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No. 13-550

In the Supreme Court of the United States

GLENN TIBBLE, *et al.*,
Petitioners,

v.

EDISON INTERNATIONAL, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CAMBRIDGE FIDUCIARY SERVICES LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Cambridge Fiduciary Services, LLC ("CFS") provides fiduciary consulting and fiduciary assessment services regarding conformity with fiduciary standards of care to those responsible for managing other people's investments. CFS has provided these services to an affiliated registered investment advisor and its clients with $24.6 billion in assets and to other entities responsible for the management of $62.8 billion in assets. Many of the clients advised by CFS sponsor ERISA retirement plans. CFS's services are rooted in prudent investment practices that achieve a fiduciary standard of excellence, sometimes referred to by investment professionals as "best practices."

CFS was formed in 2009 as part of Cambridge Financial Services Group ("Cambridge"), an employee benefits and investment advisory firm established in 1983. CFS was organized to provide fiduciary consulting services to Cambridge's investment advisor and other clients. CFS counseled various Cambridge clients on fiduciary practices, including multiple defined contribution plan sponsors.

CFS's role on behalf of Cambridge and its clients continued until June 2013, when the investment advisory business of Cambridge was purchased by Cap-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus* represents that all parties have consented to the filing of this brief. *See* Respondents' Consent to the Filing of Amicus Curiae Briefs (Nov. 24, 2014).

trust Financial Advisors. At the time of sale, Cambridge had $2.6 billion in assets under care, including one 401(k) plan with $1.25 billion in assets and another with $260 million in assets. Cambridge had additional clients with approximately $22 billion in assets for whom Cambridge provided regular investment advisory and fiduciary services.

According to the Investment Company Institute, the 401(k) plan retirement system held $4.4 trillion in assets as of March 2014 on behalf of more than 52 million active participants and millions of former employees and retirees.[2] These constituents rely on plan fiduciaries to act as "prudent experts" in the management of plan assets. As an organization performing fiduciary assessments of the conformity of plan sponsors and their advisors to a fiduciary standard of care and providing fiduciary advice on such conformity, CFS is concerned about evolving and improving the fiduciary standard of care and concerned that the rule adopted by the Ninth Circuit will diminish such standards of care and threaten recent progress in reducing fees because the rule will erode the duty to monitor retirement plan fees on an ongoing basis.

SUMMARY OF ARGUMENT

CFS's experience in advising and counseling ERISA fiduciaries and its knowledge and understanding of prevailing and evolving best practices and

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[2] Investment Company Institute, "The U.S. Retirement Market, Second Quarter 2014", at 2 http://www.ici.org/research/stats/retirement/ret_14_q2; last viewed Nov. 30, 2014.); Investment Company Institute, "Frequently Asked Questions About 401(k) Plans, October 21, 2014, at 1, (available at http://www.ici.org/faqs/faq/faqs_401k.; last viewed Nov. 30, 2014).

standards of care yields four key observations: (1) many plan fiduciaries, especially among large plans, already follow good monitoring practices, meaning that reversing the Ninth Circuit will not result in increased costs for these fiduciaries or their employers; (2) the cost of regular monitoring includes a small amount for "benchmarking" plan fees in all service categories—investment, administration, trustee, consulting, and the like, and is, in many cases, largely born by plan participants, not employers or fiduciaries; (3) the Ninth Circuit's decision threatens to erode the past decade's progress on fee reductions in defined contribution plans, driven in part by private lawsuits, which has saved plan participants billions of dollars; and (4) the Ninth Circuit's standard of "material" changed circumstances is unworkable and illogical.

ARGUMENT

I. Reversing the Ninth Circuit Will Not Result in Materially Higher Costs of Plan Administration.

CFS has advised many employer fiduciaries who administer defined contribution plans that they sponsor as well as the investment consultants who in turn advise these plan fiduciaries. It has been CFS's experience that many such plan fiduciaries and their investment consultants follow or counsel best fiduciary practices. For those plan sponsors, reversing the Ninth Circuit will have little or no impact because they have already adopted the prevailing standards of care and absorbed the commensurate costs (to the extent that they do not pass those costs on to the plan). Further, in CFS's experience, the cost of benchmarking investment fees and expenses form a small part of

the total costs of vigilance and prudence, which are born, in large measure, by plans, not plan sponsors. For those plan sponsors and plan fiduciaries who do not currently follow best practices, CFS does not believe it is a lot to ask that they spend a little more time every year minding their plans' fees and expenses—especially since they pass on much of the costs of such monitoring to their plans in any event. CFS suspects that plan participants are more than willing to bear some incremental costs of fiduciary vigilance in exchange for lower fees.

