No. 15-2792

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RONALD C. TUSSEY; CHARLES E. FISHER; TIMOTHY PINNELL,
Plaintiffs-Appellants,

v.

ABB, INC.; JOHN W. CUTLER, JR.; PENSION REVIEW COMMITTEE OF ABB, INC.; PENSION & THRIFT MANAGEMENT GROUP OF ABB, INC.; EMPLOYEE BENEFITS COMMITTEE OF ABB, INC.,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Missouri, No. 2:06-cv-04305-NKL
Hon. Nanette K. Laughrey, presiding

BRIEF OF AMICUS CURIAE AARP IN SUPPORT OF PLAINTIFFS-APPELLANTS URGING REVERSAL

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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, and AARP Insurance Plan, also known as the AARP Health Trust.

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

Dated: November 3, 2015

/s/ *Mary Ellen Signorille*
Mary Ellen Signorille

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INTEREST OF AMICUS CURIAE[1]

AARP is a nonprofit, nonpartisan organization, with a membership that helps people turn their goals and dreams into real possibilities, seeks to strengthen communities, and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities, and protection from financial abuse. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pensions, health, disability, and other employee benefits.[2]

As the types of retirement plans have changed over the last decades from defined benefit pension plans (under which employers bear the risk of loss) to defined contribution pension plans (under which plan participants bear the risk of loss), the responsibility for making retirement investment decisions has shifted to

[1] Counsel for AARP states that no counsel for a party authored this brief, in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

[2] AARP has participated as amicus curiae in numerous cases to protect the rights of participants and their beneficiaries under ERISA including the previous appeal of this case, *Tussey v. ABB*, 746 F.3d 327 (8th Cir. 2014), and other cases concerning issues surrounding breaches of fiduciary duties. *See, e.g., Fifth Third Bancorp v. Dudenhoeffer,* 134 S. Ct. 2459 (2014); *Cigna Corp. v. Amara*, 131 S. Ct. 1866 (2011); *Tatum v. R.J. Reynolds*, 761 F.3d 346 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015).

small, often inexperienced investors. It is important to plan participants covered by Employee Retirement Income Security Act (ERISA) that plan assets will be available to pay the benefits to which they are entitled and that these assets are used exclusively for the benefit of participants, ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), as the quality of workers' lives in retirement depends heavily on their eligibility for, and the amount of, their retirement and welfare benefits. To this end, plan participants have a significant interest in ensuring that fiduciaries properly and prudently administer the plan and manage plan assets, thus making the protections afforded by ERISA quantifiable to workers of all ages and to retirees. 29 U.S.C. § 1001.

Given the current primacy of defined contribution plans in the American workplace, it is imperative that fiduciaries of ERISA-governed plans be held to a high standard of duty to manage plans prudently and to act to solely for the benefit of plan participants. When there is a breach of that duty, fiduciaries should be held accountable. Accordingly, resolution of the issues in this case will have a direct and vital bearing on plan participants' ability to protect their retirement accounts from mismanagement and to ensure their economic security in retirement. In light of the significance of the issues presented by this case, AARP respectfully submits this brief as amicus curiae to facilitate a full consideration of these issues by the Court.

ARGUMENT

I. ERISA WAS ENACTED TO PROTECT EMPLOYEES AND RETIREES FROM A VARIETY OF ABUSES SURROUNDING THEIR RETIREMENT BENEFITS.

A. Congress Enacted ERISA's Fiduciary Standards To Protect Retirement Plan Assets And Thus Participants' Retirement Security.

