UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Julio C. Alas, et al., Plaintiffs, v. AT&T Services, Inc., et al., Defendants.	Case No. 2:17-cv-8106-VAP-RAOx **Order GRANTING Defendants' Motion for Summary Judgment (Dkt. 164) and DENYING Plaintiffs' Motion for Partial Summary Judgment (Dkt. 176)**

Before the Court are Defendants' AT&T Services, Inc. and the Benefit Plan Investment Committee's ("Defendants") Motion for Summary Judgment and Plaintiffs' Robert Bugielski and Chad Simicek, on behalf of a class of participants and beneficiaries, ("Plaintiffs") Motion for Partial Summary Judgment.

After considering all the papers filed in support of, and in opposition to, the Motions, as well as the arguments advanced at the hearing, the Court **GRANTS** Defendants' Motion and **DENIES** Plaintiffs' Motion.

I. BACKGROUND

On November 12, 2018, Plaintiffs filed the Third Amended Complaint ("TAC") against Defendants with claims for (1) breaches of fiduciary duties of prudence, candor, and prohibited transactions under ERISA § § 404(a) and 29 U.S.C. § 1104(a); (2) prohibited transactions under ERISA § 406(a) and 29 U.S.C. § 1106(a); and (3) breaches of fiduciary duties of prudence and candor and self-dealing prohibited transactions under ERISA § § 404(a), 406(b)(1), and 29 U.S.C. § § 1104(a) and 1106(b)(1). (TAC, 24-27). Plaintiffs later voluntarily dismissed Count 3. (Dkt. 161).

In the TAC, Plaintiffs alleged Defendants failed to implement a process to control the administrative expenses that participants in the AT&T Retirement Savings Plan ("Plan") paid to the Plan's recordkeeper, Fidelity Investments Institutional Operations Company, Inc. ("Fidelity"). Plaintiffs also alleged Defendants failed to analyze and evaluate compensation paid to Fidelity from Financial Engines Advisors L.L.C. ("Financial Engines"), which provided computer-based investment advice to Plan participants. As a result of Defendants' failure to perform their fiduciary duties, Plaintiffs alleged that Plan participants paid grossly excessive fees to Fidelity.

On similar grounds, Plaintiffs alleged that Defendants engaged in a prohibited transaction with Fidelity in defiance of ERISA § 406(a). According to Plaintiffs, Defendants failed to obtain from Fidelity the required disclosures of direct and indirect compensation in connection with all the services that Fidelity was providing, which resulted in Defendants failing to ascertain whether Fidelity's total compensation was reasonable.

Plaintiffs also claimed that Defendants failed to report Fidelity's compensation accurately on the required annual Form 5500, filed with the Employee Benefit Security Administration ("EBSA"). Plaintiffs assert Defendants' reporting failure was a violation of the duty of candor set forth in ERISA § 404(a).

In response to the TAC, Defendants filed two motions: a Motion for Reconsideration regarding an earlier Motion to Dismiss, and a Motion to Dismiss the TAC. (Dkt. 100). The Court declined to reconsider its previous ruling and granted Defendants' Motion to Dismiss only as to newly named individual defendants in the TAC. (Dkt. 106). Defendants subsequently filed an Answer to the TAC on April 08, 2019. (Dkt. 112).

On June 14, 2021, Defendants filed a Motion for Summary Judgment as to all claims in the TAC ("Defs.' Motion," Dkt. 165), along with a Statement of Undisputed Facts ("Defs.' SUF," Dkt. 165.1) containing 49 facts, and the Declarations of Julianne Galloway, John Phipps, and Nancy Ross, including Exhibits 1-57. ("Defs.' Ex.," Dkt. 165.2-61).

On June 15, 2021, Plaintiffs filed a Motion for Partial Summary Judgment ("Pls.' Motion," Dkt. 167) as to Defendants' breach of fiduciary duty and prohibited transactions, along with a Statement of Undisputed Facts containing 128 facts, ("Pls.' SUF," Dkt. 167.1), and the Declaration of John J. Nestico (Dkt. 167.2), including exhibits 2-56 and four unnumbered deposition transcripts. ("Pls.' Ex.," Dkt. 168.1-42). On August 9, 2021, Plaintiffs submitted a reply brief in support of their Motion for Partial Summary Judgment ("Pls.' Reply," Dkt. 195) along with new evidence, including a Supplemental Statement of Undisputed Facts ("Pls.' SSUF," Dkt. 195.1) with 31 new facts. Defendants filed a response to the new summary judgment evidence on August 30, 2021. (Defendants' Response to New Summary Judgment Evidence, "Defs.' Response", Dkt. 207).

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II. LEGAL STANDARD

A motion for summary judgment or partial summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

"[W]hen parties submit cross-motions for summary judgment, each motion must be considered on its own merits." *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (internal quotations and citations omitted). Thus, "[t]he court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." *Id.* (quoting Wright, et al., *Federal Practice and Procedure* § 2720, at 335-36 (3d ed. 1998)). If, however, the cross-motions are before the court at the same time, the court must consider the evidence proffered by both sets of motions before ruling on either one. *Riverside Two*, 249 F.3d at 1135-36.

Generally, the burden is on the moving party to demonstrate that it is entitled to summary judgment. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). "The moving party may produce evidence negating an essential element of the nonmoving party's case, or . . . show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000) (reconciling *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). The nonmoving party must then "do more than simply show that there is some metaphysical doubt as to the material facts" but must show specific facts which raise a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A genuine issue of material fact will exist "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248.

In ruling on a motion for summary judgment, a court construes the evidence in the light most favorable to the non-moving party. *Barlow v. Ground*, 943 F.2d 1132, 1135 (9th Cir. 1991). "[T]he judge's function is not [] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

III. FACTS

A. Undisputed Facts

The following material facts are supported adequately by admissible evidence and are uncontroverted. They are "admitted to exist without controversy" for the purposes of deciding Plaintiffs' and Defendants' Motions, respectively. *See* C.D. Cal. L.R. 56-3.

1. <u>The AT&T Retirement Savings Plan</u>

The Plan is an individual account, 401(k) defined contribution plan offered to eligible AT&T employees. (Defs.' SUF, no.1; Pls.' SUF, no. 1). Defendant AT&T Services is the administrator of the Plan and a fiduciary of the Plan. (Pls.' SUF, nos. 5-6). AT&T Services delegated responsibility for certain investment-related functions, like monitoring Plan investment expenses, to Defendant Benefit Plan Investment Committee ("BPIC"), which is comprised of AT&T's CFO, Treasurer, Controller, Vice President of Investment Management, and Vice President – Benefits. (Pls.' SUF, no. 9).

