No. _____

In The

Supreme Court of the United States

JAMES DEFAZIO, BRENDA DIMARO, HALLIE LAVICK, MICHAEL MCNAIR, THERESA BEETHAM, DELANE HUMPHRIES, SONYA PACE, NANCY RUSSELL STANTON, JUDY SEAY, AND CINDY WIRTH, *Petitioners*

v.

HOLLISTER INC., FIRM OF JOHN DICKINSON SCHNEIDER INC., RICHARD ZWIRNER, MICHAEL WINN, LORETTA STEMPINSKI, ALLAN HERBERT, JAMES MCCORMACK, JAMES KARLOVSKY, RICHARD FREMGEN, SAMUEL BRILLIANT, DONALD GRONEBERG, CHARLES GUNDERSON, LORI KELLEHER, CHARLES SCHELLENTRAGER, AND HOWARD SIMON, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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August 4, 2015

QUESTIONS PRESENTED

On April 6, 2012, the Honorable William B. Shubb of the Eastern District of California found the respondents, *i.e.*, ERISA fiduciaries, guilty of fraud. They had made false statements about self-dealing transactions to participants, beneficiaries, experts, district judges, the US Department of Labor, and even their own lawyers in pleadings, discovery responses, public filings, and agency investigations. Using state law contracts, they sold plan assets without investigation, much less a prudent one; and artificially manipulated their value so they appeared to grow at a phenomenal rate for an impossible period – *i.e.*, 27% per year for over 30 years – all while secretly draining cash out the plan. Fiduciaries then used those same assets (and contracts) to transfer control of the employer-sponsor *away* from the plan and *into* a trust, which they alone administered, so that they could continue profiting at the expense of retirees. Yet, despite *all* of that, the district court refused to stop these ERISA violations because petitioners could not say *exactly* what would have happened if respondents had fulfilled their fiduciary duties, or quantify the harm caused to the plan. The Ninth Circuit affirmed.

The questions presented are:

(1) Which party bears the burden of proving loss to the plan under ERISA § 409(a)?

(2) Are private party contracts that dictate fiduciary obligations (and plan asset valuations) preempted by ERISA?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing before the United States Court of Court of Appeals for the Ninth Circuit:

The Hollister Employee Share Ownership Trust (HolliShare or the plan) is an eligible individual account plan (EIAP) under ERISA.

The petitioners and plaintiffs below – *viz.*, James DeFazio, Brenda DiMaro, Hallie Lavick, Michael McNair, Theresa Beetham, DeLane Humphries, Sonya Pace, Nancy Russell Stanton, Judy Seay, and Cindy Wirth – are participants and beneficiaries of the plan.

The respondents and defendants below – *viz.*, Hollister Inc. (Hollister), a wholly-owned subsidiary of The Firm of John Dickinson Schneider Inc. (JDS), Richard Zwirner, Michael Winn, Loretta Stempinski, Allan Herbert, James McCormack, James Karlovsky, Richard Fremgen, Samuel Brilliant, Donald Groneberg, Charles Gunderson, Lori Kelleher, Charles Schellentrager, and Howard Simon – are named fiduciaries and parties-in-interest of the plan.

DeFazio's ex-wife, Kathy Ellis, was a participant of the plan and plaintiff in this lawsuit. Ellis settled her ERISA claim, however, during the pendency of the appeal.

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Miscellaneous

PETITION FOR WRIT OF CERTIORARI

James DeFazio, Brenda DiMaro, Hallie Lavick, Michael McNair, Theresa Beetham, DeLane Humphries, Sonya Pace, Nancy Russell Stanton, Judy Seay, and Cindy Wirth respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The published district court orders are located at: 636 F.Supp.2d 1045 (E.D. Cal. 2009), *Pet. App. 136a*; 800 F.Supp.2d 1113 (E.D. Cal. 2009), *Pet. App. 129a*; 854 F.Supp.2d 770 (E.D. Cal. 2012), *Pet. App. 9a*. The Ninth Circuit unpublished memorandum summarily affirming those orders is located at 2015 WL 2330181. *Pet. App. 1a*.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was finalized on May 15, 2015. *Pet. App. 2a*. This petition was timely filed on August 3, 2015. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

Section 1002 of Title 29 of the United States Code provides:

> (18) The term "adequate consideration" [] means … (B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary.

* * * * * * * * * * * *

Section 1106 of Title 29 of the United States Code provides in pertinent part:

> (a) Transactions between plan and party-in-interest
>
> Except as provided in section 1108 of this title:
>
> > (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect--
> >
> > > (A) sale or exchange, or leasing, of any property between the plan and a party-in-interest;

* * * * * * * * * * * *

Section 1108 of Title 29 of the United States Code provides:

> (e) Acquisition or sale by plan of qualifying employer securities; acquisition, sale, or lease by plan of qualifying employer real property
>
> Sections 1106 and 1107 of this title shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 1107(d)(5) of this title) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 1107(d)(4) of this title)--
>
> > (1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 1107(e)(1) of this title),
>
> * * * * * * * * * * *

Section 1109 of Title 29 of the United States Code provides:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other

> equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

* * * * * * * * * * * *

Section 1110 of Title 29 of the United States Code provides:

> (a) Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

* * * * * * * * * * * *

Section 1113 of Title 29 of the United States Code provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of--
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
> >
> > (2) three years after the earliest date on which the plaintiff had actual knowledge of the

breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

* * * * * * * * * * *

Section 1132 of Title 29 of the United States Code provides:

Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought --

(1) by a participant or beneficiary -

…

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

[…]

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any

> person referred to in section 101(f)(1) [29 U.S.C. § 1021(f)(1)]. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

* * * * * * * * * * *

Section 1144 of Title 29 of the United States Code provides in pertinent part:

Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)]. This section shall take effect on January 1, 1975.

* * * * * * * * * * *

STATEMENT OF THE CASE

HolliShare is a defined contribution plan under ERISA. *Pet. App. 10a.* Its predominant asset – and approximately 95% of its total value – is held in common shares of the employer sponsor, JDS. *Ibid.* Because the plan invests so heavily in JDS, the value of each retiree's account is determined by the value of those shares. *Pet. App. 12a.* But while the plan allows for the sale of stock, it doesn't set the price; instead, it requires that all sales be in accordance with the JDS articles. *Pet. App. 15a.* This requirement has (allegedly) created a number of complications, not the least of which is that the JDS articles grant JDS the right to repurchase common shares with only a small amount of cash and a promissory note.[1] *Pet. App. 13a-14a.* Moreover, JDS *only* has to pay current (month-end) book value, *which it alone calculates*, for each share. *Ibid.* But this right was never enforced against the plan, because HolliShare's cash needs always exceeded that small amount and ERISA prohibited the plan from accepting a promissory note as payment. *Ibid.* To avoid this complication, HolliShare and JDS entered into an undisclosed/unwritten contract in the mid-1980s (the mid-80s agreement) that has since governed JDS's repurchase of common shares from the plan. *Pet. App. 15a-16a.* Under that agreement, HolliShare provides advance projections of its cash needs and sells shares back to JDS at their audited

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[1] We say *allegedly* because respondents conceded below that JDS could pay all cash when exercising its right of first refusal under the JDS articles.

book value from the end of the prior year (December 31 book value) in a sufficient number to meet those needs. *Ibid*. In exchange, JDS purchases all of the shares the plan offers for cash. *Ibid*. No other steps were taken when selling these assets, (*ibid.*); and the plan sold $253,350,987.47 worth of stock on nineteen separate occasions using this method. *Pet. App. 16a-17a*. Despite the fact that more than a quarter-billion dollars' worth of shares were sold on these nineteen separate occasions, participants were never told about the mid-80s agreement (*Pet. App. 30a-38a*), nor why JDS common shares were such an "extraordinary" investment, increasing in value at a rate normally reserved for Ponzi schemes, *i.e.*, an average of 26.79% *every year* from 1977 through 2010 without *ever* losing money. *Pet. App. 11a*. If they had, participants would've been appalled to learn that respondents were using mathematical tricks and accounting gimmicks to defalcate the plan while, simultaneously, making it appear impossibly profitable. And while the amounts and shares have changed over the years, the methods fiduciaries used to achieve such amazing results were relatively straightforward:

Example No. 1

Assume JDS has 100 outstanding shares, each share has a current book value of $1, and HolliShare owns all of them. If HolliShare sells half of those shares back to JDS at $1 per share, the total book value of JDS drops to $50 but the per share value remains the same:

Before Sale

HolliShare	JDS
100 shares	No shares
No cash	$100 in cash

($100 cash ÷ 100 outstanding shares = $1 per share)

After Sale

HolliShare	JDS
50 shares	50 shares
$50 in cash	$50 in cash

($50 cash ÷ 50 outstanding shares = $1 per share)

As this example illustrates, selling shares isn't going to change the per share book value, *provided* those shares are all valued the same. But what happens when shares are sold at *below* current book value?

Example No. 2

JDS has 100 outstanding shares and the current book value of each share is $1. Instead of owning all of them, however, HolliShare only owns 50 shares and someone else – a direct shareholder – owns the rest. If HolliShare inexplicitly decides to sell half its shares at a loss (*e.g.*, 75¢ per share), the per share book value of all remaining shares, including those still owned by the plan, actually *increases*:

Before Sale

HolliShare	Direct Shareholder	JDS
50 shares	50 shares	No shares
No cash	No cash	$100 in cash

($100 cash ÷ 100 outstanding shares = $1 per share)

After Sale

HolliShare	Direct Shareholder	JDS
25 shares	50 shares	25 shares
$18.75 in cash	No cash	$81.25 in cash

($81.25 cash ÷ 75 outstanding shares = $1.08 per share)

Even though the plan lost money ($18.75 instead of $25.00), its remaining shares increase 8% in value *on paper*. A simple mathematical trick that allows respondents – who are all direct shareholders – to quietly drain money out of the plan while artificially inflating its value. The other trick they used, to ensure that plan benefits did not grow uncontrollably, was to sell themselves shares – at an even *steeper* discount – to manipulate its value downwards.

Example No. 3

Assume that JDS has 50 outstanding shares, HolliShare owns all of them, and each one has a current book value of $1 ($50 total). If JDS sells an additional 50 treasury shares to a direct shareholder at $1 per share, the total book value of JDS will increase but the per share value will remain the same:

Before Sale

HolliShare	Direct Shareholder	JDS
50 shares	No shares	50 shares
No cash	$50 cash	$50 in cash

($50 cash ÷ 50 outstanding shares = $1 per share)

After Sale

HolliShare	Direct Shareholder	JDS
50 shares	50 shares	No shares
No cash	No cash	$100 in cash

($100 cash ÷ 100 outstanding shares = $1 per share)

Again, selling shares at book value isn't going to change the per share value, *provided* all of the shares are valued the same. By selling themselves stock at *below* current book value, however, respondents would profit at the expense of the only shareholder not afforded the same opportunity, *i.e.*, the plan. *Pet. App. 11a.*

Example No. 4

Modifying the example above, assume JDS sells those additional 50 treasury shares to the direct shareholder for 50¢ per share instead of the current book value of $1. The per share book value of all outstanding shares will immediately drop from $1 to 75¢ by virtue of the sale, while the book value of each share bought by the direct shareholder will immediately *increase* from 50¢ to 75¢ ($12.50 total). This increase is *in addition* to the cash they saved by buying shares at a deflated price ($25):

Before Sale

HolliShare	Direct Shareholder	JDS
50 shares	No shares	50 shares
No cash	$50 cash	$50 in cash

($50 cash ÷ 50 outstanding shares = $1 per share)

After Sale

HolliShare	Direct Shareholder	JDS
50 shares	50 shares	No shares
No cash	$25 cash	$75 in cash

($75 cash ÷ 100 outstanding shares = 75¢ per share)

Using these two simple levers, respondents could manipulate the plan's value up or down, while simultaneously concealing that, regardless which lever was pulled, money would be taken out and put directly into the fiduciaries' pockets. *Pet. App. 59a.* And, considering the number of common shares held by each fiduciary (*e.g.*, Winn once sold $20 million in shares to keep his holding below ten percent; Herbert sold his shares for about $18 million; Zwirner is

estimated to have over $45 million in common shares, *Pet. App. 118a*), those were some pretty deep pockets. And because respondents were less than eager to reveal their skim to the people who might object, they took steps to actively conceal the mid-80s agreement from participants, beneficiaries, the US Department of Labor, district judges … *even their own lawyers*.[2]

Beginning in 1993, fiduciaries rewrote plan disclosures so the casual reader would believe that JDS had uniformly and consistently exercised its right of first refusal under the JDS articles and bought the plan's common shares at *current* book value. *Pet. App. 30a-38a.* They told one beneficiary, *viz.*, DeFazio, that JDS had *always* exercised that right and would continue to do so in the foreseeable future. *Ibid.* Moreover, when the Department of Labor opened an investigation into their practice, respondents not only told the investigator that JDS was exercising its right of first refusal at current book value, they produced a document entitled, *HolliShare purchase and sale of JDS shares since January 1, 1994*, which falsely claimed that the plan sold shares the day *after* valuation, and not when the sales actually occurred three to five months later. *Pet. App. 38a.* This misrepresentation was devastating, as it allowed fiduciaries to conceal from

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[2] We intentionally minimized our citations to the respondents' fraudulent conduct. If respondents should deny their fraud, or accuse us of overstating it, we will happily give a full accounting in our reply, lest there be any confusion as to who is the innocent party.

the Department their use of stale valuations and continue skimming the plan for another two decades! And when petitioners finally challenged these prohibited transactions in federal court, respondents submitted dozens of pleadings – many signed under the penalty of perjury – which falsely represented that JDS had *always* exercised its repurchase rights under the JDS articles and *always* bought the plan's common shares at current book value. *Pet. App. 39a* Respondents even went so far as to mock us for suggesting that JDS negotiate a price for the plan's shares, or that fiduciaries investigate the fair market value of those shares before each sale. *Ibid.* But as bad as these false statements were, they were nothing when compared to the harm inflicted on retirees when respondents literally stole control of a billion dollar medical supply company away from the plan *without telling anyone!*

Briefly, John D. Schneider ("Schneider") wanted his companies, JDS and Hollister, to remain independent and employee-owned. *Pet. App. 10a-13a, 140a-141a, 144a-145a.* To accomplish that task, he incorporated ownership restrictions into the JDS articles so that only employees, officers, directors, and deferred benefit plans of JDS and Hollister could own stock. *Ibid.* Next, Schneider created two classes of shares, preferred and common, and required two-thirds approval of both classes to change the ownership restrictions. *Ibid.* Schneider kept the preferred shares, which gave him control over the company, but allowed select employees to buy the common shares through a direct share ownership program. *Ibid.* He also created a retirement plan, HolliShare, to invest in common shares, so that

employees who couldn't buy JDS stock could still share in its success. *Ibid.* Schneider then placed his preferred shares into a trust (the Schneider 1977 Trust), giving its trustees effective control over the company. *Ibid.* He designated himself as the first trustee, but allowed plan fiduciaries Winn, Stempinski, and Zwirner to assume that role in 1981. *Ibid.* By its express terms, the trust would expire on April 21, 2001, and its preferred shares distributed to Hollister employees. *Ibid.* Under the JDS articles, employees who received those shares would have to sell them back to JDS when they retired; and JDS, in turn, would cancel them upon repurchase. *Pet. App. 194a-195a.* Eventually, all of the preferred shares would be cancelled, leaving only the common shares, which could still only be owned by employees and their retirement plans. *Ibid.* HolliShare would experience a sharp increase in value as the majority shareholder of the only remaining class of stock; and Schneider's dream would be fulfilled. *Ibid.*

But as the expiration date approached, Schneider's trustees, who again were fiduciaries of the plan, grew concerned about what employees might do with control of the company. *Pet. App. 145-148a.* So, they sent a letter to the employees, proposing that a new trust be created (the Preferred Share Trust) – one that they would also control – to hold indefinitely the preferred shares slated for distribution. *Ibid.* Such a trust, the letter explained, was necessary to maintain Hollister's independent and employee-owned nature, and it was what Schneider (now deceased) would have wanted. *Ibid.* All of this was utterly and completely false.

The employees were never told that (1) JDS would have remained independent and employee-owned *without* the new trust; (2) the plan, which owned 69% of the outstanding common shares, could keep it that way by vetoing any proposed changes to the ownership restrictions; (3) plan fiduciaries were profiting under the status quo *via* the mid-80s agreement; or (4) by transferring those preferred shares to the new trust, fiduciaries would continue to do so, *i.e.,* profit, for the foreseeable future. *Ibid.* In light of the one-sided (and inaccurate) information provided, it was no surprise when those same employees agreed to fund the new trust with Schneider's preferred shares. *Ibid.* Nor was it a surprise when the only individuals who could have protected the plan and stopped Schneider's old trustees (and their co-fiduciaries) from cementing their control were direct shareholders profiting under the mid-80s agreement, who voted the plan's shares in favor of the Preferred Share Trust. *Ibid.* This culminated the series of events that became known as the "1999 Transaction."[3] Eventually (and as alluded to above), petitioners brought suit under ERISA to, *inter alia*, stop fiduciaries from selling plan assets at below fair market value and unwind the 1999 Transaction. It didn't go well.

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[3] This was by no means the fiduciaries' only undisclosed ERISA violation, merely the biggest.

By the time petitioners discovered that respondents had intentionally misrepresented the plan's sale of assets (and hid other fiduciary breaches and prohibited transactions), ERISA's general six-year statute of limitations had expired. *Pet. App. 219a.* To mitigate the damage, plaintiffs immediately moved to amend their complaint under Rule 9(b) and plead with particularity the fraudulent statements that respondents had made throughout the course of litigation, to extend the limitation period under ERISA's fraud and concealment exception. *Pet. App. 218a-234a.* In so doing, plaintiffs cited to – and then reproduced verbatim – long excerpts from the defense's legal memoranda and discovery responses, to show that respondents had committed actual fraud. *Pet. App. 237a-240a.* That also didn't go well. Adopting the fiduciaries' argument verbatim, Judge Shubb held that fraudulent statements made when defending an ERISA lawsuit cannot extend the statute of limitations for claims averred *in* that lawsuit, because they (the false statements) were directed at the court, not participants and beneficiaries. *Ibid.* Furthermore, once the initial charge of fraud was made, petitioners could hardly claim to have detrimentally relied on those statements (false or otherwise). The motion was denied and, unfortunately, petitioners' substantive arguments didn't fare much better.

The district court first dismissed the claim surrounding the 1999 Transaction on the ground that petitioners could not say what would have happened if plan fiduciaries had behaved in a prudent and loyal manner. *Pet. App. 195a-204a.* Specifically, Judge

Shubb found that petitioners lacked constitutional standing because it was impossible to know *exactly* what would have happened had the respondents fulfilled their fiduciary obligations and not engaged in prohibited transactions. *Ibid.* In so doing, he resolved all factual uncertainties *against* the participants, including: (1) whether two-thirds of the preferred shareholders would have voted to remove the JDS stock restrictions while plaintiffs still had retirement accounts; (2) the exact date on which HolliShare would become the majority holder of all outstanding JDS shares; and (3) whether plan fiduciaries would have prevailed in a suit against the Preferred Share Trust for unauthorized share ownership. *Ibid.* It did not matter that these uncertainties could all be traced directly to respondents' breaches of fiduciary duty, which, coincidentally, allowed them to benefit at the expense of the plan. *Ibid.* Because plaintiffs could not say *exactly* what would have happened, they could not prove that the plan suffered a redressable injury and thus their claim regarding the 1999 Transaction was summarily dismissed. *Ibid.*

The district court then dismissed petitioners' claim that respondents had breached their fiduciary duties and engaged in prohibited transactions on the grounds that plaintiffs could not quantify the loss caused to the plan. *Pet. App. 88a.*[4] Specifically,

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[4] "Surprisingly, after four weeks of trial, the court did not hear a single expert witness estimate the value of the JDS stock at the time of each prohibited transaction … Even plaintiffs are unsure what value should have been used to ensure HolliShare received adequate consideration."

Judge Shubb found that plan trustees neither investigated nor determined the fair market value of plan assets under the mid-80s agreement. *Pet. App. 51a-62a.* Instead, they simply set the price at the December 31 book value and sold the shares to JDS (a) without ever determining whether it was the fair market value, yet (b) knowing for certain it was less than current book value. *Ibid.* The trustees also never sought an independent appraisal. *Ibid.* In fact, the first outside appraisal was performed at the request of defense counsel; and, even then, the trustees refused to review it. *Ibid.* He also blamed them for failing to meaningfully review, discuss, or even question the lack of valuation, and for selling common shares without negotiating the price. *Ibid.* He also found that the mid-80s agreement itself did not come about from meaningful negotiations, as trustees accepted its terms without question. *Ibid.* This blind acceptance of an amorphous verbal agreement that set the price of the plan's most valuable asset, the district judge continued, underscores their failure to perform a thorough investigation. *Ibid.* Not surprisingly, the Hollister Board – which had a fiduciary duty to appoint and monitor plan trustees – did not fare much better. *Pet. App. 70a-73a.*

The board knew that the plan was engaging in prohibited transactions with JDS, and that trustees were not investigating before each sale. *Ibid.* Yet, despite this "red flag," the Hollister Board did nothing and, as such, was equally liable for the fiduciary breaches that occurred. *Ibid.* Judge Shubb thus concluded that plan fiduciaries had breached their duties of loyalty and prudence, personally

benefitted from prohibited self-dealing transactions, concealed other potential markets for the plan's common shares, and took affirmative steps to fraudulently conceal both from participants and beneficiaries. Unfortunately, this conclusion wasn't enough for the district court to order them to stop violating ERISA.

Succinctly stated, the district court wasn't persuaded that the fair market value of the plan's common shares could ever exceed December 31 book value, since the JDS articles severely restricted who could purchase those shares and, thus, the only market for plan assets was JDS or someone authorized under the JDS articles. *Pet. App. 89a-90a.* And since direct shareholders were already buying shares from JDS at the December 31 book value, it was unreasonable to conclude that they would ever pay more than that for common shares.[5] *Ibid.* Nor did the district judge believe that the state law stock restrictions found in the JDS articles, or the valuation restrictions in the mid-80s agreement, were preempted by ERISA. *Pet. App. 189a-190a.* Conceding that ERISA superseded state laws that relate to employee benefit plans, and that that preemption was conspicuous for its breadth, the district court was also bound by the Ninth Circuit

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[5] Of course, because plan trustees never investigated whether someone other than JDS was interested in purchasing plan assets (*e.g.,* direct shareholders who might want to purchase more shares than JDS was offering at the December 31 book value, or employees who were not offered shares at all), the district court couldn't say for certain. *Ibid.*

holding that limits ERISA preemption to state actions having the effect of law. *Ibid.* Ergo, because both agreements were created by private parties (and not the state), neither was preempted by ERISA. *Ibid.* So even though no one could say what the fair market value of the JDS shares was, and the plan could have been selling them at below market value for over thirty years, the district court nevertheless concluded that HolliShare did not suffer a "material loss" and, therefore, equitable relief was unwarranted. *Pet. App. 105a-108a.* With that, petitioners' claim against the fiduciaries for selling plan assets at below fair market value was also dismissed.

It is these ERISA violations – along with one that pertains solely to DeFazio, which we touch on at the end – that serve as the basis for this petition.

SUMMARY OF ARGUMENT

ERISA has come to earn the distinction as our modern contender for high rank in the law's order of obscurity. As one court perceived it, and styled in one of the many metaphors the statute has inspired to portray its formidable labyrinths, ERISA is "a veritable Sargasso Sea of obfuscation."[6] Indeed, *this* Court – laboring through an interpretation of the statute – took the occasion to comment on its "unhelpful text and the frustrating difficulty of defining its key term[.]"[7] It should thus be no surprise that splits routinely develop over ERISA's provisions. This petition deals with four of them:

First, ERISA § 409(a) provides that a fiduciary is personally liable for losses resulting from a breach of duty.[8] ERISA does not, however, state who bears the burden of proving that loss or the applicable standard for meeting this burden. Three circuits – *viz.*, the Fourth, Fifth, and Eighth – and the US Department of Labor place that burden squarely on plan fiduciaries, requiring them to prove that no harm befell the plan once a breach of fiduciary duty is established. But five circuits – *viz.*, the Second, Sixth, Seventh, Ninth, and Eleventh – burden participants and beneficiaries. This split is

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[6] *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 717 (2d Cir. 1993)

[7] *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins.,* 514 U.S. 645, 656 (1995).

[8] 29 U.S.C. §1109(a).

problematic for petitioners, who – despite establishing that respondents (a) breached their fiduciary duties of care, loyalty, and prudence by engaging in prohibited self-dealing transactions over a thirty-year period and then (b) concealed those breaches through verified acts of fraud – could not quantify the loss to the plan; and, thus, were denied relief because they were litigating in the Ninth Circuit.

Second, ERISA § 413 generally requires that plaintiffs file a claim within six years of the last act of the alleged violation, regardless of when they actually learned of it.[9] The fraud or concealment exception, however, tolls the limitations period for six years from the date of discovery. *Ibid*. But what constitutes *fraud or concealment* is an open question. The Third, Ninth and DC Circuits have held that passive concealment *alone*, *i.e.*, a fiduciary's failure to disclose material information to a beneficiary, does not qualify, while the Second, Seventh and Tenth Circuits have held that it does. Obviously, this split creates a number of problems, *e.g.,* a Hollister employee in California cannot bring suit to recover for fiduciary breaches silently hidden for over forty years, but a Hollister employee in Colorado can.

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[9] 29 U.S.C. §1113.

Third, ERISA § 410(a) states that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy."[10] To enforce that policy, ERISA § 514(a) supersedes any and all state laws insofar as they relate to any employee benefit plan governed by ERISA.[11] This provision is conspicuous for its breadth, and evinces Congress' intent to eliminate conflicting and inconsistent state and local regulations. The Ninth Circuit, however, has held that private parties *can* use state law agreements and instruments to relieve fiduciary compliance because ERISA only preempts contracts mandated by state law. No other circuit has imposed such an onerous restriction, which effectively allows fiduciaries to accomplish by private agreement what they could not do under law – ignore ERISA responsibilities, duties, and obligations.

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[10] 29 U.S.C. §1110(a).

[11] 29 U.S.C. §1144(a).

Finally, ERISA § 502(e)(1) mandates that federal courts have *exclusive* jurisdiction over ERISA claims, but carves out a narrow area of concurrent state jurisdiction for benefit claims under the terms of the plan.[12] By its express terms, this exception is limited to: 1) recover benefits due under the terms of the plan; 2) enforce rights under the plan; and 3) clarify rights to future benefits under the plan.[13] The Ninth Circuit, however, has chosen to move in the opposite direction, holding that state courts not only have concurrent jurisdiction over these three subjects, but *any* dispute that would otherwise fall under the federal court's *exclusive* jurisdiction. Such an allowance runs afoul of both Congress and the Department of Labor, as neither wanted state courts anywhere near ERISA, and creates a split with every other court to confront the issue (except California), all of whom have narrowly construed concurrent state jurisdiction, if not flatly rejected efforts to expand its scope.

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[12] 29 U.S.C. §§1132(e)(1), incorporating 1132(a)(1)(B).

[13] *Ibid.*

ARGUMENT

I. Circuits are openly (and deeply) divided over who bears the burden of proving that a breach of fiduciary duty caused a loss to a plan under ERISA § 409(a), *i.e.*, participants or fiduciaries; and *certiorari* is necessary to resolve that split once and for all.

A split has plagued the circuits for nearly two decades over who has the burden of proof in a breach of fiduciary duty claim under ERISA. Specifically, ERISA § 409(a) provides that a fiduciary shall be liable for losses "resulting from" a breach of duty.[14] It does not, however, specify who bears the burden of proof on the issue of causation of the loss.[15] In an ordinary civil lawsuit, the default rule is that, when a statute is silent, the burden of proof rests with the plaintiff.[16] But ERISA isn't an ordinary civil statute. As noted above, the circuits are openly divided over which party must prove that an alleged breach of fiduciary duty caused a loss to an ERISA plan, with the Fourth, Fifth, and Eighth Circuits placing that burden squarely on fiduciaries;[17] while the Second,

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[14] 29 U.S.C. §1109(a).

[15] *Ibid.*

[16] *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005).

[17] *Tatum v. RJR Pension Inv. Committee*, 761 F.3d 346 (4th Cir. 2014); *McDonald v. Provident Indem. Life Ins.*, 60 F.3d 234, 237 (5th Cir. 1995); *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992).

Sixth, Seventh, Ninth, and Eleventh Circuits place the burden on participants and beneficiaries.[18] For the reasons that follow, petitioners believe the minority is correct, as it most closely aligns with ERISA's goal of protecting beneficiaries from the unlawful actions of their fiduciaries.

Congress modeled ERISA on the common law of trusts.[19] This Court therefore looks to principles of trust law for guidance when interpreting that Act.[20] Under the common law of trusts, fiduciaries had a duty to act wholly and entirely for the benefit of their trust, and without reference to their own interests.[21] They were prohibited from self-dealings with trust property, as such transactions were deemed harmful

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[18] *Silverman v. Mut. Benefit Life Ins.*, 138 F.3d 98, 104 (2nd Cir. 1998); *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995); *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1099 (9th Cir. 2004); *Peabody v. Davis*, 636 F.3d 368, 373 (7th Cir. 2011); *Willett v. Blue Cross & Blue Shield*, 953 F.2d 1335, 1343 (11th Cir. 1992).

[19] *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport,* 472 U.S. 559, 570 (1985).

[20] *Tibble v. Edison Int'l*, 135 S.Ct.1823, 1828 (2015).

[21] *Handbook of the Law of Trusts*, George Bogert, p.18 (1921)(Bogert); *Commentaries on the Law of Trusts and Trustees, Vol.2,* Charles Beach, pp.1119-1121 (1897) (Beach); *Commentaries on Equity Jurisprudence, Vol.1,* Joseph Story, pp.423-424 (14ed. 1918) (Story); *Equity in its relations to Common Law*, William Billson, p.164 (1917) (Billson).

and void as against public policy;[22] and could not use trust property for their own purposes,[23] even though they would do no actual injury to that property or the trust itself.[24] In light of this duty, Courts of Equity *always* burdened the dominant party, *viz.*, fiduciaries,[25] with proving that they were without fault – *i.e.*, the transaction was fully disclosed, the beneficiary acquiesced, and the trust received fair market value for its property.[26] This longstanding

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[22] *Treatise on the Law of Fraud and Mistake as Administered in the Courts of Equity*, William Kerr, pp.102-103 (1868) (Kerr); *Manual of the Principles of Equity*, John Indermaur, pp.166-167 (2ed. 1890) (Indermaur); *Story*, pp.424-425; *Bogert*, p.146.

[23] *Practical and Concise Manual of the Law Relating to Private Trusts and Trustees*, Sir Arthur Underhill, pp.245-247 (5ed. 1901)(Underhill); *Practical Treatise on the Law of Trusts and Trustees*, Thomas Lewin, p.395 (2ed. 1858)(Lewin); *Story*, pp.423-424.

[24] *Treatise on the Law of Trusts and Trustees, Vol.2*, Jairus Perry, pp.1386-87 (6ed. 1911); *Lewin*, p.395; *Story*, p.425.

[25] *Treatise on Equity Jurisprudence*, *Vol.2,* John Pomeroy, pp.1750-1759 (3ed. 1905) (Pomeroy Jurisprudence); *Bogert*, p.145; *Indermaur*, p.167; *Story*, pp.350-351, 406; *Billson*, p.163.

[26] *Beckett on Trusts and Trustees Illinois*, James Beckett, pp.209-210 (1912); *Treatise on the Law of Trusts and Trustees, Vol.1*, Jairus Perry, pp.325-26 (6ed. 1911); *General Treatise on the Principles and Practice by which Courts of Equity are Guided as to the Prevention or Remedial Correction of Fraud, Vol.1*, John Hovenden, pp.479-480, & 483-484 (1825) (Hovenden); *Bogert*, p.145; *Story*, pp.321, 350-351; *Lewin*, pp.395-396.

principle rested on the view that, as between innocent beneficiaries and defaulting fiduciaries, the latter should bear the risk of uncertainty as to the consequences of its breach of duty.[27] More importantly, a beneficiary's inability to prove loss was inconsequential,[28] since the act itself was deemed harmful.[29] Just as trust law burdens breaching fiduciaries to prove that their beneficiaries were not harmed, Congress intended for ERISA fiduciaries to prove that retirees were not harmed (and we aren't the only ones to think so).

The United States submitted an *amicus brief* in *RJR Pension Investment Committee, v. Tatum*, No. 14-656 (2015) on the question of who bears the burden of proof under ERISA § 409(a).[30] The answer was a surprise to no one.[31] The Solicitor General began by acknowledging that ERISA's fiduciary duties are derived from the common law of trusts, and that fiduciaries would be liable for disproving

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[27] *Story*, p.425; *Beach*, p.1186.

[28] *Hovenden*, p.484; *Lewin*, p.576.

[29] *Lewin*, pp.395, 576; *Underhill*, pp.356-57; *Beach*, p.1573; *Indermaur*, pp.166-167

[30] Brief for the United States as *Amicus Curiae* in *RJR Pension Investment Committee, v. Tatum*, 2015 WL 3397989 (2015).

[31] Secretary of Labor Brief as *Amicus Curiae* in *Tatum v. R.J. Reynolds Tobacco Company,* 2013 WL 3193467 (4th Cir. 2013).

loss under long standing trust-law principles.[32] Looking to those principles for guidance, the Solicitor General then explained how burdening fiduciaries would further ERISA's purpose of protecting the interests of participants and beneficiaries by imposing trust-law fiduciary duties and accompanying remedies.[33] A contrary rule, the Solicitor General concluded, would insufficiently deter fiduciaries from engaging in wrongful conduct, inadequately protect beneficiaries' interests, and create significant barriers to recovery for conceded breaches.[34] And therein lies the rub of this ordeal.

Judge Shubb painstakingly documented how HolliShare fiduciaries breached their collective duties under ERISA, engaged in prohibited self-dealing transactions, and then fraudulently misrepresented both. Yet, he felt compelled by controlling Ninth Circuit law not to stop them because the innocent *participants* could not offer evidence of loss.[35] Such a holding strains credulity and makes a mockery of all that ERISA stands for and all that Congress intended by crafting a complex statute whose ultimate purpose was and remains to protect the innocent from the greed of those whom they are

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[32] 2015 WL 3397989 at **8-10.

[33] *Id.* at *10 (citations omitted).

[34] *Ibid.*

[35] This holding is curious since proof of actual harm is not an element of a prohibited transaction claim. *Commissioner v. Keystone Consol. Indus., Inc.,* 508 U.S.152, 160 (1993).

compelled to trust.

ERISA's primary objective is to ensure that plan assets are prudently managed for the benefit of participants and their beneficiaries. The statute does this through its fiduciary provisions and accompanying remedies, which were designed to deter imprudent or other harmful conduct.[36] Imposing on plaintiffs who have already established a fiduciary breach with the added burden of proving actual loss creates significant barriers for those seeking relief. Moreover, it provides an unfair advantage to those who have already been shown to have engaged in wrongful conduct, thereby minimizing the fiduciary provisions' deterrent effect. Simply put, to hold as the district court did here – a holding that was upheld on appeal but would have been rejected had it been addressed in other circuits – will serve only to encourage dishonest fiduciaries to engage in ever more egregious acts of wrongdoing.

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[36] *Brock v. Robbins*, 830 F.2d 640, 647 (7th Cir. 1987).

II. Another split that has plagued circuits for decades is whether a fiduciary's failure to disclose material information to a participant or beneficiary, which constituted an *actual* fraud in the Courts of Equity under a divided bench, tolls the statute of limitations under the fraud and concealment exception of ERISA § 413.

Fraud and concealment – as they apply to the limitations period to a breach of fiduciary duty claim under ERISA – raise another question that has plagued circuits for decades.[37] Briefly, ERISA § 413 provides that "[n]o action" for breach of fiduciary duty "may be commenced" after the earlier of "six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation."[38] There is an exception to the rule, however, where an action may be commenced no later than six years after the date of discovery in instances of fraud or concealment. *Ibid.* But what constitutes *fraud or concealment* is an open question, as ERISA § 413's use of the phrase is ambiguous and the legislative history behind that subsection unclear.[39] The

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[37] *Hi-Lex Controls, v. Blue Cross Blue Shield of Michigan*, 751 F.3d 740, 748 (6th Cir. 2014)(citations omitted)("Other circuit courts have split when interpreting the scope of the fraud or concealment exception."); *Fulghum v. Embarq Corp.*, 785 F.3d 395, 414 (10th Cir. 2015)(same).

[38] 29 U.S.C. §1113.

[39] *Hi-Lex*, 751 F.3d at 748; *Radiology Ctr., S.C. v. Stifel,*

general consensus amongst the circuits is that, at a minimum, it incorporates the equitable doctrine of *fraudulent concealment*.[40] Under that doctrine, passive concealment alone, *e.g.*, a fiduciary's failure to disclose material information to a beneficiary, constitutes fraud and would toll the statute of limitations. A number of circuits, however, the Third, Ninth and DC in particular, have held that passive concealment *alone* cannot toll the statute of limitations under ERISA.[41] They are wrong.

When ERISA § 413 was enacted, fraud was defined as "a false representation of a matter of fact, whether by words or conduct, by false or misleading allegations or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury."[42] Concealment, at the time, was defined as "a withholding of something which one knows and which one, in duty, is bound to reveal."[43]

Nicolaus & Co., 919 F.2d 1216, 1221 (7th Cir. 1990); *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 190 (2nd Cir. 2001); *Fulghum*, 785 F.3d at 414.

40 *Fulghum*, 785 F.3d at 414 (string citation omitted).

41 *Ranke v. Sanofi-Synthelabo Group Pension Plan*, 436 F.3d 197, 204 (3rd Cir. 2006); *Larson v. Northrop Corp.*, 21 F.3d 1164, 1174 (D.C. Cir. 1994); *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1401 (9th Cir. 1995).

42 Black's Law Dictionary 788 (4ed. 1968).

43 Blacks at 360.

The fraud or concealment exception is set out in the disjunctive, and canons of construction indicate that terms connected in the disjunctive be given separate meanings.[44] With respect to *fraud* and *concealment*, while there is some overlap between the two, it is possible to give each a separate meaning, *i.e.*, ERISA's limitations period is extended when the defendant (1) made "a false representation of a matter of fact, whether by words or conduct, by false or misleading allegations or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury," or (2) when the defendant conceals the alleged breach of fiduciary duty.[45] In other words, the fraud and concealment exception supports both active *and* passive concealment; and while the legislative history behind this subsection may be murky, Congress' intent regarding ERISA is crystal clear.

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[44] *Garcia v. United States*, 469 U.S. 70, 73 (1984).

[45] *Fulghum*, 785 F.3d at 414; *Caputo*, 267 F.3d at 188-190.

Congress drafted ERISA with the understanding that trust law, which includes a well established body of authority on fraud and concealment, would inform interpretation of both ERISA's fiduciary duties and the remedial provisions designed to enforce them.[46] And trust law unequivocally states that a fiduciary's failure to disclose information not only qualifies as actual fraud,[47] but tolls the limitations period until that fraud is discovered.[48] Indeed, this principle is one of the hoariest in law: Someone who serves in a fiduciary capacity, particularly when dealing with money and property belonging to others, is guilty of fraud if he conceals material facts from those on whose behalf he is entrusted to act – especially when, by doing so, he benefits himself. Nor does this fraud become any less offensive (or actionable) simply because it was presented in open court.

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[46] *Tibble,* 135 S.Ct. at 1828-29.

[47] *Notes of lectures on equity jurisprudence to accompany Merwin's Equity*, William Lile, p.136 (1921); *Handbook of Equity Jurisprudence*, Norman Fetter, p.137 (1895); *Pomeroy Jurisprudence*, p.1609; *Indermaur*, p.160; *Hovenden*, p.480; *Story*, pp.298 & 306; *Billson*, pp.164-165.

[48] *Bogert*, p.552; *Lewin*, p.583; *Hovenden*, p.480.

Historically, equity exercised exclusive jurisdiction over claims by a beneficiary against a fiduciary for breach of trust, subject to limited exceptions not relevant here.[49] Claims against fiduciaries for fraudulent concealment were thus exclusively equitable in nature, and the fact that it occurred in court had absolutely no bearing on the issue.[50] Nor did it matter that such misrepresentations were directed *to* the court, instead of the beneficiary, as third-party fraud was also an established form of concealment in the Courts of Equity – especially where the misrepresenting party intended for a third-party to act upon those statements, causing the injury.[51] And while the district judge found plaintiffs' reliance on these statements illogical, he missed the fact that the original complaint did not sound in fraud. More troubling is that this ruling undercuts long-standing principles of equity and strikes at the very heart of the judicial process. In its simplest and starkest terms, the fiduciaries stole everything and got away with it by not telling those who trusted them, and then lying about it in open court – all without suffering any consequences for their wrongdoing.

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[49] *Treatise on Equitable Remedies*, *Vol.2*, John Pomeroy, pp.1519-20 (1905) (Pomeroy Remedies); *Pomeroy Jurisprudence*, p.1628; *Lewin*, p.590.

[50] *Kerr*, pp.228-234; *Pomeroy Remedies*, pp.1110-1111; *Lewin*, pp.234-235; *Hovenden*, p.40; *Story,* p.343; *Billson*, p.157; *Pomeroy Jurisprudence*, pp.1568-70.

[51] *Practical Exposition of the Principles of Equity*, H. Arthur Smith, pp.208-9 (5ed. 1914).

Unfortunately, because of this lack of candor to participants and beneficiaries (not to mention court and counsel), petitioners were forced to adjust their theories, several times during litigation, to reflect the fiduciaries' ever-changing story and rolling disclosures. To allow them (the fiduciaries) to escape liability because, at best, they didn't tell anyone about violating ERISA and, at worst, lied about it in court proceedings, is an affront to everything for which ERISA stands. Petitioners would therefore ask the Court to grant *certiorari* and resolve the split between the circuits by holding that ERISA not only tolls the limitations period for claims against fiduciaries who actively conceal those claims through fraudulent court filings but against fiduciaries who fail to disclose those claims in the first place.

III. *Certiorari* is also warranted because the Ninth Circuit's rule that private parties can use contracts (and other agreements) to minimize or eliminate statutory obligations under ERISA – as long as those agreements are not mandated by state law – runs afoul of Congressional intent, Department of Labor interpretations, and every other Circuit to consider the issue.

It is a fundamental principle of the U.S. Constitution that Congress has the power to preempt state law.[52] Nowhere is this principle more apparent than when Congress explicitly states a clear intent – in either the language of the federal statute or its legislative history – to do so.[53] And nowhere was that intent stated any clearer than with ERISA. ERISA is designed to promote the interests of employees and their beneficiaries in employee benefit plans.[54] It sets various standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans – the purpose of which is to provide a uniform regulatory regime over employee benefit plans.[55] To this end, ERISA § 514(a) expressly preempts any and all state laws that *relate to* an employee benefit

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[52] *Travelers,* 514 U.S. at 645.

[53] *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992).

[54] *Aetna Health Inc. v. Davila,* 542 U.S. 200, 208 (2004).

[55] *Ibid.*

plan.[56] But even if a state law isn't entirely displaced, it is still preempted to the extent it *actually* conflicts with ERISA;[57] that is, when (1) it is impossible to comply with both state and federal law, or (2) where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.[58] In this instance, respondents' use of state law contracts to dictate ERISA compliance and asset valuation does both.

ERISA prohibits fiduciaries from engaging in certain transactions, including, among other things, the sale of plan assets to a party-in-interest, *e.g.*, JDS.[59] By statute, such a sale is only allowed if the plan receives adequate consideration.[60] For employer securities that have no recognized market, *adequate consideration*, means, in relevant part, the fair market value of the asset as determined in good faith by *the trustee or named fiduciary*.[61] Fiduciaries bear the "heavy" burden of proving that they meet this exemption, which requires an intensive and scrupulous independent investigation before the sale

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[56] 29 U.S.C. §1144(a).

[57] *John Hancock Mut. Life Ins. v. Harris Trust & Sav. Bank,* 510 U.S. 86, 99-100 (1993); *Davila*, 542 U.S. at 217-18.

[58] *Gade*, 505 U.S. at 98 (string citation omitted).

[59] 29 U.S.C. §1106(a)(1)(A).

[60] 29 U.S.C. §1108(e)(1).

