No. 17-55421

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R. ALEXANDER ACOSTA, Secretary of the United States Department of Labor,
Plaintiff-Appellee,

v.

CITY NATIONAL CORPORATION, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:15-cv-03084-TJH-JC

APPELLEE'S ANSWERING BRIEF

KATE S. O'SCANNLAIN
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor
for Plan Benefits Security

THOMAS TSO
Counsel for Appellate
and Special Litigation

JEFFREY M. HAHN
Senior Trial Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave. N.W.
Room N-4611
Washington, D.C. 20210
(202) 693-5695

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF JURISDICTION....................1

STATEMENT OF THE ISSUES....................2

STATEMENT OF THE CASE....................4

A. Factual Background 4

B. The Secretary's Lawsuit 9

C. The District Court's Orders 11

SUMMARY OF THE ARGUMENT 15

ARGUMENT 19

I. STANDARD OF REVIEW 19

II. THE DISTRICT COURT CORRECTLY HELD THAT ERISA SECTION 408(c)(2) DOES NOT EXEMPT TRANSACTIONS PROHIBITED BY SECTION 406(b) 19

A. This Court's Decisions in Patelco and Barboza Foreclose City National's Attempt to Seek Refuge in ERISA Section 408(c)(2)....................20

B. City National's Factual Distinction of Patelco is Irrelevant and Undermined by Barboza 24

III. THE DISTRICT COURT CORRECTLY DETERMINED DAMAGES 25

TABLE OF CONTENTS (continued)

A. The District Court Correctly Refused to Offset City National's Compensation with Post-Hoc Estimates of What it Paid its Employees to Service the Plan........................27

1. The District Court Correctly Placed the Burden on City National to Prove Its Direct Expenses.........................29

2. The District Court Correctly Required City National to Prove What It Paid Its Employees to Service the Plan with Contemporaneous Evidence of "Actually Incurred" Expenses..32

B. The District Court Properly Refused to Offset City National's Compensation with Other Supposed Direct Expenses and Rebates...39

1. The District Court Correctly Held that City National Did Not Establish that It Actually Rebated $290,000 to the Plan..40

2. The District Court Correctly Held that City National Did Not Properly Establish Third-Party Direct Expenses...41

3. The District Court Correctly Held that PTE 77-3 Did Not Permit City National to Keep, as Recordkeeping Compensation, the Revenue Derived From City National's Own Mutual Funds...44

C. The District Court Acted Within Its Discretion in Applying Prejudgment Interest to the Losses Associated with the Secretary's Entire Claim...47

IV. THE DISTRICT COURT CORRECTLY HELD THAT THE SECRETARY'S COMPLAINT WAS TIMELY FILED....................49

TABLE OF CONTENTS (continued)

CONCLUSION 54

STATEMENT OF RELATED CASES

CERTIFICATE OF COMPLIANCE

ADDENDUM

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases:

Barboza v. California Ass'n of Prof'l Firefighters,
799 F.3d 1257 (9th Cir. 2015) .... passim

Bone v. Refco, Inc.,
774 F.2d 235 (8th Cir. 1985) 48

Chevron, USA., Inc. v. Natural Resources Defense Council,
467 U.S. 837 (1984) 24

Cottrill v. Sparrow, Johnson & Ursillo, Inc.,
100 F.3d 220 (1st Cir. 1996) abrogated on other grounds by,
Hardt v. Reliance Standard Life Ins Co.,
560 U.S. 242 (2010) 47, 48

Cutaiar v. Marshall,
590 F.2d 523 (3d Cir. 1979) 25

Daniels v. Nat'l Emp. Benefit Servs., Inc.,
858 F. Supp. 684 (N.D. Ohio 1994) 22

Davidowitz v. Delta Dental Plan of California, Inc.,
946 F.2d 1476 (9th Cir. 1991) 34

Docusign, Inc. v. Sertifi, Inc.,
468 F. Supp. 2d 1305 (W.D. Wash. 2006) 41

Donovan v. Daugherty,
550 F. Supp. 390 (S.D. Ala. 1982) 22

Firestone Tire and Rubber Co. v. Bruch,
489 U.S. 101 (1989) 34

Fluor Corp. v. U.S. ex rel. Mosher Steel Co.,
405 F.2d 823 (9th Cir. 1969) 48

Cases-(continued):

FTC v. Morton Salt Co.,
334 U.S. 37, (1948) 31

Gilliam v. Edwards,
492 F. Supp. 1255 (D. N.J. 1980)..22

Gobeille v. Liberty Mut. Ins. Co.,
136 S.Ct. 936 (2016)...4

Harley v. Minnesota Min. and Mfg. Co.,
284 F.3d 901 (8th Cir. 2002) 21, 24

Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.,
530 U.S. 238 (2000) 19, 25

Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Michigan,
751 F.3d 740 (6th Cir. 2014) cert denied,
135 S.Ct. 404 (2014)... 21, 22

Howard v. Shay,
100 F.3d 1484 (9th Cir. 1996) 31

In re Agricultural Research and Tech. Grp. Inc.,
916 F.2d 528 (9th Cir. 1990) 47

Jesinger v. Nevada Fed. Credit Union,
24 F.3d 1127 (9th Cir. 1994) 34

JG v. Douglas Cty. School Dist.,
552 F.3d 786 (9th Cir. 2008) 41

Kim v. Fujikawa,
871 F.2d 1427 (9th Cir. 1989) .... passim

LaScala v. Scrufari,
96 F. Supp. 2d 233 (W.D.N.Y. 2000) 22

Cases-(continued):

Leimkuehler v. American United Life Ins. Co.,
713 F.3d 905 (7th Cir. 2013) 5

Lockheed Corp. v. Spink,
517 U.S. 882 (1996) 30

Lowen v. Tower Asset Mgmt. Inc.,
829 F.2d 1209 (2d Cir. 1987) 25

M & R Inv. Co., Inc. v. Fitzsimmons,
685 F.2d 283 (9th Cir. 1982) .... passim

Marshall v. Kelly,
465 F. Supp. 341 (W.D. Okla. 1978) 22

Meacham v. Knolls Atomic Power Lab.,
554 U.S. 84 (2008) 31

Nat'l Sec. Sys., Inc. v. Iola,
700 F.3d 65 (3d Cir. 2012) 22, 24, 25

Patelco Credit Union v. Sahni,
262 F.3d 897 (9th Cir. 2001) .... passim

Phillips v. Alaska Hotel and Rest. Empls Pension Fund,
262 F.3d 897 (9th Cir. 2001) .... passim

PM Grp. Life Ins. Co. v. Western Growers Assur. Trust,
953 F.2d 543 (9th Cir. 1992) 34

Salyers v. Metro. Life Ins. Co.,
871 F.3d 934 (9th Cir. 1992) 34

Schikore v. Bank of America Supplemental Ret. Plan,
269 F.3d 956 (9th Cir. 2001) 34

Shaw v. Int'l Ass'n of Machinists and Aerospace Workers Pension Plan,
750 F.2d 1458 (9th Cir. 1985) 47, 48

Cases (continued):

Smith v. Clark Cnty. Sch. Dist.,
727 F.3d 950 (9th Cir.2013) 19

Socony Mobil Oil Co. v. Klapal,
205 F. Supp. 388 (D. Neb. 1962) 49

Tibble v. Edison Int'l,
843 F.3d 1187 (9th Cir. 2016)(en banc), abrogated on other grounds,
135 S.Ct. 1823 (2015) 18, 26, 52, 53

United States v. State of Wash.,
872 F.2d 874 (9th Cir. 1989) 21

Wright v. Ore. Metallugical Corp.,
360 F.3d 1090 (9th Cir 2004) 53

Wildman v. American Century Servs, LLC,
237 F. Supp. 3d 902 (W.D. Mo. 2017) 45

Ziegler v. Conn. Gen. Life Ins. Co.,
916 F.2d 548 (9th Cir. 1990) 50

Federal Statutes:

Internal Revenue Code (Title 26):

I.R.C. § 6621 (2012) 13

Employee Retirement Income Security Act of 1974, (Title I),
as amended, 29 U.S.C. § 1001 et seq.:

Section 4(a)(3), 29 U.S.C. § 1023(a)(3) 43

Section 404(a), 29 U.S.C. § 1104(a) 19

Section 404(a)(1), 29 U.S.C. § 1104(a)(1) 2

Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) 10, 11, 16

Federal Statutes-(continued):

Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) 10, 12, 16, 50

Section 406, 29 U.S.C. § 1106 .... 44, 51

Section 406(a), 29 U.S.C. § 1106(a) 16, 20

Section 406(b), 29 U.S.C. § 1106(b) .... passim

Section 406(b)(1), 29 U.S.C. § 1106(b)(1)... passim

Section 406(b)(2), 29 U.S.C. §1106(b)(2)...9, 12

Section 408, 29 U.S.C. § 1108 .... 21, 23, 31

Section 408(a), 29 U.S.C. § 1108(a) 44, 45

Section 408(b)(19), 29 U.S.C. § 1108(b)(19) 23

Section 408(c), 29 U.S.C. § 1108(c) 20, 22, 23, 35

Section 408(c)(2), 29 U.S.C. § 1108(c)(2) .... passim

Section 408(c)(3), 29 U.S.C. § 1108(c)(3) 22

Section 408(f), 29 U.S.C. § 1108(f)...23

Section 409(a), 29 U.S.C. § 1109(a) 25, 29

Section 413(1), 29 U.S.C. § 1113(1) .... passim

Section 413(2), 29 U.S.C. § 1113(2) 51, 52

Miscellaneous:

Fed. R. App. P. 12.1 ....2 n.1

Fed. R. App. P. 35(a)(1)..21

Fed. R. Civ. P. 62 ....2 n.1

Miscellaneous-(continued):

29 C.F.R. § 2550.408b–2 26

29 C.F.R. § 2550.408b–2(a) 24

29 C.F.R. § 2550.408c-2(b)(2) 23 n.6,

29 C.F.R. § 2550.408c-2(b)(3) 36

29 C.F.R. § 2550.408c-2(b)(4) 38

29 C.F.R. § 2550.408c-(2) 6 n.4, 35

29 C.F.R. § 2550.408c-2(a) 23 n.6, 24

41 Fed. Reg. 54080-81 (Dec. 10, 1976) 45

42 Fed. Reg. 18734-35 (Apr. 8, 1977) 54

Dep't of Labor, Adv. Op. 2013-03, 2013 WL 3546834 (July 3, 2013) 6 n.4

Dep't of Labor, Adv. Op. 97-19A, 1997 WL 540069 (August 28, 1997) 26

Dep't of Labor, Adv. Op. 93-06A, 1993 WL 97262 (Mar. 11, 1993) 36

Dep't of Labor, Adv. Op. 80-58A, 1980 WL 8955 (Oct. 1, 1980) 36, 37

STATEMENT OF JURISDICTION

The Secretary agrees with the Statement of Jurisdiction set forth in Appellants' Opening Brief.

STATEMENT OF THE ISSUES

The district court ruled that Appellants City National Corporation and various of its employees and subsidiaries, as fiduciaries of the City National Corporation Profit Sharing Plan, engaged in self-dealing prohibited by section 406(b) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1106(b), when they unilaterally set and approved the fee payable to one of the City National subsidiaries to serve as the Plan's recordkeeper, and when the subsidiary regularly accepted that fee as compensation for its services. The court also ruled that by failing to track the expenses the subsidiary incurred servicing the Plan, and by failing to refund the Plan after determining the subsidiary had charged it an excessive fee, Appellants breached their fiduciary duties of loyalty and prudence in violation of ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1). The court ordered Appellants to return to the Plan the illegal compensation paid to the subsidiary, plus interest, from which the court then deducted certain offsets to which the Secretary agreed. The only issues on appeal are: [1]

---

[1] The Secretary and Appellants filed a joint motion in the district court under Federal Rule of Civil Procedure 62 for an indicative ruling to dismiss four individual co-defendants, Richard Bloch, Kenneth Coleman, Bruce Rosenblum, and Robert Tuttle. The parties also jointly filed notice of this motion with this Court. Dkt. No. 26. If and when the district court indicates that, upon a remand by this Court, it would grant the motion and dismiss the four individual defendants, the parties will request that this Court remand the case for that limited purpose, with this Court retaining jurisdiction in the meantime. See Fed. R. App. P.12.1

1. Whether the prohibited-transaction exemption in ERISA section 408(c)(2), 29 U.S.C. § 1108(c)(2), excuses Appellants' violations of section 406(b), even though this Court held in Patelco Credit Union v. Sahni, 262 F.3d 897, 911 (9th Cir. 2001), and Barboza v. California Ass'n of Professional Firefighters, 799 F.3d 1257, 1269 (9th Cir. 2015), that section 408(c)(2) does not exempt section 406(b) violations.

2. Whether the district court correctly refused to offset Appellants' liability to return all of their illegal compensation by certain expenses Appellants claim that they "actually incurred" on the Plan's behalf, where those expenses were either based on speculative retrospective estimates, not specifically tied to the Plan, or not interrelated with the acts giving rise to their ERISA violations.

3. Whether the district court acted within its discretion in calculating prejudgment interest on the entirety of Appellants' illegal compensation, rather than on the balance of their compensation after deducting offsets, where those offsets were collateral to Appellants' illegal compensation.

4. Whether the district court correctly held that the Secretary's Complaint was not barred by ERISA's six-year time limit in section 413(1), 29 U.S.C. § 1113(1).

