Docket Nos. 10-56406(L), 10-56415

In the
United States Court of Appeals
For the Ninth Circuit

GLENN TIBBLE, WILLIAM BAUER, WILLIAM IZRAL, HENRY RUNOWIECKI, FREDERICK SUHADOLC and HUGH TINMAN, Jr., as representatives of a class of similarly situated persons, and on behalf of the Plan,

Plaintiffs-Appellants,

v.

EDISON INTERNATIONAL, THE EDISON INTERNATIONAL BENEFITS COMMITTEE, FKA The Southern California Edison Benefits Committee, EDISON INTERNATIONAL TRUST INVESTMENT COMMITTEE, SECRETARY OF THE EDISON INTERNATIONAL BENEFITS COMMITTEE, SOUTHERN CALIFORNIA EDISON'S VICE PRESIDENT OF HUMAN RESOURCES and MANAGER OF SOUTHERN CALIFORNIA EDISON'S HR SERVICE CENTER,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Central District of California, No. 2:07-cv-05359-SVW-AGR ·Honorable Stephen V. Wilson

BRIEF OF AARP *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4)(1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, AARP Financial, AARP Global Network, and Focalyst.

AARP has no parent corporation, nor has it issued shares or securities.

/s/ Jay E. Sushelsky
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INTEREST OF *AMICUS CURIAE*[1]

AARP is a nonpartisan, nonprofit organization dedicated to representing the needs and interests of persons aged 50 and older. Nearly half of AARP's members are employed full or part-time, with many working for employers which provide pension and health plans covered by ERISA. One of AARP's primary objectives is to foster the economic security of individuals as they age by attempting to ensure the availability, security, equity, and adequacy of public and private pension, health, disability, and other employee benefits through educational and advocacy efforts

Participants in private, employer-sponsored employee benefit plans rely on ERISA to protect their rights under those plans. In particular, ERISA's protections, and plan participants' opportunities to enforce the statute's protections, are of vital concern to workers of all ages and to retirees, since the quality of workers' lives in retirement depends heavily on their retirement plan benefits.

Given the primacy of 401(k) plans in the American workplace landscape, it is imperative that fiduciaries of ERISA-governed plans be held to a high standard of duty to manage plans prudently. The resolution of the issues in this case will

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[1] Pursuant to Fed. R. App. P. 29(c)(5), *amicus curiae* AARP certify that the parties have consented to the filing of this brief, that no party or party's counsel authored this brief in whole or in part, and that no person other than amicus contributed money intended to fund the brief's preparation or submission.

have a direct and vital bearing on individuals' ability to obtain those benefits which will foster their economic security. AARP, therefore, submits its brief *amicus curiae* to facilitate a full consideration by this Court of these issues.

SUMMARY OF ARGUMENT

ERISA was enacted to protect the interests of employees in private retirement benefit programs. As 401(k) plans grow in popularity, employees bear a greater responsibility for funding their retirement. With millions of participants and trillions of dollars at stake, and the relatively small balances in 401(k) plans to start with, the district court overlooked the substantial impact fees can have on the return on investments and the resulting implications for employees' self-sufficiency in retirement.

The district court's narrow interpretation of ERISA's duty of prudence falls short of the statutory language of ERISA when applied to large defined contribution plan fiduciaries in their selection of mutual funds to stock the plan's investment options menu. Large defined contribution plans can avail themselves of cost cutting opportunities not provided to smaller plans, which are limited to purchasing retail shares. Although the district court acknowledged the magnitude of the plan, *i.e.*, a multi-billion dollar plan with market power, the court stopped short of announcing a *per se* rule that selection of retail class shares over less costly options in the context of large defined contribution plans creates a rebuttable presumption of imprudence. This Court should declare such a rule.

ARGUMENT

I. THE DEFINED CONTRIBUTION RETIREMENT PLAN PARTICIPANT COMMUNITY IS HARMED BY FIDUCIARY PRACTICES THAT FALL SHORT OF ERISA'S STANDARD.

