Jerome J. Schlichter (admitted *pro hac vice*)
SCHLICHTER BOGARD & DENTON LLP
100 South Fourth Street, Suite 1200
St. Louis, MO 63102
(314) 621-6115
(314) 621-5934 (fax)
jschlichter@uselaws.com
*Lead Counsel for Plaintiffs*

Eric H. Jaso
SPIRO HARRISON
830 Morris Turnpike 2nd Floor
Short Hills, NJ 07078
(973) 310-4026
ejaso@spiroharrison.com
*Local Counsel for Plaintiffs*

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

| | |
|---|---|
| BETH BERKELHAMMER, et al,<br><br>*Plaintiffs*,<br><br>v.<br><br>ADP TOTALSOURCE GROUP, INC., et al.,<br><br>*Defendants*. | No. 2:20-CV-05696-ES-MAH<br><br>**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO ADP DEFENDANTS' MOTION TO DISMISS** |

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# INTRODUCTION

The Complaint provides sufficient facts to plausibly show that Defendants breached their fiduciary duties under the Employee Retirement Income Security Act (ERISA) in the operation and administration of the ADP TotalSource Retirement Savings Plan (Plan). Plaintiffs plausibly show that Defendants failed to monitor and control the compensation paid to the Plan's recordkeeper (Voya), which far exceeded what a prudent and loyal fiduciary would have obtained, because of the business partnership between ADP and Voya. Defendants also caused the Plan to pay prohibited payments to ADP TotalSource putatively for administrative services for which no exemption applies. Plaintiffs further show that Defendants provided five investment options that consistently underperformed their benchmarks or passively managed equivalents and should not have been provided in the Plan. Plaintiffs further show that Defendants allowed excessive investment management and managed account services fees to be charged to the Plan and its participants when the same services could have been obtained at a substantially lower cost. And Plaintiffs show that Defendants allowed third parties to unlawfully use confidential participant data to solicit non-Plan business.

Since Defendants never disclosed how they made these decisions, Plaintiffs cannot be expected to plead specifically how that decision-making process was deficient. But the facts they can and do plead, and the reasonable inferences drawn

from those facts, plausibly show that Plaintiffs state fiduciary breach claims.

## BACKGROUND

Plaintiffs are current participants in the Plan, a defined contribution, individual account, employee benefit plan. Doc. 1 ¶¶11, 20–21 (Compl.); 29 U.S.C. §1002(2)(A) and §1002(34). The Plan is intended to be a multiple employer plan in under 26 U.S.C. §413(c). *Id.* ¶12. The Plan is maintained under a written Plan document. *Id.* ¶13; Ex. H, Doc. 32-10; 29 U.S.C. §1102(a)(1). The Plan has over $4.44 billion in assets and over 114,000 participants. Compl. ¶18.

ADP TotalSource Group, Inc. (ADP TotalSource) is a wholly owned subsidiary of Automatic Data Processing, Inc. (ADP). *Id.* ¶¶14–15. ADP TotalSource is a Professional Employer Organization (PEO) that provides off-site human resources services to small- and medium-sized businesses, including payroll, retirement benefits, and regulatory compliance. *Id.* ¶¶15, 50; Ex. B, Doc. 32-4 at 8–9.[1] When employers contract with ADP TotalSource to provide HR outsourcing services, their employees become co-employees of ADP TotalSource. Compl. ¶15; *Sec'y of Labor v. Doyle*, 675 F.3d 187, 191 n.2 (3d Cir. 2012); Ex. B, Doc. 32-4 at 9. Through this arrangement, the employers have the option to permit their employees to participate in the Plan. Compl. ¶16; Ex. C, Doc. 32-5.

ADP TotalSource appointed the ADP TotalSource Retirement Savings Plan

[1] "Doc." Page number references are to the CM/ECF header page number.

Committee (Committee) as the plan administrator and delegated its duties for administration of the Plan to the Committee. Compl. ¶29; Ex. H, Doc. 32-10 at 70 (§8.8). The Committee is the "named fiduciary" in the Plan document responsible for the control, management and administration of the Plan. Compl. ¶28; Ex. H, Doc. 32-10 at 11, 68 (§§2.9A, 8.1, 8.2); 29 U.S.C. §1102(a). The Committee also is the named fiduciary with respect to the management and investment of Plan assets. Compl. ¶30; Ex. H, Doc. 32-10 at 44 (§5.1).

The Committee appointed NFP Retirement, Inc. d/b/a 401k Advisors, Inc. (NFP) as the Plan's investment consultant to provide investment advice to the Committee regarding the selection, monitoring, and retention of Plan investments. Compl. ¶34; 29 U.S.C. §1002(21)(A)(ii); *see also* Ex. H, Doc. 32-10 at 44 (§5.2). As the investment consultant, NFP also was responsible for advising the Committee with respect to the reasonableness of the Plan's fees from all sources paid to the Plan's service providers. Compl. ¶35; *see also* Ex. H, Doc. 32-10 at 44 (§5.2). The Committee retained final decision-making authority over the selection and retention of Plan investments and service providers. Compl. ¶35.

Plaintiffs seek to recover for the Plan the losses Defendants are obligated to make good and restore to the Plan, as well as equitable and other relief to cure and prevent further breaches, to which the Plan is entitled under 29 U.S.C. §1109(a). 29 U.S.C. §1132(a)(2) and (a)(3). Plaintiffs allege that Defendants breached their

duty in five primary respects: (1) causing the Plan to pay unreasonable recordkeeping and administrative expenses, including prohibited payments to ADP TotalSource; (2) providing five Plan investments that should not have been selected or retained in the Plan; (3) causing the Plan to pay unreasonable investment management expenses; (4) causing the Plan to pay unreasonable managed account expenses; and (5) allowing third parties to unlawfully use confidential data regarding Plan participants.

1. The largest plan administrative expense is recordkeeping–keeping track of each individual participant's account, contributions, distributions, and gains and losses, as well as handling communications with participants. Compl. ¶¶45, 55. Recordkeeping is a commodity service, with pricing typically based on the number of participants in a plan. *Id.* ¶55. Numerous recordkeepers are capable of providing a high level of service and will vigorously compete to win the Plan's business. *Id.* ¶¶18–19, 56. The cost of recordkeeping services depends on the number of participants not on the amount of assets in a participant's account, and therefore, fiduciaries negotiate a fixed dollar amount for services. *Id.* ¶57.

The ADP Defendants retained Voya Institutional Plan Services, LLC (Voya) as the Plan's recordkeeper not based on merit but because of the business relationship between ADP and Voya. *Id.* ¶¶72, 81. Over the years at issue, Defendants failed to monitor and control Voya's total compensation, which caused the Plan to pay up to

over four times a reasonable fee for recordkeeping services. *Id.* ¶¶74–76, 83–87. Although prudent fiduciaries engage in a competitive bidding process every three years to obtain a reasonable fee for the desired level of services, Defendants did not sufficiently put the Plan's recordkeeping services out to bid. *Id.* ¶¶65–67, 77.

