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United States District Court  
Central District of California  
Western Division

THOMAS E. PEREZ,

CV 15-03084 TJH (JCx)

Plaintiff,

v.

Order

CITY NATIONAL CORPORATION,  
*et al.*,

[65]

Defendants.

The Court has considered Plaintiff Secretary of Labor Thomas E. Perez’s [hereafter “the Secretary”] motion for partial summary judgment, together with the moving and opposing papers.

The Secretary claims that City National Corporation, various City National subsidiaries, and various individual employees, acting as fiduciaries, engaged in self-dealing when City National Corporation, or its subsidiaries, received compensation from the City National Corporation Profit Sharing Plan [hereafter “the Plan”] when they were only entitled to reimbursement for limited, verifiable direct expenses pursuant to the Employee Retirement Income Securities Act of 1974 [“ERISA”]. 29 U.S.C. §§ 1001-1191c.

The Secretary moves for partial summary judgment against City National

1 Corporation, City National Bank, and the Plan's Benefit Committee members Marianna  
2 Lamutt, Christopher Carey, Michael Cahill, Michael Nunnelee, Richard Byrd, Vernon  
3 Kozlen, and Kate Dwyer [collectively hereafter "City National"] on the following  
4 ERISA claims: (1) Violation of the fiduciary requirements to act prudently and for the  
5 exclusive purpose of providing benefits to Plan participants and beneficiaries, pursuant  
6 to 29 U.S.C. §§ 1104(a)(1)(A) and (B); (2) Violation of ERISA's fiduciary  
7 requirements to not engage in prohibited transactions, pursuant to 29 U.S.C.  
8 §§ 1106(b)(1) and (2); and (3) Joint and several liability as co-fiduciaries, pursuant to  
9 29 U.S.C. § 1105(a) and § 1109(a).

10 The Secretary's claims relate to City National's administration of the Plan from  
11 2006 through 2012, and are subject to a six-year statute of limitations. 29 U.S.C.  
12 § 1113(1). The parties signed annual tolling agreements starting in 2011, and ending  
13 in 2015. Accordingly, the Secretary's claims are not barred by the statute of  
14 limitations.

15 In a motion for summary judgment, when the moving party has the burden of  
16 proof at trial, as the Secretary has here, the moving party has the initial burden of  
17 establishing a *prima facie* case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323  
18 (1986). If the Secretary satisfies his burden, the burden shifts to City National to  
19 introduce evidence sufficient to raise a triable issue. *See Celotex Corp.*, 477 U.S. at  
20 323.

21 ERISA requires that City National, as fiduciaries, must act "for the exclusive  
22 purpose of providing benefits to participants and beneficiaries; and defraying reasonable  
23 expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A). ERISA fiduciaries  
24 are, also, required to act "with the care, skill, prudence, and diligence under the  
25 circumstances, then prevailing, that a prudent [person] acting in a like capacity and  
26 familiar with such matters would use in the conduct of an enterprise of a like character  
27 and with like aims." 29 U.S.C. § 1104(a)(1)(B).

28 The Secretary provided evidence, in the form of deposition testimony from

1 named defendants and other City National employees, that City National did not act for  
2 the exclusive benefit of Plan participants or defray reasonable expenses, in violation of  
3 29 U.S.C. § 1104(a)(1)(A). City National admitted that it received compensation from  
4 the Plan in a mostly automated process without tracking direct expenses or knowing  
5 how much direct expenses were required for the Plan's operation, such that City  
6 National could not ensure that it was receiving reimbursement for no more than direct  
7 expenses. Moreover, City National's failure to track direct expenses, acceptance of  
8 fees from the Plan without any review or independent investigation into the  
9 reasonableness of those fees, and the failure to reimburse the Plan upon discovery of  
10 the unreasonably high fees establishes that City National failed to act with the care,  
11 skill, prudence, and diligence under the circumstances of a prudent person, thereby  
12 violating 29 U.S.C. § 1104(a)(1)(B).

13 Accordingly, the Secretary has satisfied his initial burden of establishing a *prima*  
14 *facie* case that City National breached its fiduciary duties pursuant to 29 U.S.C.  
15 §§ 1104(a)(1)(A) and (B). Therefore, the burden shifts to City National to introduce  
16 evidence sufficient to raise a triable issue.

17 To establish that City National did not breach its fiduciary duties imposed by 29  
18 U.S.C. §§ 1104(a)(1)(A) and (B), City National introduced evidence that SunGard, an  
19 outside vendor, would have provided Plan administrative services at a greater cost than  
20 charged by City National. However, City National contacted only one potential vendor,  
21 SunGard. The ERISA fiduciary duties are the "highest known to the law," and to  
22 enforce them, the Court must focus on a fiduciary's thoroughness of the investigation  
23 of its options to insure that it acted in the best interests of the plan beneficiaries.  
24 *Howard v. Shay*, 100 F.3d 1484, 1488-89 (9th Cir. 1996). Rather than shopping  
25 administration of the Plan to additional vendors or appointing a non-conflicted fiduciary,  
26 City National relied on SunGard's proposed administrative fees, which City National  
27 did not question or retain a second vendor to review. *See Howard*, 100 F.3d at 1489.  
28 A prudent fiduciary would have done more, and merely hiring an independent vendor

1 does not fulfill ERISA’s prudence requirement. *See Howard*, 100 F.3d at 1489-90.  
2 Accordingly, City National failed to raise a triable issue that it violated 29 U.S.C.  
3 §§ 1104(a)(1)(A) and (B).

