studies, and Fiduciary Analytics. The Foundation for Fiduciary Studies defines and substantiates specific investment fiduciary practices for trustees and investment committee members, investment advisors and investment managers and is widely used in the industry.

119. For investments, such as the Plan's mutual funds, that carry fees used to compensate the plan's recordkeeper for administrative services—known as revenue sharing—*Prudent Practices for Investment Stewards* notes that fiduciaries "should investigate how the various service vendors associated with each component of the all-inclusive fee [expense ratio] are compensated to ensure that no one vendor is receiving unreasonable compensation, and to compare the costs of the same services on an *a la carte* basis." Fiduciary 360, *Prudent Practices for Investment Stewards*, at 49 (U.S. ed., 2008)("2008 Investment Stewards"). When a service provider's compensation is determined based on a percentage of the assets, additional due diligence is required of fiduciaries when monitoring these asset-based fees.

> [A]s assets grow, the [fiduciary] should periodically determine whether it is more advantageous to pay for record-keeping and administrative costs on an *a la carte* basis and switch to mutual funds that have a lower expense ratio in order to reduce the overall expenses of the investment program.

Id.

120. Furthermore, in discharging this well-established duty to continually monitor and examine service provider compensation for reasonableness, a fiduciary permitting its plan to pay for recordkeeping services through a revenue sharing arrangement must ensure that the recordkeeper rebates to the plan all revenue sharing payments in excess of compensation other recordkeepers would receive if the plan negotiated recordkeeping costs on a fixed-dollar, per-participant basis through a competitive bidding process. To ensure that only reasonable fees are and continue to be paid for plan services, it is well-recognized that prudent fiduciaries of large defined contribution plans put the plan's recordkeeping and administrative services out for competitive bidding at regular intervals of approximately three years to determine the market price the plan is able to command for recordkeeping services. *See* 2008 Investment Stewards, at 21 (Practice S-1.4.4: "Consideration is given to putting vendor contracts *back* out for bid every three years.")(emphasis added).Prior to March 31, 2012, Vanguard was compensated through direct payments from the Plan and from revenue sharing received on Vanguard and non-Vanguard mutual fund options, many of which were retail share classes. Vanguard received 10 bps of internal revenue sharing on the retail (Investor) share class Vanguard mutual funds, 35 bps on the retail (Investor) share class Artisan Mid Cap and Small Cap Value mutual funds, 10 on the Neuberger Berman Genesis Fund, 10 bps on the BlackRock Small

Cap Growth Fund, and 8 bps on the Dodge and Cox Income Fund.

121. Based on the nature of administrative and recordkeeping services provided by Vanguard, the Plan's participant level (37,500–40,000), and the recordkeeping market, the outside limit of a reasonable recordkeeping fee would have been on average $25 per participant between 2010 and 2015. *George v. Kraft Foods Global, Inc.*, 641 F.3d 786, 788, 798 (7th Cir. 2011) (reversing summary judgment finding a per-participant recordkeeping fee of $20 to $27 for a plan of between 37,000 and 55,000 participants was a matter of expert opinion to be determined at trial).

122. Based on the direct compensation levels shown on the Plan's Form 5500 filed with the Department of Labor, and the estimated revenue sharing or indirect compensation Vanguard received from its proprietary Investor share mutual fund options and non-Vanguard mutual funds, the Plan paid approximately $167 to $181 per participant in 2010 and 2011, as much as 624% more than a reasonable fee for these services, resulting in millions of dollars in unreasonable recordkeeping fees paid to Vanguard, Chevron's largest shareholder.

123. As of January 1, 2015, Vanguard was compensated based on a $23 per-participant base recordkeeping fee plus additional charges for participant communication and education services, other expected or anticipated services (such as loan or brokerage window fees), and pass-through expenses (for travel and postage expenses for mailing participant communications), for an estimated total annual fee of $30.50 per participant.

124. Moreover, from 2010 through 2012, the indirect compensation Vanguard received from the Plan's investment options is significantly underreported on the Plan's 5500 because Chevron entered into a bundled

arrangement with Vanguard for recordkeeping services, whereby the Plan's recordkeeping expenses were primarily paid through Vanguard's proprietary mutual fund investments that constituted the vast majority of investments offered to Plan participants. Revenue sharing arrangements are not disclosed publicly, but instead are exceedingly opaque. *See Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 908 (7th Cir. 2013)("very little about the mutual fund industry or the management of 401(k) plans can plausibly be described as transparent").

125. The Plan's recordkeeping fees were excessive in part because Chevron failed to monitor and control the amount of asset-based revenue sharing fees Vanguard received and failed to investigate obtaining recordkeeping and investment management services on an open architecture, unbundled basis to ensure Plan service providers were not receiving unreasonable compensation as Plan assets increased. The excessive compensation the Plan paid to and kept by Vanguard as a result of Chevron's failure to monitor or evaluate such compensation for reasonableness is illustrated based on the dramatic increase in Plan assets since Vanguard was hired to perform recordkeeping services in 2002, and was compensated primarily through asset-based revenue sharing payments until March 31, 2012. From 2003 to 2011, Plan assets grew by $7.5 billion—from $8.6 billion to $16.1 billion—an 87% increase. The amount of this increase alone exceeds the total asset size of all but a tiny number of 401(k) plans. From February 2010 through March 31, 2012, Plan assets grew by $3 billion—from $13 billion to $16 billion—resulting in Vanguard continuing to benefit from this enormous increase in Plan assets, which was 22% over this period. This growth in asset size of the Plan produced a corresponding increase in the recordkeeping fees paid by Chevron employees and

retirees to Vanguard without a commensurate increase in services provided to the Plan. Chevron could have and should have either obtained a readily-available flat fee for recordkeeping services or capped the amount of revenue sharing to ensure that excessive amounts were returned to the Plan, but failed to do so. This resulted in Chevron's largest shareholder, Vanguard, receiving millions of dollars in excessive recordkeeping fees at the expense of Chevron employees and retirees.

