

In the United States Court of Appeals
for the Third Circuit

No. 10-2447

MARK RENFRO, *et al.*,
Plaintiffs-Appellants,

vs.

UNISYS CORP., *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania (Schiller, J.)

Dist. Ct. Civil Action No. 07-2098

**Brief of The Investment Company
Institute as *Amicus Curiae* in Support of
Appellees**

Thomas L. Cabbage III
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. NW
Washington DC 20004-2401
(202) 662-6000
tcabbage@cov.com

Fed. R. App. P. 26.1 Disclosure Statement

The Investment Company Institute has no publicly traded parent corporation.

Table of Contents

Fed. R. App. P. 26.1 Disclosure Statement	i
Table of Contents.....	ii
Table of Authorities	iv
Statement of Interest of the <i>Amicus Curiae</i>	1
Discussion	2
I. Introduction.....	2
II. Defined Contribution Plans and Mutual Funds.....	2
A. Defined Contribution Plans.....	2
B. Mutual Funds	4
1. Mutual Funds Generally.....	4
2. “Retail” and “Institutional” Investment Vehicles	7
C. Mutual Funds Are Very Common Investment Options in 401(k) Plans, Large and Small	12
III. Plaintiffs Did Not Plead a Colorable Claim of Fiduciary Imprudence.....	15
A. Prudent Fiduciary Decision Making.....	15
B. A Court Can Infer Neither an Imprudent Process Nor an Objectively Unsound Outcome from the Alleged Selection of Retail Mutual Funds	17
C. The Extrinsic Statements Plaintiffs Cite on Appeal Do Not Render Their Conclusory Allegations Plausible.....	20
D. The DOL Advocates an Erroneous Pleading Standard.....	25

Conclusion..... 32

Appendix A.....A-i

Certificate of ComplianceA-viii

Certificate of Virus CheckA-viii

Certificate of Service A-ix

Table of Authorities

Judicial Decisions

<i>Armstrong v. LaSalle Bank N.A.</i> , 446 F.3d 728 (7th Cir. 2006)	16
<i>Ashcroft v. Iqbal</i> , 129 S. Ct. 1937 (2009)	19, 20
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	<i>passim</i>
<i>Chao v. Merino</i> , 452 F.3d 174 (2d Cir. 2006).....	16
<i>Conkright v. Frommert</i> , 130 S. Ct. 1640 (2010)	31
<i>Cooper v. IBM Personal Pension Plan</i> , 457 F.3d 636 (7th Cir. 2006)	32
<i>Fink v. Nat’l Sav. & Trust Co.</i> , 772 F.2d 951 (D.C. Cir. 1985)	15
<i>Hecker v. Deere & Co.</i> , 556 F.3d 575 (7th Cir.), <i>reh’g denied</i> , 569 F.3d 708 (2009), <i>cert. denied</i> , 130 S. Ct. 1141 (2010)	18, 29, 31
<i>Jones v. Harris Assocs., L.P.</i> , 130 S. Ct. 1418 (2010).....	4, 11, 12, 24
<i>LaRue v. DeWolff, Boberg & Assocs., Inc.</i> , 128 S. Ct. 1020 (2008)	29
<i>Lockheed Corp. v. Spink</i> , 517 U.S. 882 (1996)	31
<i>Oran v. Stafford</i> , 226 F.3d 275 (3d Cir. 2000).....	14
<i>Unisys Sav. Plan Litig., In re</i> , 74 F.3d 420 (3d Cir. 1996) (“ <i>Unisys I</i> ”)	16
<i>Unisys Sav. Plan Litig., In re</i> , 173 F.3d 145 (3d Cir. 1992) (“ <i>Unisys II</i> ”)	15
<i>Vitale v. Latrobe Area Hosp.</i> , 420 F.3d 278 (3d Cir. 2005)	16

Statutory Provisions

15 U.S.C. § 77j(a) 7

15 U.S.C. § 80a-8(b) 7

15 U.S.C. § 80a-1 *et seq.* (Investment Company Act of 1940
(1940 Act)) 4

15 U.S.C. § 80a-18(f) 8

15 U.S.C. § 80a-22 6

26 U.S.C. § 562(c) (Internal Revenue Code § 562(c)) 8

29 U.S.C. § 1002(21) (ERISA § 3(21)) 4

29 U.S.C. § 1101(b) (ERISA § 401(b)) 4

29 U.S.C. § 1104(a) (ERISA § 404(a)) 15, 16

29 U.S.C. § 1132(a) (ERISA § 502(a)) 29

Federal Regulations

17 C.F.R. § 270.18f-3 9

17 C.F.R. § 270.22c-1(b)(1) 6

17 C.F.R. § 274.11A 7

29 C.F.R. § 2509.75-3 4

29 C.F.R. § 2550.404c-1(e)(1)(i) 4

Federal Procedural Rules

Fed. R. Civ. P. 12(b) 19

Fed. R. App. P. 32(a) A-viii

Other Sources and Authorities

Collins, Sean, *The Expenses of Defined Benefit Pension Plans and Mutual Funds* (ICI 2003) (www.ici.org/pdf/per09-06.pdf) 3, 26

Deloitte Consulting LLP, *et al.*, *401(k) Annual Benchmarking Survey* (2006) (www.ifebp.org/pdf/research/2005-06Annual401kSurvey.pdf) 13

Deloitte Consulting LLP, *et al.*, *401(k) Annual Benchmarking Survey* (2009) ([www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_consulting_401\(k\)AnnualBenchmarkingSurvey2009_081409.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_consulting_401(k)AnnualBenchmarkingSurvey2009_081409.pdf)) 12, 13

Edelen, Roger M., *et al.*, “Scale Effects in Mutual Fund Performance: The Role of Trading Costs” (May 17, 2007) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951367 (abstract)) 23

Holden, Sarah, & Michael Hadley, *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2006* (ICI 2006) (www.ici.org/pdf/fm-v15n7.pdf) 27

Holden, Sarah, & Michael Hadley, *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2008* (ICI 2009) (www.ici.org/pdf/fm-v18n6.pdf) 27

Holden, Sarah, Michael Hadley and Shaun Lutz, *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2009* (ICI 2010) (www.ici.org/pdf/fm-v19n5.pdf) 9, 27

HUBBARD, R. GLENN, *ET AL.*, *THE MUTUAL FUND INDUSTRY: COMPETITION AND INVESTOR WELFARE* (2010) 26

Investment Company Institute, *Mutual Funds and Institutional Accounts: A Comparison* (ICI 2006) (www.ici.org/pdf/ppr_06_mf_inst_comparison.pdf) 10, 11

Kopcke, Richard W., *et al.*, “Reducing Costs of 401(k) Plans with ETFs and Commingled Trusts” (July 2010) (http://crr.bc.edu/images/stories/Briefs/ib_10-11.pdf) 21, 22, 23

Mitchell, Olivia, *et al.*, “The Inattentive Participant: Portfolio Trading Behavior in 401(k) Plans” (2006) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1094834 (abstract)) 22

Profit Sharing/401k Council of America, *53rd Annual Survey of Profit Sharing and 401(k) Plans (Reflecting 2009 Plan Experience)* (2010) 13, 14

Shidler, Lisa, “Trading costs on mutual funds outweigh commission fees for investors, experts say,” *Investment News* (May 29, 2009) (www.investmentnews.com (registration required)) 22