Despite Voya performing what appears to be the same services to the Plan, ADP TotalSource paid itself nearly $10 million from Plan assets putatively as reimbursement for administrative services provided to the Plan. *Id.* ¶¶104, 107, 113. Defendants did not control these fees, which substantially increased between 2014 and 2018. *Id.* ¶¶107–09. The payments also bore no discernable relationship to the services putatively rendered and were duplicative of payments made by participating employers for administrative functions. *Id.* ¶¶102–05, 113.

Defendants allowed these excessive recordkeeping and administrative fees to be charged to the Plan even though the Plan had inherent administrative efficiencies by combining employees from thousands of employers and their retirement assets under a centralized retirement plan structure. *Id.* ¶¶51–52. Combining employers together in this manner enabled the Plan to achieve substantial economies of scale by spreading costs across a larger participant and asset base. *Id.* ¶¶53–54. Further cost efficiencies were obtained in part because ADP TotalSource was required only to submit a single annual Form 5500 filing, a single IRS qualification filing, and a single annual independent audit. *Id.* ¶54. In

addition, the Plan had uniform features across all participating employers that can be easily automated to reduce costs. *Id.* ¶88; Ex. C, Doc. 32-5 at 2–10.

2. In light of the effect of fees on expected investment returns, loyal and prudent fiduciaries carefully scrutinize whether the added cost of actively managed funds is justified by an expectation of higher returns net of all expenses. Compl. ¶121. During their selection process, fiduciaries must make a reasoned determination that an actively managed investment option provided to plan participants will outperform its benchmark index or passively managed equivalent net of investment expenses. *Id.* ¶124. As part of their continuing duty to monitor plan investments, *id.* ¶¶135, 300, when an investment underperforms over a trailing three-year period, fiduciaries remove it from the plan because once an actively managed fund has underperformed over that relevant period, it is highly unlikely it will outperform in the future. *Id.* ¶¶125, 135.

Defendants did not satisfy out their fiduciary obligations in providing investment options to Plan participants. They selected and maintained five investments that consistently underperformed their benchmarks or passively managed equivalents available to the Plan. *Id.* ¶¶128–81, 301. By providing these high-cost and poorly performing investments, Defendants failed to make a reasoned determination that providing these investments was prudent and in the exclusive interest of Plan participants. *Id.* ¶¶136, 146, 155, 174. A prudent and

loyal fiduciary would not have selected them or removed them (well before when some were removed). *Id.* ¶¶139, 144, 156, 163, 180. And three of these investments were proprietary Voya investments that were provided to participants to benefit Voya and the ADP Defendants rather than based on an independent investigation into their merits. *Id.* ¶¶138, 145, 168.

3. Multi-billion defined contribution plans, like the Plan, have tremendous bargaining power to obtain low fees for investment management services, such as through lower-cost institutional shares of mutual fund investments. *Id.* ¶182. Retail shares are identical to institutional shares in every respect except that retail shares charge higher fees. *Id.* ¶183. Since the only difference between share classes is cost, a prudent investor will select the lowest-cost option. *Id.* ¶184. That did not happen here. Defendants provided higher-cost share classes instead of otherwise identical lower-cost shares that were available to the Plan causing nearly $9 million in losses. *Id.* ¶¶185–87.

4. Managed accounts are investment services under which providers make investment decisions for participants to allocate their retirement savings among the investment options chosen the plan's fiduciaries. *Id.* ¶¶188–89. Managed account services do not differ in quality but primarily in price. *Id.* ¶190. Managed accounts often have little to no advantage over lower-cost funds, such as target date funds, risk-based funds and balanced funds. *Id.* ¶¶199–200.

The ADP Defendants retained Voya Retirement Advisors, LLC (Voya Retirement) as the Plan's managed account provider not based on merit but because Voya requested that its affiliate provide those services. *Id.* ¶¶214–15, 217. Despite the Plan's substantial bargaining power to obtain lower managed account services fees, Defendants caused the Plan to pay uncapped, asset-based managed account services fees that were as much as 2,000% more than what other managed account providers charge for superior or equivalent services. *Id.* ¶¶219–22. Despite Voya Retirement's asset-based compensation dramatically increasing since 2014, Defendants did not control this revenue and never put the Plan's managed account services out to competitive bidding to obtain a reasonable fee. *Id.* ¶224.

5. Confidential financial information and other non-public information of participants, such as participant contact information, account balances, investment histories, and triggering events when a participant nears retirement, is an extremely valuable asset in the financial services industry. *Id.* ¶¶226–28. This is because financial service providers, including recordkeepers and their affiliates, can use this confidential information to solicit the sale of non-plan products and services from participants. *Id.* ¶¶228–29. The revenue derived from these sales often represents multiples of the recordkeeping fees paid to the recordkeeper. *Id.* ¶232. To protect participant confidential data, prudent and loyal fiduciaries contractually prohibit the plan's recordkeeper from using this data to solicit the

sale of non-plan products and services. *Id.* ¶235.

Defendants allowed Voya and its affiliates to collect, use, transmit and profit from the use of confidential data of Plan participants. *Id.* ¶236. Voya collected confidential plan participant data by virtue of its position as the Plan's recordkeeper. *Id.* ¶¶249–52. Voya then shared this confidential plan participant data with its affiliates, including Voya Financial Advisors, Inc., that earned additional compensation by steering participants to Voya's excessively priced managed account services and non-Plan financial products and services. *Id.* ¶¶237–46. Defendants failed to protect participants' valuable confidential data by prohibiting Voya's use of that data and allowed Voya and its affiliates to sell non-Plan products and services that were unreasonably expensive and not in participants' exclusive interest. *Id.* ¶¶241, 255–57.

Plaintiffs' Complaint alleges: Defendants caused the Plan to pay unreasonable recordkeeping fees in violation of 29 U.S.C. §1104(a)(1) (*id.* ¶¶265–73, Count I) and §1106(a)(1) (*id.* ¶¶274–80, Count II); the ADP Defendants caused the Plan to pay Plan assets to ADP TotalSource in violation §1106(b) (*id.* ¶¶281–86, Count III) and §1106(a) (*id.* ¶¶287–96, Count IV); Defendants caused imprudent and poorly performing investments to be provided in the Plan in violation of §1104(a)(1) (*id.* ¶¶297–304, Count V); Defendants caused the Plan to incur excessive investment management fees (*id.* ¶¶305–12, Count VI); Defendants

caused the Plan to incur excessive managed account fees in violation of §1104(a)(1) (*id.* ¶¶313–20, Count VII); Defendants engaged in prohibited transactions under §1106(a) related to the proprietary Voya investments provided in the Plan (*id.* ¶¶321–27, Count VIII); and Defendants allowed Voya to use confidential plan participant data in violation of §1104(a)(1) (*id.* ¶¶328–35, Count IX) and §1106(a) (*id.* ¶¶336–44, Count X). Related to those counts, the Complaint alleges the ADP Defendants failed to monitor fiduciaries (*id.* ¶¶345–53, Counts XI) and also seeks other equitable relief against the ADP Defendants under §1132(a)(3) (*id.* ¶¶354–59, Count XII).