A. CFS Has Many Years of Experience Advising both Retirement Plan Fiduciaries and Their Investment Consultants.

CFS's fiduciary services to Cambridge clients were designed to promote client conformity to a fiduciary standard of care consistent with ERISA's "prudent expert" standard. Fiduciary services included preparing investment policy statements ("IPS"), counseling on the fiduciary responsibilities of investment committees, and periodic attendance at investment committee meetings. These fiduciary services complemented Cambridge's investment advisory services, which were themselves based on a fiduciary standard of care and performed in a fiduciary capacity, as overseen by CFS.

When clients opted for mutual funds, Cambridge was responsible for recommending the share class appropriate to the client's needs. This was generally the share class with the lowest expense ratio.

Cambridge clients were also advised that, following initial selection of a fund or manager, there was a duty to monitor on a periodic basis, generally annu-

ally, to verify that the initial selection remained prudent and in the best interests of plan participants. Fee monitoring takes into account the amount of plan assets (for purposes of leveraging bargaining power and the availability of price breaks), the cost of administration, and the fiduciary duty to control and account for plan fees and expenses. Without such monitoring a plan fiduciary might not realize, for example, that payments to a plan's record-keeper from revenue sharing exceed the reasonable costs of plan administration. Or a plan fiduciary might forego opportunities to fix past mistakes.

CFS also performs fiduciary certification assessments on behalf of CEFEX, the Centre for Fiduciary Excellence. CEFEX is an independent global assessment and certification organization dedicated to assisting investment fiduciaries (investment committees, investment advisors and asset managers) in adhering to the highest standards of fiduciary excellence in their particular investment function. CEFEX determined that standardization is essential to achieving global acceptance of the principles of fiduciary excellence because a standard approach provides investors with consistent and unbiased methodologies. CEFEX uses the International Organization for Standardization (ISO) 19011 standard for performing assessments.

The CEFEX certification of a qualified plan, including 401(k) plans, is based on the fiduciary standard described in the handbook Prudent Practices for Investment Stewards. For investment advisors, CEFEX bases certification on the handbook Prudent Practices for Investment Advisors. Both are published

by fi360[3] of Bridgeville, Pennsylvania, and contain 21 best practices, including supporting criteria, describing how an investment fiduciary can prudently manage the investments for which it is responsible. Each practice is substantiated by ERISA, the Uniform Prudent Investor Act, the Uniform Prudent Management of Institutional Funds Act, the Uniform Management of Public Employee Retirement Systems Act and the Investment Advisors Act of 1940. (Collectively, the Prudent Practices applicable to Investment Stewards and to Investment Advisors are referred to herein as "the Practices".)

CEFEX assessments of fiduciary oversight are performed by analysts appointed by CEFEX. Such analysts must earn the Accredited Investment Fiduciary Analyst™ or AIFA® designation awarded by fi360 (a founding CEFEX member) after a period of study and examination and demonstrate prior investment industry experience. Today, there are some 40 CEFEX analysts, including one of CFS's principals.

These assessments verify whether an entity conforms to a fiduciary standard of excellence—"best practices" if you will. Satisfactory completion of an assessment results in CEFEX issuing a certificate attesting to an entity's conformity with the standard. Certification is annual. CFS currently performs these assessments for a multiemployer pension fund ($160 million in assets), the registered investment advisors of four major independent broker/dealers ($62 billion

[3] The Practices were first published in 2003 and were updated in 2006 and 2013. *See* http://www.fi360.com/about-fi360/history (last viewed Dec. 8, 2014).

in assets, much of it represented by 401(k) plan assets) and two other investment advisory firms ($822 million in 401(k) assets).