U.S. Dep’t of Labor, *A Look at 401(k) Plan Fees* (www.dol.gov/ebsa/publications/401k_employee.html) 30

U.S. Dep’t of Labor, *Understanding Retirement Plan Fees and Expenses* (2004) (www.dol.gov/ebsa/publications/undrstndgrtrmnt.pdf) 30

U.S. Dep’t of Labor, Brief of Secretary of Labor as *Amicus* in *Braden v. Wal-Mart Stores, Inc.* (8th Cir. No. 08-3798) (March 13, 2009) ([www.dol.gov/sol/media/briefs/braden\(A\)-03-13-2009.pdf](http://www.dol.gov/sol/media/briefs/braden(A)-03-13-2009.pdf)) 30

U.S. Securities & Exchange Comm’n, *Mutual Fund Fees and Expenses* (2007) (www.sec.gov/answers/mffees.htm) 6

U.S. Securities & Exchange Comm’n, “Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies,” 74 Fed. Reg. 4546 (Jan. 26, 2009)..... 7

Vine, John M., *Prudent Investing*, TAX MGM'T COMPENSATION
PLANNING J., Vol. 38, No. 1 (Jan. 1, 2010)
(www.eric.org/forms/uploadFiles/1E77B0000009E.filename
e.10-_VineArt_Prud_Invstng.pdf) 15

Williams, Howard R., *The Prudent Man Rule of the Pension
Reform Act of 1974*, 31 BUS. LAWYER 99 (1975)..... 16

**STATEMENT OF INTEREST OF THE
*AMICUS CURIAE***

The Investment Company Institute (“ICI” or “Institute”) respectfully submits this brief as *amicus curiae*. ICI is the national association of investment companies in the United States. Its members include over 8,500 mutual funds. Since its founding in 1940, one of ICI’s main objectives has been to protect and advance the interests of all mutual fund shareholders (including 401(k) plan participants invested in mutual funds) through advocacy directed at ensuring a sound legal and regulatory framework for the mutual fund industry. ICI’s legislative, regulatory, and other initiatives focus on increasing government and public awareness of issues affecting investment companies and their shareholders. ICI conducts extensive research on the retirement market and the mutual fund industry, which is used and cited routinely by the Federal Reserve, the Department of Labor (“DOL”), and other regulators.

Mutual funds are a major investment vehicle of choice for fiduciaries and participants in 401(k) plans. With the consent of all parties, ICI submits this *amicus* brief in support of Appellees.

DISCUSSION

I. Introduction

ICI endorses the district court opinion in its entirety. Given limited space, however, this brief addresses only Plaintiffs' arguments that the Second Amended Complaint ("Complaint") states claims that alleged fiduciaries "breached their duties of loyalty and prudence by selecting retail mutual funds as plan investment options" (App't Br. at 2) and the DOL's views supporting those arguments.

II. Defined Contribution Plans and Mutual Funds

A. Defined Contribution Plans

Defined contribution plans provide benefits to participants based on balances in accounts maintained for each participant. A participant's account reflects her interest in the contributions made to the plan and her share of the plan's investment experience and expenses. The most common defined contribution plans are 401(k) plans.

Most 401(k) plans allow each participant to allocate all or part of the participant's account balance among several designated investment options. Many plans allow participants to elect to change investments as often as daily. Because participants vary in age and other respects, they may prefer different investment styles to achieve varied goals

according to their own objectives, risk tolerances, expected retirement dates, and other savings needs. In large plans, investment decisions are made individually by thousands of participants, any one of whom may elect to change an investment on any business day. The transactional patterns of participant-directed 401(k) plans therefore differ greatly from those of a typical defined benefit pension plan, which invests an aggregate trust fund from which formulaic benefits are paid to retirees.¹

The investment options offered by 401(k) plans differ from plan to plan, but frequently include a mix of pooled equity or bond investment vehicles, capital preservation products (*e.g.*, money market funds or guaranteed investment contracts), and employer stock. Because mutual funds offer diversified investment portfolios and provide publicly available information that can help participants make informed decisions, mutual funds are especially popular investment options.

Numerous ERISA provisions and DOL regulations expressly contemplate that plan assets may be invested in mutual funds operated

¹ Sean Collins, *The Expenses of Defined Benefit Pension Plans and Mutual Funds*, at 17 (ICI 2003) (www.ici.org/pdf/per09-06.pdf) (“Although mutual funds and pension plans have some features in common—such as managing large pools of assets—they also have significant organizational and institutional differences.”). All websites cited herein were last viewed on November 15, 2010.

under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.* (the “1940 Act”). *See* 29 U.S.C. § 1002(21)(B) (specifying that plan investment in a mutual fund does not make the fund’s adviser a plan fiduciary for ERISA purposes); *id.* § 1101(b)(1) (specifying that mutual fund shares owned by a plan are plan assets, but that such mutual fund’s underlying investments are not plan assets); 29 C.F.R. § 2509.75-3 (specifying that “a person who is connected with an investment company ... is not deemed to be a fiduciary of or party in interest with respect to a plan solely because the plan has invested in the investment company’s shares”); *id.* § 2550.404c-1(e)(1)(i) (defining mutual funds as “look-through investment vehicles” for purposes of regulations implementing ERISA Section 404(c)).

B. Mutual Funds

1. *Mutual Funds Generally*

A mutual fund is a pool of assets, consisting primarily of a portfolio of securities purchased with capital obtained from the fund’s shareholders. *Jones v. Harris Assocs., L.P.*, 130 S. Ct. 1418, 1422 (2010).

The fund’s *raison d’être* is to allow shareholders to collectively and efficiently purchase a diversified and professionally managed portfolio,

even if they make relatively small individual investments. Under the management of its investment adviser, a mutual fund assembles its portfolio in accord with stated objectives. These investment objectives, and the styles and strategies to obtain them, can vary greatly—*e.g.*, different types of securities (equity, fixed income, or both), different sizes of targeted enterprises (“large cap,” “small cap,” etc.), different geographic locations (domestic U.S., emerging foreign markets, etc.), different management styles (index-based versus active management), and so on.

Like other professional services, the investment management services provided by mutual funds are not fungible. Even two mutual funds with the same basic objectives—*e.g.*, two small cap growth funds—can be expected to assemble different portfolios and often achieve materially different investment results. Thus investment management resembles other professional services, such as medical and legal services, whose providers are not interchangeable.

In addition to investment management, mutual funds provide numerous other services to shareholders, including communications with shareholders, compliance with myriad regulations, and accounting

services. Required by law to provide daily pricing (17 C.F.R. § 270.22c-1(b)(1)) and daily redemption (15 U.S.C. § 80a-22), mutual funds typically build or contract for the technological capacity to handle purchase, redemption, and exchange orders of thousands of shareholders daily and to provide ongoing recordkeeping and customer service to large numbers of investors. Mutual funds incur expenses for providing all of these services to shareholders.²

Mutual funds are governed by all of the major securities laws, including the 1940 Act, the Securities Act of 1933, and implementing regulations. These laws govern, *inter alia*, mutual fund capital structure, custody of fund assets, and how funds value their portfolios. This regulatory framework holds advisers and fund boards to fiduciary standards, strictly regulates conflicts of interest, and imposes disclosure rules with the needs of ordinary investors in mind. Those disclosure rules require that each mutual fund provide shareholders a prospectus containing extensive information about the fund's organization, fees and expenses, investment strategy, investment risks, and past performance, as well as a summary prospectus that discloses the key

² See SEC, *Mutual Fund Fees and Expenses* (2007) (www.sec.gov/answers/mffees.htm).

information in plain English and in a standardized format.³ These valuable protections are among the reasons that mutual funds are highly favored by retail investors.

2. “Retail” and “Institutional” Investment Vehicles

In the Complaint, Plaintiffs challenge the presence of “retail mutual funds” among the Unisys Plan’s investment options. Although Plaintiffs use the term inconsistently, the Complaint appears to define “retail mutual funds” as those “that are made available to investors with as little as \$2,500 to invest.” Complaint ¶ 47. Elsewhere, Plaintiffs seem to intend “retail mutual fund” to denote any mutual fund other than “institution-oriented investment vehicles” (App’t Br. at 11) such as “institutional share classes of ... mutual funds, ... separate accounts and/or commingled funds” (Complaint ¶50(I)). In attempting to establish “retail” as a shorthand and pejorative label, Plaintiffs have mischaracterized how mutual fund fees work and incorrectly suggest that “retail” mutual funds are essentially the “expensive” funds.

³ See 15 U.S.C. §§ 77j(a), 80a-8(b); 17 C.F.R. § 274.11A; SEC, “Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies,” 74 Fed. Reg. 4546 (Jan. 26, 2009).

First, all mutual fund investments (including those in “institutional share classes” of mutual funds) have features characteristic of investments in “retail” products. All mutual funds must be capable of interacting with and serving large numbers of shareholders. Moreover, *any* kind of investment vehicle that a 401(k) plan offers to thousands of individual, decision-making participants—whether or not it is a mutual fund—takes on a “retail” character in that setting. Thus, in the 401(k) plan setting, even trust fund vehicles such as “separate accounts” and “commingled funds” must take on, or be complemented with the services of other vendors to provide, many of the same characteristics as “retail mutual funds.”

Second, contrary to Plaintiffs’ implied suggestion, individual 401(k) plan fiduciaries cannot negotiate pricing with mutual funds. The securities laws require a mutual fund to charge the expense ratio, which includes the advisory fee, to every investor in a particular share class—no more or less.⁴ Mutual funds may establish distinct share

⁴ The effect of negotiating a discount for certain shareholders would be a senior security to those shareholders, which is prohibited by the 1940 Act. 15 U.S.C. § 80a-18(f). It also could violate an Internal Revenue Code provision prohibiting registered investment companies from distributing preferential dividends. 26 U.S.C. § 562(c).

classes within the fund, where the components of the expense ratio other than the advisory fee (*e.g.*, administrative expenses, distribution fees, and loads, if any) may vary, but the SEC requires the fund to charge the same advisory fee to all shareholders in each share class. 17 C.F.R. § 270.18f-3. Where the fund decides to establish separate share classes—and many do not—one share class may be labeled the “institutional” class because it is designed for a segment of the market requiring fewer services and distribution expenses. But no investor in any particular share class may “negotiate” with a fund or its adviser for a lower fee.

Moreover, simply because a share class is called “institutional” does not guarantee that it has lower fees than funds with similar investment objectives. The expense ratios of “institutional” mutual fund share classes are sometimes well above the fees of a “retail or general purpose” share class of another fund in the same asset category.

Institute data show that 401(k) plan assets invested in mutual funds are concentrated in lower-cost funds⁵ and when these data are

⁵ Sarah Holden, Michael Hadley and Shaun Lutz, *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2009*, at 12-15 (ICI 2010) (www.ici.org/pdf/fm-v19n5.pdf) (“Holden, Hadley & Lutz

segregated by institutional versus retail or general purpose share class, the same pattern emerges. The average expense ratio of no-load institutional funds or share classes of equity mutual funds offered for sale in 2009 was 1.03 percent. But the asset-weighted average expense ratio incurred by 401(k) investors in no-load “retail or general purpose” share classes of equity mutual funds in 2009 was 0.70 percent—fully 32 percent less. In other words, these data indicate that 401(k) plan fiduciaries and participants tend to seek out lower-cost mutual funds, regardless of the label attached to those funds.

Plaintiffs also challenge the selection of mutual funds rather than alternatives to registered mutual funds, such as trust accounts. These trust accounts may take the form of a separate account (holding a single plan’s assets) or a collective trust or commingled pool (holding multiple plans’ assets).⁶

2009”). For an explanation of the categories in the Institute’s data, see *id.* at 10.

⁶ ICI, *Mutual Funds and Institutional Accounts: A Comparison*, at 1 n.2 (ICI 2006) (www.ici.org/pdf/ppr_06_mf_inst_comparison.pdf).

These trust accounts, however, are not governed by securities laws such as the 1940 Act or 1933 Act.⁷ As the Supreme Court observed, the important protections these laws provide for investors require mutual funds to incur the costs of satisfying “more burdensome regulatory and legal obligations” than other investment vehicles must satisfy. *Harris Assocs.*, 130 S. Ct. at 1428-29.

Moreover, the court should be wary of inapt comparisons, because the services that separate accounts and collective trusts provide may differ from those of mutual funds. While some providers of trust accounts can provide services such as daily individual account valuation, customer service, or communications for individual participants, providing those services *in addition to* investment management will entail additional fees.⁸ Consequently, comparisons

⁷ *Id.* at 5. Moreover, unlike trust account managers, broker-dealers that sell mutual funds must comply with the Securities Exchange Act of 1934 and the advisers to mutual funds must comply with the Investment Advisers Act of 1940, as well as the 1940 Act.

⁸ ICI, *Mutual Funds and Institutional Accounts*, at 9 (observing that, generally, “if an institutional investor such as a defined benefit pension plan offers beneficiaries an Internet website or a call center to handle inquiries, the costs of providing those services are not encompassed in the advisory fees that the institution pays for investment management”).

that focus exclusively on the investment advisory fee component of different investment vehicles are misleading. *Id.* at 1429 (“If the services rendered are sufficiently different that a comparison is not probative, then courts must reject such a comparison.”).

C. Mutual Funds Are Very Common Investment Options in 401(k) Plans, Large and Small

Not surprisingly, mutual funds are ubiquitous investment options among 401(k) plans—including large ones. Because mutual funds are designed to provide information to a multitude of actual and potential investors and to process large numbers of investments and redemptions on a daily basis, they are well-suited to meet the needs of a 401(k) plan.

Deloitte Consulting LLP conducts a periodic survey of 401(k) plans.⁹ Its 2009 edition compiled data from more than 600 employers that sponsor such plans, including many large employers with more than 10,000 employees.¹⁰ Among 510 employers providing data on 401(k) plan investments, 91% reported offering mutual funds as investment

⁹ See [www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_consulting_401\(k\)AnnualBenchmarkingSurvey2009_081409.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_consulting_401(k)AnnualBenchmarkingSurvey2009_081409.pdf).