126. If a defined contribution plan overpays for recordkeeping services due to the fiduciaries' "failure to solicit bids" from other recordkeepers, the fiduciaries have breached their duty of prudence. *See George*, 641 F.3d at 798–99. Upon information and belief, since Vanguard was hired as the Plan's recordkeeper in 2002, Chevron has not engaged in a competitive bidding process to ensure the Plan paid reasonable fees for the services provided. Recordkeeping fees for jumbo plans such as this Plan have also been declining since 2002 due to increased technological efficiency, competition, and increased attention to fees by sponsors of other plans. Obtaining bids would have allowed Chevron to determine that the Plan's fees, even if competitive when originally negotiated, had become excessive compared to available market rates, and would have provided a basis for Chevron to negotiate a significantly lower, reasonable recordkeeping fee for the Plan, to the benefit of participants. In light of the rapidly changing recordkeeping market; only contemporaneous competitive bids would have revealed the true market price for the services. By failing to engage in a competitive bidding process for recordkeeping services, Chevron caused the Plan and its participants to pay unreasonable recordkeeping fees to Vanguard.

Chevron's Use of Vanguard as Recordkeeper for its Corporate Plans

127. In addition to providing recordkeeping services for the Plan, Vanguard also provided recordkeeping services to seven non-qualified corporate plans sponsored by Chevron. Upon information and belief, Vanguard provided discounted services for these seven Chevron corporate plans due to the significant amount of revenue sharing Vanguard generated from having Plan participants invested in higher cost share classes of its mutual funds as well as other Vanguard investments. Unlike Plan recordkeeping expenses, which are paid for by Plan participants, Chevron is responsible for paying the expenses of administering the seven corporate plans it sponsors for its executives. At a minimum, Chevron's enabling its largest shareholder, Vanguard, to receive millions of dollars of excessive compensation from employees' assets paid for recordkeeping the 401(k) plan, positioned Vanguard to be able to offer lower cost or below cost services to Chevron for its corporate plans. It also placed Chevron in a position of conflict of interest by using the same recordkeeper for the 401(k) plan, where the employees' retirement savings were at stake. This conflict could have been avoided by using a different recordkeeper for the 401(k) plan from the recordkeeper in the corporate plans, as many companies do. *See Tussey v. ABB, Inc.*, No. 06-4305, 2012 U.S. Dist. LEXIS 45240, at *114 (W.D. Mo. Mar. 31, 2012) (granting injunctive relief to prohibit fiduciary from using 401(k) plan's recordkeeper "to provide any corporate services to [fiduciary]"), *rev'd in part on other grounds*, 746 F.3d 327 (8th Cir. 2014). Using "revenue sharing to benefit [the plan sponsor and recordkeeper] at the Plan's expense" while "failing to monitor and control recordkeeping fees" and "paying excessive revenue sharing" is a breach of fiduciary duties. *Tussey*, 746 F.3d at 336.

128. The revenue sharing arrangement for recordkeeping expenses paid to Vanguard authorized by Chevron benefitted Vanguard, a third-party entity providing services to Chevron, at the Plan's expense because Vanguard's mutual funds, including those offered in the Plan, are collectively among Chevron's largest shareholders capable of exercising tremendous influence relating to matters of Chevron's corporate governance, executive compensation, and environmental policies through proxy voting. *See supra* ¶31, Bogle, *John Bogle on the Future of Investing: The Rise of the* Shareholders; *see also supra* ¶¶31–32 Braham, *Vanguard's Climate Change Dismissal.* At any time since 2002 Vanguard could have hired a pure recordkeeper to provide the same level of services to Plan participants to avoid an arrangement "infected by conflicts of interest" due to the fact that Vanguard not only held and voted significant amounts of Chevron stock, but was already doing business with Chevron as the Plan's investment provider. *See supra* ¶33-34, Morgenson, *Your Mutual Fund Has Your Proxy*, *Like it Or Not.*

129. Chevron's imprudent and disloyal failure and refusal to monitor the asset-based compensation for recordkeeping to Vanguard through March 31, 2012, and failure to obtain a reasonable fee for recordkeeping services in subsequent years, caused Vanguard to receive excessive and unreasonable compensation in excess of $20 million in losses to the Plan.[46]

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[46] Plan losses have been brought forward to the present value using the investment returns of the S&P 500 Index to compensate participants who have not been reimbursed for their losses.

IV. Imprudent retention of the Artisan Small Cap Value Fund.

130. From at least 2003 to April 1, 2014, Chevron provided the Artisan Small Cap Value Fund as a Plan investment option. Chevron selected the retail (Investor) share class of this option, which paid an extremely high amount of revenue sharing to Vanguard—35 bps. Based on the Plan's $188,255,000 investment in the Artisan Small Cap Value Fund as of December 31, 2013, this fund alone paid roughly $659,000 annually in revenue sharing to Vanguard for recordkeeping. Thus, retaining this fund in the Plan drove revenue to Vanguard.

