UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LISA PATRICO, On Behalf of The Nestle 401(K) Savings Plan and All Other Similarly Situated Individual Account Plans

Plaintiff,

v.

VOYA FINANCIAL, INC., VOYA INSTITUTIONAL PLAN SERVICES, LLC; VOYA INVESTMENT MANAGEMENT, LLC; and VOYA RETIREMENT ADVISORS, LLC

Defendants.

CASE NO.:

CLASS ACTION COMPLAINT

(ERISA)

JURY TRIAL DEMANDED

PRELIMINARY STATEMENT

1. Plaintiff Lisa Patrico brings this action on behalf of the Nestle 401(k) Savings Plan ("Nestle Savings Plan") and all other similarly situated qualified retirement plans ("Plans"), under Sections 502(a)(2) and 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1132(a)(2) and 1132(a)(3), against Voya Financial, Inc., f/k/a ING U.S., Inc. ("Voya Financial"), Voya Institutional Plan Services, LLC, f/k/a ING Institutional Plan Services, LLC ("Voya Institutional"), Voya Investment Management, LLC, f/k/a ING Investment Management, LLC ("VIM"), and Voya Retirement Advisors, LLC, f/k/a ING Investment Advisors, LLC ("VRA," collectively with Voya Financial, Voya Institutional and VIM, "Voya" or "Defendants").

2. Defendants provide services to qualified retirement plans subject to the provisions of ERISA and directly or indirectly to the Plans in connection with the matters alleged in this Complaint.

3. More specifically, Defendants provide services in connection with the administration of "individual account plans," which are tax-qualified retirement plans maintained by employers for the benefit of their employees. An individual account plan is defined in Section 3(34) of ERISA, 29 U.S.C. § 1002(34), as "a pension plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses . . . which may be allocated to such participant's account."

4. Many of the plans for which Defendants provide investment management, recordkeeping and other administrative services are "401(k) plans," which permit individual Plan participants to contribute a portion of their salary and wages on a pre-tax basis in order to save for

retirement. In many cases, the employer-sponsors make matching contributions and/or profit-sharing contributions to supplement the employees' contributions. Nearly all Plans designate a number of mutual funds or other collective investment funds as the Plans' "designated investment alternatives" and give individual Plan participants the ability to choose how their Plan accounts will be invested by allocating their accounts among the designated investment alternatives. In fact, most of the Plans that offer investment choices, including the Nestle Savings Plan, actually purport to transfer the entire responsibility and liability for investment decisions to the participants.[1]

5. A large body of federal securities law recognizes a significant difference in the level of investment-related knowledge and experience between wealthy investors and the average American worker, and, consequently, a difference in the level of protection afforded by securities regulation.

6. As recognized by the Employee Benefit Security Administration ("EBSA") of the U.S. Department of Labor ("DOL"), "[g]iven the rise in participation in 401(k) type plans and IRAs, the retirement security of millions of America's workers increasingly depends on their investment decisions. ***Thus, there is increased recognition of the importance of investment advice in helping participants avoid costly investment errors***."[2] (Emphasis added.)

7. Despite the recognized need for participants to get investment advice, certain legal impediments presented difficulties for those financial institutions, such as Voya, whose mutual

[1] *See* ERISA section 404(c), 29 USC § 1104(c) and the regulations thereunder.
[2] EBSA Fact Sheet, "*Proposed Regulation to Increase Workers' Access to High Quality Investment Advice,"* Fe. 26, 2010, available at http://www.dol.gov/ebsa/newsroom/fsinvestmentadvice.html (last reviewed March 24, 2016) (emphasis added).

funds and other investment vehicles were offered as investment choices to individual account plans. In particular, ERISA's prohibited transaction rules prevent a plan fiduciary, which includes the investment advisor, from causing the plan to engage in various transactions with "parties in interest" which also include the investment advisor--the so-called transactional prohibitions[3]. The prohibited transaction rules also prevent the investment advisor from causing the plan to engage in a transaction that would generate additional fees for the investment advisor--the so-called self-dealing prohibitions[4].

8. As a result of these prohibitions and in the absence of any applicable exemption, a financial institution such as Voya -- which provides, trust, recordkeeping, brokerage and other services to qualified retirement plans, as well as investment funds -- could not provide investment advice to participants. Voya could not do so out of concern that advising participants to invest in Voya's own funds would be a prohibited transaction in violation of ERISA § 406.