¹⁰ *Id.* at 6 (Ex. 4).

options in 2009.¹¹ This level of mutual fund usage in 401(k) plans was not unusual; Deloitte found the same datum (91%) in its 2005-06 survey.¹²

The frequent inclusion of mutual funds as investment options remains true even in the largest 401(k) plans. The Profit Sharing/401k Council's recent survey of 931 profit-sharing and 401(k) plans asked plans about the investment structure they used for various investment strategies (*e.g.*, bond-actively managed, equity-indexed international, real estate fund, etc.).¹³ While use of non-registered products like collective trusts and separate accounts is higher among larger plans, among the largest plans in the survey (with 5,000 or more participants), mutual funds were used by a majority of plans in *every category of investment strategy* except stable value funds (which generally by law cannot operate as mutual funds and must be created as trusts). For example, 79.8% of these large plans report using mutual funds for their

¹¹ *Id.* at 26 (Ex. 77).

¹² See www.ifebp.org/pdf/research/2005-06Annual401kSurvey.pdf (p. 19 (Ex. 71)).

¹³ Profit Sharing/401k Council of America, *53rd Annual Survey of Profit Sharing and 401(k) Plans (Reflecting 2009 Plan Experience)*, at 36 (2010) (Table 59).

plans' actively-managed domestic equity fund(s), compared with 17.2% for collective trusts and 22.2% for separately managed accounts.¹⁴

Further light on the widespread use of mutual funds in the largest 401(k) plans is shed by Forms 11-K filed by many (but not all) plans with the SEC.¹⁵ For fiscal years ending in 2008, at least fifty-nine defined contribution plans that held more than \$1 billion in assets (including the Unisys Plan) reported to the SEC that they owned shares of registered investment companies (*i.e.*, mutual funds). *See* Appendix A, *infra*. At least five additional plans with assets in excess of \$1 billion (but whose 2008 filings are not available online) reported investments in mutual funds in fiscal year 2007. *Id.* Notably, to the extent that some SEC filings identify particular mutual funds, so-called “retail” mutual funds appear as well as “institutional” mutual funds.¹⁶

¹⁴ About 1% of the surveyed plans reported using insurance company pooled general accounts for such investments. *Id.*

¹⁵ Courts may take judicial notice of data in SEC filings. *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000).

¹⁶ For example, the Dodge & Cox Stock Fund—a widely held “retail” mutual fund—was included among at least eleven of the aforementioned sixty-four large plans. *See* Appendix A. Shares of the Fidelity Low Price Stock Fund were reported as owned by at least nine of them, including the Unisys Plan. *Id.*

III. Plaintiffs Did Not Plead a Colorable Claim of Fiduciary Imprudence

A. Prudent Fiduciary Decision Making

In order to state a claim of entitlement to relief for breach of the fiduciary duty of prudence, the allegations must be sufficient to establish both that a fiduciary failed to follow a prudent process and that a hypothetical prudent fiduciary would not have made the same decision. *See In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 153-54 (3d Cir. 1992) (“*Unisys II*”); *Fink v. Nat’l Sav. & Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part). The allegations in the Complaint are insufficient to satisfy that standard.

ERISA defines and mandates prudent investing, not prudent investments. ERISA’s fiduciary duty provisions require consideration of the way investment decisions are made. *See* 29 U.S.C. § 1104(a)(1)(B) (directing how the fiduciary shall “discharge his duties”).¹⁷

ERISA’s fiduciary standards seek to accommodate a variety of investments and investment strategies. Congress chose not to impose

¹⁷ *See* John M. Vine, *Prudent Investing*, TAX MGM’T COMPENSATION PLANNING J., Vol. 38, No. 1 (Jan. 1, 2010) (www.eric.org/forms/uploadFiles/1E77B0000009E.filename.10-VineArt_Prud_Invstng.pdf).

rigid requirements such as “legal list” rules that limited permissible trust investments under English law and in some states.¹⁸ In accord with congressional intent, the prudence requirement is flexible, with the fiduciary’s selection process and choices evaluated in light of the character and aims of the particular plan. *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996) (“*Unisys I*”); 29 U.S.C. § 1104(a)(1)(B). ERISA establishes “an objective standard” for evaluating prudence, *Unisys I*, 74 F.3d at 434, which evaluates fiduciary conduct under circumstances and standards prevailing at the time it occurred. *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006). Although ERISA establishes a standard of care, review of fiduciaries’ actions properly entails some deference to avoid mere judicial second-guessing. *Armstrong v. LaSalle Bank N.A.*, 446 F.3d 728, 732-33 (7th Cir. 2006); *cf. Vitale v. Latrobe Area Hosp.*, 420 F.3d 278, 281-82 (3d Cir. 2005) (discussing deferential review of ERISA plan administrators’ discretionary actions).

¹⁸ See Howard R. Williams, *The Prudent Man Rule of the Pension Reform Act of 1974*, 31 BUS. LAWYER 99, 100 (1975) (discussing Congress’s rejection of a “legal list” in favor of the prudent fiduciary standard).

B. A Court Can Infer Neither an Imprudent Process Nor an Objectively Unsound Outcome from the Alleged Selection of Retail Mutual Funds

The DOL and Plaintiffs alike err in maintaining that the alleged selection of retail mutual funds is sufficient to state a claim. Selection of the mutual funds at issue here does not plausibly imply imprudent conduct.

The Complaint avers that a fiduciary breach occurred because defendants “included high priced retail mutual funds and/or other funds as Plan investment options.” Complaint ¶¶ 50(I), 75(H). On appeal, Plaintiffs attempt to establish that this averment states a claim because the chosen investments were categorically imprudent. *See* App’t Brief at 11 (“The Plan’s imprudent investment options”); *id.* at 25 (same). The Complaint alleges nothing about the actions of the fiduciaries in choosing investment options except naked, conclusory assertions about failures to adequately consider cheaper investment vehicles.

Plaintiffs’ argument on appeal focuses exclusively on the character of the chosen investment options. App’t Br. at 25-33. Thus, for example, Plaintiffs start from the premise that “mutual funds are unreasonable

for large retirement plans.” *Id.* at 26. While Plaintiffs erroneously contend that the district court adjudged retail mutual funds to be “reasonable ‘on their face’,” *id.* at 25, their brief reveals that Plaintiffs advocate the proposition that retail mutual funds are inherently imprudent as investment options for a large 401(k) plan. They urge the Court to infer a plausible entitlement to relief simply because they contend “fiduciaries of large retirement plans have easy access to institution-oriented investment vehicles ... which charge much lower fees and,” Plaintiffs assert, consequently “provide better returns than mutual funds for the same investment strategies.” *Id.* at 11.

Of course, cheaper is not necessarily better and does not necessarily assure a better investment return, because investment portfolios vary even among investment vehicles with similar strategies, investment advisers’ services are not fungible, and expenses constitute only one factor among many that determine the net investment performance of any investment vehicle. *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir.) (noting that the cheapest fund “might ... be plagued by other problems”), *reh’g denied*, 569 F.3d 708 (2009), *cert. denied*, 130 S. Ct. 1141 (2010).

Whether Plaintiffs have stated a claim must be assessed in light of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). *Twombly* establishes two working principles that are critical here. First, courts applying Rule 12(b)(6) do not credit naked assertions and other merely conclusory assertions in a pleading. 550 U.S. at 555 (pleading entitlement to relief requires “more than labels and conclusions”). Second, a plaintiff cannot rely on speculative inferences lacking foundation in well-pleaded fact to show plausible claims to relief. *Id.*; *see also Iqbal*, 129 S. Ct. at 1949.