131. The IPS requires careful monitoring of the performance of each Plan investment option, including the Artisan Small Cap Value Fund. The recent decision from the Supreme Court in *Tibble*, 135 S. Ct. at 1829, confirmed that this is an ongoing duty that continues. This must be done over one-, three-, five-, seven-, and ten-year periods, and includes comparing each fund's performance with benchmarks for its investment style and its peer group. The IPS also requires maintaining a watch list of Plan investments, which requires removing an investment if it fails to meet an investment strategy objective or the investment strategy employed by the fund is no longer appropriate for the Plan. Despite these fund performance monitoring requirements of both ERISA and the IPS, Chevron retained the Artisan Small Cap Value Fund as a Plan investment until April 1, 2014 despite the fund underperforming its benchmark, other style-specific investments, and consistently ranking at the bottom of its peer group.

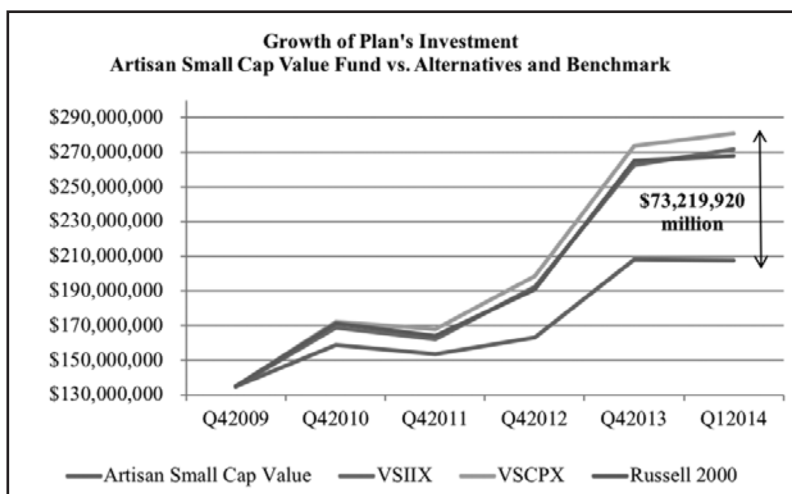
132. The Artisan Small Cap Value Fund significantly underperformed its benchmark, the Russell 2000, four out of the most recent five years. During this period, the Artisan Small Cap Value Fund ranked in the bottom

decile of its Morningstar category ranking. Specifically, in the years 2010 to 2014, the fund ranked in the 94th percentile or worse in four of the five years (96th, 98th, 94th, and 97th percentiles).

133. The Artisan Small Cap Value Fund consistently ranked in bottom decile of its Morningstar category ranking for one-, three-, and five-year periods on a quarterly basis between March 31, 2010 and March 31, 2014. For instance, over the four-year period March 31, 2010 to March 31, 2014, the fund ranked below the median of its peer group based on one-year total return for 15 out of 17 quarters, and over the 9 consequent quarters between the first quarter 2012 and the first quarter 2014, the fund consistently ranked in the bottom quartile, and consistently in the bottom decile (81st, 86th, 97th, 98th, 97th, 94th, 92nd, 95th, and 97th). This drastic underperformance negatively impacted the fund's three- and five-year peer group rankings. The fund's three-year peer group ranking began declining in the first quarter 2011, and by the first quarter 2012, and for following nine consequent quarters, the fund ranked below the median of its peer group based on three-year total return, and consistently in the bottom decile (70th, 84th, 97th, 96th, 96th, 94th, 95th, 94th, and 96th). Beginning in the first quarter 2013, and for the next five quarters, the fund ranked in the bottom quartile based on five-year total return.

134. Based on this performance history, a prudent fiduciary would have removed the Artisan Small Cap Value Fund, yet Chevron retained it after each quarter despite its ongoing abysmal performance after the first quarter of 2010, second quarter of 2010, and each subsequent quarter until April 1, 2014. Chevron should have removed the fund at each quarter during this four-year period and their failure to do so cost Plaintiffs millions of dollars in retirement assets. Chevron removed it far too late.

135. The chart below demonstrates the loss in retirement savings from Chevron's failure to remove the Artisan Small Cap Value Fund with $130 million in it as of January 2010. The chart shows the investment returns of the Artisan Small Cap Value Fund (ARTVX), the fund's benchmark (Russell 2000 Index), and similar small cap value alternatives, the Vanguard Small Cap Value Index Fund (VSIIX) and the Vanguard Small Cap Index Fund (VSCPX), *see*, *e.g.*, *supra* ¶91. The Vanguard Small Cap Value Index Fund later replaced the Artisan Small Cap Value Fund in 2014. From January 2010 to March 31, 2014, if the amounts invested in the Artisan fund had been invested in one of the two identified Vanguard alternatives, Plan participants would have avoided over $70 million in losses.

