No. 15-1007

IN THE UNITED STATES COURT OF APPEAL
FOR THE EIGHTH CIRCUIT

MCCAFFREE FINANCIAL CORP., ON BEHALF OF THE MCCAFFREE FINANCIAL EMPLOYEE RETIREMENT PROGRAM, ON BEHALF OF A CLASS OF THOSE SIMILARLY SITUATED,
Plaintiffs-Appellants

v.

PRINCIPAL LIFE INSURANCE CO.,
Defendant-Appellee

On Appeal from the United Stated District Court
for the Southern District of Iowa

Brief of the Secretary of Labor, Thomas E. Perez, as Amicus Curiae in Support of Plaintiffs-Appellants and Requesting Reversal

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QUESTION PRESENTED

Whether an insurance company providing investment services to a pension plan acted as a fiduciary under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., insofar as it retained and exercised final authority to choose the investment options available to the participants in that plan and retained and exercised unilateral authority to set and pay itself associated fees from ERISA-covered plan assets.

STATEMENT OF INTEREST

The Secretary of Labor has primary enforcement and interpretive authority for Title I of ERISA, 29 U.S.C. §§ 1134, 1135. ERISA protects plan participants by imposing stringent standards on the fiduciaries who oversee, manage, and control plan assets. Under ERISA's functional test of fiduciary status, a person is a fiduciary with respect to a plan "to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management of disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1001(21)(A). Despite the breadth of this statutory definition and the governing documents that gave the defendant broad discretionary authority over plan investments and the amount of associated fees,

the district court held that the defendant did not exercise fiduciary authority with regard to those fees.

The district court's opinion that the defendant did not act in a fiduciary capacity is in error based on the plaintiff's allegations. Although the parties contractually agreed to a large menu of possible investment options that might be made available under the plan, and agreed to some corresponding fee maximums, the defendant had discretionary authority to choose the final line-up of funds in which the plan participants actually could invest. The defendant exercised this authority when it selected the 29 funds that it made available from the initial list of 63 possible funds listed in the contract. The defendant also retained and exercised discretionary authority to set the total amount of fees it charged the plan out of monies it took from the plan. The opinion, if affirmed, could undermine ERISA's protection of plan assets by permitting disloyal, imprudent and self-dealing conduct in the exercise of fiduciary authority. The Secretary therefore has a strong interest in arguing that the district court erred.

STATEMENT OF THE CASE

I. Factual Background[1]

Plaintiff McCaffree Financial Corp. ("McCaffree") sponsors for its employees a defined contribution 401(k) retirement plan governed by ERISA, the

[1] Because this case was dismissed on the pleadings, we assume, for the purpose of this appeal, all facts alleged in the complaint are true.

McCaffree Financial Corp. Employee Retirement Program (the "McCaffree Plan" or "Plan"). Joint Appendix ("JA") 278. Plaintiff is also the administrator of the McCaffree Plan. JA 278-79. Defendant Principal Life Insurance Co. ("Principal") is an insurance company that provides investments and related services to 401(k) plans such as the plan at issue in this case. JA 279.

McCaffree and Principal are parties to a group annuity contract under which Principal offers participants in the McCaffree Plan a menu of investment options that invest in mutual funds managed by a Principal affiliate, and provides other services to the Plan for which it charges various fees. JA 279-80. Under the contract, rather than investing Plan assets directly in the Principal mutual funds, Principal pooled Plan assets in separate accounts that it managed which were named after and then invested in a selected share class of the corresponding Principal mutual funds.[2] JA 5, ¶ 22.

The contract between Principal and the McCaffree Plan listed 63 separate accounts, each tied to an underlying Principal mutual fund, that were available as possible investments. JA 51-52. However, Principal "reserved the right to limit both the number of Separate Accounts available under the contract and the number

[2] Many mutual funds offer a number of different shares to the general public known as "classes" (generally referred to as A, B and C), and might offer an institutional share class only available to relatively large investors. Each class invests in the same investment portfolio and has the same investment objectives and policies, but each offers a different set of fees and expenses. See http://www.sec.gov/answers/mfclass.htm

available to each Member." JA 51. Principal in fact exercised this right by selecting 29 of the 63 separate accounts as available investment options after the contract was signed. See JA 5-6, 14-15 ¶¶ 23-24, 55-56; see also Pl.-Appellant's Opening Br. at 4.