## STANDARD OF REVIEW

The Court must examine the Complaint holistically to determine whether it plausibly demonstrates an entitlement to relief. *Sweda v. Univ. of Pa.,* 923 F.3d 320, 331 (3d Cir. 2019). The Complaint "should not be parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Id.* at 331 (quoting *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quotation and editing marks omitted). The Court must "look to the totality of the circumstances" to assess fiduciary prudence. *Id.* at 332 (quoting *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 360 (4th Cir. 2014) (quotation marks omitted). It is improper to draw inferences from the allegations in Defendants' favor and demand the complaint plead facts that contradict those inferences. *Id.*

Plaintiffs are not required to "rule out every possible lawful explanation" for Defendants' conduct. *Id.* at 326 (quoting *Braden,* 588 F.3d at 597) (quotation and editing marks omitted). Defendants' contention that they did in fact employ a prudent process is an argument on the merits that cannot be considered at the pleading stage. *Id.* at 333. Plaintiffs cannot plead specifically how Defendants failed to engage in a prudent process and breached their fiduciary duties because this information tends systemically to be in the exclusive possession of the Defendants themselves. *Braden,* 588 F.3d at 598. It is improper to demand plaintiffs state such facts in order to survive a motion to dismiss. *Id.* That is especially so here, because Plaintiffs asked Defendants to produce the minutes of the meetings of the fiduciaries and the materials they relied on, but Defendants refused to produce them. Declaration of Alexander Braitberg ¶2, Exhibit 1 at 3 (Request 17).

**ERISA'S FIDUCIARY DUTIES**

"ERISA's protective function is a focal point of the statute." *Sweda*, 923 F.3d at 326–27. "ERISA furthers 'the national public interest in safeguarding anticipated employee benefits' upon which individuals' livelihoods depend." *Id.* (quoting *Cutaiar v. Marshall*, 590 F.2d 523, 529 (3d Cir. 1979)). Anyone who is so designated in a plan document or who exercises or has discretionary authority or control over the administration or management of a plan or any control over plan

assets is a fiduciary. 29 U.S.C. §1102(a), §1002(21)(A).

All fiduciaries are held to a "prudent man standard of care" that is based on the common law of trusts. *Sweda*, 923 F.3d at 327 (quoting *Tibble v. Edison Int'l* (*Tibble III* ), 135 S.Ct. 1823 (2015), among others); 29 U.S.C. §1104(a). "A fiduciary must 'discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries ... for the exclusive purpose of ... providing benefits to participants and their beneficiaries; and ... defraying reasonable expenses of administering the plan.'" *Sweda*, 923 F.3d at 328 (quoting 29 U.S.C. §1104(a)(1)(A)). Fiduciaries must "exercise 'the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.'" *Id.* (quoting 29 U.S.C. §1104(a)(1)(B)). These standards are the "highest known to the law." *Id.* at 333 (quoting *Tatum*, 761 F.3d at 355–56).

Fiduciaries are personally liable for any losses the plan suffers as a result of their breach of duty and must restore to the plan any profits made from the use of plan assets. 29 U.S.C. §1109(a). They are subject to such other equitable or remedial relief as the Court may deem proper. *Id.* They also are liable for the breaches of other fiduciaries in which they knowingly participate or undertake to conceal, breaches that they enable by their own breach of duty, and breaches of

which they know but fail to take reasonable efforts under the circumstances to remedy. 29 U.S.C. §1105(a). In addition to the foundational obligations of §1104, ERISA categorically bars transactions between the plan and a party in interest deemed likely to injure the plan and conflicted or self-dealing by the fiduciaries. 29 U.S.C. §1106; *Sweda*, 923 F.3d at 327.

The Court's focus in determining whether a fiduciary has breached its duty is on the fiduciary's process and not the results of the fiduciary's action. *Sweda*, 923 F.3d at 329. "A fiduciary's process must bear the marks of loyalty, skill, and diligence expected of an expert in the field." *Id.* Allegations regarding fiduciary process are inherently factual questions. *Id.*

## ARGUMENT

### I. The recordkeeping fees. Counts I and II.

Fiduciaries must understand and monitor plan expenses. *Sweda*, 923 F.3d at 328. Fiduciaries must be vigilant in the negotiation of the amount and method of payment of plan fees, including the monitoring and recovery of excessive revenue sharing payments from plan investments. *Id.* at 328–29.

Plaintiffs allege that Defendants caused the Plan to pay excessive recordkeeping fees because they did not sufficiently solicit bids from service providers, failed to monitor recordkeeping fees, allowed recordkeeping compensation to increase but services did not, failed to leverage the Plan's size to

lower fees or obtain rebates, and failed to comprehensively review Plan management. Compl. ¶¶72–91. They allege that the Plan overpaid for recordkeeping in comparison to what similarly sized (and smaller) plans paid. *Id.* ¶¶68–70, 85. Even Fidelity, one of the largest recordkeepers in the industry, admits its recordkeeping services are worth only the equivalent of $14–$21 per participant per year. *Id.* ¶71. But the Plan paid the equivalent of $80–$124 per participant over the years at issue. *Id.* ¶¶84–85. Even the average recordkeeping fee among all defined contribution plans, most of which are much smaller than ADP's and should pay higher per-participant fees, was only the equivalent of $68 per participant. *Id.* ¶91. These allegations are sufficient to state a claim of fiduciary breach under 29 U.S.C. §1104(a)(1), as alleged in Count I. *Sweda*, 923 F.3d at 330–31, 332.

As Plaintiffs point out, prudent fiduciaries negotiate a plan's recordkeeping fee based on a rate of dollars per participant because the cost of recordkeeping varies by the number of participants in a plan. Compl. ¶¶57–59. That does not mean, however, that fiduciaries must charge participants a per capita fee at the same rate. The fiduciaries are free to allocate the total recordkeeping fee as they see fit. *Id.* ¶¶60–61. Contrary to Defendants' argument, then, Plaintiffs do not contend Defendants should have charged participants "on a flat-fee per participant basis." Doc. 32-1 at 20 (Mem. In Support (MIS) at 12).

The sources cited in the Complaint support Plaintiffs' contention that prudent

fiduciaries would have reduced the Plan's recordkeeping fees to an equivalent of $30 and then $25 per participant. Whether the actual prudent fee, considering all of the relevant facts which are as yet undiscovered, is $30 or $68 or some other amount, is a matter of proof, not pleading.[2] Even at $68, the average of all plans, including those much smaller than this Plan, Defendants caused the Plan to overpay for recordkeeping.