AT&T engaged Fidelity to serve as the Plan's recordkeeper in 2005, a role that gives Fidelity authority to track participant contributions and investments, process distributions, and perform other administrative functions. (Defs.' Motion, at 2). At all relevant times, AT&T's contracts with Fidelity included a "most favored customer" clause which provided that Fidelity's fees were "not less favorable than those extended to any other" similarly situated customer. (Defs.' SUF, no. 18).

2. <u>BrokerageLink</u>

BrokerageLink is an additional service Fidelity offers to participants in the Plan. BrokerageLink, which has been available to Plan participants since 2011, allows participants to trade mutual funds, individual stocks and bonds, and other investments. (Defs.' Motion, at 3; Pls.' SUF, nos. 120-121). Plan members who execute transactions through BrokerageLink pay Fidelity's standard fee and expense schedule as well as any other fees associated with the transaction. (*Id.*). As a result of these fees, Fidelity receives "indirect compensation" with respect to Plan investments made through Brokerage Link. (Defendants' Statement of Genuine Issues in Opposition to Pls.' Motion, "Defs.' Opp. SUF," Dkt. 180.2, no. 63).

3. Financial Engines

AT&T entered into a contract with Financial Engines in August 2014 to provide advisory and managed account services to the Plan. (Defs.' SUF, no. 32). Participants volunteer to use Financial Engines' services and grant permission to Financial Engines to execute trades in their Plan account. (*Id.* at no. 33). Financial Engines initially charged a Plan Access Fee of $2.00 per year per active participant and an asset-based fee for participants who signed up to use Financial Engines' professional management services. (*Id.* at no. 39). In October 2017, AT&T extended its contract with Financial Engines, eliminated the $2.00 per participant fee, and reduced its asset-based fees. (*Id.* at no. 41).

Fidelity and Financial Engines maintain a separate agreement through which Financial Engines pays Fidelity for access to the accounts of Plan participants. (Defs.' SUF, no. 35). The Services Agreement between AT&T Services and Financial Engines states that Financial Engines "has entered into an agreement with the Plan Recordkeeper to establish and maintain secure communication links and data connectivity," and that a portion of the Plan fees would be paid to the Plan Recordkeeper "as compensation for these activities." (*Id.* at no.36). A September 2014 letter from AT&T to Fidelity establishes that "Financial Engines compensates Fidelity for maintaining the links and related services with an annual fee of 22.5 basis points," with an additional "annual $1.00 platform fee for each advice eligible plan participant." (*Id.* at no. 37). Fidelity therefore receives "indirect compensation" from Financial Engines with respect to Plan participants who use Financial Engines' services. *See, e.g.,* Defs.' Opp. SUF, no. 70.

4. Form 5500s

Retirement plans with 100 participants or more must file a Form 5500 annually. (TAC, at 18). The form details financial information about the retirement plan, including the number of plan participants, the amount of plan assets, and the amounts of certain kinds of compensation paid to service providers. The Plan has filed Form 5500s for each year stemming from 2011 to 2019. (Pls.' SUF, nos. 44-71). The Department of Labor publishes instructions on how to complete a Form 5500 on its website. *See* Defs.' Ex. 9.

B. Disputed Facts

The parties dispute whether the named Defendants in this lawsuit, the BPIC and AT&T Services, have fiduciary responsibility for the alleged breaches of fiduciary duty. Plaintiffs contend that Defendant BPIC is a fiduciary of the Plan with duties "related to the ASRP other than administration," including the duties to oversee recordkeeping fees and administrative reporting obligations. (Pls.' SUF, no. 7). Defendants argue that BPIC members do not have responsibility for recordkeeping or reporting because they delegated authority over these matters to individual AT&T executives. (Defs.' SUF, nos. 4-6).

The parties also dispute how to evaluate the total fees the Plan paid Fidelity for recordkeeping services on an annual basis from 2011 to 2018.

Plaintiffs allege that Defendants vastly over-compensated Fidelity by paying $5.055 million for recordkeeping and administrative services in 2011, for example, and increasingly more in the years following. (Pls.' SUF, nos. 44-71). While Defendants do not dispute these figures, they argue these totals do not reflect total "recordkeeping and administrative" fees because they also include compensation for a variety of additional services, "as indicated by the Services Codes in element (b) [of Form 5500]." (Defs.' Opp. SUF, nos. 44-71). Since the parties disagree on what should be included in "recordkeeping and administrative services," they also dispute the amount the Plan paid to Fidelity for recordkeeping on a per participant basis. Plaintiffs allege the Plan paid, on average, roughly $61 per participant per year in recordkeeping expenses from 2011 to 2018. (TAC, at 12). Defendants contend that the Plan spent at most $31 per participant per year (in 2011), down to $29 per participant in 2012, and only $20 per participant after the year 2018. (Defs.' Opp. SUF, nos. 44-71).

The parties also dispute the nature of the agreement between Fidelity and Financial Engines. Plaintiffs allege that Financial Engines was paying Fidelity for mere "access to the accounts" of Plan participants who had signed up to use Financial Engines, while Defendants claim that Financial Engines was paying for "access to Fidelity's data and technology." (Defs.' SUF, no. 35). This dispute becomes relevant as Plaintiffs argue that the amount of revenue Fidelity received from Financial Engines was excessively high. *See* Pls.' SUF, no 92; Pls.' Motion, at 9 ("Fidelity would receive more than 50 percent of the total fee paid for Financial Engines' managed account services"); see *also* Pls.' Motion, at 13 (questioning whether "the kickbacks Fidelity received from FE bore a reasonable relationship to such costs").

The parties next dispute whether Defendants accurately reported the indirect compensation Fidelity received from BrokerageLink and Financial Engines on Schedule C of the Form 5500s. According to Plaintiffs, Defendants incorrectly reported that Fidelity received "0" dollars in indirect compensation, failing to take into account the "indirect compensation with respect to participant investments through BrokerageLink and from Financial Engines." *See, e.g.*, Pls.' SUF, nos. 65, 68. Defendants agree they reported "0" dollars on the Form 5500s, but argue the reporting was accurate because the form prompts filers to report the "total indirect compensation . . .*excluding eligible indirect compensation."* (*See, e.g.*, Defs.' Opp. SUF, no. 68) (emphasis added). On this point, the parties also disagree about what qualifies as "eligible" indirect compensation and what does not.