Principal also retained authority to change the fund line-up at any time. The contract stated that "[a]s of any date, we may unilaterally strike [the list of available separate accounts] and replace it with a [different list of available separate account options] to allow participation in any additional Separate Account or Accounts offered by us." JA 76. McCaffree could request not to participate in one or more of the listed separate accounts, JA 52, but other than this ability, the sole authority to otherwise set the actual line-up from the larger list or to change the fund line-up entirely rested with Principal.[3] There are no allegations that McCaffree ever sent any such written notifications; in fact, McCaffree claims that the selections made by Principal after the contract was entered into were the funds that became available to the Plan. See JA 5-6 ¶¶ 23-24; see also Pl.-Appellant's

[3] It is unclear from the contract and the complaint how any objections by McCaffree would to work or what exactly Principal's contractual obligations were upon receiving a written notification. After listing the 63 separate accounts that may be available under the contract, all the rider to the contract says is that "[a]lthough all separate accounts listed above may be available under this contract, you may send us Written Notification indicating you want the contract administered so that assets held under this contract will not participate in one or more of these Separate Accounts. You may revoke your Written Notification by sending a new Written Notification." JA 52.

Opening Br. at 4-5. It is not clear from the pleadings whether Principal ever changed the line-up thereafter. JA 51-51, 76.

Principal charged the Plan three kinds of fees at issue in this case, which it deducted from Plan assets: "Operating Expenses," "Management Fees," and an underlying mutual fund management fee. JA 4-5, ¶¶ 20-21. According to a rider to the separate account contract, "Operating Expenses" are "those charges which must be paid in order to operate a Separate Account or obtain investments for a Separate Account. . . . [and] include, but are not limited to, custodial fees, transfer taxes, brokerage fees, processing fees, and other taxes and fees associated with the operation of a Separate Account." JA 5, 68. The contract includes no formula or other explanation regarding how Principal calculates the amount charged as Operating Expenses (other than the non-inclusive list). See JA 68. These expenses were "deducted from [Plan assets] in the Separate Account associated with a particular charge." Id.

Principal also charged a "Management Fee," which the contract rider stated would be calculated as a percentage of the value of assets in the separate account. JA 68-69. The contract listed the initial fees for each of the 63 potentially available accounts, which ranged from 1.51% to 2.86% of assets under management, but also reserved the right to raise them up to a listed maximum, generally 3%, by giving 30 days written notice to the Plan fiduciaries. JA 77-81.

In addition to the Operating Expenses and the Management Fees, Principal also charged the plan the management fee for the underlying mutual fund. The exact amount of this fee is not set out in the contract and the fee itself is mentioned only in a footnote in the contract rider, which states that the "Management Fee . . . does not include Management Fees of any underlying Mutual Funds," and directs McCaffree to "see the appropriate prospectuses for such charges." JA 81. There is no mention, in the footnote or elsewhere in the contract, that the amount of this underlying mutual fund fee depended on which share class Principal decided to invest in, since different share classes of the same mutual fund can have significantly different fees, nor any way to know in advance which share class Principal would choose. See JA 81.

II. Procedural History

McCaffree brought suit as a purported class action on behalf of its own Plan and all ERISA plans that had similar contracts with Principal. JA 1-3, 11-13, ¶¶ 2-3, 15, 43-51. Plaintiff alleges that Principal was a fiduciary insofar as it retained and exercised authority to select the small menu of investment options that would be available to participants. JA 4-6, 14-15 ¶¶ 18-19, 23-25, 55-57. Plaintiff further alleges that Principal was a fiduciary insofar as it retained and exercised authority in setting its fees, paid from plan assets. JA 4-10, 14-17 ¶¶ 19-21, 26-38, 53-59, 64-68. Plaintiff alleges that Principal violated its duties of prudence and loyalty,

29 U.S.C. § 1104(a)(1)(A), (B), by itself charging numerous fees – both indirectly through its selection of available funds and directly by unilaterally setting certain fees – that together were unreasonably high based on the value of the services Principal provided. JA 14-17 ¶¶ 52-70. In addition, plaintiff alleges that Principal engaged in prohibited self-dealing under ERISA section 406(b)(1), 29 U.S.C. § 1106(b)(1), when it used Plan assets to pay itself these fees. JA 17-18, ¶¶ 71-78.

Principal filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which the court granted in its entirety on December 10, 2014. JA 275-313. Citing the Seventh Circuit's decision in Leimkuehler v. AUL, 713 F.3d 905, 911-12 (7th Cir. 2013), cert. denied 134 S. Ct. 1280 (2014), and the Third Circuit's decision in Santomenno v. John Hancock, 768 F.3d 284, 295 (3d Cir. 2014), the district court noted that a service provider does not become a plan fiduciary merely by virtue of negotiating a contract with a plan. JA 295. The court pointed out that this case was "in one salient way distinguishable" from Leimkuehler and Santomenno to the extent that "[t]here is [a] dispute regarding the clarity of the disclosure in this case." JA 296. Nevertheless, the court reasoned that the fact "[t]hat the sum of these three fees or expenses may result in costs, even significant costs to Plan participants, is fully disclosed in the Separate Investment Account Rider." JA 298. The court then rejected "the proposition that to avoid being deemed a fiduciary, a service provider must go beyond disclosing its fees and

explain with precision how those fees are calculated," noting that the contract rider "discloses sufficient information to enable Plaintiff to determine with rough accuracy the cost of each separate account, a fee that could be computed by adding the specifically disclosed separate account's Management Fee to the fee of the publically available underlying mutual fund." JA 298.