Defendants contend that multiple employer plans are so unique that none of the comparisons Plaintiffs provide even suggest the Plan overpaid for recordkeeping. They cite no authority that supports their contention, much less any authority that shows *how much* more multiple employer plans cost to administer or what is reasonable compensation for recordkeeping such plans. Nor are Defendants clear on whether the claimed complexity of multiple employer plans affects *Voya's* recordkeeping compensation or *ADP TotalSource's* compensation. Those questions cannot be resolved except on the merits of the case, when Defendants can show what proof they have to support these contentions. While the Internal Revenue Code imposes a variety of tests for the Plan to qualify for preferential tax treatment (MIS 6–8, Doc. 32-1 at 14–16) and while those calculations may seem

[2] Even Defendants acknowledge this, indirectly, by pointing out that one court addressed this issue on summary judgment, not on the pleadings. MIS 14–15 (Doc. 32-1 at 22–23) (describing *Pledger* denial of motion to dismiss and grant of summary judgment).

daunting to humans, they are easily calculated by computer programs and databases. After all, ADP touts its "comprehensive range of *technology-based* HCM solutions[.]" MIS 4 (Doc. 32-1 at 12). That technology, and the economies of scale that comes with collecting many small employers into a single large plan such as TotalSource, must reduce the recordkeeping expense of this plan to an amount smaller than what each individual employer would pay in its own plan, as that appears to be one of the points of the TotalSource multiple employer package. *Cf.* Compl. ¶88 (Doc. 32-1 at 46–47);[3] *see also* Definition of 'Employer'' Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans, 84 Fed.Reg. 37508, 37533 (July 31, 2020) (multiple employer plans such as this achieve economies of scale of large plans that provide a "distinct economic advantage[]" of lower administrative costs for individual employers).

Defendants contend "competitive bidding is not required under ERISA" and point out no court had held the failure to get bids is a *per se* breach of duty. MIS 16 (Doc. 32-1 at 24). Plaintiffs do not contend it is. However, it is a factor that weighs in a holistic consideration of the Complaint in support of showing imprudent conduct by the fiduciaries. *See Sweda*, 923 F.3d at 330 (noting "failure to solicit

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[3] In fact, the Plan is designed so that employers who make safe harbor contributions are exempt from ADP, ACP, and Top-heavy tests for discrimination in plan contributions. Doc. 32-5 at 4, 10 (Ex. H, Adoption Agreement); Doc. 32-10 at 21 (§2.43).

bids"); *George v. Kraft Foods Global, Inc.*, 641 F.3d 786, 798–99 (7th Cir. 2011) (failure to solicit bids and evidence of excessive fees precludes summary judgment for defendants). Plaintiffs point to multiple expert sources (including the DOL) that recommend putting plan services out for competitive bidding every three years, as many plan fiduciaries do. Compl. ¶¶65–67. At the same time, Defendants contend that they engaged in some kind of competitive bidding and that should be dispositive in their favor. MIS 16 (Doc. 32-1 at 24). Without the facts about how that bidding was done, one cannot determine whether in fact it was competitive. Plaintiffs cannot address that issue because Defendants refused to provide them any information about that process. Braitberg Decl. Ex. 1 at 3 (Request 18).

As to Count II (29 U.S.C. §1106(a)), Defendants contend Plaintiffs have not alleged facts sufficient to show an intent to benefit Voya by allowing Voya to receive excessive compensation. *Cf. Sweda*, 923 F.3d at 339–40. Plaintiffs allege that ADP has partnered with Voya in various aspects of ADP's "integrated employee benefits solutions" business to share client bases and enhance each other's business. Compl. ¶81 (Doc. 32-1 at 43–44). ADP therefore had an interest in benefitting Voya to enhance this business relationship. This intent to benefit Voya appears again in Defendants' allowing Voya to keep its underperforming proprietary investment products in the Plan and allowing Voya to earn additional compensation from its overpriced managed account services without even putting

those services out for bid by other providers or allowing other providers to offer similar services in the Plan for less. *Id.* ¶¶128–47, 165–81, 188–224. These facts show a mutually beneficial business relationship between ADP and Voya, with the attendant conflicted interest of ADP to benefit its business partner at the cost of its employees, that does not exist in an arm's-length "ordinary service arrangement" between a plan and its recordkeeper, such as the University of Pennsylvania and TIAA-CREF and Vanguard. *Sweda*, 923 F.3d at 336, 339–40. Count II therefore satisfies *Sweda*'s pleading requirement.

## II. The payments to ADP TotalSource. Counts III, IV, and XII.

Counts III and IV allege that the ADP Defendants committed self-dealing prohibited transactions under 29 U.S.C. §1106(b) (Count III) and party-in interest prohibited transactions under 29 U.S.C. §1106(a) (Count IV) by delivering plan assets to ADP TotalSource, the "co-employer" of Plan participants in the guise of payment for plan administrative services. Compl. ¶¶281–96; *see also id.* ¶¶92–114 (detailed factual allegations). In Count XII Plaintiffs alternatively seek restitution from ADP TotalSource under 29 U.S.C. §1132(a)(3) of the unlawful payments it received from the Plan. *Id.* ¶¶354–59.

A plaintiff must plead facts to show an intent by plan fiduciaries to benefit a party in interest only with respect to claims under §1106(a) (ERISA §406(a)) involving "ordinary recordkeeping arrangements." *Sweda*, 923 F.3d at 336. That

pleading requirement does not apply to claims of self-dealing under §1106(b) (ERISA §406(b)). *Id.* Section 1106(b) transactions are "prohibited outright" and that is "regardless of the reasonableness of the compensation." *Id.* 923 F.3d at 336 (second quotation quoting *Nat'l Sec. Sys., Inc. v. Iola*, 700 F.3d 65, 93 (3d Cir. 2012)). The exemptions provided in 29 U.S.C. §1108 do not apply to §1106(b) transactions, contrary to ADP's argument. *Id.* at 94–96; *cf.* MIS at 34 (Doc. 32-1 at 42) (citing 29 U.S.C. §1108(c)(2) and 29 C.F.R. §2550.408b-2(e)(3)).[4] Therefore, Plaintiffs were not required to plead around those exemptions in order to state a claim in Count III.

As to Count IV, ADP's arrangement to have its employees' retirement plan pay its subsidiary (putatively for plan services) is far removed from an ordinary recordkeeping arrangement. That certainly was not the arrangement in *Sweda*, in which the sponsor university did not pay itself from plan assets. Because this arrangement was not an ordinary recordkeeping arrangement, Plaintiffs were not required to plead how no exemption among the many exemptions in 29 U.S.C. §1108 applied. *Sweda*, 923 F.3d at 336.