Prior to the passage of ERISA, there were no federal standards requiring persons operating employee benefit plans to avoid imprudent transactions that cause plan assets to dissipate. *See* The Am. Bar Ass'n & The Bureau Of Nat'l Affairs, *Emp. Benefits Law* xcix-c (3d ed. 2012). After assembling a record that showed a history and pattern of employees failing to receive their promised employee benefits, a lack of disclosure and transparency, and varied and numerous financial abuses, including conflicts of interest and self-dealing, Congress enacted ERISA. By "establishing standards of conduct, responsibility, and obligations for fiduciaries" and "by providing for appropriate remedies [and] sanctions" for violations of those fiduciary standards, ERISA § 2(b), 29 U.S.C. § 1001(b), Congress sought to protect "the interests of employees and their beneficiaries in employee benefit plans." ERISA § 2(b), 29 U.S.C. § 1001(b); *Shaw v. Delta Air Lines, Inc*., 463 U.S. 85, 90 (1983) ("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans."). In this manner, fiduciaries are held accountable for their

decisions, thereby fostering ERISA's primary goal of protecting employees' benefits.

One of the significant methods Congress provided participants for protecting their plans, and thus their benefits, was through ERISA's fiduciary requirements – requirements that even now, more than 40 years later, remain a keystone in ERISA's structure. *See Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc*., 472 U.S. 559, 569-71 (1985) (fiduciary powers must be exercised in accordance with trust law standards); *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) ("ERISA protects employee pensions and other benefits by . . . setting forth certain general fiduciary duties applicable to the management of both pension and non-pension benefit plans."). These exacting fiduciary requirements impose duties of prudence, loyalty, and care with respect to the management of trust funds upon plan fiduciaries. *See* ERISA § 404, 29 U.S.C. § 1104; *see also Fifth Third*, 134 S. Ct. at 2467, quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 143 n.10 (1985) (ERISA imposes standards "by which to measure fiduciaries' investment decisions and disposition of assets"); *Felber v. Estate of Regan*, 117 F.3d 1084, 1086 (8th Cir. 1997). Thus, sections 404 and 406 carefully regulate the conduct of plan fiduciaries with regard to the administration and management of the plan and its assets. *See* 29 U.S.C. §§ 1002(21)(A), 1104, 1106.

Congress established these standards of conduct to ensure fiduciaries would be held liable for their breaches. *See Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 919-20 (8th Cir. 1994) (stating that the breach of fiduciary duty is "a standard of conduct that Congress has imposed and that the fiduciary can satisfy by acting reasonably"). While, in interpreting ERISA, the common law of trusts informs a court's analysis, "trust law does not tell the entire story." *Varity*, 516 U.S. at 497. "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." *Id*. Thus, one of the underlying congressional concerns was that "courts interpret the prudent man rule and other fiduciary standards bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by ERISA." Employee Benefit Sec. Act of 1973, H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4650.

B. Although 401(k) Plans Hold Trillions Of Dollars Of Assets And Have Become The Predominant Private Retirement Savings Vehicle, Individual Account Balances Are Modest, Warranting Fiduciaries' Prudent Choice Of Investment Options.

Defined contribution plans, including 401(k) plans like the plan here, have become – aside from Social Security – the primary vehicle for providing retirement income in America. *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248,

255 n.5 (2008). Thus, the importance of protecting 401(k) plan participants by ensuring that their investment options are prudent cannot be overstated.

Since the introduction of 401(k) plans in 1980, there has been explosive growth in these plans as shown by every measure including the number of plans, number of participants, and value of assets. In 2013, there were over 527,000 401(k) plans, with over 64.4 million participants and $4.179 trillion in assets. U.S. Dep't Of Labor, Employee Benefits Sec. Admin., *Private Pension Plan Bulletin Abstract of 2013 Form 5500 Annual Reports* 47 (2013), http://www.dol.gov/ebsa /pdf/2013pensionplanbulletin.pdf. Because of the number of participants and the amount of assets in these plans, courts need to provide 401(k) plans with considerable scrutiny to ensure the safety and protection of these assets.

Alas, most individual 401(k) account balances are modest. *See* Jack Van Derhei, et al., *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2013*, EBRI Issue Brief, no. 408 (2014), http://www.ebri.org/pdf/briefspdf/EBRI _IB_408_Dec14.401%28k%29-update.pdf (2013 year end average 40(k) balance was about $72,383 with the median about $18,433). Such limited individual balances underscore the critical significance of a fiduciary's duty to perform a careful investigation before changing the menu of investment options. This will enable participants to follow the investment plan that fiduciaries and others have continually encouraged them to adopt and to accumulate sufficient assets in these

accounts to fund their retirement years. *See generally* Shlomo Benartzi with Roger Lewin, *Save More Tomorrow: Practical Behavioral Fin. Sols. to Improve 401(k) Plans* (2012) (save early, save more, save consistently, use professionally managed low fee investments).

C. Participants Rely On Plan Fiduciaries To Prudently Investigate The Investment Options Provided In Their 401(k) Plans.

Employees who participate in 401(k) plans contribute a portion of their salaries to those plans and may receive matching contributions from their employers as part of their compensation package. U.S. Dep't of Labor, Employee Benefits Sec. Admin., What You Should Know About Your Retirement 3 (Nov. 2006), http://www.dol.gov/ebsa/publications/wyskapr.html. They participate based on the assumption that "someone is minding the store," that is, fiduciaries are administering the plans prudently and solely in the participants' best interests. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

The predominance of 401(k) plans – and the shift away from traditional defined benefit plans – has caused a fundamental reallocation of investment risk in employer sponsored plans. *See*, *e.g.*, *LaRue*, 552 U.S. at 250 n.1 (describing the differences between defined benefit and defined contribution plans). Gone are the days when retirees could count on a predictable life-time annuity funded solely by their employers. Today, income security in retirement depends primarily on two

factors: (1) the level of employee and employer contributions to 401(k) plans, and (2) the quality and performance of the investment options in which those contributions are invested including the amount of fees charged. *See*, *e.g*., *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1826 (2015) (participant's retirement benefits are determined by the market performance of contributions, less expenses which can significantly reduce the account value).

Significantly, unlike participants in defined benefit plans, 401(k) participants alone bear the risk if their investment choices perform poorly. *LaRue, supra; Tibble, supra; Strengthening Worker Ret. Sec. Before the H. Comm. on Educ. and Labor*, S.1, 111th Cong. § 3 (2009) (statement of John C. Bogle, Founder and Former Chief Executive of the Vanguard Group), http://edlabor.house .gov/documents/111/pdf/testimony/20090224JohnBogleTestimony.pdf (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"). Thus, the fiduciary's duty to prudently monitor, select, and retain plan investment options is critical to the proper functioning of retirement plans. *See Tibble*, 135 S. Ct. at 1828. Retirees and future retirees rely heavily on the prudence, knowledge, and expertise of plan fiduciaries charged with evaluating those investment options. Participants trust when fiduciaries provide a menu of investment options, favorable options for participants

have been included and inferior options have been excluded. They trust that if plan fiduciaries eliminate an investment option, the decision was backed by sound and thoughtful deliberation. Participants also trust that when fiduciaries provide investment options, those investment options will not charge excessive fees and/or the fees will not be used to further corporate purposes. In sum, participants trust that fiduciaries will act solely in the best interests of the participants and beneficiaries. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

Fiduciary decisions resulting in participants having to clear their accounts of a particular investment are particularly critical and require significant investigation, use of complete and correct facts, and honest evaluation of those facts. Eliminating a particular investment is declaring that the investment is so bad that no reasonable participant would want to hold it. This evaluation should not be a casual decision. Participants' reliance on fiduciaries is especially great in such situations, especially for those participants who do not actively manage their accounts. *See generally* Ning Tang & Olivia S. Mitchell, *The Efficiency of Pension Plan Inv. Menus: Inv. Choices in Defined Contribution Pension Plans* (Ret. Research Consortium, Working Paper No. 2008-176, 2008) (investment menus significantly shape workers' accumulations of retirement wealth), http://www.mrrc.isr.umich.edu/publications/conference/pdf/UM08-20A0708C.pdf.

II. IN ENACTING ERISA, CONGRESS PROVIDED THE COURTS WITH BROAD REMEDIAL POWERS TO EFFECTIVELY PROTECT PARTICIPANTS AND BENEFICIARIES.

A. ERISA's Legislative History Demonstrates That Congress Intended Courts To Provide Remedies When Fiduciaries Breached Their Duties.

Both the House Education and Labor and the Senate Labor and Public Welfare Committees elaborated on the aims of the statute's remedial provisions in virtually identical language:

> The enforcement provisions have been designed specifically to provide both the Secretary [of Labor] and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants.

H.R. Rep. No. 93-533, at 17 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4655; S. Rep. No. 93-127, at 35 (1973), reprinted in 1974 U.S.C.C.A.N. 4838, 4871; *see also Varity*, 516 U.S. at 489. Congress revealed its displeasure that the courts were "reluctant to apply concepts of equitable relief," indicating that the courts were not awarding the full panoply of available relief to make employees whole. S. Rep. No. 93-127, at 5 (1973), reprinted in 1974 U.S.C.C.A.N. 4838, 4871. "As part of [the] closely integrated regulatory system Congress included various safeguards to preclude abuse and 'to completely secure the rights and expectations brought into

being by this landmark reform legislation.'" *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 137 (1990) (quoting S. Rep. No. 93-127, at 36 (1973)). These statements "support the view that the creation of an adequate and, indeed, improved remedial scheme for the benefit of participants and beneficiaries was an important goal" under ERISA. *Strom v. Goldman, Sachs & Co*., 202 F.3d 138, 145 (2d Cir. 1999).

B. Courts Should Fulfill Congress' Intent For ERISA To Provide Participants With A Remedy When Fiduciaries Breach Their Duties of Loyalty and Prudence.

In order to remedy a breach of the duty of loyalty or other fiduciary duty, a participant, beneficiary, fiduciary, or the Secretary of Labor may sue on behalf of the plan. 29 U.S.C. § 1132(a)(2). ERISA also provides "for appropriate remedies, sanctions and ready access to the Federal Court" to remedy violations of these fiduciary standards. ERISA § 2(b), 29 U.S.C. § 1001(b); *Varity*, 516 U.S. at 514. Those remedies include that a fiduciary is "personally liable to make good to [the] plan any losses to the plan resulting from" the breach and "to restore to [the] plan any profits" the fiduciary made through use of plan assets." ERISA § 409(a), 29 U.S.C. § 1109(a); *see Felber*, 117 F.3d at 1086. These provisions ensure that plan assets are managed prudently and that the plan is administered for the benefit of plan participants and beneficiaries.

Given these objectives, courts – including this Circuit – have determined that ERISA must provide plaintiffs with a remedy and will not immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy. Remedies should be tailored to ensure that they effectively deter imprudence.

Here, a remedy for ABB's numerous, intentional and conflicted breaches of the duty of prudence and loyalty in the administration of its PRISM 401(k) plan should be crafted.

C. To Determine The Appropriate Remedy After A Breach Of Fiduciary Duty Has Been Proven, The Most Profitable Investment Option Must Be Used As The Comparator.

A long-standing trust law principle explains that as between innocent beneficiaries and a defaulting fiduciary, the latter should bear the risk of uncertainty as to the consequences of its breach of fiduciary duty. *See Estate of Stetson,* 345 A.2d 679, 690 (Pa. 1975); *Nedd v. United Mine Workers of Am.*, 556 F.2d 190, 211 (3d Cir. 1977). Not surprisingly, courts have consistently accepted this time-honored trust law rule in ERISA cases. The court measures the losses caused by defendants' breaches by presuming that, "[w]here several alternative investment strategies were equally plausible . . . the funds would have been used in the most profitable of these. The burden of proving that the funds would have earned less than that amount is on the fiduciaries found to be in breach of their

duty." *Donovan v. Bierwirth,* 754 F.2d 1049, 1056 (2d Cir. 1985). The Fourth Circuit, echoing and adopting the same rationale of the Second Circuit, recently explained that "this well-established approach" is based on the law of trusts and "comports with the structure and purpose of ERISA." *Tatum*, 761 F.3d at 362 (citing cases, the Rest. (Third) of Trusts § 100 (2012) and Bogert & Bogert, *The Law of Trusts & Trustees* § 871 (2d rev. ed. 1995 & Suppl. 2013)).

Indeed, any doubt or ambiguity concerning a potential loss always should be resolved against the fiduciaries. *Roth*, 61 F.3d at 602*, citing Bierwith*, 754 F.2d at 1056; *accord*, *Sec'y of Labor v. Gilley*, 290 F.3d 827, 830 (6th Cir. 2002); *Dardaganis v. Grace Cap., Inc*., 889 F.2d 1237, 1244 (2d Cir. 1989) ("[U]ncertainties in fixing damages will generally be resolved against the wrongdoer."); *Kim v. Fujikawa*, 871 F.2d 1427, 1430-31 (9th Cir. 1989); *Leigh v. Engle*, 727 F.2d 113, 138-139 (7th Cir. 1984); *Eaves v. Penn*, 587 F.2d 453, 462 (10th Cir. 1978) ("[I]n the absence of an election of a particular remedy by all beneficiaries, the court has a duty to enforce the remedy which is most advantageous to the participants and most conducive to effectuating the purposes of the trust.").

D. The Court's Exercise Of ERISA's Broad Remedial Powers Acts As A Deterrent To Fiduciaries.

The protections provided by the fiduciary duty of prudence are only effective if the duty is backed by an effective enforcement mechanism. Indeed, in enacting ERISA Congress recognized that the policy goal of protecting the interests of plan participants could be achieved only "by establishing standards of conduct . . . and by providing appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b) (emphasis added). There would be little incentive for plan fiduciaries to conduct thorough investigations into the prudence of plan investment options and exclusively for the benefit of participants if they knew there would be no meaningful sanction(s) for failing to do so.

Fiduciaries are more likely to comply with ERISA's stringent standards if they face a realistic risk of being assessed the highest amount of losses to the plan. This deterrent effect benefits not only the participants but also the courts by eliminating unnecessary litigation and encouraging settlement. *Cf.*, *e.g., Nat'l Cos. Health Ben. Plan v. St. Joseph's Hosp., Inc.,* 929 F.2d 1558, 1575 (11th Cir. 1991), *abrogated on other grounds, Geissal v. Moore Med. Corp.,* 524 U.S. 74 (1998) (in ERISA cases, "the deterrent value of an award of attorneys' fee is high" because the plan "would only be liable for what it should have covered before this litigation commenced. With nothing to lose but their own litigation costs, other ERISA-plan

sponsors might find it worthwhile to force underfinanced beneficiaries to sue them to gain their benefits or accept undervalued settlements.”).

E. Regardless Of The Flagrancy Of The Fiduciary Breach, Courts Cannot Award Compensatory And Punitive Damages Against The Fiduciaries.

Because Congress crafted ERISA’s enforcement scheme with such evident care, courts have refused to infer remedies not contained in the wording of Section 502, 29 U.S.C. § 1132. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 53-54 (1987); *Russell,* 473 U.S. at 147-48. Instead, courts have affirmed that ERISA is the exclusive mechanism available to plan participants and beneficiaries. Where, as here, a breach of fiduciary duty has been demonstrated, ERISA provides only for the recovery of losses to a plan, profits made from plan assets, or other legal or equitable relief. *See* ERISA § 409(a), 29 U.S.C. § 1109(a); *cf. Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Pilot Life Ins. Co.*, 481 U.S. at 41. Based on the statutory language and civil enforcement scheme, courts have declared that there are no compensatory, punitive, or extra-contractual damages permitted under ERISA, regardless of the flagrancy of the violation. *See Russell*, 473 U.S. at 144, 147-48 (ERISA's breach of fiduciary duty provision provides no express authority for an award of punitive damages to a beneficiary); s*ee generally Great-West Life Annuity Ins. Co. v. Knudson,* 534 U.S. 204 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993). Consequently, using the highest yield investment as a comparator

is one of the few available tools that judges have to deter bad actors.[3] *Cf., e.g., Anderson v. Unum Life Ins. Co. of Am.*, 414 F. Supp. 2d 1079, 1108-09 (M.D. Ala. 2006) (recognizing that with no punitive or extra-contractual damages available under ERISA insurers have little to lose if they deny benefits).

F. The Wellington Fund Is The Appropriate Comparator To Determine The Loss To The Plan For Both The Improper Removal Of This Investment Option And The Selection Of Its Replacement.

The ABB PRISM plan suffered one breach of fiduciary duty when the PRISM fiduciaries removed the Wellington Fund from the PRISM Plan's investment menu. The ABB PRISM plan suffered a second breach of fiduciary duty when the PRISM fiduciaries selected the replacement for the Wellington Fund – the Fidelity Freedom Fund.

ABB's PRISM Plans Investment Policy (hereinafter "PRISM IPS") details the criteria for selection and de-selection of investment options offered by the PRISM Plans in addition to criteria for monitoring, evaluation, and de-selection of the investment results of the Plans' investment options. A5–6; App. 110–11, 356−58, 569-75, 748–51. The IPS requires that ABB's Pension Review Committee

[3] Although amicus recognizes that under trust law a court can excuse a breach of trust, it may only do so if the trustee acted honestly and reasonably. Restat. (Third) of Trusts, § 95. This is not that case. The court should not give the PRISM Plan fiduciaries a "get-out-of-jail" card. Here, the fiduciaries actions were knowing and intentional.

examine a fund's performance over a rolling three and five-year period. A6. Additionally, the IPS requires the Committee to review and consider information ratios, Morningstar ratings (which requires a minimum of three years of history), the stability of the fund's investment team, and tracking errors. A5; App. 571. Based on these benchmarks and information, the Committee determines if there are five years of under-performance. A6; App. 377–80. If there is such under-performance, then the fund is placed onto a "watch list," and then is removed within six months if necessary. *Id*. Only after that review can a fund be removed from ABB's PRISM Plan. *Id.*

The Wellington Fund did not meet the PRISM IPS de-selection standards because its annual performance by the end of 2000 exceeded the IPS' required Morningstar benchmark by 4%, or 400 basis points. A7; App. 122, 381–82, 454, 771. Moreover, the Wellington Fund fees were low, especially compared with the Fidelity Freedom Fund, which had both higher revenue sharing for plan recordkeeping as well as higher total annual expenses – clearly a significant increase in cost for the participants. A13; App. 97, 118, 349, 381–82, 589, 771, 775–807.

Despite the PRISM IPS' requirement to select an investment with a long track record, the decision to select the Fidelity Freedom Fund, "which had been in existence for fewer than five years by 2000," violated the IPS. *Tussey v. ABB Inc.*,

2015 U.S. Dist. LEXIS 89068, *14-15 (W.D. Mo. July 9, 2015). The fiduciaries' decision was a clear violation of the IPS not only because of the Freedom Fund's infancy, but also due to it underperformance and higher fees. A13; App. 97, 118, 349, 381–82, 589, 771, 775–807. This is especially obvious when compared to the Wellington Fund's seventy-year record of upward trajectory in growth and prosperity. A7; App. 381–82. Additionally, selection of a new fund required a "winnowing process" that never occurred. A6; App. 112, 571. Thus, not only was there no objective basis to remove the Wellington Fund, the removal also violated the provisions of the PRISM IPS, of which the Pension Review Committee was well aware. To add insult to injury, the PRISM Plan contracted with Fidelity that all participants in the Wellington Fund would be automatically transferred, or "mapped," into the more expensive Freedom Fund. A11; App. 537- 539. Thus, as found by the district court, the reason for removing the Wellington Fund was to save money for ABB. Clearly, this "deal" was not for the benefit of the participants.