[61] 29 U.S.C. §1002(18)(B).

occurs.[62] *Respondents did none of that here.* Instead, they placed stock restrictions in the JDS articles, value restrictions in the mid-80s agreement, and conduct restrictions in the Preferred Share Trust – all but guaranteeing that the plan could only sell common shares for December 31 book value, and that an independent and scrupulous investigation would never occur. Moreover, under these contracts, the only one valuing plan assets for sale was neither a named fiduciary nor a plan trustee; it's a party-in-interest who is *literally* dictating the price it will pay for HolliShare stock. At the risk of overstating the obvious, it is impossible to comply with ERISA's requirement that fiduciaries investigate the fair market value of plan assets, *and* with respondents' no-investigation contracts. It is equally impossible to determine the fair market value of HolliShare stock, when those same contracts dictate what that value *will be* December 31 book value.[63]

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[62] *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996); *Eyler v. Commissioner*, 88 F.3d 445, 454-5 (7th Cir. 1996); *Chao v. Hall Holding*, 285 F.3d 415, 436-7 (6th Cir. 2002).

[63] Respondents conceded, repeatedly arguing to the district judge, that *no investigation* was required to sell plan assets, other than to determine whether JDS calculated the December 31 book value in accordance with GAAP. *See* Reply to Dismiss the First Amended Complaint in *DiMaro v. Hollister, Inc.,* 2006 WL 8199078 (E.D. Cal. 2006).

Congress enacted ERISA to protect the retirement savings of American workers by imposing high standards of fiduciary responsibility and to stop the misuse and mismanagement of plan assets. In fact, one of Congress' biggest fears, when drafting these protections, was that an employer (or other party-in-interest) would "drain off" plan assets by selling them at something other than fair market value.[64] To stop this from happening, Congress made clear that "exculpatory provisions, which relieve a fiduciary from liability for breach of the fiduciary responsibility are to be void and of no effect."[65] It also explained how "the large numbers of people and enormous amounts of money involved in such plans coupled with the public interest in their financial soundness as expressed in the Act, require that no such exculpatory provision be permitted."[66] And the circuits to address this issue, including the Ninth, have universally held that fiduciaries cannot use contracts to minimize or eliminate their statutory obligations under ERISA. But unlike its sisters, the Ninth Circuit limits this prohibition to contracts and agreements mandated under a *particular* state law.[67]

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[64] H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. (August 12, 1974), reprinted 1974 U.S.C.C.A.N. 5038, 5093.

[65] 1974 U.S.C.C.A.N. at 5101, discussing 29 U.S.C. §1110(a).

[66] S. Rep. 93-127, 93d Cong., 1st Sess. (April 18, 1973), reprinted 1974 U.S.C.C.A.N. 4838, 4869-70 (discussing same).

[67] *Associated Gen. Contractors of Am. v. Metro. Water Dist. of S. California*, 159 F.3d 1178, 1183, n.2 (9th Cir. 1998).

Because contracts between private parties are not state laws, the Ninth Circuit believes that they cannot be preempted, and thus are not void under ERISA. This is absurd.

It is highly unlikely that the same Congress that made contractual relief for fiduciaries from ERISA responsibilities, obligations and duties "void as against public policy," would condone contracts, which eliminated those very same protections, simply because they were entered into between private parties. Moreover, the Secretary of Labor expressed a similar sentiment in *Herman v. NationsBank of Georgia,* explaining how Congress established "extraordinarily stringent standards" for the management of plan assets and ERISA fiduciary duties are "the highest known to the law."[68] But if ERISA fiduciaries could insulate themselves against liability by simply entering into contracts requiring the conduct constituting the breaches, many of these protections will be eliminated in direct contravention of the clearly expressed policy underlying ERISA § 410(a).[69] The Ninth Circuit's singular view that private-party state law contracts, which serve as an obstacle to the full purposes and objectives of Congress, are not preempted is therefore clearly erroneous. ERISA calls for federal supremacy. In

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[68] Answering Brief in *Herman v. NationsBank of Georgia*, 1996 WL 33423527, **44-45 (11th Cir. 1996) (citations omitted).

[69] *Ibid.* citing 29 U.S.C. §1110(a); *Herman v. NationsBank of Georgia*, 126 F.3d 1354, 1363 (11th Cir. 1997).

the case of a direct conflict, federal supremacy requires that state law yield. So while state contract law might not generally be displaced by ERISA, it can nevertheless be preempted when, as here, it directly undercuts the very purpose for which ERISA was enacted. *Certiorari* is warranted.

IV. State courts *do not* have concurrent jurisdiction to resolve questions of ERISA law – much less order a fiduciary to violate the terms of the plan – as ERISA § 502(e)(1) grants federal courts *exclusive* jurisdiction to make those determinations, and the Ninth Circuit is wrong to say otherwise.

The final question to be resolved by this petition involves the Ninth Circuit's holding that state courts have concurrent jurisdiction to resolve ERISA questions that otherwise fall under the federal court's exclusive jurisdiction.[70] Briefly, this lawsuit originated because the plan administer, *viz.*, Hollister, had been distributing DeFazio's retirement account in a manner that violated ERISA and the terms of the plan. *Pet. App. 148a-150a, & 204a-210a.* When DeFazio brought suit in federal court to stop these distributions, Hollister filed a motion in Sacramento Family Court for leave to: (1) deposit DeFazio's account into an escrow *outside* of the plan; (2) relieve themselves of their obligations under ERISA, pending final resolution of the federal lawsuit; and (3) force him to post a substantial bond

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[70] *Mack v. Kuckenmeister,* 619 F.3d 1010, 1018-19 (9th Cir. 2010)("Because a state court has concurrent jurisdiction over ... proceedings [to enforce, clarify, or collect] under 29 U.S.C. § 1132(a)(1)(B) ... it *follows* that it has jurisdiction to decide the intermediate question of whether or not the DRO is a QDRO. […] Just because the question could arise in a case where the federal courts have exclusive jurisdiction, however, does not mean that a state court could not have concurrent jurisdiction when it arises in a different context.").

to indemnify them against any liability for breaching their fiduciary duties.[71] They even demanded that he pay their attorney's fees for this lawsuit![72] It is undisputed that Hollister's request violated both ERISA and the terms of the plan. Yet, the family court granted Hollister's motion anyway, distributing DeFazio's account but denying them fees.[73] Adding insult to this injury, when DeFazio's unlawful distribution and retaliation claims were finally heard in federal court, Judge Shubb refused to grant him relief – even though the undisputed evidence also showed that Hollister had done both. *Pet. App. 126a.* Specifically, the district judge held that the Sacramento Family Court could "order somebody to violate the terms of a plan," even if it also violated ERISA, (*Pet. App. 128a*); and when DeFazio's counsel pointed out that such a distribution would be preempted, the district judge responded: "What do you want the parties to do? Go to the judge and say: We're not going to follow your order." *Ibid.* Yes, that's *exactly* what we want them to do.

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[71] *Ellis v. DeFazio,* 2008 WL 10883911 (Cal. Super. Jan. 18, 2008)(motion).

[72] *Ibid.*

[73] *Ellis v. DeFazio,* 2008 WL 10884002 (Cal. Super. Apr. 23, 2008)(order).

ERISA provides that the federal courts shall have exclusive jurisdiction over all civil actions brought under Title I of ERISA.[74] The *only* exception to this provision is that state courts have concurrent jurisdiction over actions brought by participants and beneficiaries to: (1) recover benefits due them under the terms of the plan, (2) enforce rights under the terms of a plan, or (3) clarify rights to future benefits under the terms of a plan.[75] The operative words being: *under the terms of the plan.* Congress gave the state courts concurrent jurisdiction over these actions because they typically involved the application of general principles of contract law for which the state courts have substantial expertise.[76] But Congress didn't want state courts anywhere near ERISA, much less violating the terms of the plan, and flat-out said so in the Conference Report.[77] And if there was any doubt as to the Department of Labor's view, it was eliminated by the *three* amicus briefs in which the Secretary explicitly said – in no uncertain terms – that state courts cannot resolve questions of ERISA law or distribute benefits not authorized under the terms of the plan.[78] *And that's the problem.* The

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[74] 29 U.S.C. §1132(e)(1).

[75] 29 U.S.C. §§1132(e)(1), citing §1132(a)(1)(B).

[76] *Menhorn v. Firestone Tire & Rubber,* 738 F.2d 1496, 1500, n.2 (9th Cir. 1984).

[77] 1974 U.S.C.C.A.N. at 5107 (italics added).

[78] *Nasca v. Peoplesoft*, 1998 WL 34103915, **4-14 (9th Cir. 1998); *Marriage of Oddino*, 1997 WL 33559420, **7-33 (Cal. 1997); *Boggs v. Boggs,* 1996 WL 714742, **10-28 (1996).

Ninth Circuit knows about Congress' intent and the Department's view, as both were placed squarely before the circuit on multiple occasions. *It doesn't care.* The Ninth Circuit believes that state courts have concurrent jurisdiction to resolve *any dispute* that would otherwise fall under the exclusive jurisdiction of the federal court.[79] This is a big deal, as the Ninth Circuit's expansive view of concurrent jurisdiction runs afoul of *literally* every court in Union (except California);[80] and that's where the question becomes personal. For nearly a decade, DeFazio fought Hollister and the other fiduciaries over their handling of the plan and the valuing of accounts. His vigilance served as the seed-crystal in which the above ERISA violations came to light. Without him, none of the fiduciary breaches or prohibited transactions identified in this lawsuit would have been discovered … *none of them* … and respondents would continue their practice of secretly

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[79] *Mack,* 619 F.3d at 1018-19.

[80] *Compare, e.g., Gorman v. Life Ins. Co. of North Am.*, 811 S.W.2d 542, 545 (Tex. 1991); *Appeal of A & J Beverage Distribution*, 163 N.H. 228, 235-36 (N.H. 2012); *Matter of Estate of Damon*, 915 P.2d 1301, 1306 (Colo. 1996); *Richland Hosp., Inc. v. Ralyon*, 33 Ohio St.3d 87, 89 (Ohio 1987); *Stanford v. Paul W. Heard & Co.*, 240 Ga.App. 869, 871 (Ga. 1999); *Johnson v. Colonial Life & Acc. Ins. Co.*, 173 N.C.App. 365, 373-374 (N.C. 2005); *McMartin v Central States, Southeast and Southwest Areas Pension Fund*, 159 Mich.App 1, 6 (Mich. 1987); *Gresham v. Massachusetts Mutual Life Ins. Co.*, 248 N.J.Super. 64, 69-70 (N.J.1991); *Yates v. NYC Health & Hospitals Corp.*, 950 N.Y.S.2d 841 (N.Y. 2012); *with Marriage of Oddino,* 16 Cal.4th 67 (Cal. 1997).

draining money from the plan. There is a palpable – indeed, overwhelming – sense of injustice in allowing the defendants to circumvent both their obligations under the plan and duties under ERISA by sneaking into a local family court and forcibly distributing his account in retaliation for that very vigilance; and the Ninth Circuit's condoning of such practice warrants granting this petition.

CONCLUSION

This case clearly brings to light the egregiousness of what can happen if the existing split regarding the application of state law to ERISA is allowed to continue. It won't only allow cheating fiduciaries to continue to get away with their wrongdoing, but it will allow a serious lack of uniformity to continue to impose terrible risks on the life savings and investments of millions of hard-working Americans who have innocently trusted others with their money. This is the case that cries out for addressing the split(s) that has plagued this nation.

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August 4, 2015

APPENDIX

Table of Contents

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 12-15973, 12-16099

JAMES P. DEFAZIO; ET AL.,

Plaintiffs - Appellants,

AND

KATHLEEN ELLIS

Plaintiff,

V.

HOLLISTER EMPLOYEE SHARE OWNERSHIP TRUST; ET AL.,

Defendants - Appellees.

JAMES P. DEFAZIO; ET AL.,

Plaintiffs - Appellees,

v.

HOLLISTER EMPLOYEE SHARE OWNERSHIP TRUST; ET AL.,

Defendants,

AND

ALLAN F. HERBERT,

Defendants - Appellants,

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, Senior District Judge, Presiding

Argued and Submitted March 11, 2015
Filed May 15, 2015

San Francisco, California

Before: McKeown, Murguia, and Friedland,
Circuit Judges.

MEMORANDUM

A group of former participants in the Hollister Employee Share Ownership Trust ("Plan Participants" and the "Plan," respectively) sued the Plan, Hollister, Inc., Hollister's parent company The Firm of John Dickinson Schneider, Inc. ("JDS"), and various Plan fiduciaries for violation of their rights under the Employee Retirement Income Security Act ("ERISA"). 29 U.S.C. § 1001 *et seq*. The parties are familiar with the facts underlying this eleven-year dispute, and we do not recount them here.

I. The Appeal

The Plan Participants appeal the district court's judgment in favor of the defendant companies and fiduciaries following multiple pre-trial motions and a fifteen-day bench trial. The district court entered careful and detailed orders explaining its pre-trial rulings, as well as extensive findings of fact and conclusions of law following trial.

A. The 1999 Transaction

We affirm the district court's determination on summary judgment that the Plan Participants lacked standing to pursue relief on the 1999 Transaction, in which JDS preferred shares were transferred to a trust rather than distributed to Hollister employees. The fact that the plaintiffs are former – not current – plan participants does not undermine their statutory standing under ERISA. *See LaRue v. DeWolff, Boberg & Assocs., Inc.,* 552 U.S. 248, 256 (2008); *Harris v. Amgen, Inc.,* 573 F.3d 728, 735 (9th Cir. 2009). However, the stacked assumptions and

speculation surrounding this claim do not support Article III's standing requirements of traceability and redressability. *Bernhardt v. Cnty. of Los Angeles,* 279 F.3d 862, 869 (9th Cir. 2002) (noting that injury must be "fairly traceable" to alleged misconduct and that a claim is not redressable as "too speculative if it can be redressed only through 'the unfettered choices made by independent actors not before the court'") (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)).

B. Post-1992 Plan-JDS Share Repurchases

At trial, the district court determined that "because ... the fiduciaries' breaches of their duties did not cause a material harm to the Plan, plaintiffs are not entitled to damages." That conclusion remains unchallenged on appeal. The Plan Participants affirmatively abandoned their claim to monetary relief, but continue to pursue their claims for equitable relief. To the extent any additional money damages claim might underlie the claim for equitable relief, the Plan Participants waived that claim.

Notably, both in their briefs and at oral argument, the Plan Participants could not articulate proposed equitable relief that is not tied into or an end-run around their claim for monetary relief. To the extent such a claim could be divined, the Plan Participants, who have already cashed out of the Plan, lack Article III standing as to redressability vis-a-vis their claims for prospective equitable relief. *See Mayfield v. United States,* 599 F.3d 964, 970 (9th Cir. 2010) ("Past exposure to harmful or illegal conduct does not

necessarily confer standing to seek injunctive relief if the plaintiff does not continue to suffer adverse effects. [*Lujan,* 504 U.S. at 564.] Nor does speculation or 'subjective apprehension' about future harm support standing.") (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 184 (2000)). "Once a plaintiff has been wronged, he is entitled to injunctive relief only if he can show that he faces a 'real or immediate threat ... that he will again be wronged in a similar way.'" *Id.* (omission in original) (quoting *City of Los Angeles v. Lyons,* 461 U.S. 95, 111 (1983)).

In light of this determination, we not specifically address every claim the Plan Participants raise on appeal.[1] With respect to most of the Plan Participants' claims, any error was harmless in view of the unavailability of the requested equitable relief and the waiver and abandonment of monetary claims.

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[1] The Plan Participants' failure to show damages or entitlement to equitable relief also bars recovery on their claim that the restrictions on the transferability of JDS stock in the JDS Articles were invalid as preempted by ERISA. This argument is unpersuasive for an independent reason. ERISA preempts "State laws." 29 U.S.C. § 1144(a). Contracts between private parties, such as the JDS Articles, are not state laws. *See Associated Gen. Contractors of Am. v. Metro. Water Dist. of S. California*, 159 F.3d 1178, 1183 n. 2 (9th Cir. 1998) ("We see no merit in AGC's argument that simply because a contract is legal and enforceable it has the effect of law of a state.").

C. Pre-1993 Plan-JDS Share Repurchases

The district court dismissed the pre-1993 share repurchase claims on the basis of the ERISA statute of limitations. 29 U.S.C. § 1113. We need not parse the active/passive distinction for the "fraud or concealment" exception to the statute of limitations for two reasons: (1) the Plan Participants abandoned their claim for monetary damages, and (2) the district court determined that "[i]f the court's finding that plaintiffs' claims based on defendants' conduct from 1982 to 1992 is reversed for any reason, the remainder of the court's analysis in this Order of plaintiffs' post-1992 claims would apply equally to their time-barred claims." The infirmities in the Plan Participants' monetary and equitable claims for post-1992 JDS share repurchases apply with equal force to the pre-1993 claims.

D. Amendments to the JDS Articles of Incorporation

To the extent that the Plan Participants argue that passive concealment has tolled ERISA's statute of limitations with respect to the 1978, 1980, and 1984 amendments to the JDS Articles of Incorporation, we reject that argument. As the district court noted, all the amendments to the Articles of Incorporation were filed with the Illinois Secretary of State. Thus, even assuming that passive concealment might toll ERISA's statute of limitations, the record would not support a claim of passive concealment here.

E. Excessive Sales of JDS Stock

To the extent that the Plan Participants appeal the district court's rejection of their allegations that Plan trustees sold more shares of JDS stock than necessary in 1982, 1987, and 1993, their argument fails because – as the district court held after trial – they have not proposed or sought any remedy with respect to this claim. The Plan Participants do not contest this holding on appeal; thus, they have waived any challenge to the district court's ruling on this claim.

II. Qualified Domestic Relations Orders

Separately, James DeFazio raises an issue relating to the handling of his portion of his former wife's Plan account. We conclude that these orders were "qualified domestic relations orders" under ERISA and complied with the Act's requirements. *See* 29 U.S.C. § 1056(d)(3)(D). DeFazio's related claims are without merit.

III. The Cross-Appeal

In their cross-appeal, the defendant companies and fiduciaries ask us to reverse the district court's finding of breach of fiduciary duties, the statute of limitations ruling permitting the post-1992 transactions to proceed to trial, the district court's holding that the Hollister Board had a duty to monitor the Plan trustees, and other issues. We offer no judgment or view on those issues as it is unnecessary to address them in light of our affirmance of the district court's judgment in favor of the defendant companies and fiduciaries.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Nos. CIV. 2:04-1358-WBS-GGH, 2:05-0559-WBS-GGH, 2:05-1726-WBS-GGH

JAMES P. DEFAZIO; ET AL.,

Plaintiffs,

v.

HOLLISTER, INC., ET AL.,

Defendants.

April 6, 2012

MEMORANDUM OF DECISION

After conducting a fifteen-day bench trial and providing the parties with extended time to submit post-trial briefing, the court finds in favor of all defendants on all of plaintiffs' claims under the Employee Retirement Income Security Act

("ERISA"), 29 U.S.C. §§ 1001-1461. This memorandum constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).

I. Factual and Procedural Background

Defendant Hollister, Inc. ("Hollister") is a privately-held Illinois corporation that develops, manufactures, and markets medical devices in the fields of ostomy, continence care, and wound care. Hollister is the wholly-owned and operating subsidiary of defendant The Firm of John Dickinson Schneider ("JDS"). JDS is an Illinois close corporation that holds all of Hollister's capital stock.

John D. Schneider, who only had a high school education and initially began a printing business, founded JDS and developed Hollister into a prosperous company. Schneider desired for JDS and Hollister to remain independent and employee-owned companies and wanted his employees to share in their success. Schneider accomplished these goals through a direct shareholder program and the Hollister Employee Share Ownership Trust ("HolliShare" or "Plan").

HolliShare is a non-contributory, tax qualified defined contribution profit sharing plan designed to provide retirement benefits to Hollister's non-union employees in the United States. It is governed by a written instrument, the HolliShare Employee Share Ownership Trust ("Plan Instrument"). HolliShare's predominant asset, which totals approximately 95% of its total value, is its JDS common shares. The Plan Instrument mandates that HolliShare's assets

be invested in JDS shares to the maximum extent practicable. When initially funded in 1974, HolliShare received 11,950 common shares of JDS that were purchased from shareholders. In exchange, HolliShare assumed the obligation to pay the long-term promissory notes issued to the shareholders to purchase the shares. In late 1974, the Plan transferred 4,007 shares back to JDS along with the related promissory note obligations, leaving the Plan with 7,943 shares. HolliShare has not purchased JDS shares since 1975, but the number of its total shares has increased due to two 100-for-1 stock splits and a 9-for-1 stock dividend.

HolliShare's ownership of JDS shares has proved to be an extraordinary investment, and the annual increases in value of JDS shares according to JDS's valuations exceeded most publicly-traded investments. For example, from 1977 through 2010, the mean average increase in JDS's share price was 26.79% each year, whereas the mean average increase for the Standard & Poors 500 index was 8.8% per year, the mean average increase for the Mid-Cap Index was 14.09% per year, and the mean average increase for the Small-Cap Index was 15.24% per year.

HolliShare participants are neither required nor permitted to contribute to HolliShare. HolliShare primarily raised the liquidity to pay benefits to participants through annual cash contributions from Hollister and cash paid by JDS for the repurchase of the Plan's stock. Hollister is required to contribute 5% of the aggregate compensation of participants to HolliShare each year, but, in recent years, Hollister

has contributed between 7.5% to 8.5% of the aggregate compensation, totaling approximately $33 million in contributions since 1990. Because HolliShare invests primarily in JDS common shares, the principal factor that determines the change in value of each HolliShare participant's account is the annual decline or appreciation in the value of the Plan's JDS common shares, and the balance in each participant's account is generally based on the participant's pro-rata percentage of the value of HolliShare. Participants in HolliShare learned about the Plan and its financial condition in annual reports, which were referred to by the parties as and often bore the title of "HolliShare Highlights."

JDS has two classes of shares, preferred[1] and

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[1] HolliShare does not own any preferred shares and all of the preferred shares, which have the controlling interest, were originally owned by Schneider. Schneider placed all of his outstanding preferred shares in the 1977 Preferred Share Trust, which was set to expire in 2001. Upon its expiration, the 1977 Preferred Share Trust provided for the shares to be distributed to the Hollister employees who owned common shares and agreed in writing to abide by Schneider's principles. Instead of allowing the shares to be distributed, a new trust, the 1999 Preferred Share Trust, was created and, with the consent of the employees who would have received preferred shares upon expiration of the 1977 Preferred Share Trust, the JDS preferred shares were transferred to the 1999 Preferred Share Trust. Although plaintiffs asserted claims based on these trust transactions, the court entered summary judgment in favor of defendants on these claims prior to trial in its June 26, 2009 Order ("June 2009 Order"). See DeFazio v. Hollister, Inc., 636 F.Supp.2d 1045, 1052-54, 1072-77 (E.D. Cal. 2009).

common, neither of which has a generally recognized public market. The JDS Articles of Incorporation[2] ("JDS Articles") provide several restrictions on JDS shares relevant to this case. First, under Article Five, only certain persons and entities are entitled to own JDS shares, including holders of shares as of May 5, 1978, select directors and officers of JDS or Hollister, select JDS or Hollister employees, and any deferred benefit plan maintained by JDS and/or Hollister.[3] (Ex. 533, Art. V, ¶ II.C.)

Second, Article Five restricts the manner in which holders of JDS stock may transfer ownership. Specifically, subparagraph II.D.2.a gives JDS a right of first refusal by requiring that any holder of JDS stock who intends to transfer one or more shares must first offer to sell those shares to JDS. Subparagraph II.D.3.b further provides that the price paid for any common share purchased by JDS under its right of first refusal "shall be its book value as of the end of the calendar month in which the Repurchase Date occurs ... computed in accordance

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[2] The JDS Articles were amended multiple times between 1978 and 1999. (See Exs. 531-36.) Unless otherwise noted, the cited paragraphs of JDS Articles are common to all of the versions.

[3] Subparagraph II.C was amended in 1984 to allow a non-employee director or officer of JDS or Hollister, such as defendant Richard T. Zwirner, to own stock if the individual had "performed substantial and continuing services" for JDS or Hollister. The JDS Articles were amended again in 1999 to allow The 1999 Preferred Share Trust to hold shares.

with generally accepted accounting principles."[4] (Ex. 531, Art. V, ¶ II.D.3.b.)

The JDS Articles also provide that when JDS repurchases shares pursuant to its right of first refusal, it is obligated to pay only a minimal amount in cash (set originally at $5,000 and then increased to $250,000 in 1999) and can pay the remainder with a promissory note. Not only did HolliShare's cash needs always exceeded the $5,000 and $250,000 minimums, it could not receive a promissory note for its sale of JDS stock because ERISA prohibited it from accepting a promissory note as payment from an employer. See 29 U.S.C. § 1106(a)(1)(B).

In addition to the right of first refusal, subparagraph II.D.7.a provides for the sale of JDS shares under "exceptional circumstances":

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[4] As noted in an earlier Order, "book value" refers to a method used to value corporate stock, but the term has no generally accepted definition. DeFazio v. Hollister Emp. Share Ownership Trust, 406 F.Supp.2d 1085, 1087 n. 2 (E.D. Cal. 2005) (Karlton, J.) (citing 51 A.L.R.2d 606 § 2). "[T]he term contemplates a theoretical value resulting from depreciation or appreciation as computed upon an originally determined base." Id. Albeit a simplified explanation, book value is generally calculated by subtracting a company's liabilities from its assets.

> Under exceptional circumstances and in the discretion of the Corporation's Board of Directors, shares may be repurchased by the Corporation at such other times, upon such other terms, in such other manners, over such other periods of time, or on such other conditions as the Corporation and the owner or holder of such shares may from time to time agree.

(Ex. 531, Art. V, ¶ II.D.7.a.)

The Plan Instrument permits the sale of the Plan's JDS stock and does not set the price for such sales but requires that the sales be conducted in accordance with the JDS Articles. (Ex. 9-9.14, § 11.01(2).) Defendants testified at trial that, since the mid-1980s, HolliShare has sold its holdings of JDS common shares to JDS pursuant to the "exceptional circumstances" provision of subparagraph II.D.7.a, not the right of first refusal embodied in subparagraph II.D.2.a. Defendants testified that HolliShare and JDS entered into an agreement in the mid-1980s ("mid-80s agreement")[5] that has since governed JDS's repurchases of common shares from HolliShare. Neither the mid-80s agreement nor its terms were memorialized in writing. Defendants testified that the terms of the agreement were that HolliShare would provide advance projections of the Plan's cash needs, HolliShare would sell shares back

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[5] As this litigation progressed, counsel referred to this agreement as the "mid-80s agreement," (Tr. 862:16-21), and the court will refer to it as such in this Order as well.

to JDS once a year, the purchase price would be the audited book value from December 31 of the prior year, JDS would purchase all of the shares HolliShare sought to sell, and JDS would pay all cash for the shares.

Although the theories underlying plaintiffs' claims have evolved as this case has progressed, the heart of plaintiffs' case at trial was that the price JDS paid for HolliShare's sales of its JDS stock should have been 1) the current month-end book value from the month in which the sale took place ("month-end book value"); or 2) a price determined to be the fair market value of the shares. Plaintiffs contend that, by selling at the December 31 book value from the year prior to the sale ("December 31 book value") instead of the month-end book value or the fair market value, the HolliShare fiduciaries breached their duties under ERISA and caused the Plan to suffer extraordinary losses.

The parties have stipulated as to a variety of details concerning the challenged transactions, including the sale date, the December 31 book value that was used for the sale price, the number of shares sold, and, for almost all of the sales, the month-end book value for the month in which the challenged transactions occurred. (See Docket No. 630 ("Stipulation of Facts").) Between 1981 and 2007, HolliShare sold its shares to JDS on nineteen occasions. The years in which sales took place, the number of shares sold, and the cash proceeds generated were as follows: 1981 (69,300 shares for $997,227.00); 1982 (38,000 shares for $723,140.00); 1985 (20,000 shares for $1,368,400.00); 1986 (180,000

shares for $12,619,800.00); 1987 (100,000 shares for $9,756,000.00); 1993 (75,000 shares for $25,830,000.00); 1995 (30,000 shares for $14,697,300.00); 1996 (166,973 shares for $10,000,012.97); 1997 (135,000 shares for $9,863,100.00); 1998 (250,000 shares for $21,262,500.00); 1999 (200,000 shares for $21,332,000.00); 2000 (150,000 shares for $18,679,500.00); 2001 (220,000 shares for $29,590,000.00); 2002 (46,250 shares for $7,174,300.00); 2003 (44,750 shares for $8,490,417.50); 2004 (50,000 shares for $11,908,000.00); 2005 (22,000 shares for $6,335,120.00); 2006 (26,500 shares for $8,717,400.00); and 2007 (85,500 shares for $34,006,770.00). (Id. ¶¶ 28-46.)

A. The Parties

1. Plaintiffs

With the exception of plaintiff James P. DeFazio, all of the plaintiffs in this case are former employees of Hollister and former participants in HolliShare. The former HolliShare participant plaintiffs and the years in which they ended their Hollister employment and received the distribution of their HolliShare accounts include: DeLane Humphries (1998); Brenda Dimaro (1999); Judy Seay (1999); Hallie Lavick (2000); Michael McNair (2002); Nancy Russell Stanton (2002); Sonya Pace (2003); Kathleen Ellis (2004); Theresa Beetham (2006); and Cindy Worth (2006). All of these plaintiffs had terminated their employment and received lump sum distributions of their HolliShare accounts before

commencing or joining this action. James P. DeFazio is Ellis's former husband and is an alternate payee on an account created with funds from Ellis's HolliShare distribution.

In a fourteen-month period between 2004 and 2005, three subsets of the current plaintiffs independently filed complaints against Hollister, JDS, the HolliShare Trustees, and various members of the boards of directors of both companies.[6] The cases were consolidated by court order on May 25, 2006. (Docket No. 87.) All of the plaintiffs except Ellis ("DeFazio/Dimaro plaintiffs") are represented by the same counsel and filed their Fifth Amended Complaint on July 22, 2008. (Docket No. 368.) Ellis, the only plaintiff represented by separate counsel, filed her Fourth Amended Complaint on January 23, 2008.[7] (Docket No. 314.) The allegations asserted against defendants are substantially similar in both

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[6] This case was not brought as a class action on behalf of all past or current members of HolliShare. The DeFazio/Dimaro plaintiffs included class allegations in their Fourth and Fifth Amended Complaints, but then filed a statement of non-opposition to defendants' motion to strike those allegations, (Docket No. 533), and thus the court granted defendants' motion to strike the class allegations. DeFazio, 636 F. Supp. 2d at 1055-56.

Plaintiffs also named HolliShare as a defendant, but have never treated it as a defendant and did not propose findings of fact or conclusions of law addressing its liability. Thus the court will enter judgment in favor of HolliShare.

[7] As used in this Order, the term "plaintiffs" refers collectively to all eleven plaintiffs unless otherwise noted.

operative complaints, and counsel for the DeFazio/Dimaro plaintiffs and Ellis tried the case together, with Ellis's counsel taking the lead at trial and in the post-trial briefing.

2. Defendants

a. HolliShare Trustee Defendants

Defendant Richard T. Zwirner has performed legal work for Hollister and JDS since 1969, and he has been a HolliShare Trustee since 1976. He has also provided consulting services to Hollister since the late 1970s and served as the Corporate Secretary of JDS from 1974 to 1981, a Director of JDS and Hollister since 1978, Hollister's Vice President of Marketing and Sales from 1991 to 1994, and General Counsel to Hollister since 1977.

Hollister's chief financial officers also served as HolliShare Trustees, which, in succession, were defendants Charles H. Gunderson,[8] James J. McCormack, and Samuel P. Brilliant. McCormack served as a HolliShare Trustee from 1989 to June 2000 and was also Hollister's Treasurer and Chief Financial Officer from 1981 to 2000, Vice President of

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[8] Although plaintiffs indicate in their proposed findings of fact that Gunderson was a Trustee before McCormack (Docket No. 647 at 13:20-21), the only testimony at trial was that Gunderson was the "vice president and treasurer of the corporation" prior to his termination. (Tr. 245:5-8.) More importantly, the court dismissed Gunderson as a defendant in this action in the June 2009 Order. See DeFazio, 636 F.Supp.2d at 1059, 1080.

Finance from 1981 to 1993, and a Senior Vice President from 1993 to 2000. Brilliant became a HolliShare Trustee in July of 2000 and was still a Trustee at the time of trial. Brilliant also served as Hollister's Vice President of Finance and Treasurer from October 1998 to July 2000 and became its Chief Financial Officer and a Vice President of Hollister in 2000.

Hollister's heads of the human resources department also served as HolliShare Trustees, which, in succession, were defendants Charles C. Schellentrager, James A. Karlovsky, and Lori Kelleher. Although it is unclear from the testimony at trial when Schellentrager became a Trustee, his term ended in 1990 at the latest when Karlovsky succeeded him. Karlovsky served as a Trustee from 1990 to July 2004 and also served as Hollister's Vice President of Human Resources from 1989 to 2003 and Executive Assistant to the President from 2003 to 2004. Kelleher succeeded Karlovsky as a Trustee in 2004 and continued to serve as a Trustee until 2011.

Defendant Loretta A. Stempinski also served as a HolliShare Trustee from 1980 to 2001, held various positions in Hollister from 1961 to 1980, and served as a Director of JDS and Hollister from 1980 to 2001.[9] Ellis has not asserted claims against

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[9] Defendants contend that plaintiffs did not adduce any evidence at trial with respect to Stempinski. However, Winn testified that she was a HolliShare Trustee and a Hollister and JDS board member. (Tr. 46:4-11, 62:11-14, 117:7-11.)

Stempinski.

b. Non-Trustee Defendants

Defendant Michael C. Winn served as a Director of JDS and Hollister from 1979 to May 2001 and as Hollister's Vice President of Legal Affairs from 1974 to 1977, President from 1977 to 2001, and Chairman and CEO from 1981 until 2001. Ellis has not asserted claims against Winn. Defendant Alan F. Herbert served on the Boards of Directors of Hollister and JDS from 1998 to May 2011 and also served as Hollister's President and Chief Operating Officer from 1997 to 2001, President from 2001 to 2007, and Chairman and CEO from 2007 until 2011.

Plaintiffs also named Donald J. Groneberg, Richard I. Fremgen, and Donna J. Matson as defendants. The only testimony about Groneberg at trial was that he was a member of the finance department at Hollister. (Tr. 2153:21-2154:2, 2374:24-2375:1.) Plaintiffs did not offer evidence at trial establishing that Groneberg owed fiduciary duties to the HolliShare beneficiaries and have not proposed findings of fact or conclusions of law addressing his liability. Similarly, while there was limited testimony about Fremgen being on the Hollister Board of Directors (Tr. 315:14-316:5, 1546:25-1547:4) and defendants have indicated that he was on the board from 1999 until 2010, there was no testimony about his conduct at trial and plaintiffs did not propose any findings of fact or conclusions of law with respect to claims against him. Lastly, based on two passing references to her at trial, it appears Matson may have been a HolliShare Trustee. (See

Tr. 306, 1913.) While the clerk's office has not terminated her as a defendant in this action, it appears she was dismissed in an early order in this case and neither party appears to believe claims are still pending against her. The court will therefore enter judgment in favor of Groneberg, Fremgen, and Matson.

B. Plaintiffs' Claims

Because plaintiffs failed to sufficiently identify their claims remaining for trial in their pretrial statement, the Final Pretrial Order required plaintiffs to file "an amended statement of the remaining claims that identifies, for each claim, 1) the statutory or common law basis for the claim; 2) the elements plaintiff must prove in order to prevail on the claim; 3) the plaintiff or plaintiffs asserting the claim; and 4) the defendant or defendants that the claim is asserted against." (Docket No. 583 at 3:23-28.) In their amended statement, plaintiffs identified twelve ERISA claims under various subsections of 29 U.S.C. §§ 1103-1106, 1110, 1140, and 1056. (Docket No. 588.)

II. Analysis

A. Statutory Standing

ERISA provides for a civil action to be brought only by the Secretary of Labor, a participant, a beneficiary,[10] or a fiduciary. 29 U.S.C. § 1132. In the context of ERISA, a "participant" means "any employee or former employee of an employer ... who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." Id. § 1002(7). "The Supreme Court has interpreted this section as conferring standing on former employees who 'have a reasonable expectation of returning to covered employment or ... a colorable claim to vested benefits.'" Vaughn v. Bay Envtl. Mgmt., Inc., 567 F.3d 1021, 1025 (9th Cir. 2009) (quoting Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117 (1989)).

Relying on Kuntz v. Reese, 785 F.2d 1410, 1411 (9th Cir. 1986), defendants have repeatedly argued during the course of this litigation that plaintiffs lack statutory standing under ERISA because, as retirees who have withdrawn their full account balances, they no longer have a colorable claim to vested benefits and thus are not "participants." In 2006, however, Judge Karlton rejected defendants' argument, concluding that the Ninth Circuit has "allowed suit

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[10] Defendants concede that, as an "alternate payee," DeFazio is deemed to be a "beneficiary" under 29 U.S.C. § 1056(d)(3)(J). (Docket No. 658 at 20 n. 8.)

even when plaintiffs have received their vested benefits if they allege that fiduciaries 'personally profited' from a breach of their duty of loyalty to the plan." Ellis v. Hollister, Inc., Civ. 05-559 LKK GGH, 2006 WL 988529, at *4 (E.D. Cal. Apr. 14, 2006) (citing Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock, 861 F.2d 1406, 1418 (9th Cir. 1988)). Defendants requested this court to reconsider Judge Karlton's ruling in 2007, and the court declined to do so because the ruling was not clearly erroneous. See DeFazio v. Hollister, Inc., Civ. No. 04-1358 WBS GGH, 2007 WL 3231670, at *3-4 (E.D. Cal. Nov. 1, 2007). The court again declines defendants' suggestion that the court should depart from Judge Karlton's 2006 decision.

Moreover, the Ninth Circuit has more recently distinguished Kuntz and held that a "former employee who has received a full distribution of his or her account balance under a defined contribution pension plan has standing as a plan participant to file suit under [ERISA] to recover losses occasioned by a breach of fiduciary duty that allegedly reduced the amount of his or her benefits." Vaughn, 567 F.3d at 1023, 1025-26; accord Harris v. Amgen, Inc., 573 F.3d 728, 733 (9th Cir. 2009). In Vaughn, the Ninth Circuit did not require that the trustees had personally profited from their breaches in order for the participants to have standing, which Judge Karlton had previously found would be required under the pre-Vaughn precedent.[11]

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[11] Whether the Trustees personally profited as a result of their breaches would be relevant if plaintiffs were seeking a

B. Statute of Limitations

1. "Fraud or Concealment" Exception

ERISA's statute of limitations provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of --
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

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constructive trust on any ill-gotten profits. See Amalgamated Clothing & Textile Workers Union, AFL-CIO, 861 F.2d at 1414 ("[T]he imposition of a constructive trust on a fiduciary's ill-gotten profits in favor of all plan participants and beneficiaries is an important, appropriate, and available form of relief under ERISA § 409(a).") Plaintiffs have not, however, sought such a remedy. (See Docket Nos. 650-53, 662.)

29 U.S.C. § 1113 (emphasis added). While § 1113 requires a plaintiff to file a claim within six years of the date of the last act constituting a part of the alleged violation, regardless of when the plaintiff actually learned of the violation, the "'fraud or concealment' exception tolls the running of the limitations period for six years from the date of discovery." Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1401 (9th Cir. 1995). "Plaintiffs bear the burden of proving 'fraud or concealment' under 29 U.S.C. § 1113." accord Barker, 64 F.3d at 1401 (finding the "fraud or concealment" exception inapplicable "because the plaintiffs have not produced specific evidence of fraudulent activity or concealment" by defendants).

Here, plaintiffs rely on the "fraud or concealment" exception to assert claims based on defendants' alleged breaches of fiduciary duties beginning in 1982. The "fraud or concealment" exception applies only when an ERISA fiduciary either "made knowingly false misrepresentations with the intent to defraud the plaintiffs" or took "affirmative steps ... to conceal any alleged fiduciary breaches." Barker, 64 F.3d at 1401; accord Radiology Ctr., S.C. v. Stifel, Nicolaus & Co., 919 F.2d 1216, 1220 (7th Cir. 1990) ("An ERISA fiduciary can delay a wronged beneficiary's discovery of his claim [meriting application of the 'fraud or concealment' exception] either by misrepresenting the significance of facts the beneficiary is aware of (fraud) or by hiding facts so that the beneficiary never becomes aware of them (concealment).").

Courts have recognized that the "fraud or concealment" exception to § 1113 incorporates the common law doctrine of fraudulent concealment. Barker, 64 F.3d at 1402. Under that common law doctrine, passive concealment alone may toll the statute of limitations if the defendant has a duty to disclose material information. Thorman v. Am. Seafoods Co., 421 F.3d 1090, 1092 (9th Cir. 2005). Courts that have considered the issue, however, have held that the doctrine of passive concealment does not apply to § 1113. See, e.g., Ranke v. Sanofi-Synthelabo Inc., 436 F.3d 197, 204 (3d Cir. 2006) (stating that an ERISA fiduciary must "have taken affirmative steps to hide an alleged breach of fiduciary duty from a beneficiary in order for the 'fraud or concealment' exception to apply"); Larson v. Northrop Corp., 21 F.3d 1164, 1174 (D.C. Cir. 1994) ("While a fiduciary's mere silence could, in some circumstances, amount to fraud, it would still fall short of the fraudulent concealment that courts have required for purposes of § 1113."); Schaefer v. Ark. Med. Soc'y, 853 F.2d 1487, 1491 (8th Cir. 1988) (holding that active concealment under § 1113 requires "more than merely a failure to disclose").

The Ninth Circuit in Barker implicitly found passive concealment insufficient to toll the statute of limitations. There, the Ninth Circuit recognized that an ERISA fiduciary generally has a duty to disclose "complete and accurate information material to the beneficiary's circumstances," but focused only on whether the defendants had affirmatively concealed their breach when holding that the defendants did not engage in "fraud or concealment" under § 1113. See Barker, 64 F.3d at 1401, 1403. An ERISA

fiduciary's mere failure to disclose material information thus does not merit tolling under § 1113.

The "fraud or concealment" exception tolls the statute of limitations only "until the plaintiff in the exercise of reasonable diligence discovered or should have discovered the alleged fraud or concealment." J. Geils Band Emp. Ben. Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1252 (1st Cir. 1996) (citing Larson, 21 F.3d at 1172-74).[12] Defendants first argue that plaintiffs cannot rely on the "fraud or concealment" exception because none of the plaintiffs testified at trial or submitted evidence establishing that they exercised reasonable diligence.

When addressing a similar tolling provision in the statute of limitations for federal securities fraud claims (28 U.S.C. § 1658(b)), however, the Supreme Court held that "the limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered 'the facts constituting the violation,' ... irrespective of whether the actual plaintiff undertook a reasonably diligent investigation." Merck & Co., Inc. v. Reynolds, --- U.S. ----, ----, 130 S.Ct. 1784, 1798 (2010) (emphasis added). The Court's holding applies equally to § 1113, especially because the Court's

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[12] In cases of active concealment, some courts have held that a plaintiff can rely on the "fraud or concealment" exception even in the absence of diligence by the plaintiff. See J. Geils Band Emp. Ben. Plan, 76 F.3d at 1254 n. 10; Martin v. Consultants & Adm'rs, Inc., 966 F.2d 1078, 1096 n. 19 (7th Cir. 1992).

analysis in Merck is centered around concepts embodied in the general "discovery rule." See id. at 1793-98. Holding otherwise could fault plaintiffs for failing to exercise reasonable diligence even when the exercise of reasonable diligence would not have alerted them to their claims because the defendants had concealed their misconduct. Therefore, assuming plaintiffs in this case were not reasonably diligent, they would be precluded from relying on the "fraud or concealment" exception only if a reasonably diligent plaintiff would have discovered the misconduct.[13]

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[13] When addressing tolling in the context of federal securities fraud claims, the Supreme Court "held that the ultimate burden is on the defendant to demonstrate that a reasonably diligent plaintiff would have discovered the facts constituting the violation." Strategic Diversity, Inc. v. Alchemix Corp., 666 F.3d 1197, 1206 (9th Cir. 2012) (discussing Merck & Co., 130 S.Ct. at 1798). In contrast, the First Circuit held that, for tolling under § 1113, the plaintiff has the burden of showing reasonable diligence unless the plaintiff alleges that the statute is tolled based on the defendant's self-concealing wrong. J. Geils Band Emp. Ben. Plan, 76 F.3d at 1259; see also Truck Drivers & Helpers Union, Local No. 170 v. N.L.R.B., 993 F.2d 990, 996 (1st Cir. 1993) ("[A] plaintiff may establish a self-concealing wrong by demonstrating that the defendant 'engage[d] in some misleading, deceptive or otherwise contrived action or scheme, in the course of committing the wrong, that is designed to mask the existence of a cause of action.' " (quoting Hobson v. Wilson, 737 F.2d 1, 34-35 (D.C. Cir. 1984) (alteration in original)).