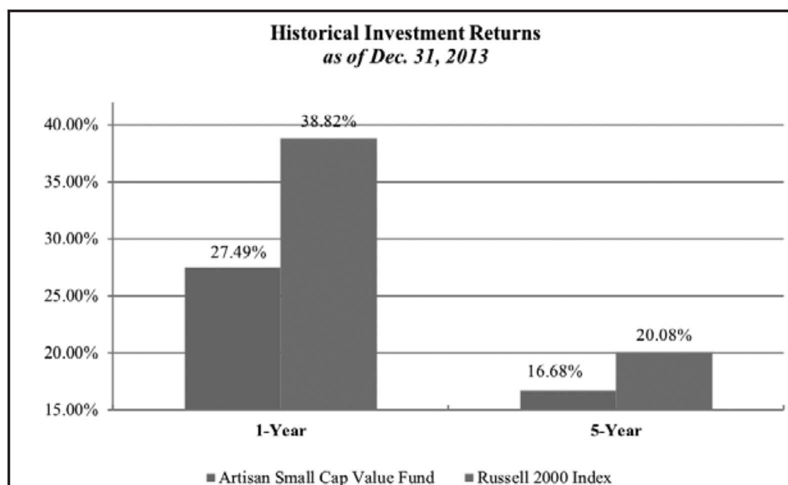


136. The above graph clearly indicates that the Artisan Small Cap Value Fund significantly underperformed its benchmark *and* readily available alternatives for years before it was removed from the Plan in April 2014.

137. In addition, the Vanguard Small Cap Value Index Fund (VSIIX) with an expense ratio of 8 bps, and

the Vanguard Small Cap Index Fund (VSCPX) with an expense ratio of 6 bps, charged dramatically lower fees than the Artisan Small Cap Value Fund, which charged participants 122–124 bps, or up to 1967% more than the better-performing lower-cost alternatives.

138. The consistent underperformance of the Artisan Small Cap Value Fund during the relevant time period is further demonstrated based on the fund's investment performance compared to its benchmark over the one- and five-year periods ending December 31, 2013. Notably, for the five-year period, the fund underperformed its benchmark by over *340 basis points*.



139. Prudent fiduciaries of defined contribution plans continuously monitor plan investment options and replace imprudent investments, and would have removed the Artisan Small Cap Value Fund from the Plan well before 2014. Despite the fund monitoring criteria set forth in the IPS, and prudent conduct of other fiduciaries, Chevron failed to conduct a prudent process to monitor and remove the fund until it was actually removed as of April 1, 2014, after years of underperformance

compared to its benchmark, peer group, and lower-cost alternatives. In particular, Chevron failed to monitor the fund's dismal underperformance over one- and three-year periods verses its peer group when it continually performed below the median of its peer group beginning in March 2010 (one-year rank) and March 2012 (three-year rank). Based on the consistently poor investment returns, the highest investment expenses among the Plan investments, and the standards used by independent fiduciaries, at least by March 31, 2013, even if at an earlier time it had been prudent to include in the Plan, the fund was clearly no longer appropriate for inclusion in the Plan and should have been removed. Of course, removing the fund from the Plan would have eliminated a steady stream of up to $659,000 in annual revenue sharing payments to Vanguard.

140. Had the amounts invested in the Artisan Small Cap Value Fund instead been invested in a reasonable lower-cost and better-performing prudent alternative prior to the fund's removal in April 1, 2014, such as the Vanguard Small Cap Value Index Fund, Plan participants would not have lost in excess of $78 million dollars between February 2010 and March 31, 2014, or lost in excess of $31 million between March 31, 2013, if it only became imprudent by that time, and March 31, 2014, of their retirement savings from the fund being retained in the Plan.

ERISA'S FIDUCIARY STANDARDS AND PROHIBITED TRANSACTIONS

141. ERISA imposes strict fiduciary duties of loyalty and prudence upon the Defendants as fiduciaries of the Plan. 29 U.S.C. §1104(a), states, in relevant part, that: "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—(A) for the exclusive purpose of (i) providing

benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; [and] (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims." The standard for the level of expertise to which fiduciaries are held is that of a prudent expert in financial matters. *See*, *e.g. Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984).

142. Under ERISA, fiduciaries that exercise any authority or control over plan assets, including the selection of plan investments and service providers, must act prudently and solely in the interest of participants in the plan. "[A] fiduciary of a defined contribution, participant-driven, 401(k) plan created to provide retirement income for employees who is given discretion to select and maintain specific investment options for participants—must exercise prudence in selecting and retaining available investment options." *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007). In determining whether a fiduciary has selected investments prudently, courts "examine the totality of the circumstances[.]" *Id.*

143. ERISA fiduciaries selecting plan investments and service providers "must also scrupulously adhere to a duty of loyalty, and make any decisions in a fiduciary capacity with 'an eye single to the interests of the participants and beneficiaries.'" *Id.* at 418–19. "Corporate officers must 'avoid placing themselves in a position where their acts [or interests] as officers or directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees of a pension plan.'" *Id.* at 419 (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982)). As the Supreme Court recently confirmed, ERISA's

"duty of prudence involves a continuing duty to monitor investments and remove imprudent ones[.]" *Tibble*, 135 S. Ct. at 1829.

144. An investment policy statement or IPS is a governing plan document within the meaning of 29 U.S.C. §1104(a)(1)(D). See 29 C.F.R. § 2509.94-2 (1994), replaced by 29 C.F.R. §2509.08-2(2) (2008) ("Statements of investment policy issued by a named fiduciary authorized to appoint investment managers would be part of the 'documents and instruments governing the plan' within the meaning of ERISA Sec. 404(a)(1)(D)."). "Fiduciaries who are responsible for plan investments governed by ERISA must comply with the plan's written statements of investment policy, insofar as those written statements are consistent with the provisions of ERISA." *Cal. Ironworkers Field Pension Trust v. Loomis Sayles & Co.*, 259 F.3d 1036, 1042 (9th Cir. 2001). "[F]ailure to follow written statements of investment policy constitutes a breach of fiduciary duty." *Id.* (*citing Dardaganis v. Grace Capital, Inc.*, 889 F.2d 1237, 1241–42 (2d Cir. 1989)). A violation of investment guidelines is an independent breach of fiduciary duty, regardless of whether the action was otherwise prudent. See 29 U.S.C. §1104(a)(1)(D).