To determine the appropriate comparator for damages, the district court relied upon this Court's comment that

> it seems the participants' mapping damages, if any, would be more accurately measured by comparing the difference between the performance of the Freedom Fund and the minimum return of the subset of managed allocation funds the ABB fiduciaries could have chosen without breaching their fiduciary obligations.

Tussey, 2015 U.S. Dist. LEXIS 89068 at *37, quoting *Tussey*, 746 F.3d at 339. This comment applies an incorrect standard for determining damages. In *Tatum*, 761 F.3d at365, the Fourth Circuit applied a "would have" standard to determine causation – that is, whether a reasonable fiduciary would have made the same decision had there been procedural prudence.

No prudent fiduciary would have removed the Wellington Fund. A prudent fiduciary, more likely than not, would have stayed with the Wellington Fund.[4] *Cf. Tatum*, 761 F.3d at 362 (a fiduciary decision is objectively prudent if "a hypothetical prudent fiduciary would have made the same decision anyway").[5] Once a court determines that the fiduciary breach would have caused damages, the court should then apply the *Roth/Bierwith* standard to determine the appropriate comparator – in this case, the Wellington Fund. *Roth*, 61 F.3d at 602, citing *Bierwirth*, 754 F.2d at 1056. Whether the Eighth Circuit comment applies the

[4] Because these breaches of fiduciary duty implicate the duties of prudence and loyalty including self-dealing, AARP submits that it is the Defendant's burden to demonstrate the reasons the Plaintiffs' suggested alternatives should not be used as the comparator. *Cf. Braden v. Wal-Mart Stores, Inc*., 588 F.3d 585, 602 (8th Cir. 2009) (burden of proof is always on the party to the self-dealing transaction to justify its fairness).

[5] We note that the Solicitor General agreed with the position of the U.S. Court of Appeals for the Fourth Circuit. Brief for the United States As Amicus Curiae in *RJR Pension Inv. Comm. v. Tatum*, 135 S. Ct. 2887 (2015).

"could have" standard to causation or damages, it is inappropriate and misplaced. Consequently, the Wellington Fund should be used as the comparator to determine loss for the fiduciary breach of the removal of the Wellington Fund and the selection of the Freedom Fund.

We note that defendants may complain that using the comparator with the highest return versus the lowest minimum return will give plaintiffs the right to argue for the best deal using hindsight. The simple answer is all the defendants have to do to avoid that rule is not to breach their fiduciary duties. Leaving participants and beneficiaries with no remedy against a knowing and intentional wrongdoing fiduciary is inconsistent with the fiduciary's duty of loyalty and prudence. *See NLRB v. Amax Coal Co*., 453 U.S. 322, 329-330 (1981) (the rule against divided loyalties is designed "[t]o deter the trustee from all temptation and to prevent any possible injury to the beneficiary" and "must be enforced with uncompromising rigidity").

CONCLUSION

For the reasons stated above, AARP respectfully submits that the district court's order should be reversed and the case remanded for further proceedings.

Dated: November 3, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed.R.App.P.29(d) , because this brief contains words, excluding the parts of the brief exempted by Fed.R.App.P.32(a)(7)(B)(iii).

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Dated: November 3, 2015

/s/ Mary Ellen Signorille
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I, Mary Ellen Signorille, hereby certify that on November 3, 2015, I served ten copies of the foregoing brief with the Clerk of the U.S. Court of Appeals for the Eighth Circuit by overnight delivery and on all other parties to this matter by depositing a copy of the same in the United States Mail, postage prepaid.

Dated: November 3, 2015

s/Mary Ellen Signorille
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