The parties have not addressed which party has the burden to establish either the existence or absence of reasonable diligence. Nonetheless, because the court finds that the

2. HolliShare Highlights

Plaintiffs contend that defendants concealed the sales price of HolliShare's JDS shares in the HolliShare Highlights, which were the annual reports distributed to participants to inform them about HolliShare's funding and financial condition.[14] In the June 2009 Order, this court held that, based on language in the HolliShare Highlights, a participant could have reasonably believed that HolliShare's shares of JDS stock were sold to JDS at the month-end book value from the month in which a sale occurred. DeFazio, 636 F. Supp. 2d at 1061.

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exercise of diligence would not have uncovered the alleged breaches, the court's conclusion about reasonable diligence would be the same regardless of which party had the burden on that issue.

[14] The Ninth Circuit has held that the "fraud or concealment" exception applies "only when the defendant himself has taken steps to hide his breach of fiduciary duty." Barker, 64 F.3d at 1402. As a result, "[p]laintiffs may not generally use the fraudulent concealment by one defendant as a means to toll the statute of limitations against other defendants." Id. (quoting Griffin v. McNiff, 744 F.Supp. 1237, 1256 n. 20 (S.D.N.Y. 1990), aff'd, 996 F.2d 303 (2d Cir. 1993)) (internal quotation marks omitted). The testimony from at least some of the Trustees in this case was that they read and reviewed the HolliShare Highlights before they were distributed to the participants. (See Tr. 371:14-16, 372:9-12 (Karlovsky), 2452:16-23 (Zwirner).) From this testimony--and in light of the fact that defendants have not argued that any of the Trustees did not read or review the HolliShare Highlights--the court finds that each Trustee approved the HolliShare Highlights and is responsible for the information provided to the beneficiaries in them.

Specifically, from 1993 to 2000, the HolliShare Highlights informed participants of the following:

> JDS common shares, which are valued at their book value, are not publicly traded. They are for all practical purposes not transferable to any person or entity other than JDS itself. They are subject to severe transfer restrictions which require that the Trust first offer them to JDS, the parent company of Hollister Incorporated, at their book value.
>
> To date, JDS has repurchased common shares from the Trust at their book value to provide the plan with the needed cash.

(Exs. 4-4.18 at 7, 4-4.19 at 7, 4-4.20 at 7, 4-4.21 at 7, 4-4.22 at 7, 4-4.23 at 7, 4-4.24 at 7, 4-4.25 at 7.)[15] Based on this information, a reasonable participant could have believed that HolliShare sold its holdings of JDS common shares pursuant to the sale price specified for sales made pursuant to the "right of first refusal" in subparagraph II.D.2.a of Article 5 of the JDS Articles.

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[15] Beginning in 1998 and continuing through 2000, the following underscored language was omitted: "They are subject to severe transfer restrictions which require that the Trust first offer them to JDS, <u>the parent company of Hollister Incorporated,</u> at their book value." (<u>See</u> Exs. 4.4-23 at 7, 4.4-24 at 7, 4-4.25 at 7 (emphasis added).) This omission does not affect the court's analysis.

Specifically, subparagraph II.D.2.a provides:

> If any ... trust ... desires or intends to transfer any one or more shares of the Corporation, ... such holder shall first offer in writing, ... to sell to the Corporation all shares of the Corporation which such holder desires or intends to transfer ... at the price and in the manner set forth in subparagraphs 3 and 4 of this paragraph D.

(Ex. 531, Art. V, ¶ II.D.2.a.) Subparagraph II.D.3.b of Article Five then mandates that, for sales pursuant to the right of first refusal, "[t]he price of each common share shall be its book value as of the end of the calendar month in which the Repurchase Date occurs. ..." (Id. Art. V, ¶ II.D.3.b.) When the explanation in the HolliShare Highlights that the transfer restrictions on its JDS shares "require that the Trust first offer them to JDS ... at their book value" is read in conjunction with the right of first refusal in the JDS Articles, a participant could reasonably conclude that the shares were sold at the month-end book value dictated in subparagraph II.D.3.b.

Defendants argue, however, that a reasonable beneficiary would not draw this conclusion because the JDS Articles also provide for JDS to pay the purchase price for sales pursuant to the right of first refusal with a limited amount of cash and the remainder in a subordinated promissory note. (See id. Art. 5, ¶ II.D.4.a.) In contrast to this provision, they point out that HolliShare always received payment for its shares from JDS in cash, suggesting

that the sales were not conducted under the terms of the right of first refusal. In the HolliShare Highlights, however, beneficiaries were told that "JDS has repurchased common shares from the Trust at their book value to provide the plan with the needed cash." Although this suggests that payments may have been in cash, it does not preclude the possibility that HolliShare received a promissory note, especially because a promissory note could have been sold to a bank to obtain cash. (See Tr. 663:10-664:2.) That HolliShare's receipt of cash only payments for its JDS stock is inconsistent with the terms of payment for a sale conducted pursuant to the right of first refusal would therefore not prevent a reasonable participant from concluding that HolliShare's sales were conducted under the terms and at the price provided for in the right of first refusal provision.

Before 1993, however, the HolliShare Highlights did not contain similar language suggesting that HolliShare's sales of its JDS stock were pursuant to and according to the terms of the right of first refusal. Specifically, from 1983 to 1992, the HolliShare Highlights stated:

> JDS common shares, which are valued at their book value, are not publicly traded. They are subject to severe transfer restrictions and can only be sold to JDS, the parent company of Hollister Incorporated.
>
> To date, JDS has repurchased common shares from the Trust at their book value to provide the plan with needed cash.

(Exs. 4-4.8 at 9, 4-4.9 at 10, 4-4.10 at 10, 4-4.11 at 6, 4-4.12 at 6, 4-4.13 at 7, 4-4.14 at 7, 4-4.15 at 7, 4-4.16 at 7, 4-4.17 at 7.)[16] Similarly, the 1982 HolliShare Highlights explained:

> In evaluating these comparisons, it must be recognized that JDS common shares, which are valued at their book value, are not publicly traded and are subject to very severe transfer restrictions. As a practical matter, they can only be sold to JDS, the parent company of Hollister Incorporated.
>
> To date, JDS has repurchased common shares from the Trust at their book value in order to provide the Trust with needed cash.

(Ex. 4-4.7 at 7.)

The explanations from 1982 to 1992 are silent with respect to whether "book value" refers to the December 31 book value or month-end book value and lack any language suggesting one or the other. Based on the explanations, it is equally plausible that HolliShare sold its shares under the exceptional circumstances provision. At most, the HolliShare Highlights from 1982 to 1992 omit arguably material

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[16] From 1983 to 1987, the first sentence of the explanation varied slightly. (See Exs. 4-4.8 at 9, 4-4.9 at 10, 4-4.10 at 10 ("As you evaluate these comparisons, remember that JDS common shares, which are valued at their book value, are not publicly traded."); Exs. 4-4.11 at 6, 4-4.12 at 6 ("Remember that JDS common shares, which are valued at their book value, are not publicly traded.").)

information, which is insufficient to trigger the "fraud or concealment" exception. Plaintiffs have not satisfied the court that defendants committed any other affirmative acts of concealment during that ten-year period that would have led a reasonable participant to believe that HolliShare's sales of its JDS stock were at the month-end book value.

Accordingly, because plaintiffs are unable to rely on the "fraud or concealment" exception for any alleged misconduct between 1982 to 1992, their claims based on HolliShare's sale of JDS stock from 1982 to 1992 are time barred and the court will enter judgment in favor of defendants on those claims.[17] Further, because Schellentrager's tenure as trustee ended when Karlovsky replaced him in 1990, (Tr. 345:1-5), the entirety of plaintiffs' claims against him are untimely and the court will enter judgment in his favor.

Returning to plaintiffs' claims based on HolliShare's sale of JDS stock beginning in 1993, defendants further contend that the following language in the Plan Instrument disclosed the use of the December 31 book value:

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[17] If the court's finding that plaintiffs' claims based on defendants' conduct from 1982 to 1992 is reversed for any reason, the remainder of the court's analysis in this Order of plaintiffs' post-1992 claims would apply equally to their time-barred claims.

> The assets in the Trust Fund shall be valued by the Trustees at their respective fair market values as of each December 31st. The fair market value of Common Shares of JDS Inc. held in the Trust Fund shall, subject to the provisions of the remainder of this Section 7.03, be their book value as of the valuation date as reflected on the books of JDS Inc. The Trustees shall accept such book value as the fair market value if such book value is computed in accordance with generally accepted accounting principles.

(Ex. 501 § 7.03.)[18] Article VII of the Plan Instrument, which this explanation is a part of, however, is titled "Accounts and Allocations of Funds" and addresses valuing each participant's account in detail, not valuing JDS stock for the purpose of a sale.

Because the first sentence addresses the "assets in the Trust Fund" more broadly, the reference to the December 31 value in that sentence could be interpreted as referring to the valuation of all assets in the trust for purposes of determining the value of each participant's account. This is consistent with the use of December 31 as the date of evaluation for

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[18] The explanation was also included in the letter sent to DeFazio, which is discussed below. (Ex. 176.) Although defendants have not relied on this evidence, all of the HolliShare Highlights before the court also included substantially similar language in the endnotes following the breakdown of HolliShare's financial information.

participant's accounts regardless of when they retire in the following year. On the other hand, the second sentence, which specifically refers to the "fair market value of Common Shares of JDS Inc.," omits any reference to December 31 and states that the value shall be "their book value as of the valuation date." Based on the use of "valuation date" in that sentence, a participant could reasonably conclude that the book value of JDS stock would vary depending on when the valuation and sale occurred and thus would not remain stagnant for the entire year at the December 31 book value. Although the correct interpretation of this explanation is not clear, a reasonable participant could still believe that HolliShare's sales of JDS stock were set at the right of first refusal price of month-end book value and that only the accounts were valued annually as of December 31.

Plaintiffs have thus persuaded the court that the potential inconsistency between HolliShare's receipt of cash payments and the provision for a promissory note in the right of first refusal and the disclosure setting the valuation date for HolliShare accounts at December 31 did not amount to "storm warnings" putting the plaintiffs on notice about defendants' alleged breaches. Even assuming these inconsistencies would have alerted a reasonably diligent participant to defendants' alleged breaches, the most a reasonable participant could be expected to do in receipt of potentially conflicting information would be to inquire further about the terms of the sales. While the court doubts that a reasonably diligent participant would have done more than review the annual HolliShare Highlights, the court finds that even additional efforts would not have led

a participant to discover the alleged misconduct.

For example, a reasonably diligent participant might have inquired about the details pertaining to the Plan's sale of JDS stock. In this case, however, DeFazio made such an inquiry. In a letter dated November 3, 1997, he was told that, since 1973, "every transfer by JDS Inc[.] has been at book value; and JDS Inc[.] has always exercised its right of first refusal and repurchased such shares at book value." (Ex. 176 at 3.) As previously discussed, the express reference to the "right of first refusal" in this letter when read in conjunction with the JDS Articles indicates that the price for the JDS stock would have been the "book value as of the end of the calendar month in which the Repurchase Date occurs." (Ex. 531.)

Additionally, if plaintiffs had pursued an investigation beyond inquiring from Hollister or HolliShare, the evidence suggests they would not have discovered the precise terms of HolliShare's sales of JDS stock. In response to a Department of Labor investigator's request for documents evidencing HolliShare's sales of its shares to JDS, (Ex. 54 at 8), HolliShare indicated sales prices for sales from 1994 to 1998 that were the December 31 book value, but also indicated that each of the sales took place on January 1, (id. at 10). From the information provided to the Department of Labor and available to the participants, it would be unlikely that a reasonably diligent participant would have known that the sales in 1994 to 1998 actually took place in March of each year, with a sales price that is allegedly three months, not one day, "old."

The court also doubts that additional efforts or inquiries by plaintiffs could have unveiled the dynamics and purported terms of the Plan's sales of JDS stock because even defendants' counsel seemed unaware of the terms of such sales for at least the first three years of this litigation. In a memorandum in support of their motion to dismiss plaintiffs' First Amended Complaint filed in October 2006, counsel for seven of the defendants stated, "It cannot seriously be argued that a routine and commonplace sale by HolliShare of JDS common shares involves any 'extraordinary circumstances.'" (Docket No. 148 at 11:15-17.) A year later, the same counsel again explained that sales could not have been pursuant to the "exceptional circumstances" provision. (See Docket No. 282 at 12:3-6 ("Plaintiffs do not suggest what 'exceptional circumstances' exist that would – or even may – justify a decision by the JDS Board to treat HolliShare's periodic offers to sell some of its JDS common shares differently from offers to sell made by all other JDS shareholders.").) If it was unclear to at least some of defendants' counsel that the sales were pursuant to the exceptional circumstances provision, it would be unreasonable to conclude that a reasonably diligent participant would have discovered that fact about HolliShare's sales of JDS stock.

Accordingly, the court finds that a reasonably diligent participant would not have discovered the alleged misconduct at issue in this case before the plaintiffs in this case did and therefore any lack of diligence or inquiry by plaintiffs does not preclude them from relying on the "fraud or concealment" exception. Because § 1113 tolls the statute of

limitations to six years after the discovery date and the true sales prices and terms were not revealed until after this case was filed, plaintiffs' ERISA claims beginning in 1993 and continuing through 2011 are timely.

C. Sales of JDS Shares at December 31 Book Value

1. Breach of Fiduciary Duties

a. Prohibited Transactions under ERISA

ERISA establishes a blanket prohibition on certain transactions that "entail a high potential for abuse," including the sale or exchange of property between an ERISA plan and a "party in interest." Donovan v. Cunningham, 716 F.2d 1455, 1465 (5th Cir. 1983) (discussing 29 U.S.C. § 1106(a)(1)). As used in § 1106(a)(1), a "party in interest" includes the employer of the employees covered by the ERISA plan in question. 29 U.S.C. § 1002(14).

Nevertheless, ERISA provides an exemption for prohibited transactions that meet certain requirements, and § 1108(e) allows the sale or acquisition by a plan of employer stock if three criteria are met:

> (1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 1107(e)(1) of this title), (2) if no commission is charged with respect thereto, and (3) if-- (A) the plan is an eligible individual account plan (as defined in

section 1107(d)(3) of this title). ...

Id. § 1108(e). The parties stipulated that HolliShare is an eligible individual account plan under ERISA, (Stipulation of Facts ¶ 26), and plaintiffs have not alleged that a commission was charged. Therefore, the only dispute at trial to determine whether HolliShare's sales of JDS stock to JDS came within the exception in § 1108(e) was whether the sales were for "adequate consideration."

When a security has no generally recognized market, the term "adequate consideration" means "the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary [of Labor]." 29 U.S.C. § 1002(18); see also 29 C.F.R. § 2550.408e (cross-referencing § 1002(18) in defining "adequate consideration" for purposes of § 1108(e)). The Secretary of Labor has yet to promulgate regulations guiding a trustee's determination of fair market value.[19]

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[19] In 1988, the Department of Labor proposed a regulation that elaborated on the definition of "adequate consideration." It states:

> First, the value assigned to an asset must reflect its fair market value. ... Second, the value assigned to an asset must be the product of a determination made by the fiduciary in good faith. ... The Department will consider that a fiduciary has determined adequate consideration in accordance with section 3(18)(B) of the Act ... only if both of these requirements are satisfied.

In addition to prohibiting certain transactions, ERISA also imposes on fiduciaries the "highest" duties known to law. Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996). Specifically, § 1104(a)(1) requires an ERISA fiduciary to "act for the exclusive benefit of plan beneficiaries" and § 1104(a)(1)(B)

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53 Fed. Reg. 17632 (May 17, 1988). "Although proposed regulations have no legal effect, numerous circuit courts have adopted the DOL's proposed definition of adequate consideration." Henry v. Champlain Enters., Inc., 445 F.3d 610, 619 (2d Cir. 2006). Relying on language in Howard v. Shay, 100 F.3d 1484 (9th Cir. 1996), that is similar to the proposed regulation, the Second Circuit has indicated that the Ninth Circuit adopted the proposed regulation. See Henry, 445 F.3d. at 619 ("To enforce [ERISA fiduciary rules], the court focuses not only on the merits of the transaction, but also on the thoroughness of the investigation into the merits of the transaction." (quoting Howard, 100 F.3d at 1488 (internal quotation marks omitted))). Although the Ninth Circuit applies a standard similar to the proposed regulation, it has not expressly adopted the proposed regulation.

As this court previously explained, courts "decline to take cognizance of the proposed regulations ... because a proposed regulation does not represent an agency's considered interpretation of its statute." DeFazio, 2007 WL 3231670, at *10; see Draper v. Baker Hughes Inc., 892 F.Supp. 1287, 1293 (E.D. Cal. 1995) (disregarding a proposed regulation issued by the Department of the Treasury relating to the COBRA statute, noting that "almost a decade has passed since COBRA's Enactment, and the promised regulatory guidelines have not materialized"). The court will therefore rely on Ninth Circuit precedent, not the Department of Labor's proposed regulation that has not, for some reason or no reason at all, been adopted since its proposal over twenty years ago.

requires the fiduciary to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." Id. (quoting § 1104(a)(1)(B)) (internal quotation marks omitted). When an ERISA plan transacts in employer securities, its fiduciaries thus bear the "heavy" burden of showing that the transaction satisfies the requirements of § 1108(e) and that the fiduciaries fulfilled their duties of loyalty and care under § 1104(a)(1) and (a)(1)(B). See id.

Whether a particular transaction with an interested party complies with §§ 1104(a)(1), (a)(1)(B), and 1108(e) depends upon the conduct of the fiduciaries. See id. (citing Cunningham, 716 F.2d at 1467-68). Fiduciaries "are obliged at a minimum to engage in an intensive and scrupulous independent investigation of their options." Id. at 1488-89; see Cosgrove v. Circle K Corp., 915 F.Supp. 1050, 1064 (D. Ariz. 1995) ("Good faith requires that the trustees of the Plan have used a prudent method of determining value."), aff'd, 107 F.3d 877 (9th Cir. 1997). The precise scope and nature of the required investigation depends upon the circumstances surrounding the transaction and the asset. See Keach v. U.S. Trust Co., 419 F.3d 626, 637 (7th Cir. 2005) (evaluating the sufficiency of the fiduciary's investigation "within the context of the totality of the circumstances"); Cunningham, 716 F.2d at 1467-68 (noting that fiduciaries may satisfy their burden by showing they determined fair market value based upon "a prudent investigation in the circumstances

then prevailing"); see also Henry v. Champlain Enters., Inc., 445 F.3d 610, 619 (2d Cir. 2006) ("Whether a fiduciary has made a proper determination of fair market value depends on whether the parties are 'well-informed about the asset and the market for that asset.'" (quoting Cunningham, 716 F.2d at 1467)). Failure to "investigate suspicions that one has with respect to the funding and maintenance of the plan constitutes a breach of" the duty to act in the best interests of the plan participants. Barker, 64 F.3d at 1403.

b. *Firestone* and the *Moench* Presumption

Relying on Firestone, 489 U.S. 101, defendants argue that the Trustees' decision to enter into and perform under the terms of the mid-80s agreement--including the purported setting of "fair market value" of JDS common stock in the mid-80s agreement--is entitled to a presumption that the Trustees acted prudently and reasonably because the Plan Instrument vested the Trustees with broad discretion. In Firestone, the Supreme Court held that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Id. at 115; accord Burke v. Pitney Bowes Inc. Long-Term Disability Plan, 544 F.3d 1016, 1023-24 (9th Cir. 2008) (recognizing the holding from Firestone and explaining that, "[w]hen a plan unambiguously gives the plan administrator discretion to determine eligibility or construe the plan's terms, a deferential abuse of discretion

standard is applicable" to a denial of benefit claim).

Section 1132, however, lays out several claims for relief and plaintiffs' claims are brought under subsections (a)(2) and (a)(3), not subsection (a)(1)(B).[20] Not only was Firestone's holding limited to claims under § 1132(a)(1)(B), the Court explicitly indicated that its discussion was "limited to the appropriate standard of review in § 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations" and that it "express[ed] no view as to the appropriate standard of review for actions under

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[20] Section 1132(a) provides:

> Persons empowered to bring a civil action. A civil action may be brought--
>
> (1) by a participant or beneficiary--...
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. ...

29 U.S.C. § 1132(a).

other remedial provisions of ERISA." Firestone, 489 U.S. at 108. Accordingly, Firestone does not govern the conduct at issue in this case because plaintiffs are not seeking relief for a denial of their benefits under § 1132(a)(1)(B). See John Blair Commc'ns, Inc. Profit Sharing Plan v. Telemundo Grp., Inc. Profit Sharing Plan, 26 F.3d 360, 369 (2d Cir. 1994) ("[W]e decline to apply the arbitrary and capricious standard [from Firestone] to the fiduciary conduct at issue here because this case does not involve a simple denial of benefits, over which the plan administrators have discretion. ... [D]ecisions that improperly disregard the valid interests of beneficiaries in favor of third parties remain subject to the strict prudent person standard articulated in § 404 of ERISA.").

Nonetheless, courts have extended application of the deferential review applied in Firestone to claims other than those for a denial of benefits under § 1132(a)(1)(B). In Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995), the plaintiffs sought relief under § 1132(a)(2), alleging that the fiduciaries of their employee stock option plan ("ESOP") breached their duties when they invested solely in employer common stock even though the employer was deteriorating financially. Recognizing that "the arbitrary and capricious standard of review allowed in Firestone should not be applied mechanically to all ERISA claims," the Third Circuit reasoned that "the Court's mode of analysis is certainly relevant to determine the standard of review pertaining to all claims filed under ERISA challenging a fiduciary's performance." Moench, 62 F.3d at 565. Developing what has been coined as the "Moench presumption," the Third Circuit held:

> [A]n ESOP fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision. However, the plaintiff may overcome that presumption by establishing that the fiduciary abused its discretion by investing in employer securities.

Id. at 571.

Consistent with every circuit that has evaluated the Moench presumption, the Ninth Circuit recently adopted the presumption in Quan v. Computer Scis. Corp., 623 F.3d 870 (9th Cir. 2010). Similar to Moench, the plaintiffs in Quan asserted claims under § 1132(a)(2), alleging that the fiduciaries of their eligible individual account plan ("EIAP") made imprudent investments in their employer's common stock.

The Third Circuit's development of the Moench presumption, and the Ninth Circuit's adoption of it in Quan, centered around the fact that the plaintiffs challenged the fiduciaries' decisions to invest in employer stock even though the plans in both cases required or encouraged the fiduciaries to invest in employer stock and ERISA exempted the fiduciaries of the plans from the general duty to diversify plan investments. See 29 U.S.C. § 1104(a)(2) ("In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real

property or qualifying employer securities."); Quan, 623 F.3d at 881 ("Congress has granted favored status to ESOPs and other EIAPs by exempting them from certain ERISA requirements. ... We adopt the Moench presumption because it provides a substantial shield to fiduciaries when plan terms require or encourage the fiduciary to invest primarily in employer stock."). In Moench and Quan, the plaintiffs did not allege that the conduct at issue constituted prohibited transactions under ERISA or that adequate consideration was not paid for the employer stock.

Unlike the plans and claims at issue in Moench and Quan, plaintiffs' claims do not conflict with ERISA, the terms of the Plan Instrument, or the Congressional policy in favor of plans that "tie employee compensation to the company's success."[21] Quan, 623 F.3d at 881. Section 1106(a)(1) unequivocally prohibits the sale of HolliShare's JDS stock to JDS unless the sale was for adequate consideration. 29 U.S.C. §§ 1106(a)(1), 1108(e). ERISA then defines "adequate consideration" as "the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary [of Labor]." Id. § 1002(18) (emphasis added). As the Ninth Circuit has explained, this places a heavy burden on the fiduciaries "to engage in an intensive and scrupulous

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[21] Understandably in light of Hollister and JDS's exceptional performance, plaintiffs do not attack the Trustees' decision to primarily invest the Plan assets in JDS common stock.

independent investigation of their options to insure that they act in the best interests of the plan beneficiaries." Howard, 100 F.3d at 1488-89.

Not only have defendants failed to cite a single case in which plaintiffs challenged a transaction as prohibited under ERISA and the court applied the more deferential standard of review, applying the more lenient standard would be inconsistent with ERISA's explicit requirement of a good faith determination and courts' application of the more exacting standard. For example, when evaluating whether a plan received adequate consideration under § 1002(18) in Howard, the Ninth Circuit stated that a fiduciary had "the burden of proving that he fulfilled his duties of care and loyalty" and discussed the various inquiries the fiduciary must have undergone to fulfill his burden. Id. at 1488-89. The court ultimately found in favor of plaintiffs because, even though the fiduciaries obtained an independent assessment from a financial advisor, the fiduciaries failed to "meaningfully review, discuss, or question the valuation" or assumptions used. Id. at 1489-90. The Ninth Circuit neither considered nor applied a more deferential standard, and the breaches at issue in Howard are similar to the alleged breaches in this case.

It could still be argued that, because § 1002(18) contemplates adherence to the ERISA plan in determining fair market value, if a plan vests the fiduciary with discretion in arriving at the fair market value, the fiduciary's valuation would be subject to the less stringent abuse of discretion review. See 29 U.S.C. § 1002(18) ("[T]he fair market

value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary [of Labor]." (emphasis added)). As the Second Circuit explained, however, reviewing "decisions that improperly disregard the valid interests of beneficiaries in favor of third parties" under a standard less stringent than the "the strict prudent person standard articulated in § 404 ... would allow plan administrators to grant themselves broad discretion over all matters concerning plan administration, thereby eviscerating ERISA's statutory command that fiduciary decisions be held to a strict standard." John Blair Commc'ns, Inc. Profit Sharing Plan, 26 F.3d at 369; cf. 29 U.S.C. § 1104(a)(1)(D) (requiring a fiduciary to discharge his duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]").

Lastly, even assuming the Plan Instrument vested the Trustees with discretion to determine the fair market value and that, under the reasoning of Firestone, their determination should be reviewed only for an abuse of that discretion, defendants' conduct in this case would still not be reviewed under the less stringent standard of review. As the Moench Court recognized in response to the argument that the plan gave the trustees the discretion to interpret the plan, "the deferential standard of review of a plan interpretation 'is appropriate only when the trust instrument allows the trustee to interpret the instrument and when the trustee has in fact interpreted the instrument.'" Moench, 62 F.3d at 567

(quoting Trustees of Cent. States, Se. & Sw. Areas Health & Welfare Fund v. State Farm Mut. Auto. Ins. Co., 17 F.3d 1081, 1083 (7th Cir. 1994)); see also Moench, 62 F.3d at 567-68 ("[T]his is not a case implicating the arbitrary and capricious standard of review. The Committee points to nothing in the record indicating that it--the Committee--actually deliberated, discussed or interpreted the plan in any formal manner. ... 'Thus, if the trustee without knowledge of or inquiry into the relevant circumstances and merely as a result of his arbitrary decision or whim exercises or fails to exercise a power, the court will interpose.'" (quoting Restatement (Second) of Trusts § 187, comment (h))).

As discussed in greater detail below, however, there was no testimony that the Trustees used the December 31 book value because they determined that it reflected the "fair market value" of the JDS stock. Without having exercised the discretion presumably afforded the Trustees in the Plan Instrument, any argument that the determination is subject to review only for an abuse of that discretion must fail.

c. Trustees' Lack of Investigation

The court must therefore determine whether, at trial, the fiduciaries carried their burden of proving that they fulfilled their duties under §§ 1104(a)(1), (a)(1)(B), and 1108(e), which required them "at a minimum to engage in an intensive and scrupulous independent investigation of their options to insure that they act in the best interests of the plan beneficiaries." Howard, 100 F.3d at 1488-89 (quoting

Leigh v. Engle, 727 F.2d 113, 125-26 (7th Cir. 1984)) (internal quotation marks omitted). At trial, plaintiffs' central focus was that the Trustees breached their duties when they sold HolliShare's JDS shares to JDS at the December 31 book value from the prior year without determining that the sale price was for "adequate consideration" and, consequently, sold the Plan's JDS stock to JDS for less than "adequate consideration."

The consistent testimony from the Trustees who testified at trial was that, after the mid-80s agreement, the Trustees used the December 31 book value as the sale price for HolliShare's JDS stock. At trial, Winn and Zwirner testified at length about the arguably "exceptional" circumstances that led to the mid-80s agreement, including Hollister's six-year arbitration with its international distributor that put severe financial strains on the company, (Tr. 644-46, 2376), uncertainty in predicting HolliShare's liquidity needs in upcoming years, and concerns about whether JDS could satisfy HolliShare's increasing cash needs, (Tr. 656-58, 2071:15-22). Because the controlling inquiry examines "how the fiduciary acted viewed from the perspective of the time of the [challenged] decision rather than from the vantage point of hindsight," Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 918 (8th Cir. 1994) (alteration in original) (internal quotation marks omitted), the circumstances in the mid-80s may very well have merited use of the agreement JDS and HolliShare reached. The agreement, however, neither demonstrates that the Trustees sought to determine the fair market value of the JDS shares nor justifies the Trustees' unquestioning adherence

to its terms.

Although the Trustees relied on the December 31 book value to set the sales price of HolliShare's JDS shares, the evidence at trial established that they never attempted to determine whether the December 31 book value was the fair market value for the Plan's stock. Specifically, Karlovsky testified that it was his understanding that the fair market value in the month of sale was the December 31 book value regardless of when the sale took place. (Tr. 406:22-407:5.) He explained that his "recollection is that [the Trustees] accepted the audited year end valuation according to the plan as the book value and [ ] used it." (Tr. 471:12-18.) Karlovsky also testified that he "didn't have the ability or skills or the basis to determine" the fair market value of JDS stock in the month of the sale because he lacked "access to understanding and the ingredients to do our book value valuation," which was done by the finance department. (Tr. 406:9-16.) He testified that he "did not attempt to calculate any other valuation" and is not aware that any of the other Trustees did either. (Tr. 471:12-18.) As Judge O'Scannlain has explained, "[i]f [fiduciaries] do not have all of the knowledge and expertise necessary to make a prudent decision, they have a duty to obtain independent advice." Howard, 100 F.3d at 1490 (O'Scannlain, J., dissenting on other grounds).

In addition to never attempting to determine the "fair market value" of HolliShare's JDS shares, the Trustees never requested or obtained an independent valuation of the stock by an outside auditor. Zwirner, who has been a Trustee since 1976, recognized that it was within the prerogative of the Trustees to obtain an outside appraisal, but did not recall a single time that the Trustees obtained an independent appraisal to value the Plan's JDS stock. (Tr. 1889:10-17, 2101:3-8; accord Tr. 393:21-23 (Karlovsky testifying that he never asked for or requested an appraisal of the JDS stock).) It appears that the first outside appraisal performed of HolliShare's JDS stock in the history of HolliShare was done at the request of defense counsel after this litigation commenced, and Zwirner, who is still a HolliShare Trustee and was aware of the appraisal, did not even request to review it. (Tr. 2495:14-25.)

Although § 1108(e) and case law interpreting it have never required trustees to obtain an independent audit, the Ninth Circuit has recognized that "securing an independent assessment from a financial advisor or legal counsel is evidence of a thorough investigation." Howard, 100 F.3d at 1489 (citing Martin v. Feilen, 965 F.2d 660, 670-71 (8th Cir. 1992)); see also Katsaros v. Cody, 744 F.2d 270, 275 (2d Cir. 1984) (finding that fiduciaries breached their duties when "[t]hey lacked any expertise in such important matters as capital adequacy, quality of assets, liquidity, the value of the bank's stock, and the like" and "[n]o effort was made to obtain independent professional assistance or analysis of the financial data presented to them"). In explaining that obtaining an independent assessment is "not a

complete defense to a charge of imprudence," the Ninth Circuit has also held that a trustee must "(1) investigate the expert's qualifications, (2) provide the expert with complete and accurate information, and (3) make certain that reliance on the expert's advice is reasonably justified under the circumstances." Howard, 100 F.3d at 1489 (internal citations omitted). In light of the Howard court's criticism of the trustees' failure to "meaningfully review, discuss, or question the valuation" they obtained, it would go against reason for the court to conclude that trustees who did not even obtain an independent audit or perform a sufficiently similar inquiry had fulfilled their duties.

In assessing the thoroughness of trustees' investigation of an asset's fair market value, the Ninth Circuit has also found fault when the trustees "completed the transaction without negotiation." Id. at 1484; accord Chao v. Hall Holding Co., Inc., 285 F.3d 415, 432, 434 (6th Cir. 2002) (holding that plan fiduciaries failed to prove that they had made a good faith inquiry into fair market value when they, inter alia, did not engage in a negotiation to set the price of the stock). The evidence at trial in this case confirmed that, after the mid-80s agreement, the Trustees never attempted to negotiate a different price with JDS for the sale of its stock. (See Tr. 898:12-899:1 (McCormack testifying that he never attempted to negotiate the price); Tr. 1299:22-1300:2 (Brilliant testifying that he never suggested negotiating the price).) In fact, Zwirner testified that, "a few times over [his] 30 some years as trustee," HolliShare considered the possibility of selling JDS shares at a price higher than book value,

but the Trustees always concluded that "JDS Inc. always repurchases at book and would not – just would not entertain that." (Tr. 2373:6-20.) Although Zwirner's conclusion could have ultimately been correct,[22] the Trustees never attempted to determine whether § 1108(e) demanded a higher price or, assuming it did, present information to JDS in an effort to negotiate.

The Trustees also seemed to accept the terms of the mid-80s agreement without question or a consistent understanding of its terms or justifications for them. At its inception, the mid-80s agreement did not appear to come about as a result of meaningful negotiations between JDS and HolliShare. With respect to the price, the testimony was that JDS suggested the use of the December 31 book value from the prior year, (Tr. 2059:25-2060:7), and Zwirner testified that, when sales were pursuant to the "exceptional circumstances" provision, the practice was that JDS set the terms of the sale and there was no room for negotiation. (See Tr. 2114:20-22, 2115:4-7 ("When JDS's board uses its discretion and uses the exceptional circumstances clause to deviate, there's not necessarily a negotiation. ... JDS can determine they'll permit the exceptional circumstances under conditions they specify, and then the person wanting the exception either says yes or no. That's the way it worked in practice.").)

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[22] The parties never addressed the implications under ERISA and for HolliShare if JDS refused to repurchase HolliShare's shares at the fair market value or even at the December 31 book value.

Karlovsky also testified that he did not know how the mid-80s agreement came about and that Zwirner had simply told him it was the existing practice without explanation. (Tr. 370:23-371:2.)

Not only were the Trustees unable to produce a single document memorializing the terms of the mid-80s agreement or even pinpointing the year it was consummated, but the Trustees also lacked a consistent understanding of it. For example, defendants suggested that if the month-end book value in the month of a sale was actually lower than the December 31 book value from the prior year, HolliShare would have received the benefit of the higher value and been able to sell at the December 31 book value. Winn, on the other hand, testified that it was not his understanding that JDS would have paid the higher price if the book value in the month of sale had fallen below the December 31 book value. (Tr. 659:19-22.) Additionally, although one of the "terms" of the mid-80s agreement was that JDS would purchase all of the shares HolliShare offered, the Trustees felt the need to obtain a commitment from JDS that it would continue to purchase shares in 1999. (See Ex. 41 at 68.) After discussing the fact that the commitment would not be binding on JDS, the JDS Board agreed to make a commitment to HolliShare that included a "restatement of the historic commitment of the company to repurchase its stock and ... a new, three-year commitment that is subject to renewal annually." (Id.) The Trustees' unquestioning acceptance of an amorphous verbal agreement that set the price of the Plan's most valuable asset underscores their failure to perform a thorough investigation.

The Trustees also accepted the use of the December 31 book value without question even though they knew that the month-end book value during the month of each sale was almost always greater than the December 31 book value. Not only did Zwirner and Stempkinski receive monthly financial statements that included the current month-end book value for JDS because of their roles as Hollister and JDS board members, (Tr. 1107:5-11), Zwirner, McCormack, Karlovsky, and Brilliant all testified that they knew the December 31 book value was less than the month-end book value, (Tr. 2016:6-9 (Zwirner), 767:17-19, 1034:6-9 (McCormack), 404:13-23 (Karlovsky), 1325:2-10 (Brilliant)). Brilliant also testified that he did not recall having discussions with anyone about whether selling for less than month-end book value was reducing the value of HolliShare. (Tr. 1344:7-14.) In Cunningham, the Fifth Circuit held that fiduciaries did not fulfill their duties when, similar to HolliShare's use of an out-dated book value, the fiduciaries relied on an appraisal that was "out of date" at the time of the transaction because "the factual assumptions upon which it was based were no longer valid." Cunningham, 716 F.2d at 1469.

The evidence at trial also revealed that at least Zwirner knew that an outside appraisal of JDS had been conducted as part of a capitalization study in anticipation of the termination of the 1977 Preferred Share Trust and that the outside appraisal suggested that the market value of JDS stock without any ownership or transfer restrictions was at least 3.4 times book value. (Tr. 102:14-18, 122:24-123:22.) Of course, a valuation of JDS stock without ownership restrictions was entirely hypothetical because the shares of JDS stock could not be sold on the public market. In receipt of such information, however, a prudent fiduciary would at least inquire whether an outside appraiser would value JDS stock above book value even with the restrictions.

Not only did ERISA require the Trustees to ensure they were receiving adequate consideration to sell HolliShare's shares to JDS, the use of the December 31 book value should have prompted a thorough inquiry by the Trustees because, when the Plan sold its shares to JDS at the December 31 book value, the evidence suggests the Trustees may have personally benefitted as individual shareholders. Zwirner acknowledged that, when HolliShare sold below month-end book value and JDS retired the purchased shares, the current book value for each outstanding share increased and, as an owner of outstanding shares, the value of his shares also increased. (Tr. 2050:6-14.) At a minimum, a prudent fiduciary would have questioned and assessed the justifications for this “transfer of value” that occurred when HolliShare sold its shares for less than the month-end book value.

It appears the only Trustee who ever questioned the use of the December 31 book value was Karlovsky. When he first became Trustee, he wondered whether the use of the December 31 book value affected the Plan and "went back and [] used [his] mathematical modeling capabilities and [] work experience in benefits to do some simulation and sensitivity analysis to see if [the use of the December 31 book value] had a significant impact on the plan." (Tr. 354:9-13.) Based on the results of his simulation, Karlovsky concluded that it did not. Tellingly, however, Karlovsky's concern was whether use of the December 31 book value from the prior year had made "a significant difference to the overall operation of the plan," (Tr. 352:6-7), not whether the price constituted the "fair market value" of the Plan's JDS stock. Even assuming Karlovsky's simulation was accurate, determining that a price does not have a long-term detrimental effect on the plan does not fulfill the trustee's duty to ensure that the plan receives adequate consideration under § 1108(e) for each sale.

All of the Trustees were also individual shareholders under the direct shareholder program and thus knew that they received month-end book value when they sold their shares to JDS under the right of first refusal provision. The court's overall impression from the testimony was that the Trustees never meaningfully questioned the disparity in price between HolliShare's sales and individual shareholders' sales that occurred in the same month. As an explanation for the use of the December 31 book value from the prior year for the sale of HolliShare's shares and the month-end book value

for the sales of the individual shareholders' shares, defendants explain that HolliShare received the lower price because the December 31 book value was the only audited number and HolliShare received all cash. The court recognizes that a prudent trustee would generally prefer to use an audited value. Here, however, nothing precluded the Trustees from obtaining an audit of a month-end book value and, because a sale generally occurred only once a year, the burden of obtaining a single updated valuation based on the annual audited valuation would not have been unbearably burdensome. Moreover, the Trustees' justification for using the December 31 book value because it was audited was not entirely convincing in light of Zwirner's testimony that he could not recall a single month in his tenure as Trustee when the audited December 31 book value differed from the December 31 book value JDS calculated and submitted to the auditors.[23] (Tr. 2144:8-13.) JDS also tracked its monthly book value and McCormack testified that, in his over ten years with Hollister, he does not recall a single month when JDS determined its calculation of a month-end book value had to be adjusted or was calculated

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[23] It appears that the book value for 1983 was adjusted because the 1984 HolliShare Highlights state, "A change in Financial Accounting Standards Board requirements, implemented in JDS' 1983 financial statements audited by Arthur Andersen & Co., resulted in an increase in the book value of JDS common shares from $39.21 to $41.08 per share as of December 31, 1983." (Ex. 4-4.9.) Zwirner testified that he has "no recollection of this discrepancy between the company's books and the audited figure." (Tr. 2456:7-9.)

incorrectly. (Tr. 1105:7, 1106:7-13.)

With respect to the fact that HolliShare required cash payments for JDS's purchases of its shares and the JDS Articles provided for the individual shareholders to receive a promissory note for sales over a certain sum, the court agrees with defendants that the cash payment could detrimentally affect the value of HolliShare's shares and that the Trustees would be required to consider this factor in determining the fair market value of the Plan's shares. Nonetheless, while a prudent trustee may have determined that the significant cash need decreased the fair market value of HolliShare's stock, the evidence shows that the Trustees never attempted to quantify how HolliShare's cash needs affected the value of its stock. Depending on the year and the month of a sale, the difference between the December 31 book value and month-end book value inevitably varied. Defendants have not satisfied the court that the Trustees determined that the difference between the December 31 book value and the month-end book value of each sale had any correlation to the decrease in value of HolliShare's stock because of their need for cash payments.

d. Transfer and Ownership Restrictions

The Trustees emphasize that they were familiar with the JDS Articles and transfer and ownership restrictions on JDS stock and considered these restrictions when they sold for the December 31 book value.[24] With the exception of Brilliant, who had not

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[24] Judge Karlton originally rejected defendants' argument that

even read the JDS Articles before this litigation commenced, (Tr. 1276-78, 1295:14-1296:1, 1280:22-24), the other Trustees were generally familiar with the JDS Articles and the transfer and ownership restrictions on JDS stock. Although nothing in the HolliShare Trust or JDS Articles required the Trustees to sell HolliShare's shares at the December 31 book value, defendants contend that the ownership and transfer restrictions in the JDS Articles limited the value of JDS stock.

It is without question that the fair market value of JDS stock was affected by the restrictions in the JDS Articles that limited ownership to HolliShare, select employees, and the preferred share trusts and the transfer restrictions that gave JDS the right of first refusal. As the Cunningham court explained, "[a]ppraisal of closely-held stock is a very inexact science" that has a "level of uncertainty inherent in the process and [a] variety of potential fact patterns." Cunningham, 716 F.2d at 1473; accord Rhodes v. Amoco Oil Co., 143 F.3d 1369, 1372 (10th Cir. 1998) ("[T]here is no universally infallible index of fair market value." (quoting Amerada Hess Corp. v. Comm'r, 517 F.2d 75, 83 (3d Cir. 1975) (alteration in original) (internal quotation marks omitted)).

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the settlor doctrine bars plaintiffs' claims, Ellis, 2006 WL 988529, at *5-6, and the undersigned declined to reconsider it a year later. See DeFazio, 2007 WL 3231670, at *4. As has been previously discussed in two prior orders in this case, the settlor doctrine does not preclude plaintiffs' claims. Moreover, even assuming the design of the HolliShare Plan dictated the use of book value, it did not dictate the use of December 31 book value.

Defendants rely heavily on Krueger International, Inc. v. Blank, 225 F.3d 806 (7th Cir. 2000), to argue that defendants complied with their fiduciary duties. In Krueger, an employee at a privately held company had stock as part of the company's Salaried Employees Retirement Plan. Krueger, 225 F.3d at 808. The company's Stockholders Agreement provided for the company to have the "option to redeem all" of its stock when an employee died and set the purchase price for redeemed stock at "the proportionate value of the Appraised Value of all shares [of its stock] as of the last day of the fiscal period ... ending on or immediately proceeding the date of notice of exercise of the option." Id. (quoting subsections 4.4 and 6.1 of the Shareholders Agreement) (internal quotation marks omitted). When one of the company's employees died in 1996, a dispute arose between the potential beneficiaries, and the company notified the beneficiaries that it intended to redeem all of the employee's shares, but would not disburse any proceeds until the appropriate beneficiaries were determined. Id. at 808-09. When the state supreme court resolved the entitlement disputes between the beneficiaries four years later, the price of the company's stock had increased substantially. Id. at 809. The beneficiaries and company therefore disputed whether the "fair market value" of the stock should be set at the 1996 price when the company exercised its option or the 2000 price when the transaction was completed and the benefits were paid.

The Seventh Circuit explained that the "repurchase option is an inseparable part of owning" the company stock and that, because the stock was encumbered by a purchase option at the time of the employee's death, if the company exercised that option, then, under the Shareholders Agreement, the purchase price was set in 1996. Id. at 812-13. It explained, "[b]ecause the fair market value of stock that someone else has the right to purchase for $258.70 is just $258.70 (at least as long as the stock alone is worth more than that), there would be no violation of the ERISA 'adequate consideration' rules for [the company] to pay that amount per share (plus the interest, of course) to the beneficiaries." Id. at 813.