145. ERISA also imposes co-fiduciary liability on plan fiduciaries. Under 29 U.S.C. §1105(a), in addition to any liability for its own breach, a fiduciary "shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances: (1) if he participants knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; or (2) if, by his failure to comply with section 404(a)(1) in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach;

or (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach."

146. The general duties of loyalty and prudence imposed by 29 U.S.C. §1104 are supplemented by a list of transactions that are expressly prohibited by 29 U.S.C. §1106, and are considered *per se* violations because they entail a high potential for abuse. Section 1106(a)(1) states, in pertinent part, 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 (A) sale or exchange, or leasing, of any property between the plan and a party in interest; . . . (C) furnishing of goods, services, or facilities between the plan and party in interest; [or] (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan[.]"

147. Under 29 U.S.C. §1109(a), "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. §1132(a)(2) empowers any plan participant to bring a civil action for appropriate relief under 29 U.S.C. §1109 on behalf of the plan.

CLASS ACTION ALLEGATIONS

148. 29 U.S.C. §1132(a)(2) authorizes any participant or beneficiary of the Plan to bring an action individually

on behalf of the Plan to enforce a breaching fiduciary's liability to the Plan under 29 U.S.C. §1109(a).

149. In acting in this representative capacity and to enhance the due process protections of unnamed participants and beneficiaries of the Plan, as an alternative to direct individual actions on behalf of the Plan under 29 U.S.C. §§1132(a)(2) and (3), Plaintiffs seek to certify this action as a class action on behalf of all participants and beneficiaries of the Plan. Plaintiffs seek to certify, and to be appointed as representatives of, the following class:

> All participants and beneficiaries of the Chevron Employee Savings Investment Plan from February 17, 2010 through the date of judgment, excluding the Defendants.

150. This action meets the requirements of Federal Rule of Civil Procedure 23 and is certifiable as a class action for the following reasons:

a. The Class includes over 40,000 members and is so large that joinder of all its members is impracticable.

b. There are questions of law and fact common to this Class because the Defendants owed fiduciary duties to the Plan and to all participants and beneficiaries and took the actions and omissions alleged herein as to the Plan and not as to any individual participant. Thus, common questions of law and fact include the following, without limitation: who are the fiduciaries liable for the remedies provided by 29 U.S.C. §1109(a); whether the fiduciaries of the Plan breached their fiduciary duties to the Plan; what are the losses to the Plan resulting from each breach of fiduciary duty; and what Plan-wide equitable and other relief

the court should impose in light of Defendants' breach of duty.

c. Plaintiffs' claims are typical of the claims of the Class because each Plaintiff was a participant during the time period at issue in this action and all participants in the Plan were harmed by Defendants' misconduct.

d. Plaintiffs are adequate representatives of the Class because they were participants in the Plan during the Class period, have no interest that is in conflict with the Class, are committed to the vigorous representation of the Class, and have engaged experienced and competent attorneys to represent the Class.

e. Prosecution of separate actions for these breaches of fiduciary duties by individual participants and beneficiaries would create the risk of (A) inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendants in respect to the discharge of their fiduciary duties to the Plan and personal liability to the Plan under 29 U.S.C. §1109(a), and (B) adjudications by individual participants and beneficiaries regarding these breaches of fiduciary duties and remedies for the Plan would, as a practical matter, be dispositive of the interests of the participants and beneficiaries not parties to the adjudication or would substantially impair or impede those participants' and beneficiaries' ability to protect their interests. Therefore, this action should be certified as a class action under Rule 23(b)(1)(A) or (B).

151. A class action is the superior method for the fair and efficient adjudication of this controversy because joinder of all participants and beneficiaries

is impracticable, the losses suffered by individual participants and beneficiaries may be small and impracticable for individual members to enforce their rights through individual actions, and the common questions of law and fact predominate over individual questions. Given the nature of the allegations, no class member has an interest in individually controlling the prosecution of this matter, and Plaintiffs are aware of no difficulties likely to be encountered in the management of this matter as a class action. Alternatively, then, this action may be certified as a class under Rule 23(b)(3) if it is not certified under Rule 23(b)(1)(A) or (B).

152. Plaintiffs' counsel, Schlichter, Bogard & Denton LLP, will fairly and adequately represent the interests of the Class and is best able to represent the interests of the Class under Rule 23(g).

a. Schlichter, Bogard & Denton has been appointed as class counsel in 15 other ERISA class actions regarding excessive fees in large defined contribution plans. As a district court in one of those cases recently observed: "the firm of Schlichter, Bogard & Denton ha[s] demonstrated its well-earned reputation as a pioneer and the leader in the field" of 401(k) plan excessive fee litigation. *Abbott v. Lockheed Martin Corp.*, No. 06-701, 2015 U.S.Dist.LEXIS 93206 at 4–5 (S.D. Ill. July 17, 2015). Other courts have made similar findings: "It is clear to the Court that the firm of Schlichter, Bogard & Denton is preeminent in the field" of 401(k) fee litigation "and is the only firm which has invested such massive resources in this area." *George v. Kraft Foods Global, Inc.*, No. 08-3799, 2012 U.S.Dist.LEXIS 166816 at 8 (N.D. Ill. June 26, 2012). "As the preeminent firm in 401(k) fee litigation, Schlichter, Bogard & Denton has achieved unparalleled results on

behalf of its clients." *Nolte v. Cigna Corp.*, No. 07-2046, 2013 U.S.Dist.LEXIS 184622 at 8 (C.D. Ill. Oct. 15, 2013). In another 401(k) fee case, the District Court stated: "Litigating this case against formidable defendants and their sophisticated attorneys required Class Counsel to demonstrate extraordinary skill and determination." *Beesley v. Int'l Paper Co.*, No. 06-703, 2014 U.S.Dist.LEXIS 12037 at 8 (S.D.Ill. Jan. 31, 2014).