Over 8,000 fi360 advisor designees are committed to applying the Practices in their advisory activities. CEFEX has certified over 65 advisory firms as conforming to the Practices. These advisory firms are collectively responsible for over $140 billion in assets,[4] of which $81 billion represents ERISA defined contribution plan assets. These advisory firms have, in turn, provided counsel with respect to the Practices to their plan fiduciary clients, which include some 5,096 defined contribution plans.

B. Many Plan Fiduciaries Are and Have Been Vigilant and Diligent.

The notion that overruling the Ninth Circuit will compel plan fiduciaries to do a lot more than they have been doing to protect themselves from lawsuits is bogus. It is CFS's experience that at many, if not most, large plans with over $250 million in assets the plan fiduciaries already follow appropriate standards of monitoring fees. For these fiduciaries, there is no increased cost in vigilance *because they are already doing it*. And it is these large plan fiduciaries, motivated in part by good intentions, but also by fee litigation since 2006 and Department of Labor rulemaking, that have helped to drive down retirement plan fees in virtually all market segments, which has benefited all plans and their participants generally.

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[4] This does not include the additional $62 billion in broker/dealer advisory assets overseen by CFS.

Further, the standard employed by CEFEX, which many plan fiduciaries and their respective investment consultants and advisors follow, command diligence in monitoring fees, investments, and vendors. The fi360 Handbooks offer a practical approach to framing the issue. They separate the Practices and supporting criteria into a four step process that together constitute a Fiduciary Quality Management System. One of those four fundamental steps is monitoring. As the Handbooks explain:

> No one should be lulled into thinking that the 'heavy lifting' was done [at selection] and the client portfolio is now on 'auto pilot,' marked only by periodic re-balancing, quarterly performance reports, and routine client meetings.

Practice 4.4 and its Criteria are especially relevant to the monitoring issues in this case:

> Practice 4.4 - "Periodic reviews are conducted to ensure that investment-related fees, compensation, and expenses are fair and reasonable for the services provided."
>
> > Criterion 4.4.1 - "A summary of all parties compensated from the portfolio or from plan or trust assets and the amount of compensation has been documented."
> >
> > Criterion 4.4.2 - "Fees, compensation, and expenses paid from the portfolio or from plan or trust assets are periodically reviewed to ensure consistency will all applicable laws, regulations, and service agreements."
> >
> > Criterion 4.4.3 - "Fees, compensation, and expenses paid from plan or trust assets are

> periodically reviewed to ensure such costs are fair and reasonable based upon the services rendered and the size and complexity of the portfolio or plan."

The thousands of fi360 advisor designees and 65 CEFEX certified advisory firms already counsel their clients to conform to the monitoring required by these Practices.

C. Vigilance and Diligence in Monitoring Are Not Expensive.

In our experience, large plans, *i.e.*, plans exceeding $250 million in assets, are typically administered by a committee consisting of three or more of the plan sponsor's officers or managers. These committees typically meet quarterly for a few hours to review the company's retirement plans. The committee members may spend a couple of additional hours in advance of a meeting reviewing briefing materials that will be presented at the meeting. One or a few of the sponsor's employees may be tasked with supporting the committee, preparing briefing materials, and working with investment managers, vendors, consultants, and the like. Such employees often attend committee meetings.

In addition, many committees hire independent consultants (such as Cambridge and CFS) to assist in vendor selection and monitoring. A typical committee meeting involves investment performance review, new investment evaluation and manager searches, other vendor reviews, particular issues of concern, and the like. Less frequently, full fee and vendor reviews are conducted, typically referred to as "benchmarking." Best practice is to conduct a detailed fee review annually. To be sure, monitoring activities in

general are not without cost. Vigilant committee members, all of whom generally have important jobs with the employer, may spend 25-50 hours a year on committee matters. Staff support may also require several full-time employees, especially for very large plans. And consultants are not cheap. For a large plan, the lost manager hours, staff compensation, and consultant fees are not insubstantial. That said, the plan often pays for employee staffing on plan administration and almost always pays for consultants who advise the plan fiduciaries.