Although the reasoning from Krueger that the restrictions in a Shareholders Agreement--or here, the JDS Articles--affects the price of the stock, the case is distinguishable. In Krueger, the parties disputed whether adequate consideration was determined at the time the call was exercised or at the time the transaction was completed. The parties did not dispute the valuation method used to determine the price of each share in 1996 or 2000. Krueger therefore did not engage in the inquiry that is dispositive to plaintiffs' claims under § 1108(e)--whether the Trustees engaged in a sufficient investigation to determine the fair market value of the Plan's JDS stock. In Krueger, because the appraised value of the stock was not at issue, the Shareholders Agreement set the purchase price of the stock at the time of the call. In this case, while the JDS Articles undeniably affect the fair market value of JDS Stock, they never set it at the December

31 book value.

As the Second Circuit has explained, "[t]he court's task is to inquire whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." Henry, 445 F.3d at 618 (quoting Katsaros v. Cody, 744 F.2d 270, 279 (2d Cir. 1984) (alteration in original) (internal quotation marks omitted)). Here, the Trustees never attempted to quantify the amount by which the transfer and ownership restrictions affected the value of the Plan's JDS stock. Even assuming that use of the book value system was appropriate to value JDS,[25] an inquiry into and correlation between the use of the December 31 book value versus the month-end book value never occurred.

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[25] The court is not suggesting that the use of book value was per se imprudent or violated ERISA. In a closed-corporation, it may very well be that book value is the most reliable and accurate method to assess the fair market value. In this case, use of book value was also consistent with the JDS Articles, Schneider's principles, and the 1999 Preferred Share Trust. Here, however, the fiduciaries never investigated whether the use of book value was appropriate and ERISA unquestionably required them to do so. Putting aside the Trustees' failure to use the month-end book value, they failed to investigate whether discounts or increases had to be made to the book value in order to arrive at the fair market value of the closely held stock.

e. Hypothetical Prudent Fiduciary

Lastly, defendants argue that the court should follow the Eighth Circuit's holding in Roth, 16 F.3d 915. In Roth, the Eighth Circuit held that, "[e]ven if a trustee failed to conduct an investigation before making a decision, he is insulated from liability if a hypothetical prudent fiduciary would have made the same decision anyway." 16 F.3d at 919; accord Bussian v. RJR Nabisco, Inc., 223 F.3d 286 (5th Cir. 2000); Herman v. Mercantile Bank, N.A., 143 F.3d 419, 421 (8th Cir. 1998). The Eighth Circuit reasoned that such an exception was justified because, if the Trustees actually sold assets for fair market value even in the absence of an investigation to determine fair market value, "there was no causal connection between their allegedly deficient conduct and a loss to the ESOP." Roth, 16 F.3d at 919.

When it first introduced the "hypothetical prudent fiduciary" standard, the Eighth Circuit relied on a concurring opinion from then-Judge Scalia in Fink v. National Savings and Trust Co., 772 F.2d 951 (D.C. Cir. 1985). Specifically, in Fink, Judge Scalia commented that he did not know of a "case in which a trustee who has happened-through prayer, astrology or just blind luck-to make (or hold) objectively prudent investments (e.g., an investment in a highly regarded 'blue chip' stock) has been held liable for losses from those investments because of his failure to investigate and evaluate beforehand." Id. at 962. Judge Scalia explained that "[i]t is the imprudent investment rather than the failure to investigate and evaluate that is the basis of suit." Id.

While reasoning that a fiduciary who happens to make a prudent investment despite his lack of investigation is not liable in "an action for damages arising from losing investments," Judge Scalia nonetheless recognized that such a "[b]reach of the fiduciary duty to investigate and evaluate would sustain an action to enjoin or remove the trustee or perhaps even to recover trustee fees paid for the investigative and evaluative services that went unperformed." Id. (citation omitted). While the "hypothetical prudent fiduciary" inquiry may therefore limit an award of damages against a fiduciary who fails to investigate but nonetheless makes a prudent investment, Judge Scalia's concurring opinion in Fink does not support the conclusion that the fiduciary is absolved from all liability under ERISA.

The Seventh Circuit similarly concluded that a plan was not entitled to damages based on a fiduciary's "imprudent but harmless conduct," but could nonetheless seek appropriate equitable relief, such as an injunction. Brock v. Robbins, 830 F.2d 640, 647 (7th Cir. 1987); see also id. at 647 ("[N]o court has held trustees liable in money damages for imprudent conduct which resulted in no loss or damages to the ERISA plan and no benefit or gain to the trustees and did not put the assets of the plan at risk." (emphasis added) (internal quotation marks omitted)); cf. Donovan v. Bierwirth, 754 F.2d 1049, 1052 n. 3 (2d Cir. 1985) ("[T]here can be a breach of duty without any 'loss' to a plan."). Consistent with numerous other circuits, the Ninth Circuit has also emphasized that the inquiry under §§ 1108(e) and 1104(a)(1)(B) is focused on the defendants' conduct,

not the result. See Howard, 100 F.3d at 1488; see also Cunningham, 716 F.2d at 1467 ("[I]t is especially significant that the adequate consideration test, like the prudent man rule, is expressly focused upon the conduct of the fiduciaries.") (emphasis added); Henry, 445 F.3d at 619 ("[I]n practice, the 'fair market value' inquiry overlaps considerably with the 'good faith' inquiry; both are 'expressly focused upon the conduct of the fiduciaries.'" (quoting Cunningham, 716 F.2d at 1467)); Eyler v. Comm'r of Internal Revenue, 88 F.3d 445, 455 (7th Cir. 1996) ("ESOP fiduciaries will carry the burden of proving that adequate consideration was paid 'by showing that they arrived at their determination of fair market value by way of a prudent investigation in the circumstances then prevailing.' Thus, the adequate consideration test focuses on the conduct of the fiduciaries in determining the price, not the price itself." (quoting Cunningham, 716 F.2d at 1467 (citation omitted)).

Accordingly, while determining whether the Trustees' failure to investigate the fair market value of JDS stock caused monetary loss to plaintiffs and HolliShare would affect an award of damages, financial loss is not required to prove a breach of a fiduciary duty under §§ 1108(e) and 1104(a)(1)(B) and the court will not apply the "hypothetical prudent investor" exception to absolve defendants from liability. Chao, 285 F.3d at 436 (rejecting application of the "hypothetical reasonable fiduciary" standard because doing so would "ignore" the second part of the "adequate consideration" definition, which requires that the fair market value is "determined in good faith by the trustee").

2. Claims Against Hollister Board Members & JDS

To qualify as an ERISA fiduciary, an individual or entity may either be named as a fiduciary under the terms of an ERISA plan, see 29 U.S.C. § 1102(a), or act as a functional or de facto fiduciary by exercising discretionary control over the management or administration of the plan or its assets, see id. § 1002(21)(A). When an individual or entity is a named fiduciary, that fiduciary's liability may be limited pursuant to provisions of a plan instrument that allocates responsibility among named fiduciaries. See Walker v. Nat'l City Bank of Minneapolis, 18 F.3d 630, 633 (8th Cir. 1994) ("[U]nless ERISA mandates otherwise, division of authority in the plan determines the duties of the various fiduciaries."); 29 C.F.R. § 2509.75-8(D-4) (noting that a plan instrument may allocate responsibility among named fiduciaries).

Here, the Trust Instrument specifies Hollister, the HolliShare Trustees, and the Hollister Board as named fiduciaries. (Ex. 9-9.14, § 11.11.) Hollister is responsible for administration of the Plan, (id.),[26] the Trustees are responsible for management of the Plan's assets, (id. §§ 11.01, 11.02), and the Hollister

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[26] Plaintiffs neither presented evidence at trial nor submitted proposed findings of fact and conclusions of law with respect to any claims against Hollister as the plan administrator. Although Ellis requested the court appoint a new plan administrator, the DeFazio/Dimaro plaintiffs' proposed order would have Hollister remain as the plan administrator. (Docket Nos. 650-53, 662.) The court will therefore enter judgment in favor of Hollister.

Board has the authority to appoint and remove the Trustees, (id. §§ 11.05-11.07). The Board also has the authority to inspect and audit HolliShare's records and receive reports from the Trustees. (Id. § 11.04.)

a. Hollister Board Members

The Trustee defendants who also served on the Hollister Board are Zwirner and Stempinski and the non-trustee defendants who served on the Hollister Board are Winn and Herbert. Plaintiffs do not dispute that the Hollister Board appointed competent individuals to serve as the HolliShare Trustees, but alleges that the Board breached its duty to monitor the Trustees it appointed. The Hollister Board's potential liability therefore arises only from its fiduciary duty to appoint and monitor[27] the HolliShare Trustees. See 29 C.F.R. § 2509.75-8 (FR-17) ("[T]rustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their

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[27] After trial, defendants argued in a footnote that there "is conflicting Ninth Circuit authority regarding whether the persons who appoint fiduciaries of an ERISA plan have a fiduciary duty to monitor reasonably the actions of their appointees" and that various courts have rejected imposition of a duty to monitor appointed fiduciaries. (See Defs.' Proposed Findings & Conclusions at 167 n. 397.) This position is the exact opposite of the position defendants argued in their motion for summary judgment: "Moreover, while the power to appoint plan trustees carries with it the duty to monitor the trustees' activities, the Hollister Board did so as a matter of undisputed fact." (Docket No. 484 at 3:24-25.)

performance has been in compliance with the terms of the plan and statutory standards. ..."); In re Calpine Corp., No. 03-1685, 2005 WL 1431506, at *3 (N.D. Cal. Mar. 31, 2005) (noting that the "power of appointment gives rise to a limited duty to monitor").

The court recognizes that there is authority suggesting that the limited duty to appoint trustees might not give rise to a duty to monitor those trustees. See Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1325 (9th Cir. 1985) (per curiam) (holding that an employer who appointed the plan administrator was only a fiduciary and liable as such with respect to the selection of the administrator). The court, however, previously adhered to the position both parties advanced and will not hold otherwise when there has not been a change in the controlling law. Moreover, in addition to the duty to appoint trustees, the Hollister Board also has the authority to inspect and audit HolliShare's records and receive reports from the Trustees. These powers are consistent with an oversight and monitoring role.

Here, the vast majority of HolliShare's holdings consisted of JDS common shares, meaning that almost all of the Plan's transactions fell explicitly within ERISA's prohibited transaction provision. ERISA unequivocally required the Trustees to conduct a good faith investigation to determine the fair market value of the Plan's shares of JDS stock and sell those shares at that value. The evidence at trial established that the Hollister Board knew that HolliShare had been selling its shares at the December 31 book value since at least the mid-80s and that the December 31 book value was less than

the month-end book value.[28] Not only did the Trustees fail to perform an adequate investigation to determine the fair market value, the Hollister board members understood that the December 31 book value was always used and had no reason to conclude that an investigation to determine the fair market value of the JDS shares led to that price. (See Tr. 1881:11-1883:22.) The continual use of a preset sales price and lack of any document or discussion suggesting that the Trustees had performed an investigation to determine the fair market value of the Plan's shares should have served as a red flag to the Hollister board members that the Trustees were not fulfilling their duties under ERISA. The court thus finds that the Hollister board members breached their duty to adequately monitor the HolliShare Trustees. Cf. Leigh, 727 F.2d at 135-36 (holding that appointing fiduciaries who were aware of the plan trustees' conflicting loyalties in certain transactions were obliged to take extra measures to monitor the trustees' actions).

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[28] Winn also testified that he knew that JDS "had a value in the outside world higher than book value." (Tr. 140:18-20.) He gained this knowledge as a result of the capitalization study, but never shared the information with Karlovsky, one of the Trustees. (Tr. 391:22-393:23.)

b. JDS

Unlike the Hollister Board, the Trust Instrument does not name JDS as a fiduciary. Plaintiffs contend, however, that JDS was a de facto, or functional, fiduciary of HolliShare based on the discretionary control and authority it exercised over the management of HolliShare's main asset. Plaintiffs rely on the evidence at trial establishing that JDS, through the mid-80s agreement, proposed and established the practice of HolliShare selling its shares to JDS once per year at the December 31 book value. At least one HolliShare Trustee testified that he did not feel HolliShare could negotiate for a higher price because JDS had always paid the December 31 book value and he did not feel that the price was open to negotiation. (Tr. 2114:20-22, 2115:4-7.)

When determining whether a person is a de facto fiduciary, "the threshold question is not whether the actions of some person ... adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." Pegram v. Herdrich, 530 U.S. 211, 226 (2000). "An individual or entity performs a 'fiduciary' function with respect to a pension plan when 'exercis[ing] any discretionary authority or discretionary control respecting management of such plan or exercis[ing] any authority or control respecting management or disposition of its assets' under ERISA." Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1101 (9th Cir. 2004) (quoting 29 U.S.C. § 1002(21)(A)).

The strongest theory suggesting that JDS had discretionary control over HolliShare's shares of JDS stock is that JDS was--at least in practice--the only buyer for HolliShare's shares and therefore could render HolliShare unable to meet its cash needs by refusing to purchase its shares. This dynamic, however, is part in parcel of the design of the HolliShare plan as a profit-sharing plan and JDS as a closely held corporation with severe ownership restrictions. While JDS may have proposed the price and been reluctant to negotiate for a higher price, it was acting as a corporation making business decisions in doing so, not a fiduciary to HolliShare. Assuming the mid-80s agreement was a binding agreement between JDS and HolliShare, it was the Trustees who had the power to negotiate the terms and agree to them on behalf of the beneficiaries. It was the Trustees who had the power and obligation to ensure that the sales were for fair market value and to negotiate on behalf of the beneficiaries. It was also the Trustees who had the power to assess their cash needs for the year and decide how many shares to sell.

Judge Karlton previously held in this case that JDS would be an ERISA fiduciary only if it "in fact exercised any discretionary authority over plan assets." Ellis, 2006 WL 988529, at *7. The court is not convinced from the evidence at trial that JDS had discretion or authority to make HolliShare sell shares at a given time or that it sought to exercise authority to limit the number of shares HolliShare sold. See Assocs. In Adolescent Psychiatry, S.C. v. Home Life Ins. Co., 941 F.2d 561, 570 (7th Cir. 1991) ("[T]he power to act for the plan is essential to status

as a fiduciary under ERISA."); Farm King Supply, Inc. Integrated Profit Sharing Plan & Trust v. Edward D. Jones & Co., 884 F.2d 288, 292 (7th Cir. 1989) ("[C]ases which hold that the person or firm was a fiduciary have a common theme conspicuously absent here, viz., the authority to exercise control unilaterally over a portion of a plan's assets, not merely to propose investments."). The evidence at trial was that the Trustees calculated how many shares they wanted to sell and JDS bought the shares on every occasion and has provided commitments to continue to do so. (See Ex. 41 at 68.) The weight of the evidence does not persuade the court that JDS ever attempted to exercise control over HolliShare's sales. Accordingly, because the court is not convinced that JDS exercised discretionary control over the Plan's assets sufficient to render it a de facto fiduciary, the court will enter judgment in favor of JDS.

3. Co-Fiduciary Liability for Breaches under § 1104

Section 1105(a) provides for liability of a fiduciary based on a breach of duty by a co-fiduciary:

> In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

> (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1105(a). Section 1105(a) "effectively imposes on every ERISA fiduciary an affirmative duty to prevent other fiduciaries from breaching their duties for which they are jointly and severally liable." Stewart v. Thorpe Holding Co. Profit Sharing Plan, 207 F.3d 1143, 1157 (9th Cir. 2000).

Plaintiffs appear to rely on § 1105(a)(2) and seek to hold defendants jointly liable as co-fiduciaries for losses caused by the fiduciaries' breaches of the duty of loyalty under § 1104(a)(1) and duty of prudence under § 1104(a)(1)(B). Given the court's findings that the fiduciary defendants breached their duties under § 1104(a)(1) and (a)(1)(B), it follows that their conduct enabled their co-fiduciaries to breach the same duties. See Springate v. Weighmasters Murphy, Inc. Money Purchase Pension Plan, 217 F.Supp.2d 1007, 1025 (C.D. Cal. 2002) (holding that, because "each Defendant failed to comply with Section 1104(a)(1), and in doing so, each Defendant enabled the other fiduciaries to commit a breach," each Defendant is liable for the breaches of a co-fiduciary under § 1105(a)).

Nonetheless, because § 1105(a) requires that the fiduciary's breach "enabled such other fiduciary to commit a breach," a fiduciary's liability for any losses caused by a breach would be limited to the time in which that defendant served as a fiduciary. ERISA clearly limits liability to the time in which a defendant served as a fiduciary, stating, "No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary." 29 U.S.C. § 1109(b). Plaintiffs thus cannot simply group all the fiduciaries together when they each served different terms, and any award of damages would need to be broken down by the years in which the various defendants served as fiduciaries.

D. Requested Relief

Plaintiffs brought their claims under subsections (a)(2) and (a)(3) of § 1132. Subsection 1132(a)(2) provides for a participant to bring a civil action "for appropriate relief" under § 1109, which provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including

> removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. § 1109(a). "Under 29 U.S.C. §§ 1109(a) and 1132(a)(2), ERISA beneficiaries may bring an action against fiduciaries who breach their duties to the plan, and may recover both damages and equitable relief from them." Landwehr v. DuPree, 72 F.3d 726, 733 (9th Cir. 1995). "The Supreme Court has held that recovery for a violation of 29 U.S.C. § 1109 for breach of fiduciary duty inures to the benefit of the plan as a whole, and not to an individual beneficiary." Paulsen v. CNF Inc., 559 F.3d 1061, 1073 (9th Cir. 2009); see also LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 256, 128 S.Ct. 1020, 169 L.Ed.2d 847 (2008) ("[A]lthough § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account.").

"Neither section 409(a) [of ERISA, 29 U.S.C. § 1109(a)] nor any other section of ERISA discloses the methods which are to be used in measuring the 'losses' for which breaching fiduciaries are to be held liable." Kim v. Fujikawa, 871 F.2d 1427, 1430 (9th Cir. 1989). "The reports of the various committees concerning this section of ERISA make it clear that Congress intended to provide the courts with broad remedies for redressing the interests of participants and beneficiaries when they have been adversely affected by breaches of a fiduciary duty." Eaves v. Penn, 587 F.2d 453, 462 (10th Cir. 1978); see also id.

at 462-63 ("Among the factors which the court may consider in selecting a remedy are: (1) the purposes of the trust; (2) the relative pecuniary advantages to the trust estate of the various remedies; (3) the nature of the interest of each beneficiary; (4) the practical availability of the various remedies; and (5) the extent of the deviation from the terms of the trust required by the adoption of each of the remedies.").

Subsection 1132(a)(3) provides for a participant to bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3). The Supreme Court has "interpreted the term 'appropriate equitable relief' in § 502(a)(3) [of ERISA, 29 U.S.C. § 1132(a)(3),] as referring to those categories of relief that, traditionally speaking (i.e., prior to the merger of law and equity) were typically available in equity." CIGNA Corp. v. Amara, --- U.S. ----, ----, 131 S.Ct. 1866, 1878 (2011) (quoting Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 361 (2006)) (internal quotation marks omitted). Because § 1132(a)(3) is limited to equitable relief, compensatory damages are not available under this subsection. Mertens v. Hewitt Assocs., 508 U.S. 248, 255-56 (1993).

In CIGNA Corp., however, the Supreme Court discussed, in dicta, the ability to award equitable relief under § 1132(a)(3) that would require a plan administrator to award monetary compensation to already retired beneficiaries "for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment." CIGNA Corp., 131 S.Ct. at 1880.[29] The court referred to this as an equitable "surcharge remedy" and recognized that "[t]he relevant substantive provisions of ERISA do not set forth any particular standard for determining harm." Id. at 1880-81.

As the final week of trial came to a close in this case, plaintiffs could not articulate the remedy they were seeking, and suggested that the court could simply fashion appropriate equitable relief. The court is not in the business of divining appropriate relief absent a request from plaintiffs. In five different proposed orders submitted with their post-trial briefing,[30] (see Docket Nos. 650-53, 662), plaintiffs have, for the first time, identified the relief they are seeking, which includes:

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[29] In CIGNA Corp., the Court was addressing violations of §§ 1022(a) and 1024(b) and the surcharge that might be awarded based on the district court's reformation of the plan documents. CIGNA Corp., 131 S.Ct. at 1880-81. Nothing in the Court's opinion suggests that its discussion would not apply equally to the breaches at issue in this case.

[30] In their five proposed orders, plaintiffs do not request damages based on any profits the fiduciaries allegedly received as a result of their breaches.

1. **Removing Existing Trustees and Appointing a New Trustee**: Plaintiffs request the court to issue a preliminary and permanent injunction removing the HolliShare Trustees and barring them from serving as Plan Trustees in the future. Plaintiffs then request the court to appoint an independent trustee "to carry out the orders of the Court to calculate the losses of the Plan and to correct the fiduciary breaches and prohibited transactions."

2. **Damages**: Plaintiffs request an award of damages against the fiduciaries individually for restitution or a surcharge from 1992 through the present.[31] Plaintiffs' calculations are based on the difference between the actual price paid by JDS in each prohibited transaction (December 31 book value from the year prior to the sale) and (a) the month-end book value in the month the transaction took place **or** (b) the fair market value of the shares in the month the sale occurred as determined by an

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[31] Although fiduciaries can be jointly and severally liable for harms resulting from their breaches, see Stewart, 207 F.3d at 1157, plaintiffs erroneously seek to hold all of HolliShare's fiduciaries liable for all losses regardless of when each defendant served as a fiduciary. See 29 U.S.C. § 1109(b) ("No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary."). Assuming the breaches caused loss to the Plan, damages would have be broken down by year and only the defendants who breached fiduciary duties in a particular year could be liable for losses caused that year.

independent appraiser retained by the court-appointed trustee. If the month-end book value is used, Ellis calculates the amount of damages at $30,674,599.56, plus interest.[32] (Docket No. 650.) The DeFazio/Dimaro plaintiffs used a "slightly different damage calculation" than Ellis, and are requesting an award of $244,382,485.00.[33] (Docket No. 654.)

3. **Recovery of Excess Shares**: As an alternative to an award of damages, plaintiffs seek an order against the fiduciaries individually requiring them to recover the excess shares redeemed by JDS in the transactions from 1992 to the present and restore the shares to HolliShare, with the value of the excess shares distributed to each participant's account for each of the years. The excess shares would be calculated based upon the difference between the actual shares sold in each prohibited transaction and (a) the number of shares that would have been sold in each prohibited transaction if the shares were valued at the month-end book value **or** (b) the number of shares that

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[32] Of the $30,674,599.56, plaintiffs claim that Ellis is entitled to $108,917.87. (Docket No. 650.)

[33] Of the $244,382,485.00, plaintiffs claim that Beetham is entitled to $78,032.68; DiMaro is entitled to $10,430.00; Humphries is entitled to $41,537.00; Lavick is entitled to $4,212.00; McNair is entitled to $980.00; Pace is entitled to $100,345.00; Seay is entitled to $882,055.00; Stanton is entitled to $110,803.00; Wirth is entitled to $23,414.00; and DeFazio and Ellis are entitled to $5,634,083.00. (Docket No. 654 at 4.) The remainder would be awarded to the Plan.

would have been sold in each prohibited transaction if the shares were valued at the fair market value as determined by an independent appraiser retained by the court-appointed trustee. The DeFazio/Dimaro plaintiffs have calculated what they believe was the loss to the Plan as the result of selling an excessive number of shares due to the use of the December 31 book value. They have calculated this loss to the Plan at $729,912,295.00. (Docket No. 654 at 4.)

The court now addresses each of the remedies plaintiffs seek.

1. Removal of Existing Trustees and Appointment of a New Trustee

At the close of trial during discussions with counsel about post-trial briefing, the court unequivocally raised its concerns with plaintiffs' counsel about the court's ability to grant any prospective injunctive relief, stating:

> [Y]ou better be able to explain to me why any of the plaintiffs, any one [ ] of them is entitled to any equitable relief when they no longer have an interest in the plan. I referenced that in my ruling on the motion for summary judgment, and I still fail to see how any modifications to the plan or putting money in the plan or changing how the plan is administered or changing the articles or anything else is going to inure to the benefit of any plaintiff in this case. I fail to see an Article III context how they even have standing to ask for that kind of relief when they no longer have an interest in the fund.

(Tr. 2658:7-17); see also DeFazio, 636 F. Supp. 2d at 1076-77 (citing Bendaoud v. Hodgson, 578 F. Supp. 2d 257, 267-68 (D. Mass. 2008), for the holding that a plaintiff who was no longer a participant in a defined contribution plan had no standing to seek purely prospective relief); see generally Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 433 F.3d 181, 199-203 (2d Cir. 2005) (discussing Article III standing in the context of ERISA claims). Every single plaintiff that was a HolliShare participant had terminated his or her employment with Hollister and received a full lump sum distribution of his or her HolliShare account before commencing or joining this action.

Although plaintiffs' proposed orders request prospective injunctive relief, their over 350 pages of post-trial submissions are devoid of any substantive discussion addressing the court's concerns about their ability to seek such relief. When defendants pointed out the deficiency in plaintiffs' briefs on this issue, plaintiffs still failed to address the issue in their reply brief. In the face of the court's clear and direct request for authority supporting any request for injunctive relief, the court can only construe plaintiffs' silence on this issue as an admission that their requests for injunctive relief are not "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed.R.Civ.P. 11(b) (2).

Not only would it be inappropriate in this case to order removal of the existing Trustees and appoint a new trustee, the court is quite certain that appointing a new trustee as plaintiffs request would

only prolong what has already been a painfully protracted case. The court has every reason to believe that an independent trustee will be unable to render decisions that both sides will believe are acceptable, thus requiring the parties to return to court in the same position they are in today, only several years later. As the court explained at trial, it is neither its role nor its desire to "step in, roll up [its] sleeves and decide how to run this company or this ERISA plan." (Tr. 2658:24-25.)

Moreover, plaintiffs do not merely request the court to appoint an independent trustee, plaintiffs also request the court to order the trustee "to calculate the losses of the Plan and to correct the fiduciary breaches and prohibited transactions." (Docket Nos. 650-53.) The purpose of the trial was for plaintiffs to put on evidence that would allow the court to "calculate the losses of the Plan and to correct the fiduciary breaches and prohibited transactions." Plaintiffs are essentially asking for a second chance to do what they should have done at trial.

This case has been pending in this court since 2004 and the various judges assigned to it have issued over thirty substantive orders. Plaintiffs have had more than ample time and opportunity to prove their case and could have retained experts to testify at trial about the exact calculations they are asking a court-appointed trustee to calculate. Accordingly, the court will deny plaintiffs' request for an injunction removing the existing Trustees and appointing a new trustee.

2. Damages

To seek damages under § 1132(a)(2) and (a)(3), plaintiffs generally have the burden of proving the harm caused by defendants' breaches of their fiduciary duties by a preponderance of the evidence. See Cigna Corp., 131 S.Ct. at 1881 ("[A] fiduciary can be surcharged under § 502(a)(3) only upon a showing of actual harm -- proved (under the default rule for civil cases) by a preponderance of the evidence."). However, "once the ERISA plaintiff has proved a breach of fiduciary duty and a prima facie case of loss to the plan or ill-gotten profit to the fiduciary, the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by, or his profit was not attributable to, the breach of duty." Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992); accord Roth, 61 F.3d at 602. "In determining the amount that a breaching fiduciary must restore to the [ERISA plan] as a result of a prohibited transaction, the court 'should resolve doubts in favor of the plaintiffs.'" Kim, 871 F.2d at 1430-31; accord Sec'y of U.S. Dep't of Labor v. Gilley, 290 F.3d 827, 830 (6th Cir. 2002) ("[T]o the extent that there is any ambiguity in determining the amount of loss in an ERISA action, the uncertainty should be resolved against the breaching fiduciary."); Patelco Credit Union v. Sahni, 262 F.3d 897, 912 (9th Cir. 2001).[34]

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[34] In Vaughn, 567 F.3d 1021, the Ninth Circuit explained that it has "never required that [an ERISA] claim be for an 'ascertainable amount,' " but declined to determine whether it "should apply such a requirement, because in [the case], the amount sought is ascertainable, despite the fact that it

In finding that defendants breached their duties under §§ 1104(a)(1), (a)(1)(B), and 1108(e) by failing to perform an investigation to determine the fair market value of HolliShare's JDS stock, the court did not have to find--and did not find--that the fair market value of the JDS shares at the time of each prohibited transaction could not have been the December 31 book value. Surprisingly, after four weeks of trial, the court did not hear a single expert witness estimate the value of the JDS stock at the time of each prohibited transaction. While plaintiffs have suggested that the fair market value could be the month-end book value, which was the valuation used for individual shareholders when they sold their shares, they have alternatively suggested that the court-appointed trustee could appoint an appraiser to determine the fair market value of HolliShare's JDS shares at the time of each prohibited sale.[35] Even plaintiffs are unsure what value should have been used to ensure HolliShare received adequate consideration.

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is not readily apparent on the face of the First Amended Complaint." Id. at 1026-27.

[35] For the same reasons that the court declines to appoint a trustee, the court declines to invite a second trial in this case so that an expert can value the JDS stock at the time of each prohibited transaction to determine the fair market value. Any evidence the outside appraiser would consider could have been presented at trial and used to guide the court in its determination.

Not only did the parties present insufficient evidence to establish the fair market value of the JDS shares for each prohibited transaction, the weight of the evidence presented at trial does not persuade the court that the fair market value exceeded the December 31 book value. Most significantly, the JDS Articles severely restricted who could purchase JDS shares and thus the only market for HolliShare's sales was JDS or one of the select individuals authorized to purchase shares under the direct shareholder program. (See Ex. 531-36 Art. 5, ¶ II.C.) Each year, offering circulars were distributed to the eligible direct shareholders in the second or third quarter that provided them with options to purchase JDS stock at the audited December 31 book value from the prior year. (Tr. 558:6-559:1, 725:3-731:4, 1272:20-1273:14, 1710:5-7; see also Tr. 557:22-559:5 (Karlovsky explaining that the ability to purchase JDS shares at the December 31 book value even when sales were made during the following year "was considered to be one of the benefits of the direct share program").)[36] It would

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[36] The Trustees never investigated whether any individuals eligible to purchase JDS shares were interested in purchasing shares from HolliShare. Brilliant testified that his "best logic" was that there was not an eligible buyer who had sufficient funds to purchase the amount of JDS stock HolliShare sold each year, but recognized that nothing precluded the Trustees from selling smaller quantities of its JDS stock to multiple buyers. (Tr. 1304:20-1305:19.) The court agrees with plaintiffs that a prudent trustee would have at least explored the option of selling shares to individual shareholders, especially because nothing precluded HolliShare from selling smaller quantities of shares to multiple buyers. Nonetheless, because eligible

therefore be unreasonable to conclude that the direct shareholders would have been willing to purchase stock from HolliShare at a price that exceeded the December 31 book value. When the only other "market" for JDS shares was set at the December 31 book value, it is at least possible that the fair market value of those shares was the December 31 book value. Cf. Krueger Int'l, Inc., 225 F.3d at 812-13.

Furthermore, the fact that individual shareholders who were part of the direct shareholder program were able to sell their shares at the month-end book value does not invariably lead to the conclusion that the fair market value of HolliShare's shares was also the month-end book value. The direct shareholders sold their shares pursuant to the right of first refusal provision in the JDS Articles, which set the sales price at the month-end book value, but also required the seller to receive most of the payment in the form of a promissory note. In contrast to the individual shareholders who sold their shares under the right of first refusal, HolliShare received payment in all cash. Winn testified about an occasion in the 1980s when he sold shares to JDS and received $5,000 in cash and the balance in a promissory note. (Tr. 663:11-14.) Because he needed all cash to satisfy an obligation, he sold the promissory note to a bank that was familiar with

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employees were offered options to purchase shares at the December 31 book value around the same time HolliShare sold its shares, the court finds it unlikely that an eligible employee would have paid more than the December 31 book value for HolliShare's shares.

Hollister. (Tr. 663:20-25.) The bank, nonetheless, only paid Winn around 90% of the note's principal amount, thus illustrating that the receipt of all cash gave a significant benefit to HolliShare that direct shareholders did not receive.[37] (Tr. 663:15-664:2, 2393:20-2394:8.) Defendants' expert, Roger Grabowski, also testified at trial that the value the direct shareholders received would have to be discounted to its cash equivalent in order to compare it to the price HolliShare received. (Tr. 2537:9-23, 2543:8-15.)

Moreover, the only testimony at trial valuing JDS stock during the time-period at issue came from defendants' expert, Grabowski. Grabowski is an accredited senior appraiser with the American Society of Appraisers who has been performing business appraisals for about thirty-five years and is currently a managing director at a valuation and financial consulting firm. (Tr. 2510:1-7, 2512:6-11, 2518:15-17.) Grabowski had also been a finance

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[37] It is worth noting that the increase in the book value of JDS stock from the December 31 book value to the month-end book value in the month of each prohibited transaction between 1993 to 2007 was almost always under ten percent. Specifically, for the years in which the parties stipulated to the month-end book value in the month HolliShare sold shares, the book value of JDS stock had increased by the following percentages from December 31 to the month-end at the time of the sale: 1993 (1.2% increase); 1996 (7.88% increase); 1998 (4.16% increase); 1999 (5.34% increase); 2000 (3.6% increase); 2001 (3.24% increase); 2002 (9.7% increase); 2003 (9.45% increase); 2005 (7.21% increase); 2006 (8.33% increase); and 2007 (11.55% increase).

professor at a university and has authored five books pertaining to valuation, including one about valuation of closely held entities that was used in a course he taught for continuing education for certified public accountants. (Tr. 2517:9-22, 2518:25-2519:4.)

Grabowski was asked to "render an opinion of the fair market value of the common shares of JDS that were held by the HolliShare plan for the period '74 through 2007." (Tr. 2527:19-25.) He concluded that the fair market value was the "formula price, which was book value," explaining:

> It is our opinion that the fair market value in this case is determined by and is equal to generally accepted accounting principles, GAAP, book value of the subject shares pursuant to the stipulated formula pricing in place and corroborated by the historical practice. ... Formula, practice and right of first refusal at book value establish and limit the market. No reasonable financial investor [ ] would pay more. It is our opinion that the fair market value of the subject shares from '74 through 2007 is equal to their book value.

(Tr. 2528:18-2529:8 (reading from the "Summary of Conclusions" in Grabowski's expert report).)[38]

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[38] Grabowski's valuation does not distinguish between the December 31 book value or the month-end book value because, at the time defendants requested his opinion, plaintiffs' theory did not distinguish between the two book

Grabowski also testified about a "hypothetical fair market value" of JDS shares from 1997 to 2007, which he estimated exceeded the book value by 1.1 to 1.8 times depending on the year. This valuation is not relevant because Grabowski calculated this "hypothetical fair market value" as if the restrictions in the JDS Articles did not exist and there could be "freely open trading" of the stock. (Tr. 2572:7-10.)

The only expert testimony plaintiffs offered about the fair market value of HolliShare's shares of JDS stock came from their expert, John Calvin Korschot. Korschot's appraisal, however, was limited to the fair market value of JDS stock as of December 31, 2003. To appraise the JDS stock, Korschot relied on the market and income approaches to come up with an initial value and then discounted that value by fifteen percent to account for the lack of marketability of JDS stock. The resulting value, however, relied on two "critical" assumptions. (Tr. 1975:11-12.) First, Korschot assumed the use of book value for HolliShare's sales of JDS shares would not be required, but would still be used for sales from individual shareholders under the right of first refusal. (See Tr. 1701-1706, 1729:6-10, 1795:7-12.) Second, Korschot assumed that JDS would continue its practice of buying back shares on a regular basis from the Plan at the determined "fair market value." (Tr. 1692:10-12, 1730:19-1731:4.) Not only did Korschot appraise HolliShare stock as of a single

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values. His explanation about favors affecting his valuation are nonetheless relevant.

date,[39] but the court also finds his assumptions to be flawed and is not persuaded that an evaluation of JDS stock could vary so drastically for sales by HolliShare at his estimated "fair market value" and sales by direct shareholders set at the book value.

An additional flaw is that a persuasive explanation was not offered about how JDS's purchase of shares from HolliShare at the increased fair market value Korschot calculated would have affected the fair market value of JDS shares in subsequent years. Simple math reveals that even the book value of JDS would have decreased if it was paying a significantly higher price for its shares.

Plaintiffs recognize that, "[t]he testimony of the experts does not provide a complete analysis of the difference between the previous December 31 book value and the properly appraised fair market value on the dates of the transactions from years 1982 through the present." (Pls.' Proposed Findings & Conclusions 57:24-58:1.) With both parties' experts, the insufficiency of the evidence stemmed not from a lack of qualifications, but from the counsels' failure to

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[39] Even if the court found Korschot's testimony and appraisal credible, his evaluation of the fair market value of JDS stock on December 31, 2003 is barely relevant to calculating damages because, in 2003, HolliShare sold shares to JDS in June, not December. (See Stipulation of Facts ¶ 42.) At most, Korschot's testimony established that the fair market value of JDS stock as of December 31, 2003 exceeded the audited book value for that month, which could support the inference that the "fair market value" of JDS stock exceeded the book value during other months.

request opinions on the relevant issues and ensure that the experts did not rely on assumptions that rendered their opinions irrelevant. Although the court must resolve any ambiguities in favor of plaintiffs, the inadequacy of the evidence on this issue resulted not from ambiguities or difficulty in computations but from the parties' failure to ask their experts the appropriate questions.[40]

Along this same vein, because the court ultimately finds in favor of defendants on damages, defendants' argument that plaintiffs failed to timely disclose their surcharge theory or damages calculations is moot.

With these considerations in mind, the court is not persuaded from the evidence at trial that the fair market value of HolliShare's JDS shares at the time of each prohibited transaction was anything more than the preceding December 31 book value. Moreover, even if the court were to assume that the fair market value of HolliShare's sales at the time of each prohibited transaction exceeded the December 31 book value, the court still finds that the sales at the December 31 book value did not cause harm to the Plan. The court is persuaded that the use of the December 31 book value did not have a detrimental effect on HolliShare when evaluated over an extended duration of time. As discussed in more detail below, four defendants and one expert credibly

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[40] The fact that this issue was not appropriately addressed with the experts stems from the fact that plaintiffs' theory in this case has changed over the course of this litigation.

and consistently testified that, based on the dynamics of the HolliShare Plan, the closely held nature of JDS, and the fact that JDS retired shares it purchased, HolliShare's sale of its JDS stock at the December 31 book value did not cause a material loss to HolliShare.

As a threshold matter, the court agrees with defendants that any loss to the Plan must be assessed on a long-term basis, not isolated annual inquiries that ignore the dynamics of the Plan and various factors affecting its growth. When determining whether trustees' purchase of employer stock in an attempt to prevent a tender offer by another company caused a loss to a plan, the Second Circuit held that the appropriate measure of loss compared what the plan earned on the challenged investment and what it would have earned if the funds had been available for other purposes. Donovan v. Bierwirth, 754 F.2d 1049, 1056-57 (2d Cir. 1985). In performing this inquiry, the Second Circuit explained that the comparisons of the respective investments must be considered over an extended period of time and not limited to the date of the challenged transaction. Id. "Donovan thus stands squarely for the proposition that loss must be determined by examining the assets of the plan as a whole, not at an instant ..., but over a period of time." Roth, 61 F.3d at 604; see also id. at 602-03 (rejecting the district court's "snapshot" assessment of loss and explaining that it "failed to consider the time frame component of the loss calculation, and so doing implicitly focused upon too narrow a time frame").

Turning to the evidence presented at trial, Karlovsky first testified about the simulation he performed to determine whether the use of the December 31 book value had an impact on the Plan. Karlovsky has a Bachelor of Arts in systems engineering and a Master's degree in industrial engineering management, had previously worked as a strategic planning analyst, and had performed extensive research dealing with employee relations and compensation. (Tr. 336:1-337:25.) He explained:

> So when I joined the company and was evaluating the plan, I went back and used, for my own satisfaction, I went back and I used my mathematical modeling capabilities and my work experience in benefits to do some simulation and sensitivity analysis to see if it had a significant impact on the plan. …
>
> [T]he plan has a plan design that's almost -- first of all, it's very elegantly simple. You're taking the profits of the company and spreading it across the ownership shares. It's reciprocating, in that if you were to sell [] too many shares, for example, we would have cash left over at the end of the year. The price would be affected for the following year if we [sold] too much shares because the profits of the coming year would be spread over fewer shares. So the price within the plan goes up for the next year.
>
> And if we had [sold] too many shares, as we estimate the next year, we would have cash in the plan and we would have a higher price for

it and we would be selling fewer shares -- we would be asking to sell fewer shares the following year.

If you simulate that over time and you look at the decisions that may be affected by the associates as well because there's behavioral impact in the dynamics of the plan, you find that when you're looking at a retirement plan, that isn't a one year event. You're looking at someone working 15, 20, 25 years to receive a benefit.

The plan will moderate itself so that the individuals are receiving a just benefit over time, and materially it doesn't have a significant impact. ... In my simulation that I had done, ... what would happen if we sold fewer shares in the middle of the year or the converse was what I did, I said we sold more shares, that would affect succeeding years in terms of the number of shares we would be buying back.

You can't just add them independently year after year. One year has an impact on the others. They reciprocate for each other because the price has gone up and we need fewer shares at a higher price the following year.

It's kind of a self-correcting model over time where one year makes an adjustment for the prior year, and the simulation process is what you would have to do. You cannot just do an additive of one year on top of the other on top

> of the other without involving the dynamics.

(Tr. 354:8-355:13, 361:1-14.) Karlovsky ultimately concluded that use of the December 31 book value did not cause a "material difference" to the Plan. (Tr. 357:15-16, 435:2-4, 438:1-8.)

McCormack, who has a Bachelor of Arts in social studies with a focus in economics and a Masters in Business Administration with an emphasis in finance, explained that, based on the closely held nature of JDS and the fact that JDS was not reissuing new shares, the financial effect of selling more shares one year (because the December 31 book value was used) evened out over time because there would be fewer outstanding shares the following year:

> [I]n public companies we have a dilution of shareholder interest or a shareholder stock value, because in public companies, the shares are-you have an initial public offering and then you issue new shares, and that happens.
>
> And then what happens, it dilutes the share ownership interest and the value of stock over time, everything else being equal.
>
> At Hollister it was a very unique situation. We had the reverse dilution effect that we were always, as we have discussed, sir, retiring the shares over time. So therefore, the more shares that we sold, the more shares that we retired. You add the impact of earnings of the corporation plus the number of shares being reduced and you've got a higher value.

> However, at Hollister, there was what we call the counterintuitive reverse dilution effect, and if I can attempt to explain that. The people in the plan would plan their account, would have a target, if you will, for the account balance they wanted to retire at. That retirement balance would be such that they would make a decision each year on whether or not they would leave, leave early or when they wanted to do.
>
> On the other hand, if we sold the shares at June 30th [month-end book value for a sale in June], we have to sell them at a higher price, and the consequence would be that they would receive a lesser benefit over time.
>
> What we discovered through various analysis in discussion with my treasury department, that this counterintuitive effect based upon the number of shares outstanding -- and this also took into consideration the direct share ownerships also -- over time, this would balance out.
>
> So I understand where you're coming from because you're coming from a public company knowledge. But the uniqueness of Hollister and the HolliShare plan and the direct ownership plan makes your conclusion [that selling at the December 31 book value harmed the plan], I think, erroneous.

(Tr. 768:9-769:20.)

Brilliant, who has a Bachelor of Arts in industrial management and a Masters in Business Administration from the Wharton Business School and had been a certified public accountant since 1975, (Tr. 1264:3-7, 1356:11-12), reached the same conclusion as McCormack, explaining:

> By selling shares at the December 31st book value, as has been stated several times, versus the current book value, there are more shares that the plan is selling. At the end of the subsequent year, the next December 31st, there will be -- by selling more shares back to the company, there will be less outstanding -- there would be less outstanding common shares as of 12/31.
>
> And when those outstanding shares are then divided into the shareholders' equity, which was unchanged because the dollar amount had already been subtracted under any share -- at any share price or book value price, mathematically it would have the book value per share going up as of 12/31 because you'd have less shares in the denominator. So all common shareholders, both direct and the plan, would have a higher book value than they would have otherwise had if they had sold -- if they had sold less shares.
>
> And the plan participation account, the account balances from year to year, the dollar amount of a participant's account balance is increased by the change in the value, the total value of the company. The predominant

> portion of that is the -- of the change in the assets of the plan, and the predominant asset is the JDS -- their ownership of the stock.
>
> So if the book value increases 18 percent, and that same calculation at a different share value would have been 17 and a half percent, the participants, at the end of the following year, their individual account balance in that example would go up by 18 percent instead of going up by 17 percent.

(Tr. 1367:19-1368:22.)

Zwirner who has a Bachelor of Arts in economics and a Juris Doctorate, (Tr. 1982:20-23), echoed McCormack and Brilliant's conclusion:

> [I]f you were to use the month end value, in the first year you would be selling back fewer shares, and at the end of that calendar year the plan would own more shares, which means it would own a larger percentage of the net equity of the company, which means the plan would be worth more and the account balances would be worth more.
>
> What starts to happen in the second and subsequent years, however, is that when those -- with those larger account balances, when people retire, the amounts required to pay out benefits are higher, which would then require HolliShare to sell back more shares than they do today, and that would have the opposite effect of reducing their ownership interest.

> Also, to the extent of the incremental cash required to pay the higher benefits, there would be a permanent reduction in the net equity of JDS Inc., which would again, at the end of the year, reduce the value of the company and the value, percentage value owned by the plan.

(Tr. 2384:7-23.) Zwirner testified that it was his belief that, "over a period of time," the use of the December 31 book value instead of the month-end value had "no effect" on HolliShare. (Tr. 2385:24-25.)

Lastly, defendants' expert, Grabowski, performed an extensive analysis in which he examined the effect on the Plan if it was assumed that the fair market value of HolliShare's shares was two or three times the December 31 book value and HolliShare sold its shares at the increased price. He concluded that the benefits the participants received would have ultimately been the same regardless of whether the book value was used or a hypothetical fair market value of two or three times book value was used:

> Q. Is it your understanding what really drives the incremental changes in the actual benefits and cash money that HolliShare participants walk out of the plan with, the principal driver is not what the values are, but what the incremental changes are from year to year in the values are?
>
> A. Yes, it is. It took awhile for that sink in for me, but that's the driver of the value of the participants.

Q. Is this showing us that whether you value at book value and you do it consistently or value two times book value and do it consistently, if you assume that the rates of return on the shares is going to be the same percentage rates of return, you're going to generate the same dollars for the participants?

A. Yes.

Q. Let's to go the chart, the next page, paragraph three. Same analysis as the prior one except this one is at three times book?

A. Yes.

Q. You're, again, generating on the "dollars redeemed" line exactly the same amount of dollars?

A. Yes.

Q. This is saying if it's three times book at the beginning and three times book at the end, what the HolliShare participants are going to walk away with when they retire from this company is the same amount of dollars?

A. That's correct. On the previous page, going back to that, one of the things we did determine was the variability that actually occurred in the book value increases in HolliShare, in the JDS common stock was, in fact, a lot lower volatility than what the public shares of the guideline companies were. So it's not just a matter of the average over a period

> of time, it's -- the volatility is different and it's lower, so that those are two factors that need to be taken into account.
>
> Q. If I can translate that into terms I think I can understand, is what you're telling us is you're going to come out with the same dollars, but you're going to have more stability using the book value than a market-based valuation method?
>
> A. Yes. That's not based on theory, but based on looking at the guideline company, change in market values each year. They go up and down. There is a lot of volatility. The JDS stock book value has not had that kind of volatility.

(Tr. 2557:2-2558:20.) Grabowski further explained, "So there's a continuous change in how the value of the plan changes, but it's really the incremental change. If book value goes up the same amount in percentage terms as market value goes up, the relative wealth at the end will be the same, the relative benefit to the participants." (Tr. 2555:14-18.)

All of these witnesses were well-educated and had training relevant to understanding the effect of using the December 31 book value for HolliShare's sales under all of the circumstances and dynamics relevant to HolliShare and JDS. Their consistent, credible, and unchallenged testimony was that the use of the December 31 book value did not cause long-term harm to the Plan. Based on their testimony and the evidence presented at trial, including the dynamics of the Plan and JDS, the court is persuaded that

HolliShare's sale of JDS stock at the December 31 book value did not cause a material loss to HolliShare even if the December 31 book value was something less than the fair market value of the Plan's JDS shares at the time of each sale.

In Cigna Corp., the Supreme Court explained that "just as a court of equity would not surcharge a trustee for a nonexistent harm, a fiduciary can be surcharged under § 502(a)(3) only upon a showing of actual harm--proved (under the default rule for civil cases) by a preponderance of the evidence." Cigna Corp., 131 S.Ct. at 1881 (citation omitted); accord Eaves, 587 F.2d at 463 ("The law clearly permits approximations as to the extent of damage, so long as the fact of damage or 'lost profits' is certain." (emphasis added)); Brock, 830 F.2d at 647 ("[M]onetarily penalizing an honest but imprudent trustee whose actions do not result in a loss to the fund will not further the primary purpose of ERISA."). Accordingly, because the court finds that the fiduciaries' breaches of their duties did not cause a material harm to the Plan, plaintiffs are not entitled to damages.

3. Recovery of Excess Shares

Consistent with the court's finding that the Trustees' sale of HolliShare's JDS shares at the December 31 book value did not cause a loss to the Plan over an extended period of time, the court is also convinced that use of the December 31 book value did not cause HolliShare to retain fewer shares than it would have if a higher price was used. As McCormack, Brilliant, and Zwirner testified, while

use of a value lower than fair market value would have caused HolliShare to sell more shares to raise its cash requirements in the first year, when those shares were retired, it would decrease the number of outstanding shares and therefore increase the book value per share of the outstanding shares in the following year. As a result, HolliShare's remaining shares would have a higher value in subsequent years and HolliShare would need to sell fewer shares to meet its cash needs. Any loss in shares during the first year would therefore even out in subsequent years. The weight of the evidence therefore persuades the court that the use of the December 31 book value did not cause HolliShare to incur a material reduction in the number of JDS shares it owned.[41]

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[41] For purposes of discussion, the court refers to the "number of shares," but recognizes that comparing the number of shares from year to year is an oversimplification. Since JDS stock was issued, there has been at least two 100-for-1 stock splits and a 9-for-1 stock dividend. Even assuming the court found that the use of the December 31 book value caused loss to HolliShare, simply calculating the number of extra shares sold in a given year and requiring the Trustees to replace those shares would be misguided because it would ignore the fact that one share in 1992 is not the same as one share in 2012 because, during that time, two stock splits occurred and one dividend was declared.

The testimony at trial was that, even though it is continually selling shares, HolliShare can infinitely extend its ownership of JDS stock through stock splits. (See Tr. 554:16-555:7.)

Accordingly, because plaintiffs lack standing to seek prospective injunctive relief and the court finds that the fiduciary defendants' breaches of ERISA in failing to investigate the fair market value of HolliShare's JDS shares did not cause a loss to the Plan or plaintiffs, the court will enter judgment in favor of defendants on plaintiffs' claims under §§ 1104(a)(1), (a)(1)(B), and 1108(e).

E. Remaining Claims of Breach

At trial, plaintiffs' claims based on HolliShare's sale of its JDS shares at the December 31 book value from the prior year revealed itself to be the heart of plaintiffs' case, and the damages and surcharge remedy plaintiffs seek is based entirely on those prohibited transactions. Plaintiffs have nonetheless alleged numerous other claims, which the court will briefly address.

First, plaintiffs allege that the Trustees breached their fiduciary duties and violated § 1104(a)(1)(D) by failing to follow the Plan's requirement to invest Plan assets in JDS shares to the maximum extent possible when they sold more shares of JDS stock than necessary to meet HolliShare's cash requirements in 1982, 1987, and 1993. Plaintiffs did not, however, propose or seek a remedy with respect to this claim. The evidence at trial also does not persuade the court that these sales were concealed from the beneficiaries, thus plaintiffs are unable to rely on the "fraud or concealment" exception in § 1113 and the claims are untimely.

Second, plaintiffs allege that the Trustees breached duties owed to HolliShare when they voted HolliShare's shares in favor of various amendments to the JDS Articles in 1978, 1980, 1984, and 1999. In the June 2009 Order, the court held that the statute of limitations foreclosed all of plaintiffs' claims based on the votes in 1978, 1980, and 1984 and plaintiffs' direct claims against the fiduciaries based on the votes in 1999. See DeFazio, 636 F.Supp.2d at 1058-59. The court nonetheless held that plaintiffs' co-fiduciary liability claims under § 1105(a)(3) based on the votes in favor of the 1999 amendments were not time barred. As the court explained in the June 2009 Order, § 1105(a)(3) "makes a fiduciary liable for the breach of another fiduciary if 'he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach,'" and "[o]ne form of remedying the breaches of a co-fiduciary would be to file a suit against the breaching co-fiduciary to restore the losses to the plan or redress any violations of ERISA." Id. (quoting § 1105(a)(3)). The court therefore concluded in the June 2009 Order that, if "HolliShare fiduciaries had actual knowledge of the votes at the time they were cast and [ ] such votes constituted ERISA violations," the fiduciaries would have had three years to file suit and thus the claims were timely under § 1132(2). Id. at 1059.

The 1999 amendments prohibited natural persons from owning more than 10% of JDS stock, which plaintiffs contend eliminated a potential market for HolliShare to sell its common stock. The 1999 amendments also added a limited indemnity provision to the JDS Articles that indemnified

directors from personal liability to shareholders for certain breaches. (See Ex. 535 at 5.) Even assuming these amendments constituted fiduciary breaches and thus give rise to § 1105(a)(3) claims against the appropriate fiduciaries,[42] plaintiffs neither offered

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[42] In holding that plaintiffs' § 1105(a)(3) claims relating to the 1999 amendments were timely, the court did not clarify which fiduciaries plaintiffs had viable § 1105(a)(3) claims against based on the 1999 amendments. Plaintiffs seem to suggest they are alleging the claim based on the limitation of ownership against Brilliant, Kelleher, and Zwirner and the claim based on the indemnity provision against Zwirner, McCormack, and Karlovsky. (See Pls.' Proposed Findings & Conclusions at 98:9-15.) Defendants appear to believe both claims are against only Brilliant and Kelleher. (See Defs.' Proposed Findings & Conclusions at 141-44.)

In discussing liability in the June 2009 Order, the court stated that plaintiffs had viable claims under § 1105(a)(3) only if the fiduciary had "knowledge of the votes at the time they were cast." DeFazio, 636 F.Supp.2d at 1059. Here, Brilliant did not become a trustee until 2000 and Kelleher did not become a trustee until 2004. Even assuming Brilliant and Kelleher had a duty to remedy a fiduciary breach that occurred before they were fiduciaries, but see 29 U.S.C. § 1109(b) ("No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary."), there was no testimony showing that they had knowledge that the votes in favor of the 1999 amendments violated ERISA. See Cunningham, 716 F.2d at 1475 ("Section 405 does not impose vicarious liability--it requires actual knowledge by the co-fiduciary. ... '[T]he fiduciary must know the other person is a fiduciary with respect to the plan, must know that he participated in the act that constituted a breach, and must know that it was a breach.'" (quoting H.R.Rep. No. 1280, 1974 U.S.Code Cong. & Ad. News at 5083)).

evidence that the amendments caused harm to the Plan or their individual accounts nor requested or proposed a remedy for any such harm. See Silverman v. Mut. Ben. Life Ins. Co., 138 F.3d 98, 104 (2d Cir. 1998) ("[Section 1109(a)] requires a plaintiff to demonstrate in a suit for compensatory damages that the plan's losses 'result[ed] from' [the fiduciary's] breach of § 1105(a)(3)." (second alteration in original)). Presumably, plaintiffs would suggest that their requested relief is included in their request that the court appointed trustee simply "correct the fiduciary breaches." Any such relief, however, would be prospective in nature, which the court has held plaintiffs lack standing to seek. See DeFazio, 636 F.Supp.2d at 1076-77. Accordingly, the court will enter judgment in favor of defendants on plaintiffs' § 1105(a)(3) claims relating to the 1999 amendments.

Third, based on the fact that many of the Trustees were individual shareholders and served on the JDS and Hollister Boards, plaintiffs allege that the fiduciaries breached various other duties and had numerous conflicts of interest. See generally Pegram v. Herdrich, 530 U.S. 211, 224, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000) ("[T]he trustee under ERISA may wear different hats, ... [but ERISA requires that] the

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It therefore appears that the proper defendants would have been Zwirner, McCormack, and Karlovsky, who were all trustees in 1999 at the time of HolliShare's vote in favor of the 1999 amendments. Nonetheless, the court's conclusion that plaintiffs failed to offer evidence of harm or seek a remedy with respect to their § 1105(a)(3) claims based on the 1999 amendments applies equally regardless of which defendants the claims are against.

fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions."); Cunningham, 716 F.2d at 1465 ("ERISA clearly provides that a fiduciary may be an officer or employee of the company whose securities he purchases on behalf of a plan." (citing 29 U.S.C. § 1108(c)(3))). For example, plaintiffs contend that, when HolliShare allegedly sold shares below the fair market value, the difference remained on the books of the company and was therefore spread equally amongst the remaining shares, including the individual shareholders. In doing so, plaintiffs contend that the Trustees breached their duty of loyalty under § 1104(a)(1)(A) and violated § 1106(b)(1), which prohibits a fiduciary from benefitting from any transaction that harms a plan. Plaintiffs base additional claims on the fiduciaries' alleged conflicts of interest and concealment of other potential markets for HolliShare's JDS shares.

The court has already determined that, in failing to perform a good faith investigation to determine the fair market value of the Plan's JDS shares, the fiduciaries breached their duties under §§ 1104(a)(1), (a)(1)(B), and 1108(e). This finding is sufficient to award plaintiffs the entirety of the relief they requested and have standing to seek. The court unequivocally informed plaintiffs at trial that it would only consider the relief plaintiffs requested, and plaintiffs have not sought any relief based on any alleged profit the fiduciaries gained from their breaches. The court will therefore enter judgment in favor of defendants on plaintiffs' claims relating to the fiduciaries' alleged conflicts and personal profits.

Lastly, in their amended statement purporting to identify all of their claims for trial, plaintiffs identified several claims that they declined to address at trial, in their post-trial briefing, or in their proposed findings of fact and conclusions of law. The court can only assume that plaintiffs have abandoned those claims, and in any event for the reasons discussed above plaintiffs are not entitled to any relief on those claims. The court will therefore enter judgment in favor of defendants on those claims. Specifically, the court will enter judgment in favor of defendants on the following abandoned claims: 1) plaintiffs' claim under § 1103 for defendants' alleged failure to hold HolliShare assets in trust for the participants and beneficiaries; 2) plaintiffs' claim under § 1104(a)(1)(C) for defendants' alleged failure to diversify HolliShare's investments; and 3) plaintiffs' claim under § 1110(a), which declares void any plan provision that relieves ERISA fiduciaries from liability.[43]

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[43] The plaintiffs may have based their § 1110 claim on the indemnity provision added to the JDS Articles via the 1999 amendments, but their post-trial submissions do not reflect such an intent. Even if plaintiffs intended to attack the indemnity provision added via the 1999 amendments, the court's conclusion that the breach did not cause harm to plaintiffs would be the same.

During the course of trial, the court also ruled in favor of defendants on Defazio's and Ellis's claims under § 1056(d)(3) relating to payment of Defazio's benefits pursuant to the qualified domestic relations orders and Defazio's and Ellis's claims under § 1140 relating to defendants' filing of a motion in their divorce proceeding. (See Tr. 2171:3-2174:8, 2175:20-2176:8); see generally DeFazio, 636 F.Supp.2d at 1077-79.

F. Attorneys' Fees

Both parties have requested an award of attorneys' fees in this action. Pursuant to 29 U.S.C. § 1132(g)(1), "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." The Supreme Court has recently held that "a fee claimant need not be a 'prevailing party' to be eligible for an attorney's fees award under § 1132(g)(1)." Hardt v. Reliance Standard Life Ins. Co., 560 U.S. ----, ----, 130 S.Ct. 2149, 2156 (2010). Because Congress did not clearly indicate that it intended to abandon the American Rule, which provides for each litigant to pay his or her own fees, "a fees claimant must show 'some degree of success on the merits' before a court may award attorney's fees under § 1132(g)(1)." Id. at 2158 (quoting Ruckelshaus v. Sierra Club, 463 U.S. 680, 694 (1983)). "A claimant does not satisfy that requirement by achieving 'trivial success on the merits' or a 'purely procedural victor[y],' but does satisfy it if the court can fairly call the outcome of the litigation some success on the merits without conducting a 'lengthy inquir[y] into the question whether a particular party's success was 'substantial'

or occurred on a 'central issue.'" Id. (quoting Ruckelshaus, 463 U.S. at 688 n. 9).

After Hardt, the Ninth Circuit held that a district court "must consider the Hummell factors after they have determined that a litigant has achieved 'some degree of success on the merits.'" Simonia v. Glendale Nissan/Infiniti Disability Plan, 608 F.3d 1118, 1119 (9th Cir. 2010); see Hardt, 130 S.Ct. at 2158 n. 8 ("We do not foreclose the possibility that once a claimant has satisfied this requirement, and thus becomes eligible for a fees award under § 1132(g)(1), a court may consider the five factors adopted by the Court of Appeals, in deciding whether to award attorney's fees."). The Hummell factors include:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980).

Here, the court found that the Trustees breached their duties under §§ 1104(a)(1), (a)(1)(B), and 1108(e) in failing to perform a good faith investigation to determine the fair market value of

HolliShare's JDS stock and that the Hollister board members failed to adequately monitor the Trustees in this respect. In the abstract, this was a significant finding in favor of plaintiffs and an issue that the parties deeply disputed. The court ultimately concluded, however, that plaintiffs lacked standing to seek prospective injunctive relief and that the sales at the December 31 book value did not cause harm to HolliShare or plaintiffs' HolliShare accounts. This finding deflates the sails of any "victory" plaintiffs achieved in proving that defendants breached their fiduciary duties.

The outcome in this case is analogous to Farrar v. Hobby, 506 U.S. 103 (1992), in which the Supreme Court explained that a plaintiff who sought compensatory damages, but failed to prove "actual, compensable injury" and was awarded only nominal damages in the amount of $1.00 based on the violation of his procedural due process rights was not entitled to attorneys' fees. Farrar, 506 U.S. at 115. When evaluating the plaintiffs' "degree of success," the Court explained that plaintiffs "received nominal damages instead of the $17 million in compensatory damages that they sought," and thus the "litigation accomplished little beyond giving petitioners 'the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated.'" Id. at 114, 113 S.Ct. 566 (quoting Hewitt v. Helms, 482 U.S. 755, 762 (1987)) (alteration in original). The Court held, "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all." Id. at 115; see also id. at 116 ("If ever there was a plaintiff who

deserved no attorney's fees at all, that plaintiff is Joseph Farrar. He filed a lawsuit demanding 17 million dollars from six defendants. After 10 years of litigation and two trips to the Court of Appeals, he got one dollar from one defendant. As the Court holds today, that is simply not the type of victory that merits an award of attorney's fees.") (O'Connor, J., concurring).

Here, plaintiffs sought extraordinary damages, ranging from $30,674,599.56 to $244,382,485.00, but are not entitled to any award of damages. Plaintiffs' proof of defendants' breaches may give them some level of moral satisfaction, but their inability to prove any harm or obtain injunctive relief prevented them from achieving "some degree of success on the merits." Accordingly, the court finds that plaintiffs are not entitled to fees under § 1132(g)(1). See Simonia, 608 F.3d at 1121 ("Only after passing through the 'some degree of success on the merits' door is a claimant entitled to the district court's discretionary grant of fees under § 1132(g)(1).").

Defendants ultimately prevailed in this case and are entitled to seek fees under § 1132(g)(1); thus the court must determine whether to award defendants their attorneys' fees in light of the Hummell factors.

(1) the degree of the opposing parties' culpability or bad faith;

Based on the court's conclusion that the fiduciary defendants breached their duties, the court finds that this factor weighs in favor of plaintiffs and merits against awarding defendants their attorneys' fees. Although harm did not result from the fiduciaries'

breaches, it does not make their conduct acceptable. Defendants also argue that plaintiffs engaged in bad faith in pursuing this lawsuit and that plaintiffs' counsel's characterization of the defendants throughout this litigation amounted to bad faith. This case unquestionably did not proceed in an expeditious fashion, the theories of liability often appeared to be a moving target, and the growing animosity between counsel were palpable. The court finds, however, that both sides were responsible for the prolonged litigation and levied arguably personal attacks against their adversaries.

(2) the ability of the opposing parties to satisfy an award of fees;

Although the court lacks evidence about each of the plaintiffs' ability to satisfy an award of fees, nothing in the record suggests that they have significant financial resources. With the exception of Ellis, even the balances of plaintiffs' HolliShare accounts were minimal when compared to the proceeds many of the defendants received from the sales of their JDS shares. For example, in order to keep his holding of JDS shares below ten percent, Winn sold $20 million in shares on one occasion, (Tr. 1858:14-15), and Herbert ultimately sold his shares for about $18 million, (Tr. 19823:9-12). Most significantly, Zwirner, who, as an attorney might be expected to help his fellow Trustees understand and comply with ERISA, was estimated to have JDS shares value in excess of $45 million, (Tr. 1925:2-6), and, when asked how much he had sold in the last six years to keep his holdings under ten percent, he answered that it was in the "range" of five to twenty

million dollars. (Tr. 2017:2-18.) The court's impression at trial was that, even though defendants' fees will undoubtedly be significant, defendants are fully capable of paying them and plaintiffs are not. The burden of defendants' fees should not be shifted from the defendants, who breached their fiduciary duties and appear to have more than adequate resources to pay their attorneys, to the plaintiffs.

(3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances;

An award of fees may undoubtedly deter plaintiffs from pursuing such complicated and contorted ERISA cases in the future. Given that the court found that the fiduciary defendants breached their duties under ERISA, however, the court cannot conclude that such cases should be entirely discouraged because there was at least some merit to plaintiffs' claims even if there was ultimately no harm. Similar to the Court's concern in Farrar, however, counsel might be more reluctant to pursue a case for almost a decade in the absence of clear loss to the Plan or a plaintiff that has standing to seek prospective injunctive relief. This factor therefore weighs in favor of defendants.

(4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA;

Here, plaintiffs sought relief in favor of the Plan, but clearly lacked standing to obtain an injunction

affecting the future management of the Plan, and the evidence at trial convinced the court that the Plan did not suffer harm. It is unclear to the court why plaintiffs did not address these deficiencies early in the litigation. HolliShare was extremely successful and provided returns in excess of publicly traded stock and, to the extent that this action could have rendered HolliShare's primary investment worthless by bankrupting JDS or caused Hollister to think twice about continuing to offer the Plan to its employees,[44] the lawsuit would arguably be against the interests of current participants. The court therefore finds that this factor weights slightly in favor of defendants.

(5) the relative merits of the parties' positions.

Lastly, the court finds that the factor evaluating the relative merits of the parties does not weigh in favor of either party. As previously discussed, plaintiffs proved that defendants breached their fiduciary duties and, if any one of the plaintiffs had standing to seek injunctive relief, the court may have removed the Trustees from their positions. At the same time, however, defendants ultimately proved

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[44] In enacting ERISA, "Congress sought 'to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'" Conkright v. Frommert, --- U.S. ----, ---- , 130 S.Ct. 1640, 1649 (2010) (quoting Varity Corp. v. Howe, 516 U.S. 489, 497 (1996)) (alterations in original). This only one illustration suggesting that Congress may not succeeded in this aim.

that their conduct did not cause harm to the Plan. At the end, this litigation resulted in more of a wash than a victory for either side.

When balancing the factors, the court concludes that the considerations weigh heavily in favor of denying defendants' fees under § 1132(g)(1). Although defendants prevailed in establishing that they did not cause harm to the Plan, they breached their duties and should not be able to shift the burden of their defense to plaintiffs. Accordingly, the court declines to award either side their attorneys' fees.

For the foregoing reasons, THE COURT HEREBY FINDS in favor of all defendants on all claims by all plaintiffs. Each side shall bear their own attorneys' fees.

The Clerk of the Court is instructed to enter judgment accordingly.

DATED: April 5, 2012.

s/ /

William B. Shubb
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Nos. CIV. 2:04-1358-WBS-GGH, 2:05-0559-WBS-GGH, 2:05-1726-WBS-GGH

JAMES P. DEFAZIO; ET AL.,

Plaintiffs,

v.

HOLLISTER, INC., ET AL.,

Defendants.

September 7, 2011

TRIAL TRANSCRIPT

Attorney James Crawford direct examination of defendant Richard Zwirner

[pp. 2171-2176]

Q. The first page of this exhibit shows this document was sent to Ms. Ellis by the secretary to the trustees?

THE COURT: Before we go further into this, counsel, could you each tell me your understanding of the status of this issue in this case now.

MR. CRAWFORD: It's still alive.

THE COURT: Defense, what's your understanding?

MR. ADDUCCI: The QDRO claim is still in the case.

MR. CRAWFORD: It involves the issue of whether the alternate payee account was entitled to just money market interest or the growth.

THE COURT: Right. You moved for summary judgment on this issue.

MR. CRAWFORD: And you denied the motion, but you did not grant a cross motion.

THE COURT: I did not grant a cross motion.

MR. ADDUCCI: There was no cross motion.

THE COURT: If you're not entitled to judgment on this, what is the status of the issue?

MR. CRAWFORD: We were not entitled to judgment on the undisputed facts, but now we're going into --

THE COURT: There's some disputed facts you're going to bring out other than the undisputed

facts?

MR. CRAWFORD: I don't believe so, Your Honor.

THE COURT: My recollection of my understanding at the time, which, admittedly, is somewhat dimmed by the passage of time was that I thought you weren't entitled to recover and I just couldn't grant summary judgment to the defendants because they did not move for summary judgment, but I didn't -- I don't recall that there was disputed facts on the issue, so I may have to go back.

I looked at my order and I can't really tell what my thinking was. I did not recall there being disputed facts on this issue.

MR. CRAWFORD: A, I believe there were.

And, B, the facts that were submitted to the court that we viewed as not disputed did not include all the facts that bear upon this issue.

THE COURT: All right. Why did you not give me all the facts if you were going to move for summary judgment?

MR. CRAWFORD: Because they were disputed.

THE COURT: Disputed? Give me an example of a fact on this issue that is disputed.

MR. CRAWFORD: The fact is that the trustees claim that the alternate payee's account could be left in the plan once Ms. Ellis had passed earliest retirement age. It's quite clear to me, based on the QDRO procedures and the terms of the plan, that was not correct.

If it was not correct, then the QDRO was invalid.

THE COURT: Whether it's correct or not can be discerned from looking at the plan; right?

MR. CRAWFORD: Not only the plan, but the QDRO procedures as well. I'm trying to establish these are QDRO procedures.

THE COURT: I don't know what you're going to present to me that's disputed, but let's go ahead and air this whole thing.

MR. ADDUCCI: Your Honor, I did find a couple of points in your opinion where you address this. I think your recollection is correct. You saw on -- I have to find the page. It's one of those things you've got to search for the page. Apparently 1079:

(Reading:)

> Though there is an absence of a genuine issue of material fact, DeFazio has failed to show he is entitled to judgment as a matter of law on his claims based upon HolliShare's compliance with the superior court orders; accordingly, the

court must deny his motion for summary judgment.

THE COURT: The record is what it is. That was my recollection and that's what I said at the time. There was a absence of a genuine issue of material fact.

My thinking at the time was that if defendants had moved on the same set of facts that were presented to the court as presented by the plaintiff, that they would have been entitled to summary judgment on this issue. They just did not move.

But if there other facts, hey, it's their problem if they did not move for summary judgment. You're entitled now to bring out now whatever facts in addition to what you presented at the time of the motion that you want to present now.

MR. CRAWFORD: Thank you, Your Honor. This will be relatively brief.

Q. Just to finish up here, Mr. Zwirner, do you see this letter sending this information out to Ms. Ellis was signed by the secretary of the trustees?

A. Yes.

Q. Would you have reviewed this letter before it was sent out?

A. I don't recall reviewing this letter. I reviewed some letters that went out.

Q. The last page of this exhibit, you see item three there that says:

(Reading:)

> In no event, however, will distribution to the alternate payee be delayed beyond the code section 414(p), quote, earliest retirement age, unquote, of the participant.
>
> Do you see that?

A. I do.

Q. In Mr. DeFazio's case you did, in fact, delay the distribution of Mr. DeFazio's alternate payee account beyond the earliest retirement age of Ms. Ellis, did you not?

A. Hollister was ordered by the divorce court to hold his alternate payee account, which I believe -- you have me reading here.

Q. Sorry. You can give whatever explanation you want.

Please first answer the question.

Did you, in fact, delay beyond the code section 414(p), earliest retirement age, the distribution of the alternate payee account created for Mr. DeFazio?

A. I don't agree with the word "delayed" in light of the court order, no.

Q. Did you get advice from inhouse counsel on Schuyler Roche and Zwirner that a court could order you to violate the terms of your plan?

THE COURT: I think a court can order somebody to violate the terms of a plan. I think I've made up my mind on this issue at the time I heard it previously. I think it was my thought that somebody is entitled to obey a court order without being punished for it.

That was my thinking.

MR. CRAWFORD: I believe the reason for the QDRO to be added to ERISA was the problem that any court order that would cause a distribution other than under the terms of the plan would be preempted by ERISA.

THE COURT: What do you want the parties to do? Go to the judge and say: We're not going to follow your order.

Let's get on another subject. I've ruled. You lose on this point.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Nos. CIV. 2:04-1358-WBS-GGH, 2:05-0559-WBS-GGH, 2:05-1726-WBS-GGH

JAMES P. DEFAZIO; ET AL.,

Plaintiffs,

v.

HOLLISTER, INC., ET AL.,

Defendants.

September 2, 2009

MEMORANDUM AND ORDER RE: MOTION FOR RECONSIDERATION

On June 29, 2009, 636 F.Supp.2d 1045 (E.D. Cal. 2009), the court issued an Order in the above-titled action ("June 29 Order") granting in part and denying in part the parties' various cross motions for

summary judgment. Thereafter, on August 24, 2009, plaintiffs filed a motion for reconsideration requesting that the court review and set aside several findings of the June 29 Order.[1] Although "[m]otions for reconsideration are disfavored," Tucker v. Garcia, No. 03-5594, 2009 WL 2448595, at *1 (E.D. Cal. Aug. 10, 2009) (Ishii, C.J.), plaintiffs have identified two Ninth Circuit decisions issued after June 29, 2009, that they argue changed the law as applied in the June 29 Order. See Dixon v. Wallowa County, 336 F.3d 1013, 1022 (9th Cir. 2003) (noting that an intervening change in the law is a valid basis for reconsideration). The court will address each decision in turn.[2]

A. Harris v. Amgen, Inc.

Plaintiffs contend that the Ninth Circuit's decision in Harris v. Amgen, Inc., 573 F.3d 728 (9th Cir. 2009), issued on July 14, 2009, undermines this court's holding that plaintiffs failed to demonstrate that they had Article III standing to seek make-whole monetary relief pursuant to 29 U.S.C. § 1132(a)(2) for their claims related to the 1999 Transaction. In Harris, the Ninth Circuit rejected the argument that a former participant in a defined contribution plan could not show redressability solely

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[1] Plaintiff Kathleen Ellis--the only plaintiff who is represented by separate counsel--joined the motion for reconsideration on August 26, 2009. (Docket No. 566.)

[2] The factual and procedural background of this case remains substantially the same as in the court's June 29 Order. (See June 29 Order (Docket No. 559) 2:8-13:11.)

because any recovery would go to the plan as a whole and administrators had discretion in allocating plan assets. 573 F.3d at 735. Noting the distinction between defined benefit plans such as pensions and defined contribution plans, the Ninth Circuit explained that "'the redressability problem that arises in defined benefit plans does not exist with respect to defined contribution plans' because in defined contribution plans a successful suit leads to restoration of individual accounts." Id. (quoting In re Mut. Funds Inv. Litig., 529 F.3d 207, 218 (4th Cir. 2008)). The Ninth Circuit therefore held that "there is no lack of redressability merely because a plaintiff's recovery under Section 502(a)(2) [29 U.S.C. § 1132(a)(2)] might first go to the defined contribution plan rather than directly to the plaintiff." Id. at 736.

The Harris decision does not affect this court's grant of summary judgment in favor of defendants regarding plaintiffs' lack of standing to seek relief under § 1132(a)(2). In its June 29 Order, the court did not hold that plaintiffs lacked Article III standing solely because any recovery involving the 1999 Transaction would accrue to the HolliShare plan as a whole or because plaintiffs had already received their final distributions from HolliShare. Rather, the court recognized that plaintiffs could have standing but held that they had failed to set forth facts showing at least a genuine issue of material fact regarding whether the value or composition of HolliShare's assets would have been any different during the time that plaintiffs still had HolliShare accounts in the absence of the alleged fiduciary breaches related to the 1999 Transaction. (June 29

Order 55:17-59:11.)

As presented at summary judgment, plaintiffs' request for make-whole monetary relief was chiefly premised on a set of assumptions and conjecture about how third-parties, whose behavior was not governed by ERISA, would have responded if HolliShare trustees had not voted in favor of the 1999 Transaction. Since the benefits to plaintiffs from the recovery in this case thus depends upon the conduct of actors who retain independent discretion, the court held that plaintiffs had failed to carry their burden at summary judgment of supporting their contention that make-whole monetary relief would redress the alleged fiduciary breaches.

Accordingly, because the Ninth Circuit's holding in Harris that former participants in defined contribution plans generally have Article III standing to pursue claims under § 1132(a)(2) does not alter the court's analysis of plaintiffs' standing in this case, the court will deny plaintiffs' request to reconsider the June 29 Order in light of that decision.[3]

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[3] This court also held that plaintiffs lacked constitutional standing to seek equitable relief pursuant to 29 U.S.C. § 1132(a)(3). (June 29 Order 59:12-60:24.) Since Harris only addressed claims under § 1132(a)(2), plaintiffs have not identified any possible change in the law affecting that portion of the court's Order.

B. Johnson v. Couturier

Plaintiffs next contend that the court's rejection of their argument that ERISA preempts the stock restrictions contained in the JDS Articles and the mid-80s buy back agreements has been implicitly overruled by the Ninth Circuit's opinion in Johnson v. Couturier, 572 F.3d 1067 (9th Cir. 2009), issued on July 27, 2009. In Johnson, the Ninth Circuit held that ERISA preempted section 317 of the California Corporations Code as applied to certain indemnity agreements between the defendant ERISA fiduciaries and the corporation of which they were directors. 572 F.3d at 1078. The Ninth Circuit explained that section 317 was preempted because it authorized indemnity agreements that effectively limited the liability of fiduciaries when they violated the ERISA fiduciary standard of care. Id. There was thus no question in Johnson that a particular state law conflicted with provisions of ERISA.

In contrast, in its June 29 Order, this court rejected plaintiffs' preemption argument because they failed to identify any provision of law or state action having the effect of law that conflicts with the terms of ERISA. (June 29 Order 48:27-49:22.) Instead, plaintiffs argued that the JDS stock restrictions and the mid-80s buy-back agreements qualified as state law because those instruments are purportedly enforceable under Illinois law, and ERISA therefore preempts the provisions of those instruments in conflict with ERISA. In Associated General Contractors of America v. Metropolitan Water District of Southern California, 159 F.3d 1178, 1183 n. 2 (9th Cir. 1998), however, the Ninth Circuit

expressly rejected that contention, holding that there is "no merit in [the] argument that simply because a contract is legal and enforceable it has the effect of law of a state." The Ninth Circuit's holding in Johnson did not purport to overrule its earlier holding in Associated General Contractors, and therefore Johnson did not effect an intervening change in the law as applied in the June 29 Order. Accordingly, the court will deny plaintiffs' request that the court reconsider the June 29 Order on that basis.

All of plaintiffs' remaining arguments in support of their motion for reconsideration simply restate their original positions opposing summary judgment or otherwise fail to raise new issues or identify errors that would justify reconsideration of the court's Order. See Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir. 2003) ("'[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.'" (quoting Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000))); Vaughn v. Giurbino, No. 06-1019, 2009 WL 382979, at *1 (E.D. Cal. Feb. 13, 2009) (O'Neill, J.) ("'A party seeking reconsideration must show more than a disagreement with the Court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden.'" (quoting United States v. Westlands Water Dist., 134 F.Supp.2d 1111, 1131 (E.D. Cal. 2001)).

IT IS THEREFORE ORDERED that plaintiffs' motion for reconsideration be, and the same hereby is, DENIED.

DATED: September 2, 2009.

s/ /

William B. Shubb
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Nos. CIV. 2:04-1358-WBS-GGH, 2:05-0559-WBS-GGH, 2:05-1726-WBS-GGH

JAMES P. DEFAZIO; ET AL.,

Plaintiffs,

v.

HOLLISTER, INC., ET AL.,

Defendants.

June 29, 2009

MEMORANDUM AND ORDER RE: CROSSMOTIONS FOR PARTIAL SUMMARY JUDGMENT, DEFENDANTS' MOTION TO STRIKE CLASS ACTION ALLEGATIONS, AND PLAINTIFFS' MOTION TO REMOVE PLAN TRUSTEES

Plaintiffs James P. DeFazio, Theresa Beetham, Brenda DiMaro, DeLane Humphries, Hallie Lavick, Michael McNair, Sonya Pace, Judy Seay, Nancy Russell Stanton, Cindy Worth, and Kathleen Ellis filed these consolidated actions against defendants Hollister, Inc. ("Hollister"), Hollister Employee Share Ownership Trust ("HolliShare"), The Firm of John Dickinson Schneider, Inc. ("JDS"), Samuel Brilliant, Richard I. Fremgen, Donald K. Groneberg, Charles H. Gunderson, Alan F. Herbert, James A. Karlovsky, Lori Kelleher, James J. McCormack, Charles C. Schellentrager, Loretta L. Stempinski, Michael C. Winn, and Richard T. Zwirner alleging violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1144. Presently before the court are plaintiffs' and defendants' cross-motions for partial summary judgment, defendants' motion to strike class action allegations, and plaintiffs' motion to remove the plan trustees.

I. Factual and Procedural Background[1]

In a fourteen-month period between 2004 and 2005, three groups of the current makeup of plaintiffs--former participants and beneficiaries of HolliShare, a defined contribution plan[2] established

---

[1] The following facts are undisputed unless otherwise noted.

[2] A "defined contribution plan" or "individual account plan" pays the participant the value of his or her retirement account at retirement. LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S.Ct. 1020, 1022 n. 1 (2008). In contrast, a "defined benefit plan," not at issue in this case, pays the participant a fixed level of retirement income. Id.

by Hollister (see 1st Zwirner Decl. (Docket No. 399) ¶ 7)--independently filed complaints against defendants Hollister, its parent company JDS, the HolliShare trustees, and various members of the boards of directors of both companies. The cases were consolidated by court order on May 25, 2006. (Docket No. 87.) Currently, the plaintiffs are divided into two groups based upon the two operative complaints in this litigation. Ten of the plaintiffs ("DeFazio/DiMaro plaintiffs") are represented by the same counsel and filed their Fifth Amended Complaint ("HAC") on July 22, 2008. (See Docket No. 368.) Ellis, the only plaintiff represented by separate counsel, filed her Fourth Amended Complaint ("FAC") on January 23, 2008.[3] (See Docket No. 314.) Though they differ in some respects--most notably, the HAC contains class action allegations while the FAC does not--the allegations asserted against defendants are substantially similar in both the HAC and FAC.

The claims in this case are based upon the alleged misconduct by the fiduciaries of HolliShare. HolliShare is funded through contributions by Hollister from the company's profits; participants are not permitted to make personal contributions. (See Defs.' 1st App'x (Docket Nos. 486-488) Ex. 1 ("Trust Instrument") §§ 6.01, 6.02.) Hollister is a privately-held Illinois corporation that manufactures and markets healthcare products. (1st Zwirner Decl. (Docket No. 399) ¶¶ 4, 8.) It is the operating

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[3] As used in this Order, the term "plaintiffs" refers collectively to all eleven plaintiffs unless otherwise noted.

subsidiary of JDS, an Illinois corporation that holds all of Hollister's capital stock.[4] (Id. ¶ 5.) Consistent with the terms of the HolliShare Trust Instrument, the plan's principal investment is common shares of JDS.[5] (Trust Instrument § 11.01(1); 2d Zwirner Decl. (Docket No. 494) ¶ 8.)

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[4] The parties have filed numerous purported evidentiary objections to the materials submitted in support of the parties' respective motions. The bulk of these so-called objections do not raise cognizable arguments under the Federal Rules of Evidence, and many consist simply of argument on the merits of the motions. To the extent that the objections concern evidence not relied upon, they are moot. The court will address only those specific objections raising cognizable evidentiary objections to material relied upon in the court's analysis.

Here, plaintiffs do not dispute the facts concerning the structure of Hollister and JDS, but object to this evidence on relevance grounds. (Pls.' Reply to Disputed Material Facts (Docket No. 540) No. 2.) The court overrules this objection, as these facts are relevant to a background understanding of the relationship between the various entities in this litigation.

[5] Under the terms of the Trust Instrument, participants' accounts are not valued in numbers of shares of JDS common stock. Instead, HolliShare invests in JDS common stock with contributions from Hollister, and participants' accounts are valued based on their proportional interest in the total value of that trust fund. (Trust Instrument § 7.02(1).)

In their papers on the instant motions, the parties have divided plaintiffs' claims into three rough categories according to the three primary factual bases upon which they are premised: the prohibited transactions between HolliShare and JDS, the 1999 Transaction (a series of events culminating in the transfer of all of the preferred shares of JDS to a new trust), and the DeFazio-Ellis divorce proceedings.[6] Though these categorizations overlap in certain areas, given the complexity of the factual issues in this case, the court will follow the convention adopted by the parties.

A. Prohibited Transactions

JDS has two classes of shares, preferred and common, neither of which has a generally recognized public market. (2d Zwirner Decl. ¶¶ 10-11.) The JDS Articles of Incorporation ("JDS Articles") provide several restrictions on JDS shares relevant to this case.[7] First, pursuant to article five, paragraph II.C ("paragraph II.C"), only certain persons and entities are entitled to own JDS shares, including holders of shares as of May 5, 1978, employees of JDS and/or Hollister, and any deferred benefit plan maintained

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[6] In contrast, plaintiffs in their complaints have divided their claims by the specific provisions of ERISA that defendants allegedly breached. Each claim is then premised on multiple factual bases.

[7] The JDS Articles were amended multiple times between 1978 and 1999. (See Defs.' 1st App'x Ex. 4.) Unless otherwise noted, the cited paragraphs of JDS Articles are common to all of the versions.

by JDS and/or Hollister.[8] (Defs.' 1st App'x Ex. 4 ("JDS Articles") 9.)

Second, article five, paragraph II.D ("paragraph II.D") restricts the manner in which holders of JDS stock may transfer ownership. Specifically, paragraph II.D.2 gives JDS a first right of refusal by requiring that any holder of JDS stock who intends to transfer one or more shares to another must first offer to sell those shares to JDS. (JDS Articles 10.) Paragraph II.D.3 further provides that the price paid for any common share purchased by JDS "shall be its book value as of the end of the calendar month in which the Repurchase Date occurs. ... The book value of each common share shall be computed in accordance with generally accepted accounting principles. ..."[9] (Id. 12.) Despite these requirements, paragraph II.D.7 provides that:

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[8] Paragraph II.C was amended in 1984 to allow certain directors and officers of JDS and Hollister to own stock and again in 1999 to allow The Firm of John Dickinson Schneider, Inc. Preferred Share Trust April 21, 1999 to hold shares. (JDS Articles 35, 51.)

[9] As noted in an earlier Order, "book value" refers to a method used to value corporate stock, but the term has no generally accepted definition. DeFazio v. Hollister Employee Share Ownership Trust, 406 F.Supp.2d 1085, 1087 n. 2 (E.D. Cal. 2005) (Karlton, J.) (citing 51 A.L.R.2d 606 § 2). "[T]he term contemplates a theoretical value resulting from depreciation or appreciation as computed upon an originally determined base." Id.

> "Under exceptional circumstances and in the discretion of the Corporation's Board of Directors, shares may be repurchased by the Corporation at such other times, upon such other terms, in such other manners, over such other periods of time, or on such other conditions as the Corporation and the owner or holder of such shares may from time to time agree."

(JDS Articles 15.)

JDS common shares are HolliShare's primary investment, and HolliShare must sell those shares in order to raise the cash needed to pay benefits to participants and beneficiaries. (3d Zwirner Decl. (Docket No. 515) ¶ 7.) Since the mid-1980s, HolliShare has sold its holdings of JDS common shares to JDS pursuant to the "exceptional circumstances" provision of paragraph II.D.7, not the first right of refusal embodied in paragraph II.D.2. (Pls.' Stmt. of Undisputed Facts Ex. B ("Zwirner Dep.") 237:19-238:8; 3d Zwirner Decl. ¶¶ 9, 16, 18.) Defendants contend that HolliShare and JDS entered into an agreement ("mid-80s buy-back agreement") that has since governed JDS's repurchase of common shares from HolliShare in order to avoid certain complications. (See 3d Zwirner Decl. ¶ 16.)