The parties also dispute whether AT&T appropriately considered Fidelity's indirect compensation from BrokerageLink and Financial Engines in determining whether Fidelity's overall compensation was reasonable. Plaintiffs allege that Defendants defied ERISA § § 1104(a) and 406(a) by failing to consider Fidelity's compensation from other sources, which resulted in Defendants engaging in prohibited transactions with Fidelity. (TAC, at 25-26). Defendants counter that they did consider and evaluate Fidelity's compensation in connection with BrokerageLink and Financial

Engines, and that Fidelity's overall compensation was reasonable. (Defs.' Opp. SUF, no. 126).

IV. EVIDENTIARY ISSUES

Defendants dispute the admissibility of Form 5500s Plaintiffs submitted in support of their Motion for Partial Summary Judgment. *See* Defs.' Response. These Form 5500s concern four retirement plans from four companies--Costco, FedEx, HCA, Home Depot--and two trusts. (Pls.' Reply, Dkt. 195.2-26). Plaintiffs seek to use the Form 5500s as evidence of the amount of direct compensation that each company paid to its recordkeeper per plan participant. (*Id.* at 1-2*)*. Defendants argue that the Form 5500s are inadmissible hearsay because they are statements prepared by non-parties offered for the truth of what they assert. Moreover, Defendants assert that Plaintiffs cannot draw conclusions about other plans' payments to their service providers because they have no "knowledge of the specific services those plans received, the quality of scope of those services, how the service providers were compensated, or how the Form 5500s were completed." (Defs.' Response, at 3).

In certain circumstances, a Form 5500 Annual Report would be admissible under Federal Rule of Evidence 803(6), the business record exception to hearsay evidence. "Rule 803(6) provides that records of regularly conducted business activity meeting the following criteria constitute an exception to the prohibition against hearsay evidence: [a] . . . report, record, or data compilation . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the . . . report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . . " *U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co*., 576 F.3d 1040, 1043 (9th Cir. 2009), citing Fed. R. Evid. 803 (6).

In the summary judgment context, "the evidence presented . . . does not yet need to be in a form that would be admissible at trial, [instead] the proponent must set out facts that it will be able to prove through admissible evidence." *Norse v. City of Santa Cruz*, 629 F.3d. The Court thus must consider whether Plaintiffs *could* properly introduce the Form 5500s at trial under the business record exception. *See Fraser v. Goodale*, 342 F.3d 1032, 1037 (9th Cir. 2003) (holding that because the contents of a diary "could be admitted into evidence at trial in a variety of ways," the contents could be considered at the summary judgment stage).

In their Reply, Plaintiffs attempt to introduce the Form 5500s through the Declaration of John J. Nestico, Plaintiffs' counsel, who attests that each of the documents attached as exhibits are "publicly available documents obtained from the website of the Employee Benefit Security Administration of the U.S. Department of Labor." (Dkt. 195.2, at 3). This does not lay the foundation to introduce a record under the business records exception because Nestico is neither a custodian of the records nor a qualified witness. *Contra United States v. Evans*, 178 F. App'x 747 (9th Cir. 2006) (holding that manager of local store of cellular telephone service provider was qualified to authenticate cellular telephone bill and admit it under business records exception); *United States v. Miller*, 771 F.2d 1219 (9th Cir. 1985) (holding that telephone company billing supervisor could introduce telephone bills under business records exception).

Plaintiffs could, however, introduce the Form 5500s at trial by subpoenaing the record custodian from each company to testify, which would be sufficient to lay a foundation under the business records exception. *See, e.g.*, *Begaren v. Sec'y of Corr.*, No. SACV1702178DMG (SHKx), 2019 WL 3210100, at *10 (C.D. Cal. May 15, 2019), *report and recommendation adopted,* No. CV1702178DMG (SHKx), 2020 WL 4820700 (C.D. Cal. Aug. 19, 2020) (finding that an AT&T records custodian's testimony identifying a phone bill laid a foundation for the business records exception). Therefore, while the Court agrees with Defendants that Plaintiffs could have, and indeed should have, hired an expert witness to introduce the Form 5500s in their Motion, or to introduce general evidence about other companies' recordkeeping practices, the Court finds that Plaintiffs still could properly introduce the forms at trial. *See* Defs.' Response, at 5.

Even if Plaintiffs were to lay a foundation for the Form 5500s, however, the forms are not probative of the point Plaintiffs are trying to prove, i.e., that other retirement plans report direct and/or indirect compensation differently than the Plan. The forms themselves do not reveal the underlying services that each company's retirement plans used, nor the processes that those plans used to calculate their recordkeeping expenses. *See* Defs.' Response, at 3 (noting that Plaintiffs have no "knowledge of the specific services those plans received, the quality of scope of those services, how the service providers were compensated, or how the Form 5500s were completed"). Form 5500s are merely a tool to report annual financial information to the EBSA—they do not serve as detailed accounts of retirement plans' recordkeeping services. The Court therefore finds that, while the Form 5500s could be admissible at trial under the business records exception, Plaintiffs' conclusions about the forms are unsupported and can not be accepted as true. *See, e.g., Pulse Elecs., Inc. v. U.D. Elec. Corp.*, No. 318CV00373BEN (MSBx), 2021 WL 981123, at *33 (S.D. Cal. Mar. 16, 2021) (determining that certain photographs proffered as evidence, even if admitted, "proved nothing dispositive" to the instant motion).

The Court can also take judicial notice of the Form 5500s. Pursuant to Federal Rule of Evidence 201, a court may properly take judicial notice of matters in the public record. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). A court may take judicial notice of a public record not for the truth of the facts recited in the document, but for the existence of the matters therein that cannot reasonably be questioned. *See* Fed. R. Evid. 201. A court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (citation omitted). If a court takes judicial notice of a document, it must specify what facts it judicially noticed from the document. *Id.*

Here, the Court finds the Form 5500s to be records that are publicly available and relevant to the issues raised in the Motions. The Form 5500s provide a sample of how other companies reported fees, including what service codes are selected and what boxes are filled out on Schedule C. The Court cannot, however, determine that the Form 5500s prove the matters for which Plaintiffs proffer them. The Court therefore takes judicial notice of Exhibits 84-107 but will not consider them for the truth of the matters contained therein, i.e, that the fees reported reflect the "direct compensation" each company paid to its recordkeeper. (Dkt. 195).