This was, in fact, a highly unusual arrangement, particularly when the plan had an outside recordkeeper (Voya), who appears to have been providing the same

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[4] Section 1108(c)(2) (ERISA §408(c)(2)) is not "an independently operative reasonable-compensation exception." *Nat'l Sec.*, 700 F.3d at 96.

administrative services. It is an arrangement to which ERISA is particularly sensitive because of the possibility of abuse by employers seeking to enrich themselves at their employees' expense. ERISA expressly prohibits plan assets from inuring to the benefit of an employer. 29 U.S.C. §1103(c)(1). The DOL imposes stringent requirements on plan fiduciaries who might benefit employers through putative plan service arrangements. 29 C.F.R. §2550.408b-2(a) (applying the exemptions under 29 U.S.C. §1108(b)(2) and §1108(c)). That requires a determination by the appropriate plan fiduciary that the service provided to the plan was necessary for the establishment or operation of the plan, was furnished under a contract or arrangement that is reasonable, and was paid for with no more than reasonable compensation. *Id.*; DOL Advisory Opinion 97-03A, 1997 WL 28100 at *2 (Jan. 23, 1997); DOL Adv. Op. 89-09A, 1989 WL 206414 at *4 (June 13, 1989). Where the plan fiduciaries have a potential conflict of interest because they are executives and employees of the corporation that will benefit from the payments, they must have an *independent* fiduciary determine that the arrangement satisfies the three elements of this exemption. 29 C.F.R. §2550.408b-2(e)(2). Fiduciaries cannot "exercis[e] the authority, control, or responsibility which makes such persons fiduciaries when they have interests which may conflict with the interests of the plans for which they act." 29 C.F.R. §2550.408b-2(e)(1); *see also Freund v. Marshall & Isley Bank*, 485 F. Supp. 629, 637–38 (W.D. Wis. 1979).

The fiduciary cannot "use any of the authority, control or responsibility which makes such person a fiduciary to cause a plan to pay ... a fee for a service furnished by a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary." 29 C.F.R. §2550.408b-2(e)(2). To avoid this conflict of interest, the fiduciaries must have an independent fiduciary determine whether the proposed arrangement is for services that are necessary to the administration of the plan, is a reasonable arrangement, and is for reasonable compensation. *Id*; *see also* DOL Adv. Op. 97-03A, 1997 WL 28100 at *4 (independent fiduciary must determine how to allocate expenses that benefit employer and plan).

Apart from *who* must determine whether an arrangement with an employer's subsidiary meets this regulatory exemption, *whether* the arrangement meets the detailed requirements of this exemption is a fact-specific determination. 29 C.F.R. §2550.408b-2(b) (what is a necessary service); 29 C.F.R. §2550.408b-2(a)(2) (what is a reasonable contract or arrangement); 29 C.F.R. §2550.408b-2(d) and 29 C.F.R. §2550.408c-2(b)(1) (what is reasonable compensation).

Defendants do not even claim to have had an independent fiduciary determine that the arrangement by which ADP TotalSource received plan assets satisfied the elements of this exemption, much less to have disclosed that to participants. This type of self-dealing is not an ordinary or ubiquitous service arrangement, in the

sense that recordkeeping contract with a third party would be. *Cf. Sweda*, 923 F.3d at 336. It is instead the type of transaction ERISA's prohibited transaction provisions seek to prohibit outright—"a special risk to the plan from a transaction presumably not at arm's length[.]" *Id.* at 338. To require Plaintiffs to plead whether Defendants did that or how (if done) it was defective is impossible, since those are facts exclusively in ADP's possession. *See Braden*, 588 F.3d at 598 ("If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer."). The fact that ADP used its own subsidiary to perform putative services for the plan and receive plan assets alone is enough to show an intent to benefit the party in interest—its own subsidiary.

Count IV, therefore, also states a claim.

## III. The Imprudent investments. Counts V and VI.

### A. Count V.

Count V alleges that Defendants breached their duty under §1104(a)(1) by providing as Plan investment options five investment products that were overpriced and underperformed for such an extended time that a prudent fiduciary would not have selected them or removed them (well before when some were removed). Compl. ¶¶128–81, 297–304. Three of those five options were Voya's proprietary investment products (counting the nine vintages of target date funds as

a single option). As shown above, ADP had a business relationship with Voya that provided it an incentive to have its officer-fiduciaries retain Voya's funds in the Plan for Voya's (and hence ADP's) benefit. Those facts alone establish a plausible claim that Defendants did not act solely in the interest of Plan participants and for the exclusive purpose of providing benefits to the participants or defraying reasonable administrative expenses. 29 U.S.C. §1104(a)(1)(A). Plaintiffs' allegations of the imprudence of these options are sufficient to state a claim under 29 U.S.C. §1104(a)(1)(B) for the same reasons recognized in *Sweda*, 923 F.3d at 331–34. Defendants' argument that they did in fact employ a prudent process in providing these funds "goes to the merits and is misplaced at this early stage." *Id.* at 333.

Plaintiffs do not allege *ex post* that these funds were imprudent merely because they ended up underperforming. Instead, they point out the underperformance of these funds at the start of the statutory damages period. Compl. ¶¶131, 134, 141 (five-year performance at end of 2014), 149–50, 159 (performance as of inclusion in Plan), 172.[5] They point out this underperformance both as to the funds' own benchmarks and prudent alternatives that were available to the Plan at the beginning of the statutory period. *Id.* ¶¶132–33, 151–52, 160, 178. Plaintiffs also

[5] Because many of these funds are not publicly traded mutual funds, their performance data for each year is not publicly available. *See* Compl. ¶177.

point out underperformance during the statutory period to show that even if the funds should not have been removed as of 2014, their continued underperformance compelled their removal in each following year. *Id.* ¶¶134, 143, 153–54, 162, 173, 179. This evidence of underperformance covers periods up to ten years, as well as three and five years. *Id.* ¶¶143, 152, 159.

Defendants contend that it is a matter of law that three- or five-year underperformance is insufficient to plausibly allege imprudent oversight of a plan's investment options. MIS 21 (Doc. 32-1 at 29). *Sweda* contains no such rule. While that was the conclusion of the single district court decision that Defendants cite, that conclusion is based on a misreading of *Jenkins v. Yager*, 444 F.3d 916, 925–26 (7th Cir. 2006). *See Dorman v. Charles Schwab Corp.,* No. 17–285, 2019 WL 580785 at *6 (N.D. Cal. Feb. 8, 2019) (citing *Jenkins*). *Jenkins* was decided on summary judgment with evidence of the fiduciary's extensive monitoring process and explanation of why he considered currently underperforming investments to remain prudent for the plan—*i.e.*, uncontradicted evidence of a prudent process. *Jenkins*, 444 F.3d at 925. In the face of that evidence, the plaintiff's reliance on just three years of losses was insufficient to create a triable issue. *Id.* at 925–26. *Jenkins* did not impose a bright-line rule, much less a rule that applies at the pleading stage, as *Dorman* and Defendants suggest. Furthermore, bright-line rules are inappropriate for ERISA. *Sweda*, 923 F.3d at 330. Plaintiffs cannot plead

particularly how Defendants' process in retaining these investments was imprudent because Defendants refused to produce the documents that are in their exclusive possession that would describe that process. Braitberg Decl. Ex. 1 at 3 (Request 17).

Plaintiffs do not contend that Defendants breached their duty *per se* by providing these underperforming funds merely because they were actively managed. *Cf.* MIS 20. Instead, they point out the established fact, supported by numerous authorities, that it is rare for an actively managed fund to persistently outperform an index net of the higher fees those funds charge and, therefore, that prudent fiduciaries do not select higher-cost actively managed mutual funds without a thorough process to determine the fund reasonably is expected to outperform a cheaper index fund. Compl. ¶¶120–24. Since the actively managed funds at issue in the Complaint did not consistently outperform their indexes as of the time they were chosen for the Plan or consistently underperformed after they were chosen, it is plausible Defendants did not have a prudent process for selecting and monitoring them. Moreover, three of the five challenged funds were Voya investment products, selected apparently for the benefit they provided Voya, not any benefit they provided Plaintiffs.