The JDS Articles provide that when JDS repurchases shares pursuant to the first right of refusal, it is obligated to pay a only minimal amount in cash (set originally at $5,000 and then increased to $250,000 in 1999) and can pay the remainder with a promissory note. (JDS Articles 12, 44.) Because

HolliShare, as an ERISA plan, is prohibited from accepting a promissory note as payment from an employer, see 29 U.S.C. § 1106(a)(1)(B), and HolliShare's cash needs often exceeded the $5,000 and $250,000 minimums, HolliShare could not have sold its shares to JDS under the terms of that provision. (3d Zwirner Decl. ¶ 15.) If JDS did not waive its right of refusal, HolliShare would thus have been unable to sell its JDS stock to anyone pursuant to paragraph II.D.2. (Id.)

To avoid this problem, and to allow JDS to plan ahead for its cash flow needs, HolliShare and JDS agreed in the mid-1980s that: 1) JDS would repurchase HolliShare's common shares entirely for cash (i.e., would not tender promissory notes); 2) the price employed would be the most recent audited December 31 per share book value rather than the month-end book value from the date of the transaction, as provided in paragraph II.D.3; and 3) such transactions would take place only once a year. (3d Zwirner Decl. ¶ 16.)

Plaintiffs contend that these repurchases of JDS common shares from HolliShare using book value violated defendants' statutory duties under ERISA. Particularly in light of evidence that JDS common shares may have had a value in the "outside world" of up to three-times book value (Pls.' Stmt. Disputed Facts Ex. F ("Winn Dep.") 91:15-92:13), plaintiffs assert that defendants breached their fiduciary duties, 29 U.S.C. 1104(a)(1)(B), and violated the provision on prohibited transactions, id. §

1106(a)(1)(A).[10]

B. 1999 Transaction

HolliShare does not invest in JDS preferred shares. John Schneider, the founder of JDS, owned a majority of the outstanding preferred shares until he placed all of his holdings into a trust in 1977 ("1977 Schneider Trust"). (2d Zwirner Decl. ¶ 24; Defs.' 1st App'x Ex. 3 at 2-3.) Because those shares comprised a controlling interest in JDS, the 1977 Schneider Trust, through its trustees, effectively controlled JDS.[11] (2d Zwirner Decl. ¶ 24.) After 1981, defendants Winn, Stempinski, and Zwirner became trustees of the trust. (Id. ¶ 29.)

The terms of the 1977 Schneider Trust provided that it would expire on April 21, 2001. (Defs.' 1st App'x Ex. 3 at 11.) Upon its expiration, the trust called for its corpus of preferred shares to be distributed to employees of Hollister who then owned common shares and agreed to abide by certain

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[10] Though plaintiffs have only moved for partial summary judgment based on the sales of JDS common shares to JDS to raise cash for its obligations, the overall impact of the book value method was broader. The book value method was also used to determine the annual value of both the HolliShare trust as a whole and the proportionate value of each participant's account. (Trust Instrument §§ 7.02, 7.03.)

[11] Each share of preferred and common stock is entitled to one vote. (2d Zwirner Decl. ¶ 13.) However, since 1977, there have been 61,750,000 outstanding preferred shares compared with only about 400,000 to 3,000,000 common shares. (2d Zwirner Decl. ¶ 14.)

principles in governing JDS.[12] (Id.) These employee-beneficiaries would have received a number of preferred shares in proportion to their relative holdings of JDS common shares. (Id.) Several years before the 1977 Schneider Trust was set to expire, however, its trustees considered the impact of the distribution of preferred shares on the company. (2d Zwirner Decl. ¶ 32.) Defendants contend that the trustees perceived several adverse effects from the distribution, including the possibility that a small number of employees might form an insulated controlling bloc, the prospect that the employees might vote to take JDS public, and the potential that votes to appoint members of the JDS and Hollister boards of directors could lead to factionalism in the company. (Id.)[13]

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[12] The listed principles included such policies as pursuing conservative financial and investment strategies, introducing new and improved products, continuing to sell common shares directly to certain employees, and maintaining standards of quality and service. (See Defs.' 1st App'x Ex. 3 at 13-17.)

[13] Plaintiffs object to this evidence on grounds of lack of personal knowledge, relevance, and hearsay. (Pls.' Opp'n Stmt. Undisputed Facts (Docket No. 523) No. 64.) The court overrules this objection. Zwirner, who was one of the trustees of the 1977 Schneider Trust, has personal knowledge of the trustees' considerations. This evidence is relevant to defendants' positions concerning the legality of the 1999 Transaction. Finally, there is no hearsay because the evidence does not consist of an out of court statement offered for its truth.

Plaintiffs simply repeat these same objections to all of the

Ultimately, Winn, Stempinski, and Zwirner proposed that a new trust ("1999 Preferred Share Trust") be created to hold the preferred shares that would otherwise be distributed to the employee beneficiaries of the 1977 Schneider Trust. (See 2d Zwirner Decl. ¶ 34; Winn Decl. (Docket No. 492) ¶ 28.) On February 17, 1999, they sent a letter ("1999 Proposal Letter") to all employees of Hollister who then owned JDS common shares, stating that the trustees believed that the 1999 Preferred Share Trust was desirable to maintain the independent and employee-owned nature of Hollister and adherence to the principles of John Schneider. (Defs.' 1st App'x Ex. 5 ("1999 Proposal Letter") at 2; 2d Zwirner Decl. ¶ 37.) The letter requested that the recipients transfer the preferred shares to which they would otherwise be entitled to the new trust. (Id.) The letter further informed recipients that they would either need to sign an enclosed "Agreement to Vote," which stated that the signatory agreed to adhere to the principles specified by the 1977 Schneider Trust, or the "Consent," which stated that the signatory agreed to transfer the preferred shares he or she would have been entitled to receive to the 1999 Preferred Share Trust. (1999 Proposal Letter 27; id. Enclosures 4, 5.)

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evidence concerning the trustees' proposal of the 1999 Trust without providing any particularized argument for each objection. (See Pls.' Opp'n Stmt. Undisputed Facts (Docket No. 523) Nos. 66, 67, 69.) For the same reasons, the court overrules these objections.

On April 21, 1999, all of the recipients of the 1999 Proposal Letter agreed to transfer their prospective preferred shares to the 1999 Preferred Share Trust.[14] (Zwirner Decl. ¶ 43; Winn Decl. ¶ 41.) In order to effect the transfer of shares between the 1977 Schneider Trust and the 1999 Preferred Share Trust at the expiration of the former in 2001, however, the JDS Articles had to be amended to allow the 1999 Preferred Share Trust to own JDS shares. Because the JDS Articles provided that any changes to the stock restrictions required a two-thirds vote of all classes of shares--rather than simply a majority of all outstanding stock (JDS Articles 27)--votes from the shares held by HolliShare (approximately 69% of all common shares) were necessary to effect the amendment. (See Thielitz Decl. (Docket No. 493) ¶ 4; 2d Zwirner Decl. ¶ 49.)

At a meeting on April 28, 1999, the HolliShare trustees--who at that time were Zwirner, Karlovsky, and McCormack--agreed to vote HolliShare's JDS common shares in favor of the amendment to the JDS Articles. Ultimately, at the April 30, 1999 JDS shareholders' meeting, JDS shareholders voted unanimously to amend the JDS Articles, and those

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[14] The record does not indicate the exact number of employees who would have received preferred shares at the expiration of the 1977 Schneider Trust. Nonetheless, the 1999 Proposal Letter indicates that ninety-one employees owned common shares in 1999, and at least eighty-one employees signed the consent form transferring the shares they would have received to the 1999 Preferred Share Trust. (See 1999 Proposal Letter 4; Pls.' Stmt. Undisputed Facts Ex. P at 6-11.)

amendments were filed with the Illinois secretary of state on June 14, 1999. (2d Zwirner Decl. ¶ 65; JDS Articles 51-52.) The propriety of the vote to approve the amendments, as well as the adequacy of the trustees' decision making process, form the basis of plaintiffs' claims related to the 1999 Transaction. Plaintiffs essentially argue that, but for the 1999 Transaction, HolliShare would have become the majority shareholder of JDS and its holdings would have experienced an increase in value.

For purposes of the instant motions, plaintiffs contend that all of the HolliShare fiduciaries who voted in favor of the 1999 Transaction violated ERISA by engaging in a self-dealing transaction, 29 U.S.C. § 1106(b), and breaching their fiduciary duties, id. §§ 1104, 1105.

C. DeFazio-Ellis Divorce Proceedings

Particular to plaintiffs DeFazio and Ellis, the HAC and FAC also assert claims against all defendants based upon Hollister's compliance with a series of domestic relations orders (DROs) issued by the Superior Court of Sacramento as part of DeFazio and Ellis's divorce proceedings. (HAC ¶¶ 132-34; FAC ¶¶ 69-71.)

The marriage of DeFazio and Ellis was dissolved by court order on March 1, 1999.[15] (Defs.' Req. Judicial Notice (Docket No. 530) Ex. A at 14.) In that order, the Superior Court reserved decision for a later date on the division of Ellis's retirement assets and the amount of DeFazio's share of those assets that would be held as security for the payment of child support. (Id. at 6-8.) The issue of the division of Ellis's retirement account with HolliShare was finally determined by a March 29, 2002 stipulation and order ("March 2002 order"). In that order, entitled "Stipulated Qualified Domestic Relations Order," DeFazio and Ellis agreed that DeFazio was entitled to one-half the value of Ellis's HolliShare account as community property, and HolliShare was ordered to hold DeFazio's share in a segregated account. (Req. Judicial Notice Ex. G ("March 2002 order") ¶¶ 4-5.) The order further provided that the

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[15] Defendants have requested that the court take judicial notice of various filings and orders in the DeFazio-Ellis divorce proceedings before the Superior Court of Sacramento. Plaintiffs have not opposed this request. proceeding, the court takes judicial notice of the filings and orders from the Superior Court proceedings. See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992) ("[W]e may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct Because the specified documents comprise public records of a related court relation to matters at issue." (internal quotation marks omitted)); see also Kourtis v. Cameron, 419 F.3d 989, 994 n. 2 (9th Cir. 2005) (taking judicial notice of an unpublished decision from another court), overruled on other grounds by Taylor v. Sturgell, 128 S.Ct. 2161 (2008).

Superior Court "retains jurisdiction over Husband's Share in the entire amount up to One Million Five Hundred Thousand and No/100 Dollars ($1,500,000.00), pending resolution of child support and property settlement issues between Husband and Wife," and ordered HolliShare to retain possession of those funds "pending further order of this court." (Id. ¶ 7.) The March 2002 order also stated that "this Order is intended to be a Qualified Domestic Relations Order, as that term is defined in [the Internal Revenue] Code section 414(p) and section 206(d)(3) of the Employee Retirement Income Security Act." (Id. 1:26-28.)

Pursuant to the March 2002 order, the Superior Court issued six subsequent orders ordering HolliShare to distribute payments to Ellis that comprised child support payments that DeFazio failed to make and advances on future anticipated child support obligations, as well as associated attorneys fees and costs for the collection of past-due child support payments. (See id. Exs. I (order dated August 5, 2002), J (order dated April 2, 2003), K (order dated May 4, 2004), N (order dated June 20, 2004), T (order dated November 9, 2005), U (order dated December 13, 2007).)[16]

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[16] The Superior Court also issued an order dated December 28, 2002, correcting the March 2002 stipulation's division of Ellis's HolliShare account by reducing DeFazio's community property portion by $53,750. (Req. Judicial Notice Ex. H ¶ 1.)

Presently before the court are the parties' seven separate motions: 1) defendants' motion to strike plaintiffs' class action allegations (Docket No. 495); 2) defendants' motion for partial summary on claims barred by the statute of limitations (Docket No. 483); 3) defendants' motion for partial summary judgment on the fiduciary status of the Hollister Board and JDS (Docket No. 484); 4) plaintiffs' motion for partial summary judgment on claims related to the prohibited transactions and 1999 Transaction (Docket No. 477); 5) defendants' motion for partial summary judgment on the claims related to the 1999 Transaction (Docket No. 489); 6) DeFazio's motion for partial summary judgment on claims related to the divorce proceedings (Docket No. 474);[17] and 7) plaintiffs' motion to remove the plan trustees (Docket No. 475).

Before turning to the merits of these motions, the court notes that despite the submission of twenty briefs and hundreds of pages of evidence in support of the instant motions, the parties have declined to address numerous claims and have chosen not to discuss specific arguments and factual issues. Plaintiffs in particular expressly chose to withhold certain theories and evidence in their motions. (See Docket No. 537 at 20:3-9) ("[P]laintiffs are smarter

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[17] Though Ellis also asserts claims based on defendants' compliance with the Superior Court orders, she does not join DeFazio's motion. (See Docket No. 476 (joining only plaintiffs' motion for partial summary judgment on claims related to the prohibited transactions and 1999 Transaction).)

than that. Our motion for partial summary judgment of the prohibited transaction claims was tailored to narrow questions of law. ... We also intentionally avoided disputed factual questions. ...”). Even assuming the wisdom of this strategy, the parties have pursued it haphazardly, creating a disjointed record and often confusing each other as to whether certain issues had been raised or whether plaintiffs had abandoned particular claims. The rationale underlying this strategy is not immediately apparent. Nevertheless, the court shall confine its analysis to the particular theories and arguments presented in the parties' moving papers.

II. Discussion

A. Motion to Strike Class Allegations

Defendants move to strike the DeFazio/DiMaro plaintiffs' class allegations, which were first alleged in the Fourth Amended Complaint filed on January 23, 2008. (See Docket No. 312 ¶¶ 13-20.) With discovery now closed and the trial date approaching, plaintiffs have not yet moved for class certification, and defendants contend that they have suffered prejudice as a result of the DeFazio/DiMaro plaintiffs' delay in doing so. (See Docket No. 495 2:20-26); Siskind v. Sperry Ret. Program, Unisys, 47 F.3d 498, 503 (2d Cir. 1995) (“[F]undamental fairness requires that a defendant named in a suit be told promptly the number of parties to whom it may ultimately be liable for money damages.” (citing McCarthy v. Kleindienst, 741 F.2d 1406, 1412 (D.C. Cir. 1984))); see also Sterling v. Envtl. Control Bd. of N.Y., 793 F.2d 52, 58 (2d Cir. 1986) (holding that a

plaintiff's "failure to move for class certification until a late date is a valid reason for denial of such a motion").

In response to defendants' motion to strike, the DeFazio/DiMaro plaintiffs submitted a statement of non-opposition. (Docket No. 533.) Having considered defendants' arguments and in light of plaintiffs' non-opposition, the court will grant defendants' motion to strike the DeFazio/DiMaro plaintiffs' class allegations. See, e.g., Rones v. N.A.A.C.P., 170 F.R.D. 80, 82 (D.D.C. 1997); Roberson v. Danny Ontiveros Trucking, No. 08-552, 2008 WL 4809960, at *6 (E.D. Cal. Nov. 3, 2008) (O'Neill, J.); Valdez v. St. Francis Mem'l Hosp., No. 78-2174, 1979 WL 146, at *1 (N.D. Cal. Jan. 17, 1979); see also Read v. Input/Output, Inc., No. 05-108, 2005 WL 2086179, at *2-3 (S.D. Tex. Aug. 26, 2005). Accordingly, paragraphs twelve through nineteen of the HAC shall be stricken.

B. Cross-Motions for Partial Summary Judgment

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A material fact is one that could affect the outcome of the suit, and a genuine issue is one that could permit a reasonable jury to enter a verdict in the nonmoving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. Id. at 256. On issues for

which the ultimate burden of persuasion at trial lies with the nonmoving party, the moving party bears the initial burden of establishing the absence of a genuine issue of material fact and can satisfy this burden by presenting evidence that negates an essential element of the nonmoving party's case or by demonstrating that the nonmoving party cannot produce evidence to support an essential element of its claim or defense. Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1102 (9th Cir. 2000).

Once the moving party carries its initial burden, the nonmoving party "may not rely merely on allegations or denials in its own pleading," but must go beyond the pleadings and, "by affidavits or as otherwise provided in [Rule 56,] set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e); accord Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Valandingham v. Bojorquez, 866 F.2d 1135, 1137 (9th Cir. 1989). On those issues for which it will bear the ultimate burden of persuasion at trial, the nonmoving party "must produce evidence to support its claim or defense." Nissan Fire, 210 F.3d at 1103.

In its inquiry, the court must view any inferences drawn from the underlying facts in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The court also may not engage in credibility determinations or weigh the evidence, for these are jury functions. Anderson, 477 U.S. at 255.

When the parties submit cross-motions for summary judgment, the court must consider each motion separately to determine whether either party has met its burden, "giving the nonmoving party in each instance the benefit of all reasonable inferences." ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092, 1097 (9th Cir. 2003); see also Fair Hous. Council v. Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001) (when parties submit cross-motions for summary judgment, "each motion must be considered on its own merits" and "the court must review the evidence submitted in support of each cross-motion").

1. Defendants' Motion on the Statute of Limitations

Defendants move for partial summary judgment on several of plaintiffs' claims as time barred.[18] ERISA's statute of limitations provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of--

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[18] As part of their motion, defendants argue that plaintiffs' claims related to the 1999 Transaction are barred by the statute of limitations. The parties' contentions regarding the 1999 Transaction, including the related amendments to the JDS Articles, are addressed in Section II.B.4, infra.

> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113 (emphasis added).

Unless the "fraud or concealment" exception applies, a plaintiff must file a claim within six years of the date of the last act constituting a part of the alleged violation, regardless of when the plaintiff actually learned of the violation. Kanawi v. Bechtel Corp., 590 F.Supp.2d 1213, 1225 (N.D. Cal. 2008). "The fraud or concealment exception applies only when an ERISA fiduciary either misrepresents the significance of facts the beneficiary is aware of (fraud) or ... hides facts so that the beneficiary never becomes aware of them (concealment)." Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1401 (9th Cir. 1995) (quoting Radiology Ctr., S.C. v. Stifel, Nicolaus & Co., 919 F.2d 1216, 1220 (7th Cir. 1990)); see Ranke v. Sanofi-Synthelabo Inc., 436 F.3d 197, 204 (3d Cir. 2006) (stating that an ERISA fiduciary must "have taken affirmative steps to hide an alleged breach of fiduciary duty from a beneficiary in order for the 'fraud or concealment' exception to apply").

Some courts have recognized that the "fraud or concealment" exception to § 1113 incorporates the common law doctrine of "fraudulent concealment." Barker, 64 F.3d at 1402. Under that common law doctrine, passive concealment alone may toll the statute of limitations if the defendant has a duty to disclose material information. Thorman v. Am. Seafoods Co., 421 F.3d 1090, 1092 (9th Cir. 2005). Courts that have considered the question, however, have rejected the doctrine of passive concealment as applied to § 1113. See, e.g., Larson v. Northrop Corp., 21 F.3d 1164, 1174 (D.C. Cir. 1994) ("While a fiduciary's mere silence could, in some circumstances, amount to fraud, it would still fall short of the fraudulent concealment that courts have required for purposes of § 1113."); Schaefer v. Ark. Med. Soc'y, 853 F.2d 1487, 1491 (8th Cir. 1988) (holding that active concealment under § 1113 requires "more than merely a failure to disclose").

The Ninth Circuit in Barker also implicitly found passive concealment insufficient to toll the six-year statute of limitations. In holding that the defendants in that case did not engage in "fraud or concealment," the Barker court focused only on whether the defendants had affirmatively concealed their breach, see 64 F.3d at 1401, even though the Court of Appeals recognized that an ERISA fiduciary generally has a duty to disclose accurate information to beneficiaries, see id. at 1403 (noting the fiduciary's duty "to convey complete and accurate information material to the beneficiary's circumstance"). The "fraud or concealment" exception, therefore, does not

apply simply because an ERISA fiduciary fails to disclose material information.[19]

a. Amendments to the JDS Articles

Defendants first move for summary judgment on plaintiffs' claims based upon HolliShare trustees' votes in favor of amending the JDS Articles in 1978, 1980, 1984, and 1999. (Docket No. 483 7:9-16.) According to the complaints, defendants' breached their fiduciary duties by voting for these amendments, which allegedly harmed HolliShare's assets. For example, the 1978 amendments reinstated the stock transfer restrictions on repurchases of JDS common shares. (HAC ¶ 66; FAC ¶ 50.) The 1980 amendment allegedly reduced JDS cash reserves and thus JDS's ability to repurchase HolliShare's holdings, while the 1984 amendment allegedly reduced the reliability of JDS audits. (See HAC ¶¶ 67-68; FAC ¶¶ 51-52.) The 1999 amendments--the votes for the last of which were

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[19] In their opposition to defendants' motion, plaintiffs request that the court grant summary judgment sua sponte in their favor based on the absence of evidence of complete and accurate disclosures by HolliShare fiduciaries. (Docket No. 532 at 7:9-13.) The statute of limitations defense presented in defendants' motion does not involve the duty to disclose. The court will not enter summary judgment in favor of plaintiffs under these circumstances. See Kassbaum v. Steppenwolf Prods., Inc., 236 F.3d 487, 495 (9th Cir. 2000) (noting that "great care" must be exercised in granting summary judgment to a non-movant on certain claims to ensure that the movant has had an adequate opportunity to respond).

cast on April 30, 1999--indemnified corporate directors from suit by shareholders and prohibited any natural persons from owning more than 10% of JDS stock. (See HAC ¶¶ 69-70, 76; FAC ¶¶ 53; Thielitz Decl. ¶ 40.)

The first of the complaints in this consolidated action was filed on July 15, 2004. (Docket No. 1.) However, the first complaints that asserted claims related to these amendments were not filed until April 19 and 20, 2007 (see Docket Nos. 182-183), more than six years after the vote for the last amendment at issue. Based on the record before the court, there is no evidence from which a reasonable inference could be drawn that defendants took steps to conceal any of the votes in favor of the amendments. Furthermore, all of the amendments to the JDS Articles were filed with the Illinois Secretary of State. (See JDS Articles 6, 32, 40, 42, 49.) Though it does not appear that HolliShare fiduciaries affirmatively disclosed to beneficiaries and participants that they had voted HolliShare's holdings of JDS common shares in favor of these amendments, such passive concealment does not qualify for the "fraud or concealment" exception of § 1113. Accordingly, because there is no dispute that the first complaints to assert claims based on votes in favor of amendments to the JDS Articles were filed after the six-year limitations period expired for the 1978, 1980, 1984, and certain 1999 amendments, defendants are entitled to summary judgment on plaintiffs' claims based upon any fiduciary's affirmative vote in favor of these amendments.

Nonetheless, plaintiffs have also asserted claims pursuant to 29 U.S.C. § 1105(a)(3), which makes a fiduciary liable for the breach of another fiduciary if "he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach." The failure to remedy such a breach constitutes a separate breach of duty. See Dep't of Labor Opinion No. 76-95 (Sept. 30, 1976) (providing that the failure to take action to cure the breaches of another fiduciary despite knowledge constitutes a separate breach of fiduciary responsibility of a successor fiduciary). Pursuant to § 1113(1)(B), the six-year statutory period does not begin to run in the case of a fiduciary omission until the date on which the fiduciary "could have cured the breach or violation."

One form of remedying the breaches of a co-fiduciary would be to file a suit against the breaching co-fiduciary to restore the losses to the plan or redress any violations of ERISA. See Fernandez v. K-M Indus. Holding Co., 585 F.Supp.2d 1177, 1185 (N.D. Cal. 2008) (holding that the statute of limitations did not begin until the last day defendant could have brought an action against co-fiduciaries for engaging in a prohibited transaction). See generally Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995) (holding that 29 U.S.C. § 1132(a)(2), (3) authorizes suits by fiduciaries against co-fiduciaries seeking relief on behalf of the plan).

Assuming HolliShare fiduciaries had actual knowledge of the votes at the time they were cast and that such votes constituted ERISA violations, they would have had three years to file a suit. 29 U.S.C. § 1113(2). With regard to votes in favor of the 1999 amendments at issue, that three-year period would have expired in April 2002, and there is no evidence indicating that any fiduciary took steps to remedy the breach in question. Since the complaints asserting claims based on these votes were filed on April 19 and 20, 2007, plaintiffs' § 1105(a)(3) claims related to the votes in favor of the 1999 amendments are not time barred.

As part of their motion for partial summary judgment, defendants have also requested that Gunderson be dismissed as a defendant from this action because no basis for his liability appears in the record. (Docket No. 483 at 7:17-8:3.) In response, plaintiffs have not identified any conduct for which Gunderson could be liable other than a purported failure to challenge the 1978 amendments while he served as a HolliShare trustee in 1979. (Docket No. 532 at 14:27-15:8.) Since claims based on the conduct of fiduciaries associated with the 1978 amendments are time barred, however, the court will grant defendants' request to dismiss Gunderson as a defendant in this action.

b. DiMaro, Humphries, and Seay

Defendants also move for summary judgment on the claims asserted by DiMaro, Humphries, and Seay related to HolliShare's use of book value both in the calculation of the balance of individual accounts and in the sales of JDS common shares to JDS (the prohibited transactions). (Docket No. 483 at 8:6-12:11.) They contend that, because these plaintiffs terminated their employment with Hollister more than six years before they filed suit, any claims based on the use of book value that affected these plaintiffs' retirement accounts are time barred.[20] (Docket No. 483 at 11-23.) The record shows that Humphries' employment with Hollister terminated on January 3, 1998; Seay's employment terminated on July 16, 1999; and DiMaro's employment terminated on September 30, 1999. (Thielitz Decl. ¶ 4.)

The statute of limitations must be applied separately to the claims concerning the valuation of individual accounts and the use of book value in the prohibited transactions, as these claims are based on distinct facts. With regard to the use of book value to determine the value of individual accounts, the Trust Instrument provides that, when participants become "former participants"--such as by terminating their Hollister employment (Trust Instrument § 3.14)--their account balances are determined using the most

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[20] Defendants do not contend in the instant motion that Humphries, DiMaro, and Seay had actual knowledge of their claims, which would invoke the shorter three-year limitations period.

recent December 31 valuation preceding the employee's termination date. (Id. § 7.02(2).) Those calculations are apparently not made until after the annual audit of JDS year-end financial statements is available, usually by late April or May. (3d Zwirner Decl. ¶ 10.) Thus, the last use of the book value method that affects the determination of a terminated employee's account occurs in the middle of the year following the December 31 preceding termination. Consequently, the ERISA violations applicable to the claims at issue occurred, at the latest, by late April or May 1998 for Humphries and late April or May 1999 for DiMaro and Seay.

DiMaro did not file a complaint until August 25, 2005 (Case No. 05-1726, Docket No. 1), and Humphries and Seay did not assert claims in this action until April 19, 2007 (Second Am. Compl. (Docket No. 183))--both more than six years after the last valuations of their respective accounts. Furthermore, the "fraud or concealment" exception does not apply, as plaintiffs have not identified acts by defendants that concealed or misrepresented the fact that HolliShare accounts are valued using book value. Accordingly, defendants have demonstrated an absence of genuine issues of material fact concerning the expiration of the statute of limitations for DiMaro's, Humphries', and Seay's claims related to HolliShare's valuations of their accounts using book value, and defendants are entitled to judgment as a matter of law on those claims.

These plaintiffs have also asserted claims pursuant to § 1105(a) (3) based on the valuations of their accounts. As described earlier, fiduciaries with knowledge of the breaches of a co-fiduciary have three years to bring suit to remedy the breach, and there is no indication in the record that any fiduciary took steps to remedy the breaches in question.

Even assuming that all HolliShare fiduciaries were aware of the valuations at the earliest possible date, the limitations period did not begin to run for the § 1105(a)(3) claims until three years after the last valuation of the accounts--i.e., late April or May 2001 for Humphries and late April or May 2002 for DiMaro and Seay. DiMaro's complaint filed on August 25, 2005, and Seay's complaint filed on April 19, 2007, were thus timely for their § 1105(a)(3) claims. Humphries' complaint, filed on April 19, 2007, may have been filed more than six years after the last date on which a co-fiduciary could have brought suit in late April or May 2001, assuming that all HolliShare fiduciaries had knowledge of the valuation when it was made in 1998. However, in the absence of evidence of the exact date on which Humphries' account was valued in 1998 and the date on which all co-fiduciaries acquired knowledge of that valuation, defendants have not shown that her claims are barred as a matter of law. Accordingly, defendants are not entitled to summary judgment on the § 1105(a)(3) claims asserted by DiMaro, Humphries, and Seay related to the use of book value in calculating the balances of their accounts.

With regard to claims based upon the use of book value in the prohibited transactions, the last violation occurred on the date of HolliShare's annual sale of JDS common shares to JDS preceding the final valuation of DiMaro's, Humphries', and Seay's accounts, as that is the last sale of plan assets that could have affected the balances of those plaintiffs' accounts. Those sales took place in the middle of the year after the completion of JDS's year-end audit. (3d Zwirner Decl. ¶ 11.) Thus, the last sale that affected Humphries' account took place in mid-1997, and the last transaction that affected DiMaro's and Seay's accounts took place in mid-1998. Because these plaintiffs did not file complaints until more than six years later on August 25, 2005, and April 19, 2007, their claims are time-barred unless acts of "fraud or concealment" tolled the statute of limitations.

Plaintiffs seek to toll the statute of limitations by identifying disclosures made to HolliShare participants that appear to misrepresent the circumstances and conditions of sales of JDS common shares by HolliShare to JDS. For example, the HolliShare trustees provide each HolliShare participant with an annual publication entitled "HolliShare Highlights." (See 2d Zwirner Decl. ¶ 25; Defs.' 1st App'x Ex. 9.) That publication, at least since 1997, has stated that "[JDS common shares] are subject to severe transfer restrictions which require that the Trust [i.e., HolliShare] first offer them to JDS at their book value. To date, JDS has repurchased common shares from the Trust at their book value to provide the plan with needed cash." (Ellis's App'x (Docket Nos. 513, 517, 519-20) Ex. E at

7 (1997 edition); Pls.' Stmt. Undisputed Facts Ex. C at 1 (1999 edition); Defs.' 1st App'x Ex. 9 at 1 (2005 edition).)

Upon reading these two sentences, a recipient of "HolliShare Highlights" could have reasonably believed that HolliShare sold its holdings of JDS common shares pursuant to the sale price specified in the "transfer restrictions" of the JDS Articles. Under paragraph II.D.3 of the JDS Articles, those restrictions require the use of month-end book value from the month in which the transaction occurs. The evidence shows, however, that all sales since the mid-1980s have occurred pursuant to the mid-80s buy-back agreement whereby the prior December 31 book value is used. (Zwirner Dep. 237:19-238:8; 3d Zwirner Decl. ¶¶ 9, 16, 18.)

In addition, because this disclosure references the stock restrictions in connection with the sale of JDS common shares, it appears to conceal the fact that HolliShare's sales to JDS occurred pursuant to a negotiated agreement under the "exceptional circumstances" provision of paragraph II.D.7 rather than the absolute right of first refusal contained in paragraph II.D.2. These disclosures could thus be read to misrepresent not only the sale price used in HolliShare's sales of JDS common shares, but also the flexibility and discretion HolliShare fiduciaries may have had in setting the terms of those sales. Making inferences in favor of plaintiffs, such misrepresentations could have reasonably hindered DiMaro, Humphries, and Seay from discovering the alleged breaches of fiduciary duty. See Montrose Med. Group Participating Sav. Plan v. Bulger, 243

F.3d 773, 789 (3d Cir. 2001) (finding that a fiduciary's misrepresentations as to the reasons justifying particular transactions could have inhibited the plaintiffs' capacity to discovery the breaches of fiduciary duty).

Defendants have identified another disclosure made to HolliShare participants that appears to disclose the use of the December 31 book value in sales of JDS common shares. (See 3d Zwirner Decl. Ex. A at 16.) This other, seemingly conflicting disclosure, however, simply provides additional evidence of a genuine issue of material fact over whether the information provided to HolliShare participants affirmatively misrepresented or concealed facts concerning the use of book value in the prohibited transactions.

Despite evidence of "fraud or concealment," the statute of limitations would not be tolled as to claims asserted against defendants who did not actually engage in the acts designed to conceal the alleged fiduciary breaches. See Barker, 64 F.3d at 1402 (noting that the "fraud or concealment" exception applies only when "the defendant himself has taken steps to hide his breach"). The evidence does not indicate whether all of the defendants played a role in the production or distribution of the disclosures in question. Nevertheless, in light of evidence that at least some of the defendants, including individuals who served as HolliShare trustees, were responsible for the disclosures in question, the court cannot determine as a matter of law that all of the claims related to the use of book value in the sales of JDS common shares asserted by DiMaro, Humphries, and

Seay are time barred.

Finally, assuming defendants did engage in acts of "fraud or concealment," the statute of limitations was tolled only until the point at which plaintiffs could have discovered the breaches or misrepresentations with reasonable diligence. See Bulger, 243 F.3d at 788 ("The statute of limitations is tolled until the plaintiff in the exercise of reasonable diligence discovered or should have discovered the alleged fraud or concealment." (internal quotation marks omitted)); Schaefer v. Ark. Med. Soc'y, 853 F.2d 1487, 1491-92 (8th Cir. 1988) (providing that, under the "fraud or concealment" exception to § 1113, the plaintiffs had to show that "despite their exercise of due diligence or care, they were not on notice of [defendant's] breach of duty").

The evidence indicates that the minutes of the annual JDS Board of Directors meetings state that JDS repurchased JDS common shares from HolliShare at December 31 book value based on the recommendation of the HolliShare trustees. (See, e.g., Pls. Stmt. Disputed Facts Ex. A at H02445.) Those Board minutes could have put plaintiffs on notice of the purported concealment of the facts concerning the circumstances of HolliShare's sales of JDS common shares. The record, however, does not indicate whether (or when) plaintiffs or other HolliShare participants had access to these JDS Board minutes. Making inferences in favor of plaintiffs, there thus exists a genuine issue of material fact concerning whether DiMaro, Humphries, and Seay could have discovered the alleged breaches and acts of concealment more than

six years before they filed their claims in this action, and defendants are not entitled to summary judgment on these claims.

Defendants are also not entitled to summary judgment on these plaintiffs' § 1105(a)(3) claims related to the use of book value in the prohibited transactions for the same reasons that the § 1105(a)(3) claims related to the valuation of plaintiffs' accounts survive summary judgment.

Accordingly, defendants are entitled to summary judgment only on the non-§ 1105(a)(3) claims asserted by DiMaro, Humphries, and Seay related to the valuation of their accounts using the book value method.

c. Ellis

Defendants claim that Ellis had actual knowledge of her claims related to HolliShare's valuation of her account and the use of book value in the sales of JDS common shares more than three years before she filed her complaint on March 22, 2005. (Docket No. 483 at 9:15-18; see Case No. 05-559, Docket No. 1.) Actual knowledge of a breach or violation starts the shorter three-year statute of limitations pursuant to 29 U.S.C. § 1113(a)(2). See Ziegler v. Conn. Gen. Life Ins. Co., 916 F.2d 548, 552 (9th Cir. 1990). Unlike the "fraud or concealment" exception, under which a plaintiff's constructive knowledge may start the statutory period, J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1255 (1st Cir. 1996), actual knowledge requires that "a plaintiff [] know of the essential facts of the transaction or conduct constituting the violation."

Martin v. Consultants & Adm'rs, Inc., 966 F.2d 1078, 1086 (7th Cir. 1992); see Waller v. Blue Cross of Cal., 32 F.3d 1337, 1341 (9th Cir. 1994) (holding that knowledge of a transaction that was not inherently a breach of fiduciary duty was not the equivalent of actual knowledge of the breach of the duties of care and loyalty).

Whether a plaintiff had actual knowledge more than three years before filing a claim involves a two-step analysis: "first, when did the alleged 'breach or violation' occur; and second, when did [plaintiff] have 'actual knowledge' of the breach or violation?" Ziegler, 916 F.2d at 550.

With regard to Ellis's claims related to the valuation of her account, the alleged breach or violation occurred in late April or May each year when book value of JDS common shares was used to value her account. As for Ellis's knowledge of that violation, the evidence shows that Ellis was in receipt of several letters beginning in 1997 discussing HolliShare's use of book value to calculate account balances. First, on May 25, 1997, Ellis drafted a letter to the HolliShare plan administrator asking whether book value was "a fair representation of the value of the Company." (Defs.' 2d App'x Ex. 5 at 45.) Though Ellis wrote the letter, DeFazio, her husband at the time, instructed her what to write. (Ellis's App'x Ex. I ("Ellis Dep.") 67:5.) Ellis then received a reply to this letter from Hollister, which stated that "the fair value of HolliShare's investment in JDS Inc. shares is the book value of such shares," and that any "hypothesis as to what JDS Inc. might be sold for as an entity is highly speculative and irrelevant given

the [Trust Instrument]." (Id. Ex. K at 1.)

In addition, on December 24, 1997, Ellis received and read a copy of a September 26, 1997 letter sent by DeFazio to Hollister. (Ellis Dep. 83:14-19.) That letter described DeFazio's concern over the use of the book value method "as the basis for determining account balances," and how "all the tax attorneys and pension consultants [DeFazio] discussed this matter with say that this is definitely an incorrect practice." (Defs.' 2d App'x Ex. 5 at 49.) The letter goes on to say that the "current value should reflect what the stock would sell for." (Id.) Finally, in the DeFazio-Ellis divorce proceeding, Ellis filed a declaration on September 20, 2001, in which she indicated that DeFazio had been labeled a "whistle blower" at Hollister with respect to his investigation into the value of Ellis's HolliShare account. (Id. at 53.)

The collection of letters from 1997 provides sufficient evidence of Ellis's actual knowledge of her claims related to the use of book value to calculate the balance of her HolliShare account. Even though she testified that she did not understand the distinctions between book value and fair market value at the time she drafted the May 25, 1997 letter (Ellis Dep. 68:1-2), DeFazio's September 26, 1997 letter, which Ellis read, explained DeFazio's opinion that book value is not an appropriate measure of JDS stock. These letters were sufficient to give Ellis awareness that HolliShare used book value to determine the value of her account, that HolliShare relied upon the Trust Instrument and JDS Articles to justify the use of book value, and that there was a question as to whether that method represented the

market value of the stock. That knowledge constituted the essential facts underlying her claims related to HolliShare's valuation of her account.

Whether Ellis knew or agreed with DeFazio that the facts surrounding HolliShare's use of book value to value her account constituted a violation of ERISA is irrelevant. See Blanton v. Anzalone, 760 F.2d 989, 992 (9th Cir. 1985) (holding that the ERISA statute of limitations is triggered by "knowledge of the transaction that constituted the alleged violation, not by [] knowledge of the law"). Furthermore, even though the final valuation of Ellis's account occurred in 2004, the year of the termination of her employment, the three-year statute of limitations began to run at the latest in 1997, as that was the earliest time she became aware of the breaches in question. See Phillips v. Alaska Hotel & Rest. Employees Pension Fund, 944 F.2d 509, 520 (9th Cir. 1991) (holding that, pursuant to § 1113(2), the statute of limitations begins to run upon the earliest date that the plaintiff becomes aware of any breach in a series of breaches of the same character). Finally, the plan administrator's denial of wrongdoing does not constitute an act of fraud or concealment. See Whitlock Corp. v. Deloitte & Touche, L.L.P., 233 F.3d 1063, 1066 (7th Cir. 2000) ("Simple denials of liability do not toll the period of limitations or estop the adverse party to rely on it.").

Ellis's knowledge in 1997 therefore started the three-year statute of limitations, and her claims filed on March 22, 2005, related to HolliShare's use of book value to calculate the balance of her account and the failure to correct that practice are time-

barred.

With regard to Ellis's claims related to the use of book value in the prohibited transactions, the relevant violation occurred each year when HolliShare sold shares to JDS for the allegedly improper sale price. As for Ellis's knowledge, the evidence does not indicate that she had actual knowledge of the essential facts related to the use of book value in the prohibited transactions more than three years before she filed her complaint on March 22, 2005. None of the correspondence identified by defendants describes the circumstances of the sales of JDS common shares by HolliShare; instead, the letters focus on the use of book value in calculating the balance of individual accounts and the value of HolliShare's holdings generally. (See, e.g., Defs.' 2d App'x Ex. 5 at 50 (describing DeFazio's concern only with "the practice of using the book value of the JDS stock as the current value for that stock in the annual report of the plan, and more important as the basis for determining the account balances and the amount of the distributions to former employees").)

Furthermore, Ellis's declaration submitted in her divorce proceedings references the "valuation of HolliShare" (id. at 49) and does not indicate that she was aware of the use of book value in the annual sales of JDS common shares to JDS. The evidence therefore does not show that Ellis had actual knowledge of the essential facts underlying her claims related to the use of book value in the sales of JDS common shares.

Accordingly, defendants are entitled to summary judgment only on Ellis's claims related to HolliShare's use of book value in calculating the balance of her account.

d. DeFazio

Defendants move to dismiss DeFazio's claims based on HolliShare's alleged mishandling of his alternate payee account by not providing the same return as other HolliShare accounts. (Docket No. 483 at 12:20-13:3.) They argue that DeFazio had actual knowledge of his claim in 1997. In his September 26, 1997 letter, DeFazio expressed some concern regarding HolliShare's handling of alternate payee accounts, stating, "I believe the plan automatically invests the account balances of former employees or alternate payees in an investment, similar to a money market account, until those balances are paid out." (Defs.' 2d App'x Ex. 5 at 49.) The letter also expressed that "this is not a correct practice." (Id.) In response to an inquiry from DeFazio, Hollister sent a letter on October 18, 2002, stating that his "funds are in a segregated account within HolliShare earning the 90-Commercial Paper Rate as per the Wall Street Journal." (Pls.' Supplemental Stmt. Undisputed Facts (Docket No. 528) Ex. HH at 2.)

DeFazio appeared to recognize as early as 1997 that he would not be receiving the same increase in value on his alternate payee account as did HolliShare participants, and claims based only on that difference are time barred. Nevertheless, his letter does not demonstrate that he had actual knowledge that the plan retained possession of the

funds within HolliShare. That distinction is an essential fact to any claim that HolliShare fiduciaries retained the difference in interest between the shares held in DeFazio's alternate payee account and the 90-day commercial paper rate, which DeFazio has identified as his basis for asserting claims based upon the segregation of his alternate payee account. (See Docket No. 532 at 11:17-24.) Moreover, the evidence does not indicate that DeFazio became aware of this distinction before he received Hollister's letter on October 18, 2002. Since he filed his first amended complaint containing allegations related to the segregation of his alternate payee account on October 6, 2004, his claims are not time barred. Accordingly, defendants are not entitled to summary judgment on DeFazio's claims.

2. Defendants' Motion on the Fiduciary Status of JDS and the Hollister Board

Defendants move for summary judgment on all claims asserted against certain individual defendants in their capacities as members of the Hollister Board of Directors on the basis that these defendants properly discharged their duties under ERISA. They also move to dismiss the claims asserted against JDS, contending that the company does not qualify as a de facto ERISA fiduciary. (Docket No. 484 1:19-2:2.)

a. Hollister Board

To qualify as an ERISA fiduciary, an individual or entity may either be named as a fiduciary under the terms of an ERISA plan, see 29 U.S.C. § 1102(a), or act as a functional or de facto fiduciary by exercising discretionary control over the management or administration of the plan or its assets, see 29 U.S.C. § 1002(21)(A). When an individual or entity is a named fiduciary, that fiduciary's liability may be limited pursuant to provisions of a plan instrument that allocates responsibility among named fiduciaries. See Walker v. Nat'l City Bank of Minneapolis, 18 F.3d 630, 633 (8th Cir. 1994) ("[U]nless ERISA mandates otherwise, division of authority in the plan determines the duties of the various fiduciaries."); 29 C.F.R. § 2509.75-8(D-4) (noting that a plan instrument may allocate responsibility among named fiduciaries).

Here, the Trust Instrument specifies Hollister, the HolliShare trustees, and the Hollister Board as named fiduciaries. (Trust Instrument § 11.11.) Hollister is responsible for plan administration (id.), the trustees are responsible for management of the plan's assets (id. §§ 11.01, 11.02), and the Hollister Board has the authority to appoint and remove trustees, (id. §§ 11.05-11.07). The Board also has the authority to inspect and audit plan records and receive reports from the plan trustees. (Id. § 11.04.) The parties do not dispute that the Hollister Board's potential liability therefore arises from its fiduciary duty to appoint and monitor the HolliShare trustees. (See Docket No. 484 3:24-25; Docket No. 531 20:1-3); Gelardi v. Pertec Computer Corp., 761 F.2d 1323,

1325 (9th Cir. 1985) (per curiam) (holding that an employer who appointed the plan administrator was only a fiduciary and liable as such with respect to the selection of the administrator); In re Calpine Corp., No. 03-1685, 2005 WL 1431506, at *3 (N.D. Cal. Mar. 31, 2005) (noting that the "power of appointment gives rise to a limited duty to monitor").