STATEMENT OF THE CASE

A. Factual Background

The City National Corporation Profit Sharing Plan ("Plan") is a defined-contribution 401(k) plan for employees of City National Corporation ("CNC") and is subject to Title I of ERISA. Supplemental Excerpts of Record ("SER"):105. CNC is the Plan's sponsor, Administrator, and one of its named fiduciaries. SER:105-06. The Plan's trustee is City National Bank ("CNB"), a subsidiary of CNC, and also a Plan fiduciary. SER:106; 10ER:2323. This brief refers to CNC and CNB as "City National."

One of the service providers to a large retirement plan is a recordkeeper, a role "central to, and an essential part of, the uniform system of plan administration contemplated by ERISA." Gobeille v. Liberty Mut. Ins. Co., 136 S.Ct. 936, 945 (2016). Prior to 2000, an outside entity, Plan Member Services, was the Plan's recordkeeper. 10ER:2331. In April 2000, however, CNC's Benefits Committee decided to switch to an "in house" recordkeeper: CNB. 10ER:2331; SER:107; 8ER:1822-29. In a Professional Services Agreement between CNC and CNB effective April 1, 2000, CNB "agree[d] to provide certain recordkeeping services with respect to the [Plan]," including generating participant account statements, processing participant investments and withdrawals, and processing contributions to the Plan. 8ER:1822-24.

City National compensated itself for its recordkeeping services through a process called "revenue sharing"—i.e., by sharing in the revenue earned by the mutual funds offered to the Plan's participants. SER:27, 107, 112. The mutual funds charged the Plan a certain number of basis points (or percentage) of the value of the Plan's investments in a specific mutual fund. 10ER:2340-41; Appellants' Br. 6; SER:112. This is often referred to as the mutual fund's "expense ratio." "Because a portion of a mutual fund's expense ratio is typically intended to cover the costs of providing [] participant-level services," if those services (like recordkeeping) are provided by an entity other than the mutual fund company, "the mutual funds are willing to pay some of these fees to [the service provider]." Leimkuehler v. American United Life Ins. Co., 713 F.3d 905, 909 (7th Cir. 2013). This is what happened here: City National assumed the responsibility for the Plan's recordkeeping by selecting itself (CNB) to provide that service, and through its contracts with the mutual funds, "shared" a portion of the mutual funds' fees charged to the Plan. Id. In practice, the mutual fund companies simply wired CNB its share of the mutual fund revenue, usually on a monthly basis, and in a largely automated process. 10ER:2343-47; 7ER:1469.[2] This occurred throughout the 2006-2011 period. 10ER:2308-09.[3]

[2] In 2008, City National hired Fidelity to execute and settle mutual fund trades for its ERISA plan clients. 10ER:2347. Even after hiring Fidelity, however, City

At the same time it was serving as the Plan's recordkeeper, CNB also was providing recordkeeping services to over 200 other ERISA plans. 10ER:2330-31; SER:23. However, CNB had no system in place to track how much time its employees spent servicing the CNC Plan as compared to the hundreds of other plans it serviced. 10ER:2373-74; SER:46. CNB also did not need to provide proof of its direct expenses incurred in servicing the Plan in order to receive its recordkeeping fees. SER:25. As a result, when CNB took its monthly fee, it did so without any idea of how much it had actually expended on the Plan's behalf that month.[4]

National still was paid through mutual-fund revenue sharing, which still was a largely automated process. 10ER:2349-50.

[3] The time period at issue in the Secretary's Complaint is 2006-2012. 9ER:2239, n.2.

[4] City National did not dispute below, and does not dispute here, that the illegal compensation it received for its recordkeeping services was Plan assets. See 9ER:2252; 7ER:1590-1619 (City National's summary judgment opposition). The Secretary notes that merely because revenue sharing generated by a plan investment may be used to pay plan service providers for their services does not automatically convert the revenue sharing payments into plan assets. See DOL Advisory Opinion No. 2013-03, 2013 WL 3546834 (July 3, 2013). We also note, however, that a violation of section 406(b) of ERISA occurs with respect to the self-selection by a fiduciary, such as City National, to receive compensation for services (and the on-going receipt of that compensation) beyond its direct expenses, as defined in 29 CFR 2550.408(c)(2), irrespective of the status of revenue sharing as plan assets.

CNC's Benefits Committee, the members of which were salaried CNB employees and individual co-defendants in this action, met periodically to review the Plan's fee structure. SER:108. At its February 19, 2008 meeting, Benefits Committee member Michael Nunnelee observed that City National's service-provider fees for the Plan "may be high." SER:79. Accordingly, on May 6, 2008, the Benefits Committee reduced the Plan's fees paid to City National for recordkeeping to 26 basis points of Plan assets going forward, SER:109, but did not rebate the Plan the amounts City National previously received that exceeded 26 basis points. Id.; SER:85. And at the April 27, 2009 Benefits Committee meeting, Tom McNair, then-head of City National's recordkeeping department, indicated that "the Plan's fees are at the high end of the market." SER:89, 109. The Benefits Committee later approved a further two basis point fee reduction at its July 21, 2009 meeting, which the minutes describe as "bring[ing] the plan into line with third party vendors." SER:94-95, 109. Again, the Committee did not authorize a retroactive refund to the Plan. SER:109.

In July 2009, the Department of Labor's Employee Benefits Security Administration notified City National that it was investigating the company for possible ERISA violations relating to the Plan. SER:102. In October 2010, City National retained Mercer Consulting ("Mercer") to conduct a review of the Plan. SER:109. Mercer provided City National with its analysis on December 10, 2010.

8ER:1864-1988. It found that "Administrative fees for the Plan"—which by that point were 21 basis points —"are higher than those we found in a survey of our comparably sized clients." 8ER:1903. In fact, according to Mercer, other financial service firms like City National charged only 10 basis points on average for administrative services. Id. Most importantly, Mercer reported that "[n]one of Mercer's clients or affiliates which provide recordkeeping services to their own plans do so for a profit; they solely charge direct expenses back to the plans." Id. After receiving the Mercer report, City National did not retroactively refund the Plan for any recordkeeping fees it previously received. SER:109.

In January 2011, roughly one month after receiving Mercer's report, City National decided it "need[ed] to go through the exercise of determining our cost of supplying services to the CNC Plan." SER:98. Because City National did not have any employees who were exclusively dedicated to servicing the Plan (their work was instead spread across some number of the 200-plus plans serviced by City National), SER:108; 10ER:2363, 2380, and because it did not keep contemporaneous employee time records, 10ER:2373-74, City National had to devise a method to reconstruct how much time its employees spent on Plan-related work, and how much of their salary and benefits should be attributed to the Plan as a result. The method City National chose was to estimate retrospectively years later the amount of time it took to complete a given recordkeeping task; ascertain

all of the tasks that its employees performed for the Plan in a given year (by, among other things, mining archived email); and then determine the Plan's share of employee salaries commensurate with City National's Plan-related work. 10ER:2364-67. This was challenging because, as one of the individuals who helped ascertain City National's direct costs testified, "most" of the "records that were kept when an expense was incurred relating to the Plan" were "reconstructed after the fact." 7ER:1663.

Finally, in the fourth quarter of 2011, City National decided to stop revenue sharing, and thus stopped charging recordkeeping fees to the Plan. 10ER:2361-62.

B. The Secretary's Lawsuit

Between September of 2011 and February of 2015, the Secretary and City National entered into a series of five agreements to toll ERISA's time limits for a prospective ERISA action by the Secretary against City National. See 7ER:1568-89.

On April 24, 2015, the Secretary filed his Complaint against City National. 10ER:2461-77. The Secretary alleged that by setting and approving its own recordkeeping fees and regularly receiving those fees as compensation, City National violated ERISA's rules prohibiting self-dealing and acting in a transaction on behalf of a party adverse to the Plan, 29 U.S.C. § 1106(b)(1), (2). 10ER:2466-72. The Secretary also alleged that by failing to track its direct expenses incurred

in servicing the Plan and failing to refund the Plan for the excessive fees paid to City National, City National violated ERISA's fiduciary duties of prudence and loyalty, 29 U.S.C. § 1104(a)(1)(A), (B). 10ER:2466-72.

During the course of litigation, in an effort to show that its compensation did not exceed the direct expenses it incurred on the Plan's behalf, City National retained Basil Imburgia, a putative expert in financial accounting, to "offer an opinion and supporting analyses on the direct expenses [] incurred by [City National] in providing recordkeeping and administrative services to the [Plan] from 2006 to 2011." 8ER:1792-93. In his putative expert report (the "Imburgia Report"), Mr. Imburgia explained that the "vast majority" of the Plan's direct expenses comprised the salaries, bonuses, and benefits that City National paid its employees in the Retirement Services Division (the division responsible for recordkeeping) who serviced the Plan. 8ER:1800-01.

To calculate these expenses, Mr. Imburgia first determined the "total Direct Expenses [] applicable to all plans serviced by the Retirement Services Division," and then "multiplied the yearly totals by the percentage of participants in the Plan, relative to the total number of participants serviced by the Retirement Services Division for each given year." 8ER:1802. In other words, to determine the Plan's direct expenses for a given year, Mr. Imburgia simply (a) determined the total amount of expenses City National incurred servicing all of its 200-plus plan

clients; (b) divided the number of participants in the CNC Plan by the total number of participants serviced by City National across all plans; and (c) and then multiplied (a) times (b). Id.

C. The District Court's Orders

The district court issued two orders relevant to this appeal: (1) an April 5, 2016, order granting the Secretary's motion for partial summary judgment on liability and ordering an independent accounting of City National's Plan-related revenue, see 1ER:8-13; and (2) a February 8, 2017 order granting the Secretary's summary judgment motion on damages, see 1ER:1-7.

In its liability order, the court ruled, as a threshold matter, that the Secretary's claims were timely filed under ERISA's six-year time limit, 29 U.S.C. § 1113(1). The court explained that the "Secretary's claims relate to City National's administration of the Plan from 2006 through 2012," and noted that "the parties signed annual tolling agreements starting in 2011, and ending in 2015." 1ER:9. On this basis the court concluded that the Secretary's claims are not time-barred. Id.

The court held that City National, including the Benefits Committee members, breached its duty of loyalty under ERISA section 404(a)(1)(A) because "it received compensation from the Plan in a mostly automated process without tracking direct expenses . . . such that City National could not ensure that it was

receiving reimbursement for no more than direct expenses." 1ER:10. Based on that conduct—as well as City National's "acceptance of fees from the Plan without any review or independent investigation into the reasonableness of those fees, and the failure to reimburse the Plan upon discovery of the unreasonably high fees"—the court held City National breached its duty of prudence under ERISA section 404(a)(1)(B). Id.

The district court further held in its liability order that by hiring "its own subsidiary to administer the Plan" and setting its own fee, City National and the Benefits Committee members engaged in prohibited self-dealing in violation of ERISA section 406(b)(1). 1ER:11. The court also concluded that City National and the Benefits Committee members violated the separate prohibition in ERISA section 406(b)(2) on fiduciaries acting in transactions on behalf of parties (in this case, itself) whose interests are adverse to the Plan. 1ER:11-12.[5] The court rejected City National's argument that its self-dealing was excused by ERISA section 408(c)(2), 29 U.S.C. § 1108(c)(2)—which allows a fiduciary to receive from a plan "reasonable compensation" for services rendered and reimbursement for "expenses properly and actually incurred"—based on this Court's decision in Patelco Credit Union v. Sahni, 262 F.3d 897, 911 (9th Cir. 2001), which held that

[5] City National does not appeal the district court's ruling that the Benefits Committee members were conflicted and acted disloyally.

the section 408(c)(2) exemption does not apply to section 406(b) violations. 1ER:12. The district court ultimately "ordered that City National, with the assistance of an independent fiduciary, perform an accounting of [sic] all of the compensation it received, in the form of mutual fund revenue for the Plan, plus lost opportunity cost." 1ER:13.

City National retained Evercore Trust Company ("Evercore") to perform this court-ordered accounting. Appellants' Br. 19. On August 15, 2016, Evercore issued its report. See 7ER:1464-71. It determined that City National received $4,647,090.27 in revenue sharing payments from 2006-2012. 7ER:1476. Evercore then calculated the Plan's lost opportunity costs—that is, the money the Plan would have earned had the Plan, and not City National, received these revenue sharing payments and invested the proceeds—based on two alternative interest rates: the rate of return that the Plan experienced over the relevant time period ("Plan ROR"), and the interest rate on amounts a fiduciary voluntarily agrees to return to a plan under the Department of Labor's Voluntary Fiduciary Correction Program ("VFCP"), 7ER:1470, which is the rate found at Internal Revenue Code § 6621. 65FR 14171. Evercore determined that the Plan's total losses (inclusive of lost opportunity costs) were $8,185,596.13 using the Plan ROR, and $6,061,101.19 using the VFCP rate. 7ER:1471.

On February 8, 2017, the district court granted the Secretary's motion for summary judgment on damages. Citing Kim v. Fujikawa, 871 F.2d 1427, 1431 (9th Cir. 1989), the district court said that the measure of damages when a fiduciary commits a prohibited transaction is the "'entire cost' of the prohibited transaction," which was all of the illegal compensation received by City National. 1ER:3. To determine lost opportunity costs, the court used the Plan ROR, and not the lower VFCP rate, because the Plan ROR was more likely to compensate the Plan for City National's self-dealing, and because City National's misconduct spanned over a decade. 1ER:3-4.

As to City National's contention that any damages award should be offset by certain expenses it allegedly incurred on the Plan's behalf, the district court, again citing Kim, said that any such expenses were City National's burden to prove, and that any doubts associated with prohibited-transaction-related damages must be resolved in the Secretary's favor. 1ER:4; Kim, 871 F.2d at 1430-31 (resolving doubts in plaintiff's favor where a prohibited transaction has been proven "avoids the unfair result of depriving the [plaintiff] of any recovery simply because the defendants have made it difficult to disentangle the prohibited transaction.").

Against that backdrop, the district court refused to credit City National's evidence (the Imburgia Report) of the salaries it supposedly paid its employees for their Plan-related work because it was based on after-the-fact "estimates or

averages," and did not show that the expenses were "actually incurred by the Plan." 1ER:4. This same problem plagued City National's request to offset certain rebate payments supposedly made to the Plan, and certain expenses it incurred on the Plan's behalf. 1ER:5. As to City National's $32,500 payment to KPMG in 2006 related to a Plan audit, the court reasoned that because the audit concerned the 2005 Plan year—which was outside the 2006-2012 time period at issue in the Secretary's Complaint—it also should not be used to offset damages. Id. With no objection from the Secretary, the district court did, however, credit City National with $818,214 in rebates it paid to the Plan and documented expenses it incurred. Id.

Thus, relying on the Evercore report, the district court agreed with the damages amount of $8,185,596.13, which included City National's illegal compensation plus lost opportunity costs based on the Plan's rate of return. The district court then deducted from that total amount the offsets ($818,214) the Secretary did not oppose. The district court awarded damages in the amount of $7,367,382.13 (i.e., $8,185,596.13 minus $818,214). 1ER:6-7.

SUMMARY OF ARGUMENT

City National does not dispute that it engaged in transactions prohibited by ERISA section 406(b). City National also does not dispute the district court's ruling that, by accepting its recordkeeping fee without any idea of the costs it

incurred servicing the Plan, and by failing to refund the Plan after determining its fee was too high, City National breached its fiduciary duties of prudence and loyalty in violation of ERISA sections 404(a)(1)(A), (B).

1. Instead, City National contends that it is excused from section 406(b) liability by the exemption in ERISA section 408(c)(2), which permits an ERISA plan to pay its fiduciary "reasonable compensation." 29 U.S.C. § 1108(c)(2). But this Court long ago held that the section 408(c)(2) exemption applies only to transactions otherwise prohibited by section 406(a), and does not excuse self-dealing transactions barred by section 406(b), like the kind City National engaged in here. Patelco Credit Union v. Sahni, 262 F.3d 897, 911 (9th Cir. 2001). City National tries to limit Patelco to its facts by claiming that Patelco only denied section 408(c)(2) relief for self-dealing transactions in which a fiduciary received kickbacks, put Plan assets in his personal account, or committed fraud. But that contention runs headlong into this Court's opinion in Barboza v. California Ass'n of Professional Firefighters, 799 F.3d 1257, 1269 (9th Cir. 2015), which refused to apply the section 408(c)(2) exemption to a transaction prohibited by section 406(b) that had no such indicia of illegitimacy.

2. With no credible basis to question the Court's liability ruling, City National spends the bulk of its brief contesting the relief awarded to the Secretary. City National contends the district court should have offset its responsibility to

return the full amount of its illegal compensation by its putative expert's post-hoc estimate of what City National paid its employees to service the Plan. Where a self-dealing fiduciary seeks to offset its illegal compensation with its plan-related direct expenses, the fiduciary must first prove it actually incurred the expense in servicing the plan. City National did not meet this threshold proof requirement. As the district concluded and as City National concedes, City National did not even attempt to track how much of its employee salaries were attributable to Plan-related work—i.e., the salaries it "actually incurred" on the Plan's behalf—and it made no contemporaneous attempt to reconcile these employee expenses with its recordkeeping compensation. If a fiduciary could simply hire an accountant to reconstruct its expenses years later—based on guesswork and crude arithmetic and without the benefit of any contemporaneous records—and use the results to offset its liability for illegal compensation, it would fatally undermine ERISA's categorical prohibition on self-dealing. That prohibition also would be undermined if the district court were to have credited the other offsets City National sought, which relate to "third party" expenses like printing and mailing costs where there is no evidence that those expenses were actually incurred by City National in providing recordkeeping services to the Plan.

3. City National contends the district court should have calculated prejudgment interest on City National's liability for losses after allowed offsets

were subtracted from that liability, rather than before. Because those offsets were not directly tied to the prohibited transactions City National committed, the district court acted well within its discretion in applying pre-judgment interest to the entire claim, rather than on the balance after offsets.

4. Finally, City National seeks salvation in ERISA section 413(1), which requires a plaintiff to file suit six years from the last act constituting the "breach or violation." 29 U.S.C. § 1113(1). City National erroneously claims that the "breach or violation" that started the six-year clock was its execution of the Professional Services Agreement in April 2000 (more than six years before the parties executed their first tolling agreement), and that it cannot be held responsible for any illegal compensation it received from 2006 onward. The Secretary's claims, however, are based upon the fiduciary breaches and prohibited transactions committed by City National from 2006-2012—not the initial execution of the Professional Services Agreement. This Court has made clear that where there is a series of related breaches, each successive breach can re-start the six-year clock in ERISA section 413(1). See Tibble v. Edison Int'l, 843 F.3d 1187 (9th Cir. 2016) (en banc). Because the Secretary and City National executed tolling agreements beginning in 2011, the Secretary's claims were timely under ERISA's six-year limitations period.

ARGUMENT

I. STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed de novo. Smith v. Clark Cnty. Sch. Dist., 727 F.3d 950, 954 (9th Cir. 2013).

II. THE DISTRICT COURT CORRECTLY HELD THAT ERISA SECTION 408(c)(2) DOES NOT EXEMPT TRANSACTIONS PROHIBITED BY SECTION 406(b)

"Responding to deficiencies in prior law regulating transactions by plan fiduciaries," Congress enacted section 406 of ERISA, "which supplements the fiduciary's general duty of loyalty to the plan's beneficiaries, section 404(a), by categorically barring certain transactions deemed 'likely to injure the pension plan.'" Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 242 (2000) (citation omitted). "The result is a broad per se prohibition of transactions ERISA implicitly defines as not arm's-length." M & R Inv. Co., Inc. v. Fitzsimmons, 685 F.2d 283, 287 (9th Cir. 1982). One such per se prohibited transaction, specified in section 406(b)(1), prohibits a fiduciary from "self-dealing . . . by paying itself from plan funds." Barboza v. California Ass'n of Prof. Firefighters, 799 F.3d 1257, 1269 (9th Cir. 2015).

City National does not dispute that it engaged in prohibited self-dealing in violation of section 406(b) when, as the district court wrote, City National "entered into a professional servicing agreement with its own subsidiary to

administer the Plan," which "provided that City National could determine [its] 'reasonable fee' collected from the Plan's funds," and then proceeded to pay itself over the ensuing decade. 1ER:10. Instead, City National relies on ERISA section 408(c)(2), which says that "nothing in section [406] shall be construed to prohibit any fiduciary from" receiving "reasonable compensation." 29 U.S.C. § 1108(c)(2); see Appellants' Br. 51. As City National acknowledges, however, this Court long ago held that section 408(c)(2) does not excuse section 406(b) self-dealing violations, but instead can only excuse violations of section 406(a). Patelco Credit Union v. Sahni, 262 F.3d 897, 911 (9th Cir. 2001); Appellants' Br. 51. Nevertheless, City National re-argues binding precedent and tries to limit Patelco to its facts. As explained below, its legal arguments are meritless, and its distinction of Patelco is one without a difference.

A. This Court's Decisions in Patelco and Barboza Foreclose City National's Attempt to Seek Refuge in ERISA Section 408(c)(2)

In Patelco, this Court held unequivocally that "the reasonable compensation provision [of section 408(c)(2)] does not apply to fiduciary self-dealing" prohibited by section 406(b). 262 F.3d at 911. This Court reiterated its holding in Barboza v. California Ass'n of Prof. Firefighters, 799 F.3d 1257, 1269 (9th Cir. 2015). It again held that the "exemption for reasonable compensation under 29 U.S.C. § 1108(c) does not apply . . . to a fiduciary who engages in a prohibited transaction under 29 U.S.C. § 1106(b)(1) by paying itself from the assets of a welfare benefit

plan." Id. As the Court explained, "while a plan may pay a fiduciary 'reasonable compensation for services rendered' under [section 408(c)(2)]," "the fiduciary may not engage in self-dealing under 29 U.S.C. § 1106(b) by paying itself from plan funds." Id. (emphasis added).

Although City National "recognize[s] that the Panel is bound by Patelco and by Barboza," it nevertheless argues that Patelco "is wrongly decided and should be reviewed en banc." Appellants' Br. 51. Of course, a panel of this Court may not overturn the decision of an earlier panel "unless an en banc decision, Supreme Court decision, or subsequent legislation undermines those decisions." U.S. v. State of Wash., 872 F.2d 874, 880 (9th Cir. 1989). City National has not identified any such decision or legislation as having undermined Patelco.

City National likewise fails even to grapple with, much less satisfy, the standard for granting en banc review. Fed. R. App. Pr. 35(a). The best City National can muster is to point to a lone decision from a sister circuit that disagreed with Patelco. See Appellants' Br. 61-63 (discussing Harley v. Minnesota Min. and Mfg. Co., 284 F.3d 901, 908-909 (8th Cir. 2002)). But it is the Eighth Circuit that is the outlier, not this Court. Indeed, "the majority of courts that have examined this statutory interpretation issue have held that § 1108 applies only to transactions under § 1106(a), not § 1106(b)." Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich., 751 F.3d 740, 750 (6th Cir. 2014), cert. denied, 135 S.Ct.

404 (2014); see, e.g., Nat'l Sec. Sys., Inc. v. Iola, 700 F.3d 65, 93–96 (3d Cir. 2012); Chao v. Linder, 421 F.Supp. 2d 1129, 1135–36 (N.D. Ill. 2006); LaScala v. Scrufari, 96 F. Supp. 2d 233, 238 (W.D.N.Y. 2000); Daniels v. Nat'l Emp. Benefit Servs., Inc., 858 F. Supp. 684, 693 (N.D. Ohio 1994); Donovan v. Daugherty, 550 F. Supp. 390, 404 n.3 (S.D. Ala. 1982); Gilliam v. Edwards, 492 F. Supp. 1255, 1262 (D. N.J. 1980); Marshall v. Kelly, 465 F. Supp. 341, 353 (W.D. Okla. 1978).

They have done so for good reason. While ERISA section 408(c)(2) may allow a fiduciary to receive reasonable compensation, that does not mean the fiduciary may establish that compensation, which the statute unambiguously prohibits. See 29 U.S.C. § 1106(b)(1). Read as a whole, ERISA section 408(c) functions as a series of assurances to fiduciaries that they may still retain other roles with respect to the plan and be reasonably compensated for their service as a fiduciary. They may still receive benefits as plan participants (section 408(c)(1)), receive reasonable compensation for services rendered and reimbursement for direct expenses (section 408(c)(2)), and be officers or employees of parties-in-interest to the plan, such as the plan's sponsor (section 408(c)(3)). 29 U.S.C. § 1108(c)(1)-(3). It does not follow, however, that because fiduciaries may receive reasonable compensation, they may also set the compensation themselves.

On its face, section 408(c)(2) speaks to the amount of compensation a fiduciary may receive (a "reasonable" amount); it does not speak to the manner in

which that compensation is determined, an issue that is separately addressed in the provisions of ERISA section 406(b)(1) that were violated here. Appellants' interpretation effectively reads the self-dealing prohibitions out of ERISA. Put differently, section 408(c) does not license a fiduciary to self-deal any more than a law entitling a bank officer to reasonable compensation authorizes him to draw that pay by robbing the bank. For this reason the Department of Labor, since shortly after the statute was enacted, has interpreted ERISA section 408(c)(2) as not providing for an independent exemption from the prohibitions imposed by ERISA section 406(b), and that interpretation has been endorsed by this Court and left undisturbed by Congress.[6]

City National identifies two section 408 exemptions that expressly extend to section 406(b)(2) violations, sections 408(b)(19) and 408(f). See Appellants' Br. 58. According to City National, these exemptions undermine the notion that section 408 "never applies to [section 406(b)] claims." Id. This Court in Patelco, however, did not hold that "section 408" can "never" apply to section 406(b) violations. It merely held, consistent with its statutory construction and the

---

[6] See 29 C.F.R. 2550.408b-2 ("[S]ection 408(b)(2) does not contain an exemption from acts described in section 406(b)(1) of the Act"); 29 C.F.R. 2550.408c-2(a) (explaining that Section 408(c)(2) and its implementing regulation "clarify what constitutes reasonable compensation for such services" specified in section 408(b)(2)).

Secretary's regulations, that section 408(c)(2) specifically does not exempt such violations. See Patelco, 262 F.3d at 911; 29 C.F.R. § 2550.408b–2(a); 29 C.F.R. § 2550.408c-2(a). Because the Department's rules were promulgated after notice and comment (and public hearings), they should be upheld so long as Congress has not clearly expressed an intent to the contrary and they permissibly interpret ERISA. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984). In short, not only are Appellants' arguments foreclosed by precedent, they are also meritless.

B. City National's Factual Distinction of Patelco is Irrelevant and Undermined by Barboza

Finally, City National seeks to limit Patelco to its facts and contends that the facts in Patelco are "distinguishable" from those here. Appellants' Br. 51. According to City National, the fiduciary defendants in Patelco, as well as the defendants in the other two circuit court cases that agreed with Patelco (the Third Circuit in Iola and the Sixth Circuit in Hi-Lex), "received kickbacks from third parties, placed plan funds in a personal account . . . or committed fraud." Id. at 62. In contrast, City National says it "received compensation from a plan for legitimate services rendered," just like the fiduciary defendant in Harley (the Eighth Circuit case that diverged from Patelco). Id. at 61-62.

This is a red herring. Section 406(b) does not prohibit only those self-dealing transactions that involve a kickback, a transfer of plan assets to a personal

account, or some fraudulent act. Transactions can violate section 406(b) even if they "involve[] no taint of scandal, no hint of self-dealing, no trace of bad faith." Cutaiar v. Marshall, 590 F.2d 523, 528 (3d Cir. 1979); Lowen, 829 F.2d at 1213 (same). A fiduciary's subjective intent is simply irrelevant. That is because the section 406 prohibitions are "prophylactic rules" that "'categorically bar certain transactions deemed likely to injure the . . . plan.'" Iola, 700 F.3d at 92 (quoting Harris Trust, 530 U.S. at 242). Carving out for special treatment so-called "legitimate" 406(b) violations has no basis in the statutory text and undermines the prophylactic and categorical nature of section 406(b).

It also would be contrary to this Court's decision in Barboza. The prohibited transactions there were not "kickbacks" or other forms of "fraud," but were just like City National's transactions here—self-dealing compensation for administrative services provided to the plan. Barboza, 799 F.3d at 1263.

III. THE DISTRICT COURT CORRECTLY DETERMINED DAMAGES

Failing to identify any exemption that credibly applies to its violation, City National spends most of its brief contesting the amount of damages the district court awarded the Secretary. Having entered into prohibited transactions, City National must "make good" to the "plan any losses to the plan resulting from each breach, and to restore to such plan any profits . . . which have been made through use of assets of the plan by the fiduciary." 29 U.S.C. § 1109(a). The "loss"

associated with a prohibited transaction, at a minimum, is "the entire cost of the prohibited transaction." Kim v. Fujikawa, 871 F.2d 1427, 1431 (9th Cir. 1989). In cases involving section 406(b) like this one, the "entire cost" of the transaction is all of the illegal compensation the fiduciary paid itself. See Patelco, 262 F.3d at 911 (rejecting the reasonable compensation exemption to section 406(b)'s bar against a fiduciary's self-dealing with respect to his own compensation).

This Court in Kim suggested that a fiduciary's liability for losses can be offset by expenses incurred by the fiduciary for the plan's benefit. See 871 F.2d at 1431. For self-dealing transactions that violate section 406(b), the fiduciary may claim an offset to the "entire cost" of its self-dealing only for direct expenses the fiduciary incurs that the plan would have to pay if the plan directly incurred the same expenses, because such expenses, if proven, are not deemed a part of the illegal compensation taken from the plan. See Tibble v. Edison, 729 F.3d 1110, 1132 (9th Cir. 2013), abrogated on other grounds, 135 S.Ct. 1823 (2015) (recognizing that a fiduciary who "receive[s] reimbursement from an unrelated mutual fund of direct expenses for which the plan would otherwise be liable" is not receiving the illegal "compensation" barred by section 406(b)) (citing DOL Advisory Opinion 97-19A, 1997 WL 540069 (August 28, 1997) (citing 29 C.F.R. § 2550.408b-2) (emphasis added)).

City National contends that the district court made three errors in

considering City National's proposed offsets to its liability for the full amount of its illegal compensation: (1) refusing to offset the amount City National purportedly paid its employees to service the Plan, which City National derived in the course of litigation from its putative expert's after-the-fact estimates; (2) refusing to offset certain other expenses it supposedly incurred on the Plan's behalf and rebates paid to the Plan, which City National claims that it did contemporaneously document; and (3) calculating the award of prejudgment interest (here lost opportunity costs) before applying offsets, rather than after. As explained below, these rulings should be affirmed.

A. The District Court Correctly Refused to Offset City National's Compensation with Post-Hoc Estimates of What it Paid its Employees to Service the Plan

City National faults the district court for failing to deduct from City National's illegal compensation the salary and other fringe benefits it paid its employees for servicing the Plan. It is undisputed, however, that at the time it served as the Plan's record keeper, City National did not document how much time its employees spent servicing the Plan as compared to the other 200-plus plans it serviced. 10ER:2373-74; SER:46. It is also undisputed that, at the time City National received its recordkeeping compensation, City National did not provide the Plan with invoices or other statements explaining how its compensation corresponded to its actual expenses as recordkeeper. SER:25. It was only in the

course of this litigation, and with the help of a putative accounting expert, that City National sought to reverse engineer its historical financial statements to estimate the expenses it incurred servicing the Plan as its recordkeeper. 8ER:1800-03. City National then asked the district court to take that estimate and offset it against its illegal compensation.

City National claims that by refusing to do so, and instead holding City National liable for the "entire cost of the prohibited transaction"—i.e., all the revenue it received for recordkeeping—the district court misconceived the measure of losses and misallocated the burden of proof.[7] According to City National, for loss purposes,"[t]he central question is whether CNB received more money than it should have for providing necessary services, thereby causing the Plan to suffer a loss." Appellants' Br. 30. In other words, "[i]f CNB's direct costs of administering the Plan exceeded the revenue sharing, there was no loss." Id. at 31. City National then contends that the district court wrongly absolved the Secretary from having to prove losses as so defined (i.e., by showing that City National's compensation exceeded its Plan-related expenses), and instead "burden[ed] [City National] with proving the absence of loss" (i.e., by showing that its expenses equaled or exceeded its compensation). Id. City National claims that the court further erred

[7] The parties also agreed to a handful of documented offsets during the Department's investigation. 4ER:660-661.

by requiring it to meet this undeserved burden with "doubt-free evidence," in the form of "contemporaneous time records," id., and rejecting the "entirely conventional" evidence, in the form of post-hoc reconstructed estimates, that City National provided. Id. at 32. City National is wrong on all counts.

1. The District Court Correctly Placed the Burden on City National to Prove Its Direct Expenses

As to the measure of losses and how the burden of proving them should be allocated, City National's arguments—that the plan suffered a loss only if City National "received more money than it should have" and that it was the Secretary's burden to make this showing—are directly at odds with this Court's decision in Kim v. Fujikawa, 871 F.2d 1427 (9th Cir. 1989). The defendant in Kim, like City National here, argued "that the district court erred in holding him personally liable for the entire cost of the prohibited transaction." Id. at 1430. According to the defendant in Kim, because the plan supposedly benefitted from some portion of the work he performed, that benefit should not be considered a "loss" to the plan, and the case should be remanded so the district court could parse the benefits from the costs. Id.

In Kim, this Court "rejected this argument." Id. It first noted that while section 409(a) of ERISA requires a breaching fiduciary to restore to the plan "any losses to the plan resulting from each such breach," 29 U.S.C. § 1109(a), "[n]either section 409(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." Id. This Court held that the loss associated with a prohibited transaction is "the entire cost of the prohibited transaction." Kim, 871F.2d at 1431. To the extent the fiduciary claims that its illegal actions nonetheless benefitted the plan, the Court "place[d] squarely on the breaching fiduciary the burden of demonstrating what portion of the activities of the [breaching fiduciary] benefitted the [plan]." Id. Moreover, "[i]n determining the amount that a breaching fiduciary must restore to the Funds as a result of a prohibited transaction, the court should resolve doubts in favor of the plaintiffs." Id. at 1430-31.

Pursuant to the framework established in Kim, the breaching fiduciaries have the burden of establishing the direct expenses they incurred that can be offset against their liability to return their illegal compensation, which is consistent with the purposes behind ERISA's prohibited-transaction rules. "Congress enacted [section] 406 'to bar categorically a transaction that [is] likely to injure the pension plan." Lockheed Corp. v. Spink, 517 U.S. 882, 888 (1996). City National admits to receiving compensation pursuant to prohibited transactions with the plan, which ERISA renders "illegal and, therefore, unenforceable." M & R Inv. Co., Inc. v. Fitzsimmons, 685 F.2d 283, 287 (9th Cir. 1982). In the face of such categorically illegal transactions, it makes little sense for the aggrieved plaintiff to have to parse how it was nevertheless benefitted.

Burdening the breaching fiduciary—and not the plaintiff—with proving, for purposes of offsetting losses, the extent to which its non-exempt self-dealing transactions benefitted the plan also is analogous to how the burden is allocated when a fiduciary invokes an applicable exemption to the prohibited-transaction rules. See 29 U.S.C. § 1108. "'The burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.'" Meacham v. Knolls Atomic Power Lab, 554 U.S. 84, 91 (2008) (quoting FTC v. Morton Salt Co., 334 U.S. 37, 44-45, (1948)); see Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996).

The district court, therefore, simply adhered to well-established precedent when it said that "[t]he measure of damages in cases where, as here, an ERISA fiduciary breaches its duties is the 'entire cost of the prohibited transaction." 1ER:3; see Kim, 871 F.2d at 1431. And it also faithfully applied the principles discussed in Kim when it said that "City National, as the breaching fiduciary, is entitled to offsets for certain items from the entire cost of the prohibited transaction only if it demonstrates that those [purported direct expenses that] benefitted the Plan." 1ER:4 (emphasis added); see Kim, 871 F.2d at 1431. City National's contentions to the contrary turn Kim on its head, and should be rejected.

2. <u>The District Court Correctly Required City National to Prove What It Paid Its Employees to Service the Plan with Contemporaneous Evidence of "Actually Incurred" Expenses</u>

Although City National's repeated receipt of compensation were non-exempt prohibited transactions, City National nevertheless contends that it used the money to pay the Plan's expenses; most prominently, by paying the salaries of its employees who serviced the Plan. City National claims that these payments should offset its liability to return illegal compensation. Its primary evidence for these employee expenses is a report by its putative accounting expert, (the Imburgia Report), prepared in litigation, that purports to infer from City National's historical financial statements how much of its employee salaries was attributable to Plan-related work. <u>See</u> Appellants' Br. 32-42; <u>id.</u> at 15 (citing 8ER:1794). Mr. Imburgia simply tallied the total amount of salary City National paid to all of its employees in its recordkeeping division for a given year; determined how many participants were in the CNC Plan as a percentage of the total participants serviced by City National across all plan clients; and then allocated to the Plan its pro-rata share of City National's employee salaries. 8ER:1802.

The district court rejected this evidence because it was "based on estimates or averages" and did not establish that these employee salaries were "actually incurred" by City National in servicing the CNC Plan, as compared to the hundreds of other plans City National serviced. 1ER:4. As the district court explained, by

calculating its expenses using after-the-fact "estimates and averages, City National could have over or undercharged the Plan." 1ER:12. According to City National, its expert report, even if "labeled estimates, averages, or approximations," is nonetheless perfectly "conventional evidence" that is accepted in all types of cases, including those involving copyright violations, the Fair Labor Standard Act, and even delinquent pension contributions. Appellants' Br. 32-33, 36-42.

In seeking to draw analogies from cases far afield from this one, City National elides both the specific nature of the Secretary's claims and the specific basis for the Court's rejection of its evidence. This case is not about copyright law, the Fair Labor Standards Act, or unpaid pension contributions.[8] It is one that implicates ERISA's strict prohibited-transaction rules, which are supplemented by well-established regulations. And it was on the basis of one of those rules and its implementing regulation that the district court based its decision to reject City National's evidence of offsets.

"The Supreme Court has directed that, where ERISA is silent on an issue of employee benefit law, 'courts are to develop a federal common law of rights and

---

[8] Additionally, the cited cases concern the evidentiary standards for a prima facie case for loss for violations in other areas of the law where retrospective estimates may be permitted. Here, the question concerns a defendant's burden for proving offsets to an established loss caused by a prohibited transaction, based on the direct expenses it claims to have incurred servicing the plan. That standard is supplied by this Court's decisions in Kim, Patelco, and the Secretary’s regulations.

obligations under ERISA-regulated plans.'" Davidowitz v. Delta Dental Plan of California, Inc., 946 F.2d 1476, 1480 (9th Cir. 1991) (quoting Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989)). As discussed, this court found that one issue on which ERISA is silent is "the methods which are to be used in measuring the 'losses' for which breaching fiduciaries are to be held liable," including for a prohibited transaction. Kim, 871 F.2d at 1430. If ERISA does not supply the method by which a fiduciary can prove offsets to losses, that method should be supplied by federal common law.

"In developing a body of federal common law governing employee benefit plans," this Court has said it has "the 'obligation' to adopt a federal rule that 'best comports with the interests served by ERISA's regulatory scheme.'" Salyers v. Metropolitan Life Insurance Company, 871 F.3d 934, 939 (9th Cir. 1992) (quoting PM Grp. Life Ins. Co. v. Western Growers Assur. Trust, 953 F.2d 543, 546 (9th Cir. 1992)); Davidowitz, 946 F.2d at 1480 ("courts must look to the underlying objectives and policies of ERISA when developing this common law."); Schikore v. BankAmerica Supplemental Retirement Plan, 269 F.3d 956, 962 (9th Cir. 2001) ("In formulating the federal common law applicable to ERISA, courts are to be governed by the federal policies at issue."). When creating federal common law, courts should not undermine agency regulations. See Jesinger v. Nevada Fed. Credit Union, 24 F.3d 1127, 1132 (9th Cir. 1994) (citation omitted).

The district court's requirement that City National prove these plan-related expenses with contemporaneous evidence—and not after-the-fact estimates—best comports with ERISA's regulatory scheme. In his summary judgment papers, the Secretary explained that while unavailable to City National to excuse its section 406(b) violation, the exemption in section 408(c)(2) offers guidance for evaluating City National's claim for offsetting its illegal compensation by the direct expenses it incurred in servicing the Plan. When applicable, section 408(c)(2) allows a fiduciary to receive from a plan "reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan." 29 U.S.C. § 1108(c)(2) (emphasis added); 9ER:2251-52.[9] The Department's regulation implementing section 408(c)(2), 29 C.F.R. 2550.408c-2, and its Advisory Opinions on the subject, make clear that satisfying the terms of section 408(c)(2)'s exemption for direct expenses "actually incurred" requires documented and contemporaneous evidence of direct expenses, not after-the-fact estimates.

Directly on point is DOL Advisory Opinion ("AO") No. 93-06A, which addressed whether employee salaries can qualify as reimbursable direct expenses under section 408(c)(2). The Department explained that otherwise reasonable

[9] It was on the basis of these principles derived from section 408(c)(2)'s exemption for "actually incurred expenses" that the district court rejected City National's evidence. See 1ER:4 ("City National has not shown that any of the expenses that it asserts should have been included in the Accounting were actually incurred by the Plan.") (emphasis added); 1ER:5.

employee salaries "may be a properly reimbursable expense under 29 C.F.R. 2550.408c-2(b)(3) if the expense would not, in fact, have been sustained had the services not been provided, if it can be properly allocated to the particular services provided, and if the expense does not represent an allocable portion of overhead costs." AO 93-06A, 1993 WL 97262, at *6 (Mar. 11, 1993). If the fiduciary provides services to multiple plans, then the reimbursement of direct expenses "requires that the parties maintain records adequate to verify that the allocation methods employed properly allocate expenses to the plans from which reimbursement is obtained" and receive review and approval from the fiduciary. Id. at *7. Here, even though City National allocated its employee salaries between plans (of which there were hundreds), it assuredly did not do so with adequate records with contemporaneous review and approval by a fiduciary but rather years after the fact in the course of litigation.

A primary reason for requiring contemporaneous documentation of direct expenses is to ensure that the fiduciary takes from the Plan only what it needs to cover the expense, as the Department explained in AO 80-58A. The Department there addressed whether a plan could pay its trustees a flat fee (specifically, a per diem allowance) as a means of "reimbursing the trustees for actual expense incurred in the performance of their duties for the plan." AO 80-58A, 1980 WL 8955, at *1 (Oct. 1, 1980). The Department noted that, where applicable, section

408(c)(2) allows a plan to pay its fiduciary reasonable compensation both for "services rendered" and "to reimburse expenses incurred by a fiduciary in the performance of services for a plan." Id. at *2 (citing 29 U.S.C. § 1108(c)(2)). While the Department said that a per-diem allowance, provided it was reasonable, could potentially qualify as compensation for services rendered, it could not be counted as reimbursement for actually incurred expenses. As the Department explained, "such reimbursement is permitted for expenses that are properly and actually incurred," and "because a fiduciary who is paid a per diem allowance as a means of reimbursement may receive an amount in excess of his actual expenses, such a method of reimbursement is not permitted under section 408(c)(2)." Id.

City National's automatic receipt of its recordkeeping fee, untethered to any contemporaneous documentation reflecting its actual expenses for the corresponding period, poses the same problem. Without reconciling the expenses it actually incurred with the fee it was paid over the corresponding period, City National may well have received compensation in "an amount in excess of [its] actual expenses." AO 80-58A, 1980 WL 8955, at *2. And in fact, even City National's own internal estimates of its Plan-related expenses for 2008 showed that its fees exceeded its costs that year. 9ER:2377.

This concern with ensuring that a plan's reimbursement payment to a fiduciary precisely matches the actual expenses for which the fiduciary seeks

reimbursement is reflected in section 408(c)(2)'s implementing regulation. That regulation allows a plan to advance funds to its fiduciary "to cover direct expenses to be properly and actually incurred" in the future, but only if "the fiduciary . . . accounts to the plan at the end of the period covered by the advance for the expenses properly and actually incurred." 29 C.F.R. § 2550.408c-2(b)(4) (emphasis added). In other words, the fiduciary's reconciliation of its expenses with the plan's reimbursement payments must be done at the end of each payment period, not many years later. Thus, as the Department explained in AO 80-58A, a plan may advance funds to its fiduciary to cover expenses "provided that the fiduciary accounts to the plan at the end of such period for the expenses properly and actually incurred and refunds to the plan the amount, if any, by which the advance exceeds the fiduciary's actual expenses." AO 80-58A, 1980 WL 8955, at *2 (emphasis added). City National did not account to the Plan for its actually incurred expenses at the end of any of the periods for which it was compensated; in fact, it took its fee without tracking its expenses at all.

Although the section 408(c)(2) exemption is only a defense against liability to a section 406(a) violation, ERISA's prohibited-transaction rules would be undermined if a more lenient standard could be used to prove offsets for direct expenses against losses caused by a section 406(b) violation. Consider a fiduciary that fails altogether to maintain any contemporaneous records of its expenses in

servicing a plan while blithely, and without approval by an independent fiduciary, receiving an arbitrary payment from the plan as reimbursement for its services. Such payments would be blatant prohibited transactions that would not qualify for the section 408(c)(2) exemption. Yet none of that would matter if the fiduciary could later hire an accountant to re-construct its expenses and allocate to the plan, based on rough arithmetic, a portion of its overall expenses. By defanging the prohibited-transaction rules in this way, the incentive for a fiduciary to maintain rigorous records of its direct expenses, and to only take from the plan what it actually needs to cover them, would be substantially weakened.

As a result, the district court was correct to hold City National's evidence of its employee salaries to section 408(c)(2)'s standard for "actually incurred" direct expenses.

B. The District Court Properly Refused to Offset City National's Compensation with Other Supposed Direct Expenses and Rebates

Aside from its expert's reconstructed estimates of the Plan's supposed share of City National's employee salaries that City National failed to document at the time, City National also faults the district court for excluding three other categories of offsets against its revenue-sharing compensation: (1) certain rebates purportedly paid to the plan, (2) certain third party expenses incurred by City National on the Plan's behalf, and (3) revenue derived from City National's own proprietary mutual funds. The district court was correct to exclude all three.

1. <u>The District Court Correctly Held that City National Did Not Establish that It Actually Rebated $290,000 to the Plan</u>

The district court offset $538,902 in rebates City National paid to the Plan against its liability to the Plan.[10] City National says the court should have deducted an additional $290,000. Appellants' Br. 43. The district court rejected this request because "no evidence that [these] expenses were actually incurred has been presented to the Court." 1ER:5. Indeed, the only rebate-related evidence City National cited in its Statement of Uncontroverted Facts was the declaration of its accounting expert, Mr. Imburgia. <u>See</u> SER:9. For his part, Mr. Imburgia also did not cite any evidence of City National actually rebating money to the Plan, but instead arrived at his tally based on the fact that "the Benefits Committee approved these rebates to the CNB Plan." 6ER:1406.

City National now contends that the Department of Labor "ignored evidence that easily sufficed to avoid summary judgment," specifically, trust account statements purportedly showing that rebate payments were made. Appellants' Br. 43. City National, however, did not provide or otherwise rely on this evidence in its summary judgment motion, 4ER:676, or even in opposition to the Secretary's motion, 3ER:587-88, but did so only in connection with its reply brief. <u>See</u>

[10] The district court credited the rebate payments not because it evaluated the evidence and found it satisfactory, but rather because the Secretary agreed to these offsets during the investigation by the Department of Labor's Employee Benefits Security Administration. 1ER:5.

2ER:24. It was well within the district court's discretion to decline to sift through evidence that City National provided only on reply. See JG v. Douglas County School Dist., 552 F.3d 786, 803, n.14 (9th Cir. 2008) (finding that district court did not abuse its discretion in denying plaintiff's motion to strike new evidence defendant submitted with summary judgment reply where the district court "did not consider the new evidence"); Docusign, Inc. v. Sertifi, Inc., 468 F. Supp. 2d 1305, 1307 (W.D. Wash. 2006) ("It is well established that new arguments and evidence presented for the first time in Reply are waived").

2. The District Court Correctly Held that City National Did Not Properly Establish Third-Party Direct Expenses

City National claims that the district court improperly excluded three different "contemporaneously documented third-party administrative expenses." Appellants' Br. 44.

First, City National wants credit for $207,003 in custodial fees Fidelity purportedly retained, which Fidelity supposedly took out of City National's revenue sharing compensation. Id. The problem is that City National, in its summary judgment motion, supported its custodial-fee offset with the same type of conjectural evidence that it used to support its rebate offset: a declaration from Mr. Imburgia that did not rely on any evidence of payments actually made to Fidelity, but instead calculated, based on a formula, what these payments might have been had City National hewed to its agreement with Fidelity. See SER:26; 6ER:1407.

This is not evidence of "actually incurred expenses." 29 U.S.C. § 1108(c)(2). On appeal, City National now cites to spreadsheets submitted with its summary judgment reply purporting to show these Fidelity payments. See Appellants' Br. 44 (citing 3ER:460). Not only are these spreadsheets inscrutable, see 3ER:460, but as with the rebate evidence that City National also provided only on reply, they are too little, too late.

City National also faults the district court for failing to offset $145,660 in purported "printing and mailing costs." Appellants' Br. 45. The evidence that City National cites for these supposed costs shows why the district court was correct to reject this offset. In particular, City National points to a mass of invoices from a company called SCICOM Data Services, Ltd. See id. (citing 4ER:724-1396). None of these invoices specify which of the 200-plus plans serviced by City National received the printing and mailing services corresponding to the invoice. Id. As a result, the district court was correct to hold that they did not qualify as "evidence that expenses were actually incurred" by the Plan. 1ER:5; Kim, 871 F.2d at 1431 (affirming district court's refusal to credit breaching fiduciaries with benefits supposedly conferred on plan where fiduciaries "have not maintained records to determine what expenses are used for the benefit of the union" even if such offsets were allowed).

Finally, City National says the district court should have credited it with a $32,500 offset for an audit of the Plan performed by KPMG. Appellants' Br. 45. The district court noted that even though the payment to KPMG was made in 2006, the audit concerned Plan year 2005, which is outside the "relevant time period" in the Secretary's Complaint (2006 to 2012). 1ER:5. And because, "[i]n determining the amount that a breaching fiduciary must restore to the Funds as a result of a prohibited transaction, the court should resolve doubts in favor of the plaintiffs," Kim, 871 F.2d at 1430-31 (citation and quotation omitted), the district court concluded that City National was not entitled to the $32,500 offset. 1ER:5.

The district court was correct to conclude that because the invoices City National seeks credit for concern an audit of the 2005 Plan year, they cannot be offset against City National's illegal compensation earned between 2006 and 2012. There must be some connection between the loss and the claimed set off. City National may offset the Plan's losses only with direct expenses it conferred on the Plan that were directly tied to its illegal compensation earned from 2006 to 2012. City National's payments to KPMG for an audit of the 2005 Plan year, even if they were made in 2006, had nothing to do with the compensation it earned in 2006. ERISA requires plan administrators to commission an audit of the plan for each plan year. 29 U.S.C. § 1023(a)(3). As a result, CNB's obligation to pay for an audit of the Plan was fixed in 2005, meaning that CNB would have paid KPMG for

the audits regardless of the subsequent illegal compensation. See 8ER:1835 (Professional Services Agreement obligating CNB to conduct full compliance testing and reporting with respect to each plan year); 9ER:2115 (internal memo describing direct costs in servicing the Plan as including "Annual audit packages: multiple reports are provided to the Plan auditor, KPMG."); 2ER:140 (declaration of City National's accounting expert explaining that "ERISA requires annual audits of the Plan, which were performed by the outside auditor, KPMG."). In short, this benefit was already obligated as part of CNB's role as recordkeeper in Plan year 2005, before CNB received illegal compensation in 2006.

3. The District Court Correctly Held that PTE 77-3 Did Not Permit City National to Keep, as Recordkeeping Compensation, the Revenue Derived From City National's Own Mutual Funds

City National contends that over $534,000 in revenue it earned from the Plan's investments in its own mutual funds (CNI Charter Funds) "was categorically exempt from [section 406] under PTE 77-3," and should have been applied as an offset against damages. Appellants' Br. 46. As explained below, PTE 77-3 is a narrow exemption with a narrow purpose. City National's effort to leverage it for another purpose altogether should be rejected.

PTE 77-3 is one of the "class exemptions" the Secretary promulgated pursuant to his authority under ERISA section 408(a) to "grant a conditional or unconditional exemption of any . . . class of fiduciaries or transactions" from

section 406. 29 U.S.C. § 1108(a). Provided certain conditions are met, PTE 77-3 simply says that section 406's prohibitions "shall not apply to the acquisition or sale of shares" in a mutual fund by a plan covering employees of that mutual fund company, its investment adviser or principal underwriter, or any affiliated person of the investment adviser or principal underwriter. 42 Fed. Reg. 18734-35 (Apr. 8, 1977). In short, under PTE 77-3, an in-house ERISA plan of these mutual-fund-affiliated entities may buy and sell shares of the affiliated mutual funds as long as the exemption's conditions are met. Wildman v. American Century Services, LLC, 237 F. Supp. 3d 902, 913 (W.D. Mo. 2017) (describing PTE 77-3 as "allow[ing] plans sponsored by mutual fund advisors to invest in affiliated mutual funds."). But PTE 77-3 nowhere authorizes the plan's fiduciary, in addition to buying the sponsor's mutual funds, to separately hire itself as the Plan's recordkeeper, set its own compensation, and then pay itself automatically.

City National's argument to the contrary rests not on the plain language of PTE 77-3, but rather on a misleadingly incomplete quotation from a pre-regulatory notice. City National claims that PTE 77-3 "was intended to allow the collection of the entire expense ratio charged by the funds, including 'payment of the mutual fund's customary investment advisory fee' and 'any administrative fees[.]'" Appellants' Br. 47 (quoting 41 Fed. Reg. 54080, 54081 (Dec. 10, 1976)).

Missing from City National's brief is the context for this quotation, and how it ultimately was expressed in PTE 77-3 itself. One of PTE 77-3's express conditions is that the "[t]he plan does not pay any investment management, investment advisory or similar fee . . . ." 42 Fed. Reg. 18735. However, the exemption makes clear that "[t]his condition does not preclude the payment of investment advisory fees by the investment company [i.e., the mutual fund] under the terms of its investment advisory agreement." Id. By prohibiting the fiduciary from collecting an investment advisory fee from the plan but allowing it to do so from the mutual fund itself, pursuant to its separate investment advisory agreement with the fund, PTE 77-3 simply ensures that the fiduciary does not "double dip."

Here, however, City National is not seeking to collect investment advisory fees under its investment advisory agreement with the CNI Charter Funds, but rather recordkeeping fees under its recordkeeping agreement with the Plan. See Appellants' Br. 7 (relying on City National's recordkeeping agreement with the Plan as authorization to compensate itself out of its CNI Charter Fund fees). The fact that PTE 77-3 may allow City National to receive an investment advisory fee pursuant to its agreement with the CNI Charter Funds does not mean that it also allows City National to receive a recordkeeping fee pursuant to its self-dealing arrangement with the Plan.

C. The District Court Acted Within Its Discretion in Applying Prejudgment Interest to the Losses Associated with the Secretary's Entire Claim

A portion of the district court's damages award comprised the Plan's lost opportunity costs, which the court determined by using the Plan's rate of return. See 1ER:3-4. City National "acknowledge[s] that the district court had discretion to choose the Plan's actual rate of return as the basis for calculating lost opportunity cost," and does not take issue with the court's decision to do so or to award pre-judgment interest to compensate the Plan for its lost opportunity costs more generally. Appellants' Br. 48. Instead, it contends that the district court erred by calculating pre-judgment interest on City National's liability for the gross amount of its recordkeeping compensation (before deducting offsets) rather than on its net compensation (after offsets). This Court reviews the award of prejudgment interest on summary judgment under an "abuse of discretion" standard. See In re Agricultural Research and Tech. Grp., Inc., 916 F.2d 528, 541-42 (9th Cir. 1990).

"In ERISA cases the district court may grant prejudgment interest in its discretion to prevailing fiduciaries, beneficiaries, or plan participants." Cottrill v. Sparrow, Johnson & Ursillo, Inc., 100 F.3d 220, 223 (1st Cir. 1996) (abrogated on other grounds by Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242 (2010)); Shaw v. International Ass'n of Machinists and Aerospace Workers Pension Plan,

750 F.2d 1458, 1465 (9th Cir. 1985) (explaining, in an ERISA case, that "[w]hether interest will be awarded is a question of fairness, lying within the court's sound discretion, to be answered by balancing the equities.") (internal citation and quotations omitted). "This judicial discretion encompasses not only the overarching question—whether to award prejudgment interest at all—but also subsidiary questions that arise after the court decides to make an award, including matters such as the period and rate to be used in calculating interest." Cottrill,100 F.3d at 223. In situations where a defendant asserts a counterclaim or setoff, one such subsidiary question is whether to award prejudgment interest on the plaintiff's claim before or after deducting the counterclaim or setoff.

City National urges an "interest on the balance" approach, while the district court utilized an "interest on the claim" approach. This Court has endorsed these alternative approaches to prejudgment interest. See Fluor Corp. v. U.S. ex rel. Mosher Steel Co., 405 F.2d 823, 830 (9th Cir. 1969). As this Court recognized:

> If the unliquidated set-off or counterclaim is based upon a breach unrelated to the sum due under the primary claim, interest is allowed on the entire claim. The amount of the counterclaim or set-off as determined at trial is then deducted from this total. If, as in the present case, the unliquidated set-off or counterclaim constitutes a partial payment of the primary claim, interest is allowable on the balance due after deducting the amount of the set-off or counterclaim as determined at trial.

Fluor, 405 F.2d at 830 (emphasis added). Similarly in Bone v. Refco, Inc., 774 F.2d 235, 240 (8th Cir. 1985), the Eighth Circuit applied offsets based on collateral

matters only after applying prejudgment interest to the plaintiff's entire claim. See also Socony Mobil Oil Co. v. Klapal, 205 F. Supp. 388, 392 (D. Neb. 1962) ("By way of summarizing the 'interest on the entire claim' rule it may be said that where the unliquidated setoff or counterclaim . . . arises out of a collateral matter the plaintiff is entitled to interest on the entire amount of his liquidated claim and not on the balance only.").

The district court's application of the "interest on the entire claim" approach to the facts in this case is not an abuse of discretion, because the approach fits within Kim's framework for calculating damages resulting from prohibited transaction claims. The "liquidated" damages for a prohibited transaction are simply the "entire cost" of the transaction plus lost opportunity costs. Prohibited payments are categorically void and all payments must be returned to the Plan. In contrast, City National's offsets concern payment of direct expenses through collateral actions that were not directly tied to the prohibited transactions themselves (City National's illegal compensation), and the amounts for the offset are not fixed by law or the Plan. The district court was within its discretion to adopt an "interest on the entire claim" methodology to this case.

IV. THE DISTRICT COURT CORRECTLY HELD THAT THE SECRETARY'S COMPLAINT WAS TIMELY FILED

City National contends that the Secretary's Complaint was untimely under ERISA section 413(1), which bars claims brought more than "six years after . . .

the date of the last action which constituted a part of the breach or violation." 29 U.S.C. § 1113(1); Appellants' Br. 63-66. According to City National, the operative "breach or violation" that started the six-year clock was the original Professional Services Agreement, which was executed in April 2000. Appellants' Br. 64 ("[City National's] alleged breach was in 2000, when they consummated the Plan-CNB Agreement."). Citing this Court's decisions in M & R Inv. Co. v. Fitzsimmons, 685 F.2d 283 (9th Cir. 1982) and Ziegler v. Conn. Gen. Life Ins. Co., 916 F.2d 548 (9th Cir. 1990), City National characterizes its actual and continual receipt of compensation over the subsequent 11-year period as merely the Plan's "resulting injury," not independent ERISA violations. Id. With the sole violation fixed in 2000, the argument goes, the Secretary's claims are untimely.

City National's suggested dichotomy—between the Agreement as the "violation" and the payments to CNB the "resulting injury"—is a false one that rests on a fundamental misreading of M & R and Ziegler and is contradicted by a more recent opinion of the Court.

M & R did not concern ERISA's time limits. It instead addressed whether ERISA section 406(a)(1)(B)'s ban on loans between a plan and a "party in interest" (i.e., an insider to the plan) could be violated only upon the actual disbursement of the loan proceeds, as the defendant argued, or if instead the loan agreement itself could be challenged even without a subsequent flow of funds. M & R, 685 F.2d at

287 ("[The defendant] contends that because the loan proceeds were never disbursed, there has not been a 'lending of money,' and ERISA has not been violated."). This Court held that "the 'lending of money' prohibition of section 406(a)(1)(B) of ERISA makes the loan transaction before us illegal and, therefore, unenforceable," and that the plaintiff did not have to wait until those disbursements occurred in order to bring a section 406 claim. Id. The Court nowhere held that the actual disbursement of loan proceeds, if and when they occur, cannot also violate section 406(a)(1)(B), to say nothing of the other species of prohibited transactions (like the self-dealing transactions at issue here).

While Ziegler addressed ERISA's time limits, it too is distinguishable. ERISA's time limits have two distinct periods: (1) a six-year period, at issue here, which is tied to the date of the "breach or violation," 29 U.S.C. § 1113(1); and (2) a separate three-year period that runs from when a plaintiff acquires "actual knowledge of the breach or violation." 29 U.S.C. § 1113(2) (emphasis added). Ziegler concerned only the three-year period from the date of "actual knowledge." 916 F.2d at 550 (quoting only 29 U.S.C. § 1113(2)); id. at 552 ("the key to the ERISA statute of limitations when applied to these types of violations is . . . 'actual knowledge' of the breach or violation."). And this Court simply held that, for the three-year period in ERISA section 413(2), the clock starts when a plaintiff

acquires "actual knowledge" of a breach caused by entering into an illegal contract, even if payments have not yet been made under it. Id. at 552-53.

Unlike in Ziegler, City National does not contend that the Secretary had "actual knowledge" of the offending contract more than three years before filing suit; in fact, it does not even invoke section 413(2)'s three-year "actual knowledge" period at all. Instead, City National argues that the contract's execution date in April 2000 is the only relevant "breach or violation" from which section 413(1)'s separate six-year period must be measured. But again, Ziegler said only that a plaintiff's actual knowledge of an illegal contract starts section 413(2)'s three-year clock. It nowhere said that the mere execution of an illegal contract starts the separate six-year clock under ERISA section 413(1) (tied to the "date of the last action which constituted a part of the breach or violation"), and subsumes any subsequent illegal acts taken under the contract.

To the contrary, this Court has since made clear that a series of related ERISA violations or a continuing ERISA violation, even if tied to the same initial contract, can indeed re-start the six-year period of section 413(1). Tibble v. Edison International, 843 F.3d 1187, 1196 (9th Cir. 2016) (en banc). The Court explained that "[w]hen a plaintiff has actual knowledge of a breach, § 1113(2) [section 413(2)] operates to keep her from sitting on her rights and allowing the series of related breaches to continue." Id. But "when a plaintiff does not have actual

knowledge of a breach and § 1113(1) [section 413(1)] applies," the rationale for tying the accrual of the plaintiff's claim to the earlier related breach "is no longer relevant." Id.

Because City National invokes only section 413(1), the notion that the Secretary's claim accrued only upon the earliest breach in the series—the execution of the Professional Services Agreement—is demonstrably wrong. Under section 413(1) and Tibble, any subsequent breach, such as each receipt of illegal compensation, re-starts the six-year time limit. The Secretary timely sued for recovery of the illegal compensation within that six-year period.

Finally, City National contends that "to continue doing something that one is already doing is not a § 1106 'transaction.'" Appellants' Br. 65 (citing Wright v. Ore. Metallurgical Corp., 360 F.3d 1090, 1101 (9th Cir. 2004)). Appellants mischaracterize this Court's holding in Wright and elide its materially distinct facts. The plaintiffs there alleged that the defendants committed a prohibited transaction by their decision "not to sell" employer stock. Wright, 360 F.3d at 1101. This Court held that the plaintiffs had failed to state a prohibited-transaction claim because "[t]he decision by the [] Defendants to continue to hold 15% of Plan assets in employer stock was not a 'transaction.'" Id. The Secretary's prohibited-transaction claim, in contrast, is not grounded on Appellants' decision to "continue

to hold" assets acquired before 2006, but rather on their affirmative self-dealing throughout the 2006-2012 period.

CONCLUSION

For the foregoing reasons, the district court's summary judgment orders on liability and damages should be affirmed, except with respect to individual co-defendants Bloch, Coleman, Rosenblum, and Tuttle.

Respectfully Submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor for Plan Benefits Security

THOMAS TSO
Counsel for Appellate and Special Litigation

/s/ Jeffrey Hahn
JEFFREY HAHN
Senior Trial Attorney
United States Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Ave. N.W.
Room N-4611
Washington, DC 20210

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,514 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a monospaced typeface using Microsoft Word version 2010 in 14-point Times New Roman font.

Dated: February 5, 2018

/s/ Jeffrey Hahn
JEFFREY HAHN
Senior Trial Attorney
United States Department of Labor
Plan Benefits Security Division
200 Constitution Ave. N.W.
Room N-4611
Washington, DC 20210

STATEMENT OF RELATED CASES

There are no related cases.

Dated: February 5, 2018

/s/ Jeffrey Hahn
JEFFREY HAHN
Senior Trial Attorney
United States Department of Labor
Plan Benefits Security Division
200 Constitution Ave. N.W.
Room N-4611
Washington, DC 20210

ADDENDUM

Except for the following, all applicable statutes, etc., are contained in the addendum of Appellants.

ADDENDUM

Table of Contents

29 U.S.C. § 1104	A-001
29 U.S.C. § 1113	A-006
29 U.S.C. § 1023	A-007
26 U.S.C. § 6621	A-017

United States Code Annotated
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program (Refs & Annos)
Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)
Subtitle B. Regulatory Provisions
Part 4. Fiduciary Responsibility (Refs & Annos)

29 U.S.C.A. § 1104

§ 1104. Fiduciary duties

Currentness

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) 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;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III.

(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 (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)--

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of--

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of Title 26, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon--

(A) the earlier of--

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which--

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if--

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) Default investment arrangements

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

(A) In general

For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) Notice requirements

(i) In general

The requirements of this subparagraph are met if each participant or beneficiary--

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) Form of notice

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of Title 26 shall apply with respect to the notices described in this subparagraph.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement--

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement--

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection--

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

CREDIT(S)

(Pub.L. 93-406, Title I, § 404, Sept. 2, 1974, 88 Stat. 877; Pub.L. 96-364, Title III, § 309, Sept. 26, 1980, 94 Stat. 1296; Pub.L. 101-508, Title XII, § 12002(b)(1), (2)(A), Nov. 5, 1990, 104 Stat. 1388-565, 1388-566; Pub.L. 104-188, Title I, § 1421(d)(2), Aug. 20, 1996, 110 Stat. 1799; Pub.L. 107-16, Title VI, § 657(c)(1), June 7, 2001, 115 Stat. 136; Pub.L. 107-147, Title IV, § 411(t), Mar. 9, 2002, 116 Stat. 51; Pub.L. 109-280, Title VI, §§ 621(a), 624(a), Aug. 17, 2006, 120 Stat. 978, 980; Pub.L. 110-458, Title I, § 106(d), Dec. 23, 2008, 122 Stat. 5107.)

Notes of Decisions (1044)

29 U.S.C.A. § 1104, 29 USCA § 1104
Current through P.L. 115-90. Also includes P.L. 115-92 to 115-117, and 115-119. Title 26 current through 115-122.

End of Document © 2018 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program (Refs & Annos)
Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)
Subtitle B. Regulatory Provisions
Part 4. Fiduciary Responsibility (Refs & Annos)

29 U.S.C.A. § 1113

§ 1113. Limitation of actions

Currentness

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.

CREDIT(S)

(Pub.L. 93-406, Title I, § 413, Sept. 2, 1974, 88 Stat. 889; Pub.L. 100-203, Title IX, § 9342(b), Dec. 22, 1987, 101 Stat. 1330-371; Pub.L. 101-239, Title VII, §§ 7881(j)(4), 7894(e)(5), Dec. 19, 1989, 103 Stat. 2443, 2450.)

Notes of Decisions (309)

29 U.S.C.A. § 1113, 29 USCA § 1113
Current through P.L. 115-90. Also includes P.L. 115-92 to 115-117, and 115-119. Title 26 current through 115-122.

End of Document © 2018 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program (Refs & Annos)
Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)
Subtitle B. Regulatory Provisions
Part 1. Reporting and Disclosure

29 U.S.C.A. § 1023

§ 1023. Annual reports

Effective: April 7, 2014
Currentness

(a) Publication and filing

(1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 1024(a) of this title, and shall be made available and furnished to participants in accordance with section 1024(b) of this title.

(B) The annual report shall include the information described in subsections (b) and (c) and where applicable subsections (d), (e), and (f) and shall also include--

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

(2) If some or all of the information necessary to enable the administrator to comply with the requirements of this subchapter is maintained by--

(A) an insurance carrier or other organization which provides some or all of the benefits under the plan, or holds assets of the plan in a separate account,

(B) a bank or similar institution which holds some or all of the assets of the plan in a common or collective trust or a separate trust, or custodial account, or

(C) a plan sponsor as defined in section 1002(16)(B) of this title,

such carrier, organization, bank, institution, or plan sponsor shall transmit and certify the accuracy of such information to the administrator within 120 days after the end of the plan year (or such other date as may be prescribed under regulations of the Secretary).

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

(3)(A) Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual reports by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. Such examination shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public accountant. The independent qualified public accountant shall also offer his opinion as to whether the separate schedules specified in subsection (b)(3) of this section and the summary material required under section 1024(b)(3) of this title present fairly, and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole. The opinion by the independent qualified public accountant shall be made a part of the annual report. In a case where a plan is not required to file an annual report, the requirements of this paragraph shall not apply. In a case where by reason of section 1024(a)(2) of this title a plan is required only to file a simplified annual report, the Secretary may waive the requirements of this paragraph.

(B) In offering his opinion under this section the accountant may rely on the correctness of any actuarial matter certified to by an enrolled actuary, if he so states his reliance.

(C) The opinion required by subparagraph (A) need not be expressed as to any statements required by subsection (b)(3)(G) prepared by a bank or similar institution or insurance carrier regulated and supervised and subject to periodic examination by a State or Federal agency if such statements are certified by the bank, similar institution, or insurance carrier as accurate and are made a part of the annual report.

(D) For purposes of this subchapter, the term "qualified public accountant" means--

(i) a person who is a certified public accountant, certified by a regulatory authority of a State;

(ii) a person who is a licensed public accountant licensed by a regulatory authority of a State; or

(iii) a person certified by the Secretary as a qualified public accountant in accordance with regulations published by him for a person who practices in States where there is no certification or licensing procedure for accountants.

(4)(A) The administrator of an employee pension benefit plan subject to the reporting requirement of subsection (d) of this section shall engage, on behalf of all plan participants, an enrolled actuary who shall be responsible for the preparation of the materials comprising the actuarial statement required under subsection (d) of this section. In a case where a plan is not required to file an annual report, the requirement of this paragraph shall not apply, and, in a case where by reason of section 1024(a)(2) of this title, a plan is required only to file a simplified report, the Secretary may waive the requirement of this paragraph.

(B) The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported under subsection (d) of this section--

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

(i) are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and

(ii) represent his best estimate of anticipated experience under the plan.

The opinion by the enrolled actuary shall be made with respect to, and shall be made a part of, each annual report.

(C) For purposes of this subchapter, the term "enrolled actuary" means an actuary enrolled under subtitle C of subchapter II of this chapter.

(D) In making a certification under this section the enrolled actuary may rely on the correctness of any accounting matter under subsection (b) to which any qualified public accountant has expressed an opinion, if he so states his reliance.

(b) Financial statement

An annual report under this section shall include a financial statement containing the following information:

(1) With respect to an employee welfare benefit plan: a statement of assets and liabilities; a statement of changes in fund balance; and a statement of changes in financial position. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of the plan.

(2) With respect to an employee pension benefit plan: a statement of assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of revenues and expenses and other changes aggregated by general source and application. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; the funding policy (including policy with respect to prior service cost), and any changes in such policies during the year; a description of any significant changes in plan benefits made during the period; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of such pension plan.

(3) With respect to all employee benefit plans, the statement required under paragraph (1) or (2) shall have attached the following information in separate schedules:

(A) a statement of the assets and liabilities of the plan aggregated by categories and valued at their current value, and the same data displayed in comparative form for the end of the previous fiscal year of the plan;

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

(B) a statement of receipts and disbursements during the preceding twelve-month period aggregated by general sources and applications;

(C) a schedule of all assets held for investment purposes aggregated and identified by issuer, borrower, or lessor, or similar party to the transaction (including a notation as to whether such party is known to be a party in interest), maturity date, rate of interest, collateral, par or maturity value, cost, and current value;

(D) a schedule of each transaction involving a person known to be party in interest, the identity of such party in interest and his relationship or that of any other party in interest to the plan, a description of each asset to which the transaction relates; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expense incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction;

(E) a schedule of all loans or fixed income obligations which were in default as of the close of the plan's fiscal year or were classified during the year as uncollectable and the following information with respect to each loan on such schedule (including a notation as to whether parties involved are known to be parties in interest): the original principal amount of the loan, the amount of principal and interest received during the reporting year, the unpaid balance, the identity and address of the obligor, a detailed description of the loan (including date of making and maturity, interest rate, the type and value of collateral, and other material terms), the amount of principal and interest overdue (if any) and an explanation thereof;

(F) a list of all leases which were in default or were classified during the year as uncollectable; and the following information with respect to each lease on such schedule (including a notation as to whether parties involved are known to be parties in interest): the type of property leased (and, in the case of fixed assets such as land, buildings, leasehold, and so forth, the location of the property), the identity of the lessor or lessee from or to whom the plan is leasing, the relationship of such lessors and lessees, if any, to the plan, the employer, employee organization, or any other party in interest, the terms of the lease regarding rent, taxes, insurance, repairs, expenses, and renewal options; the date the leased property was purchased and its cost, the date the property was leased and its approximate value at such date, the gross rental receipts during the reporting period, expenses paid for the leased property during the reporting period, the net receipts from the lease, the amounts in arrears, and a statement as to what steps have been taken to collect amounts due or otherwise remedy the default;

(G) if some or all of the assets of a plan or plans are held in a common or collective trust maintained by a bank or similar institution or in a separate account maintained by an insurance carrier or a separate trust maintained by a bank as trustee, the report shall include the most recent annual statement of assets and liabilities of such common or collective trust, and in the case of a separate account or a separate trust, such other information as is required by the administrator in order to comply with this subsection; and

(H) a schedule of each reportable transaction, the name of each party to the transaction (except that, in the case of an acquisition or sale of a security on the market, the report need not identify the person from whom the security was acquired or to whom it was sold) and a description of each asset to which the transaction applies; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

asset, and the net gain (or loss) on each transaction. For purposes of the preceding sentence, the term "reportable transaction" means a transaction to which the plan is a party if such transaction is--

(i) a transaction involving an amount in excess of 3 percent of the current value of the assets of the plan;

(ii) any transaction (other than a transaction respecting a security) which is part of a series of transactions with or in conjunction with a person in a plan year, if the aggregate amount of such transactions exceeds 3 percent of the current value of the assets of the plan;

(iii) a transaction which is part of a series of transactions respecting one or more securities of the same issuer, if the aggregate amount of such transactions in the plan year exceeds 3 percent of the current value of the assets of the plan; or

(iv) a transaction with or in conjunction with a person respecting a security, if any other transaction with or in conjunction with such person in the plan year respecting a security is required to be reported by reason of clause (i).

(4) The Secretary may, by regulation, relieve any plan from filing a copy of a statement of assets and liabilities (or other information) described in paragraph (3)(G) if such statement and other information is filed with the Secretary by the bank or insurance carrier which maintains the common or collective trust or separate account.

(c) Information to be furnished by administrator

The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

(2) The name and address of each fiduciary.

(3) Except in the case of a person whose compensation is minimal (determined under regulations of the Secretary) and who performs solely ministerial duties (determined under such regulations), the name of each person (including but not limited to, any consultant, broker, trustee, accountant, insurance carrier, actuary, administrator, investment manager, or custodian who rendered services to the plan or who had transactions with the plan) who received directly or indirectly compensation from the plan during the preceding year for services rendered to the plan or its participants, the amount of such compensation, the nature of his services to the plan or its participants, his relationship to the employer of the employees covered by the plan, or the employee organization, and any other office, position, or employment he holds with any party in interest.

(4) An explanation of the reason for any change in appointment of trustee, accountant, insurance carrier, enrolled actuary, administrator, investment manager, or custodian.

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

(5) Such financial and actuarial information including but not limited to the material described in subsections (b) and (d) of this section as the Secretary may find necessary or appropriate.

(d) Actuarial statement

With respect to an employee pension benefit plan (other than (A) a profit sharing, savings, or other plan, which is an individual account plan, (B) a plan described in section 1081(b) of this title, or (C) a plan described both in section 1321(b) of this title and in paragraph (1), (2), (3), (4), (5), (6), or (7) of section 1081(a) of this title) an annual report under this section for a plan year shall include a complete actuarial statement applicable to the plan year which shall include the following:

(1) The date of the plan year, and the date of the actuarial valuation applicable to the plan year for which the report is filed.

(2) The date and amount of the contribution (or contributions) received by the plan for the plan year for which the report is filed and contributions for prior plan years not previously reported.

(3) The following information applicable to the plan year for which the report is filed: the normal costs or target normal costs, the accrued liabilities or funding target, an identification of benefits not included in the calculation; a statement of the other facts and actuarial assumptions and methods used to determine costs, and a justification for any change in actuarial assumptions or cost methods; and the minimum contribution required under section 1082 of this title.

(4) The number of participants and beneficiaries, both retired and nonretired, covered by the plan.

(5) The current value of the assets accumulated in the plan, and the present value of the assets of the plan used by the actuary in any computation of the amount of contributions to the plan required under section 1082 of this title and a statement explaining the basis of such valuation of present value of assets.

(6) Information required in regulations of the Pension Benefit Guaranty Corporation with respect to:

(A) the current value of the assets of the plan,

(B) the present value of all nonforfeitable benefits for participants and beneficiaries receiving payments under the plan,

(C) the present value of all nonforfeitable benefits for all other participants and beneficiaries,

(D) the present value of all accrued benefits which are not nonforfeitable (including a separate accounting of such benefits which are benefit commitments, as defined in section 1301(a)(16) of this title), and

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

(E) the actuarial assumptions and techniques used in determining the values described in subparagraphs (A) through (D).

(7) A certification of the contribution necessary to reduce the minimum required contribution determined under section 1083 of this title, or the accumulated funding deficiency determined under section 1084 of this title, to zero.

(8) A statement by the enrolled actuary--

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the applicable requirements of sections 1083(h), 1084(c)(3), and 1085a(c)(3) of this title (relating to reasonable actuarial assumptions and methods) have been complied with.

(9) A copy of the opinion required by subsection (a)(4).

(10) A statement by the actuary which discloses--

(A) any event which the actuary has not taken into account, and

(B) any trend which, for purposes of the actuarial assumptions used, was not assumed to continue in the future,

but only if, to the best of the actuary's knowledge, such event or trend may require a material increase in plan costs or required contribution rates.

(11) If the current value of the assets of the plan is less than 70 percent of--

(A) in the case of a single-employer plan, the funding target (as defined in section 1083(d)(1) of this title) of the plan, or

(B) in the case of a multiemployer plan, the current liability (as defined in section 1084(c)(6)(D) of this title) under the plan,

the percentage which such value is of the amount described in subparagraph (A) or (B).

(12) A statement explaining the actuarial assumptions and methods used in projecting future retirements and forms of benefit distributions under the plan.

(13) Such other information regarding the plan as the Secretary may by regulation require.

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

(14) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

Such actuary shall make an actuarial valuation of the plan for every third plan year, unless he determines that a more frequent valuation is necessary to support his opinion under subsection (a)(4) of this section.

(e) Statement from insurance company, insurance service, or other similar organizations which sell or guarantee plan benefits

If some or all of the benefits under the plan are purchased from and guaranteed by an insurance company, insurance service, or other similar organization, a report under this section shall include a statement from such insurance company, service, or other similar organization covering the plan year and enumerating--

(1) the premium rate or subscription charge and the total premium or subscription charges paid to each such carrier, insurance service, or other similar organization and the approximate number of persons covered by each class of such benefits; and

(2) the total amount of premiums received, the approximate number of persons covered by each class of benefits, and the total claims paid by such company, service, or other organization; dividends or retroactive rate adjustments, commissions, and administrative service or other fees or other specific acquisition costs paid by such company, service, or other organization; any amounts held to provide benefits after retirement; the remainder of such premiums; and the names and addresses of the brokers, agents, or other persons to whom commissions or fees were paid, the amount paid to each, and for what purpose. If any such company, service, or other organization does not maintain separate experience records covering the specific groups it serves, the report shall include in lieu of the information required by the foregoing provisions of this paragraph (A) a statement as to the basis of its premium rate or subscription charge, the total amount of premiums or subscription charges received from the plan, and a copy of the financial report of the company, service, or other organization and (B) if such company, service, or organization incurs specific costs in connection with the acquisition or retention of any particular plan or plans, a detailed statement of such costs.

(f) Additional information with respect to defined benefit plans

(1) Liabilities under 2 or more plans

(A) In general

In any case in which any liabilities to participants or their beneficiaries under a defined benefit plan as of the end of a plan year consist (in whole or in part) of liabilities to such participants and beneficiaries under 2 or more pension plans as of immediately before such plan year, an annual report under this section for such plan year shall include the funded percentage of each of such 2 or more pension plans as of the last day of such plan year and the funded percentage of the plan with respect to which the annual report is filed as of the last day of such plan year.

(B) Funded percentage

For purposes of this paragraph, the term "funded percentage"--

 © 2018 Thomson Reuters. No claim to original U.S. Government Works.

(i) in the case of a single-employer plan, means the funding target attainment percentage, as defined in section 1083(d)(2) of this title, and

(ii) in the case of a multiemployer plan, has the meaning given such term in section 1085(i)(2) of this title.

(2) Additional information for multiemployer plans

With respect to any defined benefit plan which is a multiemployer plan, an annual report under this section for a plan year shall include, in addition to the information required under paragraph (1), the following, as of the end of the plan year to which the report relates:

(A) The number of employers obligated to contribute to the plan.

(B) A list of the employers that contributed more than 5 percent of the total contributions to the plan during such plan year.

(C) The number of participants under the plan on whose behalf no contributions were made by an employer as an employer of the participant for such plan year and for each of the 2 preceding plan years.

(D) The ratios of--

(i) the number of participants under the plan on whose behalf no employer had an obligation to make an employer contribution during the plan year, to

(ii) the number of participants under the plan on whose behalf no employer had an obligation to make an employer contribution during each of the 2 preceding plan years.

(E) Whether the plan received an amortization extension under section 1084(d) of this title or section 431(d) of Title 26 for such plan year and, if so, the amount of the difference between the minimum required contribution for the year and the minimum required contribution which would have been required without regard to the extension, and the period of such extension.

(F) Whether the plan used the shortfall funding method (as such term is used in section 1085 of this title) for such plan year and, if so, the amount of the difference between the minimum required contribution for the year and the minimum required contribution which would have been required without regard to the use of such method, and the period of use of such method.

(G) Whether the plan was in critical or endangered status under section 1085 of this title for such plan year, and if so, a summary of any funding improvement or rehabilitation plan (or modification thereto) adopted during the plan year, and the funded percentage of the plan.

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

(H) The number of employers that withdrew from the plan during the preceding plan year and the aggregate amount of withdrawal liability assessed, or estimated to be assessed, against such withdrawn employers.

(I) In the case of a multiemployer plan that has merged with another plan or to which assets and liabilities have been transferred, the actuarial valuation of the assets and liabilities of each affected plan during the year preceding the effective date of the merger or transfer, based upon the most recent data available as of the day before the first day of the plan year, or other valuation method performed under standards and procedures as the Secretary may prescribe by regulation.

(g) Additional information with respect to multiple employer plans

With respect to any multiple employer plan, an annual report under this section for a plan year shall include a list of participating employers and a good faith estimate of the percentage of total contributions made by such participating employers during the plan year.

CREDIT(S)

(Pub.L. 93-406, Title I, § 103, Sept. 2, 1974, 88 Stat. 841; Pub.L. 96-364, Title III, § 307, Sept. 26, 1980, 94 Stat. 1295; Pub.L. 99-272, Title XI, § 11016(b)(1), Apr. 7, 1986, 100 Stat. 272; Pub.L. 100-203, Title IX, § 9342(a)(1), Dec. 22, 1987, 101 Stat. 1330-371; Pub.L. 101-239, Title VII, § 7881(j)(1), Dec. 19, 1989, 103 Stat. 2442; Pub.L. 109-280, Title I, § 108(a)(2), (3), formerly § 107(a)(2), (3), Title V, § 503(a)(1), (b), Aug. 17, 2006, 120 Stat. 818, 942, renumbered § 108(a)(2), (3), Pub.L. 111-192, Title II, § 202(a), June 25, 2010, 124 Stat. 1297; Pub.L. 110-458, Title I, § 101(d)(1)(A), Dec. 23, 2008, 122 Stat. 5098; Pub.L. 113-97, Title I, §§ 102(b)(5), 104(c), Apr. 7, 2014, 128 Stat. 1116, 1121.)

Notes of Decisions (8)

29 U.S.C.A. § 1023, 29 USCA § 1023
Current through P.L. 115-90. Also includes P.L. 115-92 to 115-117, and 115-119. Title 26 current through 115-122.

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

 © 2018 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle F. Procedure and Administration (Refs & Annos)
Chapter 67. Interest
Subchapter C. Determination of Interest Rate; Compounding of Interest (Refs & Annos)

26 U.S.C.A. § 6621, I.R.C. § 6621

§ 6621. Determination of rate of interest

Effective: July 23, 1998
Currentness

(a) General rule.--

(1) Overpayment rate.--The overpayment rate established under this section shall be the sum of--

(A) the Federal short-term rate determined under subsection (b), plus

(B) 3 percentage points (2 percentage points in the case of a corporation).

To the extent that an overpayment of tax by a corporation for any taxable period (as defined in subsection (c)(3), applied by substituting "overpayment" for "underpayment") exceeds $10,000, subparagraph (B) shall be applied by substituting "0.5 percentage point" for "2 percentage points".

(2) Underpayment rate.--The underpayment rate established under this section shall be the sum of--

(A) the Federal short-term rate determined under subsection (b), plus

(B) 3 percentage points.

(b) Federal short-term rate.--For purposes of this section--

(1) General rule.--The Secretary shall determine the Federal short-term rate for the first month in each calendar quarter.

(2) Period during which rate applies.--

(A) In general.--Except as provided in subparagraph (B), the Federal short-term rate determined under paragraph (1) for any month shall apply during the first calendar quarter beginning after such month.

 © 2018 Thomson Reuters. No claim to original U.S. Government Works.

(B) Special rule for individual estimated tax.--In determining the addition to tax under section 6654 for failure to pay estimated tax for any taxable year, the Federal short-term rate which applies during the 3rd month following such taxable year shall also apply during the first 15 days of the 4th month following such taxable year.

(3) Federal short-term rate.--The Federal short-term rate for any month shall be the Federal short-term rate determined during such month by the Secretary in accordance with section 1274(d). Any such rate shall be rounded to the nearest full percent (or, if a multiple of ½ of 1 percent, such rate shall be increased to the next highest full percent).

(c) Increase in underpayment rate for large corporate underpayments.--

(1) In general.--For purposes of determining the amount of interest payable under section 6601 on any large corporate underpayment for periods after the applicable date, paragraph (2) of subsection (a) shall be applied by substituting "5 percentage points" for "3 percentage points".

(2) Applicable date.--For purposes of this subsection--

(A) In general.--The applicable date is the 30th day after the earlier of--

(i) the date on which the 1st letter of proposed deficiency which allows the taxpayer an opportunity for administrative review in the Internal Revenue Service Office of Appeals is sent, or

(ii) the date on which the deficiency notice under section 6212 is sent.

The preceding sentence shall be applied without regard to any such letter or notice which is withdrawn by the Secretary.

(B) Special rules.--

(i) Nondeficiency procedures.--In the case of any underpayment of any tax imposed by this title to which the deficiency procedures do not apply, subparagraph (A) shall be applied by taking into account any letter or notice provided by the Secretary which notifies the taxpayer of the assessment or proposed assessment of the tax.

(ii) Exception where amounts paid in full.--For purposes of subparagraph (A), a letter or notice shall be disregarded if, during the 30-day period beginning on the day on which it was sent, the taxpayer makes a payment equal to the amount shown as due in such letter or notice, as the case may be.

(iii) Exception for letters or notices involving small amounts.--For purposes of this paragraph, any letter or notice shall be disregarded if the amount of the deficiency or proposed deficiency (or the assessment or proposed assessment) set forth in such letter or notice is not greater than $100,000 (determined by not taking into account any interest, penalties, or additions to tax).

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

(3) Large corporate underpayment.--For purposes of this subsection--

(A) In general.--The term "large corporate underpayment" means any underpayment of a tax by a C corporation for any taxable period if the amount of such underpayment for such period exceeds $100,000.

(B) Taxable period.--For purposes of subparagraph (A), the term "taxable period" means--

(i) in the case of any tax imposed by subtitle A, the taxable year, or

(ii) in the case of any other tax, the period to which the underpayment relates.

(d) Elimination of interest on overlapping periods of tax overpayments and underpayments.--To the extent that, for any period, interest is payable under subchapter A and allowable under subchapter B on equivalent underpayments and overpayments by the same taxpayer of tax imposed by this title, the net rate of interest under this section on such amounts shall be zero for such period.

CREDIT(S)

(Added Pub.L. 93-625, § 7(a)(1), Jan. 3, 1975, 88 Stat. 2114; amended Pub.L. 94-455, Title XIX, § 1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834; Pub.L. 96-167, § 4(b), Dec. 29, 1979, 93 Stat. 1275; Pub.L. 97-34, Title VII, § 711(a) to (c), Aug. 13, 1981, 95 Stat. 340; Pub.L. 97-248, Title III, § 345(a), Sept. 3, 1982, 96 Stat. 636; Pub.L. 98-369, Div. A, Title I, § 144(a), July 18, 1984, 98 Stat. 682; Pub.L. 99-514, Title XV, §§ 1511(a), (c)(1), 1535(a), Oct. 22, 1986, 100 Stat. 2744, 2750; Pub.L. 100-647, Title I, § 1015(d), Nov. 10, 1988, 102 Stat. 3569; Pub.L. 101-239, Title VII, § 7721(b), Dec. 19, 1989, 103 Stat. 2399; Pub.L. 101-508, Title XI, § 11341(a), Nov. 5, 1990, 104 Stat. 1388-470; Pub.L. 103-465, Title VII, § 713(a), Dec. 8, 1994, 108 Stat. 5001; Pub.L. 104-188, Title I, § 1702(c)(6), (7), Aug. 20, 1996, 110 Stat. 1870; Pub.L. 105-34, Title XIV, § 1463(a), Title XVI, § 1604(b)(1), Aug. 5, 1997, 111 Stat. 1057, 1097; Pub.L. 105-206, Title III, §§ 3301(a), 3302(a), July 22, 1998, 112 Stat. 741.)

Notes of Decisions (140)

26 U.S.C.A. § 6621, 26 USCA § 6621
Current through P.L. 115-90. Also includes P.L. 115-92 to 115-117, and 115-119. Title 26 current through 115-122.

End of Document
© 2018 Thomson Reuters. No claim to original U.S. Government Works.

 © 2018 Thomson Reuters. No claim to original U.S. Government Works.

9th Circuit Case Number(s) 17-55421

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Feb 5, 2018 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ Jeffrey M. Hahn

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)

CERTIFICATION REGARDING ECF VERSION

I hereby certify that this paper copy of the Appellee's Answering brief in this case is identical to the brief filed via ECF on February 5, 2018 (Dkt. No. 30).

/s/ Jeffrey Hahn
JEFFREY HAHN
Senior Trial Attorney
United States Department of Labor
Plan Benefits Security Division
200 Constitution Ave. N.W.
Room N-4611
Washington, DC 20210