A comparison between the allegations in *Twombly* and this case is illuminating. In *Twombly*, the plaintiffs alleged that the defendants had secretly conspired and overtly engaged in parallel conduct. The Supreme Court held that the conclusory allegations of conspiracy need not be credited; it also concluded that the alleged fact of parallel actions did not plausibly imply conspiracy because such conduct “could just as well be independent action” by the defendants. *Twombly*, 550 U.S. at 556-57.

Similarly, Plaintiffs here allege (1) in conclusory fashion that Unisys Plan fiduciaries failed to consider alternatives to retail mutual funds

and (2) that retail mutual funds were chosen. The first allegation is a naked assertion. No “factual matter,” *id.*, or “well-pleaded facts,” *Iqbal*, 129 S. Ct. at 1949, about the selection process have been alleged. The second allegation—*i.e.*, that retail mutual funds were chosen—is concrete, but does not plausibly suggest entitlement to relief. Plaintiffs merely speculate about a flawed process, because the fact that retail mutual funds were chosen does not support the inference that fiduciaries failed to act prudently in doing so. As shown by the data on the ubiquity of mutual funds in 401(k) plans (including the largest ones) and that 401(k) plan assets are concentrated in lower-cost mutual funds regardless of label, the selection of those funds “could just as well be” (*Twombly*, 550 U.S. at 557) the result of careful, skillful, prudent, and diligent decision making. When “placed in a context,” *id.*, the alleged choice of retail mutual funds as investment options does not imply any imprudence by those responsible for choosing, nor support the inference that objectively unsound choices were made.

C. The Extrinsic Statements Plaintiffs Cite on Appeal Do Not Render Their Conclusory Allegations Plausible

Plaintiffs seek on appeal to avoid dismissal by citing statements from third-party sources about mutual funds in general. Even if considered,

the statements do not lend plausibility to the Complaint's premise that retail mutual funds cannot have been chosen by a prudent fiduciary.

First, Plaintiffs confuse different issues by arguing that mutual funds incur "higher transaction costs" relative to "institutional-sized investments" because of "heavy trading activity by retail investors." App't Br. at 27. The third-party sources actually deal with issues that are neither exclusively applicable to retail mutual funds nor valid bases for concluding that mutual funds generally deliver investment returns that are inferior to alternatives.

The Kopcke paper cited by Plaintiffs discusses the transaction costs incurred by "actively-managed mutual funds."¹⁹ Active management generally refers to a type of investment strategy in which an adviser selects particular securities for purchase or sale because the adviser concludes that such transactions present favorable opportunities at a given time.²⁰ Kopcke focused on certain effects on portfolio returns (*e.g.*,

¹⁹ Richard W. Kopcke, *et al.*, "Reducing Costs of 401(k) Plans with ETFs and Commingled Trusts," at 1 (July 2010) (http://crr.bc.edu/images/stories/Briefs/ib_10-11.pdf).

²⁰ In contrast, passively managed investment funds, such as index funds, do not assemble their portfolios by attempting to identify particularly favorable transactions at particular times.

commissions and “market impacts”) associated with transactions in securities for a large, actively-managed fund (*i.e.*, the “turnover” of assets in the fund’s portfolio). As Kopcke observes, the magnitude of such effects stems from the frequency and size of transactions undertaken by actively-managed funds, rather than to their mutual fund structure.²¹ Any large, actively-managed investment pool—including separate accounts, collective trusts, hedge funds, defined benefit pension plans, and “institutional” mutual funds—must incur similar transaction costs due to active management.²² The commissions and market impacts do not necessarily result from the frequency with

²¹ The short news article that Plaintiffs cite also concerns the trading costs associated with “active management.” See Lisa Shidler, “Trading costs on mutual funds outweigh commission fees for investors, experts say,” *Investment News* (May 29, 2009) (www.investmentnews.com (registration required)).

²² Citing a paper by Mitchell, Plaintiffs make an inapt comparison between the frequency that individual 401(k) participants make changes in their allocation among the diversified investment options available in their plan with the rate that professional investment advisers managing a portfolio of equity investments “turnover” the portfolio. App’t Br. at 26 (citing Olivia Mitchell, *et al.*, “The Inattentive Participant: Portfolio Trading Behavior in 401(k) Plans” (2006) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1094834 (abstract))). This is a false analogy. A better, though still imperfect, analogy would be between the turnover rates in mutual funds with professionally managed separate accounts or trust vehicles *with the same investment objective*.

which individual investors (such as 401(k) participants) move dollars into or out of an investment option. Thus, Plaintiffs err in contending that effects observed by Kopcke are attributable to “trading activity by retail investors.” App’t Br. at 27.²³

The Edelen paper that Plaintiffs cite also addresses a different issue—yet, again, one related to fund size and turnover rather than to a fund’s legal structure. In addition to observing (like Kopcke) the “market impact” caused by very large sales or purchases of securities, Edelen notes that the continuous “inflow” of new capital from investors requires large funds to make purchases (with attendant transaction costs) to put such capital to work.²⁴ But such inflow is not unique to retail mutual funds. Large trusts and institutional mutual funds

²³ Although Kopcke states that exchanged-traded funds (ETFs) and commingled trusts provide comparatively lower cost investment vehicles, the paper makes apparent that such lower costs are attributable to the passive management of ETFs and some commingled trusts, and to generally lower “administration and managements costs” (rather than trading costs). Kopcke, at 5. By noting that commingled trusts “avoid the costs of public registration and compliance,” *id.*, Kopcke underscores that trusts do not provide the protections to investors that stem from public registration and compliance.

²⁴ Roger M. Edelen, *et al.*, “Scale Effects in Mutual Fund Performance: The Role of Trading Costs” (May 17, 2007) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951367 (abstract)).

likewise make purchases when they receive new capital—especially if they are options in 401(k) plans that receive regular payroll contributions from participants.

Finally, Plaintiffs assert categorically that mutual funds “have conflicted management structures.” App’t Br. at 28. Once again, Plaintiffs are pointing to an issue that is specific neither to retail mutual funds nor to the mutual funds offered in the Unisys Plan. Plaintiffs ignore that the management and governance of mutual funds is regulated extensively by the 1940 Act. *See* pages 6-7, *supra*. As the Supreme Court observed, this extensive regulation was specifically designed to deal with the commonplace affiliation between mutual fund and adviser to which Plaintiffs refer. *Harris Assocs.*, 130 S. Ct. at 1422.

At the end of the day, a hodge-podge of concerns and criticisms about mutual funds cannot make plausible the extraordinarily broad proposition on which the barebones Complaint depends: that no careful, skillful, prudent, and diligent fiduciary of a large 401(k) plan would have selected retail mutual funds. Indisputable facts concerning many of the nation’s largest 401(k) plans show otherwise. Moreover, while costs—whether explicit expense ratios or implicit trading costs—

constitute one set of criteria, other factors such as the legal protections of the mutual fund registered investment company structure can weigh heavily in favor of a fiduciary's choice of a mutual fund over another kind of pooled investment product.