9. One obvious solution to this problem was to have the investment advice provided by a registered investment adviser that was independent of and unrelated to the financial institutions whose funds were included as investment choices in the plan. This would ensure that the fund provider did not have a financial stake in the outcome of the advice. Financial Engines Advisors L.L.C. ("FE" or "Financial Engines"), a federally registered investment advisor and wholly-owned subsidiary of Financial Engines, Inc. claims to fulfill that role, and FE has become the preeminent purportedly independent investment advice provider to 401(k) plan participants.

10. Voya determined to make available investment advice services to the participants of its customers' plans. If, however, Voya were to allow such services to be provided through an

[3] ERISA § 406(a), 29 USC 1106(a).
[4] ERISA § 406(b), 29 USC 1106(b).

independent and unrelated investment advisor, Voya would lose out on all the associated fees it could charge to participants. Accordingly, in breach of duty, Voya devised a strategy that would satisfy the need for a supposedly independent investment advisor while preserving Voya's ability to collect fees for the program: Voya offers the advice program through Voya Retirement Advisors LLC and charges a fee for the service, but subcontracts with Financial Engines to actually provide the investment advice. According to disclosures made to Nestle employees and employees of other employers whose 401(k) plans are administered by Voya, Voya Retirement Advisors charges each participant 50 basis points (.50%) for the first $100,000 of the individual's account managed by Voya Retirement Advisors, 40 basis for the next $150,000, and 25 basis points for amounts in excess of $250,000.

11. As it turns out, Voya Retirement Advisors does not actually provide any material services in connection with the advice provided to participants. Instead, virtually all of the services in connection with the advice program are provided by Financial Engines.

12. To be sure, Voya undertakes to make it appear that Voya Investment Advisors is materially involved in the process. The Nestle Savings Plan brochure announcing the advice program, which brochure on information and belief was drafted at least in material part by Voya, states that the program is "powered by Financial Engines," but the associated footnote states: "Advisory Services provided by ING Investment Advisors, L.L.C. for which Financial Engines® Advisors, L.L.C. acts as sub advisor."

13. The same footnote appears in Nestle Savings Plan participants' quarterly statements that are "signed" by ING (now Voya) Investment Advisors LLC.

14. Plan communications for Nestle Savings Plan participants direct that written inquiries with respect to the advice program be addressed to Voya "c/o Financial Engines."

15. Even the ING (Voya) individualized quarterly statements of accounts managed through the advice program are copyrighted by Financial Engines.

16. On information and belief, Voya provides no material services in connection with the advice program, and the only reason for structuring the advice service as being provided by Voya with sub advisory services by Financial Engines is to allow Voya to collect a fee to which it is not entitled.

17. In this arrangement between Voya and Financial Engines, there is no advice other than the sub advice, and to call it a sub advisory arrangement is pure fiction designed to allow Voya to substantially and materially increase the fee charged pursuant to this illegal arrangement and to conceal the true nature of the arrangement.

18. There are alternative ways to view the true nature of this arrangement, all of which run afoul of ERISA's fiduciary and prohibited transaction rules.

19. From one perspective, Voya has interposed itself between the participants and Financial Engines and charged a fee simply, and unreasonably, to allow participants access to an advice program that is performed entirely or nearly entirely by Financial Engines. Voya pays Financial Engines only a portion of the fee being charged to participants, keeping the other substantial portion for itself. Any transaction for necessary services between the Plans and Voya as a party in interest is prohibited by Section 406(a) of ERISA unless the agreement for the services meets the conditions set forth in ERISA § 408(b)(2). Among those conditions is the requirement that the service provider be paid no more than reasonable compensation. Effectively charging 25 basis points (0.25%) for performing virtually no services is *per se* unreasonable. Even assuming some minimal level of service being provided by Voya, the compensation for that service is plainly unreasonable considering the fact it is Financial Engines that is providing the actual advice and

the real value of the service.

20. From another perspective, Financial Engines, the true service provider, is charging the fees detailed in paragraph 10 above. Financial Engines then pays Voya a percentage of that fee. This arrangement violates ERISA § 406(b)(3), which prohibits a plan fiduciary from receiving "any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan."

21. Perhaps in awareness of the impropriety of these practices, Voya has taken affirmative steps to conceal from Plan participants these practices and the compensation they generated for Voya by providing incomplete, inaccurate, misleading or false information in the Annual Returns on Form 5500 for the Nestle Savings Plan and other Plans with respect to the fee sharing issues in this case. On information and belief, Voya prepares the Nestle Savings Plan's 5500 filings.