Indeed, in the case before the Court, the investment committee retained Hewitt Financial Services to advise it. *Tibble v. Edison Int'l*, 729 F.3d 1110, 1138 (9th Cir. 2013). According to the Edison 401(k) Savings Plan Form 5500 for 2009, Hewitt was compensated by the plan for its services.[5] This is consistent with our experience where much of the monitoring costs are born by the plan and its participants, not the plan sponsor. More important to this case, the cost of benchmarking is a small part of a plan's total investment and administration expense. In fact, many investment advisors do not charge for benchmarking mutual funds, the investment vehicle involved here, because of readily available mutual fund data sources, such as Morningstar, and the relative ease of compiling a report.

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[5] 2009 Form 5500 Annual Return/Report of Employee Benefit Plan, Schedule C, page 3 (reflecting payments for recordkeeping, shareholder servicing, sub-transfer agency, distribution, and "other" services according to the listed service codes). This document can be located at https://www.efast.dol.gov/portal/app/disseminate?execution=e1s1. Type 951240335 into EIN field and 002 into Plan Number. The search will retrieve this plan's Forms 5500 and accompanying auditor's report.

II. Fee Litigation and the Prospect of Fiduciary Liability Have Resulted in Substantially Lower Defined Contribution Plan Fees.

In the middle of the last decade, the Department of Labor turned a spotlight on defined contribution plan fees and fiduciary oversight.[6] Beginning in 2006, dozens of lawsuits against fiduciaries for large plans alleging excessive plan fees have been filed, many settling for tens of millions of dollars. Several years later, New England Pension Consultants, LLC ("NEPC") summarized the findings of its annual defined contribution Plan & Fee Survey: "Fees related to retirement investment accounts hit a record low this year."[7] NEPC attributed declining fees in part to "well publicized litigation."[8] Much of that litigation would have stopped dead in the tracks had the Ninth Circuit's rule applied.

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[6] *See, e.g.*, *Meeting Your Fiduciary Responsibilities* (May 2004) (available at www.dol.gov/ebsa/publications/fiduciaryresponsibility.html) (last viewed November 30, 2014); *Understanding Retirement Plan Fees and Expenses* (May 2004) (available at http://www.dol.gov/ebsa/publications/undrstndgrtrmnt.html) (last viewed November 30, 2014).

[7] Defined Contribution Plan Fees Continue to Decline: 2013 NEPC Plan & Fee Study, at 1. ("NEPC 2013 Survey") (available at http://www.nepc.com/writable/research_articles/file/2013_09_nepc_dc_plan_fees.pdf; last viewed December 8, 2014).

[8] NEPC 2014 Defined Contribution Plan & Fee Survey: What Plan Sponsors Are Doing Now, at 1, ("NEPC 2014 Survey") (available at http://www.nepc.com/writable/research_articles/file/2014_10_nepc_2014_defined_contribution_plan_and_fee_survey-_what_plan_sponsors_are_doing_now.pdf; last viewed December 8, 2014).

In 2006, the first year of the NEPC survey and the first year with multiple fee-lawsuits, average record-keeping fees were $118 per plan participant and the median plan weighted average expense ratio was 57 basis points.[9] In 2014, the median per-participant record-keeping fee was $70 and the median plan weighted average expense ratio was 49 basis points.[10] In other words, record-keeping fees have declined 40% since 2006 and total plan fees have declined by 21%.

Similar trends are visible in mutual fund fees. Mutual funds are widely held by defined contribution plans. The Investment Company Institute ("ICI"), the trade association for the mutual fund industry, reported that over the past ten years, the average expense ratio (the total reported fees charged to a mutual fund) for actively-managed equity funds and index equity funds have declined, respectively, by 21 and 13 basis points.[11] Over the past five years, expense ratios for target date funds (funds that allocate and reallocate assets based on a projected retirement date) have declined from 67 basis points to 58 basis points—about 13.5%

The data are even more striking on an asset-weighted basis. From 2003 to 2013, asset-weighted fees fell in four mutual fund categories, as depicted in Table 1 below.[12]

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[9] 2014 NEPC Survey at 1.

[10] 2014 NEPC Survey at 3.