b. Federal judges have recognized that the work of Schlichter, Bogard & Denton in litigating 401(k) excessive fee cases has contributed to the "dramatic reductions in fees paid by 401(k) plan participants throughout the United States, through heightened awareness and scrutiny of fees, self-dealing, and imprudent investment options in 401(k) plans." *Kruger v. Novant Health, Inc.*, No. 14-208, Doc. 61 at 16 (M.D.N.C. Sept. 29, 2016)(quoting declaration of AARP). "[T]he fee reduction attributed to Schlichter, Bogard & Denton's fee litigation and the Department of Labor's fee disclosure regulations approach $2.8 billion in annual savings for American workers and retirees." *Spano v. Boeing Co.*, No. 06-743, Doc. 587 at 6 (S.D.Ill. Mar. 31, 2016) (quoting *Nolte*, 2013 U.S.Dist.LEXIS 184622 at 6).

c. The U.S. District Court Judge G. Patrick Murphy recognized the work of Schlichter Bogard & Denton as exceptional:

> Schlichter, Bogard & Denton's work throughout this litigation illustrates an exceptional example of a private attorney general risking large sums of money and investing many thousands of hours for the benefit of employees and retirees. No case had previously been

> brought by either the Department of Labor or private attorneys against large employers for excessive fees in a 401(k) plan. Class Counsel performed substantial work…, investigating the facts, examining documents, and consulting and paying experts to determine whether it was viable. This case has been pending since September 11, 2006. Litigating the case required Class Counsel to be of the highest caliber and committed to the interests of the participants and beneficiaries of the General Dynamics 401(k) Plans.

Will v. General Dynamics, No. 06-698, 2010 U.S.Dist. LEXIS 123349 at 8–9 (S.D.Ill. Nov. 22, 2010).

d. Schlichter, Bogard & Denton handled the only full trial of an ERISA excessive fee case, resulting in a $36.9 million judgment for the plaintiffs that was affirmed in part by the Eighth Circuit. *Tussey v. ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014). In awarding attorney's fees after trial, the district court concluded that "Plaintiffs' attorneys are clearly experts in ERISA litigation." *Tussey v. ABB, Inc.*, No. 06-4305, 2012 U.S.Dist.LEXIS 157428 at 10 (W.D.Mo. Nov. 2, 2012). Following remand, the district court again awarded Plaintiffs' attorney's fees emphasizing the significant contribution Plaintiffs' attorneys have made to ERISA litigation, including educating the Department of Labor and courts about the importance of monitoring fees in 401(k) plans.

> Of special importance is the significant, national contribution made by the Plaintiffs whose litigation clarified ERISA standards in the context of investment fees. The litigation educated plan administrators, the Department

of Labor, the courts and retirement plan participants about the importance of monitoring recordkeeping fees and separating a fiduciary's corporate interest from its fiduciary obligations.

Tussey v. ABB, Inc., 2015 U.S.Dist.LEXIS 164818 at 7–8 (W.D.Mo. Dec. 9, 2015).

e. Schlichter, Bogard & Denton is also class counsel in *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1829 (2015), in which the Supreme Court held in a unanimous 9–0 decision that ERISA fiduciaries have "a continuing duty to monitor investments and remove imprudent ones[.]" Schlichter, Bogard & Denton successfully petitioned for a writ of certiorari, and obtained amicus support from the United States Solicitor General and AARP, among others. Given the Court's broad recognition of an ongoing fiduciary duty, the *Tibble* decision will have a broad effect on defined contribution plans.

f. The firm's work in ERISA excessive fee class actions has been covered by the New York Times and Wall Street Journal, among other media outlets. See, e.g., Gretchen Morgenson, *A Lone Ranger of the 401(k)'s*, N.Y. TIMES (Mar. 29, 2014);[47] Liz Moyer, *High Court Spotlight Put on 401(k) Plans*, WALL ST. J. (Feb. 23, 2015);[48] Floyd Norris, *What a 401(k) Plan Really Owes Employees*, N.Y. TIMES (Oct. 16, 2014);[49] Jess

[47] Available at http://www.nytimes.com/2014/03/30/business/a-lone-ranger-of-the-401-k-s.html?_r=0.

[48] Available at http://www.wsj.com/articles/high-court-spotlight-put-on-401-k-plans-1424716527.

[49] Available at http://www.nytimes.com/2014/10/17/business/what-a-401-k-plan-really-owes-employees.html?_r=0.