22. Even if Voya does not prepare the 5500 filings, Voya is required to provide to Nestle and all of its plan sponsor customers complete information about the direct and indirect compensation Voya expects to receive as well as the compensation it is paying to others (subcontractors) for the performance of services. As an example of Voya's disclosure failures, in the 2011 plan year Annual Return for the Nestle in the USA Savings Trust ("Nestle Trust," the master trust in which the Nestle Savings Plan is invested), Voya disclosed (or caused the Nestle Trust to disclose) that FE received direct compensation from the Nestle Savings Plan, and that Voya received direct as well as indirect compensation (although it concealed the source of that indirect compensation). In contrast, for the 2012 - 2014 plan years, once the Nestle Savings Plan expanded the advice service provided by FE, instituting the so-called Professional Account Manager service, Voya disclosed no compensation paid to FE for advice service, though FE was

paid for such service. In fact, Voya even failed to disclose FE as a plan service provider at all, though FE continued in that role.

JURISDICTION

23. Plaintiff brings this action pursuant to ERISA §§ 502(a)(2) and 502(a)(3), 29 U.S.C. §§ 1132(a)(2), and (3). This Court has subject matter jurisdiction over Plaintiff's claims pursuant to ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), and pursuant to 28 U.S.C. § 1331, because this action arises under the laws of the United States. This Court also has jurisdiction over the subject matter of this action pursuant to 18 U.S.C. §§ 1961, 1962 and 1964; 28 U.S.C. §§ 1331, 1332 and 1367; and 15 U.S.C. § 15.

24. Pursuant to 29 U.S.C. § 1132(e)(2) and 28 U.S.C. §§ 1391(b) and (c), venue is proper in this District because Defendants Voya Financial and VIM have principal places of business in this District from which Defendants' corporate services are performed. In addition, violations alleged herein occurred in this District.

THE PARTIES AND THE PLANS

25. At all relevant times (the "Relevant Period"), Plaintiff Lisa Patrico has been a participant in the Nestle Savings Plan, an ERISA Plan as defined in ERISA § 3(7), 29 U.S.C. § 1002(7). Plaintiff Patrico engaged FE to provide investment advice.

26. At all relevant times, the Nestle Savings Plan was an employee pension benefit plan within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), and an individual account plan within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34).

27. The Nestle Savings Plan is, along with other plans sponsored by Nestle USA, Inc., invested in the Nestle Trust.

28. Defendant Voya Institutional Plan Services, LLC, f/k/a ING Institutional Plan

Services, LLC ("Voya Institutional"), is an affiliate and wholly-owned subsidiary of Defendant Voya Financial, Inc., f/k/a ING U.S., Inc. ("Voya Financial"), a Delaware corporation with its headquarters in New York, New York. Voya Institutional provides recordkeeping and information management services for employee benefit plans for which it receives direct compensation from the Nestle Savings Plan and other Plans, and receives indirect compensation from other service providers to the Plans in connection with the services Voya Institutional provides to the Plans. Voya Institutional serves as an agent to Voya Financial and is located in Windsor, Connecticut.

29. Defendant Voya Investment Management, LLC, f/k/a ING Investment Management, LLC ("VIM"), is an affiliate and wholly-owned subsidiary of Defendant Voya Financial. VIM provides investment management services for employee benefit plans for which it receives direct compensation from the Nestle Savings Plan and other Plans, and receives indirect compensation from other service providers to the Plans in connection with the services VIM provides to the Plans. VIM serves as an agent to Voya Financial and is located in New York, New York.

30. Defendant Voya Retirement Advisors, LLC, f/k/a ING Investment Advisors, LLC ("VRA"), is an affiliate and wholly-owned subsidiary of Defendant Voya Financial. VRA provides investment advisory services for employee benefit plans for which it receives direct compensation from the Nestle Savings Plan and other Plans, and receives indirect compensation from other service providers to the Plans in connection with the services VRA provides to the Plans. VRA serves as an agent to Voya Financial and is located in New York, New York.

31. The Nestle Savings Plan allows participants to self-direct their contributions and account balances to various mutual funds and other collective investment options. These self-directed accounts provide for the participant to opt into receiving individualized investment advice

from FE.