[11] ICI Research Perspective: Trends in the Expenses and Fess of Mutual Funds, 2013, May 2014, at 1 ("ICI Perspective") (available at http://www.ici.org/pdf/per20-02.pdf; last viewed December 8, 2014).

[12] *Id.* at 3, Figure 1.

Table 1

Year	Equity	Blend	Bond	Money Market
2003	100 bp	90 bp	75 bp	42 bp
2013	74 bp	80 bp	61 bp	17 bp
BP change	-26	-10	-14	-25
% change	-26%	-11%	-18.6%	-59.5%

The ICI attributes this trend in part to investor preference for lower-cost funds.[13] In the case of defined contribution plans where the funds are chosen by plan fiduciaries, this means that fiduciaries are driving the trend to lower investment management fees for their retirement plan participants. This is a good thing. CFS submits that fiduciary preference for low-cost investment options and decreased record-keeping fees are directly correlated to fee litigation against plan fiduciaries. Large plan sponsors and the financial services community have monitored fee litigation closely from the moment the first of these cases were filed in 2006. Consultants and lawyers alike have been emphasizing in the years since that conflict-free, regular scrutiny of fees is critical to avoiding suit. Several ERISA legal conferences a year devote substantial time to fee litigation. The Ninth Circuit's ruling threatens to reverse these real gains by immunizing fiduciaries from lawsuits over current fees that were set years prior.

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[13] *See, e.g.,* ICI Perspective, at 2 (equity investors shifting no no-load institutional shares and lower-cost index funds), 15 (investor preference for low-cost funds driving down fees for target-date funds).

Consider how these reductions in fees translate into real dollars for working Americans. Basic plan data from a retirement plan database illustrates the dollar impact of these fee reductions.[14] We identified 2,478 defined contribution plans with assets greater than or equal to $250 million. Collectively, these plans had 40,568,708 participants and $3.06 trillion in assets. If plan participants in these large plans in 2014 had paid the $118 per-participant record-keeping fee that was the norm in 2006 instead of than the median 2014 $70 per-participant fee (as reported in the NEPC surveys), they would have paid an additional $1.947 billion in record-keeping fees in 2014 alone.

The saved dollars on total plan fees are enormous as well. NEPC reported total defined contribution plan fees of 57 basis points in 2006 and 49 basis points in 2014, a difference of 8 basis points. That difference applied to the total plan assets of the large plan group equals $2.448 billion. In sum, *declining fees saved $2.448 billion in fees for about 40 million plan participants in 2014 alone*. Add in the fee savings for every other year since 2006, and the fee savings for all the plans with under $250 million in assets, and compound those savings over many years of investment returns, and it is apparent that tens of millions of

[14] The Retirement Plan Prospector is a subscription database containing data for approximately 803,000 defined contribution plans. It can be accessed with a subscription at http://prospector.judydiamond.com/. The data comes largely from the Forms 5500 and accompanying financial statements filed annually by retirement plans with the Internal Revenue Service and Department of Labor. Virtually every data point on the Form 5500 can be searched.

Americans have benefited and will benefit from pressure on fees by receiving increased retirement income. These savings were driven in part by fee litigation. The accumulated fee savings over time are very valuable to individual retirees, as depicted in the following figure.

Figure 1

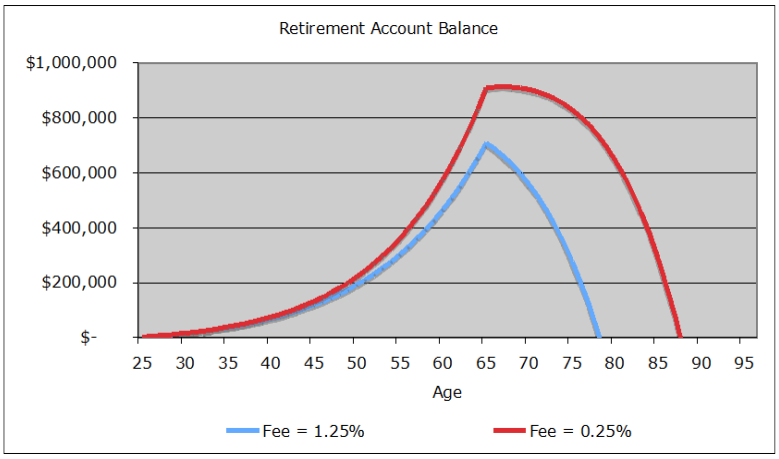

Figure 1 depicts the portfolio trajectory for a typical employee in a defined contribution plan. In this example, an individual starts saving at age 25 and continues to participate until age 65. At that time, savings are withdrawn until the balance reaches $0. As illustrated, the effective life of the assets moves from age 88 to age 78 if fees are increased by 100 basis points.[15] Even a difference of 10 basis points in fees