4 ERISA, also, prohibits plan fiduciaries from engaging in self-dealing. 29 U.S.C.  
5 §§ 1106(b)(1) and (2). The Secretary asserts that City National engaged in self-dealing  
6 by charging high fees to the Plan and failing to keep records of direct expenses that City  
7 National actually incurred in servicing the Plan.

8 ERISA provides that a fiduciary “shall not deal with the assets of the plan in his  
9 own interest or for his own account.” 29 U.S.C. § 1106(b)(1). The term “assets of the  
10 plan” must be read broadly in favor of a functional approach, which requires the Court  
11 to determine “whether the item in question may be used to the benefit of the fiduciary  
12 at the expense of plan participants and beneficiaries.” *Acosta v. Pacific Enters.*, 950  
13 F.2d 611, 620 (9th Cir. 1991). The Secretary provided evidence that City National  
14 selected which mutual funds to make available to the Plan, with the understanding that  
15 each of the selected mutual funds provided revenue sharing with City National and  
16 would increase the compensation that City National received for its administration  
17 services. City National admitted that it entered into a professional servicing agreement  
18 with its own subsidiary to administer the Plan, which provided that City National was  
19 entitled to reasonable fees and additional reasonable compensation for servicing the  
20 Plan. However, those agreements, also, provided that City National could determine  
21 the “reasonable fee” collected from the Plan’s funds. *See Patelco Credit Union v.*  
22 *Sahni*, 262 F.3d 897, 911 (9th Cir. 2001). Thus, City National breached their fiduciary  
23 duties by engaging in self-dealing in violation of 29 U.S.C. § 1106(b)(1).

24 ERISA, further, provides that a fiduciary shall not, in an individual or in any  
25 other capacity, act in any transaction involving the Plan on behalf of a party whose  
26 interests are adverse to the interests of the Plan or the interests of its participants or  
27 beneficiaries. 29 U.S.C. § 1106(b)(2). The Secretary did not provide any records that  
28 identified with specificity the direct expenses actually incurred by City National.

1 However, the Secretary provided deposition testimony from City National that in 2008,  
2 its compensation from the Plan exceeded its direct expenses, which were recorded in  
3 City National's "Direct Cost Analysis." However, the Direct Cost Analysis that City  
4 National created was based on estimates and averages, rather than evidence of direct  
5 expenses actually incurred. This evidence establishes that the Plan's fiduciaries were  
6 acting on behalf of City National, rather than Plan beneficiaries, thereby violating 29  
7 U.S.C. § 1106(b)(2). Therefore, the Secretary has established a *prima facie* case that  
8 City National violated 29 U.S.C. §§ 1106(b)(1) and (2). Accordingly, the burden shifts  
9 to City National to produce evidence sufficient to raise a triable issue.

10 City National argues that the Secretary did not establish a *prima facie* case that  
11 it did not engage in the alleged prohibited self-dealing because (1) the Secretary did not  
12 provide evidence of direct expenses, (2) City National was entitled to "reasonable  
13 compensation" for administering the Plan, pursuant to 29 U.S.C. § 1108(c)(2), and  
14 (3) even if City National was charging the Plan high fees, the provision of services to  
15 the Plan exceeded City National's revenue from Plan administration.

16 First, City National's own admissions establish a *prima facie* violation of 29  
17 U.S.C. § 1106(b). Second, the reasonable compensation exemption contained in 29  
18 U.S.C. § 1108(c)(2) does not apply to fiduciary self-dealing. *See Patelco*, 262 F.3d at  
19 911. If City National wished to receive reasonable compensation for administering the  
20 Plan, it should have followed the formal procedures set forth in 29 U.S.C. § 1108(a).  
21 *See Patelco*, 262 F.3d at 912. Third, the expert reports that City National provided to  
22 raise a triable issue suffer from the same flaws as its Direct Cost Analysis: they are  
23 based on averages and estimates. City National should have kept contemporaneous time  
24 records so that it could calculate actual costs of administering the Plan. By calculating  
25 the Direct Cost Analysis using averages and estimates, City National could have over  
26 or under charged the Plan. Accordingly, City National failed to produce evidence  
27 sufficient to raise a triable issue.

28 Further, the City National defendants are all jointly and severally liable by virtue

1 of their relationship with one another, and that each Defendant enabled the others to  
2 commit their fiduciary breaches. 29 U.S.C. § 1105(a) and § 1109(a).

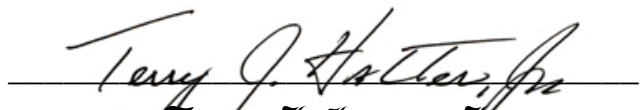
3 Accordingly,

4 **It is Ordered** that the Secretary's motion for partial summary judgment be, and  
5 hereby is, **Granted**.

6 **It is further Ordered** that City National, with the assistance of an independent  
7 fiduciary, perform an accounting of the all of the compensation it received, in the form  
8 of mutual fund revenue for the Plan, plus lost opportunity cost.

9 **It is further Ordered** that the parties shall appear for a status conference at  
10 10:00 am, Monday, April 11, 2016, to discuss whether the Secretary intends to proceed  
11 to trial on the remaining claims and defendants in light of this Order.

12  
13 Date: April 5, 2016

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15 **Terry J. Haller, Jr.**  
16 **Senior United States District Judge**