C. DISCUSSION

The Court addresses the claims of this lawsuit as follows, necessarily combining arguments where they can be grouped together and omitting them where they are redundant.

A. Breach of Fiduciary Duty Claims

1. Whether the BPIC has authority over recordkeeping and administrative issues

To establish Defendants' fiduciary duties in this case, the Court must determine the precise authority of the BPIC. The parties present conflicting evidence about whether the BPIC has responsibility for monitoring recordkeeping expenses and administration issues.

Defendants argue that the BPIC does not have responsibility for monitoring administrative expenses. In support, they point to the deposition of Marty Roy Webb,[1] who testified that the BPIC is responsible for Plan

[1] Webb was the Vice President-Benefits from the start of the class period until December 2019. Defs SUF no. 7.

issues "other than administration, typically regarding the trust and how the trust operates." (Defs.' Ex. 6, at 37:19; Defs.' Motion, at 7). Defendants claim that AT&T Services delegated authority over administrative issues, including recordkeeping, to certain Benefits executives outside of the BPIC—namely to the Senior Vice President- Compensation, Benefits & Policy, to the Vice President-Benefits, and to the Director of Savings Plan Operations. (Defs.' SUF, nos. 4-6; Defs.' Ex. 13-14).

Plaintiffs argue the BPIC does have responsibility for administrative issues, including monitoring recordkeeping expenses. They point to Defendants' Exhibit 11, the document outlining the Board of Directors of AT&T Services' delegation of authority to the BPIC, which states that the BPIC has "all powers and authority that may be necessary or appropriate to the establishment, qualification, administration and operation of each of the trusts established as part of any [employee benefit] plan . . . ." (Defs.' Ex. 11, at 2). They also point out that Defendants admitted in their Answer that AT&T was the "Plan administrator" and that "AT&T Services, and its authorized delegates, are involved in the selection and appointment of the Plan's recordkeeping and administrative service providers." (Plaintiffs' Opposition, "Pls.' Opp'n," Dkt. 185, at 7). Finally, Plaintiffs argue that the relevant individual executives, whether acting as BPIC members or not, were agents of AT&T services whenever they made decisions related to the Plan's recordkeeping. (*Id.* at 7).

The Court finds there is a genuine dispute as to the scope of the BPIC's authority and the roles of individual executives in monitoring recordkeeping expenses. Defendants do not point to any specific language from Exhibits 13 or 14 that demonstrates a delegation of authority over recordkeeping expenses away from the BPIC. Webb's deposition statements are inconclusive and vague about the precise responsibilities of the BPIC in connection with recordkeeping. Moreover, at least one person who allegedly was delegated authority over recordkeeping was also a member of the BPIC (the Vice President- Benefits). *See* Pls.' SUF, no. 9; Defs.' SUF, no 5. Defendants have not demonstrated that the BPIC lacked authority with respect to the challenged actions.

Defendants have not met their burden of showing no factual dispute exists as to whether they have a fiduciary duty regarding the Plan's recordkeeping expenses. Therefore, the Court denies Defendants' motion insofar as it is based on this theory.

2. <u>Whether Defendants breached their fiduciary duties</u>

Assuming *arguendo* that Defendants owe fiduciary duties to Plaintiffs, the Court analyzes the remainder of the Motion. Plaintiffs allege that Defendants breached the fiduciary duties of prudence, candor, and prohibited transactions under ERISA § § 1104(a) and 404(a). *See* Pls.' Motion, at 1.

"ERISA is designed to 'protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans.'" *Marshall v. Northrop Grumman Corp.*, No. 2:16-CV-06794-AB

(JCx), 2019 WL 4058583, at *6 (C.D. Cal. Aug. 14, 2019), quoting *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1093 (9th Cir. 2004); *see also* 29 U.S.C. § 1001(b). Under ERISA § § 404(a) and 1104(a)(1), "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." *Acosta v. Pac. Enterprises*, 950 F.2d 611, 617 (9th Cir. 1991), as amended on reh'g (Jan. 23, 1992), citing 29 U.S.C. § 1104(a)(1). Fiduciaries must "(1) discharge their duties with 'prudence"; (2) act 'solely in the interest of the participants' and for the 'exclusive purpose' of providing benefits to those participants; (3) diversify investments to 'minimize the risk of large losses'; and (4) act in accordance with the terms of the plan." *Marshall*, 2019 WL 4058583, at *6; ERISA § 404(a)(1); 29 U.S.C. § 1104(a)(1).

i. Duty of Prudence

In earlier pleadings, Plaintiffs contended that Defendants violated the duty of prudence by failing to monitor and oversee the recordkeeping expenses paid to Fidelity. [2] (TAC, at 25). Defendants in response argued they maintained a process to evaluate and control recordkeeping expenses paid to Fidelity. (Defs.' Motion, at 8).

The duty of prudence requires that a fiduciary exercise his responsibility "'with the care, skill, prudence, and diligence' that a prudent person

[2] Plaintiffs do not renew this argument in this fashion in their Motion for Partial Summary Judgment. Nonetheless, the Court addresses it here for the sake of comprehensiveness.

'acting in a like capacity and familiar with such matters would use.'" *Marshall,* 2019 WL 4058583, at *8, quoting 29 U.S.C. § 1104(a)(1)(B). "The prudence analysis 'focus[es] on a fiduciary's conduct in arriving at an investment decision, not on its results.'" *Id.* (citation omitted). To enforce the duty of prudence, "courts focus not only on the merits of the transaction, but also on the thoroughness of the investigation into the merits of the transaction." *Tibble v. Edison Int'l,* 843 F.3d 1187 (9th Cir. 2016), quoting *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996). "This duty of prudence extends to both the initial selection of an investment and the continuous monitoring of investments to remove imprudent ones." *Marshall*, 2019 WL 4058583, at *8, quoting *Terraza v. Safeway Inc.*, 241 F. Supp. 3d 1057, 1069-70 (N.D. Cal. 2017).