Bravin and Liz Moyer, *High Court Ruling Adds Protections for Investors in 401(k) Plans*, Wall St. J. (May 18, 2015);[50] Jim Zarroli, *Lockheed Martin Case Puts 401(k) Plans on Trial*, NPR (Dec. 15, 2014);[51] Darla Mercado, *Public Enemy No. 1 to 401(k) Profiteers*, InvestmentNews (Jan. 26, 2014).[52]

COUNT I

Breach of Duties of Loyalty and Prudence, and Violation of IPS—Vanguard Prime Money Market Mutual Fund

153. Plaintiffs restate and incorporate the allegations of the preceding paragraphs.

154. Chevron breached its duties of loyalty and prudence under 29 U.S.C. §§1104(a)(1)(A) & (B) and the provisions of the IPS in violation of 29 U.S.C. §1104(a)(1)(D) by failing and refusing to employ appropriate methods to investigate the merits of the Money Market Fund as the Plan's sole conservative investment options under the persistent and prevailing economic circumstances, and failing to employ the appropriate methods to investigate the merits of alternative conservative investment options available to the Plan, including a stable value fund, which would have provided participants a low-risk investment with a guarantee of principal and accumulated interest and

[50] Available at http://www.wsj.com/articles/high-court-ruling-adds-protections-for-investors-in-401-k-plans-1431974139.

[51] Available at http://www.npr.org/2014/12/15/370794942/lockheed-martin-case-puts-401-k-plans-on-trial.

[52] Available at http://www.investmentnews.com/article/20140126/REG/301269992/public-enemy-no-1-for-401-k-profiteers.

a predictable, higher and more stable rate of interest based on decades of historical performance. Chevron also breached its duties of prudence and loyalty by failing to come to a reasoned decision for providing the Money Market Fund instead of an alternative conservative investment option available to the plan, ultimately causing the imprudent Money Market Fund to remain in the Plan.

155. Chevron is personally liable under 29 U.S.C. §1109(a) to make good to the Plan any losses to the Plan resulting from the breaches of fiduciary duties alleged in this Count and is subject to other equitable or remedial relief as appropriate. Total Plan losses will be determined at trial after complete discovery in this case and are illustrated herein based upon the limited information that has been made available to Plan participants to date.

156. Each Defendant also knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach. Thus, each Defendant is liable for the losses caused by the breach of its co-fiduciary under 29 U.S.C. §1105(a).

COUNT II

Breach of Duties of Loyalty and Prudence— Unreasonable Investment Management Fees

157. Plaintiffs restate and incorporate the allegations of the preceding paragraphs.

158. Chevron breached its duties of loyalty and prudence under 29 U.S.C. §§1104(a)(1)(A) & (B) by providing Plan investment options that charged

unreasonable annual expenses in light of the far lower-cost versions of the same investments and alternative funds that were available to the Plan.

159. Chevron is personally liable under 29 U.S.C. §1109(a) to make good to the Plan any losses to the Plan resulting from the breaches of fiduciary duties alleged in this Count and is subject to other equitable or remedial relief as appropriate. Total Plan losses will be determined at trial after complete discovery in this case and are illustrated herein based upon the limited information that has been made available to Plan participants to date.

160. Each Defendant knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach. Thus, each Defendant is liable for the losses caused by the breach of its co-fiduciary under 29 U.S.C. §1105(a).

COUNT III

Breach of Duties of Loyalty and Prudence—Excessive Administrative Fees

161. Plaintiffs restate and incorporate herein the allegations of the preceding paragraphs.

162. Chevron caused the Plan to pay excess administrative fees to Vanguard as recordkeeper through uncapped and unmonitored revenue sharing from Plan investment options and by failing to put Plan administrative services out for competitive bidding on a regular basis, at least every three years. Chevron therefore breached it duties of loyalty and prudence under 29 U.S.C. §1104(a)(1)(A) and (B).

163. Chevron is personally liable under 29 U.S.C. §1109(a) to make good to the Plan any losses to the Plan resulting from the breaches of fiduciary duties alleged in this Count and is subject to other equitable or remedial relief as appropriate. Total Plan losses will be determined at trial after complete discovery in this case and are illustrated herein based upon the limited information that has been made available to Plan participants to date.

164. Each Defendant knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach. Thus, each defendant is liable for the losses caused by the breach of its co-fiduciary under 29 U.S.C. §1105(a).

COUNT IV

29 U.S.C. §1106(a)
Prohibited Transactions between Plan and Party in Interest

165. Plaintiffs restate and incorporate herein the allegations of the preceding paragraphs.

166. By causing the Plan to engage Vanguard to be the Plan's recordkeeper, Chevron caused the Plan to engage in a transaction that they knew or should have known constituted a direct or indirect furnishing of services between the Plan and a party in interest prohibited by 29 U.S.C. §1106(a)(1)(C).

167. By causing the Plan to engage Vanguard to be the Plan's recordkeeper, Chevron caused the Plan to engage in a transaction that they knew or should have known constituted an exchange of property between

the Plan and a party in interest prohibited by 29 U.S.C. §1106(a)(1)(A), a direct or indirect furnishing of services between the Plan and a party in interest prohibited by 29 U.S.C. §1106(a)(1)(C), and/or a transfer of Plan assets to a party in interest prohibited by 29 U.S.C. §1106(a)(1)(D).

167. Under 29 U.S.C. §1109(a), Defendants are liable to restore all losses suffered by the Plan as a result of these prohibited transactions as well as other appropriate equitable or remedial relief.

COUNT V

Breach of Duties of Loyalty and Prudence, and Violation of IPS—Artisan Small Cap Value Fund

169. Plaintiffs restate and incorporate the allegations of the preceding paragraphs.

170. Chevron breached its duties of loyalty and prudence under 29 U.S.C. §§1104(a)(1)(A) & (B) and the terms of the IPS in violation of 29 U.S.C. §1104(a)(1)(D) by providing and failing to remove as a Plan investment option the Artisan Small Cap Value Fund. Rather than employing a prudent process for monitoring and retaining the Artisan Small Cap Value Fund, Chevron retained this fund in the Plan despite consistent and dramatic underperformance compared to its benchmark, peer group, and similar lower-cost investment alternatives that were readily available to the Plan.

171. A prudent and loyal fiduciary who engaged in a prudent process for monitoring plan investments and removing imprudent funds would have concluded that the Artisan Small Cap Value Fund was imprudent, not in the interest of the Plan and its participants, and should have been removed long before Chevron ultimately removed it.

172. Chevron is personally liable under 29 U.S.C. §1109(a) to make good to the Plan any losses to the Plan resulting from the breaches of fiduciary duties alleged in this Count and is subject to other equitable or remedial relief as appropriate. Total Plan losses will be determined at trial after complete discovery in this case and are illustrated herein based upon the limited information that has been made available to Plan participants to date.

173. Each Defendant knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach. Thus, each Defendant is liable for the losses caused by the breach of its co-fiduciary under 29 U.S.C. §1105(a).

COUNT VI

Failure to Monitor Fiduciaries

174. Plaintiffs restate and incorporate the allegations contained in the preceding paragraphs as though fully set forth here.

175. A monitoring fiduciary must ensure that the monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment and holding of plan assets, and must take prompt and effective action to protect the plan and participants when they are not doing so.

176. To the extent any of the Chevron Corporation's fiduciary responsibilities were delegated to another fiduciary, Chevron's monitoring duty included an obligation to ensure that any delegated tasks were being performed prudently and loyally.

177. Chevron breached its fiduciary monitoring duties by, among other things:

a. failing to monitor its appointees, to evaluate their performance, or to have a system in place for doing so, and standing idly by as the Plan suffered enormous losses as a result of their appointees' imprudent actions and omissions with respect to the Plan;

b. failing to monitor its appointees' fiduciary process, which would have alerted any prudent fiduciary to the potential breach because of the excessive administrative and investment management fees and consistent underperforming Plan investments in violation of ERISA;

c. failing to ensure that the monitored fiduciaries had a prudent process in place for evaluating the Plan's administrative fees and ensuring that the fees were competitive, including a process to identify and determine the amount of all sources of compensation to the Plan's recordkeeper and the amount of any revenue sharing payments, a process to prevent the recordkeeper from receiving revenue sharing that would increase the recordkeeper's compensation to unreasonable levels even though the services provided remained the same, and a process to periodically obtain competitive bids to determine the market rate for the services provided to the Plan;

d. failing to ensure that the monitored fiduciaries considered the ready availability of comparable investment options to such a jumbo plan, including lower-cost share classes of the identical mutual funds, still lower cost separate accounts, and lower cost collective trusts, that charged far lower fees than the Plan's mutual fund options; and

e. failing to remove appointees whose performance was inadequate in that they continued to maintain imprudent, excessive-cost investments, and an option that did not even keep up with inflation, all to the detriment of Plan participants' retirement savings.

178. As a consequence of these breaches of the fiduciary duty to monitor, the Plan suffered very substantial losses. Had Chevron Corporation discharged its fiduciary monitoring duties prudently as described above, the losses suffered by the Plan would have been avoided. Therefore, as a direct result of the breaches of fiduciary duty alleged herein, the Plan, and the Plaintiffs and the other Class members, lost tens of millions of dollars in their retirement savings.

179. Chevron Corporation is personally liable under 29 U.S.C. §1109(a) to make good to the Plan any losses to the Plan resulting from the breaches of fiduciary duties alleged in this Count and is subject to other equitable or remedial relief as appropriate.

DEMAND FOR JURY TRIAL

180. Plaintiffs demand a trial by jury under Fed.R.Civ.P. 38 and the Constitution of the United States.

PRAYER FOR RELIEF

Plaintiffs, on behalf of the Plan and all similarly situated Plan participants and beneficiaries, respectfully request that the Court:

- find and declare that the Defendants breached their fiduciary duties as described above;
- find and adjudge that Defendants are personally liable to make good to the Plan all losses to the Plan resulting from each breach of fiduciary

duties, and to otherwise restore the Plan to the position it would have occupied but for the breaches of fiduciary duty;

- determine the method by which Plan losses under 29 U.S.C. §1109(a) should be calculated;
- order Defendants to provide all accountings necessary to determine the amounts Defendants must make good the Plan under §1109(a);
- remove the fiduciaries who have breached their fiduciary duties and enjoin them from future ERISA violations;
- reform the Plan to render it compliant with ERISA;
- surcharge against Defendants and in favor of the Plan all amounts involved in any transactions which such accounting reveals were improper, excessive and/or in violation of ERISA;
- certify the Class, appoint each of the Plaintiffs as a class representative, and appoint Schlichter, Bogard & Denton LLP as Class Counsel;
- award to the Plaintiffs and the Class their attorney's fees and costs under 29 U.S.C. §1132(g)(1) and the common fund doctrine;
- order the payment of interest to the extent it is allowed by law; and
- grant other equitable or remedial relief as the Court deems appropriate.

September 30, 2016

Respectfully submitted,

SCHLICHTER BOGARD & DENTON, LLP

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