32. At all relevant times, Voya provided investment management, investment advisory, recordkeeping and other administrative services to the Plans, which services included availability of investment advisory services provided by FE to plan participants.

33. At all relevant times, FE was the exclusive provider of individualized investment advice services to participants in the Plans.

NATURE OF THE ACTION – ERISA CLAIMS

34. Fiduciaries for retirement plans owe the plan and its participants and beneficiaries duties described as among the "highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2d Cir. 1982); *Braden v. Walmart Stores, Inc.*, 588 F.3d 585, 602 (8th Cir. 2009).

35. When choosing service providers for a retirement plan, and especially when choosing a service provider who will be a fiduciary to the retirement plan, an ERISA plan fiduciary is required to act with the care, skill, prudence and diligence that would be exercised by someone who is experienced and knowledgeable about the services to be provided; a prudent expert. Most fundamentally, ERISA fiduciaries are required to act solely in the best interests of plan participants. ERISA § 404(a)(1), 29 U.S.C. 1104(a)(1).

36. Specifically with respect to that most fundamental fiduciary obligation, ERISA prohibits a plan fiduciary from: (i) dealing with the assets of the plan for its own benefit or for its own account; (ii) representing a party or acting in a transaction on behalf of a party whose interests are adverse to the interests of the plan or its participants; and (iii) receiving for its own account any consideration from a party dealing with such plan in a transaction involving plan assets. ERISA § 406(b), 29 U.S.C. § 1106(b).

37. "Hiring a service provider in and of itself is a fiduciary function."[5] *A fortiori*, selecting and hiring a service provider that will be a fiduciary is a fiduciary function.

38. Voya[6] selected and hired FE as the subadvisor to ING (now Voya) Investment Advisors LLC and controlled the negotiation and implementation of the terms and conditions under which FE would provide investment advice to participants of the Plans — specifically, the terms regarding the fee sharing arrangement between Voya and FE with respect to services provided to retirement plan investors participating in the investment advice program. Although the Plans' sponsors selected Voya as the Plans' recordkeeper, investment manager, and investment advisor, if a Plan sponsor wanted to include a participant-level investment advice program in the suite of services, there was no choice but to accept FE as the provider together with the unlawful fee-sharing arrangement complained of herein.

39. To put it in different terms, Nestle and the other Plan sponsors selected the investment advice service as an optional benefit from the menu of services offered by Voya for the benefit of Plan participants, but it was Voya who selected FE as the actual service provider, controlled the terms and conditions under which the services would be provided and the fees being paid, and retained the authority to change service providers.

40. Because it was Voya that selected FE as the provider of investment advice to the Plans and Voya that negotiated all of the terms and conditions of the agreement with FE, and

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[5] EBSA Publication *Meeting Your Fiduciary Responsibilities*, available at http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html (last visited July 28, 2016).

[6] A Voya Enrollment Guide states that the investment advice program is offered through Voya Retirement Advisors. The Nestle Savings Plan's 5500, however, reports that only Voya Investment Management LLC and Voya Institutional Plan Services receive direct or indirect compensation from the Nestle Savings Plan. Conversely, a Nestle brochure states: "Advisory Services provided by ING Investment Advisors, L.L.C. for which Financial Engines® Advisors, L.L.C. acts as sub advisor." Exhibit A attached hereto - *Nestlé Smart$aving Program:* Coming July 2012: New investment fund options and an expanded investment advice service, at 9, fn **.

because the selection of a plan service provider is a fiduciary function, Voya is a fiduciary to the Plans with respect to the investment advice services and the agreement with FE. The inclusion of an investment advice provider such as FE for Plans contracting with Voya for recordkeeping and other administrative services is treated no differently under ERISA than selection of plan investment choices that are required to be included in a plan's lineup of investment choices.[7]

41. Voya is also plainly a fiduciary to the Plans by virtue of its investment management and investment advisory services to the Plans through VRA and VIM. See 29 U.S.C. subsections 1002(21)(A)(ii) and 1002(38).

42. In turn, because Voya's agreement with FE mandated the fee splitting arrangement based on the use by participants in the Plans of the investment advice program, Voya (i) caused the Plans to engage in a transaction (the investment advice services agreement) that is not eligible for the exemption provided by ERISA § 408(b)(2) because the compensation paid for such service is unreasonable; or (ii) caused the Plans to transfer plan assets to, or use by or for the benefit of a party in interest through the collection of excessive and unreasonable fees for which Voya provided virtually no services; or (iii) received consideration for its own account from a party dealing with the plan (FE) in connection with a transaction involving plan assets (managing the investment of participant accounts)..