Plaintiffs do not dispute that over the years, the Hollister Board appointed competent individuals as trustees, including the General Counsel of JDS and Hollister (Zwirner), Hollister's Chief Financial Officers (Gunderson, McCormack, and Brilliant), and Hollister's heads of human resources (Simon, Schellentrager, Karlovsky, and Kelleher). (2d Zwirner Decl. ¶ 70; Winn Decl. ¶ 57.) The Hollister Board received annual reports from the trustees covering the performance of HolliShare assets, its benefit obligations, and the sales of JDS common shares. (2d Zwirner Decl. ¶ 71; Winn Decl. ¶ 58.) The Board also monitored the returns on HolliShare's investments, including the annual increases in the book value of JDS common shares.[21] (2d Zwirner Decl. ¶ 72; Winn Decl. ¶ 59.)

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[21] Plaintiffs object to this evidence for lack of foundation and lack of personal knowledge. (Pls.' Opp'n Stmt. Undisputed Facts (Docket No. 523) No. 128.) The court overrules this objection. Winn and Zwirner, who have both served as Hollister Board members, have sufficient personal knowledge to give evidence as to the Board's monitoring of the annual change in book value.

The adequacy of such monitoring, however, depends largely on the factual circumstances of the plan's investments and the trustees' conduct. See 29 C.F.R. § 2509.75-8 (FR-17) ("[T]rustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards. ..."). The evidence shows that the vast majority of HolliShare's holdings consisted of JDS common shares (2d Zwirner Decl. ¶ 8), meaning that most of the plan's transactions fell explicitly within the ERISA's prohibited transaction provision. See 29 U.S.C. § 1106(a)(1)(A) (prohibiting transactions "between the plan and a party in interest"); id. § 1002(14) (defining "party in interest" to include "an employer any of whose employees are covered by such plan"). The HolliShare trustees may therefore have had conflicts of interest in those transactions, especially since at least one trustee--Zwirner--also held positions with JDS and Hollister.

The Hollister Board would have reasonably been aware of these potential conflicts of interest since they flowed directly from the formal positions held by the parties to the transactions. The Hollister Board should have known that ERISA required that the trustees perform a good faith determination of the fair market value of plan assets. In light of these circumstances, a fact finder could reasonably infer that the Hollister Board's limited annual monitoring of HolliShare trustees was insufficient. See Leigh v. Engle, 727 F.2d 113, 135-36 (7th Cir. 1984) (holding that appointing fiduciaries who were aware of the plan trustees' conflicting loyalties in certain

transactions were obliged to take extra measures to monitor the trustees' actions). A genuine issue of material fact thus exists as to the adequacy of the Hollister Board's monitoring of the plan trustees.

b. JDS

The Trust Instrument does not make JDS a named fiduciary. Nevertheless, to the extent that JDS exercised discretionary control or authority over the management of HolliShare's assets, it can be considered a de facto, or functional, fiduciary of the plan. See Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1100 (9th Cir. 2004) (citing 29 U.S.C. § 1002(21)(A)); Beddall v. State Street Bank & Trust Co., 137 F.3d 12, 18 (1st Cir. 1998) ("The key determinant of whether a person qualifies as a functional fiduciary is whether that person exercises discretionary authority in respect to, or meaningful control over, an ERISA plan, its administration, or its assets. ...").

Here, though JDS did not actually manage HolliShare's assets, the evidence indicates that JDS exercised discretion over HolliShare's sales of its primary asset--JDS common shares. It is undisputed that, as a result of the JDS stock ownership and transfer restrictions, no generally recognized market exists for HolliShare's holdings of JDS common shares. (See 1st Zwirner Decl. ¶ 10; Pls.' Resp. Defs.' Stmt. Disputed Facts (Docket No. 540) No. 5.) Zwirner stated in his declaration that, given the number of shares that HolliShare must sell each year to meet its cash needs, HolliShare might not be able to sell its holdings for even book value without JDS's

commitment to purchase its shares.[22] (1st Zwirner Decl. ¶ 50.)

This evidence alone is sufficient to create a genuine issue of material fact as to JDS's discretionary control over HolliShare's holdings of JDS common shares. If, for example, HolliShare had a particularly strong need for cash in a particularly lean year for JDS, JDS could choose not to repurchase HolliShare's shares or to repurchase fewer than all of the shares HolliShare sought to sell. According to Zwirner, HolliShare would thereafter be forced to sell its holdings for a lower price. JDS has, of course, agreed to repurchase HolliShare's holdings pursuant to the mid-80s buy-back agreement and currently through three-year commitments. (See id. ¶ 49). Defendants contend that under those arrangements, HolliShare trustees determine the number of shares that JDS will repurchase in a given transaction. (2d Zwirner Decl. ¶ 77.) Nevertheless, no evidence suggests that those commitments are legally binding on JDS, and a reasonable fact finder could infer that HolliShare would have no recourse if JDS decided to stop or reduce its repurchases.

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[22] Plaintiffs object to this evidence for lack of personal knowledge. The objection is overruled. Zwirner, who serves not only as a HolliShare trustee but also as a JDS Board member (1st Zwirner Decl. ¶¶ 6-7), has sufficient personal knowledge of the market for JDS common shares and HolliShare cash needs to testify thereto.

Accordingly, because there exist genuine issues of material fact regarding the fiduciary status of the Hollister Board and JDS, defendants are not entitled to partial summary judgment in their favor, and the court must deny their motion.

3. Prohibited Transactions

Plaintiffs move for partial summary judgment on their claims arising out of the annual sales of JDS common shares by HolliShare to JDS. Specifically, plaintiffs argue that HolliShare's sales of JDS common shares to JDS for per-share book value breached ERISA's fiduciary duty of prudence and violated the prohibition on certain types of transactions. (Docket No. 479 at 6:10-8:26); see 29 U.S.C. §§ 1104(a)(1)(B), 1106(a)(1)(A).

a. Good Faith Determination

ERISA establishes a blanket prohibition on certain transactions, including the sale or exchange of property between an ERISA plan and a "party in interest," because such transactions "entail a high potential for abuse." Donovan v. Cunningham, 716 F.2d 1455, 1465 (5th Cir. 1983) (discussing 29 U.S.C. § 1106(a)(1)). As used in this section, a "party in interest" includes the employer of the employees covered by the ERISA plan in question. 29 U.S.C. § 1002(14). Nevertheless, ERISA provides an exemption for transactions that meet certain requirements. Section 1108(e) provides an exemption for the sale or acquisition by a plan of employer stock if the sale price is for "adequate consideration." When a security has no generally recognized market, the term "adequate consideration" means "the fair

market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary [of Labor]." Id. § 1002(18); see also 29 C.F.R. § 2550.408e (cross-referencing 29 U.S.C. § 1002(18) in defining "adequate consideration" for purposes of § 1108(e)).

In addition to prohibiting certain transactions with plan assets, ERISA also imposes a general duty on fiduciaries to act for the exclusive benefit of plan beneficiaries "with the care, skill, prudence, and diligence ... that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Thus, when an ERISA plan transacts in employer securities, its fiduciaries bear the burden of showing that the transaction satisfies the requirements of both §§ 1104(a)(1)(B) and 1108(e). See Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996).

Whether a particular transaction with an interested party complies with both §§ 1104(a)(1)(B) and 1108(e) depends upon the conduct of the fiduciaries.[23] See Howard, 100 F.3d at 1488 (citing

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[23] In addition to the thoroughness of investigation, the assessment of the transaction ordinarily includes consideration of "the merits of the transaction." Howard, 100 F.3d at 1488. Plaintiffs, however, have moved only on the basis that the HolliShare fiduciaries did not engage in an adequate investigation, not that they did not receive sufficient value in exchange for the JDS shares. (See Docket No. 479 at 7:23-25; Docket No. 537 at 20:9-12.)

Donovan v. Cunningham, 716 F.2d 1455, 1467-68 (5th Cir. 1983)). Fiduciaries "are obliged at a minimum to engage in an intensive and scrupulous independent investigation of their options." Id. at 1488-89; see Cosgrove v. Circle K Corp., 915 F.Supp. 1050, 1064 (D. Ariz. 1995) ("Good faith requires that the trustees of the Plan have used a prudent method of determining value."), aff'd, 107 F.3d 877 (9th Cir. 1997). Nevertheless, the precise scope and nature of the required investigation depends upon the circumstances surrounding the transaction and the asset. See Keach v. U.S. Trust Co., 419 F.3d 626, 637 (7th Cir. 2005) (evaluating the sufficiency of the fiduciary's investigation "within the context of the totality of the circumstances"); Cunningham, 716 F.2d at 1467-68 (noting that fiduciaries may satisfy their burden by showing they determined fair market value based upon "a prudent investigation in the circumstances then prevailing"); see also Henry v. Champlain Enters., Inc., 445 F.3d 610, 619 (2d Cir. 2006) ("Whether a fiduciary has made a proper determination of fair market value depends on whether the parties are well-informed about the asset and the market for that asset." (internal quotation marks omitted)).

Here, plaintiffs contend that HolliShare fiduciaries inadequately investigated whether JDS common shares could be sold at a sale price above the December 31 book value employed under the mid-80s buy-back agreement given their awareness of higher estimates of the value of JDS common shares. (Docket No. 479 at 3:8-10.) For example, plaintiffs direct the court's attention to a 1997 memorandum in which Zwirner stated that he discussed with McCormack, another HolliShare trustee (see Defs.' 2d App'x Ex. 9 at 17:24-18:24), an "analysis" performed by First Union that estimated the value of JDS to be 3.34 times the book value. (Pls. Stmt. Undisputed Facts Ex. H at 1.) Additionally, Winn, who served on the Hollister Board of Directors until 2001 (Winn Decl. ¶ 2), testified that he knew that JDS common shares had a value in the "outside world" of up to three-times book value. (Winn Dep. 91:15-92:13.) Though the record does not contain a description of the bases for these higher estimates of the value of JDS common shares or whether they included consideration of the applicable stock restrictions, this evidence suggests that multiple defendants had knowledge that JDS common shares could have a value higher than book value.

Defendants respond that the existence of such estimates does not render their determination of the fair market value inadequate in light of the stock ownership and transfer restrictions applicable to JDS common shares. (Docket No. 511 at 5:20-24.) It is undisputed that these restrictions limited the market for JDS common shares. (See 1st Zwirner Decl. ¶ 10; Pls.' Resp. Defs.' Stmt. Disputed Facts (Docket No. 540) No. 5.) The restricted nature of JDS common

shares thus provides part of the relevant context for the investigation into the fair market value of that asset. See Krueger Int'l, Inc. v. Blank, 225 F.3d 806, 812 (7th Cir. 2000) ("Before the accounting rules of an ERISA plan can be applied, the basic terms of the asset to be accounted for must be determined. That is what the [shareholder agreement] does--it defines the bundle of rights to which a[] shareholder (whether a direct shareholder or a shareholder through an ERISA plan) is entitled."); see also Foltz v. U.S. News & World Report, Inc., 865 F.2d 364, 370-71, 374 (D.C. Cir. 1989) (upholding a plan's valuation of closely-held stock based upon the valuation method specified in the corporation's certificate of incorporation).

The parties also do not dispute that the HolliShare trustees were well-informed regarding the restrictions applicable to JDS common shares held by HolliShare as a consequence of their roles in Hollister and JDS. (Pls.' Resp. Defs.' Stmt. Disputed Facts (Docket No. 540) No. 40.) The three trustee positions have been filled by the Hollister General Counsel, Chief Financial Officer, and head of human resources. (1st Zwirner Decl. ¶ 28.) Plaintiffs do not dispute that the trustees were also aware of JDS's historical practice of redeeming common shares offered to it pursuant to the right of first refusal. (1st Zwirner Decl. ¶ 22; Pls.' Resp. Defs.' Stmt. Disputed Facts (Docket No. 540) Nos. 17, 40.)

Zwirner stated in his declaration that the HolliShare trustees consciously considered these factors whenever they decided the amount of shares to sell to JDS and the price they would receive pursuant to the mid-80s buy-back agreement. (1st Zwirner Decl. ¶¶ 41-42.) Furthermore, Zwirner testified that he determined the fair market value for any particular sale of shares to JDS by taking into account "the totality of the circumstances" then prevailing. (Zwirner Dep. 21:23-22:9.) Even though conditions changed from year to year, he testified that no such changes "led [him] to reconsider the agreement in practice." (Id. at 22:10-14.)

This evidence of the HolliShare trustees' general consideration of the market for JDS common shares in light of the applicable stock restrictions is sufficient to create a genuine issue of material fact regarding the adequacy of the investigation into the possibility of selling JDS common shares at prices higher than book value. Plaintiffs are therefore not entitled to summary judgment in their favor on the claims related to the prohibited transactions.

In addition to their arguments that defendants failed to conduct an adequate investigation, plaintiffs also argue that, because ERISA's exemption to 29 U.S.C. § 1106(a)(1)(B) requires that the value of the asset be determined "by the trustee or named fiduciary," 29 U.S.C. § 1002(18), the sales of common shares to JDS constituted per se violations of § 1106(a)(1)(B) because book value was determined solely by JDS, which is neither a trustee or named fiduciary. (Docket No. 479 at 7:10-22.) As discussed, however, the record suggests that the HolliShare

fiduciaries performed an investigation to determine whether the repurchase price of JDS common shares represented the fair market value for JDS common shares.[24]

Plaintiffs' argument further fails to recognize that book value is simply a particular method of calculating the value of corporate stock. The JDS articles do not empower JDS management to simply determine the repurchase price of its shares; rather, the JDS articles, at least since 1978, establish book value as the method of valuation for the repurchase of JDS shares. (JDS Articles 12.) Though the parties have not submitted evidence of the precise formula underlying that method, they do not dispute that the book value was computed from audited JDS financial statements. (Pls.' Resp. Defs.' Stmt. Undisputed Facts (Docket No. 540) No. 53.) The increase in book value from year-to-year is also apparently driven by the profitability of Hollister. (1st Zwirner Decl. ¶ 36.) There is no evidence suggesting that the book value employed for any particular transaction was simply a

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[24] Focusing on defendants' response to certain interrogatories, plaintiffs contend that defendants believed they lacked the power to "assign a value" to JDS common stock. (Docket No. 479 8:18-22 (citing Docket No. 375).) This evidence is at best ambiguous, since in the context of the interrogatories, it is not clear whether defendants' answers address the ability to perform an investigation into the price or the ability to set the price of JDS common stock. Furthermore, given the evidence of the HolliShare trustees' consideration of the market for the asset, the interrogatory responses at best create a genuine issue of material fact concerning the adequacy of investigation.

figure chosen by JDS--rather than the valuation method called for in the JDS Articles--and thus plaintiffs' argument that JDS determined the repurchase price is unsupported by the record.[25]

b. ERISA Preemption

Plaintiffs contend that, because specific provisions of the JDS Articles and the mid-80s buy-back agreement set the repurchase price of JDS common shares at book value, the provisions prevent HolliShare trustees from performing their duties under the statute and are therefore preempted by ERISA. (Docket No. 479 at 14:18-15:11.) Plaintiffs request that the court order these provisions stricken "in their entirety [] so that plan fiduciaries can fulfill their duties under ERISA." (Id. at 15:10.)

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[25] Plaintiffs' additional argument that HolliShare trustees may not rely on section 7.03 of the Trust Instrument, which provides that the assets of HolliShare "shall be valued ... at their respective fair market values as of each December 31st," to excuse their statutory duty of a good faith determination is moot because defendants do not rely on that provision to justify a complete absence of investigation into the transactions with JDS. Rather, evidence suggests that the December 31st valuation date influenced the timing of sales to JDS. (3d Zwirner Decl. ¶ 10.)

ERISA provides that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Though ERISA's "pre-emption clause is conspicuous for its breadth," FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990), its applicability is plainly limited by its terms to "State laws," defined as "decisions, rules, regulations, or other State action having the effect of law." 29 U.S.C. § 1144(c); see Associated Gen. Contractors of Am. v. Metro. Water Dist. of So. Cal., 159 F.3d 1178, 1182 (9th Cir. 1998) ("'ERISA [] does not preempt state action which relates to an ERISA plan so long as the state action does not have the effect of law.'") (quoting Minn. Chapter of Associated Builders & Contractors, Inc. v. County of St. Louis, 825 F.Supp. 238, 243 (D.Minn.1993)); see also id. at 1184 (holding that ERISA did not preempt a state entity's contracts requiring vendors to participate in employee benefit funds because the contracts did not qualify as "State laws" under 29 U.S.C. § 1144(c)).

Here, plaintiffs have failed to identify any "decisions, rules, regulations" or other state action having the effect of law that requires or condones the JDS stock restrictions or the mid-80s buy-back agreement as applied to JDS shares held by HolliShare. Instead, plaintiffs argue that the JDS Articles and the mid-80s buy-back agreement--agreements and arrangements created by private parties--qualify as state laws for the purposes of ERISA preemption because they are purportedly enforceable under Illinois law. (Docket No. 479 at 14:18-21.) The Ninth Circuit, however, has expressly rejected the argument that an instrument's

enforceability under the authority of a state confers upon that instrument the status of "State laws" under § 1144(c). See Associated Gen. Contractors of Am., 159 F.3d at 1183 n. 2 ("We see no merit in [plaintiff's] argument that simply because a contract is legal and enforceable it has the effect of law of a state.").

Because neither the JDS stock restrictions nor the mid-80s buy-back agreement qualify as "State laws" pursuant to § 1144(c), they are not preempted by ERISA. Cf. Krueger Int'l, Inc. v. Blank, 225 F.3d 806, 813 (7th Cir. 2000) (holding that ERISA did not preempt a shareholder agreement providing the corporation with a repurchase option because ERISA does not preempt state law except where "ERISA and the state law conflict regarding the distribution of an already defined sum").

Alternatively, plaintiffs contend that if ERISA does not preempt the JDS stock restrictions, HolliShare fiduciaries breached their duty of prudence by failing to diversify the plan's investments rather than continuing to hold an asset with such limited marketability. (Docket No. 537 at 15:24-17:6); see In re Syncor ERISA Litig., 516 F.3d 1095, 1102 (9th Cir. 2008) (noting that, even though the employee stock ownership plan at issue was designed to invest primarily in employer stock, plan fiduciaries may have breached the prudent man standard of care by investing in that stock when they knew it had an artificially inflated price). However, because plaintiffs raised this argument for the first time in their reply brief, defendants did not have an opportunity to respond or submit evidence on these

points. The court will therefore not consider the merits of this argument for the purposes of the instant motion. See Ass'n of Irritated Residents v. C & R Vanderham Dairy, 435 F. Supp. 2d 1078, 1089 (E.D. Cal. 2006) ("It is inappropriate to consider arguments raised for the first time in a reply brief.") (Ishii, J.).[26]

Accordingly, the court will deny plaintiffs' motion for partial summary judgment on the claims related to the prohibited transactions.

4. 1999 Transaction

Both plaintiffs and defendants have moved for partial summary judgment on the claims related to the 1999 Transaction. Defendants first argue that plaintiffs lack constitutional standing to assert their claims. To satisfy "the irreducible constitutional minimum of standing," a plaintiff must establish three elements: (1) the plaintiff "suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) the existence of a "causal connection between the injury and the conduct complained of"; and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61

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[26] Along similar lines, the court will not consider plaintiffs' argument, raised in their reply brief, that 29 U.S.C. § 1110(a) renders the mid-80s buy-back agreement void as against public policy. (Docket No. 537 at 9:4-11:16.)

(1992) (internal quotation marks and citations omitted). "The burden of establishing Article III standing remains at all times with the party invoking federal jurisdiction." Scott v. Pasadena Unified Sch. Dist., 306 F.3d 646, 655 (9th Cir. 2002) (citing Lujan, 504 U.S. at 561).

Defendants chiefly contend that plaintiffs claims fail to satisfy the element of redressability.[27] Redressability requires that plaintiffs show that they "would benefit in a tangible way from the court's intervention." Warth v. Seldin, 422 U.S. 490, 508 (1975) (footnote omitted); see Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."). Essentially, the redressability prong requires that plaintiffs have a stake in the recovery. See Paulsen v. CNF Inc., 559 F.3d 1061, 1073 (9th Cir. 2009). When a plaintiff seeks prospective relief, redressability requires "that prospective relief will remove the harm." Warth, 422

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[27] Defendants also argue in passing that plaintiffs have not suffered an injury in fact, but it is well-established that statutory violations qualify as an injury in fact so long as the statute in question "creates correlative procedural rights in a given plaintiff." Fernandez v. Brock, 840 F.2d 622, 630 (9th Cir. 1988). Here, plaintiffs assert that defendants violated 29 U.S.C. §§ 1104 and 1106; ERISA grants participants and beneficiaries a cause of action to prosecute violations of these provisions even before a plan incurs losses. See Ziegler v. Conn. Gen. Life. Ins. Co., 916 F.2d 548, 551 (9th Cir. 1990); M & R Inv. Co. v. Fitzsimmons, 685 F.2d 283, 287 (9th Cir. 1982).

U.S. at 505.

Plaintiffs seek two forms of relief from this court with respect to the 1999 Transaction. First, pursuant to 29 U.S.C. §§ 1109 and 1132(a)(2), which together provide that plan fiduciaries may be held personally liable to make good the losses to a plan resulting from the breach of their duties, plaintiffs seek make-whole monetary relief in the form of a revaluation of their accounts as if the 1999 Transaction had not occurred.[28] (Docket No. 531 at 6:19-21; HAC 66:7-9; FAC 41:7-9.) Second, pursuant to § 1132(a)(3), plaintiffs seek equitable relief for their claims based upon the 1999 Transaction in the form of a redistribution or cancellation of the JDS preferred shares.[29] (Docket No. 531 at 7:21-24; HAC 65:20-22; FAC 40:20-21.)

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[28] Under 29 U.S.C. § 1132(a)(2), the Secretary of Labor, a participant, a beneficiary, or a fiduciary may bring an action for relief under 29 U.S.C. § 1109. Section 1109 in turn provides that plan fiduciaries may be held personally liable "to make good to [the] plan any losses to the plan resulting from such breach [of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter]."

[29] Pursuant to 29 U.S.C. § 1132(a)(3), an ERISA plaintiff may bring an action "(A) to enjoin any act or practice which violates the provisions of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." This provision authorizes the grant of equitable relief such as injunction, mandamus, and restitution, but not compensatory damages. See McLeod v. Or. Lithoprint Inc., 102 F.3d 376, 378 (9th Cir. 1996).

Turning first to plaintiffs' request for monetary relief, in the ordinary case, losses to an ERISA plan are measured by the difference between what beneficiaries received and what they would have received absent the plan fiduciary's breaches. This lost value may be ascertained "through expert testimony or other evidence regarding investment returns during the relevant period." Vaughn v. Bay Envtl. Mgmt., Inc., --- F3d. ---, 2009 WL 1545124, at *5 (9th Cir. June 4, 2009).

Here, plaintiffs' theory as to how the alleged breaches associated with the 1999 Transaction would have affected the monetary value of their HolliShare accounts is premised on the assumption that, if the 1999 Transaction had not been consummated, HolliShare would have ultimately achieved a controlling position in JDS as the company eventually repurchased and cancelled the preferred shares issued to the employee beneficiaries of the 1977 Schneider Trust.[30] (Docket No. 479 at 3:24-26; Docket No. 531 at 14:18-27; HAC ¶¶ 43-46; FAC ¶¶ 25-27.) HolliShare's holdings of JDS common shares would thereafter allegedly increase in value due to a control premium, which HolliShare would realize in a sale of its holdings after it voted to remove the stock

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[30] Pursuant to paragraph II.D, the employee beneficiaries of the 1977 Schneider Trust would have been required to offer their holdings of preferred shares to JDS when they retired or their employment was otherwise terminated. (JDS Articles 20.) JDS, in turn, would have been required to cancel those shares upon repurchase under article five, paragraph II.G. (Id. at 27.)

ownership and transfer restrictions contained in the JDS articles. (See Docket No. 531 at 6:21-23, 14:23-27; Docket No. 479 at 4:4-8.)

The evidence indicates, however, that it is far from certain that HolliShare would have eventually controlled a majority of JDS voting shares and obtained the theoretical increase in monetary value therefrom. At the time of the creation of the 1999 Transaction and in 2001 (the year in which the 1977 Schneider Trust would have expired), the 1977 Schneider Trust held 61,750,000 JDS preferred shares--constituting 97 to 98% of all JDS outstanding shares between 1999 and 2001--compared to HolliShare's holdings of between 758,027 and 1,128,027 JDS common shares. (2d Zwirner Decl. ¶ 14; Thielitz Decl. ¶ 4.) As of the distribution of preferred shares to the eligible employee beneficiaries in 2001, therefore, HolliShare's holdings would have represented a very small percentage of all outstanding voting shares.[31] The holdings of

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[31] Plaintiffs dispute these figures, claiming that HolliShare and another trust (for foreign-based employees) could also have received shares from the 1977 Schneider Trust. (Pls.' Opp'n Stmt. Undisputed Facts (Docket No. 523) No. 103.) In support of this contention, plaintiffs cite two documents, the "Arnold & Porter opinion" and a page of discovery numbered RZ 1908, without identifying where in the record either document is located. After reviewing the materials submitted in connection with the parties' cross-motions, the court is unable to locate either document and will therefore not consider plaintiffs' contentions based upon them. See Hoffman v. Constr. Protective Servs., Inc., No. 03-1006, 2006 WL 6105639, at *6 (C.D. Cal. Aug. 25, 2006) ("While there may be evidence in the record to support such a

preferred shares would of course have decreased as employee beneficiaries of the 1977 Schneider Trust terminated their employment over time, but the evidence shows that the complete repurchase of preferred shares would have taken years. For example, as of December 31, 2008, almost a decade after the 1999 Transaction, at least fifty of the employee-beneficiaries who would have been entitled to receive preferred shares from the 1977 Schneider Trust were still employed with Hollister. (Thielitz Decl. ¶ 13.)[32]

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finding, '[j]udges are not like pigs, hunting for truffles buried in [the record].' " (quoting Entm't Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211, 1217 (9th Cir. 1997))).

Furthermore, plaintiffs' argument that HolliShare could have received preferred shares is not supported by the text of the 1977 Schneider Trust, which provides that the corpus of the trust shall be distributed to "such persons as (1) are then living, (2) are then employees of Hollister ... and (4) agree in writing to abide by [certain policies and principles]." (Defs.' App'x Ex. 3 at 11 (emphasis added).)

[32] Plaintiff objects to this evidence based on Federal Rule of Evidence 602 (personal knowledge). (Pls.' Opp'n Stmt. Undisputed Facts (Docket No. 523) No. 104.) The court overrules this objection. Dian Thielitz, who currently serves as the Assistant Secretary of Hollister and the corporate Secretary of JDS (Thielitz Decl. ¶ 2), has sufficient personal knowledge of Hollister employee records to testify as to the number of employees who were employed with Hollister as of December 31, 2008, and who would have met the share ownership requirements to be employee beneficiaries of the 1977 Schneider Trust at its expiration in 2001.

The date on which HolliShare could have become the majority holder of all outstanding shares could have also been affected by factors other than the gradual repurchase of preferred shares. HolliShare's voting power may not have proportionately increased as the number of preferred shares decreased, as the evidence indicates that the number of JDS common shares held by HolliShare has steadily decreased since 1999. (See id. ¶ 4 (stating that HolliShare holdings have decreased from 1,128,027 shares in 1999 to 458,027 shares in 2008).) In addition, pursuant to article five of the JDS Articles, which authorizes the company to issue up to 71,260,000 shares of preferred stock (JDS Articles 2), JDS could also have issued an additional 9,510,000 shares of preferred stock, thereby diluting HolliShare's voting power.[33]

Making all inferences in favor of plaintiff, this evidence shows that although the exact date on which HolliShare would become the majority holder of all outstanding JDS shares is uncertain, it is possible that HolliShare would indeed have eventually become the majority holder. Nevertheless, plaintiffs have not identified evidence from which a reasonable inference could be drawn that HolliShare would have experienced any change

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[33] The holders of the preferred shares could also have amended article five, paragraph I to change the number of preferred shares and common shares that JDS was authorized to issue. (JDS Articles 19; see also id. at 27 (providing that only the ownership and transfer restrictions required a two-thirds vote for each class of shares).)

in value during the period that any plaintiff had an account with HolliShare.[34] To enjoy the increase in value associated with a control premium, the stock ownership and transfer restrictions contained in the JDS Articles would have had to be amended. To do so under the JDS Articles requires a two-thirds vote of every class of shares, including the preferred shares. (See JDS Articles 27.)

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[34] The plaintiffs who were employees of Hollister terminated their employment on the following dates: Humphries (January 3, 1998), Seay (July 16, 1999), DiMaro (September 30, 1999), Lavick (January 7, 2000), McNair (November 17, 2001), Stanton (March 1, 2002), Pace (May 2, 2003), Ellis (June 1, 2004), Wirth (March 31, 2006), Beetham (May 19, 2006). (Thielitz Decl. ¶ 4.) All of these plaintiffs thereafter received a distribution of their vested HolliShare account balance. (See Defs.' 2d App'x (Docket Nos. 490-491) Ex. 1 at 69; id. Ex. 4 at 46; id. Ex. 5 at 43; id. Ex. 6 at 42-44; id. Ex. 8 at 41; id. Ex. 10 at 35; id. Ex. 11 at 86; id. Ex. 12 at 10; id. Ex. 13 at 20; id. Ex. 14 at 42.)

DeFazio is the only plaintiff who was not a Hollister employee; he was an alternate payee for the account of Ellis, his ex-wife. In its April 23, 2008 order, the Sacramento Superior Court presiding over the DeFazio-Ellis divorce proceedings ordered HolliShare to distribute the balance of DeFazio's alternate payee account to DeFazio. (Req. Judicial Notice Ex. W at 4.) At oral argument, the parties confirmed that HolliShare distributed the balance of DeFazio's account on May 15, 2009.

As of December 31, 2008, approximately five months before HolliShare distributed the balance of the last of the plaintiffs' accounts, at least fifty employee beneficiaries who would have been entitled to receive preferred shares from the 1977 Schneider Trust were still employed with Hollister. So long as any of these employee-beneficiaries still owned any preferred shares, HolliShare would have been unable to change the stock ownership and transfer restrictions contained in the JDS Articles without their support. Therefore, even though as former participants, plaintiffs could have statutory standing to pursue their claims, see LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 128 S.Ct. 1020, 1026 n. 6 (2008), such an attenuated theory underlying a request for plan fiduciaries to restore losses to the plan simply does not satisfy the redressability requirement of constitutional standing.

For example, in Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc., 465 F.3d 1123, 1127 (9th Cir. 2006), the Ninth Circuit held that medical benefits plan participants could not satisfy the redressability requirement in a suit for monetary relief pursuant to §§ 1109 and 1132(a) because whether the plaintiffs would have enjoyed reduced plan costs in the absence of the alleged fiduciary breaches depended on the conduct of a third party who exercised independent discretion. See also Paulsen v. CNF Inc., 559 F.3d 1061, 1073-74 (9th Cir. 2009) (holding that pension plan participants' make-whole claims did not support redressability when their theory of recovery was premised on the Pension Benefit Guaranty Corporation increasing benefits when it was not legally compelled to do so).

Similarly, under plaintiffs' theory of monetary relief, whether HolliShare would have realized a control premium while plaintiffs still had HolliShare accounts depends entirely on the assumption that holders of two-thirds of the preferred shares would have voted to remove the JDS stock restrictions.[35]

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[35] In their opposition papers, plaintiffs urge the court to explore a new, heretofore unmentioned theory by which HolliShare could have become the majority holder of all outstanding JDS stock. They highlight that, at the time paragraph II.C of the JDS Articles was amended in 1999 to allow the 1999 Preferred Share Trust to hold JDS shares, the same set of amendments eliminated article five, paragraph II.E, which allowed the 1977 Schneider Trust to hold JDS shares. (Compare JDS Articles 27, with id. at 52.) Plaintiffs argue that the 1977 Schneider Trust was therefore an unauthorized holder of JDS shares between June 14, 1999 and its expiration on April 21, 2001, and the HolliShare trustees could have brought an action to strip it of its shares.

Similar to plaintiffs' original theory, this new theory is built upon multiple assumptions about the conduct of outside parties. It presumes that such a suit against the 1977 Schneider Trust would have been successful despite the fact that participants in the 1999 Transaction envisioned that the 1977 Schneider Trust would continue to hold its shares until its expiration on April 21, 2001, at which point the shares would be transferred to the 1999 Preferred Share Trust. It also assumes that the court hearing the suit would have ordered any repossessed shares cancelled or not otherwise issued to other authorized holders. Finally, plaintiffs' new hypothetical assumes that the 1977 Schneider Trust would not have filed a reasonable counterclaim against the person or entity bringing such action to have the JDS Articles corrected to allow the trust to hold shares again. See 805 Ill. Comp. Stat. 5/12.56(a)-(b)

As plaintiffs recognize, it is of course impossible to prove exactly what would have happened if HolliShare fiduciaries had not approved the 1999 Transaction. (See Pls.' Opp'n Stmt. Undisputed Facts (Docket No. 523) Nos. 102, 104-06.) Nonetheless, the breach alleged here--the disloyal and imprudent vote of the JDS common shares held by HolliShare--does not inherently support a claim for losses to plaintiffs' retirement accounts.[36] Instead, plaintiffs' theory relies on conjecture regarding what independent third parties might have done--perhaps employee beneficiaries of the 1977 Schneider Trust would have, for some reason, declined to receive their preferred shares, or perhaps HolliShare trustees could have convinced enough preferred share holders to vote for changes to the JDS articles. In light of these ambiguities, plaintiffs, who bear the burden of showing constitutional standing, have "not demonstrated that it is 'likely,' and not merely 'speculative,' that their injury will be redressed by a favorable decision" from this court. Paulsen, 559 F.3d at 1074.

(providing a shareholder of a non-public corporation with a cause of action to seek cancellation or alteration of the articles of incorporation if the directors or those in control of the corporation have acted "in a manner that is illegal, oppressive, or fraudulent").

[36] In contrast, plaintiffs' claims based upon prohibited transactions, for example, are premised on allegedly disloyal investment decisions and improper sales of HolliShare assets that, by definition, would have changed the value or composition of plaintiffs' accounts.

With regard to plaintiffs' request for equitable relief, defendants contend that the termination of all of the plaintiffs' HolliShare accounts since the filing of this action has rendered their requests for equitable relief moot. "While standing is determined on the facts as they existed at the time the complaint was filed, a case becomes moot--and, hence, non-justiciable--if the requisite personal interest captured by the standing doctrine ceases to exist as any point during the litigation." Jacobs v. Clark County Sch. Dist., 526 F.3d 419, 425 (9th Cir. 2008) (citations and internal quotation marks omitted); see GTE Cal., Inc. v. FCC, 39 F.3d 940, 945 (9th Cir. 1994) ("To satisfy the Article III case-or-controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision. ... Where events have occurred that prevent us from granting effective relief, we lack jurisdiction and must dismiss the appeal." (internal quotation marks and citations omitted)).

Assuming the ERISA violations at issue regarding the 1999 Transaction warrant the equitable relief requested--the cancellation or redistribution of JDS preferred shares--such relief would only provide benefits to HolliShare beneficiaries prospectively. Because none of the plaintiffs still have an account with HolliShare, they could not possibly benefit from an order affecting HolliShare's current or future voting power in JDS shares.[37] See Bendaoud v.

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[37] Nor are any of the plaintiffs employee-beneficiaries of the 1977 Schneider Trust who would be entitled to receive preferred shares. (2d Zwirner Decl. ¶ 41; Winn Decl. ¶ 37.)

Hodgson, 578 F.Supp.2d 257, 267-68 (D. Mass. 2008) (holding that a plaintiff who was no longer a participant in a defined contribution plan had no standing to seek purely prospective relief). Nor does the record indicate that other types of equitable relief, such as disgorgement or restitution, would redress the alleged injury in the absence of evidence that plan fiduciaries profited from the alleged violations at the plan's expense. See Horvath v. Keystone Health Plan East, Inc., 333 F.3d 450, 456 (3d Cir. 2003) (holding that a plaintiff must demonstrate individual loss to have standing to seek restitution and disgorgement). Equitable relief simply would not "remove the harm" or otherwise provide plaintiffs with a tangible benefit.

Therefore, since neither revaluation of their accounts nor equitable relief will redress the ERISA violations at issue regarding the 1999 Transaction, plaintiffs "have no stake in the recovery and cannot satisfy the redressability requirement of constitutional standing." Paulsen, 559 F.3d at 1073. Furthermore, plaintiffs cannot satisfy the redressability requirement by purporting to seek relief on behalf of the plan as a whole. Though participants in an ERISA plan may, in general, seek relief on behalf of the plan, plaintiffs may only do so if they "otherwise meet the requirements for Article III standing." Glanton, 465 F.3d at 1127. Because plaintiffs do not have standing themselves to seek relief for the claims based on the 1999 Transaction, they cannot do so on behalf of HolliShare. Accordingly, the court must grant defendants' motion

for summary judgment on the 1999 Transaction claims.[38]

5. DeFazio-Ellis Divorce Proceedings

DeFazio moves for partial summary judgment based on HolliShare's compliance with certain domestic relations orders ("DROs") issued by the Sacramento Superior Court presiding over the DeFazio-Ellis divorce proceedings. He argues that these orders did not satisfy the requirements of a "qualified domestic relations order" ("QDRO") as that term is defined in 29 U.S.C. § 1056(d)(3)(D), and that by complying with those orders, HolliShare fiduciaries breached their duties under § 1104(a)(1)(D) to administer the plan in accordance with the terms of the plan instrument. (Docket No. 474 at 4:10-13.)

Though pension benefits may not, in general, be assigned or alienated, 29 U.S.C. § 1056(d)(1), ERISA authorizes certain state court-ordered assignments of plan benefits to former spouses and dependents. Section 1056(d)(3) provides that pension plans "shall provide for the payment of benefits in accordance with the applicable requirements of any [QDRO]." QDROs are a type of domestic relations order, which relate "to the provision of child support, alimony, or

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[38] In light of the court's holding that plaintiffs lack constitutional standing to seek relief for the 1999 Transaction, the defendants' other arguments and plaintiffs' cross motion for partial summary judgment on claims related to the 1999 Transaction are moot.

marital property rights to a spouse, former spouse, child, or other dependent of a plan participant ... made pursuant to a State domestic relations law." Id. § 1056(d)(3)(B)(ii). A DRO is a QDRO if it "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or part of the benefits payable with respect to a participant under a[n ERISA] plan." Id. § 1056(d)(3)(B)(I). In addition, the DRO may not (1) require the plan to provide any type of benefit not otherwise provided, id. § 1056(d)(3)(D)(I); (2) require the plan to provide increased benefits, id. § 1056(d)(3)(D)(ii); or (3) require benefits to be paid to an alternate payee which must be paid to another alternate payee under another QDRO, id. § 1056(d)(3)(D)(iii).[39]

These QDRO provisions are designed to provide simple, certain rules for plan administrators to follow. See Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 129 S.Ct. 865, 874 (2009) ("And the cost of less certain rules would be too plain. Plan administrators would be forced to examine a multitude of external documents that might purport to affect the dispensation of benefits. ..." (internal quotation marks omitted)); Carmona v. Carmona,

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[39] A QDRO must also specify the name and mailing address of the alternate payee and the affected plan participant, the amount or percentage of the participant's benefits to be paid or the means by which that amount will be determined, the number of payments or time period to which the order applies, and the plan to which the order applies. 29 U.S.C. § 1056(d)(3)(c). DeFazio does not contend that the DROs in question failed to satisfy these requirements.

544 F.3d 988, 999 (9th Cir. 2008) (noting that the QDRO requirements "allow a plan administrator to more easily administer the plan and reduce the risk of making improper payments").

Here, DeFazio argues that the Superior Court's March 2002 order violated certain requirements of a QDRO. That order provided that HolliShare was to segregate DeFazio's community property share of Ellis's HolliShare account, but further specified that Ellis "shall have a lien and security interest in [DeFazio's] share for unpaid child support." (Req. Judicial Notice Ex. G at 3.) The court consequently retained jurisdiction over DeFazio's share and ordered the HolliShare administrator to retain possession of $1,500,000 of DeFazio's account pending further order of the Superior Court. (Id.) DeFazio contends that this order violated § 1056(d)(3)(D)(i) because it did not allow the HolliShare administrator to immediately distribute the balance of DeFazio's alternate payee account in accordance with the terms of the Trust Instrument. (Docket No. 474 at 3:7-16.) In particular, section 9.01(3)(d) of the Trust Instrument provides that, for an alternate payee account exceeding $5,000, the account "shall be distributed upon the earliest to occur of (I) the date directed in the QDRO, (ii) the date selected in writing by the Alternate Payee, or (iii) the 'earliest retirement age' (as defined in [26 U.S.C. § 414(p)]) of the Participant from whose Account the Alternate Payee's Account was created." (Trust Instrument 33.) Section 414(p)(4)(B) in turn defines an employee's "earliest retirement age" as the later of age fifty or the earliest date on which the participant could start receiving benefits under the

plan if the participant separated from service.

It is undisputed that Ellis was over the age of fifty at the time of the March 2002 order, and she could have received benefits under the terms of the plan if she had terminated her employment. (See Req. Judicial Notice Ex. G at 1 (noting Ellis's year of birth as 1951); Trust Instrument § 8.02 (providing that a Hollister employee's account fully vests after seven years of employment).) Thus, DeFazio was entitled to an immediate distribution of his account under section 9.01(3)(d) of the Trust Instrument. Nevertheless, the March 2002 order did not violate § 1056(d)(3)(D)(i), which provides that a DRO meets the requirements of a QDRO only if it "does not require a plan to provide any type or form of benefit ... not otherwise provided under the plan." 29 U.S.C. § 1056(d)(3)(D)(i) (emphasis added). The plain language of this provision only bars a QDRO from requiring a plan to affirmatively afford a type or form of benefit not established under that plan. See Patton v. Denver Post Corp., 326 F.3d 1148, 1152 (10th Cir. 2003) ("For example, benefits of a type or form not otherwise provided is best understood as referring to a lump sum payout rather than regular payments over a period of years."); see also, e.g., Dickerson v. Dickerson, 803 F.Supp. 127, 134 (E.D. Tenn. 1992) (holding that a divorce decree was not a QDRO because it ordered the payment of retirement benefits before the time authorized under the terms of the plan).

The effect of the March 2002 order was simply to delay the timing of DeFazio's distribution described in section 9.01(3)(d) of the Trust Instrument. Though the HolliShare administrator could not have delayed the distribution under the terms of the Trust Instrument alone, to do so in accordance with a DRO did not require the administrator to affirmatively provide DeFazio with a form or type of benefit to which DeFazio would not have otherwise been entitled. The failure of the March 2002 order to provide for the immediate distribution of DeFazio's alternate payee account therefore did not violate § 1056(d)(3)(D)(i).

Alternatively, DeFazio argues that the March 2002 order was inconsistent with the distribution methods of the Trust Instrument because it "contemplated a series of distributions for child support." (Docket No. 474 at 3:17-18.) Section 9.01(1) of the Trust Instrument provides participants, former participants, and alternate payees with only limited forms of payment, including lump sum single cash payment, direct rollover to an eligible retirement plan, certain annuities, and combinations of the three. While DeFazio accurately identifies that section 9.01(1) does not allow periodic payments from a HolliShare account, the March 2002 order itself did not order such payments. The order only specified that the HolliShare administrator was to retain possession of DeFazio's account pending future order of the Superior Court. It may have "contemplated" multiple payments from DeFazio's account in the future, but it did not order that HolliShare provide them. DeFazio's alternative argument that the March 2002 order violated §

1056(d)(3)(D)(I) thus also fails.

Finally, DeFazio argues that the DROs subsequently issued pursuant to the March 2002 order violated § 1056(d)(3)(D)(iii), which provides that a DRO qualifies as a QDRO only if it "does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order." He contends that the subsequent DROs concerning DeFazio's child support obligations ordered payments from DeFazio's account to DeFazio's children--i.e., other alternate payees. (Docket No. 474 at 4:1-8.)

This argument misconstrues the terms of the subsequent DROs. Those DROs ordered HolliShare to make payments from DeFazio's alternate payee account directly to Ellis. (See, e.g., order dated August 5, 2002 at 2 ("Plan Administrator shall distribute the amounts set forth above to Petitioner [Ellis]").) Though the payments satisfied DeFazio's child support obligations, they were not paid to the children as alternate payees. Rather, the subsequent DROs simply adjusted the division of Ellis's HolliShare account between Ellis and DeFazio. DeFazio's argument that the subsequent DROs violated § 1056(d)(3)(D)(iii) is thus not supported by the terms of those orders.[40]

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[40] Because the issue has not been presented by the instant motion, the court does not hold that the March 2002 order or the subsequent DROs were in fact QDROs under ERISA.