A. It Is Unrealistic to Expect Retirement Plan Participants to Police Their Own Interests in Regard to Plan Fiduciary Conduct.

Private retirement pension benefit programs were established to provide a stable source of income to employees and their families upon retirement. Since the passage of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*. (2006), there has been a marked shift from defined benefit plans to defined contribution plans. Defined contribution plans have so eclipsed defined benefit plans that "[b]y 2005 . . . roughly 21 million active participants [were] covered by defined benefit plans and approximately 55 million active participants [were covered by] defined contribution plans." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-530T, PRIVATE PENSIONS: INCREASED RELIANCE ON 401(K) PLANS CALLS FOR BETTER INFORMATION ON FEES 5 (March 2007), *available at* http://www.gao.gov/new.items/d07530t.pdf [hereinafter GAO REPORT: PRIVATE PENSIONS: INCREASED RELIANCE ON 401(K) PLANS]. Of the various types of defined contribution plans available, 401(k) plans have become the most popular. *See* Dr. Allen Michel & Dr. Israel Shaked, *Fiduciary*

Responsibility in the Case of Defined Contribution Plans, 23-JAN Am. Bankr. Inst. J. 46, 46 (2005). As of 2005, there were approximately "436,000 401(k) plans that held about $2.4 trillion in assets for the retirement savings of more than 54 million plan participants—more than any other type of employer-sponsored pension plan in the United States." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-774, PRIVATE PENSIONS: FULFILLING FIDUCIARY OBLIGATIONS CAN PRESENT CHALLENGES FOR 401(K) PLAN SPONSORS 1 (July 2008), *available at* http://www.gao.gov/new.items/d08774.pdf.

In contrast to the predictable retirement income stream that flows from a defined benefit plan, in a defined contribution plan employer and/or employee contributions invested in a tax-deferred qualified plan determine the dollar amount a participant will receive in retirement, completely subject to the investment performance-driven accumulation that results over the life of the account. U.S. DEP'T OF LABOR, PENSION & WELFARE BENEFITS ADMIN., STUDY OF 401(K) PLAN FEES AND EXPENSES §1.1 (1998), *available at* http://www.dol.gov/ebsa/pdf/401krept.pdf [hereinafter PWBA REPORT]; *see also LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 250 n.1. (2008) (contrasting defined benefit and defined contribution plans). Accordingly, employees bear a far greater responsibility for the ultimate funding of their retirement income than previously. GAO REPORT: PRIVATE PENSIONS: INCREASED RELIANCE ON 401(K) PLANS, *supra*, at 9;

Strengthening Worker Retirement Security Before the H. Comm. on Education and Labor, 111th Cong. 3 (2009) (statement of John C. Bogle, Founder and Former Chief Executive of the Vanguard Group), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_ hearings&docid=f:47491.wais (describing this transition to defined contribution plans as "a massive transfer from business enterprises to their employees of both investment risk (and return) and the longevity risk of retirement funding"), (hereinafter *Hearing*).

Despite the rise in popularity of 401(k) plans, the flaws in the system have serious implications for individual participants. *Hearing*, *supra*, at 6 (statement of John C. Bogle) explaining that [d]espite its worthy objectives, the deeply flawed implementation of defined contribution plans has subtracted—and subtracted substantially—from the inherent value of this new system. Given the responsibility to look after their own investments, participants have acted contrary to their own best interests."). Moreover, the current market structure tolerates a symbiotic relationship between sophisticated financial advisers and naïve investors. *Id.* at 14 (quoting Davis F. Swensen, Chief Investment Officer at Yale University, who stated that "'[t]he drive for profits by Wall Street and the mutual fund industry overwhelms the concept of fiduciary responsibility, leading to an all too predictable outcome: . . . the powerful financial services industry exploits vulnerable individual investors . . . .”).