Moreover, the court rejected plaintiff's argument based on the Seventh Circuit's decision in Ed Miniat, Inc. v. Globe Life Ins. Grp, Inc., 805 F.2d 732 (7th Cir. 1986), that Principal was a fiduciary under subsection (i) of the statutory definition, 29 U.S.C. § 1002(21)(A)(i), because the contract grants it discretionary authority with regard to fund selection and fees. JA 303. In the court's view, the Ed Miniat decision was limited to cases in which the service provider not only was granted discretion but also actually exercised that discretionary authority. JA 304-05. Because plaintiff did not allege that Principal exercised its discretion to raise the fees up to the maximum, or, the court found, to limit the separate accounts that would be available to the participants, the court concluded that Principal was not a fiduciary under Ed Miniat. JA 304-05. Thus, the court concluded that because Principal "was not acting as a fiduciary at the time the fees and expenses were negotiated," it was not a fiduciary under subsection (i) of ERISA's fiduciary definition. JA 308.

Moreover, the court rejected plaintiff's argument that Principal was a fiduciary under subsection (iii) of ERISA's fiduciary definition because it had authority to select the separate accounts that would be available to the participants and exercised this authority and therefore had discretionary authority over plan administration under that provision. JA 310-12. Even if Principal's authority to select the investment line-up was plan administration, the court reasoned that choosing the investment line-up did not give rise to the breach. JA 310-12. Although the court acknowledged that the selection of the separate accounts did affect the amount of the fees, the court concluded that there was an "insufficient nexus between the ability to select separate accounts and the alleged excessive fees." JA 312.

Finally, the court rejected plaintiff's argument that Principal was a fiduciary under subsection (ii) of ERISA's fiduciary definition because it was "an admitted investment advisor." JA 312. As in Santomenno, the court reasoned that plaintiff does not "complain [that] the investment advice was faulty," and thus its "claim [that] it was charged excessive fees does not arise from the provision of investment advice." JA 312.

SUMMARY OF THE ARGUMENT

Under ERISA's broad and functional definition of fiduciary, a person is a fiduciary "to the extent (i) he exercises any discretionary authority or discretionary

control respecting management of such plan or exercises any authority or control respecting management of disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1001(21)(A). McCaffree plausibly alleges that Principal was a fiduciary under these provisions because it selected available investment options for the Plan, had the ability to change those options at any time without advance notice, and otherwise exercised authority to set its own fees in a number of respects.[4] And, McCaffree alleges, because Principal was a fiduciary in these respects, it breached its fiduciary duties of prudence and loyalty and engaged in prohibited self-dealing by using Plan assets to pay itself the investment fees. These allegations state a plausible claim under ERISA.

1. McCaffree alleges that Principal was a fiduciary under 29 U.S.C. § 1002(21)(A)(i), the first prong of the definition, because it had final say in determining which investment options were made available to plan participants

[4] McCaffree also alleges that, because Principal "admits in the Group Annuity Contract that it is an 'Investment Manager' as defined by ERISA with respect to Plan assets managed under the contract," JA 14, it is a fiduciary under the second subsection of the statutory definition, which makes someone a fiduciary to the extent that he "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so." 29 U.S.C. § 1002(21)(A)(ii). Because the complaint does not allege that Principal meets the five-part test set forth in the Department's 1975 regulation defining fiduciary investment advice, 29 C.F.R. § 2510.3-21(c), plaintiffs have failed to adequately plead fiduciary status under this prong, and this Court should affirm the dismissal of this particular claim of fiduciary status on this basis.

and it exercised this authority when it narrowed the available fund menu from 63 funds to the 29 from which participants could select. Principal's exercise of authority in selecting the small menu of investments actually available under the Plan from the big menu of possible investments set out in the contract distinguishes this case from the recent decisions from other Circuits in Leimkuehler and Santomenno (and earlier decisions like them), and makes it like the Ed Miniat case. Moreover, Principal also qualifies as a fiduciary under subsection (iii) because it had the ability under the contract to completely change the investments at any time (an issue not addressed in Leimkuehler and Santomenno), even if it did not exercise this authority. Although McCaffree had some power to object to chosen investments, this ability was, at best, after-the-fact inasmuch as Principal was not required to give advance notice of its choices or changes. For these reasons (and because the fees were not adequately disclosed), the facts alleged here are distinguishable from those addressed in a 1997 opinion letter issued by the Department of Labor.