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[7] "Viewing the evidence in the light most favorable to the Trustees, a reasonable jury could conclude that Nationwide exercises authority or control respecting disposition of plan assets by controlling which mutual funds are available investment options for the Plans and participants.

* * *

Accordingly, Nationwide may be a fiduciary to the extent that it exercises authority or control over plan assets by determining and altering which mutual funds are available for the Plans' and participants' investments." *Haddock v. Nationwide Financial Services, Inc.,* 419 F. Supp. 2d 156, 166 (D. Conn. 2006).

43. The fee charged by FE is specified in a post-2011 participant disclosure for the Nestle Savings Plan as a percentage of the value of a participant's account invested through FE: 50 basis points (fifty hundredths of one percent) for the first $100,000 invested; 40 basis points for the next $150,000 invested; and 25 basis points for amounts in excess of $250,000 invested. Fifty basis points is the maximum FE fee for any individual participant's account.

44. FE's Form ADV filed with the Securities and Exchange Commission in connection with FE's status as a registered investment adviser states: "FEA may reimburse or compensate certain plan providers for maintaining secure communications links between the plan provider's information systems and FEA's systems for the purpose of facilitating the provision of FEA's services to FEA's clients who are plan participants."

45. On information and belief, FE and Voya are splitting the asset-based fee with respect to Nestle Savings Plan accounts invested through FE as part of the Professional Account Manager service.

46. On information and belief, Voya is also receiving a fee from FE based on the number of participants eligible to participate in FE's online advice program.

47. There is no rational justification for an asset-based fee for the minimal fixed level of service Voya provides in connection with FE's investment advice program, which is little more than simply making the program available. For example, the level of Voya's services to a participant who chooses to use FE's investment advice service does not increase when that participant's account has grown through additional contributions or investment gains, yet Voya's fee will increase in proportion to the increase in the value of the account.

48. Likewise, Voya provides no greater service to one Plan participant whose account value invested through FE is $50,000 than to another Plan participant the value of whose account

invested through FE is $75,000, yet Voya's fee for the latter participant's account is materially greater than the fee for the former's account.

49. In fact, since the interface of FE's advice program with Voya's recordkeeping system does nothing more than implement investment instructions on behalf of participants in the same manner that participants directly provide investment instructions in the Plans, rights that all participants have simply by virtue of their participation in the Plans, Voya is doing nothing more than providing an electronic mechanism for implementing instructions the participants could implement on their own.

50. The cost of maintaining a communications link between Voya and FE does not increase appreciably when the number of participants in a Plan using FE's services increases, but Voya's fee for providing the service increases. An asset-based fee for a fixed level of service is unreasonable.

51. Whether or not an asset-based fee for a fixed service is ever reasonable, the amount of compensation Voya received was plainly unreasonable in relation to the service being provided.

52. As a result of this fee sharing arrangement with FE, Voya either received excessive and unreasonable compensation for a service provided entirely by another party or received for its own account consideration from a party (FE) dealing with the Plans in transactions involving plan assets, in violation of ERISA § 406(b)(3), 29 U.S.C. § 1106(b)(3).

53. Even if, *arguendo*, Voya were not considered a fiduciary with respect to its investment management and advisory services, or the selection of FE and the imposition of the fee-sharing arrangement on the Plans, the U.S. Supreme Court has made it clear that ERISA § 502(a)(3) authorizes a civil action against a non-fiduciary who participates in a transaction

prohibited by ERISA § 406:[8]

> As petitioners and *amicus curiae* the United States observe, it has long been settled that when a trustee in breach of his fiduciary duty to the beneficiaries transfers trust property to a third person, the third person takes the property subject to the trust, unless he has purchased the property for value and without notice of the fiduciary's breach of duty. The trustee or beneficiaries may then maintain an action for restitution of the property (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of the third person's profits derived therefrom.[9]

CLASS ACTION ALLEGATIONS

54. 29 U.S.C. §1132(a)(2) authorizes any participant or beneficiary of the Plan to bring an action individually on behalf of the Plan to enforce a breaching fiduciary's liability to the Plan under 29 U.S.C. § 1109(a).