B. Contribution Accumulations in 401(k) Plans Are Critical to Retirement Security.

For the majority of individuals now saving for retirement through 401(k) plans, the amount contributed and accumulated is critically important, as it is often their only source of private retirement income. “[M]ore than 60 percent of workers with pension coverage in 2003 had *only* a 401(k) plan or other defined contribution plan, which suggests that worker reliance on defined contribution plans has increased considerably since 1981.” AARP, *401(k) Participants’ Awareness and Understanding of Fees* 2 (July 2007), *available at* http://assets.aarp.org/rgcenter/econ/401k_fees.pdf [hereinafter AARP, 401(K) PARTICIPANTS].

Moreover, most 401(k) account balances are not high to start with: “While some participants have account balances of greater than $100,000, most have smaller balances. Based on industry estimates for 2005, 37 percent of participants had balances of less than $10,000, while 16 percent had balances greater than $100,000.” GAO REPORT: PRIVATE PENSIONS: INCREASED RELIANCE ON 401(K) PLANS, *supra*, at 9-10. In this environment, a fiduciary’s duty of selecting prudent investments rises to critical significance because participants’ investment selections are limited by the plan fiduciary’s selection of available fund options.

Research indicates that participants are not confident of their abilities to select prudently from among the investment options available to them, which emphasizes the significance of a plan fiduciary's role to prudently select funds. For example, a survey of stock owners age 50 to 70 indicates that:

> close to three in four respondents (72-76%) have more confidence in the abilities of mutual fund managers or stock brokers to conduct transactions for them than they have in their own abilities to conduct transactions. In contrast, only one in three (33%) are confident in their ability to buy and sell individual stocks without the assistance of stock brokers.

AARP, *Investor Perceptions and Preferences Toward Selected Stock Market Conditions and Practices: An AARP Survey of Stock Owners Ages 50 and Older* (Mar. 2004), *available at* http://assets.aarp.org/rgcenter/econ/investor.pdf. The rapid growth and primacy of such plans to fund retirement makes it vital that 401(k) retirement plan participants be protected.

C. The Impact of Excessive Fees on Retirement Savings Plan Accumulations is Significant, and Yet Most Participants are Unable to Determine Fees Charged.

The impact that fees can have on investment returns in retirement plans is meaningful, as "fees can significantly decrease retirement savings over the course of a career." GAO REPORT: PRIVATE PENSIONS: INCREASED RELIANCE ON 401(K) PLANS, *supra*, at 10. This impact is demonstrated in a report by the Employee Benefits Security Administration:

> Assume that you are an employee with 35 years until retirement and a current 401(k) account balance of $25,000. If returns on investments in your account over the next 35 years average 7 percent and fees and expenses reduce your average returns by 0.5 percent, your account balance will grow to $227,000 at retirement, even if there are no further contributions to your account. If fees and expenses are 1.5 percent, however, your account balance will grow to only $163,000. The 1 percent difference in fees and expenses would reduce your account balance at retirement by 28 percent.

U.S. DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMINISTRATION, A LOOK AT 401(K) PLAN FEES 2, *available at* http://www.dol.gov/ebsa/pdf/401kFees Employee.pdf [hereinafter EBSA REPORT]. A small difference in fee rates, therefore, can substantially alter the amount of benefits a participant will have accumulated upon retirement.

Further complicating the challenges employees and retirees face when choosing their 401(k) investments is that any disclosures with which they are supplied usually fail to provide a "simple way for participants to compare fees among investment options." GAO REPORT: PRIVATE PENSIONS: INCREASED RELIANCE ON 401(K) PLANS, *supra,* at 15. "Information on fees is disclosed to participants in a piecemeal way. In order to get a more complete picture of fees, participants must collect various documents over time." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-21, PRIVATE PENSIONS – CHANGES NEEDED TO PROVIDE 401 (K) PLAN PARTICIPANTS AND THE DEPARTMENT OF LABOR BETTER