2. McCaffree also contends that, under the terms of the contract, Principal had control to set, change and collect various operating and administrative fees, which were not adequately disclosed in the contract. Because the complaint alleges that Principal retained and exercised authority to set and change the fees, the district court erred in concluding that fiduciary status was foreclosed simply

because Principal was not acting as a fiduciary when it first entered into the contract with McCaffree.

3. Finally, the district court erred in concluding that the complaint did not assert a sufficient nexus between the fiduciary status and the alleged breaches. To the contrary, the complaint focuses on Principal's authority to select the investment options and set its fees, a focus that is directly related to McCaffree's claims that it acted disloyally, imprudently and in a prohibited, self-dealing manner in using Plan assets to pay itself allegedly excessive and unjustified fees.

ARGUMENT

PRINCIPAL ACTED AS A FIDUCIARY IN CHOOSING PLAN INVESTMENT OPTIONS AND SETTING ASSOCIATED FEES

The district court erred by concluding on the pleadings that Principal was not a fiduciary with respect to its discretionary authority to select the funds actually available to the Plan, to add or substitute other funds, to select and change the share classes in each of the selected funds, and to set its own fees paid from Plan assets. "Fiduciary status under ERISA is to be construed liberally, consistent with ERISA's policies and objectives." Arizona State Carpenters Pension Trust Fund v. Citibank, (Arizona), 125 F.3d 715, 720 (9th Cir. 1997) (citing John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 96 (1993)); accord Olson v. E.F. Hutton & Co., 957 F.2d 622, 625 (8th Cir. 1992) ("the term fiduciary is to be broadly construed" (internal quotation omitted)); Consol. Beef Indus., Inc. v. New

York Life Ins. Co., 949 F.2d 960 (8th Cir. 1991). Whether an entity is a fiduciary is a highly fact-intensive inquiry that generally cannot be resolved on a motion to dismiss. See, e.g., In re Xcel Energy, Inc. Sec., Derivative & "ERISA" Litig., 312 F. Supp. 2d 1165, 1181 (D. Minn. 2004); Young v. Principal Fin. Grp., Inc., 547 F. Supp. 2d 965 (S.D. Iowa 2008).

In reviewing a 12(b)(6) motion to dismiss, courts of appeals exercise plenary review over the district court decision. The Eighth Circuit must determine whether the "complaint . . . contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). A plaintiff need not provide specific facts in support of his allegations, but must include sufficient factual information to provide the grounds on which the claim rests, and to raise a right to relief above a speculative level. Schaaf v. Residential Funding Corp., 517 F.3d 544, 549 (8th Cir. 2008) (citing Erickson v. Pardus, 551 U.S. 89, 93-94 (2007)). Moreover, the Court must read the complaint as a whole, taking into account plaintiff's generally limited access to information at the pleading stage. Braden, 588 F.3d at 594, 598.

Under this standard, the district court should not have dismissed the claims. The complaint contains sufficient allegations to state plausible claims that Principal was a functional fiduciary under subsections (i) and (iii) of ERISA's

definition, and sets out a sufficient nexus between the asserted fiduciary status and the alleged fiduciary breaches of imprudence, disloyalty and self-dealing in directly and indirectly setting its own allegedly excessive fees for Plan investments.

A. Principal Acted as a Fiduciary When it Selected Fund Investments from the Larger List of Possible Investments

Under the alleged facts, Principal had ultimate control over the investment options available to the Plan, and its exercise of this control is sufficient to make Principal a functional fiduciary under ERISA. See JA 4-6, 14, ¶¶ 17- 18, 23-24, 55. Although McCaffree agreed in the contract to a possible universe of 63 separate account funds, Principal in fact exercised its contractual right to limit the number of funds actually available to participants in the Plan to 29 funds that it selected for the Plan line-up after the contract was in place. See JA 5-6, ¶¶ 23-24; see also Pl.-Appellant's Opening Br. at 4. Because Principal had and exercised its authority to pick and choose the precise funds to include in the investment line-up, it effectively set its own fees. JA 5-6, ¶¶ 23-24. The amount of both the Management Fees and the underlying mutual fund fees were directly determined by which investment options Principal selected. See JA 6-7, ¶¶ 28-29. Principal further exercised its authority when it determined the share class of each mutual fund in which the separate account would invest. Pl.-Appellant's Br. at 6. Although McCaffree had the contractual right to request that Principal remove any

particular investment option from the line-up, that contractual right is not alleged to have been exercised here, and it was Principal and not McCaffree that in fact chose the investments from the bigger menu. Thus, Principal actually "exercise[ed] . . . discretionary authority or discretionary control" over plan management, within the meaning of subsection (i) of ERISA's fiduciary definition. 29 U.S.C. § 1002(21)(A)(i). Moreover, because McCaffree had neither notice of, nor any ability to choose or reject share classes in the mutual fund investments of the separate account, and it was Principal that both chose the share class and deducted the associated fees from plan assets for each separate account, Principal also exercised "authority and control" over management or disposition of plan assets. Id.

Indeed, this authority and control appears consistent with how Principal marketed its services to McCaffree and others, and how it described itself in the contract. The complaint in this case cites marketing by Principal that certainly implies that it is undertaking fiduciary responsibility and concomitant "rigorous due diligence" in making these selections. JA 4, ¶ 18 ("The Principal understands the fiduciary responsibilities plan sponsors face in developing and monitoring an investment lineup appropriate to help meet the diverse needs of retirement plan participants. We undertake a rigorous due diligence process as a direct response to this challenge . . ."). Moreover, in its contract with McCaffree, Principal states that

it is "an 'investment manager' as described under the Employee Retirement Income Security Act of 1974 (ERISA) solely with respect to Plan assets held in Separate Accounts under this contract," except with respect to the right to direct the split of contributions between certain guaranteed accounts and the separate investment accounts. JA 49. ERISA defines an investment manager as a fiduciary that, among other things, "has the power to manage, acquire, or dispose of any asset of a plan." 29 U.S.C. § 1002(38). That Principal describes itself as an investment manager in its contract with McCaffree certainly bolsters McCaffree's claim that Principal was acting as a fiduciary with regard to the investments and their associated fees.

Thus, because Principal had and exercised final say over the investment line-up based on its actual selection of the 29 funds, its ability to change the possible and actual investments at any time (without notice) and (as discussed more below) its non-disclosed selection of share classes, it is a functional fiduciary under subsection (i) of the statutory definition, 29 U.S.C. § 1002(21)(A)(i). And it is these factual allegations – that it was Principal and not McCaffree that had the authority to and actually made the final fund selections in the line-up – that distinguishes this case from cases like Hecker v. Deere & Co., 556 F.3d 575, 592 (7th Cir. 2009) (Fidelity did not exercise fiduciary authority over plan assets by restricting the funds it was willing to offer to the plan's independent investment

fiduciary which retained complete authority to determine whether and to what extent to include Fidelity funds on the menu), Leimkuehler, 713 F.3d at 910 (plan sponsor and administrator "selected from the menu the specific funds [offered by the insurance company] that he wished to make available to Plan participants"), Santomenno, 768 F.3d at 288 ("From the Big Menu created by John Hancock the trustees selected which investment options to offer to their Plan participants, known as the 'Small Menu.'"), and Renfro v. Unisys Corp., 671 F.3d 314, 324 (3d Cir. 2011) (a party does not act as a fiduciary in negotiating terms of a contract that a plan fiduciary must approve).[5]

Moreover, contrary to the district court's erroneous understanding, JA 304-05, this case is like Ed Miniat, 805 F.2d at 734, in that Principal not only was granted discretion to select available funds, but actually exercised its discretionary authority, by determining the precise funds to be included on the Plan's menu, when it narrowed the list of 63 possible funds down to the 23 funds actually offered to plan participants in its role as investment manager. Principal's claim that Plaintiff could have always chosen to take their business elsewhere does not change this fact. Plans can generally hire and fire the fiduciaries responsible for managing plan assets, but that fact neither deprives the asset manager of fiduciary

[5] As discussed in Part B below, this case is also distinguishable from Leimkuehler and Santomenno based on the allegations that the overall fees in this case were not adequately disclosed. See JA 296.

status nor excuses it from adhering to ERISA's dictates. Assuming the plaintiffs' allegations are true, Principal signed up to be a fiduciary and abused its fiduciary authority. If so, it is no defense that McCaffree could or should have fired Principal. Cf. Charters v. John Hancock Life Ins. Co., 583 F. Supp. 2d 189, 197-98, 199 (D. Mass. 2008) (holding that a service provider was a fiduciary when it retained the discretion to change investments because if "Charters sought to reject a substitution and maintain his investment in the replaced fund, his only option was to terminate the Contract and select a different service provider " and pay a termination fee).

Plaintiff separately alleges that Principal was a fiduciary with respect to its right to add or delete any funds of its choosing from the big menu because it had "discretionary authority or discretionary responsibility" over plan administration under 29 U.S.C. § 1002(21)(A)(iii), regardless of whether it ever exercised that authority, JA 15-17 ¶¶56, 64, 72**,** an issue not addressed by the courts in Leimkuehler and Santomenno. There is good support for this proposition in the Eighth Circuit. See Olson v. E.F. Hutton, 957 F.2d 622, 625 (8th Cir. 1992) (subsection (iii) confers fiduciary status on those "who have actually been granted discretionary authority, regardless of whether such authority is ever exercised"); Bouboulis v. Transp. Workers Union of Am., 442 F.3d 55, 63 (2d Cir. 2006);

Bd. of Trustees of W. Lake Superior Piping Indus. Pension Fund v. Am. Benefit Plan Adm'rs, Inc., 925 F. Supp. 1424, 1429 (D. Minn. 1996).

It is true that the Eighth Circuit generally considers an act of omission to be insufficient to satisfy the "exercise" requirement in subsection (i). See, e.g., Trustees of the Graphic Commc'ns Int'l Union Upper Midwest Local 1M Health & Welfare Plan v. Bjorkedal, 516 F.3d 719, 733 (8th Cir. 2008); FirsTier Bank, N.A. v. Zeller, 16 F.3d 907, 911 (8th Cir. 1994).[6] However, these cases do not preclude the conclusion that an act of omission is sufficient to confer fiduciary status on one who "has" discretionary authority or responsibility for plan administration under subsection (iii) of ERISA's fiduciary definition, regardless of whether that individual or entity ever exercised that control. See JA 15, ¶ 56. Accordingly, even if the court determines that Principal did not exercise its discretionary authority or control in setting the investment line-up, the court can still find that Principal was a functional fiduciary under subsection (iii) based on Principal's possession of discretionary authority to set the investment options, and that it breached its duties by failing to use that authority in the Plan's interest to lower the Plan's investment fees. See, e.g., Healthcare Strategies, Inc. v. ING Life Ins. & Annuity Co., 961 F. Supp. 2d 393, 402 (D. Conn. 2013). See also Leimkuehler, 713 F.3d at 911-14 (considering whether AUL was a fiduciary only under

[6] Although the Secretary disagrees with this conclusion in both Leimkuehler and Bjorkedal, the parties are bound by the latter decision in the Eighth Circuit.

subsection (i)); Santomenno, 768 F.3d at 300 (concluding that the issue was waived).

Although ERISA does not define "plan administration" for purposes of subsection (iii), the Supreme Court considered the issue in Varity Corp. v. Howe, 516 U.S. 489, 502 (1996). The Court determined that "plan administration" included those actions that "are necessary and appropriate for carrying out the purposes" of the plan. Id. The selection of investment options is both necessary and appropriate to carry out the purpose of the plan; providing retirement income for the participants. Further, the selection of investment options for the plan is similar to those duties that would typically have fallen within the administrative duties of a trustee under common law. See Pegram v. Herdrich, 530 U.S. 211, 231 (2000) ("At common law, fiduciary duties characteristically attach to decisions about managing assets.").

One court has properly held that the authority to select investment options for a plan is sufficient to make an entity a functional fiduciary under subsection (iii). See Healthcare Strategies, Inc., 961 F. Supp. 2d at 402 ("discretionary authority to change the funds available to 401(k) plans supports fiduciary status under subsection three of 29 U.S.C. section 1002(21)(A)"). The Secretary agrees with the conclusion of this court. See also Varity Corp., 516 U.S. at 502.

The situation in this case is distinguishable from the circumstances addressed in a 1997 advisory opinion. Dep't of Labor, Advisory Op. 97-16A, 1997 WL 277979 (May 22, 1997). In that case, the Department said that an insurer providing a similar menu of mutual funds to an ERISA plan would not be a fiduciary by virtue of changing the menu when the changes would be made under a procedure that gave the plan fiduciaries advance notice (including disclosure of all associated fees), and a reasonable opportunity to accept or reject the changes. Id. at *2-*3. Under the express terms of the contract addressed in the advisory letter, failure to respond to the notice was deemed to be an acceptance of the changes, and a rejection would result in a termination, without penalty and with sufficient time to obtain a new provider. Id. at *3. In contrast, although McCaffree had some ability to object to the inclusion of funds, the contract does not explicitly make a failure to respond to Principal's selection, as seems to have happened in this case, equivalent to acceptance. Nor does the contract require Principal to give advance notice of either its initial selection of funds winnowed from the big menu or its decision to select an entirely new list of separate accounts for the big menu, and it does not adequately disclose all the fees associated with the investments.