55. In acting in this representative capacity, and to enhance the due process protections of unnamed participants and beneficiaries of the Plan, as an alternative to direct individual actions on behalf of the Plan under 29 U.S.C. §§1132(a)(2) and (3), Plaintiff seeks to certify this matter as a class action on behalf of all participants and beneficiaries of the Nestle Savings Plan and the Plans. Plaintiff seeks to certify, and to be appointed as representative of, the following class (the "Class"):

> The Nestle Savings Plan and every other participant-directed individual account plan for which Voya provides recordkeeping, investment management, or investment advisory services, and for which FE provides investment advice to Plan participants either directly or as sub advisor to Voya, one or more of whose participants have elected to utilize FE's services, at any time from the earlier of (i) six years before the filing of this action, or (ii), in the event the Court determines

[8] *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000).
[9] *Id.*, at 245.

that Voya has concealed the facts and circumstances that would have apprised Plaintiffs and the Class of the existence of Voya's breach, the first date on which Voya provided managed account investment advice services through Financial Engines either directly or as sub advisor to Voya, and in either case, through the date of judgment (the "Class Period").

56. This action meets the requirements of Rule 23 and is certifiable as a class action for the following reasons:

a. The proposed Class includes hundreds if not thousands of members and is so large that joinder of all its members is impracticable.

b. There are questions of law and fact common to the Class because the Defendants owed fiduciary duties to the Nestle Savings Plan and to all Plans and took the actions and omissions alleged herein as to all of the Plans and not as to any individual Plan. Thus, common questions of law and fact include the following, without limitation: whether Voya is a fiduciary with respect to the Plans and is liable for the remedies provided by 29 U.S.C. §1109(a); whether as a fiduciary of the Plans, Voya breached its fiduciary duties to the Plans; how the losses to the Plans resulting from each breach of fiduciary duty are to be calculated; and what Plan-wide equitable and other relief the court should impose in light of Defendants' breach of duty.

c. Plaintiff's claims are typical of the claims of the Class because Plaintiff was a Nestle Savings Plan participant during the time period at issue in this action, utilized FE's services, and all similarly situated participants in the Plans were harmed by Defendants' misconduct.

d. Plaintiff is an adequate representative of the Class because she was a participant in the Nestle Savings Plan during the Class period utilizing the services of FE, has no

interest that is in conflict with the FE Class, is committed to the vigorous representation of the FE Class, and has engaged experienced and competent attorneys to represent the FE Class.

e. Prosecution of separate actions by individual Plans for these breaches of fiduciary duties would create the risk of: (1) inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendants in respect to the discharge of their fiduciary duties to the Plans and personal liability to the Plans under 29 U.S.C. §1109(a), and (2) adjudications by the Nestle Savings Plan regarding these breaches of fiduciary duties and remedies for the Nestle Savings Plan would, as a practical matter, be dispositive of the interests of the Plans not parties to the adjudication or would substantially impair or impede those Plans' ability to protect their interests. Therefore, this action should be certified as a class action under Rule 23(b)(1)(A) or (B).

57. A class action is the superior method for the fair and efficient adjudication of this controversy because joinder of all participants and beneficiaries is impracticable, the losses suffered by individual Plans may be small and impracticable for individual Plans to enforce their rights through individual actions, and the common questions of law and fact predominate over individual questions. Given the nature of the allegations, no class member has an interest in individually controlling the prosecution of this matter, and Plaintiff is aware of no difficulties likely to be encountered in the management of this matter as a class action. Alternatively, then, this action may be certified as a class under Rule 23(b)(3) if it is not certified under Rule 23(b)(1)(A) or (B).

58. Plaintiff's counsel will fairly and adequately represent the interests of the Class and is best able to represent the interests of the Class under Rule 23(g).

COUNT I
Breach of Duty of Loyalty – Investment Advice Program

Dealing with Plan Assets for its Own Account

59. Plaintiff repeats and realleges each of the allegations in the foregoing paragraphs as if fully set forth herein.

60. ERISA § 404, 29 U.S.C. §1104, requires Voya to perform its fiduciary duties and responsibilities solely in the best interest of Plan participants for the purpose of providing them benefits under the Plans.

61. ERISA § 406(b)(1), 29 U.S.C. §1106(b)(1), prohibits a fiduciary from dealing with the assets of a plan in its own interest or for its own account.