INFORMATION ON FEES 3, 15, 17 (Nov. 2006); *see also* Jon Forman, *Taking on 401 (k) Plan Fees that Take Away From You*, THE JOURNAL RECORD, Jan. 8, 2007, at 6A, *available at* http://jay.law.ou.edu/faculty/jforman/Opeds/2007-1(401kFees).htm ("Fees, especially investment fees, are Wall Street's dirty little secret. It is extremely difficult for investors to get a complete picture of the fees that fund managers skim off the top. Fund managers rarely advertise how much they make on your money."). According to a recent AARP survey,

> Many 401(k) participants lack basic knowledge of the fees associated with their plans even though nearly eight in ten (79%) plan participants who make decisions about their 401(k) investments noted that fees are an important consideration in their decisions. For example, more than eight in ten (83%) participants acknowledged that they actually do not know how much they pay in fees and expenses associated with their own plan. Additionally, more than half (54%) of participants do not feel knowledgeable about the impact that fees can have on their retirement savings.

AARP, 401(K) PARTICIPANTS, *supra*, at 1. Imposing these high costs has serious repercussions for investors. *Hearing, supra*, at 3 (statement of John C. Bogle) (In describing the dangers of high costs, Mr. Bogle quoted an article that he wrote in the *Journal of Portfolio Management* in 2008: "These enormous costs seriously undermine the odds in favor of success for citizens who are accumulating savings for retirement. Alas, *the investor feeds at the bottom of the costly food chain of investing,* paid only *after* all the agency costs of investing are deducted from the markets' returns.") (emphasis added). The excessive nature of these fees requires a certain level of disclosure. *Id.* at 9 (statement of John C. Bogle) ("Given the centrality of low costs to the accumulation of adequate retirement savings, then, costs must be disclosed to participants.").

Excessive fees on 401(k) investments burden millions of participants' retirement accumulations, jeopardizing their ability to be financially self-sufficient in retirement. ERISA prohibits plan administrators from allowing excessive fees to be charged by mutual fund investments. Failure to comply with this prohibition results in a violation of the duties of loyalty and prudence because the administrator fails to prudently invest the assets of the Plan, while serving third party interests. *See* 29 U.S.C. § 1104(a)(1)(A) (explaining that the duty of loyalty requires the fiduciary to "discharge his [or her] duties with respect to a plan solely in the interest of the participants and beneficiaries"); 29 U.S.C. § 1104(a)(1)(B) (explaining the duty of prudence requires the fiduciary to act "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.").

II. THE DISTRICT COURT'S REFUSAL TO REGARD MAINTENANCE OF RETAIL FUNDS IN THE PLAN AS A *PER SE* FIDUCIARY BREACH IS CONTRARY TO THE STATUTORY LANGUAGE AND PURPOSE OF ERISA REGARDING FIDUCIARY OBLIGATIONS AND UNDERMINES THE HIGH STANDARD OF CONDUCT TO WHICH A FIDUCIARY IS HELD UNDER ERISA.

ERISA protects participants and their accumulated retirement savings from employers who may not always have their employees' best interests in mind when designing and administrating retirement plans. In order to protect the interests of employees and their beneficiaries in retirement plans, ERISA's "prudent person" standard applicable to plan fiduciaries requires the fiduciary to act "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." 29 U.S.C. § 1104(a)(1)(B); *see also DiFelice v. U.S. Airways Inc.*, 497 F.3d 410, 417 (4th Cir. 2007) ("Under ERISA, plan fiduciaries 'are assigned a number of detailed duties and responsibilities, which include the proper management, administration and investment of plan assets, the maintenance of proper records, the disclosure of specific information, and the avoidance of conflicts of interest.'") (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (internal quotation marks and alterations omitted)). Thus, ERISA's fiduciary mandates are meant to ensure that a fiduciary act in furtherance of interests of the participants. *Trs. of Local 478*

Trucking & Allied Indus. Pension Fund v. Siemens Corp., 721 F.2d 451, 456 (3rd Cir. 1983) (citing *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 331-32 (1981)).