D. The DOL Advocates an Erroneous Pleading Standard

Like Plaintiffs, the DOL contends that a plausible claim of imprudence can arise from allegations that “fees were excessive,” especially because a large plan can “obtain lower fees or higher services,” and that fiduciaries “failed to engage in a prudent process to select and manage these investment options.” DOL Br. at 15-16. Because there are no well-pleaded, non-conclusory factual allegations about the fiduciaries' conduct in this case, the DOL necessarily endorses the position that the alleged failure can be inferred merely from the selection of retail mutual funds. *See id.* at n.8 (endorsing view that a complaint need not “spell out the process” because a flawed fiduciary process can be inferred from the alleged selection of retail mutual funds with “excessive fees”).²⁵

²⁵ Although the DOL disavows “suggesting that it is *per se* illegal” for 401(k) plans “to include or only offer retail mutual fund options,” DOL Br. at 14 n.7, the agency maintains that the alleged inclusion of such

The DOL's observations about the importance of fees and the existence of alternative ("institutional") investment vehicles do not suffice to transform the Complaint's conclusory and speculative assertions into plausible claims. Data about the general effect of costs on investment performance ignore other criteria relevant to the selection of investment options—including the regulatory protections of those options and the services available in the essentially retail context of 401(k) plans with thousands of individual decisionmakers choosing how and when to invest account balances.

The DOL also fails to appreciate the distinctions among components of different investment vehicles' expenses, as well as other expenses that must be incurred to offer an investment option to 401(k) participants.²⁶ For example, when contrasting the fees charged by

options in a large plan and a naked allegation that the fiduciary failed to consider alternatives with lower fees or more extensive services should establish a *prima facie* entitlement to relief.

²⁶ "[C]are must be taken" when making price comparisons among investment vehicles to consider the distinction between a mutual fund's investment advisory fee and other components of its "total management costs." R. GLENN HUBBARD, ET AL., *THE MUTUAL FUND INDUSTRY: COMPETITION AND INVESTOR WELFARE* 106-107 (2010); *accord*, Collins, *Expenses of Defined Benefit ...*, at 17 ("considerable care must be exercised when analyzing the expenses" of pension plan trust accounts in comparison to mutual funds).

“institutional” funds with the expenses of mutual funds (*e.g.*, DOL Br. at 19 n.9), the DOL appears to consider only the fee charged by the former for investment advisory services while including the entire expense ratio (including administrative services) of mutual funds. Yet a 401(k) plan cannot offer any institutional investment vehicle without somehow incurring expenses for services such as daily valuation, recordkeeping, and participant communication.²⁷

The empirical data that is probative is the actual conduct of similarly situated fiduciaries who have chosen investment options for other 401(k) plans. Such fiduciaries frequently select mutual funds as

²⁷ The DOL cites ICI research to support the notion that Plaintiffs plausibly state a claim simply because of the self-evident point that plan size and average account balances “are key factors in the pricing of fund services” for a 401(k) plan. DOL Br. at 13 & n.3 (referring to the 2007 edition of ICI’s research in the text, but actually citing the 2008 edition; see Holden, Hadley & Lutz 2009 for the latest edition). First, the DOL has misquoted the research by adding the word “fund”—an important difference because the research is referring there not to how mutual funds are priced but to the pricing of 401(k) plan services. Second, in context, that research shows that “a variety of factors affect the ‘all-in’ fees of 401(k) plans,” including the service features of the plans. Holden, Hadley & Lutz 2009, at 15. The DOL fails to acknowledge that this research shows that (a) nearly half of all 401(k) plan assets are held in mutual funds and (b) share classes designated as “retail or general purpose” are the most common share class used in mutual funds held in 401(k) plans. *Id.* at 9-11. Both of these points undermine the plausibility of Plaintiffs’ allegation of imprudence.

investment options. *See* pages 12-14, *supra*, and Appendix A. These data undermine the plausibility of the Complaint and its necessary premise that only a flawed process would allow the selection of retail mutual funds. They also demonstrate that, if the DOL were correct that the allegations here sufficed to state a claim, then many of the largest 401(k) plans could be dragged into court and subjected to the burdens of pretrial discovery at any time.

By urging that conclusory allegations are sufficient to entitle Plaintiffs to the benefit of the doubt, and to commence full-blown litigation, the DOL disregards the Supreme Court's admonition that "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process" *Twombly*, 550 U.S. at 559. Moreover, the pleading standard advocated by the DOL cannot be reconciled with the Supreme Court's rejection of the contention that "a wholly conclusory statement of claim" can avoid dismissal so long as the pleadings leave open the possibility that discovery "might later establish some set of undisclosed facts to

support recovery.” *Id.* at 561 (internal quotation marks and brackets omitted).²⁸

As part of its argument, the DOL also attempts to understate the significance of the Seventh Circuit’s *Hecker* decision. According to the agency’s brief here, that court considered the complaint in *Hecker* “deficient principally because the allegations ... did not expressly allege that the price they [*i.e.*, the fiduciaries] paid as a large institutional investor was excessive in relation to the services received.” DOL Br. at 16-17. The suggestion that the *Hecker* plaintiffs merely omitted a crucial allegation renders much of the two Seventh Circuit opinions irrelevant and is contradicted by the DOL’s prior reading of *Hecker* as an *amicus* before the Eighth Circuit:

²⁸ Concern that participants lack access to “the determinative facts” (DOL Br. at 14) could be addressed by utilizing ERISA plans’ claims procedures before filing lawsuits. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 1024 (2008) (“[W]e do not decide whether petitioner ... was required to exhaust remedies set forth in the Plan before seeking relief in federal court pursuant to § 502(a)(2)”; *id.* at 1027 (Roberts, C.J., concurring in part and in the judgment) (noting potential value of requiring exhaustion of remedies before lawsuits alleging fiduciary breaches).

[T]he dismissal in *Hecker* was not based on a perceived failure to plead sufficient facts to indicate an imprudent process, but was instead based on the court's conclusion that ... no rational trier of fact could find that Deere had not offered a prudent mix of investments with a wide range of expense ratios.

Brief of Secretary of Labor in *Braden v. Wal-Mart Stores, Inc.*, at 19-20

(8th Cir. No. 08-3798) (March 13, 2009)

([www.dol.gov/sol/media/briefs/braden\(A\)-03-13-2009.pdf](http://www.dol.gov/sol/media/briefs/braden(A)-03-13-2009.pdf)) (emphasis added). The DOL was closer to the mark in its *Braden* brief.

Along with the data showing even the largest 401(k) plans' use of mutual funds, DOL's pre-litigation positions provide context on plausibility (*Twombly*, 550 U.S. at 557). The DOL has expressly contemplated and countenanced the selection of mutual funds as investment options for 401(k) plans. *See* page 4, *supra*. The DOL has also published statements that fees are not the sole factor plan fiduciaries and participants should consider in selecting investments—in fact, the DOL website tells participants: “don't consider fees in a vacuum[,]” because “cheaper [is not] necessarily better.”²⁹

²⁹ DOL, *A Look at 401(k) Plan Fees* (www.dol.gov/ebsa/publications/401k_employee.html); *see also* DOL, *Understanding Retirement Plan Fees and Expenses*, at 10 (2004) (www.dol.gov/ebsa/pdf/undrstndgrtrmnt.pdf) (“Fees and expenses are

The pleading standard that the DOL (and Plaintiffs) advocate in this case—that ERISA allows participants to bring suits based on nothing more than a naked assertion that fiduciaries failed to consider cheaper investment options—is as likely to deter sponsorship of 401(k) plans as to deter the imprudent selection of investments. Moreover, suggesting that litigation is best avoided by making cost the primary criterion in selecting investment options creates undesirable incentives. *Hecker*, 556 F.3d at 586. Thus, a decision indicating that mutual funds are inappropriate plan investments could tend to motivate fiduciaries to forgo the important regulatory protections that registered mutual funds provide to investors. *See* pages 6-7, *supra*.