Defendants present extensive evidence that they acted prudently in monitoring the Plan's recordkeeping expenses. The facts show that members of AT&T Services Benefits team periodically reviewed 408(b)(2) disclosures[3] and invoices from Fidelity to ensure the compensation for recordkeeping was reasonable. (Defs.' SUF, no. 16). Defendants also hired outside experts to evaluate the reasonableness of Fidelity's compensation. Specifically, in 2016 Defendants hired Deloitte to consult on the negotiation of a new contract with Fidelity, at which time Deloitte confirmed that the Plan had a lower recordkeeping rate than other plans. (*Id.* at no. 22). After new negotiations in 2017, AT&T obtained an even lower price for record keeping services, with an annual rate of $20 per participant. (*Id.* at no. 23).

[3] The significance of 408(b)(2) disclosures is discussed in Section iii, *infra*.

Moreover, Defendants' contracts with Fidelity included a "most favored customer" clause, which ensured that Fidelity's fees were "not less favorable than those currently extended to any other" similarly situated customer. (*Id.* at no. 8).

Plaintiffs do not dispute these facts. Hence, Defendants have met their burden of showing no factual dispute exists as to whether they breached their duty of prudence in evaluating and monitoring the record-keeping fees paid to Fidelity, as required by ERISA § 1104(a)(1). The monitoring that Defendants engaged in, both through periodic reviews and through the hiring of outside experts, suffices to show "care, skill, prudence, and diligence" in negotiating the Plan's recordkeeping fees. *Marshall*, 2019 WL 4058583, at *8, quoting 29 U.S.C. § 1104(a)(1)(B). Plaintiffs produce no evidence from which a reasonable jury could find that Defendants acted imprudently. *See White v. Chevron Corp.*, No. 16-CV-0793-PJH, 2016 WL 4502808, at *15 (N.D. Cal. Aug. 29, 2016) (finding there was no "indicia of imprudence" when "Plaintiffs have alleged no facts suggesting that the Plan fiduciaries could have obtained less-expensive recordkeeping services").

Plaintiffs also allege Defendants failed to evaluate the reasonableness of Fidelity's compensation from Financial Engines, which they argue should have been factored into Fidelity's recordkeeping fees. Plaintiffs claim that "neither AT&T Services nor the BIPC performed any analysis to determine what it cost Fidelity, if anything, to provide similar access to FE and whether the kickbacks Fidelity received from FE bore a reasonable relationship to such costs." (Pls.' Motion, at 22; *see also* Pls.'

Opp. SUF, no. 16 (alleging that Defendants had not ensured Fidelity's compensation was reasonable because they failed to evaluate the indirect compensation received by Fidelity)). Plaintiffs point out that Fidelity's only service in connection with Financial Engines was providing access to Fidelity's electronic platform. As a result of Defendants' purported failure to evaluate Fidelity's third-party compensation, Plaintiffs allege that Plan participants incurred unnecessary and inflated costs. *See id.* at 13-14.

Defendants respond that these arguments fail as a matter of law and fact. First, they argue that the recent decision in *Marshall v. Northrop Grumman Corp.* forecloses Plaintiffs' claim because it held that fees paid by Financial Engines to the recordkeeper "are not subject to fiduciary control" under ERISA. (Defs.' Mot. at 11). Defendants also rely on *Marshall* to argue that Plaintiffs need expert evidence to prove that a prudent fiduciary would monitor the compensation at issue in negotiating recordkeeping fees. *Id.*; *see Marshall*, 2019 WL 4058583.

Next, Defendants contend they did monitor the compensation Fidelity received from Financial Engine and BrokerageLink, pointing to the statements in Mr. Phipp's[4] deposition as evidence. *See* Defs.' Mot. at 12; Defs.' SUF nos. 44, 45-47 (Mr. Phipps testified that AT&T "took note" of the fee arrangement between Financial Engines and Fidelity, and the company leveraged this information to help obtain a reduction in recordkeeping fees in 2017).

[4] John Phipps was AT&T Services' Assistant Vice President for Retirement from 2008 to March 2020. (Defs.' SUF, no. 9).

Although not binding authority, the Court finds the reasoning in *Marshall v. Northrop Grumman Corp.* particularly persuasive. As Defendants point out, *Marshall* is factually similar to the instant case. In *Marshall,* plaintiffs brought a putative class action under ERISA arguing that defendants, fiduciaries of a retirement plan, breached their duty of prudence by overcompensating the plan's recordkeeper and failing to account for payments the recordkeeper received from Financial Engines. In rejecting this argument, *Marshall* emphasized that "ERISA does not require, as a matter of law, that fiduciaries leverage the type of third-party fees at issue here in order to reduce recordkeeping fees." *Marshall*, 2019 WL 4058583, at *11. Moreover, data connectivity fees between the recordkeeper and Financial Engines "are not subject to fiduciary control," and "the fees are not paid out of plan assets," because those services are provided as part of an independent business arrangement. *Id.* Any overarching agreement between the recordkeeper and Financial Engines was "separate" and "freestanding" from the recordkeeper's agreements with the retirement plan itself. *Id.*

Just as in *Marshall*, Plaintiffs here cannot maintain an ERISA claim based on the fiduciaries' purported failure to consider compensation between Fidelity and Financial Engines, because that compensation exists independent of the Plan and stems from an agreement to which the Plan is not a party. Plaintiffs' claim therefore fails as a matter of law, and there is no triable issue of fact for a jury to consider. The Court **GRANTS** summary judgment on the breach of duty of prudence claims under ERISA § § 1104(a) and 404(a).

ii. Duty of Candor

Plaintiffs bring a duty of candor claim concerning Defendants' purported failure to report all direct and indirect compensation received by Fidelity on Form 5500. The Court agrees with Defendants that the duty of candor claim duplicates Plaintiffs' injunctive relief claim as to the Form 5500s. (Defs.' Motion at 7, n.1). The Court will analyze all claims concerning Form 5500 reporting obligations in Discussion Subsection B.

iii. Prohibited Transactions

Plaintiffs next argue that Defendants engaged in prohibited, non-exempt transactions with Fidelity in violation of ERISA § 406(a).

ERISA § 406(a)(1)(D) "prohibits a fiduciary from causing a plan to engage in a transaction that transfers plan assets to a party in interest or involves the use of plan assets for the benefit of a party in interest." *Lockheed Corp. v. Spink*, 517 U.S. 882, 886, 116 S. Ct. 1783, 1787, 135 L. Ed. 2d 153 (1996). Parties in interest have been defined as "those entities that a fiduciary might be inclined to favor at the expense of the plan's beneficiaries. *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 242, 120 S. Ct. 2180, 2185, 147 L. Ed. 2d 187 (2000), citing § 3(14), 29 U.S.C. § 1002(14). "In order to sustain an alleged transgression of § 406(a), a plaintiff must show that a fiduciary caused the plan to engage in the allegedly unlawful transaction. Unless a plaintiff can make that showing, there can be no violation of § 406(a)(1) to warrant relief under the enforcement provisions. *Lockheed Corp.,* 517 U.S. at 888-89.

"Section 406's prohibitions are subject to both statutory and regulatory exemptions." *Harris Tr. & Sav. Bank*, 530 U.S. at 242, citing §§ 408(a), (b), 29 U.S.C. §§ 1108(a), (b). Of relevance to this case, ERISA § 408 (b) provides an exemption for "[c]ontracting or making reasonable arrangements with a party in interest for . . . services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C.A. § 1108 (b).

Plaintiffs argue that the § 408 (b) exemption does not apply to Fidelity's services to the plan because "Defendants cannot show they contracted to pay no more than reasonable compensation." (Pls.' Motion, at 18). Defendants respond that the services Fidelity and Financial Engines provided were necessary and the fees paid were reasonable. (Defs.' Motion, at 17).

There is no dispute that Fidelity and Financial Engines' services to the Plan were necessary. The question whether the fees were reasonable turns largely on the parties' disagreement about how to evaluate Fidelity's total compensation. For recordkeeping and administrative services, Defendants allege that the Plan paid $31 per participant to Fidelity in 2011, which was negotiated down to $29 as of August 1, 2012. (Defs.' SUF nos. 20-22). Defendants allege they subsequently negotiated a further reduction that resulted in recordkeeping fees of $20 per participant, effective January 1,

2018. (*Id.* at no. 20-23). Plaintiffs argue that these figures do not reflect the true compensation paid for recordkeeping and administrative services to Fidelity because "the . . . per participant charge is simply one of many charges for Plan services." (Plaintiffs' Response to Defendants' SUF, "Pls.' Opp. SUF," Dkt. 206, no. 20). Plaintiffs argue that other large plans include fees for a much wider variety of services under the umbrella of "recordkeeping expenses," including fees for recordkeeping, trust services, loan processing, communications, distribution and redemption fees, account maintenance, and others. (*Id.* no. 20). In addition, Plaintiffs argue again that Defendants' figures fail to take into account the undisclosed "indirect" compensation Fidelity received from Financial Engines and BrokerageLink. (*Id.* at 21).

As a preliminary matter, the Court can dispose of Plaintiffs' second claim about indirect compensation on the grounds articulated above as to the fiduciary duty of prudence. Defendants had no duty to investigate or consider the third-party compensation Fidelity was receiving from Financial Engines and/or BrokerageLink, and therefore their failure to do so does not make their compensation agreement unreasonable. As to Plaintiffs' first claim, they have failed to carry their burden of showing a triable issue of fact regarding the reasonableness of Fidelity's compensation from the Plan.

On the first claim, Plaintiffs do not present competent evidence of other companies' recordkeeping expense reporting practices, or evidence showing that companies routinely factor in the wide variety of services that

Plaintiffs allege should be included.[5] They point to Appendix B of the Plan's Service Agreement with Fidelity, which lists a range of services Fidelity provides to the Plan and their prices. (Defs.' Motion., Ex. 16, at Appendix B-1C; Pls.' Opp. SUF, no. 20). The Appendix shows, for example, that Fidelity charges the Plan various additional fees for loan transaction, cash dividend processing and mailing documents, among other services. The significance of this price list is unclear, however, because Plaintiffs present no evidence that these various services should be characterized as "recordkeeping expenses."

In their Motion, Plaintiffs draw broad conclusions about other companies' recordkeeping expenses based on their Form 5500s, but they produce no credible evidence showing how those expenses were computed. *See, eg.,* Pls.' Motion, at 4-5 ("[D]irect compensation paid in 2016 by the Costco 401(k) Plan to T. Rowe Price for all recordkeeping and administrative services was $5,530,542, or $34.78 for each of its 158, 937 participants . . . . Those mega-plans report compensation paid to the plan's recordkeeper as a single amount for all services . . . ."). As discussed *supra*, Plaintiffs cannot draw such conclusions based on the Form 5500s alone. Plaintiffs fail to produce any other evidence showing how recordkeeping expenses are generally evaluated or reported as an industry practice. As Defendants note, "Plaintiffs did not take any discovery from

[5] Even if Plaintiffs had provided competent evidence about other companies' recordkeeping expenses, the Court is not persuaded that it would prove the unreasonableness of Defendants' expenses. Evidence of what other companies pay, even if considerably less, does not establish that those payments are prima facie "reasonable."

third parties or disclose an expert to testify in support of their contentions." (Defs.' Motion, at 1).

Apart from debating the method of calculation, Plaintiffs present no other evidence disputing the reasonableness of the Plan's recordkeeping fees. The recordkeeping expenses that Defendants report, ranging from between $31 to $20, fall within the range that Plaintiffs themselves suggest is reasonable. *See* TAC, at 10 ("Generally, very large plans pay no more than roughly $30 per participant for comparable recordkeeping services, although some large plans pay even less than that.").

On their end, Defendants present substantial evidence that their recordkeeping fees were both accurately computed and reasonable. They provide copies of the Plan's services agreements with Fidelity, along with quarterly invoices showing how much the Plan was paying for recordkeeping expenses. *See., eg.,* Defs.' Motion, Ex. 38 (showing a 2011 Q4 invoice charging $7.75 per participant quarterly maintenance fee). They also demonstrate that in 2016, "AT&T Services and Deloitte determined that other large plans (45,000 or more participants) paid $38 to $94 per participant for recordkeeping, with an average of $50." (Defs.' SUF, no 22.) Deloitte ultimately concluded that "current financial terms in both Fidelity Agreements remain competitive compared to market trends and well aligned to AT&T's size and complexity." (*Id*). Plaintiffs do not dispute these facts or provide evidence to the contrary. *See* Pls.' Opp. SUF, no. 22.

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The Court therefore concludes Defendants have met their burden of showing that no factual dispute exists as to whether the Plan's recordkeeping compensation was reasonable. *See Cryer v. Franklin Res., Inc.*, No. 16-CV-04265 (CWx), 2018 WL 6267856, at *11 (N.D. Cal. Nov. 16, 2018) ("Because Plaintiffs have identified no evidence that the seventy dollars per participant fee was not reasonable and not comparable to similar plans, and appear to concede that the fees were reasonable, it follows that Plaintiffs have not presented evidence that they were harmed by any alleged "unreasonable" recordkeeping process.").

Plaintiffs next argue that Defendants failed to satisfy the disclosure requirements contained in 29 § C.F.R. 2550.408b-2, which require Fidelity to disclose "all indirect compensation that the covered service provider . . . reasonably expects to receive in connection with the services." (Pls.' Motion, at 18.) Without satisfying the disclosure requirements, Plaintiffs argue Defendants' agreement with Fidelity could not be considered exempt under ERISA § 408(b). Defendants argue they satisfied the disclosure requirements by providing a "reasonable" description of the compensation that Fidelity would receive from Financial Engines and BrokerageLink. (Defendant's Opposition, "Defs.' Opp'n," Dkt. 182, at 10; Defs.' Ex. 34-37).

To resolve whether Defendants met their disclosure obligations, the Court must determine what 29 § C.F.R. 2550.408b-2 requires. The parties do not dispute that Fidelity's "indirect compensation" from Financial Engines and BrokerageLink must be disclosed under the regulation. "Indirect compensation" is defined as "compensation received from any source other than the covered plan, the plan sponsor, the covered service provider, or an affiliate." 29 C.F.R. § 2550.408b-2. The regulation provides that Defendants must offer "a description of all indirect compensation" that the service provider "reasonably expects to receive in connection with the services," including "identification of the services for which the indirect compensation will be received, identification of the payer of the indirect compensation, and a description of the arrangement between the payer and the covered service provider, an affiliate, or a subcontractor, as applicable, pursuant to which such indirect compensation is paid." *Id.*

29 C.F.R. § 2550.408b-2 further provides an explanation of what suffices as a "description" of indirect compensation:

> A description of compensation or cost may be expressed as a monetary amount, formula, percentage of the covered plan's assets, or a per capita charge for each participant or beneficiary or, if the compensation or cost cannot reasonably be expressed in such terms, by any other reasonable method. The description may include a reasonable and good faith estimate if the covered service provider cannot otherwise readily describe compensation or cost and the covered service provider explains the methodology and assumptions used to prepare such estimate. Any description, including any estimate of recordkeeping cost under paragraph (c)(1)(iv)(D), must contain sufficient information to permit evaluation of the reasonableness of the compensation or cost. 29 C.F.R. § 2550.408b-2.

Defendants argue their disclosures "expressed Fidelity's indirect compensation in reasonable terms," as "[c]onsistent with the Department of Labor's guidelines." (Defs.' Opp'n, at 11). According to Defendants, "the BrokerageLink disclosure stated Fidelity's transaction-based commissions and fees (direct compensation) and indicated that Fidelity would receive indirect compensation in the form of revenue sharing from funds in which participants invested." (Defs.' Motion, at 11; Defs.' Ex. 34). Moreover, "[t]he Financial Engines disclosures provided a formula with the compensation Fidelity expected to receive for the services it provides to Financial Engines." (Defs.' Motion, at 11; Defs.' Ex. 35-36).

Having reviewed Defendants' exhibits containing the disclosures, the Court agrees. Fidelity's disclosures clearly provide a "reasonable" description of the indirect and direct compensation that it received from BrokerageLink and Financial Engines. *See, e.g.,* Defs.' Exhibit 34, (noting that the direct compensation and indirect compensation are both represented according to the 408(b)(2) regulation); Defs.' Exhibit 35, (providing disclosures of indirect compensation "under the 408(b)(2) regulation"); Defs.' Exhibit 36, (providing figures for "indirect compensation under the 408(b)(2) regulation").

Defendants have met their burden of showing that no factual dispute exists as to whether they engaged in prohibited transactions. Plaintiffs have failed to show a triable issue of fact pertaining to Defendants' "fail[ure] to obtain" the disclosures of indirect compensation or the inadequacy of those disclosures. (Pls.' Motion, at 14).

The Court therefore **GRANTS** summary judgment to Defendants on the ERISA § 406(a) prohibited transactions claim.

B. Form 5500 Claims

Finally, Plaintiffs allege they are entitled to injunctive relief based on inaccurately reported Form 5500s. Specifically, Plaintiffs claim that Defendants "were obligated to report on Form 5500 all direct and indirect compensation received by Fidelity in connection with the provision of recordkeeping and administrative services but failed to do so." (TAC, at 25; *see also* Pls.' Motion, at 16-17). Plaintiffs argue that Defendants only reported the direct compensation paid to Fidelity on the Plan's 5500, while reporting that Fidelity received "0" dollars in indirect compensation. Plaintiffs construe this reporting failure to be a breach of the duty of candor under ERISA § 404(a).

i. <u>Whether Plaintiffs have standing to sue for injunctive relief</u>

The parties first dispute whether Plaintiffs have standing to seek injunctive relief regarding the Plan's Form 5500 filings. Defendants rely primarily on *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020) to argue that plaintiffs seeking injunctive relief under ERISA must suffer concrete injury to meet Article III's standing requirement. (Defs.' Motion, at 18-19). Defendants assert that Plaintiffs have failed to show a concrete injury in this case. (*Id.*). In Opposition, Plaintiffs argue that *Thole*'s standing analysis applies only to lawsuits over defined-benefit plans, while lawsuits seeking to obtain information about defined-contribution plans do not require a showing of actual injury. (Pls.' Opp'n, at 17-20). Defendants in their Reply cite to another recent standing case, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) as proof that a statutory violation alone is insufficient to constitute concrete injury. (Defendants' Reply, "Defs.' Reply," Dkt. 193, at 10-11).

"[T]he party invoking federal jurisdiction . . . bear[s] the burden of demonstrating that they have standing." *TransUnion LLC*, 141 S. Ct. at 2207 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). In this case, the Court previously held that Plaintiffs had standing to challenge the Form 5500s (Dkt. 106, 7-8) because Supreme Court and Ninth Circuit precedent did not require plaintiffs to prove individual harm when seeking injunctive relief under ERISA. *See Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549, (2016)* (holding that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact"). *See also Shaver v. Operating Engineers Local 428 Pension Trust Fund*, 332 F.3d 1198, 1203 (9th Cir. 2003); *Wells v. California Physicians' Service*, No. C05-01229 (CRBx), 2007 WL 926490, at *3 (N.D. Cal. Mar. 26, 2007) ("When plan participants seek injunctive relief for violations of ERISA's disclosure or fiduciary requirements, they can demonstrate Article III standing by showing a violation of ERISA and need not prove actual injury.").

In light of the Supreme Court's recent decisions in *Thole* and *TransUnion LLC*, the Court reconsiders the issue of standing. In *Thole,* plaintiffs were retired participants in a defined-benefit plan, meaning they "receive[d] a fixed payment each month, and the payments d[id] not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions." 140 S. Ct. at 1618. Plaintiffs alleged that the defendant fiduciaries violated the duties of loyalty and prudence by poorly investing the plan's assets. *Id.* at 1618. In rejecting plaintiffs' suit on Article III standing grounds, the Supreme Court found that plaintiffs had no "concrete stake" in the lawsuit because they "ha[d] received all of their monthly benefit payments so far," and "they would still receive the exact same monthly benefits that they [we]re already slated to receive" whether they won or lost the case. *Id.* at 1619.

The Court agrees with Plaintiffs that *Thole* is distinguishable from the present case because *Thole*'s reasoning does not apply to defined-contribution plans. The Supreme Court acknowledged that, unlike in the defined-benefit plan at issue in *Thole*, the benefits in a defined-contribution plan "are typically tied to the value of their accounts, and the benefits *can* turn on the plan fiduciaries' particular investment decisions." *Id.* (emphasis added). The Supreme Court also stated that *Thole* is specific to defined-benefit plans, explaining that it was "[o]f decisive importance to this case" that "the plaintiff's retirement plan is a defined-benefit plan, not a defined-contribution plan." *Id.* at 1618.

It is particularly compelling that the *Thole* Court rejected plaintiffs' equitable-interest argument because the plan was a defined-benefit one. Plaintiffs had argued that "injuries to the plan are by definition injuries to the plan participants" even if participants 'have not suffered (and will not suffer) any monetary loss.'" The Supreme Court determined that an equitable-interest argument could not hold because "participants in a defined-benefit plan are not similarly situated to the beneficiaries of a private trust or " the participants in a defined-contribution plan." *Id.* at 1619. This reasoning suggests that in a defined-contribution plan, like the one at issue here, an equitable-interest argument still has merit.

Hence, *Thole* does not disturb the standing requirements for participants in defined-contribution plans. To the extent that Defendants cite *Anderson v. Intel Corp. Investment Policy Committee*, 2021 WL 229235 (N.D. Cal. Jan. 21, 2021) as support for extending *Thole* to defined-contribution plans, this Court declines to follow that nonbinding authority.

Defendants next argue *TransUnion LLC* supports their challenge to Plaintiffs' standing. In *TransUnion LLC*, a class of plaintiffs sued under the Fair Credit Reporting Act alleging that a credit reporting agency "failed to use reasonable procedures to ensure the accuracy of their credit files," and in some cases "provided misleading credit reports to third-party businesses." 141 S. Ct. 2190 (2021). In finding that some members of the class lacked Article III standing, the Supreme Court held that inaccurate information in internal credit files did not constitute concrete harm; rather, only plaintiffs whose information had been disseminated to third parties could demonstrate injury, in the form of reputational harm. Moreover, the Supreme Court determined that formatting errors in some of the credit agency's mailings did not constitute "informational injury" because the errors did not deprive plaintiff of "required information" and did not cause negative "downstream consequences." *Id*. at 2214.

Defendants cite *TransUnion LLC* to argue that a violation of ERISA's reporting requirements is insufficient to establish a concrete injury for standing purposes. (Defs.' Reply, at 10-1). *TransUnion LLC* is factually distinguishable from the present case, and in light of the explicit language in *Thole* regarding the inapplicability of its holding to defined-contribution plans, the Court finds Plaintiffs have standing to seek injunctive relief with respect to the Form 5500 filings.

ii. <u>Whether Defendants failed to comply with ERISA's Annual Reporting Requirements on Form 5500</u>

The parties dispute how "indirect" compensation must be reported on the Form 5500 Schedule C. Plaintiffs allege that Defendants had an obligation to report all indirect compensation that Fidelity received from BrokerageLink and Financial Engines on Item 2, element (g) of Schedule C. (Pls.' SUF no. 55). By failing to do so, Plaintiffs allege Defendants violated the duty of candor. (TAC, at 24). Defendants attack this claim on a number of grounds, arguing that 1) Plaintiffs cannot show an underlying ERISA violation; 2) the duty of candor does not apply to Form 5500s filed with the Department of Labor; 3) submitting Form 5500s to the Department of Labor is not a fiduciary function; 4) Plaintiffs' claim is factually deficient because they never read or relied on the Form 5500s; and 5) Defendants in fact complied with applicable requirements regarding the forms. (Defs.' Motion, at 19-25).

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The Court turns to Defendants' fifth argument because it is dispositive on this issue. Defendants present substantial evidence about the reporting requirements pursuant to item 2(g) of Form 5500. They present the Form 5500 form itself, which states that filers should exclude "eligible" indirect compensation when reporting on element (g). (Defs.' Motion, at 23; Defs.' Ex. 29 at -1480). They also present the instructions for Form 5500, which defines "eligible indirect compensation" as "fees charged to investment funds and reflected in the value of the investment," . . . "that were not paid directly by the plan or plan sponsor." (Defs.' Motion at 24; Defs.' Ex. 9). According to these instructions, if a Plan has received written disclosures from service providers that describe "the existence of the indirect compensation; the services provided . . . ; the amount (or estimate) of the compensation or a description of the formula . . . ; and the identity of the parties . . ." then the Plan may treat this compensation as "eligible indirect compensation." *Id.*

The Court agrees with Defendants that "[t]hese instructions show that any payments by Financial Engines to Fidelity . . . are 'eligible indirect compensation' pursuant to the Form 5500 reporting requirements. (Defs.' Motion, at 25). As discussed, Defendants received written disclosures of Fidelity's indirect compensation during the relevant period, which meet all the requirements described in the Form 5500 instructions. *See* Defs.' Exhibits 34-37. Receiving these disclosures then allowed Defendants to characterize the compensation as "eligible indirect compensation," which did not need to be reported on item 2(g) of Form 5500. *See* Defs.' