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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT J. BUGIELSKI; CHAD S. SIMECEK, individually as participants in the AT and T Retirement Savings Plan and as a representatives of all persons similarly situated, *Plaintiffs-Appellants*, v. AT&T SERVICES, INC.; AT&T BENEFIT PLAN INVESTMENT COMMITTEE, *Defendants-Appellees*.	No. 21-56196 D.C. No. 2:17-cv-08106-VAP-RAO OPINION

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, Chief District Judge, Presiding

Argued and Submitted October 17, 2022
Portland, Oregon

Filed August 4, 2023

Before: Richard A. Paez and Bridget S. Bade, Circuit Judges, and Raner C. Collins,* District Judge.

Opinion by Judge Bade

SUMMARY**

Employee Retirement Income Security Act

The panel affirmed in part and reversed in part the district court's summary judgment in favor of the defendants in an ERISA class action brought by former AT&T employees who contributed to AT&T's retirement plan, a defined contribution plan.

Plaintiffs brought this class action against the Plan's administrator, AT&T Services, Inc., and the committee responsible for some of the Plan's investment-related duties, the AT&T Benefit Plan Investment Committee (collectively, "AT&T"). Plaintiffs alleged that AT&T failed to investigate and evaluate all the compensation that the Plan's recordkeeper, Fidelity Workplace Services, received from mutual funds through BrokerageLink, Fidelity's brokerage account platform, and from Financial Engines Advisors, L.L.C. Plaintiffs alleged that (1) AT&T's failure to consider this compensation rendered its contract with Fidelity a "prohibited transaction" under ERISA § 406, (2) AT&T breached its fiduciary duty of

* The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

prudence by failing to consider this compensation, and (3) AT&T breached its duty of candor by failing to disclose this compensation to the Department of Labor.

The panel reversed the district court's grant of summary judgment on the prohibited-transaction claim. Relying on the statutory text, regulatory text, and the Department of Labor's Employee Benefits Security Administration's explanation for a regulatory amendment, the panel held that the broad scope of § 406 encompasses arm's-length transactions. Disagreeing with other circuits, the panel concluded that AT&T, by amending its contract with Fidelity to incorporate the services of BrokerageLink and Financial Engines, caused the Plan to engage in a prohibited transaction. The panel remanded for the district court to consider whether AT&T met the requirements for an exemption from the prohibited-transaction bar because the contract was "reasonable," the services were "necessary," and no more than "reasonable compensation" was paid for the services. Specifically, the panel remanded for the district court to consider whether Fidelity received no more than "reasonable compensation" from all sources, both direct and indirect, for the services it provided the Plan.

For similar reasons, the panel also reversed the district court's summary judgment on the duty-of-prudence claim. The panel concluded that, as a fiduciary, AT&T was required to monitor the compensation that Fidelity received through BrokerageLink and Financial Engines. The panel remanded for the district court to consider the duty-of-prudence claim under the proper framework in the first instance.

On the reporting claim, the panel affirmed as to the compensation from BrokerageLink and reversed as to the compensation from Financial Engines. The

panel concluded that AT&T adequately reported the compensation from Financial Engines on its Form 5500s with the Department of Labor, but it did not adequately report the compensation from Financial Engines because an alternative reporting method for "eligible indirect compensation" was not available.

COUNSEL

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Ashley E. Johnson (argued), Paulette Miniter, and Katie R. Talley, Gibson Dunn & Crutcher LLP, Dallas, Texas; Nancy G. Ross, Mayer Brown LLP, Chicago, Illinois; for Defendants-Appellees.

OPINION

BADE, Circuit Judge:

The Employee Retirement Income Security Act of 1974 ("ERISA") establishes standards for employee benefit plans to protect the interests of plan participants. *See* 29 U.S.C. § 1001. To that end, ERISA imposes a duty of prudence upon those who manage employee retirement plans, prohibits plans from engaging in transactions that could harm participants' interests, and mandates disclosures to the United States Department of Labor.

Robert Bugielski and Chad Simecek ("Plaintiffs") are former AT&T employees who contributed to AT&T's retirement plan ("the Plan"), a defined contribution plan. They brought this class action against the Plan's administrator, AT&T Services, Inc., and the committee responsible for some of the Plan's investment-related duties, the AT&T Benefit Plan Investment Committee (collectively, "AT&T"). Plaintiffs allege that AT&T failed to investigate and evaluate all the compensation that the Plan's recordkeeper, Fidelity Workplace Services ("Fidelity"), received in connection with that role. Plaintiffs argue that (1) AT&T's failure to consider this compensation rendered its contract with Fidelity a "prohibited transaction" under ERISA § 406, (2) AT&T breached its duty of prudence by failing to consider this compensation, and (3) AT&T improperly failed to disclose this compensation to the Department of Labor.

The district court granted summary judgment in AT&T's favor. It concluded that Plaintiffs' prohibited-transaction and duty-of-prudence claims failed because AT&T had no obligation to consider this compensation. It also concluded that AT&T was not

required to disclose this compensation on its reports to the Department of Labor.

Because we conclude that AT&T was required to consider this compensation and report a portion of it, we affirm in part, reverse in part, and remand for further proceedings.

I

A

Fidelity has served as the Plan's recordkeeper since 2005. As recordkeeper, Fidelity performs various administrative functions, such as enrolling new participants in the Plan, maintaining participants' accounts, and processing participants' contributions to the Plan. In exchange for these services, Fidelity charges the Plan a flat fee for each participant. Fidelity also offers other services to participants on an as-needed basis, including administering loans and processing withdrawals. Fees for these transactions are charged directly to the Plan participant requesting the service.

In approximately 2012, AT&T amended its contract with Fidelity to provide Plan participants with access to Fidelity's brokerage account platform, BrokerageLink. For a fee, BrokerageLink allows participants to invest in mutual funds not otherwise available through the Plan. These fees are based on a brokerage commission schedule that Fidelity provides to participants. For example, a participant might pay a $75 fee to purchase shares of a particular fund.

In addition to the fees it receives from participants, Fidelity receives "revenue-sharing fees" from the mutual funds available through BrokerageLink. For example, if a participant invested in a mutual fund offered through BrokerageLink, the fund would

pay Fidelity a percentage of the amount the participant invested. Participants have invested billions of dollars in these mutual funds, resulting in millions of dollars in revenue-sharing fees for Fidelity.

In 2014, AT&T contracted with Financial Engines Advisors, L.L.C. ("Financial Engines"), to provide optional investment advisory services to Plan participants. For an asset-based fee, Financial Engines would manage a participant's investments.[1]

However, to do so, Financial Engines needed access to participants' accounts. Accordingly, AT&T amended its contract with Fidelity to provide Financial Engines with this access. And in its contract with Financial Engines, AT&T authorized Financial Engines to contract directly with Fidelity to secure the requisite access. Financial Engines and Fidelity then entered into a separate agreement under which Fidelity received a portion of the fees Financial Engines earned from managing participants' investments. The compensation Fidelity received from Financial Engines was significant; in some years, Fidelity received approximately half of the total fees that Financial Engines charged participants, resulting in millions of dollars in compensation for Fidelity.

B

In their third amended complaint, Plaintiffs allege that AT&T violated several ERISA provisions by failing to consider the significant compensation that Fidelity received through BrokerageLink and Financial Engines.

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[1] Initially, Financial Engines also charged a flat per-participant fee, but AT&T later renegotiated to eliminate this fee.

Plaintiffs first allege that AT&T's amendment of its contract with Fidelity to incorporate the services of BrokerageLink and Financial Engines was a prohibited transaction under § 406(a)(1)(C). *See* 29 U.S.C. § 1106. Section 406 "prohibits fiduciaries from involving the plan and its assets in certain kinds of business deals," *Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996), and § 406(a)(1)(C) specifically prohibits the "furnishing of goods, services, or facilities" between a plan and a "party in interest," 29 U.S.C. § 1106(a)(1)(C).

Although ERISA § 408 exempts certain transactions from § 406's reach, Plaintiffs argue that none of those exemptions applies to the transaction between AT&T and Fidelity. Specifically, Plaintiffs argue that this transaction was not exempt under § 408(b)(2), which exempts from § 406's bar service contracts or arrangements between a plan and a "party in interest" if (1) the contract or arrangement is reasonable, (2) the services are necessary for the establishment or operation of the plan, and (3) no more than reasonable compensation is paid for the services. 29 U.S.C. § 1108(b)(2); 29 C.F.R. § 2550.408b-2(a). For the contract or arrangement to be "reasonable," the party in interest must disclose to the plan's fiduciary all compensation the party expects to receive "in connection with" the services provided pursuant to the contract or arrangement.[2] 29 U.S.C. § 1108(b)(2)(B), 29 C.F.R. § 2550.408b-2(c)(1)(iv); *see also* Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee

[2] The party in interest must be a "covered service provider" and provide services to a "covered plan." 29 U.S.C. § 1108(b)(2)(B); 29 C.F.R. § 2550.408b-2(c)(1). AT&T does not dispute that Fidelity was a covered service provider and the Plan was a covered plan.

Disclosure, 77 Fed. Reg. 5632-01 (Feb. 3, 2012). Plaintiffs argue that AT&T's amendment of the contract with Fidelity to incorporate Financial Engines's and BrokerageLink's services did not satisfy the requirements of § 408(b)(2) because AT&T failed to obtain the requisite disclosures of the compensation Fidelity received from these service providers or determine that such compensation was "reasonable." 29 U.S.C. § 1108(b)(2); 29 C.F.R. § 2550.408b-2(a).

Plaintiffs also allege that AT&T violated § 404 and its duty to act prudently by failing to consider this compensation. *See* 29 U.S.C. § 1104. Section 404 imposes a duty of prudence upon fiduciaries, requiring them to discharge their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *Id.* § 1104(a)(1)(B).

Finally, Plaintiffs allege that AT&T was required to include this compensation on its annual report, the "Form 5500." ERISA requires a plan's administrator to file an annual report with the Department of Labor. *See id.* § 1023. Subject to some exceptions, plan administrators are generally required to identify in the report any people or entities that received compensation for providing services to the plan, as well as the amount of compensation received. *Id.* § 1023(c)(3); Revision of Annual Information Return/Reports, 72 Fed. Reg. 64731-01, 64739 (Nov. 16, 2007). Plaintiffs allege that AT&T did not satisfy this obligation.

C

The district court granted summary judgment in AT&T's favor. The court addressed the § 404 duty-of-

prudence claim first, rejecting Plaintiffs' argument that a prudent fiduciary would have considered the compensation Fidelity received from Financial Engines and BrokerageLink. The court adopted the reasoning of another district court in *Marshall v. Northrop Grumman Corp.*, No. 2:16-cv-06794, 2019 WL 4058583, at *11 (C.D. Cal. Aug. 14, 2019), and concluded that Plaintiffs' argument "fails as a matter of law" because this sort of third-party compensation "exists independent of the Plan and stems from an agreement to which the Plan is not a party," so AT&T is not required to consider it.

The district court next rejected Plaintiffs' § 406 prohibited-transaction claim, concluding that even if a prohibited transaction occurred, AT&T satisfied the exemption requirements of § 408(b)(2). However, in its analysis of the exemption's "reasonable compensation" requirement, the district court considered only the recordkeeping expenses the Plan paid directly to Fidelity. Although Plaintiffs argued that the compensation Fidelity received from BrokerageLink and Financial Engines also must be considered, the district court rejected this argument for the same reason it rejected Plaintiffs' argument that AT&T violated its duty of prudence: AT&T "had no duty to investigate or consider the third-party compensation Fidelity was receiving from Financial Engines and/or BrokerageLink." The court also found that the remaining exemption requirements were satisfied because Fidelity provided adequate disclosure to AT&T of the compensation Fidelity would receive from Financial Engines and BrokerageLink, and there was no dispute that the services were necessary for the Plan.

Finally, the district court determined that Plaintiffs' reporting claim failed because AT&T accurately

completed its Form 5500s. The court concluded that the compensation from Financial Engines and BrokerageLink qualified as "eligible indirect compensation," and therefore AT&T properly used an alternative reporting method that did not require the amount of this compensation to be reported on the Form 5500.

II

We review de novo a district court's decision to grant summary judgment. *KST Data, Inc. v. DXC Tech. Co.*, 980 F.3d 709, 713 (9th Cir. 2020). "We also review de novo the district court's interpretation of ERISA." *Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 974 (9th Cir. 2012).

III

A

To address Plaintiffs' prohibited-transaction claim, we begin with the text of ERISA § 406. *See Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 254 (2000) ("In ERISA cases, '[a]s in any case of statutory construction, our analysis begins with the language of the statute . . . . And where the statutory language provides a clear answer, it ends there as well.'" (alterations in original) (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999))).

Under § 406(a)(1)(C), a fiduciary "shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . furnishing of goods, services, or facilities between the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(C). A "party in interest" includes "a person providing services to such plan." *Id.* § 1002(14)(B). Thus, the threshold question is whether AT&T, by amending its contract with

Fidelity to incorporate the services of BrokerageLink and Financial Engines, "cause[d] the plan to engage in a transaction" that constituted a "furnishing of goods, services, or facilities between the plan and a party in interest." *Id.* § 1106(a)(1)(C).

There is no dispute that Fidelity has been AT&T's recordkeeper since 2005 and "provid[es] services to" the Plan in that capacity. *Id.* § 1002(14)(B). Therefore, Fidelity has been a "party in interest" since that time. *Id.* Additionally, no one disputes that the transaction (the amendment of the contract between AT&T and Fidelity) constituted a "furnishing of . . . services." *Id.* § 1106(a)(1)(C). Under the plain and unambiguous statutory text, the contract amendment was a prohibited transaction under § 406(a)(1)(C).

Indeed, AT&T admits that the language of § 406(a)(1)(C) is "broad" and, if read literally, encompasses the transaction with Fidelity. AT&T argues, however, that Congress "never intended" for § 406(a) to be "so broad" that it would encompass "arm's-length service transactions." But, in contrast to AT&T's arguments based on Congress's purported intent, we have previously recognized § 406's "broad" scope, explaining that § 406 creates "a broad per se prohibition of transactions ERISA implicitly defines as not arm's-length." *M & R Inv. Co. v. Fitzsimmons*, 685 F.2d 283, 287 (9th Cir. 1982); *see also* Ronald J. Cooke, ERISA Practice & Procedure § 6.49 (Dec. 2022 update) ("Since the prohibition against transactions between plans and parties in interest is per se in nature, a violation does not depend on whether any harm results from the transaction.").

Moreover, § 406(a)(1)(C) contains no language limiting its application to non-arm's-length transactions, and accepting AT&T's "statutory intent"

argument would undermine the scheme Congress enacted. Specifically, § 408(b)(2) broadly exempts from § 406's bar transactions for "services necessary for the establishment or operation of the plan." 29 U.S.C. § 1108(b)(2)(A). And the definition of "necessary" is similarly broad: a service is necessary if it "is appropriate and helpful to the plan obtaining the service in carrying out the purposes for which the plan is established or maintained." 29 C.F.R. § 2550.408b-2(b). In other words, ERISA already contains an exemption for those "service transactions" that keep plans running smoothly, which are the very transactions AT&T argues should be exempt. We see no reason to fashion a judge-made exemption when Congress has already provided a statutory exemption.

We are particularly reluctant to adopt an atextual interpretation of § 406 because ERISA is "an enormously complex and detailed statute," *Conkright v. Frommert*, 559 U.S. 506, 509 (2010) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993)), that is "the product of a decade of congressional study of the Nation's private employee benefit system," *Mertens*, 508 U.S. at 251. Indeed, because of ERISA's complex and carefully crafted nature, the Supreme Court has "been especially 'reluctant to tamper with [the] enforcement scheme' embodied in the statute by extending remedies not specifically authorized by its text." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (alteration in original) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985)). Although the Court made this observation in a different context, we conclude that we should proceed in a similarly cautious manner and decline to read additional limitations, requirements, or exceptions into the statutory text.

B

The Department of Labor's Employee Benefits Security Administration's ("EBSA") explanation for amending the regulation implementing § 408(b)(2) confirms our reading of § 406. In pertinent part, that explanation provides:

> The furnishing of goods, services, or facilities between a plan and a party in interest to the plan generally is prohibited under section 406(a)(1)(C) of ERISA. As a result, a service relationship between a plan and a service provider would constitute a prohibited transaction, because any person providing services to the plan is defined by ERISA to be a "party in interest" to the plan. However, section 408(b)(2) of ERISA exempts certain arrangements between plans and service providers that otherwise would be prohibited transactions under section 406 of ERISA.

Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. at 5632; *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) ("Want to know what a rule means? Ask its author."). In other words, the explanation contemplates the sort of arm's-length transactions that AT&T argues § 406(a)(1)(C) was not intended to reach, confirms that these transactions "generally" are prohibited under § 406(a)(1)(C), and reiterates the role of § 408(b)(2) and its implementing regulation, 29 C.F.R. § 2550.408b-2, in providing relief from § 406's categorical bar of such transactions. Indeed, Fidelity correctly noted as much when it told AT&T that although it might be "surpris[ing]" that contracts between "a plan and a service provider, like a recordkeeper, are prohibited transactions," plans are able to "routinely

enter into contracts with service providers" because of § 408(b)(2)'s exemption.

Furthermore, when explaining its reasons for amending the regulation, EBSA provided an example of the application of § 406 and § 408 that refutes AT&T's argument that § 406 was not meant to reach the transaction in this case. After explaining that the complexity of compensation arrangements for retirement plan services required regulatory action, the agency noted that "[p]ayments from third parties and among service providers can create conflicts of interest between service providers and their clients." *Id.* at 5650. By way of example, it explained that there is a potential for conflicts when "a 401(k) plan vendor may receive 'revenue sharing' from a mutual fund that it makes available to its clients." *Id.* That is precisely the arrangement here between Fidelity and the mutual funds available through BrokerageLink. EBSA clearly recognized that such arrangements could lead to potential conflicts of interest and, as a result, required disclosure under § 408(b)(2) prior to a fiduciary's entry into this sort of arrangement.

Finally, we are persuaded by the Department of Labor's advisory opinion that a company that "provide[d] recordkeeping and related administrative services to retirement plans" and made available to those plans "a variety of investment options, including its own insurance company separate accounts and affiliated and unaffiliated mutual funds," would be "a party in interest with respect to the plan" because it was "a provider of services."[3] U.S. Dep't of Labor,

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[3] Agency interpretations "contained in formats such as opinion letters are 'entitled to respect'" under *Skidmore v. Swift &*

Opinion No. 2013-03A, 2013 WL 3546834, at *1-2 (July 3, 2013). The opinion states that § 406(a)(1)(C) "generally prohibit[s]" the furnishing of goods, services, or facilities between a plan and a party in interest, unless the exemption in § 408(b)(2) applies. *Id.* at *2. Because the situation described in the advisory opinion is remarkably similar to this case, it reinforces our conclusion that § 406(a)(1)(C) broadly applies to transactions constituting a "furnishing of goods, services, or facilities between the plan and a party in interest," and a party is a "party in interest" if it "provid[es] services to" a plan. 29 U.S.C. §§ 1002(14)(B), 1106(a)(1)(C).

C

In contrast to the statutory and regulatory text, as well as EBSA's explanation of the revised regulation, AT&T relies on three decisions to support its reading of § 406(a)(1)(C) as excluding arm's-length transactions from the statute's definition of prohibited transactions: *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Sweda v. University of Pennsylvania*, 923 F.3d 320 (3d Cir. 2019); and *Albert v. Oshkosh Corp.*, 47 F.4th 570 (7th Cir. 2022). As set forth below, we conclude that these cases either do not support AT&T's position, or we decline to follow their reasoning.

Co., 323 U.S. 134, 140 (1944), to the extent that they "have the 'power to persuade.'" *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore*, 323 U.S. at 140).

1

The first case AT&T relies upon is *Lockheed Corp. v. Spink*, in which an employer amended its defined benefit plan to offer increased pension benefits, payable out of the plan's surplus assets, to employees who would retire early, under the condition that participants release any employment-related claims against the employer. 517 U.S. at 885. The plaintiff alleged that this payment of benefits was a prohibited transaction under § 406(a)(1)(D), which prohibits a fiduciary from causing a plan to engage in a transaction that constitutes a "transfer to, or use by or for the benefit of a party in interest, of any assets in the plan." *Id.* at 886, 892 (quoting 29 U.S.C. § 1106(a)(1)(D)). The plaintiff theorized that the release of employment-related claims by participants was a significant "benefit" for the employer under § 406(a)(1)(D). *Id.* at 893.

The Court rejected this theory, holding that "the payment of benefits pursuant to an amended plan, regardless of what the plan requires of the employee in return for those benefits, does not constitute a prohibited transaction." *Id.* at 895. The Court first recognized that § 406(a)(1)(D) "does not in direct terms include the payment of benefits by a plan administrator." *Id.* at 892; *see also id.* at 894 ("Section 406(a)(1)(D) simply does not address what an employer can and cannot ask an employee to do in return for benefits."). The Court then looked to "the surrounding provisions" of § 406 to determine whether the payment of benefits was a "'transaction' in the sense that Congress used that term in § 406(a)." *Id.* at 892-93. The Court concluded it was not, noting that § 406(a) involves "commercial bargains that present a special risk of plan underfunding because they are

struck with plan insiders, presumably not at arm's length." *Id.* at 893. The common thread among the transactions in § 406(a), the Court continued, "is that they generally involve uses of plan assets that are potentially harmful to the plan," whereas the "payment of benefits conditioned on performance by plan participants cannot reasonably be said to share that characteristic." *Id.*

The Court then considered the plaintiff's concession that there were "incidental" and therefore "legitimate" benefits that a plan sponsor might also receive from operating a pension plan, such as attracting and retaining employees or providing increased compensation without increasing wages. *Id.* The Court explained that it could not see "how obtaining waivers of employment-related claims" could "meaningfully be distinguished" from these other objectives the plaintiff admitted were permissible. *Id.* at 894. Thus, the Court concluded that there was "no basis in § 406(a)(1)(D) for distinguishing a valid from an invalid *quid pro quo*." *Id.*; *see also id.* at 895 ("When § 406(a)(1)(D) is read in the context of the other prohibited transaction provisions, it becomes clear that the payment of benefits in exchange for the performance of some condition by the employee is not a 'transaction' within the meaning of § 406(a)(1).").

AT&T relies on *Lockheed*'s statement that § 406 bars transactions "likely to injure the pension plan," *id.* at 888 (quoting *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993)), to support its argument that § 406(a)(1)(C) was not meant to prohibit "the type of ubiquitous, arm's-length service transactions involved here." For several reasons, we disagree.

First, and most importantly, the text of § 406(a)(1)(D) did not support the *Lockheed* plaintiff's argument. The Court began its analysis with the statutory text and concluded that the text "does not in direct terms" include "the payment of benefits" and "simply does not address what an employer can and cannot ask an employee to do in return for benefits." *Id.* at 892, 984. In contrast, § 406(a)(1)(C) does, "in direct terms," encompass the transactions here. There is no dispute that AT&T "cause[d] the plan to engage in a transaction" involving the "furnishing of . . . services" between "the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(C). And since it decided *Lockheed*, the Court has reiterated that courts "'must enforce plain and unambiguous statutory language' in ERISA, as in any statute, 'according to its terms.'" *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)). Our approach does just that.

Second, no other authority supported the *Lockheed* plaintiff's argument. To the contrary, the Court observed that federal law "expressly approve[d]" the employer's strategy, and the Court noted its reluctance "to infer that ERISA bars conduct affirmatively sanctioned by other federal statutes" in the absence of "clearer indication than what [the Court had] in § 406(a)(1)(D)." *Lockheed Corp.*, 517 U.S. at 895 n.6. But here, AT&T identifies no equivalent law supporting its position, while Plaintiffs' position is reinforced by EBSA's explanation of the amendments to 29 C.F.R. § 2550.408b-2.

Third, the Court considered the "surrounding provisions" of § 406 and observed that the transactions identified in § 406 "generally involve uses of plan

assets that are potentially harmful to the plan." *Id.* at 892-93. And while we are mindful that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989); *see also Lockheed Corp.*, 517 U.S. at 895, we do not read this general statement as limiting § 406's scope or requiring that a transaction be harmful to be prohibited. Rather, this "general[ ]" observation explains why it made sense that the "direct terms" of the statute did not encompass the payment of benefits as a prohibited transaction. *Lockheed Corp.*, 517 U.S. at 892. The Court's analysis would have differed if the "direct terms" of § 406 had encompassed the transaction, *id.*, or if the "statutory scheme" had supported the plaintiff's argument, *Davis*, 489 U.S. at 809, as § 408(b)(2) and its implementing regulation do here. In short, our analysis is faithful to the Court's holding in *Lockheed*. Because the "direct terms" of § 406(a)(1)(C) encompass the transaction here, AT&T's contextual argument cannot create an exception to § 406(a)(1)(C) where one does not exist. *See Sulyma*, 140 S. Ct. at 777-78 (rejecting contextual argument because "that is simply not what [the statute at issue] says").

Fourth, while the payment of benefits in *Lockheed* could not "reasonably be said" to be "potentially harmful to the plan," 517 U.S. at 893, the transactions here have the potential to be harmful. Participants paid additional fees to use BrokerageLink and Financial Engines. In a defined contribution plan, like the Plan here, "participants' retirement benefits are limited to the value of their own individual investment accounts, which is determined by the market performance of employee and employer contributions, less expenses. Expenses, such as management or administrative

fees, can sometimes significantly reduce the value of an account in a defined-contribution plan." *Tibble v. Edison Int'l*, 575 U.S. 523, 526 (2015). Therefore, if AT&T entered into bad deals—as Plaintiffs hypothesize—those fees could "significantly reduce" participants' assets. *Id.* Put differently, *Lockheed* does not support AT&T's arguments because there is a fundamental difference between paying increased pension benefits to employees and authorizing transactions that generate millions of dollars for a party in interest. The text of § 406 recognizes this distinction. *Compare Lockheed Corp.*, 517 U.S. at 892 (stating that § 406(a)(1)(d) "does not in direct terms include the payment of benefits" as a prohibited transaction) *with* 29 U.S.C. § 1106(a)(1)(c) (explicitly prohibiting the "furnishing of . . . services" between a plan and a party in interest).

Finally, the Court's analysis in *Lockheed* emphasized the difficulty in distinguishing between those "benefits" the plaintiff conceded were proper under § 406(a)(1)(D) and those that were not. 517 U.S. at 894-95. There is no equivalent line-drawing concern here. To the contrary, adopting AT&T's position would implicate such a concern; a "standard that allows some [transactions with parties in interest] but not others, as [AT&T] suggests, lacks a basis" in § 406(a)(1)(C)'s categorical bar. *Id.* at 895.

For all these reasons, we do not believe *Lockheed* justifies a judicial override of § 406(a)(1)(C)'s unambiguous text.

2

We also find unpersuasive the Third Circuit's decision in *Sweda v. University of Pennsylvania*, which AT&T urges us to follow. In *Sweda*, the Third Circuit

affirmed the dismissal of various claims alleging that the fiduciaries of the University of Pennsylvania's retirement plan entered into agreements with the plan's recordkeepers that constituted prohibited transactions. 923 F.3d at 324. The court found that the plaintiffs plausibly alleged that the recordkeepers—the equivalent of Fidelity here—were "parties in interest" because they provided services to the plan. *Id.* at 339; *see* 29 U.S.C. § 1002(14)(B). And the court recognized that "it is possible to read [§ 406(a)(1)(C)] to create a per se prohibited transaction rule forbidding service arrangements between a plan and a party rendering services to the plan." *Sweda*, 923 F.3d at 339-40. Nevertheless, the court "declined" to follow that reading of § 406(a)(1)(C), and instead established a requirement that a plaintiff plead "factual allegations that support an element of intent to benefit a party in interest" to state a prohibited-transaction claim. *Id.* at 336, 338.

The court reasoned that because § 406(a)(1) was "designed to prevent 'transactions deemed likely to injure the . . . plan' and 'self-dealing,'" it seemed "improbable" that § 406(a)(1)(C) "would prohibit ubiquitous service transactions and require a fiduciary to plead reasonableness as an affirmative defense." *Id.* at 336 (alteration in original) (quoting *Nat'l Sec. Sys., Inc. v. Iola*, 700 F.3d 65, 92 (3d Cir. 2012)). The court also reasoned that reading § 406(a)(1) "as a per se rule" would "miss the balance that Congress struck in ERISA" by "expos[ing] fiduciaries to liability for every transaction whereby services are rendered to the plan." *Id.* at 337. Finally, the court noted that § 404(a)(1)(A)(ii) "specifically acknowledges that certain services are necessary to administer plans," so interpreting § 406(a)(1) "to prohibit necessary services would be absurd." *Id.* at 337.

We disagree with this approach, which does not follow the statutory text. The Supreme Court has reiterated that "a reviewing court's 'task is to apply the text [of the statute], not to improve upon it.'" *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 508-09 (2014) (alteration in original) (quoting *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 126 (1989)). Despite recognizing that each recordkeeper was a "party in interest" and that the transaction at issue fit within the terms of § 406(a)(1)(C), the Third Circuit "decline[d]" to apply the text of § 406, opting instead to create an intent requirement that the statute does not demand. *Sweda*, 923 F.3d at 336-37, 339. We believe our reading is more faithful to the text of § 406(a)(1)(C), which does not include any intent requirement. *See, e.g.*, *Lauderdale v. NFP Retirement, Inc.*, No. SACV 21-301 JVS (KESx), 2022 WL 422831, at *20 (C.D. Cal. Feb. 8, 2022) (stating, while referencing *Sweda*, that the court was "not inclined to impose an intent requirement that is not in the text of the statute").

Additionally, while the court noted that it seemed "improbable" that Congress intended to prohibit "ubiquitous service transactions," *Sweda*, 923 F.3d at 336, it did not consider EBSA's reasoning for amending § 408(b)(2)'s implementing regulation, which contemplates these very service transactions and confirms they are prohibited under § 406. *See* Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. at 5632 ("[A] service relationship between a plan and a service provider would constitute a prohibited transaction, because any person providing services to the plan is defined by ERISA to be a 'party in interest' to the plan.").

Moreover, in refusing to adopt "a per se rule," *Sweda*, 923 F.3d at 337, the court overlooked that the Supreme Court had already recognized that § 406 creates a per se rule. *Harris Tr. & Sav. Bank*, 530 U.S. at 241-42 ("Congress enacted ERISA § 406(a)(1), which supplements the fiduciary's general duty of loyalty to the plan's beneficiaries, § 404(a), by *categorically barring* certain transactions deemed 'likely to injure the pension plan.'" (emphasis added) (citation omitted)); *see also id.* at 252 (noting that § 406(a) creates "*per se* prohibitions on transacting with a party in interest").

And even assuming § 408(b)(2) "require[s] a fiduciary to plead reasonableness as an affirmative defense," *Sweda*, 923 F.3d at 336, the concern "that putting employers to the work of persuading factfinders that their choices are reasonable makes it harder and costlier to defend . . . ha[s] to be directed at Congress, which set the balance where it is," *Meacham v. Knolls Atomic Power Lab'y*, 554 U.S. 84, 101-02 (2008). Congress has already set the balance here.

Finally, we disagree with the Third Circuit's reasoning that because § 404(a)(1)(A)(ii) "specifically acknowledges that certain services are necessary to administer plans," interpreting § 406(a)(1)(C) "to prohibit necessary services would be absurd." *Sweda*, 923 F.3d at 337. As an initial matter, we know that Congress recognized that § 406(a)(1)(C) would prohibit necessary services; that is why it created an exemption. *See* 29 U.S.C. § 1108(b)(2)(A) (exempting contracts for "services necessary for the establishment or operation of the plan").

Moreover, while § 404(a)(1)(A)(ii) "acknowledges that certain services are necessary to administer plans," there are several reasons why it does not

follow that it would be "absurd" for § 406 to prohibit necessary services. *Sweda*, 923 F.3d at 337. First, § 406(a)(1)(C) only applies to service contracts with a "party in interest," and therefore it poses no bar to contracts with parties that do not meet that definition. 29 U.S.C. § 1106(a)(1)(C). Second, even if a party in interest were the sole provider of a necessary service, § 406(a)(1)(C) does not completely "prohibit necessary services" or "impede necessary service transactions." *Sweda*, 923 F.3d at 337-38. Instead, it simply ensures that, when transacting with a party in interest, a fiduciary understands the compensation the party in interest will receive from the transaction and determines that compensation is reasonable. *See* 29 C.F.R. § 2550.408b-2(a), (c), (d). This reading is consistent with ERISA's broader aim to protect plan participants, as well as §§ 406 and 408's aim to increase transparency around service providers' compensation and potential conflicts of interest. *See* 29 U.S.C. § 1001; Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. at 5632.

3

AT&T's reliance on *Albert v. Oshkosh Corp.* fares no better. In *Oshkosh*, the Seventh Circuit rejected the plaintiff's argument that "paying excessive fees" to the plan's recordkeeper and investment advisor "for Plan services" amounted to a prohibited transaction. 47 F.4th at 575-76, 584. The court acknowledged that "[u]nder a literal reading" of § 406(a)(1)(C) and the definition of "party in interest," ERISA "would prohibit payments by a plan to an entity providing services for the plan." *Id.* at 584. The court then cited *Sweda*, among other cases, as support that courts "have declined to read ERISA that way because it

would prohibit fiduciaries from paying third parties to perform essential services in support of a plan." *Id.* Concluding that the transactions were prohibited would be "inconsistent with the purpose of the statute," the court reasoned, because it would be "nonsensical" to read § 406(a)(1) "to prohibit transactions for services that are essential for defined contribution plans, such as recordkeeping and administrative services." *Id.* at 584-85.

The court distinguished past precedent that did not "confront the circularity problem" present in § 406 because "the transactions at issue [in that case] did not transform the defendants into parties in interest." *Id.* at 585. Ultimately, the court concluded that prohibiting "routine payments by plan fiduciaries to third parties in exchange for plan services" would put plan participants in "a worse position" because plans could no longer "outsource tasks like recordkeeping, investment management, or investment advising." *Id.* at 585-86.

The nature of the "transaction" in *Oshkosh* is not entirely clear from the opinion. But considering the court's discussion of a "circularity problem," it appears the "transaction" was simply payment for the services that rendered the service provider a "party in interest" in the first place. *Id.* at 583-85.[4] In other words,

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[4] This understanding of the transaction at issue is further supported by the district court's decision and the plaintiff's allegations and briefing. *See Albert v. Oshkosh Corp.*, No. 20-C-901, 2021 WL 3932029, at *8 (E.D. Wisc. Sept. 2, 2021) (rejecting as "circular reasoning" the argument that "an entity which becomes a party in interest by providing services to the Plans has engaged in a prohibited transaction simply because the Plans have paid for those services" and concluding that allegations that the

the plaintiff argued that the recordkeeper became a "party in interest" by providing recordkeeping services to the plan, and the payment for those services amounted to a prohibited transaction. *See id.* at 584 ("Subsections (A) through (D) [of § 406] cannot be read to categorically prohibit the very transactions that cause a person to obtain the status of a party in interest." (quoting *Sellers v. Anthem Life Ins. Co.*, 316 F. Supp. 3d 25, 34 (D.D.C. 2018)).

That was not the situation here, where Fidelity was a longstanding party in interest when AT&T amended its contract to incorporate additional services from new vendors, resulting in millions of dollars in compensation for Fidelity. To the extent the court in *Oshkosh* premised its decision on a situation inapposite from the one here, we find it unpersuasive.

To the extent the court was considering a situation similar to the one presented here, we simply disagree with its analysis. As in *Sweda*, the court in *Oshkosh* recognized that "a literal reading" of § 406(a)(1)(C) led to the conclusion that the transaction was prohibited, yet it concluded such a reading was "nonsensical." *Id.* at 584-85. And like the court in *Sweda*, it did not consider EBSA's explanation of its

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employer paid the service providers "excessive fees for their services, without more, do not state a prohibited transaction claim" (quotation omitted)); Brief for Appellant Andrew Albert at 45, *Albert v. Oshkosh Corp.*, 47 F.4th 570 (7th Cir. 2022) (No. 21-2789), ECF No. 27 (arguing that because the employer "paid fees to [the service providers] with plan assets" and § 408(b)(2)'s exemption is an affirmative defense, the prohibited-transaction claim survives a motion to dismiss); Amended Complaint at 64-66, *Albert v. Oshkosh Corp.*, 2021 WL 3932029 (E.D. Wisc. Sept. 2, 2021) (No. 1:20-cv-00901-WCG), ECF No. 20 (alleging that the plan engaged in a prohibited transaction by "using assets of the Plan to pay" for "unreasonable" fees).

amendment of § 408(b)(2)'s implementing regulation; if the court had, it likely would have concluded that the "literal reading" is correct. *See* Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. at 5632 ("The furnishing of . . . services . . . between a plan and a party in interest to the plan generally is prohibited under section 406(a)(1)(C) of ERISA."). We are hard-pressed to find the best reading of the statutory text, as corroborated by the agency tasked with administering the relevant regulations, "nonsensical."

Finally, the court's suggestion in *Oshkosh* that § 406 would prevent plans from outsourcing record-keeping and investment services also misses the mark. 47 F.4th at 585-86. Section 406(a)(1)(C) is not a complete ban; instead, it requires fiduciaries, before entering into an agreement with a party in interest, to understand the compensation the party in interest will receive, evaluate whether the arrangement could give rise to any conflicts of interest, and determine whether the compensation is reasonable. 29 C.F.R. § 2550.408b-2; *see generally* Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. 5632-01. Rather than frustrating "ERISA's statutory purpose," *Oshkosh*, 47 F.4th at 585, this scheme furthers it by ensuring fiduciaries understand the impact the transaction will have on participants' interests. *See* 29 U.S.C. § 1001.

* * * *

In sum, AT&T's arguments based on these cases cannot overcome the clear command of ERISA's text, as reinforced by the regulation implementing § 408(b)(2) and EBSA's explanation for its amendment. Because amending Fidelity's contract constituted a prohibited transaction under § 406(a)(1)(C),

we next consider whether the requirements for an exemption under § 408(b)(2) were satisfied.

IV

Section 408(b)(2) provides relief from the prohibited-transaction bar for service contracts or arrangements between a plan and a party in interest if (1) the contract or arrangement is "reasonable," (2) the services are "necessary for the establishment or operation of the plan," and (3) no more than "reasonable compensation is paid" for the services. 29 U.S.C. § 1108(b)(2); 29 C.F.R. § 2550.408b-2(a). Only the first and third requirements are at issue here, as Plaintiffs agree that the services were "necessary." *See* 29 C.F.R. § 2550.408b-2(b).

A

Under § 408(b)(2)'s first requirement, for the contract or arrangement to be "reasonable," the party in interest (which must be a covered service provider and provide services to a covered plan, 29 C.F.R. § 2550.408b-2(c)) must disclose to the plan's fiduciary detailed information about all compensation the party expects to receive "in connection with" the services provided pursuant to the contract or arrangement. 29 C.F.R. § 2550.408b-2(c)(1)(iv). Among other things, this includes (1) a description of all "direct compensation" the party expects to receive, and (2) a description of all "indirect compensation" the party expects to receive, including "identification of the services for which the indirect compensation will be received, identification of the payer of the indirect compensation, and a description of the arrangement between the payer and the [party in interest] . . . pursuant to

which such indirect compensation is paid."[5] *Id.* § 2550.408b-2(c)(1)(iv)(C)(1)-(2).

We need not address this requirement, however, because we conclude that remand is necessary for the district court to consider § 408(b)(2)'s third requirement: whether Fidelity received no more than "reasonable compensation" from all sources for the services it provided the Plan.

B

The parties dispute the meaning of "reasonable compensation" under the third requirement. *Id.* § 2550.408b-2(a)(3). AT&T asserts that "reasonable compensation" encompasses only the compensation Fidelity received directly from the Plan and its participants for recordkeeping, while Plaintiffs argue that the reasonableness of the compensation also includes the compensation Fidelity received from Financial Engines and BrokerageLink. The district court adopted AT&T's position, concluding that AT&T "had no duty to investigate or consider the third-party compensation Fidelity was receiving from Financial Engines and/or BrokerageLink, and therefore [its] failure to do so does not make [the] compensation agreement unreasonable."

The district court, relying on *Marshall v. Northrop Grumman Corp.*, had already concluded that AT&T had no duty to consider this compensation in its analysis of the duty-of-prudence claim. 2019 WL 4058583, at *11. The court applied this reasoning to the

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[5] "Direct" compensation is compensation "received directly from the covered plan," such as the recordkeeping fees AT&T paid Fidelity. 29 C.F.R. § 2550.408b-2(c)(1)(viii)(B)(1). "Indirect" compensation includes "compensation received from any source other than the covered plan." *Id.* § 2550.408b-2(c)(1)(viii)(B)(2).

prohibited-transaction claim and analyzed whether Fidelity's recordkeeping expenses alone were reasonable.

Although *Marshall* is not binding on us, AT&T urges us to adopt its reasoning, as the district court did. The plaintiffs in *Marshall* argued that the fiduciary breached its duty of prudence under § 404 by failing to monitor the compensation the recordkeeper received from the plan's investment advice provider, Financial Engines.[6] *Id.* at *4, 11. The district court rejected this argument, stating that "ERISA does not require, as a matter of law," that fiduciaries monitor "the type of third-party fees at issue here" because those fees "are *not subject to* fiduciary *control*, the fees are not paid out of plan assets, and [the fees] are for services [the recordkeeper] provides to Financial Engines out of an independent business arrangement." *Id.* at *11.

But this conclusion is refuted by EBSA's explanation of its amendments to § 408(b)(2)'s implementing regulation—which the *Marshall* court did not consider, as the plaintiffs brought their claim under § 404. *See id.* at *10-11. EBSA stated explicitly that the information the party in interest must disclose to the fiduciary about the compensation it expects to receive "in connection with" the services provided "will

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[6] *Marshall* involved two different types of fees: "[d]ata connectivity fees," which Financial Engines paid the recordkeeper in exchange for receiving "up-to-date participant data in a timely manner and format" so it could provide participants with investment advice, and fees from a "Master Service Agreement," under which the recordkeeper "agreed to provide data connectivity services and other services to enable Financial Engines to pursue sales opportunities within [the recordkeeper's] existing and potential client base." 2019 WL 4058583, at *5, 11.

assist plan fiduciaries in understanding the services *and in assessing the reasonableness of the compensation, direct and indirect,* that the [party in interest] will receive." Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. at 5635-36 (emphasis added). Put differently, the regulation contemplates that the fiduciary will assess the reasonableness of the compensation that the party receives "directly from the covered plan," 29 C.F.R. § 2550.408b-2(c)(1)(viii)(B)(1) (defining "direct compensation"), *and* "from any source other than the covered plan," *id.* § 2550.408b-2(c)(1)(viii)(B)(2) (defining "indirect compensation").

In amending § 2550.408b-2, EBSA explained that, when "evaluating the reasonableness" of the contract for services, "responsible plan fiduciaries have a duty to consider compensation that will be received by a [party in interest] *from all sources* in connection with the services it provides to a covered plan pursuant to the [party in interest's] contract or arrangement." Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. at 5650 (emphasis added). EBSA further explained that the phrase "in connection with" should "be construed broadly" to encompass compensation the party receives "based in whole or in part" on its contract with the plan. *Id.* at 5637. Therefore, to the extent *Marshall* found that fiduciaries do not have a duty to consider "third-party fees," 2019 WL 4058583, at *11, it conflicts with the agency's purpose in amending § 408's implementing regulation, and we reject its reasoning.

Rather, to determine whether "no more than reasonable compensation is paid" for services under § 408(b)(2)'s exemption, 29 C.F.R. § 2550.408b-2(a)(3),

a fiduciary must consider all compensation—direct and indirect—that the party in interest receives "in connection with" the services it provides to the plan under the contract. *See* Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. at 5650 ("In evaluating the reasonableness of contracts or arrangements for services, responsible plan fiduciaries have a duty to consider compensation that will be received by a covered service provider from all sources in connection with the services it provides to a covered plan pursuant to the service provider's contract or arrangement.").

This conclusion—that the fiduciary must consider all compensation the party in interest receives in connection with the services it provides the plan—is required by the text of the regulation, conforms to the structure and purpose of § 408(b)(2)'s requirements, and is reinforced by EBSA's explanation for revising § 2550.408b-2. The first exemption requirement—that the contract or arrangement be "reasonable"—calls for the party in interest to disclose information to the fiduciary about the compensation the party in interest expects to receive in connection with the services provided under the contract with the plan. 29 C.F.R. § 2550.408b-2(c)(1)(iv). The third requirement—that "no more than reasonable compensation is paid"—expects a fiduciary to consider this information. As EBSA explained, the point of disclosure is to provide information from which the fiduciary can make responsible decisions for the plan. Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. at 5634, 5635-36 (stating that the disclosure requirements "should be construed broadly to ensure that responsible plan fiduciaries base their review of a service contract or arrangement on comprehensive information," and that the disclosed

information "will assist plan fiduciaries in understanding the services and in assessing the reasonableness of the compensation" the party will receive). Disclosure is pointless if the fiduciary has no obligation to consider the disclosed information.

Moreover, one of the primary purposes of amending § 408(b)(2)'s implementing regulation was to address "third-party fees," which the court in *Marshall* found fiduciaries need not consider. 2019 WL 4058583, at *11. EBSA was particularly concerned with the special risks presented by these fees. It recognized that "[p]ayments from third parties and among service providers can create conflicts of interest between service providers and their clients," and these payments have "been largely hidden from view," thereby preventing fiduciaries "from assessing the reasonableness of the costs for plan services." Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. at 5650.

EBSA therefore implemented the regulation to "improve . . . transparency" and make it easier for fiduciaries to satisfy their "duty to consider compensation that will be received by a [party in interest] from all sources in connection with the services it provides to a covered plan" under the contract. *Id.* (outlining these risks in section titled "*The Need for Regulatory Action*"). The purpose of the regulation is clear—indeed, Fidelity even informed AT&T that "the regulation is focused on the disclosure of indirect revenue."

In short, to determine whether "no more than reasonable compensation is paid" for a party in interest's services, EBSA envisioned that a fiduciary would consider the compensation received by the party "from all sources in connection with the services it provides to a covered plan pursuant to" the contract, not just the

compensation the party receives directly from a plan. *See* Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. at 5650.

Here, that means AT&T needed to consider the compensation Fidelity received from Financial Engines and BrokerageLink when determining whether "no more than reasonable compensation" was paid for Fidelity's services. 29 C.F.R. § 2550.408b-2(a)(3). The district court did not engage in this analysis; it concluded that AT&T "had no duty" to consider this compensation and evaluated whether the recordkeeping expenses the Plan paid directly to Fidelity, alone, were reasonable. We therefore remand for the district court to conduct this analysis in the first instance.

V

For similar reasons, we also reverse the district court's judgment in favor of AT&T on Plaintiffs' duty-of-prudence claim and remand for further proceedings. Plaintiffs assert that AT&T breached its duty of prudence under ERISA § 404 by failing to monitor the compensation Fidelity received through BrokerageLink and Financial Engines. *See* 29 U.S.C. § 1104(a)(1) (requiring a fiduciary to discharge his or her duties "with the care, skill, prudence, and diligence under the circumstances then prevailing" and for the "exclusive purpose" of "providing benefits to participants" and "defraying reasonable expenses of administering the plan").

AT&T again relies on *Marshall* as support for its argument that a fiduciary need not consider this compensation, and again this reliance is misplaced. As our prior discussion of Plaintiffs' § 406 prohibited-transaction claim demonstrates, AT&T was required to consider this compensation under §§ 406 and 408.

Moreover, EBSA's explanation of the amendments to 29 C.F.R. § 2550.408b-2 explicitly envisions that fiduciaries will consider such compensation to satisfy their duty of prudence under § 404—directly refuting *Marshall*.

When amending § 2550.408b-2, EBSA explained that fiduciaries must have information about the compensation—direct and indirect—received by service providers like Fidelity "to satisfy their fiduciary obligations under ERISA [§] 404(a)(1) to act prudently." Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. at 5632. These disclosures are necessary because the duty of prudence requires a fiduciary to discharge his or her duties "solely in the interest of [plan] participants and beneficiaries" and for the purpose of "defraying reasonable expenses of administering" the plan. 29 U.S.C. § 1104(a)(1)(A)(ii). A fiduciary cannot do so, however, if he or she is unaware of how and to what extent a service provider is compensated. *See* Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. at 5632 (stating that § 408(b)(2) requires service providers to disclose all compensation they receive in connection with a plan because "plan fiduciaries need this information, when selecting and monitoring service providers," to be able to "assess[] the reasonableness of the compensation paid for services and the conflicts of interest that may affect a service provider's performance of services" and satisfy their duty of prudence).

Indeed, EBSA amended § 408(b)(2)'s implementing regulation to better allow fiduciaries to fulfill their responsibilities. EBSA recognized that "the way services are provided to employee benefit plans and . . . the way service providers are compensated" had

changed, making "it more difficult for plan sponsors and fiduciaries to understand what service providers actually are paid for the specific services rendered"—as "[§] 404(a)(1) of ERISA requires plan fiduciaries" to do. Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 75 Fed. Reg. 41600-01, 41600 (July 16, 2010) (interim rule); *see also* Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. at 5637-38 (final rule) (explaining how the final rule's disclosure requirements better enable "a responsible plan fiduciary" to understand "what compensation will be received and from whom" so he or she can "make informed decisions about service costs and potential conflicts of interest").

AT&T counters that the duty-of-prudence claim must fail because Plaintiffs offered no expert testimony to establish that a prudent fiduciary would have considered the fees Fidelity received from BrokerageLink and Financial Engines. However, AT&T identifies no Ninth Circuit precedent suggesting that expert testimony is a prerequisite to a successful claim, and we decline to create a per se rule requiring such evidence. *See Hughes v. Northwestern Univ.*, 142 S. Ct. 737, 742 (2022) ("Because the content of the duty of prudence turns on 'the circumstances . . . prevailing' at the time the fiduciary acts, § 1104(a)(1)(B), the appropriate inquiry will necessarily be context specific." (quoting *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014)).

Similarly, we cannot conclude that AT&T, in fact, considered these fees. AT&T does not even attempt to argue that it considered the compensation Fidelity received from the mutual funds available through BrokerageLink. And to support its argument that it

considered the compensation Fidelity received from Financial Engines, AT&T cites testimony from an AT&T executive that he "took note of" that compensation and took it "into account." But another AT&T executive testified that "what Financial Engines and Fidelity worked out for fees, was between them," while another echoed that sentiment and suggested that AT&T "really didn't make an inquiry about whether [the fee paid by Financial Engines to Fidelity] was a reasonable" one. On balance, this conflicting testimony does not support AT&T's claim that it considered the compensation Fidelity received from Financial Engines.

On this record, we cannot conclude that AT&T satisfied its duty of prudence as a matter of law. We therefore remand for the district court to consider Plaintiffs' duty-of-prudence claim under the proper framework in the first instance. *See Nunez v. Duncan*, 591 F.3d 1217, 1222-23 (9th Cir. 2010) (in reviewing a district court's grant of summary judgment, we determine "whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law" (quoting *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc)).

VI

Finally, we turn to Plaintiffs' reporting claim. Plaintiffs argue that AT&T breached its "duty of candor" by failing to accurately report on its Form 5500s the indirect compensation Fidelity received from Financial Engines and BrokerageLink. *See* 29 U.S.C. § 1023(c)(3). Plaintiffs seek injunctive relief requiring AT&T to correct the Form 5500s.

The Form 5500 requires plan administrators to identify service providers, like Fidelity, that receive a certain amount of compensation in connection with services rendered to the plan. U.S. Dep't of Labor, Emp. Benefits Sec. Admin., Schedule C (Form 5500), at 1. Administrators generally must report the direct and indirect compensation that the service provider received. *See id.* at 3. However, if the indirect compensation qualifies as "eligible indirect compensation" and was adequately disclosed to the plan, an alternative reporting method is available. *Id.* Under those circumstances, the administrator can check a box on the Form 5500 indicating that the service provider received eligible indirect compensation without reporting the amount. *Id.*

AT&T contends that it properly used this alternative reporting method, while Plaintiffs argue that, even if the compensation from BrokerageLink qualified as eligible indirect compensation, it was reported incorrectly, and the compensation from Financial Engines was not eligible indirect compensation. We address Plaintiffs' arguments in turn.

A

Plaintiffs argue that AT&T incorrectly reported Fidelity's compensation from BrokerageLink because the alternative reporting method is available only if the "*sole* compensation received by a recordkeeper is eligible indirect compensation," and Fidelity received other types of compensation. But, as AT&T points out, if the service provider received compensation other than eligible indirect compensation, the plan administrator simply "must complete line 2" of the Form 5500, which AT&T did. U.S. Dep't of Labor, Emp. Benefits Sec. Admin., Instructions for Form 5500, at 28. Plaintiffs do not acknowledge this portion of the

Form or argue that AT&T needed to do something more on line 2.

Additionally, AT&T received the disclosures necessary to utilize the alternative method to report the BrokerageLink compensation. *See id.* AT&T received written materials from Fidelity disclosing (1) "the existence of" the compensation from the mutual funds available through BrokerageLink, (2) "the services provided for" the compensation (certain recordkeeping or shareholder services), (3) the "amount (or estimate) of the compensation or a description of the formula used to calculate or determine the compensation" (ranges of basis points or flat fees, depending on the fund), and (4) "the identity of the party or parties paying and receiving the compensation" (Fidelity received the compensation from the mutual funds, their investment advisors, or their affiliates). *Id.*; *see also* Revision of Annual Information Return/Reports, 72 Fed. Reg. 64731-01, 64742 (Nov. 16, 2007) (stating these requirements). Therefore, we agree with the district court that AT&T adequately reported the compensation from BrokerageLink and affirm its judgment on this ground.

B

As to the compensation Fidelity received from Financial Engines, Plaintiffs challenge AT&T's position that this compensation was eligible indirect compensation. The Form 5500 instructions define "eligible indirect compensation," and we emphasize the portion of the definition on which AT&T relies:

> *[F]ees* or expense reimbursement payments *charged to investment funds and reflected in the value of the investment* or return on investment of the participating plan or its

> participants, finder's fees, "soft dollar" revenue, float revenue, and/or brokerage commissions or other transaction-based fees for transactions or services involving the plan *that were not paid directly by the plan or plan sponsor* (whether or not they are capitalized as investment costs).
>
> Investment funds or accounts for this purpose would include mutual funds, bank commingled trusts, including common and collective trusts, insurance company pooled separate accounts, and other separately managed accounts and pooled investment vehicles in which the plan invests. *Investment funds or accounts would also include separately managed investment accounts that contain assets of individual plans*.

U.S. Dep't of Labor, Emp. Benefits Sec. Admin., Instructions for Form 5500, at 28 (emphasis added).

AT&T asserts that the fees paid by Financial Engines to Fidelity are "fees . . . charged to investment funds and reflected in the value of the investment" because the fees paid to Financial Engines "came directly from the 'investment funds' contributed by" Plan participants.[7] In other words, AT&T argues that these fees are "charged to investment funds" because

[7] Plaintiffs do not dispute that these fees "were not paid directly by the plan or plan sponsor." Moreover, AT&T does not argue that the fees paid by Financial Engines to Fidelity would qualify as any other type of "eligible indirect compensation" as that term is defined in the instructions for Form 5500. *See* U.S. Dep't of Labor, Emp. Benefits Sec. Admin., Instructions for Form 5500, at 28; *see also* Revision of Annual Information Return/Reports, 72 Fed. Reg. at 64742 (EBSA's discussion of the revisions to the Form 5500 reporting requirements)

"investment funds" includes "separately managed investment accounts that contain assets of individual plans."

But a "separately managed investment account" is a specific type of investment vehicle; it does not mean, as AT&T asserts, simply an "investment account" that is "managed" by an adviser like Financial Engines. Although a separately managed account is a "portfolio[ ] of assets managed by an investment adviser," it is "usually targeted towards wealthy individual investors" and differs from a typical investment account in which the average investor invests in bonds and mutual funds. Standards for Covered Clearing Agencies for U.S. Treasury Securities and Application of the Broker-Dealer Customer Protection Rule With Respect to U.S. Treasury Securities, 87 Fed. Reg. 64610-01, 64659 (proposed Oct. 25, 2022). Unlike with a mutual fund, in which an investor shares ownership of the underlying securities with other investors, an investor in a separately managed account directly owns shares of the individual securities, allowing for a high degree of personalized investment. BlackRock, Separately Managed Accounts to construct personalized portfolios, https://www.blackrock.com/us/financial-professionals/investment-strategies/managed-accounts [https://perma.cc/2YD8-ZZLN]; Investopedia, Should You Have a Separately Managed Account?, https://www.investopedia.com/articles/mutualfund/08/mana ged-separate-account.asp [https://perma.cc/MHU3-3A2B] (explaining that with a mutual fund, an investor "share[s] ownership of the underlying securities with all of the other investors in the fund," whereas with a separately managed account, an adviser purchases shares of specific companies—not shares of a mutual fund—on the investor's behalf).

Here, Financial Engines was not purchasing individual securities on behalf of Plan participants. Rather, Financial Engines considered a participant's age, risk tolerance, and other characteristics; provided recommendations on how the participant should invest his or her money; and allocated the participant's contributions among the Plan's "menu of investment alternatives." This does not constitute a "separately managed investment account." Therefore, AT&T's argument that the fees paid to Financial Engines were "eligible indirect compensation"—and therefore did not need to be separately reported on the Form 5500—fails.

Nor can we affirm on any of the other grounds AT&T proposes.

AT&T invokes our decision in *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004), where we stated that to "establish an action for equitable relief under ERISA section 502(a)(3), the defendant must be an ERISA fiduciary acting in its fiduciary capacity," *id.* at 1178 (internal citations omitted), and must violate "ERISA-imposed fiduciary obligations," *id.* (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996)). AT&T argues that it did not act in a fiduciary capacity when completing the Form 5500, so Plaintiffs cannot establish a claim for equitable relief.[8]

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[8] Plaintiffs sometimes frame their reporting claim as a breach of the "duty of candor," which we assume is in response to this language in *Mathews*. Because equitable relief under § 502(a)(3) is not limited to breaches of fiduciary duties, we do not decide whether a fiduciary "duty of candor" exists.

Additionally, contrary to AT&T's argument, Plaintiffs have not waived this claim. Plaintiffs have not failed to argue before

But in *Mathews,* we made this statement in the context of a claim for breach of fiduciary duty, *see id.* at 1176, 1180 (stating that "[a]t issue here is an alleged violation of [§] 404(a)(1)," which imposes the fiduciary duty of prudence), and the defendant specifically argued that it did not act in a fiduciary capacity when taking the actions at issue, *id.* at 1178. But ERISA's authorization of suits for equitable relief, § 502(a)(3), is not limited to claims against fiduciaries for breach of fiduciary duty. *See* 29 U.S.C. § 1132(a)(3). Instead, § 502(a)(3) authorizes a "participant, beneficiary[,] or fiduciary" to bring an action "(A) to enjoin any act or practice which violates *any provision of this subchapter or the terms of the plan*, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) *to enforce any provisions of this subchapter or the terms of the plan*." 29 U.S.C. § 1132(a)(3) (emphases added); *see also* U.S. Dep't of Labor, Emp. Benefits Sec. Admin., FAQs about Retirement Plans and ERISA 14, https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-for-workers.pdf [https://perma.cc/TJ3M-NDLV] ("[Y]ou have a right to sue your plan and its fiduciaries . . . [t]o address a breach of a plan fiduciary's duties; or [t]o stop the plan from continuing any act or practice

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the district court that the reporting failures violated ERISA § 103. *See* 29 U.S.C. § 1023. Although Plaintiffs sometimes phrased this argument in terms of a "duty of candor" under § 404, Plaintiffs have regularly identified § 103 as authorizing their claim. They have argued, at least as far back as their opposition to AT&T's motion to dismiss the second amended complaint, that they sought relief "under ERISA § 502(a)(3) enjoining [AT&T] from filing incomplete and inaccurate Annual Reports and to correct previous inaccurate disclosures *pursuant to* 29 U.S.C. [§] 1023(a)(2)."

that violates the terms of the plan or ERISA."). Some violations of ERISA involve a breach of fiduciary duty, as in *Mathews*, but ERISA has other "provisions" that can be violated. *See Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020, 1029 (9th Cir. 2021) ("The [defendant's] escape from liability on the fiduciary duty claim does not necessarily exonerate it from its other statutory obligations.").

Indeed, in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), a *fiduciary* sued a *beneficiary* under § 502(a)(3), not for breach of fiduciary duty, but to enforce "the terms of the plan," 29 U.S.C. § 1132(a)(3). 547 U.S. at 359-61. The Court stated that the "only question" regarding the applicability of § 502(a)(3)(B) was whether the requested relief was "equitable." *Id.* at 361. Therefore, we cannot read *Mathews* to impose the limitations AT&T suggests because such a reading would be in direct conflict with *Sereboff*—in which the defendant was a beneficiary, not "an ERISA fiduciary acting in its fiduciary capacity," *Mathews*, 362 F.3d at 1178, and which was brought to enforce the terms of the plan, not to remedy violations of "ERISA-imposed fiduciary obligations," *id.* (quotation omitted). And we have recognized that *Mathews* must be read in context, as we have framed the inquiry differently in other cases. *See, e.g.*, *Warmenhoven v. NetApp, Inc.*, 13 F.4th 717, 725 (9th Cir. 2021) ("A § [502(a)(3)] claim has two elements: '(1) that there is a remediable wrong, *i.e.*, that the plaintiff seeks relief to redress a violation of ERISA or the terms of a plan; and (2) that the relief sought is appropriate equitable relief.'" (quoting *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 954 (9th Cir. 2014)). Thus, Plaintiffs can bring an equitable reporting claim without a breach of fiduciary duty claim.

AT&T also argues that Plaintiffs' reporting claim must fail because Plaintiffs cannot show that any errors in the Form 5500s led to loss. But we have rejected this argument when the plaintiff seeks only equitable relief, as Plaintiffs do here. *See Shaver v. Operating Eng'rs Local 428 Pension Tr. Fund*, 332 F.3d 1198, 1203 (9th Cir. 2003). Therefore, we reverse the judgment of the district court regarding AT&T's reporting of the compensation from Financial Engines.

VII

Because the district court did not correctly apply the relevant substantive law to Plaintiffs' prohibited-transaction and duty-of-prudence claims, we reverse and remand for it to do so. On Plaintiffs' reporting claim, we affirm the judgment of the district court as to the compensation from BrokerageLink and reverse as to the compensation from Financial Engines. Costs are awarded to Plaintiffs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Julio C. Alas, et al., Plaintiffs, v. AT&T Services, Inc., et al., Defendants.	Case No. 2:17-cv-8106-VAP-RAOx **Order GRANTING Defendants' Motion for Summary Judgment (Dkt. 164) and DENYING Plaintiffs' Motion for Partial Summary Judgment (Dkt. 176)** Sept. 28, 2021

Before the Court are Defendants' AT&T Services, Inc. and the Benefit Plan Investment Committee's ("Defendants") Motion for Summary Judgment and Plaintiffs' Robert Bugielski and Chad Simecek, on behalf of a class of participants and beneficiaries, ("Plaintiffs") Motion for Partial Summary Judgment.

After considering all the papers filed in support of, and in opposition to, the Motions, as well as the arguments advanced at the hearing, the Court **GRANTS** Defendants' Motion and **DENIES** Plaintiffs' Motion.

I. BACKGROUND

On November 12, 2018, Plaintiffs filed the Third Amended Complaint ("TAC") against Defendants with claims for (1) breaches of fiduciary duties of prudence, candor, and prohibited transactions under ERISA

§ 404(a) and 29 U.S.C. § 1104(a); (2) prohibited transactions under ERISA § 406(a) and 29 U.S.C. § 1106(a); and (3) breaches of fiduciary duties of prudence and candor and self-dealing prohibited transactions under ERISA §§ 404(a), 406(b)(1), and 29 U.S.C. §§ 1104(a) and 1106(b)(1). (TAC, 24-27). Plaintiffs later voluntarily dismissed Count 3. (Dkt. 161).

In the TAC, Plaintiffs alleged Defendants failed to implement a process to control the administrative expenses that participants in the AT&T Retirement Savings Plan ("Plan") paid to the Plan's recordkeeper, Fidelity Investments Institutional Operations Company, Inc. ("Fidelity"). Plaintiffs also alleged Defendants failed to analyze and evaluate compensation paid to Fidelity from Financial Engines Advisors L.L.C. ("Financial Engines"), which provided computer-based investment advice to Plan participants. As a result of Defendants' failure to perform their fiduciary duties, Plaintiffs alleged that Plan participants paid grossly excessive fees to Fidelity.

On similar grounds, Plaintiffs alleged that Defendants engaged in a prohibited transaction with Fidelity in defiance of ERISA § 406(a). According to Plaintiffs, Defendants failed to obtain from Fidelity the required disclosures of direct and indirect compensation in connection with all the services that Fidelity was providing, which resulted in Defendants failing to ascertain whether Fidelity's total compensation was reasonable.

Plaintiffs also claimed that Defendants failed to report Fidelity's compensation accurately on the required annual Form 5500, filed with the Employee Benefit Security Administration ("EBSA"). Plaintiffs assert Defendants' reporting failure was a violation of the duty of candor set forth in ERISA § 404(a).

In response to the TAC, Defendants filed two motions: a Motion for Reconsideration regarding an earlier Motion to Dismiss, and a Motion to Dismiss the TAC. (Dkt. 100). The Court declined to reconsider its previous ruling and granted Defendants' Motion to Dismiss only as to newly named individual defendants in the TAC. (Dkt. 106). Defendants subsequently filed an Answer to the TAC on April 08, 2019. (Dkt. 112).

On June 14, 2021, Defendants filed a Motion for Summary Judgment as to all claims in the TAC ("Defs.' Motion," Dkt. 165), along with a Statement of Undisputed Facts ("Defs.' SUF," Dkt. 165.1) containing 49 facts, and the Declarations of Julianne Galloway, John Phipps, and Nancy Ross, including Exhibits 1-57. ("Defs.' Ex.," Dkt. 165.2-61).

On June 15, 2021, Plaintiffs filed a Motion for Partial Summary Judgment ("Pls.' Motion," Dkt. 167) as to Defendants' breach of fiduciary duty and prohibited transactions, along with a Statement of Undisputed Facts containing 128 facts, ("Pls.' SUF," Dkt. 167.1), and the Declaration of John J. Nestico (Dkt. 167.2), including exhibits 2-56 and four unnumbered deposition transcripts. ("Pls.' Ex.," Dkt. 168.1-42). On August 9, 2021, Plaintiffs submitted a reply brief in support of their Motion for Partial Summary Judgment ("Pls.' Reply," Dkt. 195) along with new evidence, including a Supplemental Statement of Undisputed Facts ("Pls.' SSUF," Dkt. 195.1) with 31 new facts. Defendants filed a response to the new summary judgment evidence on August 30, 2021. (Defendants' Response to New Summary Judgment Evidence, "Defs.' Response," Dkt. 207).

II. LEGAL STANDARD

A motion for summary judgment or partial summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

"[W]hen parties submit cross-motions for summary judgment, each motion must be considered on its own merits." *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (internal quotations and citations omitted). Thus, "[t]he court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." *Id.* (quoting Wright, et al., *Federal Practice and Procedure* § 2720, at 335-36 (3d ed. 1998)). If, however, the cross-motions are before the court at the same time, the court must consider the evidence proffered by both sets of motions before ruling on either one. *Riverside Two*, 249 F.3d at 1135-36.

Generally, the burden is on the moving party to demonstrate that it is entitled to summary judgment. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). "The moving party may produce evidence negating an essential element of the nonmoving party's case, or . . . show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000) (reconciling *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). The nonmoving party must then "do more than simply

show that there is some metaphysical doubt as to the material facts" but must show specific facts which raise a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A genuine issue of material fact will exist "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248.

In ruling on a motion for summary judgment, a court construes the evidence in the light most favorable to the non-moving party. *Barlow v. Ground*, 943 F.2d 1132, 1135 (9th Cir. 1991). "[T]he judge's function is not [ ] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

III. FACTS

A. Undisputed Facts

The following material facts are supported adequately by admissible evidence and are uncontroverted. They are "admitted to exist without controversy" for the purposes of deciding Plaintiffs' and Defendants' Motions, respectively. *See* C.D. Cal. L.R. 56-3.

1. <u>The AT&T Retirement Savings Plan</u>

The Plan is an individual account, 401(k) defined contribution plan offered to eligible AT&T employees. (Defs.' SUF, no. 1; Pls.' SUF, no. 1). Defendant AT&T Services is the administrator of the Plan and a fiduciary of the Plan. (Pls.' SUF, nos. 5-6). AT&T Services delegated responsibility for certain investment-related functions, like monitoring Plan investment expenses, to Defendant Benefit Plan Investment Committee ("BPIC"), which is comprised of AT&T's CFO, Treasurer, Controller, Vice President of Investment

Management, and Vice President–Benefits. (Pls.' SUF, no. 9).

AT&T engaged Fidelity to serve as the Plan's recordkeeper in 2005, a role that gives Fidelity authority to track participant contributions and investments, process distributions, and perform other administrative functions. (Defs.' Motion, at 2). At all relevant times, AT&T's contracts with Fidelity included a "most favored customer" clause which provided that Fidelity's fees were "not less favorable than those extended to any other" similarly situated customer. (Defs.' SUF, no. 18).

2. BrokerageLink

BrokerageLink is an additional service Fidelity offers to participants in the Plan. BrokerageLink, which has been available to Plan participants since 2011, allows participants to trade mutual funds, individual stocks and bonds, and other investments. (Defs.' Motion, at 3; Pls.' SUF, nos. 120-121). Plan members who execute transactions through BrokerageLink pay Fidelity's standard fee and expense schedule as well as any other fees associated with the transaction. (*Id.*). As a result of these fees, Fidelity receives "indirect compensation" with respect to Plan investments made through BrokerageLink. (Defendants' Statement of Genuine Issues in Opposition to Pls.' Motion, "Defs.' Opp. SUF," Dkt. 180.2, no. 63).

3. Financial Engines

AT&T entered into a contract with Financial Engines in August 2014 to provide advisory and managed account services to the Plan. (Defs.' SUF, no. 32). Participants volunteer to use Financial Engines' services and grant permission to Financial Engines to execute trades in their Plan account. (*Id.* at no. 33).

Financial Engines initially charged a Plan Access Fee of $2.00 per year per active participant and an asset-based fee for participants who signed up to use Financial Engines' professional management services. (*Id.* at no. 39). In October 2017, AT&T extended its contract with Financial Engines, eliminated the $2.00 per participant fee, and reduced its asset-based fees. (*Id.* at no. 41).

Fidelity and Financial Engines maintain a separate agreement through which Financial Engines pays Fidelity for access to the accounts of Plan participants. (Defs.' SUF, no. 35). The Services Agreement between AT&T Services and Financial Engines states that Financial Engines "has entered into an agreement with the Plan Recordkeeper to establish and maintain secure communication links and data connectivity," and that a portion of the Plan fees would be paid to the Plan Recordkeeper "as compensation for these activities." (*Id.* at no. 36). A September 2014 letter from AT&T to Fidelity establishes that "Financial Engines compensates Fidelity for maintaining the links and related services with an annual fee of 22.5 basis points," with an additional "annual $1.00 platform fee for each advice eligible plan participant." (*Id.* at no. 37). Fidelity therefore receives "indirect compensation" from Financial Engines with respect to Plan participants who use Financial Engines' services. *See, e.g.,* Defs.' Opp. SUF, no. 70.

4. Form 5500s

Retirement plans with 100 participants or more must file a Form 5500 annually. (TAC, at 18). The form details financial information about the retirement plan, including the number of plan participants, the amount of plan assets, and the amounts of certain kinds of compensation paid to service providers. The

Plan has filed Form 5500s for each year stemming from 2011 to 2019. (Pls.' SUF, nos. 44-71). The Department of Labor publishes instructions on how to complete a Form 5500 on its website. *See* Defs.' Ex. 9.

B. Disputed Facts

The parties dispute whether the named Defendants in this lawsuit, the BPIC and AT&T Services, have fiduciary responsibility for the alleged breaches of fiduciary duty. Plaintiffs contend that Defendant BPIC is a fiduciary of the Plan with duties "related to the ASRP other than administration," including the duties to oversee recordkeeping fees and administrative reporting obligations. (Pls.' SUF, no. 7). Defendants argue that BPIC members do not have responsibility for recordkeeping or reporting because they delegated authority over these matters to individual AT&T executives. (Defs.' SUF, nos. 4-6).

The parties also dispute how to evaluate the total fees the Plan paid Fidelity for recordkeeping services on an annual basis from 2011 to 2018. Plaintiffs allege that Defendants vastly over-compensated Fidelity by paying $5.055 million for recordkeeping and administrative services in 2011, for example, and increasingly more in the years following. (Pls.' SUF, nos. 44-71). While Defendants do not dispute these figures, they argue these totals do not reflect total "recordkeeping and administrative" fees because they also include compensation for a variety of additional services, "as indicated by the Services Codes in element (b) [of Form 5500]." (Defs.' Opp. SUF, nos. 44-71). Since the parties disagree on what should be included in "recordkeeping and administrative services," they also dispute the amount the Plan paid to Fidelity for recordkeeping on a per participant basis. Plaintiffs allege the Plan paid, on average, roughly

$61 per participant per year in recordkeeping expenses from 2011 to 2018. (TAC, at 12). Defendants contend that the Plan spent at most $31 per participant per year (in 2011), down to $29 per participant in 2012, and only $20 per participant after the year 2018. (Defs.' Opp. SUF, nos. 44-71).

The parties also dispute the nature of the agreement between Fidelity and Financial Engines. Plaintiffs allege that Financial Engines was paying Fidelity for mere "access to the accounts" of Plan participants who had signed up to use Financial Engines, while Defendants claim that Financial Engines was paying for "access to Fidelity's data and technology." (Defs.' SUF, no. 35). This dispute becomes relevant as Plaintiffs argue that the amount of revenue Fidelity received from Financial Engines was excessively high. *See* Pls.' SUF, no 92; Pls.' Motion, at 9 ("Fidelity would receive more than 50 percent of the total fee paid for Financial Engines' managed account services."); *see also* Pls.' Motion, at 13 (questioning whether "the kickbacks Fidelity received from FE bore a reasonable relationship to such costs").

The parties next dispute whether Defendants accurately reported the indirect compensation Fidelity received from BrokerageLink and Financial Engines on Schedule C of the Form 5500s. According to Plaintiffs, Defendants incorrectly reported that Fidelity received "0" dollars in indirect compensation, failing to take into account the "indirect compensation with respect to participant investments through BrokerageLink and from Financial Engines." *See, e.g.*, Pls.' SUF, nos. 65, 68. Defendants agree they reported "0" dollars on the Form 5500s, but argue the reporting was accurate because the form prompts filers to report the "total indirect compensation . . . *excluding eligible*

indirect compensation." (*See, e.g*., Defs.' Opp. SUF, no. 68) (emphasis added). On this point, the parties also disagree about what qualifies as "eligible" indirect compensation and what does not.

The parties also dispute whether AT&T appropriately considered Fidelity's indirect compensation from BrokerageLink and Financial Engines in determining whether Fidelity's overall compensation was reasonable. Plaintiffs allege that Defendants defied ERISA §§ 1104(a) and 406(a) by failing to consider Fidelity's compensation from other sources, which resulted in Defendants engaging in prohibited transactions with Fidelity. (TAC, at 25-26). Defendants counter that they did consider and evaluate Fidelity's compensation in connection with BrokerageLink and Financial Engines, and that Fidelity's overall compensation was reasonable. (Defs.' Opp. SUF, no. 126).

IV. EVIDENTIARY ISSUES

Defendants dispute the admissibility of Form 5500s Plaintiffs submitted in support of their Motion for Partial Summary Judgment. *See* Defs.' Response. These Form 5500s concern four retirement plans from four companies—Costco, FedEx, HCA, Home Depot-and two trusts. (Pls.' Reply, Dkt. 195.2-26). Plaintiffs seek to use the Form 5500s as evidence of the amount of direct compensation that each company paid to its recordkeeper per plan participant. (*Id.* at 1-2). Defendants argue that the Form 5500s are inadmissible hearsay because they are statements prepared by non-parties offered for the truth of what they assert. Moreover, Defendants assert that Plaintiffs cannot draw conclusions about other plans' payments to their service providers because they have no "knowledge of the specific services those plans received, the quality of scope of those services, how the service providers

were compensated, or how the Form 5500s were completed." (Defs.' Response, at 3).

In certain circumstances, a Form 5500 Annual Report would be admissible under Federal Rule of Evidence 803(6), the business record exception to hearsay evidence. "Rule 803(6) provides that records of regularly conducted business activity meeting the following criteria constitute an exception to the prohibition against hearsay evidence: [a] . . . report, record, or data compilation . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the . . . report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . ." *U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040, 1043 (9th Cir. 2009), citing Fed. R. Evid. 803(6).

In the summary judgment context, "the evidence presented . . . does not yet need to be in a form that would be admissible at trial, [instead] the proponent must set out facts that it will be able to prove through admissible evidence." *Norse v. City of Santa Cruz*, 629 F.3d. The Court thus must consider whether Plaintiffs *could* properly introduce the Form 5500s at trial under the business record exception. *See Fraser v. Goodale*, 342 F.3d 1032, 1037 (9th Cir. 2003) (holding that because the contents of a diary "could be admitted into evidence at trial in a variety of ways," the contents could be considered at the summary judgment stage).

In their Reply, Plaintiffs attempt to introduce the Form 5500s through the Declaration of John J. Nestico, Plaintiffs' counsel, who attests that each of

the documents attached as exhibits are "publicly available documents obtained from the website of the Employee Benefit Security Administration of the U.S. Department of Labor." (Dkt. 195.2, at 3). This does not lay the foundation to introduce a record under the business records exception because Nestico is neither a custodian of the records nor a qualified witness. *Contra United States v. Evans*, 178 F. App'x 747 (9th Cir. 2006) (holding that manager of local store of cellular telephone service provider was qualified to authenticate cellular telephone bill and admit it under business records exception); *United States v. Miller*, 771 F.2d 1219 (9th Cir. 1985) (holding that telephone company billing supervisor could introduce telephone bills under business records exception).

Plaintiffs could, however, introduce the Form 5500s at trial by subpoenaing the record custodian from each company to testify, which would be sufficient to lay a foundation under the business records exception. *See, e.g.*, *Begaren v. Sec'y of Corr.*, No. SACV1702178DMG (SHKx), 2019 WL 3210100, at *10 (C.D. Cal. May 15, 2019), *report and recommendation adopted,* No. CV1702178DMG (SHKx), 2020 WL 4820700 (C.D. Cal. Aug. 19, 2020) (finding that an AT&T records custodian's testimony identifying a phone bill laid a foundation for the business records exception). Therefore, while the Court agrees with Defendants that Plaintiffs could have, and indeed should have, hired an expert witness to introduce the Form 5500s in their Motion, or to introduce general evidence about other companies' recordkeeping practices, the Court finds that Plaintiffs still could properly introduce the forms at trial. *See* Defs.' Response, at 5.

Even if Plaintiffs were to lay a foundation for the Form 5500s, however, the forms are not probative of the point Plaintiffs are trying to prove, i.e., that other retirement plans report direct and/or indirect compensation differently than the Plan. The forms themselves do not reveal the underlying services that each company's retirement plans used, nor the processes that those plans used to calculate their recordkeeping expenses. *See* Defs.' Response, at 3 (noting that Plaintiffs have no "knowledge of the specific services those plans received, the quality of scope of those services, how the service providers were compensated, or how the Form 5500s were completed"). Form 5500s are merely a tool to report annual financial information to the EBSA—they do not serve as detailed accounts of retirement plans' recordkeeping services. The Court therefore finds that, while the Form 5500s could be admissible at trial under the business records exception, Plaintiffs' conclusions about the forms are unsupported and can not be accepted as true. *See, e.g., Pulse Elecs., Inc. v. U.D. Elec. Corp.*, No. 318CV00373BEN (MSBx), 2021 WL 981123, at *33 (S.D. Cal. Mar. 16, 2021) (determining that certain photographs proffered as evidence, even if admitted, "proved nothing dispositive" to the instant motion).

The Court can also take judicial notice of the Form 5500s. Pursuant to Federal Rule of Evidence 201, a court may properly take judicial notice of matters in the public record. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). A court may take judicial notice of a public record not for the truth of the facts recited in the document, but for the existence of the matters therein that cannot reasonably be questioned. *See* Fed. R. Evid. 201. A court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a

direct relation to matters at issue." *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (citation omitted). If a court takes judicial notice of a document, it must specify what facts it judicially noticed from the document. *Id.*

Here, the Court finds the Form 5500s to be records that are publicly available and relevant to the issues raised in the Motions. The Form 5500s provide a sample of how other companies reported fees, including what service codes are selected and what boxes are filled out on Schedule C. The Court cannot, however, determine that the Form 5500s prove the matters for which Plaintiffs proffer them. The Court therefore takes judicial notice of Exhibits 84-107 but will not consider them for the truth of the matters contained therein, i.e., that the fees reported reflect the "direct compensation" each company paid to its recordkeeper. (Dkt. 195).

V. DISCUSSION

The Court addresses the claims of this lawsuit as follows, necessarily combining arguments where they can be grouped together and omitting them where they are redundant.

A. Breach of Fiduciary Duty Claims

1. Whether the BPIC has authority over recordkeeping and administrative issues

To establish Defendants' fiduciary duties in this case, the Court must determine the precise authority of the BPIC. The parties present conflicting evidence about whether the BPIC has responsibility for monitoring recordkeeping expenses and administration issues.

Defendants argue that the BPIC does not have responsibility for monitoring administrative expenses. In support, they point to the deposition of Marty Roy Webb,[1] who testified that the BPIC is responsible for Plan issues "other than administration, typically regarding the trust and how the trust operates." (Defs.' Ex. 6, at 37:19; Defs.' Motion, at 7). Defendants claim that AT&T Services delegated authority over administrative issues, including recordkeeping, to certain Benefits executives outside of the BPIC—namely to the Senior Vice President-Compensation, Benefits & Policy, to the Vice President-Benefits, and to the Director of Savings Plan Operations. (Defs.' SUF, nos. 4-6; Defs.' Ex. 13-14).

Plaintiffs argue the BPIC does have responsibility for administrative issues, including monitoring recordkeeping expenses. They point to Defendants' Exhibit 11, the document outlining the Board of Directors of AT&T Services' delegation of authority to the BPIC, which states that the BPIC has "all powers and authority that may be necessary or appropriate to the establishment, qualification, administration and operation of each of the trusts established as part of any [employee benefit] plan . . . ." (Defs.' Ex. 11, at 2). They also point out that Defendants admitted in their Answer that AT&T was the "Plan administrator" and that "AT&T Services, and its authorized delegates, are involved in the selection and appointment of the Plan's recordkeeping and administrative service providers." (Plaintiffs' Opposition, "Pls.' Opp'n," Dkt. 185, at 7). Finally, Plaintiffs argue that the relevant individual executives, whether acting as BPIC members or not, were agents of AT&T services whenever

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[1] Webb was the Vice President-Benefits from the start of the class period until December 2019. Defs SUF no. 7.

they made decisions related to the Plan's recordkeeping. (*Id.* at 7).

The Court finds there is a genuine dispute as to the scope of the BPIC's authority and the roles of individual executives in monitoring recordkeeping expenses. Defendants do not point to any specific language from Exhibits 13 or 14 that demonstrates a delegation of authority over recordkeeping expenses away from the BPIC. Webb's deposition statements are inconclusive and vague about the precise responsibilities of the BPIC in connection with recordkeeping. Moreover, at least one person who allegedly was delegated authority over recordkeeping was also a member of the BPIC (the Vice President-Benefits). *See* Pls.' SUF, no. 9; Defs.' SUF, no 5. Defendants have not demonstrated that the BPIC lacked authority with respect to the challenged actions.

Defendants have not met their burden of showing no factual dispute exists as to whether they have a fiduciary duty regarding the Plan's recordkeeping expenses. Therefore, the Court denies Defendants' motion insofar as it is based on this theory.

2. Whether Defendants breached their fiduciary duties

Assuming *arguendo* that Defendants owe fiduciary duties to Plaintiffs, the Court analyzes the remainder of the Motion. Plaintiffs allege that Defendants breached the fiduciary duties of prudence, candor, and prohibited transactions under ERISA §§ 1104(a) and 404(a). *See* Pls.' Motion, at 1.

"ERISA is designed to 'protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee

benefit plans.'" *Marshall v. Northrop Grumman Corp.*, No. 2:16-CV-06794-AB (JCx), 2019 WL 4058583, at *6 (C.D. Cal. Aug. 14, 2019), quoting *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1093 (9th Cir. 2004); *see also* 29 U.S.C. § 1001(b). Under ERISA §§ 404(a) and 1104(a)(1), "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." *Acosta v. Pac. Enterprises*, 950 F.2d 611, 617 (9th Cir. 1991), as amended on reh'g (Jan. 23, 1992), citing 29 U.S.C. § 1104(a)(1). Fiduciaries must "(1) discharge their duties with 'prudence'; (2) act 'solely in the interest of the participants' and for the 'exclusive purpose' of providing benefits to those participants; (3) diversify investments to 'minimize the risk of large losses'; and (4) act in accordance with the terms of the plan." *Marshall*, 2019 WL 4058583, at *6; ERISA § 404(a)(1); 29 U.S.C. § 1104(a)(1).

i. Duty of Prudence

In earlier pleadings, Plaintiffs contended that Defendants violated the duty of prudence by failing to monitor and oversee the recordkeeping expenses paid to Fidelity.[2] (TAC, at 25). Defendants in response argued they maintained a process to evaluate and control recordkeeping expenses paid to Fidelity. (Defs.' Motion, at 8).

The duty of prudence requires that a fiduciary exercise his responsibility "'with the care, skill, prudence, and diligence' that a prudent person 'acting in a like capacity and familiar with such matters would use.'" *Marshall,* 2019 WL 4058583, at *8, quoting 29

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[2] Plaintiffs do not renew this argument in this fashion in their Motion for Partial Summary Judgment. Nonetheless, the Court addresses it here for the sake of comprehensiveness.

U.S.C. § 1104(a)(1)(B). "The prudence analysis 'focus[es] on a fiduciary's conduct in arriving at an investment decision, not on its results.'" *Id.* (citation omitted). To enforce the duty of prudence, "courts focus not only on the merits of the transaction, but also on the thoroughness of the investigation into the merits of the transaction." *Tibble v. Edison Int'l,* 843 F.3d 1187 (9th Cir. 2016), quoting *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996). "This duty of prudence extends to both the initial selection of an investment and the continuous monitoring of investments to remove imprudent ones." *Marshall*, 2019 WL 4058583, at *8, quoting *Terraza v. Safeway Inc.*, 241 F. Supp. 3d 1057, 1069-70 (N.D. Cal. 2017).

Defendants present extensive evidence that they acted prudently in monitoring the Plan's recordkeeping expenses. The facts show that members of AT&T Services Benefits team periodically reviewed 408(b)(2) disclosures[3] and invoices from Fidelity to ensure the compensation for recordkeeping was reasonable. (Defs.' SUF, no. 16). Defendants also hired outside experts to evaluate the reasonableness of Fidelity's compensation. Specifically, in 2016 Defendants hired Deloitte to consult on the negotiation of a new contract with Fidelity, at which time Deloitte confirmed that the Plan had a lower recordkeeping rate than other plans. (*Id.* at no. 22). After new negotiations in 2017, AT&T obtained an even lower price for record keeping services, with an annual rate of $20 per participant. (*Id.* at no. 23). Moreover, Defendants' contracts with Fidelity included a "most favored customer" clause, which ensured that Fidelity's fees were "not less

[3] The significance of 408(b)(2) disclosures is discussed in Section iii, *infra*.

favorable than those currently extended to any other" similarly situated customer. (*Id.* at no. 8).

Plaintiffs do not dispute these facts. Hence, Defendants have met their burden of showing no factual dispute exists as to whether they breached their duty of prudence in evaluating and monitoring the recordkeeping fees paid to Fidelity, as required by ERISA § 1104(a)(1). The monitoring that Defendants engaged in, both through periodic reviews and through the hiring of outside experts, suffices to show "care, skill, prudence, and diligence" in negotiating the Plan's recordkeeping fees. *Marshall*, 2019 WL 4058583, at *8, quoting 29 U.S.C. § 1104(a)(1)(B). Plaintiffs produce no evidence from which a reasonable jury could find that Defendants acted imprudently. *See White v. Chevron Corp.*, No. 16-CV-0793-PJH, 2016 WL 4502808, at *15 (N.D. Cal. Aug. 29, 2016) (finding there was no "indicia of imprudence" when "Plaintiffs have alleged no facts suggesting that the Plan fiduciaries could have obtained less-expensive recordkeeping services").

Plaintiffs also allege Defendants failed to evaluate the reasonableness of Fidelity's compensation from Financial Engines, which they argue should have been factored into Fidelity's recordkeeping fees. Plaintiffs claim that "neither AT&T Services nor the BPIC performed any analysis to determine what it cost Fidelity, if anything, to provide similar access to FE and whether the kickbacks Fidelity received from FE bore a reasonable relationship to such costs." (Pls.' Motion, at 22; *see also* Pls.' Opp. SUF, no. 16 (alleging that Defendants had not ensured Fidelity's compensation was reasonable because they failed to evaluate the indirect compensation received by Fidelity)). Plaintiffs point out that Fidelity's only service in

connection with Financial Engines was providing access to Fidelity's electronic platform. As a result of Defendants' purported failure to evaluate Fidelity's third-party compensation, Plaintiffs allege that Plan participants incurred unnecessary and inflated costs. *See id.* at 13-14.

Defendants respond that these arguments fail as a matter of law and fact. First, they argue that the recent decision in *Marshall v. Northrop Grumman Corp.* forecloses Plaintiffs' claim because it held that fees paid by Financial Engines to the recordkeeper "are not subject to fiduciary control" under ERISA. (Defs.' Mot. at 11). Defendants also rely on *Marshall* to argue that Plaintiffs need expert evidence to prove that a prudent fiduciary would monitor the compensation at issue in negotiating recordkeeping fees. *Id.*; *see Marshall*, 2019 WL 4058583.

Next, Defendants contend they did monitor the compensation Fidelity received from Financial Engine and BrokerageLink, pointing to the statements in Mr. Phipp's[4] deposition as evidence. *See* Defs.' Mot. at 12; Defs.' SUF nos. 44, 45-47 (Mr. Phipps testified that AT&T "took note" of the fee arrangement between Financial Engines and Fidelity, and the company leveraged this information to help obtain a reduction in recordkeeping fees in 2017).

Although not binding authority, the Court finds the reasoning in *Marshall v. Northrop Grumman Corp.* particularly persuasive. As Defendants point out, *Marshall* is factually similar to the instant case. In *Marshall,* plaintiffs brought a putative class action under ERISA arguing that defendants, fiduciaries of

[4] John Phipps was AT&T Services' Assistant Vice President for Retirement from 2008 to March 2020. (Defs.' SUF, no. 9).

a retirement plan, breached their duty of prudence by overcompensating the plan's recordkeeper and failing to account for payments the recordkeeper received from Financial Engines. In rejecting this argument, *Marshall* emphasized that "ERISA does not require, as a matter of law, that fiduciaries leverage the type of third-party fees at issue here in order to reduce recordkeeping fees." *Marshall*, 2019 WL 4058583, at *11. Moreover, data connectivity fees between the recordkeeper and Financial Engines "are not subject to fiduciary control," and "the fees are not paid out of plan assets," because those services are provided as part of an independent business arrangement. *Id.* Any overarching agreement between the recordkeeper and Financial Engines was "separate" and "freestanding" from the recordkeeper's agreements with the retirement plan itself. *Id.*

Just as in *Marshall*, Plaintiffs here cannot maintain an ERISA claim based on the fiduciaries' purported failure to consider compensation between Fidelity and Financial Engines, because that compensation exists independent of the Plan and stems from an agreement to which the Plan is not a party. Plaintiffs' claim therefore fails as a matter of law, and there is no triable issue of fact for a jury to consider. The Court **GRANTS** summary judgment on the breach of duty of prudence claims under ERISA §§ 1104(a) and 404(a).

ii. Duty of Candor

Plaintiffs bring a duty of candor claim concerning Defendants' purported failure to report all direct and indirect compensation received by Fidelity on Form 5500. The Court agrees with Defendants that the duty of candor claim duplicates Plaintiffs' injunctive relief claim as to the Form 5500s. (Defs.' Motion at 7,

n.1). The Court will analyze all claims concerning Form 5500 reporting obligations in Discussion Subsection B.

iii. Prohibited Transactions

Plaintiffs next argue that Defendants engaged in prohibited, non-exempt transactions with Fidelity in violation of ERISA § 406(a).

ERISA § 406(a)(1)(D) "prohibits a fiduciary from causing a plan to engage in a transaction that transfers plan assets to a party in interest or involves the use of plan assets for the benefit of a party in interest." *Lockheed Corp. v. Spink*, 517 U.S. 882, 886, 116 S. Ct. 1783, 1787, 135 L. Ed. 2d 153 (1996). Parties in interest have been defined as "those entities that a fiduciary might be inclined to favor at the expense of the plan's beneficiaries. *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 242, 120 S. Ct. 2180, 2185, 147 L. Ed. 2d 187 (2000), citing § 3(14), 29 U.S.C. § 1002(14). "In order to sustain an alleged transgression of § 406(a), a plaintiff must show that a fiduciary caused the plan to engage in the allegedly unlawful transaction. Unless a plaintiff can make that showing, there can be no violation of § 406(a)(1) to warrant relief under the enforcement provisions. *Lockheed Corp.,* 517 U.S. at 888-89.

"Section 406's prohibitions are subject to both statutory and regulatory exemptions." *Harris Tr. & Sav. Bank*, 530 U.S. at 242, citing §§ 408(a), (b), 29 U.S.C. §§ 1108(a), (b). Of relevance to this case, ERISA § 408(b) provides an exemption for "[c]ontracting or making 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(b).

Plaintiffs argue that the § 408(b) exemption does not apply to Fidelity's services to the plan because "Defendants cannot show they contracted to pay no more than reasonable compensation." (Pls.' Motion, at 18). Defendants respond that the services Fidelity and Financial Engines provided were necessary and the fees paid were reasonable. (Defs.' Motion, at 17).

There is no dispute that Fidelity and Financial Engines' services to the Plan were necessary. The question whether the fees were reasonable turns largely on the parties' disagreement about how to evaluate Fidelity's total compensation. For recordkeeping and administrative services, Defendants allege that the Plan paid $31 per participant to Fidelity in 2011, which was negotiated down to $29 as of August 1, 2012. (Defs.' SUF nos. 20-22). Defendants allege they subsequently negotiated a further reduction that resulted in recordkeeping fees of $20 per participant, effective January 1, 2018. (*Id.* at no. 20-23). Plaintiffs argue that these figures do not reflect the true compensation paid for recordkeeping and administrative services to Fidelity because "the . . . per participant charge is simply one of many charges for Plan services." (Plaintiffs' Response to Defendants' SUF, "Pls.' Opp. SUF," Dkt. 206, no. 20). Plaintiffs argue that other large plans include fees for a much wider variety of services under the umbrella of "recordkeeping expenses," including fees for recordkeeping, trust services, loan processing, communications, distribution and redemption fees, account maintenance, and others. (*Id.* no. 20). In addition, Plaintiffs argue again that Defendants' figures fail to take into account the undisclosed "indirect" compensation Fidelity received

from Financial Engines and BrokerageLink. (*Id.* at 21).

As a preliminary matter, the Court can dispose of Plaintiffs' second claim about indirect compensation on the grounds articulated above as to the fiduciary duty of prudence. Defendants had no duty to investigate or consider the third-party compensation Fidelity was receiving from Financial Engines and/or BrokerageLink, and therefore their failure to do so does not make their compensation agreement unreasonable. As to Plaintiffs' first claim, they have failed to carry their burden of showing a triable issue of fact regarding the reasonableness of Fidelity's compensation from the Plan.

On the first claim, Plaintiffs do not present competent evidence of other companies' recordkeeping expense reporting practices, or evidence showing that companies routinely factor in the wide variety of services that Plaintiffs allege should be included.[5] They point to Appendix B of the Plan's Service Agreement with Fidelity, which lists a range of services Fidelity provides to the Plan and their prices. (Defs.' Motion., Ex. 16, at Appendix B-1C; Pls.' Opp. SUF, no. 20). The Appendix shows, for example, that Fidelity charges the Plan various additional fees for loan transaction, cash dividend processing and mailing documents, among other services. The significance of this price list is unclear, however, because Plaintiffs present no

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[5] Even if Plaintiffs had provided competent evidence about other companies' recordkeeping expenses, the Court is not persuaded that it would prove the unreasonableness of Defendants' expenses. Evidence of what other companies pay, even if considerably less, does not establish that those payments are prima facie "reasonable."

evidence that these various services should be characterized as "recordkeeping expenses."

In their Motion, Plaintiffs draw broad conclusions about other companies' recordkeeping expenses based on their Form 5500s, but they produce no credible evidence showing how those expenses were computed. *See, e.g.,* Pls.' Motion, at 4-5 ("[D]irect compensation paid in 2016 by the Costco 401(k) Plan to T. Rowe Price for all recordkeeping and administrative services was $5,530,542, or $34.78 for each of its 158, 937 participants . . . . Those mega-plans report compensation paid to the plan's recordkeeper as a single amount for all services . . . ."). As discussed *supra*, Plaintiffs cannot draw such conclusions based on the Form 5500s alone. Plaintiffs fail to produce any other evidence showing how recordkeeping expenses are generally evaluated or reported as an industry practice. As Defendants note, "Plaintiffs did not take any discovery from third parties or disclose an expert to testify in support of their contentions." (Defs.' Motion, at 1).

Apart from debating the method of calculation, Plaintiffs present no other evidence disputing the reasonableness of the Plan's recordkeeping fees. The recordkeeping expenses that Defendants report, ranging from between $31 to $20, fall within the range that Plaintiffs themselves suggest is reasonable. *See* TAC, at 10 ("Generally, very large plans pay no more than roughly $30 per participant for comparable recordkeeping services, although some large plans pay even less than that.").

On their end, Defendants present substantial evidence that their recordkeeping fees were both accurately computed and reasonable. They provide copies of the Plan's services agreements with Fidelity, along

with quarterly invoices showing how much the Plan was paying for recordkeeping expenses. *See., e.g.,* Defs.' Motion, Ex. 38 (showing a 2011 Q4 invoice charging $7.75 per participant quarterly maintenance fee). They also demonstrate that in 2016, "AT&T Services and Deloitte determined that other large plans (45,000 or more participants) paid $38 to $94 per participant for recordkeeping, with an average of $50." (Defs.' SUF, no 22.) Deloitte ultimately concluded that "current financial terms in both Fidelity Agreements remain competitive compared to market trends and well aligned to AT&T's size and complexity." (*Id.*) Plaintiffs do not dispute these facts or provide evidence to the contrary. *See* Pls.' Opp. SUF, no. 22.

The Court therefore concludes Defendants have met their burden of showing that no factual dispute exists as to whether the Plan's recordkeeping compensation was reasonable. *See Cryer v. Franklin Res., Inc.*, No. 16-CV-04265 (CWx), 2018 WL 6267856, at *11 (N.D. Cal. Nov. 16, 2018) ("Because Plaintiffs have identified no evidence that the seventy dollars per participant fee was not reasonable and not comparable to similar plans, and appear to concede that the fees were reasonable, it follows that Plaintiffs have not presented evidence that they were harmed by any alleged "unreasonable" recordkeeping process.").

Plaintiffs next argue that Defendants failed to satisfy the disclosure requirements contained in 29 C.F.R. § 2550.408b-2, which require Fidelity to disclose "all indirect compensation that the covered service provider . . . reasonably expects to receive in connection with the services." (Pls.' Motion, at 18.) Without satisfying the disclosure requirements, Plaintiffs argue Defendants' agreement with Fidelity could not be considered exempt under ERISA § 408(b).

Defendants argue they satisfied the disclosure requirements by providing a "reasonable" description of the compensation that Fidelity would receive from Financial Engines and BrokerageLink. (Defendant's Opposition, "Defs.' Opp'n," Dkt. 182, at 10; Defs.' Ex. 34-37).

To resolve whether Defendants met their disclosure obligations, the Court must determine what 29 C.F.R. § 2550.408b-2 requires. The parties do not dispute that Fidelity's "indirect compensation" from Financial Engines and BrokerageLink must be disclosed under the regulation. "Indirect compensation" is defined as "compensation received from any source other than the covered plan, the plan sponsor, the covered service provider, or an affiliate." 29 C.F.R. § 2550.408b-2. The regulation provides that Defendants must offer "a description of all indirect compensation" that the service provider "reasonably expects to receive in connection with the services," including "identification of the services for which the indirect compensation will be received, identification of the payer of the indirect compensation, and a description of the arrangement between the payer and the covered service provider, an affiliate, or a subcontractor, as applicable, pursuant to which such indirect compensation is paid." *Id.*

29 C.F.R. § 2550.408b-2 further provides an explanation of what suffices as a "description" of indirect compensation:

> A description of compensation or cost may be expressed as a monetary amount, formula, percentage of the covered plan's assets, or a per capita charge for each participant or beneficiary or, if the compensation or cost cannot reasonably be expressed in such terms, by any

> other reasonable method. The description may include a reasonable and good faith estimate if the covered service provider cannot otherwise readily describe compensation or cost and the covered service provider explains the methodology and assumptions used to prepare such estimate. Any description, including any estimate of recordkeeping cost under paragraph (c)(1)(iv)(D), must contain sufficient information to permit evaluation of the reasonableness of the compensation or cost. 29 C.F.R. § 2550.408b-2.

Defendants argue their disclosures "expressed Fidelity's indirect compensation in reasonable terms," as "[c]onsistent with the Department of Labor's guidelines." (Defs.' Opp'n, at 11). According to Defendants, "the BrokerageLink disclosure stated Fidelity's transaction-based commissions and fees (direct compensation) and indicated that Fidelity would receive indirect compensation in the form of revenue sharing from funds in which participants invested." (Defs.' Motion, at 11; Defs.' Ex. 34). Moreover, "[t]he Financial Engines disclosures provided a formula with the compensation Fidelity expected to receive for the services it provides to Financial Engines." (Defs.' Motion, at 11; Defs.' Ex. 35-36).

Having reviewed Defendants' exhibits containing the disclosures, the Court agrees. Fidelity's disclosures clearly provide a "reasonable" description of the indirect and direct compensation that it received from BrokerageLink and Financial Engines. *See, e.g.,* Defs.' Exhibit 34, (noting that the direct compensation and indirect compensation are both represented according to the 408(b)(2) regulation); Defs.' Exhibit 35, (providing disclosures of indirect compensation

"under the 408(b)(2) regulation"); Defs.' Exhibit 36, (providing figures for "indirect compensation under the 408(b)(2) regulation").

Defendants have met their burden of showing that no factual dispute exists as to whether they engaged in prohibited transactions. Plaintiffs have failed to show a triable issue of fact pertaining to Defendants' "fail[ure] to obtain" the disclosures of indirect compensation or the inadequacy of those disclosures. (Pls.' Motion, at 14).

The Court therefore **GRANTS** summary judgment to Defendants on the ERISA § 406(a) prohibited transactions claim.

B. Form 5500 Claims

Finally, Plaintiffs allege they are entitled to injunctive relief based on inaccurately reported Form 5500s. Specifically, Plaintiffs claim that Defendants "were obligated to report on Form 5500 all direct and indirect compensation received by Fidelity in connection with the provision of recordkeeping and administrative services but failed to do so." (TAC, at 25; *see also* Pls.' Motion, at 16-17). Plaintiffs argue that Defendants only reported the direct compensation paid to Fidelity on the Plan's 5500, while reporting that Fidelity received "0" dollars in indirect compensation. Plaintiffs construe this reporting failure to be a breach of the duty of candor under ERISA § 404(a).

i. Whether Plaintiffs have standing to sue for injunctive relief

The parties first dispute whether Plaintiffs have standing to seek injunctive relief regarding the Plan's Form 5500 filings. Defendants rely primarily on *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020) to argue that plaintiffs seeking injunctive relief under

ERISA must suffer concrete injury to meet Article III's standing requirement. (Defs.' Motion, at 18-19). Defendants assert that Plaintiffs have failed to show a concrete injury in this case. (*Id.*). In Opposition, Plaintiffs argue that *Thole*'s standing analysis applies only to lawsuits over defined-benefit plans, while lawsuits seeking to obtain information about defined-contribution plans do not require a showing of actual injury. (Pls.' Opp'n, at 17-20). Defendants in their Reply cite to another recent standing case, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) as proof that a statutory violation alone is insufficient to constitute concrete injury. (Defendants' Reply, "Defs.' Reply," Dkt. 193, at 10-11).

"[T]he party invoking federal jurisdiction . . . bear[s] the burden of demonstrating that they have standing." *TransUnion LLC*, 141 S. Ct. at 2207 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). In this case, the Court previously held that Plaintiffs had standing to challenge the Form 5500s (Dkt. 106, 7-8) because Supreme Court and Ninth Circuit precedent did not require plaintiffs to prove individual harm when seeking injunctive relief under ERISA. *See Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1549, (2016) (holding that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact"). *See also Shaver v. Operating Engineers Local 428 Pension Trust Fund*, 332 F.3d 1198, 1203 (9th Cir. 2003); *Wells v. California Physicians' Service*, No. C05-01229 (CRBx), 2007 WL 926490, at *3 (N.D. Cal. Mar. 26, 2007) ("When plan participants seek injunctive relief for violations of ERISA's disclosure or fiduciary requirements, they can demonstrate Article III standing by showing a violation of ERISA and need not prove actual injury.").

In light of the Supreme Court's recent decisions in *Thole* and *TransUnion LLC*, the Court reconsiders the issue of standing. In *Thole,* plaintiffs were retired participants in a defined-benefit plan, meaning they "receive[d] a fixed payment each month, and the payments d[id] not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions." 140 S. Ct. at 1618. Plaintiffs alleged that the defendant fiduciaries violated the duties of loyalty and prudence by poorly investing the plan's assets. *Id.* at 1618. In rejecting plaintiffs' suit on Article III standing grounds, the Supreme Court found that plaintiffs had no "concrete stake" in the lawsuit because they "ha[d] received all of their monthly benefit payments so far," and "they would still receive the exact same monthly benefits that they [we]re already slated to receive" whether they won or lost the case. *Id.* at 1619.

The Court agrees with Plaintiffs that *Thole* is distinguishable from the present case because *Thole*'s reasoning does not apply to defined-contribution plans. The Supreme Court acknowledged that, unlike in the defined-benefit plan at issue in *Thole*, the benefits in a defined-contribution plan "are typically tied to the value of their accounts, and the benefits *can* turn on the plan fiduciaries' particular investment decisions." *Id.* (emphasis added). The Supreme Court also stated that *Thole* is specific to defined-benefit plans, explaining that it was "[o]f decisive importance to this case" that "the plaintiff's retirement plan is a defined-benefit plan, not a defined-contribution plan." *Id.* at 1618.

It is particularly compelling that the *Thole* Court rejected plaintiffs' equitable-interest argument because the plan was a defined-benefit one. Plaintiffs

had argued that "injuries to the plan are by definition injuries to the plan participants" even if participants "'have not suffered (and will not suffer) any monetary loss.'" The Supreme Court determined that an equitable-interest argument could not hold because "participants in a defined-benefit plan are not similarly situated to the beneficiaries of a private trust or "the participants in a defined-contribution plan." *Id.* at 1619. This reasoning suggests that in a defined-contribution plan, like the one at issue here, an equitable-interest argument still has merit.

Hence, *Thole* does not disturb the standing requirements for participants in defined-contribution plans. To the extent that Defendants cite *Anderson v. Intel Corp. Investment Policy Committee*, 2021 WL 229235 (N.D. Cal. Jan. 21, 2021) as support for extending *Thole* to defined-contribution plans, this Court declines to follow that nonbinding authority.

Defendants next argue *TransUnion LLC* supports their challenge to Plaintiffs' standing. In *TransUnion LLC*, a class of plaintiffs sued under the Fair Credit Reporting Act alleging that a credit reporting agency "failed to use reasonable procedures to ensure the accuracy of their credit files," and in some cases "provided misleading credit reports to third-party businesses." 141 S. Ct. 2190 (2021). In finding that some members of the class lacked Article III standing, the Supreme Court held that inaccurate information in internal credit files did not constitute concrete harm; rather, only plaintiffs whose information had been disseminated to third parties could demonstrate injury, in the form of reputational harm. Moreover, the Supreme Court determined that formatting errors in some of the credit agency's mailings did not constitute "informational injury" because the errors did not

deprive plaintiff of "required information" and did not cause negative "downstream consequences." *Id*. at 2214.

Defendants cite *TransUnion LLC* to argue that a violation of ERISA's reporting requirements is insufficient to establish a concrete injury for standing purposes. (Defs.' Reply, at 10-1). *TransUnion LLC* is factually distinguishable from the present case, and in light of the explicit language in *Thole* regarding the inapplicability of its holding to defined-contribution plans, the Court finds Plaintiffs have standing to seek injunctive relief with respect to the Form 5500 filings.

ii. Whether Defendants failed to comply with ERISA's Annual Reporting Requirements on Form 5500

The parties dispute how "indirect" compensation must be reported on the Form 5500 Schedule C. Plaintiffs allege that Defendants had an obligation to report all indirect compensation that Fidelity received from BrokerageLink and Financial Engines on Item 2, element (g) of Schedule C. (Pls.' SUF no. 55). By failing to do so, Plaintiffs allege Defendants violated the duty of candor. (TAC, at 24). Defendants attack this claim on a number of grounds, arguing that 1) Plaintiffs cannot show an underlying ERISA violation; 2) the duty of candor does not apply to Form 5500s filed with the Department of Labor; 3) submitting Form 5500s to the Department of Labor is not a fiduciary function; 4) Plaintiffs' claim is factually deficient because they never read or relied on the Form 5500s; and 5) Defendants in fact complied with applicable requirements regarding the forms. (Defs.' Motion, at 19-25).

The Court turns to Defendants' fifth argument because it is dispositive on this issue. Defendants present substantial evidence about the reporting requirements pursuant to item 2(g) of Form 5500. They present the Form 5500 form itself, which states that filers should exclude "eligible" indirect compensation when reporting on element (g). (Defs.' Motion, at 23; Defs.' Ex. 29 at -1480). They also present the instructions for Form 5500, which defines "eligible indirect compensation" as "fees charged to investment funds and reflected in the value of the investment," . . . "that were not paid directly by the plan or plan sponsor." (Defs.' Motion at 24; Defs.' Ex. 9). According to these instructions, if a Plan has received written disclosures from service providers that describe "the existence of the indirect compensation; the services provided . . . ; the amount (or estimate) of the compensation or a description of the formula . . . ; and the identity of the parties . . ." then the Plan may treat this compensation as "eligible indirect compensation." *Id.*

The Court agrees with Defendants that "[t]hese instructions show that any payments by Financial Engines to Fidelity . . . are 'eligible indirect compensation' pursuant to the Form 5500 reporting requirements. (Defs.' Motion, at 25). As discussed, Defendants received written disclosures of Fidelity's indirect compensation during the relevant period, which meet all the requirements described in the Form 5500 instructions. *See* Defs.' Exhibits 34-37. Receiving these disclosures then allowed Defendants to characterize the compensation as "eligible indirect compensation," which did not need to be reported on item 2(g) of Form 5500. *See* Defs.' Exs. 9, 29. Defendants have carried their burden of showing no factual dispute exists as to their reporting of indirect compensation on the Form 5500s.

Plaintiffs, on their end, present no facts to support their claim that the Form 5500 disclosures were inaccurate or incorrect. As Defendants point out, Plaintiffs do not allege that "any other plan that reported the indirect compensation [did so] differently than the Plan," and "[n]or do they cite evidence that the Department of Labor thought the Plan's Form 5500s were inaccurate." (Defs.' Reply, at 12). Plaintiffs conclude, without citing to any evidence, that because the Plan reports compensation paid to Financial Engines as "direct," then payment from Financial Engines to Fidelity cannot be treated as "eligible indirect compensation." (Pls.' Opp'n, at 25). It is entirely unclear where Plaintiffs are gleaning this understanding from, and it seems to contravene the Form 5500 instructions cited in Defendants' Exhibit 9.

Plaintiffs also attempt to argue that Defendants failed to address reporting for BrokerageLink in their Motion, and that "it is absolutely clear from the 5500 rules that revenue sharing payments made to a plan service provider . . . constitute indirect compensation that must be reported on Form 5500." (Pls.' Opp'n, at 25). Defendants do not cite to any language in the Form 5500 instructions that make it "absolutely clear" that such payments must be disclosed on the form.

A detailed analysis of the duty of candor under ERISA is not required here. In contrast to Defendants' detailed, thorough application of the Department of Labor's instructions for the Form 5500s, Plaintiffs have not met their burden of showing there is a triable issue of fact pursuant to the forms. The Court finds that "the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at

trial," and Defendants are entitled to summary judgment. *Nissan Fire & Marine Ins.,* 210 F.3d at 1106.

The Court **GRANTS** summary judgment to Defendants on the duty of candor claims arising from the Form 5500 reporting obligations.

Although the Court must consider each cross motion for summary judgment on its own merits and separately, *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001), the Court has already addressed each of these arguments in ruling on Defendants' Motion, *supra*. The evidence presented in support of, and in opposition to, Defendants' Motion is the same as that presented with respect to Plaintiffs' Motion. As no new arguments or evidence have been raised in support of, or in opposition to, Plaintiffs' Motion that the Court did not already consider above, the Court **DENIES** Plaintiffs' Motion for the same reasons that it rejected Plaintiffs' arguments that Defendants breached their fiduciary duties or engaged in prohibited transactions.

VI. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment and **DENIES** Plaintiffs' Motion for Partial Summary Judgment.

The Court enters judgment in favor of Defendants and against Plaintiffs on all claims.

IT IS SO ORDERED.

Dated: 9/28/21 /s/ Virginia A. Phillips
Virginia A. Phillips
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Julio C. Alas, et al., Plaintiffs, v. AT&T, Inc., et al., Defendants.	Case No. 2:17-cv-8106-VAP-RAOx **JUDGMENT**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Pursuant to the Order awarding Summary Judgment in favor of Defendants AT&T Services, Inc., et al., IT IS ORDERED AND ADJUDGED that the action, *Julio C. Alas, et al. v. AT&T, Inc., et al.,* 2:17-cv-8106-VAP-RAOx, is DISMISSED WITH PREJUDICE. The Court orders that such judgment be entered.

IT IS SO ORDERED.

Dated: 9/28/21

/s/ Virginia A. Phillips
Virginia A. Phillips
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. BUGIELSKI; CHAD S. SIMECEK, individually as participants in the AT and T Retirement Savings Plan and as a representatives of all persons similarly situated, Plaintiffs-Appellants, v. AT&T SERVICES, INC.; AT&T BENEFIT PLAN INVESTMENT COMMITTEE, Defendants-Appellees.	No. 21-56196 D.C. No. 2:17-cv-08106-VAP-RAO Central District of California, Los Angeles ORDER Nov. 8, 2023

Before: PAEZ and BADE, Circuit Judges, and R. COLLINS,* District Judge.

The panel has unanimously voted to deny the petition for panel rehearing. Judge Bade has voted to deny the petition for rehearing en banc, and Judges Paez and Collins have so recommended. The full court has been advised of the petition for rehearing en banc

* The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc (Dkt. 59) are **DENIED**.

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3(14) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1002(14), provides, in relevant part:

§ 1002. Definitions

For purposes of this subchapter:

[* * *]

(14) The term "party in interest" means, as to an employee benefit plan—

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan.

[* * *]

Section 404(a) of ERISA, 29 U.S.C. § 1104(a), provides, in relevant part:

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III.

[* * *]

Section 406(a) and (b) of ERISA, 29 U.S.C. § 1106(a), (b), provide, in relevant part:

§ 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

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

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

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

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

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

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

[* * *]

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Section 408(b)(2)(A) of ERISA, 29 U.S.C. § 1108(b)(2)(A), provides:

§ 1108. Exemptions from prohibited transactions

[* * *]

(b) Enumeration of transactions exempted from section 1106 prohibitions

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

[* * *]

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

29 C.F.R. § 2550.408b-2(b) provides:

§ 2550.408b-2 General statutory exemptions for services or office space.

[* * *]

(b) ***Necessary service.*** A service is necessary for the establishment or operation of a plan within the meaning of section 408(b)(2) of the Act and § 2250.408b-2(a)(1) if the service is appropriate and helpful to the plan obtaining the service in carrying out the purposes for which the plan is established or maintained. A person providing such a service to a plan (or a person who is a party in interest solely by reason of a relationship to such a service provider described in section 3(14)(F), (G), (H), or (I) of the Act) may furnish goods which are necessary for the establishment or operation of the plan in the course of, and incidental to, the furnishing of such service to the plan.