Ultimately, the result that the DOL advocates would undermine important congressional goals. Recognizing that “[n]othing in ERISA requires employers to establish employee benefit plans,” *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996), Congress sought to create a system that was not so complex that litigation expenses would discourage employers from sponsoring plans, *Conkright v. Frommert*, 130 S. Ct.

one of several factors to consider when you select and monitor plan service providers and investments. The level and quality of service and investment risk and return will also affect your decisions.”).

1640, 1649 (2010). As the Seventh Circuit noted in a case where the employer ceased to offer the pension plan at issue—despite the fact that the defendants ultimately prevailed—“[i]t is possible ... for litigation about pension plans to make everyone worse off.” *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006). Prosecution of speculative claims asserted without well-pleaded facts, as Plaintiffs propose here, threatens “to make everyone worse off.”

CONCLUSION

The Institute urges the Court to affirm the judgment of the District Court.

Respectfully submitted,

/s/ Thomas L. Cabbage III
Thomas L. Cabbage III
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. NW
Washington DC 20004-2401
(202) 662-6000
tcabbage@cov.com

Counsel for *Amicus Curiae* The
Investment Company Institute

Appendix A

Selected plans with reported assets >\$1 billion ¹	Reported plan investment in mutual funds?	Forms 11-K
Abbott Laboratories Stock Ret. Program	yes	<i>Plan Year 2007</i> www.sec.gov/Archives/edgar/vpr/08/99999999997-08-030716
American Electric Power System Ret. Sav. Plan	yes *, **	www.sec.gov/Archives/edgar/data/4904/00000490409000098/form11k0609.htm
Amgen Ret. & Sav. Plan	yes	www.sec.gov/Archives/edgar/data/318154/000119312509135799/d11k.htm
Bank of America 401(k) Plan	yes *	www.sec.gov/Archives/edgar/data/70858/000119312509139256/d11k.htm
Employee Sav. & Inv. Plan of the Bank of N.Y. Co., Inc.	yes	www.sec.gov/Archives/edgar/data/1390777/000119312509135651/d11k.htm

¹ Unless otherwise noted, data are from Forms 11-K for fiscal years ending in 2008. Not all defined contribution plans file a Form 11-K. This list does not encompass all plans with assets greater than \$1 billion that have filed a Form 11-K. Investments in “mutual funds” comprise reported plan investments in registered investment companies (whether in so-called “institutional” or “retail” share classes).

* Plans whose mutual fund options (if identified by Form 11-K) include Dodge & Cox Stock Fund.

** Plans whose mutual fund options (if identified by Form 11-K) include Fidelity Low Price Stock Fund.

Appendix A

Selected plans with reported assets >\$1 billion ¹	Reported plan investment in mutual funds?	Forms 11-K
BP Master Trust for Employee Sav. Plans	yes	www.sec.gov/Archives/edgar/data/313807/000116923209003109/d77236_11-k.htm
Bristol-Myers Squibb Co. Sav. Plan Master Trust	yes	www.sec.gov/Archives/edgar/data/14272/000119312509138020/d11k.htm
Cardinal Health, Inc. U.S. Qualified Plans Master Trust and Cardinal Health Balanced Fund	yes	www.sec.gov/Archives/edgar/data/721371/000119312509140034/d11k.htm
Caterpillar Invt. Trust	yes	www.sec.gov/Archives/edgar/data/18230/000001823009000229/form11k_401k.htm
Chevron Employee Sav. Invt. Plan	yes	www.sec.gov/Archives/edgar/data/93410/000095012309017778/f52855exv99w2.htm
Citigroup 401(k) Plan	yes	www.sec.gov/Archives/edgar/data/831001/000095012309016892/y77914e11vk.htm
Coca-Cola Co. Thrift & Invt. Plan	yes	www.sec.gov/Archives/edgar/data/21344/000110465909040015/a09-16757_111k.htm
ConocoPhillips Sav. Plan	yes *, **	www.sec.gov/Archives/edgar/data/1163165/000095012309016558/h67231e11vk.htm
Dell Inc. 401(k) Plan	yes *	www.sec.gov/Archives/edgar/data/826083/000095012309017374/d68196e11vk.htm
Disney 401(k) Master Trust	yes	www.sec.gov/Archives/edgar/data/1001039/000119312509139461/dex991.htm

Appendix A

Selected plans with reported assets >\$1 billion ¹	Reported plan investment in mutual funds?	Forms 11-K
Dominion Salaried Sav. Plan	yes	www.sec.gov/Archives/edgar/data/715957/000119312509136422/d11k.htm
Duke Energy Ret. Sav. Plan	yes	www.sec.gov/Archives/edgar/data/1326160/000119312509138831/d11k.htm
Edison 401(k) Sav. Plan	yes	www.sec.gov/Archives/edgar/data/827052/000082705209000014/eix11k609.htm
Emerson Electric Co. Master Trust	yes	www.sec.gov/Archives/edgar/vprrr/09/99999999997-09-016188
Sav. Plan of Entergy Corp. & Subs. VII	yes	www.sec.gov/Archives/edgar/data/65984/000006598409000137/a03909.htm
Exelon Corp. Employee Sav. Plan	yes **	www.sec.gov/Archives/edgar/data/1109357/000119312509132506/d11k.htm
FirstEnergy Corp. Sav. Plan	yes	www.sec.gov/Archives/edgar/data/1031296/000103129609000016/form11_k.htm
Ford Defined Contribution Plans Master Trust	yes	www.sec.gov/Archives/edgar/data/37996/000095012309017886/c87153e11vk.htm
Master Trust for Ret. Sav. Plans of FPL Group, Inc. & Affiliates	yes **	www.sec.gov/Archives/edgar/data/753308/000075330809000065/form11knonbarg2008.htm
GE Sav. & Security Program	yes	<i>Plan Year 2007</i> www.sec.gov/Archives/edgar/data/40545/000004054508000025/frm11k.htm

Appendix A

Selected plans with reported assets >\$1 billion ¹	Reported plan investment in mutual funds?	Forms 11-K
General Dynamics Corp. Sav. & Stock Invt. Plan Master Trust	yes	www.sec.gov/Archives/edgar/data/40533/000119312509139287/d11k.htm www.sec.gov/Archives/edgar/data/40533/000119312509139262/d11k.htm
GM Master Trust [for Defined Contrib. Plans]	yes	<i>Plan Year 2007</i> www.sec.gov/Archives/edgar/data/40730/000004073008000014/psp07plan062608.txt
The Goldman Sachs 401(k) Plan	yes	www.sec.gov/Archives/edgar/data/886982/000095012309018767/y77991e11vk.htm
Halliburton Company Employee Benefit Master Trust	yes	www.sec.gov/Archives/edgar/data/45012/000004501209000229/ed11k_hrsp12312008.htm
The Hartford Invt. & Sav. Plan	yes	www.sec.gov/Archives/edgar/data/874766/000095012309018047/c87328e11vk.htm
Hewlett-Packard Company 401(k) Plan	yes *, **	www.sec.gov/Archives/edgar/data/47217/000004721709000027/form11-k_2008.htm
Home Depot FutureBuilder	yes *	www.sec.gov/Archives/edgar/data/354950/000095012309018535/g19538e11vk.htm
Honeywell Sav. & Ownership Plan	yes	www.sec.gov/Archives/edgar/data/773840/000093041309003372/c58044_11k.htm
IBM 401(k) Plus Plan	yes	www.sec.gov/Archives/edgar/data/51143/000110465909040756/a09-16924_211k.htm

Appendix A

Selected plans with reported assets >\$1 billion ¹	Reported plan investment in mutual funds?	Forms 11-K
Intel Corp. 401(k) Sav. Plan	yes *, **	www.sec.gov/Archives/edgar/data/50863/000095012309016714/f52532e11vk.htm
ITT Salaried Invt. & Sav. Plan	yes	www.sec.gov/Archives/edgar/data/216228/000095012309022177/y78180e11vk.htm
John Deere Sav. & Invt. Plan	yes	www.sec.gov/Archives/edgar/vpr/09/99999999997-09-008218
JPMorgan Chase 401(k) Sav. Plan	yes	www.sec.gov/Archives/edgar/data/19617/000095012309017477/y77840e11vk.htm
Kraft Foods Sav. Plan Master Trust	yes	www.sec.gov/Archives/edgar/data/1103982/000119312509130270/d11k.htm
Lockheed Martin Corp. Defined Contrib. Plans Master Trust	yes	<i>Plan Year 2007</i> www.sec.gov/Archives/edgar/vpr/08/99999999997-08-029455
Lucent Technologies Inc. Defined Contrib. Plan Master Trust	yes	www.sec.gov/Archives/edgar/data/886125/000093041309003397/c58041_11-k.htm
McKesson Corp. Profit-Sharing Invt. Plan	yes	www.sec.gov/Archives/edgar/data/927653/000095013408016941/f43820e11vk.htm
Medtronic, Inc. Sav. & Invt. Plan	yes	www.sec.gov/Archives/edgar/data/64670/000089710108002126/medtronic084306_11k.htm
Microsoft Corp. Sav. Plus 401(k) Plan	yes	www.sec.gov/Archives/edgar/data/789019/000119312509140716/d11k.htm

Appendix A

Selected plans with reported assets >\$1 billion ¹	Reported plan investment in mutual funds?	Forms 11-K
Morgan Stanley 401(k) Plan	yes *	www.sec.gov/Archives/edgar/data/895421/000095010309001535/dp13952_11k.htm
National Grid USA Cos.' Incentive Thrift Plan I	yes **	www.sec.gov/Archives/edgar/data/1004315/000095012309018708/y77995exv99w1.htm
Occidental Petroleum Corp. Sav. Plan	yes	www.sec.gov/Archives/edgar/data/797468/000079746809000073/form11k-2008.htm
PepsiCo Long Term Sav. Program Master Trust	yes	www.sec.gov/Archives/edgar/data/77476/000119312509134154/d11k.htm
Pfizer Sav. Plan	yes *, **	www.sec.gov/Archives/edgar/data/78003/000115752309004642/a5995429.htm
PG&E Corp. Ret. Sav. Plan Master Trust	yes	www.sec.gov/Archives/edgar/data/1004980/000100498009000038/exhibit1.htm
The Procter & Gamble Sav. Plan	yes	www.sec.gov/Archives/edgar/data/80424/000008042408000126/savingsplan.htm
The Prudential Employee Sav. Plan	yes	www.sec.gov/Archives/edgar/data/1137774/000119312509138605/d11k.htm
Qwest DB/DC Master Trust	yes	www.sec.gov/Archives/edgar/data/1037949/000110465909040684/a09-16974_111k.htm
Raytheon Sav. & Invt. Plan	yes	www.sec.gov/Archives/edgar/data/1047122/000119312509137619/d11k.htm
Schering-Plough Employees' Sav. Plan	yes	www.sec.gov/Archives/edgar/data/310158/000095012309017949/y77916e11vk.htm

Appendix A

Selected plans with reported assets >\$1 billion ¹	Reported plan investment in mutual funds?	Forms 11-K
Shell Sav. Group Trust	yes	<i>Plan Year 2007</i> www.sec.gov/Archives/edgar/vpr/08/99999999997-08-030869
Textron Sav. Plan	yes	www.sec.gov/Archives/edgar/data/217346/000021734609000094/elevenk.htm
Unisys Sav. Plan	yes **	www.sec.gov/Archives/edgar/data/746838/000119312509140524/d11k.htm
United Technologies Corporation Employee Sav. Plan	yes	www.sec.gov/Archives/edgar/data/101829/000119312509139452/d11k.htm
Verizon Master Sav. Trust	yes	www.sec.gov/Archives/edgar/data/732712/000119312509140689/d11k.htm www.sec.gov/Archives/edgar/data/732712/000119312509140662/d11k.htm
Wachovia Sav. Plan	yes *	www.sec.gov/Archives/edgar/data/72971/000119312509136751/d11k.htm
Wal-Mart Profit Sharing and 401(k) Plan	yes	www.sec.gov/Archives/edgar/data/104169/000010416909000013/wmtfy0911k.htm
Wells Fargo & Co. 401(k) Plan	yes *	www.sec.gov/Archives/edgar/vpr/09/99999999997-09-021754
Weyerhaeuser Co. 401(k) and Performance Share Plan Trust	yes	www.sec.gov/Archives/edgar/data/106535/000095012309017735/v52833be11vk.htm

Certificate of Compliance

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the length limitation of Fed. R. App. P. 29(d). The brief is proportionally spaced, has typeface of 14 points or more, and excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B), contains 6,896 words (including Appendix A, but excluding the signature block and certificates of counsel), as counted by Microsoft Word 97-2003, the word-processing software used to prepare this brief

/s/ Thomas L. Cabbage III
Counsel for *Amicus Curiae* The
Investment Company Institute

Certificate of Virus Check

I certify that the electronic version of this document has been checked for computer viruses using Symantec Endpoint Protection software, and found to be virus free.

/s/ Thomas L. Cabbage III
Counsel for *Amicus Curiae* The
Investment Company Institute

Certificate of Service

The undersigned attorney hereby certifies that on November 15, 2010, I caused two copies of the foregoing Brief of The Investment Company Institute as *Amicus Curiae* in Support of Appellees to be served via FedEx overnight delivery service on each of the following:

Michael A. Wolff, Esq.
Schlichter, Bogard & Denton
100 S. Fourth St.
Suite 900
St. Louis, MO 63102

Brian Ortelere, Esq.
Morgan, Lewis & Bockius LLP
1701 Market St.
Philadelphia, PA 19103-2921

Jonathan Hacker, Esq.
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006

Elizabeth Hopkins, Esq.
Louise Betts, Esq.
U.S. Department of Labor
Room N-4611
200 Constitution Ave. NW
Washington, DC 20210

/s/ Thomas L. Cabbage III
Counsel for *Amicus Curiae* The
Investment Company Institute