[15] A note about other assumptions in this analysis: The plan participant in this analysis earns $40 thousand per year and saves 5% annually towards retirement. Inflation is assumed to be 2.5%, which increases salary and annual contributions accordingly. Investment returns are assumed to be 9%, and at retirement in this analysis, the participant withdraws 70% of her projected salary on an inflation adjusted basis.

adds substantially to retirement savings over time. Assuming all the same conditions for the typical employee depicted in Figure 1, except a difference of 10 basis points in fees instead of 100, the employee would still enjoy eighteen additional months of retirement income. That may not sound like a lot, but CFS thinks eighteen additional months of retirement income security is very meaningful to a 78-year old American on a fixed income. Fees matter a lot.

In sum, the increased administrative cost of fee benchmarking, which we discussed above, pales in comparison to the fee savings achieved over the past several years.

III. The Ninth Circuit's Standard Is Unworkable and Illogical.

In *Tibble*, the Ninth Circuit held that a plaintiff may evade the statute of limitations for investments selected outside the limitations period by showing "changes in conditions occurred within the limitations period that should have prompted a full due diligence review of the funds, equivalent to the diligence review Defendants conduct when adding new funds to the Plan." 729 F.3d at 1120 (quotation omitted). This rule makes little sense in practice.

First, it is not at all clear what kind and degree of "changes in conditions" would trigger "a full due diligence review." Would a sustained period of mediocre performance be sufficient? Or is substantial underperformance required? How about the resignation of a portfolio manager? A Securities and Exchange Commission investigation into a mutual fund family? A significant relative change in expense ratios as compared to peers, even as the fees for the plan remain static? Instead of leaving fiduciaries guessing as to

whether and how circumstances have changed, the current standard of care commands them to periodically review and monitor plan fees.

Second, the Ninth Circuit rule yields absurd outcomes. Consider the scenarios in Table 2:

Table 2

At selection	Current	Material Change?	Legal Claim?
1. Top decile in fees[16]	Top quartile in fees	Yes, substantially less expensive	New claim accrues because still high fees, even though better than before
2. Top decile in fees	Top decile in fees	No, remains equally terrible	No new claim accrues even though very high fees
3. Bottom decile in fees	Top decile in fees	Yes, substantially more expensive	New claim accrues because substantial increase in fees

[16] Top decile means the fund had among the top ten percent highest fees in its peer group, *i.e.,* it was more expensive than 90% of peer funds.

As these sample scenarios illustrate, with the Ninth Circuit's rule fiduciaries that retain the highest fee, expensive investment offerings would be protected from suit so long as the fees remained just as high (Scenario 1). If, however, there was a material reduction in fees, but the fee nevertheless remained high relative to market (Scenario 2), a new claim would accrue. The outcome of this rule is inconsistent with fiduciary obligations and common sense. Consider further that many of these excessive fee lawsuits involve conflicts of interest. Indeed, many such fee lawsuits involve funds and services offered by affiliates and subsidiaries of the plan sponsor. The fiduciaries who choose these affiliated offerings are almost always employees of the plan sponsor, sometimes in the very asset management unit that reaps the fees from the plan. These employees are appointed to serve as fiduciaries by senior executives or the board of directors—their bosses. And these employees generally steer billions of dollars in assets and millions in fees to their own employer. Such arrangements are fraught with conflicts. Under the Ninth Circuit's rule, however, so long as high fees remain unchanged, a conflicted and self-dealing investment decision can be forever enshrined in the plan. Such a rule will devastate standards of fiduciary care.

CONCLUSION

The judgment of the court of appeals should be reversed.

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