The district court's analysis of Edison's exercise of prudence in the administration of the Plan was flawed by its failure to give appropriate weight to "the character" of the plan being served, i.e., that its multi-billion dollar status imbued the Plan with substantial market power. *See Tibble v. Edison Int'l, Inc.*, CV-07-5359, 2010 Lexis 69119, at *13 (C.D. Cal. July 8, 2010). Specifically, the court understated the legal significance of the fact that Edison *knowingly* maintained in the plan retail class mutual funds, which are typically the investment province of individuals or small investors[2] and not multi-billion dollar plans, such as the one at issue.

Rather than investing in retail class shares, large plans can avail themselves of two investment options normally not available to smaller plans. First, a plan investing at least $1million to $2 million can participate in a comingled account. *See* PWBA REPORT, *supra*, § 2.4.1.3. Such an account includes a set of established investment vehicles and is normally offered by most major mutual fund families. *See id.* Second, a plan seeking to invest at least $15 million to $20 million can create separate accounts with the mutual funds that contain the plan assets. *See id.*

[2] "Retail" or "brand name" funds, which are also marketed to individual and small group investors, tend to be listed in the newspaper daily and typically charge higher fees. EBSA REPORT, *supra*, § 241.

These accounts allow the plan substantially more control over its investment objectives and target portfolios. *See id.* Plans whose assets exceed $500 million often realize substantial cost savings by participating in separate accounts. *See id.* Strikingly, these accounts can result in a twenty-five percent cost savings when compared to a similar investment in retail class shares. *See id.*

Therefore, a multi-billion dollar plan, such as the one at issue, could certainly avail itself of a commingled account resulting in substantial cost savings. Further, such a plan would likely be able to establish separate accounts for its assets. As discussed above, either option would result in substantial savings for the plan participants. Nevertheless, Edison failed to avail itself of either option and persisted in a pattern of administering the plan in the manner befitting a small investor.

Rather than avail the Plan of all of the market advantages and opportunities that its size would bring, *e.g.*, by participating *inter alia* in comingled and separate accounts, Edison maintained several shares of retail class mutual funds and failed to take advantage of lower fees by converting these shares to institutional shares.[3]

[3] The plaintiffs appropriately maintain that the defendants violated their duty of prudence in relation to all six mutual funds in which the Plan held retail class shares. Due to statute of limitations concerns, the plaintiffs here seek to demonstrate that the continued investment in the Janus, Allianz, and Franklin Funds constituted a breach of this duty. Amicus discusses violations of the duty of prudence with respect to investment in the William Blair, PIMCO and MFS Funds *infra*, Part III.

Furthermore, conspicuously underlying the court's opinion is the premise, flawed at its core, that pension plan participants should be treated the same as any investor in the marketplace. This premise is wrong for two reasons. First, ERISA mandates that plan administrators are fiduciaries, establishing a fundamentally different relationship between the plan administrator and participant than between a mutual fund and an investor. Instead, the administrator is cast in the role of steward in relation to plan participants, who trustingly look to the plan administrator with the expectation of guidance. *See generally, e.g.*, Shlomo Benartzi, Richard H. Thaler, Stephen P. Utkus, & Cass R. Sunstein, *The Law and Economics of Company Stock in 401(k) Plans*, 50 J.L. & ECON. 45, 45-79 (2007) (demonstrating the trust and deference that employees naturally place in employers and other fiduciaries in the context of plan administrators who encourage them to purchase company stock). Second, although retirement plans are voluntary, if an employer decides to establish one, the employer receives tax deductions in exchange for following the rules Congress created. 26 U.S.C. § 401 (2006). Neither ordinary investors nor retail mutual funds receive such tax benefits. *See Jones v. Harris Assocs.*, 130 S. Ct. 1418 (2010) (finding that pension plans are distinct from mutual funds).