B. Principal Acted as a Fiduciary When it Set its Own Fees

In addition to being a fiduciary with regard to Plan investment fees because it controlled the selection of the actual separate accounts available to participants

in the Plan, Principal was also a fiduciary because the contract granted it discretionary control over plan assets when it allowed Principal to set its own fees in three ways: by authorizing it to change the "Management Fee" up to a pre-set maximum, by allowing it to charge whatever "Operating Expenses" it determined were appropriate, and by allowing it to choose the mutual fund share class that each separate account was invested in (since different share classes charge significantly different fees).[7] See JA 68-69, 77-81. And Principal actually exercised such authority at least with regard to the Operating Expenses and with regard to the underlying mutual fund fees by choosing the share class. The retention and exercise of such discretionary authority suffices to make Principal a fiduciary with respect to the amount of the fees it charged the Plan. See Charters, 583 F. Supp. 2d at 197-98 (holding that a service provider could be a fiduciary when it retained the discretion to modify its fees without approval).

The district court held that because Principal was not a fiduciary when it entered into the contract, it could not be a fiduciary under 29 U.S.C. § 1002(21)(A)(i) when it exercised the discretion that was granted to it under the

[7] For example, the Principal LargeCap Value Fund (which was one of the 29 funds Principal selected for the McCaffree Plan) offered an Institutional share class (PVLIX) with no load fee and a 0.41% expense ratio. The same fund offered, among other classes, Share Class A (PCACX) with a 5.50% load and a 0.85% expense ratio, a Share Class B (PCCBX) with a 5.00% load and a 2.00% expense ratio, and a number of retirement share classes, including Retirement Share Class A (PLSVX) with a 1.29% expense ratio. These expense rates are accurate as of February 18, 2015.

terms of the contract. This is incorrect. Although Principal may not have acted in a fiduciary capacity when it negotiated the terms of the contract, see Chicago Council of Carpenters Welfare Fund v. Caremark, Inc., 474 F.3d 463, 473 (7th Cir. 2007), Principal acted as an ERISA fiduciary when it exercised its discretion under the contract to set its own fees. Ed Miniat, 805 F.2d at 737 ("[w]hen a contract, however, grants an insurer discretionary authority, even though the contract itself is the product of an arm's length bargain, the insurer may be a fiduciary"); see also Seaway Food Town Inc. v. Med. Mut. of Ohio, 347 F.3d 610, 619 (6th Cir. 2003) ("where the term confers on one party the unilateral right to retain funds as compensation for services rendered with respect to an ERISA plan, that party's adherence to the term does not give rise to ERISA fiduciary status unless the term authorizes the party to exercise discretion with respect to that right"); F.H. Krear & Co. v. Nineteen Named Trs., 810 F.2d 1250, 1259 (2d Cir. 1987) ("after a person has entered into an agreement with an ERISA-covered plan, the agreement may give it such control over factors that determine the actual amount of its compensation that the person thereby becomes an ERISA fiduciary with respect to that compensation"); Charters, 583 F. Supp. 2d at 197 (control to set fee within range is sufficient authority).

Thus, under cases like Ed Minat, it is irrelevant whether Principal's discretion to set its own fees was granted under a contract which it negotiated in a

non-fiduciary capacity. When it subsequently exercises that discretionary authority, it acts as a fiduciary. This follows from ERISA's functional test of fiduciary status, under which a person or entity is a fiduciary "to the extent that" that person or entity has or exercises the requisite authority. 29 U.S.C. § 1001(21)(A). See also Trustees of the Graphic Commc'ns Int'l Union Upper Midwest Local 1M Health & Welfare Plan v. Bjorkedal, 516 F.3d 719, 732 (8th Cir. 2008) (ERISA fiduciary status "is not an all or nothing concept," but applies "when the individual is performing" specified duties). It is bolstered by the unremarkable proposition that, in enacting this remedial legislation, "Congress intended the definition of fiduciary under ERISA to be broad." Ed Miniat, 805 F.2d at 737.

Moreover, the district court erred when it rejected plaintiff's argument that Principal was a fiduciary with respect to its fees because it found that "all three fees or expenses alleged to constitute the excessive fees were disclosed" in the contract with sufficient specificity "to enable Plaintiff to determine with rough accuracy the cost of each separate account." JA 298. Even if "rough accuracy" were enough, this conclusion ignores the reality of the contract. Neither the Operating Expenses nor the underlying mutual fund fees were disclosed in a manner that enabled McCaffree to determine, with any level of accuracy, what fees it would be charged. The only information provided about the Operating Expenses