Defendants cannot avoid liability for their breach in providing these underperforming funds by pointing to other funds Plaintiffs could have invested in

to avoid their losses. *Pfeil v. State St. Bank & Tr. Co.*, 671 F.3d 585, 597 (6th Cir. 2012); *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 423–24 (4th Cir. 2007); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 308 n.18 (5th Cir. 2007); *cf.* MIS 20–21. As *Sweda* states, a "fiduciary must prudently select investments, and 'failure to monitor ... investments and remove imprudent ones' may constitute a breach." 923 F.3d at 328 (quoting *Tibble III*, 135 S.Ct. at 1828–29). *Sweda* recognizes no exception for the presence of prudent investment options in a Plan in which a participant could have invested instead of the imprudent ones.

### B. Count VI.

Count VI alleges Defendants breached their fiduciary duties by providing more expensive share classes of Plan investment options than were available to the Plan. Compl. ¶¶305–12. *Sweda* specifically recognizes similar allegations state a claim despite the fact that revenue sharing of fund fees is used to pay for recordkeeping. 923 F.3d at 328–29, 331 (citing *Tibble v. Edison Int'l*, 729 F.3d 1110, 1137–39 (9th Cir. 2013), *vacated on other grounds*, 135 S.Ct. 1823 (2015)). Just as in *Sweda*, the Complaint here includes a table comparing options in the Plan with the readily available cheaper alternatives. 923 F.3d at 331; Compl. ¶185. Just as in *Sweda*, this count plausibly states a claim.

## IV. The Managed Account Services fees. Count VII.

Despite the variety of managed account service providers who provide similar

services at lower cost, Defendants allowed Voya to be the exclusive provider of managed account services to the Plan since 2013 without ever putting those services out for competitive bidding or even allowing other providers to offer their services to participants for a lower cost and without monitoring the asset-based fees Voya collected as it gathered more assets to its monopoly managed account services. Compl. ¶¶214–24; *see also id.* ¶¶188–213 (background on managed account services); GAO-14-310 Managed Accounts in 401(k) Plans at 4–8, 14 (noting eight providers in 2013 represented over 95% of the market).[6] In Count VII Plaintiffs contend Defendants breached their duties of loyalty and prudence under 29 U.S.C. §1104(a)(1)(A)–(B).

As noted above, this preferential treatment of Voya was part of ADP's business partnership with Voya. As with allowing Voya to provide proprietary investments in the Plan and allowing Voya to receive excessive recordkeeping compensation, providing Voya exclusive right to provide managed account services to Plan participants without even having to submit to competitive bidding shows that ADP acted with the intent to benefit Voya and not solely in the interest of participants or for the exclusive purpose of providing benefits to participants or defraying reasonable administrative expenses. 29 U.S.C. §1104(a)(1)(A). Given the variety of managed account service providers with lower fees and ADP's

[6] https://www.gao.gov/assets/670/664391.pdf.

incentive to benefit Voya, it is highly unlikely ADP selected Voya to be the provider of these services to the Plan because Voya was the best provider despite its higher fees.

"Fiduciaries must ... understand and monitor plan expenses." *Sweda*, 923 F.3d at 328. Failing to monitor and constrain asset-based fees and failing to solicit competitive bids when other service providers are available at lower cost are facts that show imprudence under 29 U.S.C. §1104(a)(1)(B) at the pleading stage. *Sweda*, 923 F.3d at 330, 332. While Defendants claim they engaged in at least some kind of bidding process for the Plan's recordkeeping services, they do not even claim to have done that for the Plan's managed account services.

## V. Voya's proprietary investment options. Count VIII.

Count VIII alleges that using Voya's proprietary investment products in the Plan constituted party-in-interest transactions prohibited under 29 U.S.C. §1106(a). As described above, the business relationship between ADP and Voya goes beyond an ordinary service relationship between a plan and its service provider and is sufficient to support an inference that ADP intended to benefit Voya by providing Voya's investment products as Plan investment options despite their high expenses and poor performance. Therefore, this Count states prohibited transaction claims. *Sweda*, 923 F.3d at 338.

## VI. The unlawful use of participant data. Counts IX and X.

Plaintiffs contend that Defendants breached their duties and committed prohibited transactions by allowing Voya to use confidential participant financial information to solicit those participants for business relationships outside of the Plan. Compl. ¶¶225–59, 328–44.

### A. Plaintiffs have standing.

Plan participants have Article III standing to bring actions under 29 U.S.C. §1132(a)(2) to obtain remedies on behalf of their plan regardless of whether they individually suffered an injury. *Sweda*, 923 F.3d at 334 n.10; *Perelman v. Perelman*, 793 F.3d 368, 376 n.6 (3d Cir. 2015). *Thole v. U.S. Bank N.A.*, 140 S.Ct. 1615 (2020), does not affect that precedent because *Thole* concerned only the standing of a participant in a fully funded defined benefit plan to recover plan losses. The Third Circuit already recognized that such participants lack standing in *Perelman*. 793 F.3d at 374–76. *Thole* merely affirms that precedent. *Perelman* distinguishes standing for participants in fully funded defined benefit plans and from standing for participants in defined contribution plans. *Perelman*, 793 F.3d at 376 n.6.; *Sweda*, 923 F.3d at 334 n.10. *Thole* specifically did not address that issue, noting that its decision on standing applies *only* to defined benefit plans. 141 S.Ct. at 1618 (noting this distinction is “of decisive importance”). As *Thole* notes, affirming in principle the Third Circuit’s distinction, “every penny of gain or loss”

in a defined contribution plan is at the participants' risk. *Id.* at 1620. Consequently, the Third Circuit's precedent that all participants have standing to seek recovery on behalf of their plan remains good law.

Plaintiffs also sufficiently allege individual standing. They face the "imminent" harm of being solicited for non-Plan services because Defendants have allowed Voya to use Plan participant data for marketing purposes. *Thole*, 140 S.Ct. at 1618 ("suffered an injury in fact that is concrete, particularized, and actual or imminent"). They do not seek to recover as *Plan* losses the monetary harm that each individual participant suffered from the use of their data. That would be difficult to quantify and would not belong to the Plan anyway. Instead, they seek restitution from Voya's unjust profits from use of Plan assets or a surcharge against the Plan fiduciaries for the value of the use of this asset (such as a reduction in recordkeeping fees paid to Voya). That recovery would go to the Plan and be divided among the participants' retirement accounts (including Plaintiffs'), since all gains to the Plan belong the participants. *Thole*, 141 S.Ct. at 1620. In such cases, it is not a "loss" that a participant must show in order to have standing, but instead a right to a share of the restitution recovered for the Plan. *Perelman*, 793 F.3d at 373 n.4 (citing *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 418 (3d Cir. 2013)). That right provides defined contribution plan participants "a sufficiently concrete interest in the outcome of the issue in dispute." *Thole*, 140

S.Ct. at 1620 (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013)).

Plaintiffs also seek an injunction to enforce Defendants' duty to protect this asset and prevent further use of participant data for non-Plan marketing purposes. Compl. at 149 (Doc. 1 at 153). With respect to this injunctive relief, Plaintiffs have standing by virtue of Defendants' violation of their statutory duties. *Perelman*, 923 F.3d at 373 (citing *Horvath v. Keystone Health Plan East, Inc*., 333 F.3d 450, 456 (3d Cir. 2003)). Plaintiffs do not need to demonstrate actual harm in order to have standing to seek injunctive relief compelling Defendants to satisfy their statutory fiduciary responsibilities. *Horvath*, 333 F.3d at 456.

Moreover, Plaintiffs seek to represent a class of all participants in the Plan. Even if they did not have individual standing to assert this claim, dismissal of their claim is inappropriate if Plaintiffs may represent a class of plaintiffs who do have standing. *Haas v. Pittsburgh Nat'l Bk.*, 526 F.3d 1083, 1088 (3d Cir 1975). Plaintiffs allege the basis for certification of their claims as Rule 23(b)(1) class actions and Defendants do not contend Plaintiffs cannot represent a class of all participants in the Plan.

For all of these reasons, Plaintiffs have standing to pursue this claim.

**B. Plaintiffs state a claim of breach in Count IX.**

Because the facts regarding how Defendants allowed Voya access and use of confidential participant information is in Defendants' exclusive possession,

Plaintiffs cannot be expected to plead those facts with particularity. *Braden*, 588F.3d at 598. The Committee is the named fiduciary and administrator of the Plan. Compl. ¶¶28, 30. ADP TotalSource directors are the Committee members and ADP TotalSource has complete control over the existence of the Committee and is the administrator and named fiduciary if it abolishes the Committee. *Id.* ¶29. Defendants do not claim that Voya is an independent fiduciary of the Plan with free access to confidential participant data. Voya would not have access to that data, or the ability to use that data for its own business purposes, but for Defendants' granting that access and failing to limit Voya's use to what is necessary to administer the Plan. These facts provide enough of a basis for the Court to infer that Defendants exercised their fiduciary control over this asset to allow Voya to use it for soliciting non-Plan business from Plan participants.

Allowing a plan service provider to use confidential participant financial information for the service provider's own business purposes is failing to act solely in the interest of Plan participants (it is acting for the benefit of the service provider) and failing to act for the exclusive purpose of providing benefits to participants (it has nothing to do with Plan benefits) or defraying reasonable expenses of administration (Defendants did not even get a reduction in recordkeeping expenses). Because of the business partnership between ADP and Voya, it is easily inferable that the Defendants allowed Voya to use this plan

information to enhance Voya's business. This, therefore, is a straightforward breach of 29 U.S.C. §1104(a)(1)(A).

To protect confidential participant financial information, prudent fiduciaries of defined contribution plans prohibit service providers from using this information to sell non-plan products and services. Compl. ¶235. Prior to and during the limitations period, Plaintiffs provided specific examples of other fiduciaries that required their plan's recordkeeper to contractually agree not to use this information to solicit non-plan business. *Id.* In fact, in many settlements of fiduciary breach claims, ERISA fiduciaries have expressly committed to preventing plan recordkeepers from soliciting outside business from plan participants. Declaration of Michael A. Wolff ¶¶2–6 (Exs. 2–6). By failing to act "with the care, skill and diligence under the circumstances then prevailing" that a prudent plan fiduciary would use, Defendants also violated 29 U.S.C. §1104(a)(1)(B). *Sweda*, 923 F.3d at 332.

Defendants' answer to this is to point to the district court's rejection of a similar claim in *Divane v. Northwestern University*, No. 16-8157, 2018 WL 2388118 (N.D.Ill. May 25, 2018), *aff'd*, 953 F.3d 980 (7th Cir. 2020).[7] The Seventh Circuit did not address this claim. 953 F.3d at 987–93. The district court

[7] The *Divane* plaintiffs have petitioned the Supreme Court for a writ of certiorari. No. 19-1401 (June 19, 2020).

rejected it merely because no other court had yet recognized the claim (without citing any court that had rejected it) out of concern more for "not discourag[ing] employers from offering plans" than applying the statute's plain terms to a novel situation. 2018 WL 2388118 at *12. That district court also ignored the "protective function" that is the focal point of ERISA. *Sweda*, 923 F.3d at 326. That case, therefore, is unpersuasive.

### C. Plaintiffs state a prohibited transaction claim in Count X.

Defendants contend that confidential participant data is not a plan asset because ERISA does not specifically so define it. MIS 36–37. ERISA does not define "plan assets" at all. It only authorizes the Secretary of Labor to define the term by regulation and specifies particular things that are not plan assets (none of which are confidential participant data). 29 U.S.C. §1002(42).

The Secretary of Labor has not comprehensively defined "plan assets." In fact, the DOL did not even issue a regulation defining "plan assets" in particular contexts until 1986, twelve years after ERISA's enactment. Final Regulation Relating to the Definition of Plan Assets, 51 Fed.Reg. 41262 (Nov. 13, 1986) (29 C.F.R. §2510.3-101). Defendants' argument that §2510.3-101 exclusively defines what is a plan asset would mean that term had no meaning under the statute for the twelve years from ERISA's enactment in 1974. That clearly is absurd.

In fact, that regulation does not purport to exclusively define what is a plan

asset in all contexts. It only "describes what constitute assets of a plan with respect to a plan's investment in another entity[.]" 29 C.F.R. §2510.3-101(a)(1). Likewise, DOL's other plan-asset regulation, 29 C.F.R. §2510.3-102, only defines when participant contributions from employer assets become plan assets. 29 C.F.R. §2510.3-102(a)(1). Count X does not concern investments in another entity or contributions to a plan. Therefore, these regulations do not govern whether confidential participant information is a plan asset.

"ERISA does not explicitly define what constitute 'plan assets[.]'" 51 Fed.Reg. at 41262. DOL specifically recognizes that, outside of the particular circumstances of its two regulations, the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law including "any property, tangible or intangible, in which the plan has a beneficial ownership interest." DOL Advisory Op. 93-14A, 1993 WL 188473 at *4 (May 5, 1993). Generally, undefined terms used in ERISA have the same meaning as in the common law when ERISA was enacted. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992) (applying principle to "employee"); *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996) (applying principle to "fiduciary" and "administration"); *Tibble III*, 135 S.Ct. at 1828 (ERISA's fiduciary duty derives from the common law of trusts). The determination of whether something is a plan asset under ERISA "is largely dependent on the specific facts of a given case" and

should not be determined on a motion to dismiss. *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 899 F.Supp.2d 310, 329 (E.D. Penn. 2012) (citations omitted), *aff'd* 725 F.3d 406 (3d Cir. 2013).

When ERISA was enacted, courts generally recognized under the common law that financial information of potential customers, such as Plan participants, are valuable property and thus assets:

> Property rights exist in information, and one who spends time, money, labor, and thought in codifying and tabulating information is the owner of it. Such owner may communicate such information to another without thereby destroying his property rights in it, and one who acquires such information by virtue of a confidential relationship with the owner, or for a contractually limited purpose, cannot use it for other purposes to the prejudice of the owner, without his consent.

*Arrant v. Georgia Cas. Co.*, 102 So. 447, 449 (Ala. 1924); *see also In re Arnay's Estate*, 187 N.Y.S.2d 782, 786–787 (Surrogate's Ct. N.Y. Co. 1959) (customer list belongs to decedent's estate and administrator had no right to use for own profit); *F.B. Miller Agency v. Home Ins. Co.*, 276 Ill.App. 418, 428–29 (Ill. Ct. App. 1934) (the entity that pays for and acquires information that can be used to solicit business is the information's owner); *V.L. Phillips & Co. v. Pa. Threshermen & Farmers' Mut. Ins. Co.*, 1999 F.2d 244, 246 (4th Cir. 1952) ("this information is of vital assistance to the agency in carrying on the insurance business and it has become, in the insurance field, recognized as a valuable asset in the nature of good will."); *Meissel v. Finley*, 95 S.E.2d 186, 190–91 (Va. 1956) (similar); *Blume v.*

*Curson*, 447 S.W.2d 727, 729 (Tex. Ct. App. 1969) (similar); *Clark-Lami, Inc. v. Cord*, 440 S.W.2d 737, 740–41 (Mo. 1969) ("Confidential information … is a species of property to which the corporation has the exclusive right and benefit."). This recognition has continued since the enactment of ERISA. *See, e.g.*, *AMGRO, Inc. v. Johnson*, 71 Ill.App.3d 485, 487 (Ill. Ct. App. 1979) (intimate financial information is a "valuable asset" and an "intangible property right"); *Costanzo v. Nationwide Mut. Ins. Co*., 832 N.E.2d 71, 75 (Ohio Ct. App. 2005) ("'an agent is subject to a duty to the principal not to use or to communicate information confidentially given him … [or to use it to injure] the principal.'") (quoting Restatement (Second) of Agency §§395, 396(b) (1959)).

The SEC also recognized that such data was extremely valuable and that using it in solicitations renders a broker-dealer a fiduciary. "[L]earning the personal and intimate details of the financial affairs of clients and making recommendations as to purchases and sales of securities cultivates a confidential and intimate relationship'—rendering a broker-dealer who does so 'a fiduciary.'" *U.S. Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 374 (5th Cir. 2018) (quoting Hughes, Exchange Act Release No. 4048, 1948 WL 29537 at *4, *7 (Feb. 18, 1948), *aff'd sub nom. Hughes v. S.E.C.*, 174 F.2d 969 (D.C. Cir. 1949), and citing Mason, Moran & Co., Exchange Act Release No. 4832, 1953 WL 44092 at *4 (Apr. 23, 1953)).

Plan participants provide the Plan with intimate financial data with the understanding the data set will be used solely in their interest and to administer the Plan. *See* 29 U.S.C. §1104(a)(1)(A). Once they provide this information to the Plan, the Plan's fiduciaries control the asset. Individuals who collect that information for a specific purpose, such as plan fiduciaries for the purpose of providing benefits to participants and administering the plan, have long had a duty under the common law to hold that information in trust for that purpose. *See Oliver v. Oliver*, 45 S.E. 232, 233 (Ga. 1903) (executive "holds the information in trust for the benefit of those who placed him where this knowledge was obtained, in the well-founded expectation that the same should be used … for those who were the real owners of the company."); *Trice v. Comstock*, 121 F. 620, 625 (8th Cir. 1903) (employee holds information "in trust for his former master") (citation omitted); *Plant Indus., Inc. v. Coleman*, 287 F.Supp. 636, 642 (C.D. Cal. 1968) (implied obligation not to disclose confidential information received in trust"); *Husband C. v. Wife C.*, 391 A.2d 745, 746 (Del. 1978) ("trust, by definition, grants to nonparties ownership rights and control over property, while cutting off control by the grantor.").

Participant data in this context is a plan asset and Defendants as fiduciaries had a duty to use that asset solely in the interest of Plan participants and for the exclusive purpose of providing benefits to the participants. 29 U.S.C.

§1104(a)(1)(A). Many plan fiduciaries have recognized that duty. Wolff Decl. ¶¶2–6. Transferring that asset to Voya or for Voya's use in its own business solicitations was a prohibited transaction under 29 U.S.C. §1106(a)(1)(D).

## VII. The failure to monitor — Count XI

Defendants contend Count XI should be dismissed because Plaintiffs fail to state claims for underlying breaches. For the reasons stated above, that is wrong and this contention should be rejected.

## VIII. The claim for other remedies against ADP TotalSource — Count XII.

Count XII seeks to recover under 29 U.S.C. §1132(a)(3) restitution and disgorgement from ADP TotalSource for the plan assets it unlawfully received as alleged in Counts III and IV. It is an alternative claim for relief in the event ADP TotalSource is found not to have been a fiduciary as to those transactions. Compl. ¶358.

Since Plaintiffs are seeking alternative and not duplicative relief in this Count, their claims are not barred for the reasons stated in *Rochow v. Life Ins. Co. of N. Am.*, 780 F.3d 364, 372 (6th Cir. 2015). *Cf.* MIS 38. *Rochow* holds only that a plaintiff cannot obtain relief under §1132(a)(3) when the plaintiff has recovered all benefits due her under §1132(a)(1)(B). 780 F.3d at 370–75. This case is not a claim for benefits under §1132(a)(1)(B) and the relief sought is as an alternative, not in duplication of, the relief sought in Counts III and IV. Therefore, Defendants

provide no basis for dismissing this Count.

## CONCLUSION

The Court should deny the ADP Defendants' motion.

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Respectfully submitted,

s/ Eric H. Jaso

SPIRO HARRISON
Eric H. Jaso
830 Morris Turnpike 2nd Floor
Short Hills, NJ 07078
(973) 310-4026
ejaso@spiroharrison.com
*Local Counsel for Plaintiffs*

SCHLICHTER BOGARD & DENTON LLP
Jerome J. Schlichter (*pro hac vice*)
Michael A. Wolff (*pro hac vice*)
Heather Lea (*pro hac vice*)
Andrew D. Schlichter (*pro hac vice*)
Kurt C. Struckhoff (*pro hac vice*)
Alexander L. Braitberg (*pro hac vice*)
Joel D. Rohlf (*pro hac vice*)
100 South Fourth Street, Suite 1200
St. Louis, MO, 63102
(314) 621-6115
(314) 621-5934 (fax)
jschlichter@uselaws.com
mwolff@uselaws.com
hlea@uselaws.com
aschlichter@uselaws.com
kstruckhoff@uselaws.com
abraitberg@uselaws.com
jrohlf@uselaws.com
*Lead Counsel for Plaintiffs*