Therefore, the court disregarded Edison's imprudent failure to avail itself of its size in seeking advantageous investments for the participants. As discussed above, a fiduciary in charge of a multi-billion dollar plan has enormous market power and lower-cost options not available to smaller investors. Consequently, there is no reason that an Edison Plan participant should pay the same fees that are customary for markedly smaller investors.

This Circuit recognizes that a prudent fiduciary should make decisions for a plan with the same care and prudence that he would use in maintaining his own fund. *See Barker v. American Mobil Power Corp.*, 64 F.3d 1397, 1403 (9th Cir. 1995) (explaining that "[a]ny prudent individual who had a retirement account and who possessed the same suspicions that his own account was not being properly maintained would make inquiries to ascertain with certainty that the account was being properly funded."). As a result, just as Edison would have negotiated lower fees and participated in commingled and separate accounts for its own investments, so too should it have availed itself of these lower-cost options for the Plan at issue. Failure to do so resulted in the defendants' violation of the duty of prudence.

In refusing to find fiduciary liability for Edison's continued maintenance of retail funds in the Plan notwithstanding that the date of initial offering of those funds fell outside of the statute of limitations, the district court ratified Edison's failure to wield the plan's market power on behalf of participants, and its coincident failure to act in the same manner a prudent man would have conducted himself when investing his own property in similar circumstances. In so doing, the court denied plaintiffs their statutory right to demonstrate that the fiduciary acted imprudently and should be held accountable under ERISA's standards.

III. EDISON AND THE OTHER ADMINISTRATORS VIOLATED THE DUTY OF PRUDENCE BOTH PROCEDURALLY AND SUBSTANTIVELY BY INCLUDING RETAIL MUTUAL FUND SHARES IN THE PLAN.

As the court recognized in regard to the William Blair Fund, the defendant breached its duty of prudence by failing to even consider whether the Plan at issue would be better served by the inclusion of institutional, rather than retail, mutual fund shares. This violation manifests itself in both the procedural errors that resulted in the choice to invest in retail shares and in the substantive nature of the differences between retail and institutional classes of mutual fund shares.

A. Defendants' Inclusion of Retail Mutual Fund Shares Constituted Procedural Violations of ERISA's Duty of Prudence.

The court found that the defendants breached ERISA's duty of prudence based on the procedural violations in selecting retail class shares over institutional shares that were identical, but less costly.[4] *See Tibble*, 2010 U.S. Dist. LEXIS 69119, at *97 n.23 (explaining that because institutional shares in the William Blain, PIMCO and MFS Total Return funds would have "offered the same

[4] Edison and the other fiduciaries violated the duty of prudence in relation to six specific mutual funds. In light of statute of limitations concerns, however, this part only considers the defendants' decision to purchase retail class shares in the William Blair, PIMCO, and MFS Total Return Funds. *See Tibble*, 2010 U.S. Dist. Lexis 69119, at *78.

investment at a lower fee" as compared to the retail shares, "a prudent fiduciary . . . would have invested in the institutional share classes"). The defendants advanced several justifications for their failure to even consider investing in institutional shares. *See id.* at *84-88. First, they contended that their reliance on advice from Hewitt Financial Services ("HFS") in making investment decisions justified their failure to invest in institutional class shares. *See id.* at *85. The court swiftly rejected this argument because although reliance on expert advice may be justified in some circumstances, the defendants failed to establish that reliance was reasonable in this instance because there was no evidence that described the thoroughness or reliability of HFS's investigation into the mutual fund shares at issue. *See id.* at *86-87.