Though there is an absence of a genuine issue of material fact, DeFazio has failed to show that he is entitled to judgment as a matter of law on his claims based upon HolliShare's compliance with the Superior Court orders. Accordingly, the court must deny his motion for partial summary judgment.[41]

6. Liability Amendments to JDS and Hollister Articles

Plaintiffs also move for partial summary judgment on a factual basis unconnected to the 1999 Transaction, prohibited transactions, or the DeFazio-Ellis divorce proceeding. (Docket No. 479 at 13:7-16). Plaintiffs contend that certain amendments to the JDS Articles and the Hollister Articles of Incorporation violate ERISA, which provides that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." 29 U.S.C. § 1110(a).

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[41] In light of the court's holding that DeFazio has failed to show that he is entitled to judgment as a matter of law, the court does not reach defendants' arguments concerning the applicability of collateral estoppel, judicial estoppel, the Rooker-Feldman doctrine, or the Colorado River doctrine.

The amendments to the corporate articles at issue state that "[n]o director of the Corporation shall be personally liable to the Corporation or its shareholders for monetary damages for breach of fiduciary duty as a director." (JDS Articles 45; Pls.' Stmt. Disputed Facts Ex. Z at 11.) By their terms, these provisions are expressly limited in scope to a director's liability "as a director" to the corporation or shareholders. They do not purport to limit the liability of the directors as ERISA fiduciaries to an ERISA plan, beneficiaries, or participants. While these provisions might limit a suit by HolliShare as a shareholder against Hollister or JDS directors, they do not limit such suits to the extent they are based on breaches of ERISA duties. Accordingly, 29 U.S.C. § 1110(a) does not render these provisions void as against public policy.

C. Plaintiffs' Motion to Remove the Plan Trustees

In addition to their motion for partial summary judgment, plaintiffs also request that the court order the removal of the HolliShare trustees and appoint a neutral trustee to manage HolliShare's assets. (Docket No. 475 at 2:28-3:2.) Such removal constitutes a form of prospective equitable relief. As described earlier, see supra Section II.B.4, plaintiffs have no standing to seek prospective relief on behalf of themselves or HolliShare. Accordingly, the court must deny plaintiffs' motion to remove the plan trustees.

IT IS THEREFORE ORDERED THAT:

1) Defendants motion to strike plaintiffs' class action allegations (Docket No. 495) be, and the same hereby is, GRANTED;

2) Defendants' motion for partial summary on claims barred by the statute of limitations (Docket No. 483) be, and the same hereby is,

A) GRANTED in part with respect to claims related to the 1978, 1980, and 1984 amendments to the JDS Articles; non-§ 1105(a)(3) claims related to the 1999 amendments; DiMaro's, Humphries', and Seay's non-§ 1105(a)(3) claims related to the valuations of individual accounts using the book value method; Ellis's claims related to the valuations of her account using the book value method; and the dismissal of Gunderson as a defendant; and

B) DENIED in all other respects;

3) Defendants' motion for partial summary judgment on the fiduciary status of the Hollister Board and JDS (Docket No. 484) be, and the same hereby is, DENIED;

4) Plaintiffs' motion for partial summary judgment on claims related to the prohibited transactions and 1999 Transaction (Docket No. 477) be, and the same hereby is, DENIED;

5) Defendants' motion for partial summary judgment on the claims related to the 1999 Transaction (Docket No. 489) be, and the same hereby is, GRANTED;

6) DeFazio's motion for partial summary judgment on claims related to the divorce proceedings (Docket No. 474) be, and the same hereby is, DENIED; and

7) Plaintiffs' motion to remove the plan trustees (Docket No. 475) be, and the same hereby is, DENIED.

As discussed at the June 22, 2009 hearing, within ten days of the date of this Order, the parties shall agree upon and submit to the court a proposed trial date.

IT IS SO ORDERED.

DATED: June 29, 2009.

s/ /

William B. Shubb
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Nos. CIV. 2:04-1358-WBS-GGH, 2:05-0559-WBS-GGH, 2:05-1726-WBS-GGH

JAMES P. DEFAZIO; ET AL.,

Plaintiffs,

v.

HOLLISTER, INC., ET AL.,

Defendants.

April 8, 2008

ORDER RE: MOTIONS TO STRIKE AND MOTION TO DISMISS

Plaintiffs James P. DeFazio, Theresa Beetham, Brenda Dimaro, Kathleen Ellis, DeLane Humphries, Hallie Lavick, Michael McNair, Sonya Pace, Judy Seay, Nancy Russell Stanton, and Cindy Worth

brought this action alleging several claims pursuant to pertinent sections of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461, against defendants Hollister, Inc. ("Hollister"), Hollister Employee Share Ownership Trust ("HolliShare"), The Firm of John Dickinson Schneider, Inc. ("JDS"), Samuel Brilliant, Richard I. Fremgen, Donald K. Groneberg, Charles H. Gunderson, Alan F. Herbert, James A. Karlovsky, Lori Kelleher, James J. McCormack, Charles C. Schellentrager, Howard I. Simon, Loretta L. Stempinski, Michale C. Winn, and Richard T. Zwirner. Defendants now move to dismiss plaintiffs' claims against defendants Fremgen and Herbert as well as strike additional allegations contained within plaintiffs' Fourth Amended Complaints (Defazio Fourth Am. Compl. (FAC); Ellis FAC).[1] In a separate motion, defendants Stempinski and Winn also move to strike relevant portions of the Defazio FAC.

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[1] With the exception of plaintiff Ellis, all plaintiffs are represented by the same counsel and stand by the substance of their Fourth Amended Complaint. Ellis, through separate counsel, has filed her own Fourth Amended Complaint. Both Fourth Amended Complaints are substantially similar and, for the most part, contain identical allegations. Unlike the claims in her co-plaintiffs' Fourth Amended Complaint, however, Ellis foregoes the class action allegations and does not assert any claims against defendants Fremgen, Stempinski, and Winn. Accordingly, when a distinction is necessary, the court will refer to the Fourth Amended Complaints as the Defazio FAC and the Ellis FAC.

I. Factual and Procedural Background

To avoid repetition, the court will refrain from reciting the entire factual and procedural background, which essentially remains the same as in its November 1, 2007 Order. Defazio v. Hollister, Inc., No. 04-1358, 2007 WL 3231670, at *1-2 (E.D. Cal. Nov.1, 2007). Below, the court only highlights facts relevant to this motion as well as significant events that occurred after the November 1, 2007 Order.

Defendant Hollister is an independently-owned corporation that develops, manufactures, and markets healthcare products. (Defazio FAC ¶ 24.) Plaintiffs are various participants and beneficiaries of defendant Hollishare, a contribution pension plan designed by Hollister to provide retirement benefits to Hollister employees and their beneficiaries. (Id. at ¶ 3.)

In a fourteen month period during the years 2004 and 2005, three factions of the current makeup of plaintiffs independently filed complaints alleging that defendants--various Hollishare Trustees as well as members of defendant JDS and/or Hollister's Board of Directors--abused their fiduciary responsibilities related to the administration of Hollishare in violation of ERISA. (Id. at ¶¶ 7-10.) On May 24, 2006, Judge Karlton consolidated the three cases in order to effectuate "the most fair and efficient" manner in which to litigate the matters. (May 24, 2006 Order.) After being transferred from Judge Karlton to Judge Levi and back to Judge Karlton, this case was transferred to the undersigned

on March 28, 2007. (Docket No. 180 ("Reassignment Notice").)

Pursuant to a June 25, 2007 Stipulation Order (Docket No. 220), plaintiffs filed their Third Amended Complaints on June 29 and 30, 2007. (Defazio Third Am. Compl. (TAC); Ellis TAC.) In response, defendants filed seven separate motions to dismiss certain claims and/or defendants as well as strike portions of plaintiffs' TACs. Defazio, 2007 WL 3231670, at *2. On November 1, 2007, this court granted in part and denied in part defendants' motions to dismiss and strike plaintiffs' TACs. Id. at *12-13. Because this dismissal was without prejudice, plaintiffs subsequently filed their FACs on January 23, 2008.

On February 6, 2008, defendants brought the instant motions seeking (1) to strike several allegations found in both the Defazio and Ellis FACs pursuant to Rule 12(f) and (2) to dismiss claims against Fremgen and Herbert pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. On the same day, defendants Stempinski and Winn filed a separate motion to strike portions of Defazio's FAC, also pursuant to Rule 12(f).

II. Discussion

A. Motions to Strike

"Upon a motion made by a party ... the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). A

"motion to strike is appropriate to address requested relief ... which is not recoverable as a matter of law." Wilkerson v. Butler, 229 F.R.D. 166, 172 (E.D. Cal. 2005). "[T] he function of a [Rule] 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial ...." Sidney Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983). When ruling on a motion to strike, the court must view the challenged pleadings in the light most favorable to the pleader. See Pillsbury, Madison & Sutro v. Lerner, 31 F.3d 924, 928 (9th Cir. 1994).

Previously dismissed allegations that failed to state a claim upon which relief can be granted under any applicable legal theory should be stricken from an amended complaint. See Davis v. Astrue, No. 06-6108, 2007 WL 2088580, at *3-4 (N.D. Cal. July 18, 2007) (striking portions of a second amended complaint that reallege verbatim claims previously dismissed); Tavake v. Alameda County Bd. of Supervisors, No. 05-0744, 2005 WL 2290308, at *2 (N.D. Cal. Sept. 20, 2005) (striking portions of an amended complaint that incorporated by reference any matter from the dismissed complaint).

1. Allegations Regarding the 1999 Transaction

In their FACs, plaintiffs reassert their allegations from the TACs that defendants' 1999 reconfiguration of the Preferred Share Trust and the contemporaneous amendment to JDS' Articles of Incorporation (the "1999 Transaction") constituted an illicit attempt by defendants to entrench themselves

as perpetual managers over Hollister. (Defazio FAC ¶ 42; Ellis FAC ¶ 31.) The pre-amendment version of the Preferred Share Trust eviscerated by the 1999 Transaction was set to expire in April of 2001 and purportedly distribute the majority of JDS preferred stock to individual Hollister employees and beneficiaries. (Defazio FAC ¶ 37; Ellis FAC ¶ 26.) Plaintiffs aver that the Hollister directors initiated the 1999 Transaction in order to keep the majority of JDS preferred stock within the charge of JDS and Hollister management, therein depriving the Hollishare beneficiaries of the eventual control over JDS stock and negating their ability to effectuate employee ownership of JDS and Hollister. (See Defazio FAC ¶ 40 ("Had ownership of the JDS preferred shares transferred to Hollister's employees, these defendants could no longer appoint themselves as directors, officers, and managers of JDS and Hollister, and would lose their absolute control."); accord Ellis FAC ¶ 29.)

In its November 1, 2007 Order, this court dismissed plaintiffs' claims related to the 1999 Transaction against defendants Herbert, Stempinski, Winn, and Zwirner[2]--all of whom are or were Hollister directors. (Nov. 1, 2007 Order 20:4-10.) The court found that plaintiffs failed to bring these claims within ERISA's applicable statute of limitations. See 29 U.S.C. § 1113 (providing that no action may be brought against a fiduciary more than

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[2] The Defazio FAC reasserts claims against all four of these defendants. As mentioned above, see supra n. 2, the Ellis FAC omits any reference to Stempinski and Winn.

six years after the violation or three years after a plaintiff knew of the violation).

Cognizant of this timing dilemma, plaintiffs had argued for application of § 1113's fraud and concealment exception--i.e., that they should be allowed to commence suit beyond the statute's time limitation because defendants engaged in fraud related to the 1999 Transaction. See id. ("[E]xcept ... in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.") (emphasis added). Plaintiffs claimed that Herbert, Stempinski, Winn, and Zwirner--harboring the intent to deceive Hollister employees and beneficiaries in order to maintain control over Hollister and JDS--made misrepresentations to employee shareholders that the 1999 Transaction was necessary to effectuate deceased Hollister founder John Schneider's policies and principles in establishing an independent and employee-owned corporation.

When allegations sound in fraud, a plaintiff must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). Fed. R. Civ. P. 9(b); Swartz v. KPMG L.L.P., 476 F.3d 756, 764 (9th Cir. 2007). Rule 9(b)'s specificity requirements include an account of the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004) (citation omitted); see also Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993) ("The complaint must specify such facts as the times, dates, places, benefits received, and other

details of the alleged fraudulent activity.”).

The court found that plaintiffs' TACs had failed to sufficiently allege fraud or concealment with respect to the 1999 Transaction. Defazio v. Hollister, Inc., No. 04-1358, 2007 WL 3231670, at *9-10 (E.D. Cal. Nov. 1, 2007). Specifically, the relevant factual elements in plaintiffs' TACs were unceremoniously scattered and disorganized throughout the pleading so to render any actual claims sounding in fraud utterly indiscernible.[3] The result was a vastly

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[3] For example, the Defazio TAC consisted of ninety pages of conclusory rhetoric, overlapping dates, inconsistent allegations, and inane historical quotations-all of which were besieged by over 150 endnotes that made scarce attempt to distinguish between important evidentiary support and superfluous idiom. Courts in this circuit have repeatedly lamented this tendency to place “the burden [] on the reader to sort out the statements and match them with the corresponding adverse facts to solve the ‘puzzle’ of interpreting Plaintiffs' claims.” Wenger v. Lumisys, Inc., 2 F. Supp. 2d 1231, 1244 (N.D. Cal. 1998) (quoting In re Oak Sec. Litig., No. 96-20552, 1997 WL 448168, at *5 (N.D.Cal. Aug.1, 1997)); see also Decker v. GlenFed, Inc., 42 F.3d 1541, 1554 (9th Cir. 1994) (These “puzzle-style” complaints are an “unwelcome and wholly unnecessary strain on defendants and the court system.”); Chan v. Orthologic Corp., No. 96-1514, 1998 WL 1018624, at *14 n. 11 (D. Ariz. Feb. 5, 1998) (“This tactic not only makes it difficult to ascertain whether any of the allegations have more merit than the others, it also makes the complaint dreadfully oversized ... [and] make [s] a mockery of Rule 9(b).”); Zeid v. Kimberly, 973 F.Supp. 910, 918 (N.D. Cal. 1997) (“This method of pleading imposes an unnecessary burden on Defendants and the Court to sort out the alleged misrepresentations and match them with the corresponding ‘adverse facts.’” May v. Borick, No. 95-84-7, 1997 WL

incoherent pleading that merely grouped multiple defendants together, a far cry from Rule 9(b)'s requirement that "plaintiffs ... differentiate their allegations when suing more than one defendant ... and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." Swartz, 476 F.3d at 765 (citations omitted); see also Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir. 1989) (in the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, "identif[y] the role of [each] defendant[] in the alleged fraudulent scheme").

314166, at *8 (C.D. Cal. Mar. 3, 1997) ("[The complaint's] organization obfuscates rather than clarifies. Plaintiff's failure to address defendants' allegedly misleading statements individually, or even by category, and to state why each statement, or category of statements is misleading, renders this Court's task, and the task of the defendants, excessively difficult."); Shuster v. Symmetricom, Inc., No. 94-20024, 1997 WL 820967, at *1 (N.D. Cal. June 25, 1997) ("The Complaint as it now stands is a rambling set of allegations which is almost impossible to effectively review. … Plaintiff sets forth lengthy quotes from various releases by defendants' officers and a securities analyst but does not make clear what portion of each quote constitutes a false representation."); In re Conner Peripherals, Inc., No. 95-2244, 1996 WL 193811, at *1 (N.D. Cal. Jan.18, 1996) ("The complaint as written requires the court to excavate for actionable claims .... Judicial resources are too scarce and worthy cases too pressing for a court to spend its time rooting around in bloated complaints drafted by experienced lawyers for a handful of actionable allegations."); Strassman v. Fresh Choice, No. 95-20017, 1995 WL 743728, at *4 (N.D. Cal. Dec.7, 1995) ("The FAC's deficiencies do not stem simply from its length, but rather from its requirement that the reader find the needle in the haystack.").

Because Rule 9(b)'s stated purpose is to assure that a given defendant, upon reading a complaint, will be sufficiently apprised of fraudulent acts upon which he or she is charged, plaintiffs' TACs were patently unable to meet the heightened pleading requirements associated with triggering § 1113's exception. See Neubronner, 6 F.3d at 671 ("'[A]llegations of fraud [must be] specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.'" (quoting Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985))). Therefore, the court properly dismissed plaintiffs' TACs without prejudice. See Sparling v. Hoffman Constr. Co., 864 F.2d 635, 640 (9th Cir. 1988) (even if the factual elements of a cause of action are present but scattered throughout the complaint and not organized into a statement of the claim, dismissal is proper); Silicon Knights, Inc. v. Crystal Dynamics, Inc., 983 F.Supp. 1303, 1314 (N.D. Cal. 1997) (granting a motion to dismiss complaint for failure to plead with particularity under Rule 9(b) "where the alleged fraudulent statements and omissions are scattered throughout the complaint's common factual allegations") (internal quotations omitted).

Contending that plaintiffs have simply re-alleged deficient claims from their TACs, defendants now seek to strike all allegations in the FACs related to the 1999 Transaction. However, heeding the court's prior admonitions, plaintiffs' FACs are considerably more succinct and legible with respect to the 1999 Transaction. Though plaintiffs essentially reassert

the previously-dismissed fraudulent allegations, they have effectively refined their pleadings to elucidate relevant facts and proffer precise evidence of the purported fraudulent activity in a manner that gives defendants Stempinski, Winn, and Zwirner notice of the allegations so as to enable them to defend against the charges. See McCoy v. Cal. Med. Review, Inc., 723 F. Supp. 1363, 1372 (N.D. Cal. 1989) (finding re-organized construction of facts in Second Amended Complaint sufficient under Rule 9(b) where they identify the allegedly fraudulent documents, provide the dates the documents were submitted, and particularly describe each defendant's part in the fraud).

Specifically, the FACs cite essential excerpts from two articles found in Hollister's 1998 and 1999 quarterly newsletters, respectively, that depict alleged misrepresentations aimed at inducing voting support from the employee shareholders prior to implementation of the 1999 Transaction.[4] (Decl. of

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[4] While a court does not generally consider evidence outside the pleadings in support of a motion to strike, Farm Credit Bank of Spokane, 758 F.Supp. at 1371 n. 4, it is allowed to consider materials of which it may take judicial notice. The authenticity of the newsletters is not disputed and plaintiffs rely on them throughout their FACs. See Branch v. Tunne11, 14 F.3d 449, 454 (9th Cir. 1994) (finding that materials may be considered as part of the pleadings "if the complaint specifically refers to the document and if its authenticity is not questioned") overruled on other grounds by Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002). Thus, the court will take judicial notice of the newsletters and properly consider them in the scope of the instant motion.

Scott Hubbard in Opp'n to Defs.' Mot. to Dismiss First Am. Compl. Ex. L.) The 1998 article refers to Winn's "advi[ce that] the [proposed 1999 Transaction] will insure that [Hollister] remains employee owned, private and independent ... as it has been for decades ... and will include a successor entity similar in function and purpose to the [prior trust]." (Id. (quoting Al Herbert Elected to the Board of Directors, 1998 Hollister Highlights 2nd Qtr., Vol. 34, No. 2 at 1).) The 1999 article-authored by Stempinski, Winn, and Zwirner-thanks the employee shareholders for supporting the 1999 Transaction and recounts that "[w]hen we proposed the new Trust to our fellow employee-owners of common shares of [JDS], we advised that we believe the continuation of the independent and employee-owned nature of Hollister, and its governance in accordance with John Schneider's policies and principles, is in the best interests of all Hollister employees." (Id. (quoting A Great Company: An Enduring Company, A Message from Michael C. Winn, Loretta L. Stempinski, and Richard T. Zwirner, 1999 Hollister Highlights 2nd Qrt/Special Ed., Vol. 35, No. 2 at 3).)

This specific evidence-together with plaintiffs' allegations--accurately identifies the time (directly prior to shareholder voting on the 1999 Transaction), place (shareholder meetings and a written proposal to the employee shareholders), specific content (explicit assertions that the 1999 Transaction would further John Schneider's policies and principles in establishing an independent and employee-owned corporation) of the false representations, as well as the identities of the parties to the alleged misrepresentations (Stempinski, Winn, and Zwirner).

Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004). Because plaintiffs have met Rule 9(b)'s particularity requirement with respect to Stempinksi, Winn, and Zwirner's alleged fraud, the statute of limitations may well have been tolled on plaintiffs' § 1113 claims stemming from the 1999 Transaction. Accordingly, the court will deny defendants' motion to strike allegations in plaintiffs' FACs related to the 1999 Transaction that pertain to these three defendants.[5]

Nonetheless, plaintiffs have not met Rule 9(b)'s pleading requirement with respect to the remaining defendants listed in the FACs' § 1113 claims related to the 1999 Transaction--Brilliant, Herbert, Karlovsky, Kelleher, and McCormack. While plaintiffs allege that these defendants made misrepresentations concerning the 1999 Transaction, these allegations lack the requisite particularity and primarily assume guilt based on defendants' fiduciary status. As mentioned above, Rule 9(b) does not allow a complaint to merely lump multiple defendants together. Swartz v. KPMG LLP, 476 F.3d 756, 765 (9th Cir. 2007). Rather, plaintiffs must differentiate their allegations and inform each defendant separately of the particularized allegations and specific evidence surrounding his or her alleged participation in the fraud. Id.

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[5] Stempinski, Winn, and Zwirner in the Defazio FAC; Zwirner in the Ellis FAC.

The FACs are devoid of specific allegations regarding misrepresentations traceable to Brilliant, Karlovsky, Kelleher, or McCormack, and thus allegations against them related to the 1999 Transaction must be stricken. In contrast, the FACs do cite to articles indicating that Herbert--who, in addition to Stempinski, Winn, and Zwirner, was a member of the Hollister Board of Directors during the 1999 Trans-action--believes the 1999 Transaction upheld the principles and policies of John Schneider. (Decl. of Scott Hubbard in Opp'n to Defs.' Mot. to Dismiss First Am. Compl. Ex. L (A Commitment to Continued Success: A Message from Alan F. Herbert, 1999 Hollister Highlights 2nd Qrt/Special Ed., Vol. 35, No. 2 at 4).) However, these alleged sentiments were all expressed following the passing of the 1999 Transaction and thus logically could not have played a role in fraudulently inducing the employee shareholders to support Stempinski, Winn, and Zwirner's written proposal regarding the 1999 Transaction.[6] See Yourish v. Cal. Amplifier, 191 F.3d

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[6] In this respect, plaintiffs' submitted evidence ironically provides a rather exculpatory medium for Herbert. One article after another in the Hollister Newsletters states that the written proposal detailing the 1999 Transaction, as well as its subsequent solicitation, was within the sole control and creative development of Herbert's fellow Hollister Board members-Stempinski, Winn, and Zwirner. (See, e.g., Decl. of Scott Hubbard in Opp'n to Defs.' Mot. to Dismiss First Am. Compl. Ex. L. (Al Herbert Elected to the Board of Directors, 1998 Hollister Highlights 2nd Qtr., Vol. 34, No. 2 at 1) ("Winn advised ... Shareholders that [Herbert's] appointment [to Hollister's Board of Directors] last year allowed [Stempinski, Winn, and Zwirner] to focus on the [1999 Transaction] under development by Loretta

983, 993 (9th Cir. 1999) ("Th[e] falsity requirement can be satisfied by pointing to inconsistent contemporaneous statements ....") (citation omitted) (emphasis added).

Moreover, plaintiffs have failed to plead with particularity that Brilliant, Herbert, Karlovsky, Kelleher, or McCormack took any affirmative steps to conceal any alleged fiduciary breaches. See Ranke v. Sanofi-Synthelabo Inc., 436 F.3d 197, 204 (3d Cir. 2006) (stating that an ERISA fiduciary must "have taken affirmative steps to hide an alleged breach of fiduciary duty from a beneficiary in order for the 'fraud or concealment' exception to apply"). "The fraud or concealment exception applies only when an ERISA fiduciary either misrepresents the significance of facts the beneficiary is aware of (fraud) or ... hides facts so that the beneficiary never becomes aware of them (concealment)." Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1401 (9th Cir. 1995) (quoting Radiology Ctr., S.C. v. Stifel, Nicolaus & Co., 919 F.2d 1216, 1220 (7th Cir. 1990)).

Stempinski, Richard Zwirner and [Winn] ...."); id. (New Trust Established, 1999 Hollister Highlights 2nd Qrt./Special Ed., Vol. 35, No. 2 at 1 ("[B]eliev[ing] that continued independence, employee-ownership, and the adherence to the policies and principles set forth by John Schneider would be in the best interest of Hollister in the future", "Michael C. Winn, Loretta L. Stempinski, and Richard T. Zwirner reduced their thoughts to a written proposal [detailing the 1999 Transaction] which they shared with common shareholders who own shares directly as employees.").

Absent sufficient pleading of fraud on the parts of Brilliant, Herbert, Karlovsky, Kelleher, and McCormack, plaintiffs' § 1113 claims against these defendants fail because they were not brought within the applicable statute of limitations. Accordingly, the court will grant defendants' motion to strike allegations in plaintiffs' FACs related to the 1999 Transaction with respect to these five defendants.[7]

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[7] The court will strike the Defazio FAC as follows: 14:18-24 (Herbert's statements); ¶ 34 (all references to Herbert, Karlovsky, and McCormack); ¶ 40 (reference to Herbert); ¶ 42 (reference to Herbert); ¶ 43 (reference to Herbert but not including article with Winn statement); ¶ 44 (in its entirety); ¶ 51 (reference to Herbert); ¶ 52 (reference to Herbert); ¶ 53 (reference to Herbert); ¶¶ 56-58 (references to Herbert); ¶ 65 (reference to Karlovsky and McCormack); ¶ 71 (second sentence only); ¶ 119 (all references to Brilliant, Karlovsky, Kelleher, and McCormack); ¶ 124 (all references in first half of sentence to Brilliant, Herbert, Karlovsky, Kelleher, and McCormack); ¶ 125 (all references to Herbert, Karlovsky, and McCormack); ¶ 132 (all references in first half of sentence to Brilliant, Herbert, Karlovsky, Kelleher, and McCormack); and ¶ 133 (all references to Herbert, Karlovsky, and McCormack).

The court will strike the Ellis FAC as follows: 10:16-21 (Herbert's statements); ¶ 23 (all references to Herbert, Karlovsky, and McCormack); ¶ 29 (reference to Herbert); ¶ 33 (in its entirety); ¶ 41 (reference to Herbert); ¶ 42 (reference to Herbert); ¶ 77 (all references to Brilliant, Karlovsky, Kelleher, and McCormack); ¶ 82 (all references in first half of sentence to Brilliant, Herbert, Karlovsky, Kelleher, and McCormack); ¶ 83 (all references to Herbert, Karlovsky, and McCormack); ¶ 90 (all references in first half of sentence to Brilliant, Herbert, Karlovsky, Kelleher, and McCormack); and ¶ 91 (all references to Herbert,

2. Non-1999 Transaction Claims Against Stempinski and Winn

Contending that the November 1, 2007 Order's dismissal of claims against them was not restricted to events surrounding the 1999 Transaction, Stempinski and Winn move to strike the Defazio FAC's claims unrelated to the 1999 Transaction on two grounds. First, Stempinski and Winn argue that they effectively delegated their fiduciary status to the Hollishare trustees and therefore have no actual fiduciary relationship to Hollishare for which they could be found liable. Second, even if found to be Hollishare fiduciaries, Stempinksi and Winn next argue by analogy that because the November 1, 2007 Order dismissed the TACs' claims against defendant Fremgen--who, like Stempinski and Winn, was sued in his capacity as a director of JDS and Hollister--plaintiffs likewise cannot state cognizable claims against them in their purported fiduciary capacities.[8]

Karlovsky, and McCormack).

[8] In their prior motions, Stempinski and Winn suggested that neither one had any responsibility for the policies, operations, and administration of Hollishare six years prior to being named in this suit. Ellis v. Hollister, Inc., No. 05-0559, 2006 WL 988529, at *8 (E.D. Cal. Apr. 14, 2006). Based partially on this premise, Judge Karlton dismissed, with prejudice, plaintiffs Dimaro and Lavick's claims against Stempinski (id. at 23:14-15) and Winn based on statute of limitations. (June 27, 2006 Status (Pretrial Scheduling) Conference 10:24-25.)

Judge Karlton initially deferred resolution of defendants' motion to dismiss plaintiffs Dimaro and Lavick's claims

In their capacity as Hollister directors, Stempinski and Winn contend that their core responsibilities revolved solely around the appointment, removal, and monitoring of Hollishare trustees. (Defazio TAC App. Ex. A §§ 11.05, 11.07, 11.11 (Hollishare Employee Ownership Share Trust instrument (the "Hollishare instrument")).) In all other respects, their Hollishare-related responsibilities were purportedly delegated to the appointed trustees in accord with the Hollishare instrument. (Id. Ex. A.) Therefore, under the premise that the Hollister directors retained only minor, post-delegation oversight responsibilities,

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against Winn--along with defendant Herbert and former defendant Donna Matson--therein allowing these plain-tiffs forty-five days to conduct discovery and file another opposition or concession of non-opposition. Ellis, 2006 WL 988529, at *8. Because Dimaro and Lavick failed to file an opposition or request an extension within the forty-five day period set forth in the April 12, 2006 Order, Judge Karlton subsequently granted defendants' motion to dismiss the claims against Winn, Herbert, and Matson. (June 27, 2006 Status (Pretrial Scheduling) Conference 10:24-25.)

However, it has come to this court's attention that Winn and Stempinski were indeed directors of Hollister and thus were "named fiduciaries" of Hollishare, until May 11, 2001--well within ERISA's six year statute of limitations. (See Defs.' Mem. in Opp' n to Pls.' Mot. to Set Aside J. 2:10-15 ("[U]nder the HolliShare Plan documents, members of the Board of Directors of Hollister [including defendants Winn and Stempinski] are designated as "named fiduciaries" of Hollishare ... [a]s such, defendants' statements in their memorandum filed in support of their motion to dismiss were not consistent with the HolliShare plan documents in this respect.").)

Winn and Stempinski argue that they were released from any fiduciary liability with respect to Hollishare. See Madden v. ITT Long Term Disability Plan for Salaried Employees, 914 F.2d 1279, 1283-84 (9th Cir. 1990) (Board of Director's delegee became sole fiduciary when, as expressly authorized in ERISA plan, the Board designated "responsibility for carrying out all phases of the Administration of the Plan") (emphasis added); Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1325 (9th Cir. 1985) (once the employer appointed a plan administrator and gave it total control over the benefit plan, employer was no longer a fiduciary).

The text of the Hollishare instrument, however, explicitly refers to the Hollister directors as "named fiduciaries" and sets forth that "in addition to the duties [i.e., appointment, removal, and monitoring of trustees] imposed on [Hollister] by this Trust, [Hollister] shall also serve as [Hollishare] Administrator and shall, in such capacity, be responsible for carrying out the duties of [Hollishare] and compliance with all applicable law and regulations." (Defazio TAC App. Ex. A, § 11.11.)

Given the Hollishare instrument's plain language, in combination with persuasive congressional intent that the definition of "fiduciary" in ERISA is "to be broadly construed," Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co., 809 F.2d 617, 625 (9th Cir. 1987), the court finds that Hollister's directors--despite delegating substantial authority to the Hollishare trustees--appear to retain a substantive level of fiduciary responsibility which could subject them to liability for breach of that duty.

See Stewart v. Thorpe Holding Co. Profit Sharing Plan, 207 F.3d 1143, 1157 (9th Cir. 2000) (even when a committee or separate entity is named as the plan fiduciary, the corporate officers who continue to carry out fiduciary functions are themselves fiduciaries and cannot be shielded from liability); Kayes v. Pac. Lumber Co., 51 F.3d 1449, 1459-61 (9th Cir. 1995) (rejecting the Third Circuit's approach that relieves individual officers or directors of liability as fiduciaries unless the entity that is anointed plan's fiduciary officially delegates its fiduciary duties back to them).

Plaintiffs' second argument based on the November 1, 2007 Order's dismissal of claims against Fremgen is also unavailing. Specifically, the court dismissed charges against Fremgen because the TACs hastily lumped all of the defendants together, therein failing to identify which defendant committed which alleged breach of fiduciary duty and that said defendant was acting as a Hollishare fiduciary at the time he or she engaged in the alleged activity. (Nov. 1, 2007 Order 24:22-25:2); see also Ariz. State Carpenters Pension Trust Fund v. Citibank, 125 F.3d 715, 719 (9th Cir. 1997) ("Generally, if an ERISA plan expressly provides for a procedure allocating fiduciary responsibilities to persons other than named fiduciaries under the plan, the named fiduciary is not liable for an act or omission of such person in carrying out such responsibility."). Rather, liability under ERISA can be based only upon each defendant's individual fiduciary responsibilities. See Pegram v. Herdrich, 530 U.S. 211, 227 (2000) (pleadings must be parsed very carefully to understand what acts by each person are alleged to

be fiduciary in nature).

In the Defazio FAC, plaintiffs cure these deficiencies by alleging that each director defendant (thus incorporating Stempinski and Winn) committed the purported breaches while explicitly acting within their capacity as "named fiduciaries" of Hollishare as defined by the instrument--i.e., related to their duty to appoint, remove, and monitor Hollishare trustees. See Defazio FAC ¶ 10 ("The Hollister's Board was responsible for appointing and overseeing HolliShare's trustees; and, consequently, had fiduciary responsibilities for [Hollishare]. Even so, they never monitored HolliShare's trustees' performance of its responsibilities; never supplied the trustees with critical adverse information known to them about JDS's financial condition; and never sought to remove HolliShare trustees for failing to discharge their obligations at any time.").) Accordingly, the court will deny Stempinski and Winn's motion to strike plaintiffs' non-1999 Transaction ERISA claims against them in the Defazio FAC.[9]

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[9] In light of Judge Karlton's previous orders, however, plaintiffs Dimaro and Lavick are precluded from pursuing any claims against defendants Winn, Stempinski, and Herbert. (Apr. 12, 2006 Order; June 27, 2006 Status (Pretrial Scheduling) Conference.) While plaintiffs previously filed a motion to set aside these orders under Federal Rule of Civil Procedure 60(b)(3) that motion was clearly time-barred. Specifically, plaintiffs filed their motion to set aside the orders on September 12, 2007, evading the requirement that they bring such motion within one year of Judge Karlton's April 12, 2006 and June 27,

3. Class Action Allegations

It is well established that Federal Rule of Civil Procedure 23 places the burden on the party seeking class certification to allege and thereafter establish "numerosity," "commonality," "typicality," and "adequacy of representation." Fed. R. Civ. P. 23(a); Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1309 (9th Cir. 1977). Plaintiffs' class action allegations in the Defazio FAC meet this burden. (Defazio FAC ¶¶ 13-20.) Defendants nonetheless argue that the Defazio FAC's class action allegations--added for the first time in this version of the Complaint--should be stricken because converting the matter to a class action over three years after these consolidated cases were initially filed "would further delay and complicate this already protracted case." (Defs.' Mem. in Supp. of Mot. to Dismiss 5:5-15.)

2006 Orders dismissing their claims. See Fed. R. Civ. P. 60(c) ("A motion under [Rule 60(b)(3)] must be made ... no more than a year after the entry of the judgment or order or the date of the proceeding."); see also Butz v. Mendoza-Powers, 474 F.3d 1193, 1195 (9th Cir. 2007) (motion to set aside judgment under Rule 60(b)(3) must be brought within one year of the judgment that is being attacked). Thus, this court defers to Judge Karlton's orders dismissing all of Dimaro and Lavick's claims against the aforementioned defendants.

While the court is empathetic to arguments regarding the prolonged nature of this matter, it also recognizes that amendments adding class action allegations "are not normally denied solely on the ground that the new claim was offered late in the case." Henderson v. Nat'l R. Passenger Corp., 117 F.R.D. 620, 622 (N.D. Ill. 1987) (finding that because a stand alone assertion of "undue delay" is unlikely to justify dismissal, plaintiff's addition of class action allegations would be dismissed only where defendant could show that the proposed amendment would cause undue delay and prove futile for failure to meet the requirements for class certification). Moreover, though this case's origins indeed date back over three years, this matter regrettably is still in its early litigious stages. See Contract Buyers League v. F & F Inv., 48 F.R.D. 7, 14 (N.D. Ill. 1969) ("[T]he earlier the stage of the proceeding, the more liberally should the court construe the applicability of Rule 23."). Due to three judicial reassignments as well as four amendments to the Complaints, and the scorched-earth litigation tactics in this case, the parties have only recently been apprised of the Scheduling Order and are not required to make their initial discovery disclosures until later this month. (Feb. 19, 2008 Status (Pretrial Scheduling) Order (setting an April 11, 2008 due date for initial discovery disclosures)); see also Siegel v. Chicken Delight, Inc., 271 F.Supp. 722, 728 (S.D. Cal. 1967) (allowing plaintiffs to add class action allegations because "[t]o rule otherwise at this early stage of the proceedings would be to give credence and substance to factual assertions on the part of the defense which have yet to make their appearance on the judicial stage").

Where the Defazio FAC's class action allegations "address each of the elements of Rule 23, relate to the subject matter of the litigation, and are not redundant, immaterial, or impertinent," the court must find that the allegations--viewed in the light most favorable to plaintiffs--are sufficient to survive a motion to strike. Clark v. State Farm Mut. Auto. Ins. Co., 231 F.R.D. 405, 407 (C.D. Cal. 2005). Whether plaintiffs will be able to succeed on a motion for class certification, however, is an entirely separate matter to be decided at a later date. See Rodriguez v. Cal. Highway Patrol, 89 F.Supp.2d 1131, 1143 (N.D. Cal. 2000) (declining to strike the Complaint's class allegations because "the appropriateness of [the class allegations] will be tested in the context of a motion for certification of the class"). Accordingly, the court will deny defendants' motion to strike the Defazio FAC's class action allegations.

4. Allegations Based on Defendants' Statements in Court Filings

In portions of both FACs, plaintiffs allege that several of defendants' statements made in their court filings throughout the course of this litigation constitute fraudulent misrepresentations that may serve as a separate basis for plaintiffs' ERISA claims. For example, in paragraphs eighty-three through eighty-six of the Defazio FAC, plaintiffs cite to--and reproduce verbatim--large excerpts from arguments that defendants made in past submissions of legal memoranda in an attempt to support plaintiffs' allegations of fraud and concealment. (Defazio FAC ¶¶ 83-86.)

In their opposition to defendants' motion to strike allegations based on these statements, plaintiffs do not (and cannot) provide the court with any support for their distorted argument that statements from legal memoranda may substantiate ERISA claims against defendants in the very same judicial proceeding in which the material was submitted. Foremost, the statements in defendants' filings were not directed to any plan participants and/or beneficiaries, but were instead made to this court in the course of pending litigation. See Lincoln Alameda Creek v. Cooper Indus., Inc., 829 F.Supp. 325, 330 (N.D. Cal. 1992) ("The class of persons entitled to rely upon the representation is restricted to those to whom or for whom the misrepresentations were made."). Thus, if defendants have indeed submitted fraudulent filings, the proper reaction--as opposed to a plaintiffs' improper manufacturing of additional allegations in their FACs--may well be a Rule 11 assessment or a "fraud on the court"[10]

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[10] "'Fraud upon the court' should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Gumport v. China Int'l Trust & Inv. Corp., 926 F.2d 912, 916 (9th Cir. 1991) (citation omitted). Here, a "fraud on the court" inquiry is premature. See Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) ("A court must exercise its inherent powers with restraint and discretion in light of their potency."); Toscano v. Comm'r, 441 F.2d 930, 934 (9th Cir. 1971) (noting that the phrase "fraud on the court" "should be read narrowly, in the interest of preserving the finality of judgments").

inquiry that weighs whether such misconduct "harm[s] ... the integrity of the judicial process." Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989).

Moreover, where plaintiffs' claims arise from defendants' alleged pre-litigation acts or omissions, it is illogical to treat defendants' responses and representations made after plaintiffs' claims were asserted as a basis for the claims themselves. Indeed, once the initial claims of fraud or concealment have been made, plaintiffs can hardly maintain that they are relying to their detriment on defendants' subsequent statements defending against those claims. Accordingly, the court will grant defendants' motion to strike plaintiffs' allegations based on defendants' statements made in court filings.[11]

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[11] The court will strike the Defazio FAC as follows: ¶ 81 ("Nevertheless, the original defendants have continually represented to the Court that no other market for JDS stock existed."); ¶¶ 82-90, 107-08 (in their entirety). The Court will also strike paragraph fifty-six of the Ellis FAC in its entirety.

B. Motion to Dismiss Claims Against Fremgen and Herbert

Defendants also move to dismiss plaintiffs' claims against Fremgen[12] and Herbert. On a motion to dismiss, the court must accept the allegations in the com-plaint as true and draw all reasonable inferences in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). To survive a motion to dismiss, a plaintiff needs to plead "only enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1974 (2007). Dismissal is appropriate, however, where the plaintiff fails to state a claim supportable by a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990); see also Conley v. Gibson, 355 U.S. 41, 47 (1957) (complaint must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests") abrogated on other grounds by Twombly, 127 S.Ct. at 1968.

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[12] While the Defazio FAC reasserts claims against both Fremgen and Herbert, the Ellis FAC omits any reference to Fremgen.

Duplicating the assertions in Stempinski and Winn's above-referenced motion to strike, defendants contend that dismissal of Fremgen and Herbert is warranted because acts taken in their capacity as Hollister directors cannot render them liable for breaches of fiduciary duties in connection with Hollishare--duties which they argue were delegated to the Hollishare trustees. Like Stempinski and Winn, however, defendants overlook the allegation that, as Hollister directors, Fremgen and Herbert remained "named fiduciaries" of Hollishare even after the delegation. In this capacity, Fremgen and Herbert retained the substantial fiduciary duty to appoint, remove, and monitor Hollishare trustees as well as serve as Hollishare administrators charged with the obligation to keep Hollishare compliant "with all applicable law and regulations." (Defazio TAC App. Ex. A, § 11.11.); see also Stewart v. Thorpe Holding Co. Profit Sharing Plan, 207 F.3d 1143, 1157 (9th Cir. 2000) (even when a committee or separate entity is named as the plan fiduciary, the corporate officers who continue to carry out fiduciary functions are themselves fiduciaries and cannot be shielded from liability).

As discussed above, the November 1, 2007 Order dismissed claims against Hollister directors not for a lack of fiduciary responsibilities to Hollishare, but because plaintiffs' TACs carelessly failed to identify which defendant committed which alleged breach of fiduciary duty or allege that a defendant, once identified, was acting as a Hollishare fiduciary at the time he or she committed the breach. (Nov. 1, 2007 Order 24:22-25:2.). See Pegram v. Herdrich, 530 U.S. 211, 227 (2000) (pleadings must be parsed very

carefully to understand what acts by each person are alleged to be fiduciary in nature). Again, the Defazio FAC cures these deficiencies by alleging that each director defendant (including Fremgen and Herbert) committed the purported breaches while explicitly acting within their capacity as a "named fiduciaries" of Hollishare. See Defazio FAC ¶ 10 ("[The Hollister's Board] never monitored HolliShare's trustees' performance of its responsibilities; never supplied the trustees with critical adverse information known to them about JDS's financial condition; and never sought to remove HolliShare trustees for failing to discharge their obligations at any time.").) Accordingly, the court will deny defendants' motion to dismiss plaintiffs' claims against Fremgen and Herbert.[13]

IT IS THEREFORE ORDERED that:

(1) defendants' motion to strike plaintiffs' allegations regarding the 1999 Trans-action with respect defendants Stempinski, Winn, and Zwirner be, and the same hereby is, DENIED;

(2) defendants' motion to strike plaintiffs' allegations regarding the 1999 Trans-action with respect to defendants Brilliant, Herbert, Karlovsky, Kelleher, and McCormack be, and the same hereby

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[13] Because the court granted defendants' motion to strike allegations related to the 1999 Transaction against Herbert, the instant denial of defendants' motion to dismiss claims against Herbert applies only to plaintiffs' non-1999 Transaction claims.

is, GRANTED;

(3) defendants Stempinski and Winn's motion to strike plaintiffs' non-1999 Transaction claims in the Defazio FAC with respect to them be, and the same hereby is, DENIED;

(4) defendants' motion to strike plaintiffs' class action allegations in the Defazio FAC be, and the same hereby is, DENIED;

(5) defendants' motion to strike plaintiffs' allegations based on defendants' statements in the court filings of this case be, and the same hereby is, GRANTED;

(6) defendants' motion to dismiss plaintiffs' claims against defendant Fremgen be, and the same hereby is, DENIED; and

(7) defendants' motion to dismiss plaintiffs' non-1999 Transaction claims against defendant Herbert be, and the same hereby is, DENIED.

Plaintiffs are not specifically invited to amend their complaint yet a fifth time, but if they seek to do so, any fifth amended complaint shall be filed no later than 30 days from the date of this order.

DATED: April 7, 2008.

s/ /

William B. Shubb
United States District Judge