62. ERISA § 406(b)(3), 29 U.S.C. §1106(b)(3), prohibits a fiduciary from receiving any consideration for its own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

63. Voya acted as a fiduciary to Plaintiff, the Nestle Savings Plan, and the Plans by, *inter alia*: (a) agreeing to provide investment advice to the Plans and their participants for a fee and obtaining the authority of participants to assume management of those participants' accounts; (b) hiring FE and controlling the negotiation of the terms and conditions under which FE would provide its services to Plan participants and the fee that would be paid to FE from the fees charged by Voya; and (c) selecting FE as an investment advice provider for Plan participants.

64. Voya breached its duty of loyalty under ERISA owed to Plaintiff, the Nestle Savings Plan, and the Plans. These breaches include, *inter alia*: (a) devising an arrangement with FE for the purpose of collecting and paying to Voya unreasonable and excessive fees for services that were actually provided by FE, at the expense of plan participants and the Plans, and concealing the true nature of the arrangement from Plaintiff and the Plans; and (b) charging unreasonable and excessive fees for the services provided to the participants in the Nestle Savings Plan and the Plans

or to FE in connection with FE's investment advice program.

65. Voya is liable under 29 U.S.C. §1109(a) to make good to the Plans any losses to the Plans resulting from the breaches of fiduciary duty alleged in this Count and is subject to other equitable or remedial relief as appropriate.

COUNT II

Prohibited Transaction - Excessive and Unreasonable Compensation for Services in Violation of ERISA §408(b)(2)

66. Plaintiff repeats and realleges the allegations contained above as if fully stated herein.

67. Section 406(a)(1)(C) of ERISA, 29 USC § 1106(a)(1)(C), generally prohibits the direct or indirect furnishing of services between a plan and a party-in-interest.

68. Section 3(14) of ERISA, 29 U.S. Code § 1002(14) defines a party-in-interest as, among other things, as a person providing services to a plan.

69. As a result of providing recordkeeping, investment management and investment advisory services to the Nestle Savings Plan and the Plans, Voya is a party-in-interest to the Plans.

70. As an investment advisor to the Nestle Savings Plan, the Plans and their participants, Voya is a fiduciary to the Nestle Savings Plan, the Plans and their participants.

71. Section 408(b)(2) of ERISA, 29 USC § 1108(b)(2) exempts from the prohibitions of ERISA § 406(a)(1)(C) "contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, ***if no more than reasonable compensation is paid therefor***" (emphasis added).

72. Since Voya provided no material services in connection with the investment advice provided to participants in the Nestle Savings Plan and the Plans, the compensation Voya received in connection with such services constitutes excessive and unreasonable compensation for which

no exemption is available.

73. By charging excessive and unreasonable compensation for the nonexistent or minimal services Voya provided (i) to participants or the Nestle Savings Plan and the Plans in connection with the investment advice program, or (ii) to Financial Engines in connection with the services provided by Financial Engines, Voya has caused the Nestle Plan and the Plans to engage in prohibited transactions in violation of ERISA § 406(a).

74. Even if Voya is found not to have caused the Nestle Savings Plan and the Plans to engage in prohibited transactions, Voya is liable for disgorgement of the excessive compensation it received.

75. Accordingly, Defendants are liable to Plaintiff and the Plans for their actual damages as proven at trial plus interest and attorneys' fees.

PRAYER FOR RELIEF

Wherefore, Plaintiff prays for judgment as follows:

A. Certify this action as a class action as stated here and appoint Plaintiff's counsel as Class Counsel pursuant to Federal Rule of Civil Procedure 23;

B. Declare that Defendants breached their fiduciary duties to the FE Class;

C. Enjoin Defendants from further violations of its fiduciary responsibilities, obligations, and duties and from further engaging in transactions prohibited by ERISA;

D. Order that Defendants make good to the Plans the losses resulting from their serial breaches of fiduciary duty;

E. Order that Defendants disgorge any profits that they have made through their breaches of fiduciary duty and prohibited transactions and impose a constructive trust and/or equitable lien on any funds received by Defendants therefrom;

F. Award Plaintiff reasonable attorneys' fees and costs of suit incurred herein pursuant to ERISA § 502(g), 29 U.S.C. § 1132(g), and/or for the benefit obtained for the Plans;

G. Order Defendants to pay prejudgment interest; and

H. Award such other and further relief as the Court deems equitable and just.

DATED this 9th day of September, 2016.

By: */s/ John J. Nestico*

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