Furthermore, defendants explained that the retail shares had a performance history and Morningstar rating, the shares helped avoid confusion among participants caused by frequent changes in the fund, and the fund did not qualify for the purchasing minimum required for institutional shares. *See id.* at *88 In holding that defendants violated their duty of prudence, the court did not consider these justifications, but instead found that such explanations constituted a *post-hoc* rationalization of the defendants' procedural failings. *See id.* at 81, 88 (explaining that "[n]ot a single witness testified regarding any discussion or evaluation of the institutional versus retail share classes for these funds."). Further, the court appropriately held that the defendants violated their duty of prudence by failing to even inquire into whether the mutual funds would grant a waiver of the minimum investment in institutional shares. *See id.* at *88.

B. This Court Should Create a Rebuttabal Presumption that Defendants' Inclusion of Retail Mutual Fund Shares Constituted a Substantive Violation of ERISA's Duty of Prudence.

The defendants' decision to invest in the more expensive but otherwise equal retail mutual fund shares, which benefited the mutual funds at the cost of plan participants, resulted in a virtually *per se* violation of the duties of loyalty and prudence. *See* 29 U.S.C. § 1104(a)(1)(A-B). As such, in addition to affirming the court's findings as to defendants' procedural violations, this Court should declare a rebuttable presumption of imprudence when the fiduciaries of substantial net worth defined contribution plans select retail mutual fund share classes as plan investment options. This would create a *per se* rule that substantial dollar defined contribution plans are required to offer institutional class mutual fund shares to stock the plans, unless plan fiduciaries can carry the burden of rebutting the alleged violation by demonstrating that they made an express, detailed determination at the time of investment that retail class shares more suitably met the needs of the plan.

Although the defendants' apparent lapses and obvious procedural violations made it unnecessary for the court to consider the substantive difference between retail and institutional mutual fund shares, this Court should find that investing in retail mutual funds results in a virtually *per se* violation of the duty of prudence. Such a holding flows from the circumstances of this case. As the court below explained, "[t]he only difference between the retail share classes and the institutional share classes was that the retail share classes charged higher fees to the Plan participants." *See Tibble*, 2010 U.S. Dist. LEXIS 69119, at *80. Thus, even if the defendants had undertaken a thorough investigation of the relative merits of retail versus institutional shares, the court explains that "they would have realized that the institutional share classes offered the exact same investment at a lower cost to the Plan participants," thereby resulting in a violation of the duty of prudence. *See id.* at *83.

Apart from the circumstances of this case, ERISA's duty of prudence requires that a large plan fiduciary, as were defendants in this case, should virtually never select for inclusion in the plan investment options that include retail mutual fund shares. The higher and largely unnecessary fees of retail mutual funds demonstrate that they are almost always *per se* inappropriate in the context of large plans such as the one at issue. *See generally*, PWBA REPORT, *supra*, §§ 2.4.1.3, 4.2.1, 4.4 (recognizing that "the typical institutional fund has an expense ratio that is 50 basis points lower than comparable retail funds."); *Jones v. Harris Assoc. L.P.*, 527 F.3d 627, 634 (7th Cir. 2008) (reversed on other grounds, *Jones v. Harris Assocs. L.P.*, 130 S. Ct. 1418 (2010)); *Gartenberg v. Merrill Lynch Asset Mgmt.*, 694 F.2d 923, 929 n.3 (2nd Cir. 1982). The higher and unnecessary fees of retail shares manifest themselves in several ways. First, the record keeping benefits of retail shares is generally duplicative of the record keeping requirements of large funds, such as that administered by defendants. Second, retail mutual fund shares have higher investment advisor fees compared to institutional funds. Third, unlike institutional shares, retail shares charge advertising expenses. These differences and others demonstrate the unnecessary and higher fees that result from the purchase of retail, rather than institutional, mutual fund shares. *See* PWBA REPORT, *supra*, § 4.4 (explaining that "larger plans enjoy potentially significant economies of scale . . . through the use of institutional accounts."). Therefore, because it is almost always less expensive, and therefore more beneficial to participants, to invest in institutional, rather than retail, shares, administrators who include retail mutual funds in large scale plans engage in a virtually *per se* violation of the duty of prudence.