was a non-exclusive list of possible charges; no formula or explanation about how such charges would be calculated or justified is provided. See JA 68; Pl.-Appellant's Opening Br. at 15-16, 28 n.5. The underlying mutual fund fees are referenced only as a footnote; the contract instructs the Plan to see the appropriate prospectuses for the amount of the underlying fee, but does not indicate which share classes will be chosen by Principal. See JA 80-81 (mentioning the underlying mutual fund fees without reference to share classes); Pl.-Appellant's Br. at 6. Without this information, there is no way to determine the fees accurately. Finally, although plaintiff agreed to be charged up to a maximum rate for the Management Fees, the sole discretion for raising or setting these fees at any level between the contractually specified amount and the very high maximum of 3% (which plaintiff calculates could result in over 25% less wealth for a plan participant at retirement than if more typical fees were charged) lay with Principal.

Indeed, as the district court itself recognized, in cases like Hecker, Leimkuehler, and Santomenno, the courts determined that the overall fees at issue had been "fully disclosed." JA 296. Despite a footnote to the contrary in the district court's opinion, id. at 298 n. 8, however, the fees here were not fully disclosed, nor does plaintiff concede they were. At no point did Principal provide a formula or complete explanation as to how the Operating Expenses would be calculated or what precisely would be charged under this category. The underlying

mutual fund fees were referenced only in a footnote and make no mention of which share class the fees would track, and thus, unlike in Santomenno and Leimkuehler, there was absolutely no way for McCaffree to know when it entered into the contract, what these fees would be. See JA 80-81; Pl.-Appellant's Br. at 6. And while the minimum and maximum Management Fees for each of the separate accounts was set forth in the contract, Principal retained discretion for setting the fees anywhere in between.[8] Accordingly, this court can conclude that Principal was a fiduciary without creating a conflict with the holdings in cases like Leimkuehler and Santomenno.

C. Principal's Actions in Choosing Investment Options and Setting its Fees Has a Plausible Nexus to its Alleged Breaches of Prudence and Loyalty in Causing the Plan to Pay Allegedly Excessive and Undisclosed Fees and its Alleged Violations of ERISA's Prohibitions on Conflicted and Self-Dealing Transactions

Finally the district court erred in finding that the allegations did not have a sufficient nexus to the alleged breaches in overcharging the Plan. JA 313. This makes little sense since it is the selection of the funds, and their share classes by Principal, and the amounts charged by Principal as Operating Expenses, that determines the total amount of fees that are due from the Plan. See Healthcare

[8] Even if, as the district court concluded, Principal never exercised this authority by raising the Management Fees, the grant of such "discretionary authority or discretionary responsibility" over plan administration makes Principal a fiduciary under 29 U.S.C. § 1002(21)(A)(iii), regardless of whether it ever exercised that authority for the same reasons discussed in Part A above. See Olson, 957 F.2d at 625.

Strategies, 961 F. Supp. at 401-02. The complaint alleges that Principal was a fiduciary by virtue of its ability to choose investments and directly and indirectly set the fees associated with these investments and that it breached its duties of prudence and loyalty under ERISA by causing the plan to pay unreasonable fees when a loyal and prudent fiduciary would select products "with higher fees only where there were clear benefits to plan participants sufficient to justify the higher fees." JA 6-5, 15-16, ¶¶ 22-25, 55-60. It also alleges that Principal engaged in self-dealing prohibited transactions in violation of ERISA section 406(b)(1), 29 U.S.C. § 1106(b)(1), when it dealt with the assets of the Plan "in [its] own interest and for [its] own account" by choosing options and share classes and otherwise setting its own unreasonable fees. JA 17, ¶ 71-73.

In other words, because Principal had the contractual ability to add, without advance notice, any separate accounts of its choosing, presumably including ones with lower fees (and thus was a fiduciary under subsection (iii)), and had total discretion over the separate account Operating Fees and share classes within the mutual funds (and for this reason, and because it actually choose the available 29 funds, it was a fiduciary under subsection (i)), the complaint plausibly states a claim of fiduciary breach logically related to Principal's authority to select investment options and share classes and to charge Operating Fees. This is sufficient to survive a motion to dismiss. See Tussey v. ABB, Inc., 746 F.3d 327,

336 (8th Cir.) (allegations that fiduciaries offered investment options with unreasonable fees stated a claim for breach of loyalty and prudence), cert. denied, 135 S. Ct. 477 (2014); Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 595-96 (8th Cir. 2009) (same). Cf. Healthcare Strategies, 961 F. Supp. 2d at 399-403 (discretionary authority to change funds conferred fiduciary status on service provider but fact issues as to whether provider acted in a fiduciary capacity precluded summary judgment).

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court reverse the decision of the district court.

Respectfully submitted,

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/s/ Megan Hansen
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