Consequently, it is crucial that this Court create a pathway for plan participants to enforce the duty of prudence in the context of retail class shares. A holding of *per se* imprudence, subject to rebuttal, for large plan selection of retail shares will facilitate the ability of plan participants to ensure easier enforcement of the duty of prudence in the context of mutual fund investing. To this end, the Court should hold that once a plan participant demonstrates that retail shares have been purchased, the burden of proof shifts to the plan fiduciaries to demonstrate that their selection of retail class shares did not violate the duty of prudence. This shifting of the burden, which creates a rebuttable presumption, would be consistent with other ERISA enforcement actions. For instance, this Circuit applies a burden-shifting model in the context of ERISA denial of benefits claims involving an alleged conflict of interest. Specifically, once a plaintiff shows that a conflict of interest existed resulting in a breach of a fiduciary duty in the course of the denial of the benefits, the burden shifts to administrator to prove that a conflict of interest did not result in the denial. *Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech.*, 125 F.3d 794, 798 (9th Cir. 1997) (holding that once the plan participant demonstrates a conflict of interest the fiduciary's decision to deny claims becomes less deferential); *see also Estate of Shockley v. Alyeska Pipeline Serv. Co.*, 130 F.3d 403, 405 (9th Cir. 1997). Notably, this Circuit has commonly shifted the burden to the administrator, even when relatively little evidence was presented by the plaintiff to carry her burden. *See* Christopher R. Stevenson, *Abusing Abuse of Discretion: Judicial Review of ERISA Fiduciaries' Discretionary Decisions in Denial of Benefits Cases*, 27 Hofstra Lab. & Emp. L.J. 105, 129 (2009).

By embracing a *per se* imprudence standard, subject to rebuttal, this Court would be advancing a recent trend in which several courts recognize the potential for a violation of the duty of prudence to result from the selection of retail class shares. *See, e.g.*, *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009) (denying defendant's motion for summary judgment related to plaintiff's claim of breach of duty of prudence based on a fiduciary's investments in retail shares, explaining that plaintiff appropriately alleged a breach of the duty of prudence when "each of the ten funds included in the Plan offers only retail class shares, which charge significantly higher fees than institutional shares for the same return on investment."); *In re Regions Morgan Keegan ERISA Litigation*, 692 F. Supp. 2d 944, 958 (W.D. Tenn. 2010) (finding a cause of action exists when plaintiff alleged breach of duty of prudence when defendants "offered retail class shares in several of the [ ] Funds, despite the [ ] Plans' ability to obtain investor class shares, which charge lower fees to investors.").

Because conflicts of interests give rise to the same type of questions about plan participant-friendliness as arise in connection with the purchase of retail shares, this Court should extend the conflict-of-interest burden shifting rules to the context of large plan fiduciaries who select retail shares for their plan investment offerings. In such circumstances, once a plaintiff demonstrates that she holds retail shares in a large plan, all deference to the plan fiduciary should cease, and the burden should shift to the administrator to demonstrate that the purchase of retail shares did not result in a breach of the duty of prudence. Following that approach ensures that the practice of plan fiduciaries in selecting investment options for 401(k) plans will comport with ERISA's fiduciary duty standards.

CONCLUSION

For the reasons stated above, AARP respectfully submits that this Court should affirm the lower court's finding that the defendant violated the duty of prudence based on its procedural shortcomings in selecting the William Blair retail shares; the Court should also declare that the selection of retail mutual fund shares for inclusion in a large defined contribution plan's investment offerings results in a *per se* violation of ERISA's duty of prudence.

Dated: April 27, 2011

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STATEMENT OF RELATED CASES

AARP is not aware of any related cases pending in the Ninth Court.

April 27, 2011

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief *Amicus Curiae* of AARP is in compliance.

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached *amicus* brief is proportionately spaced, has a typeface of 14 points Times New Roman and contains 5025 words. The word processing system software used to prepare this brief was Microsoft Office Word 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 27, 2011

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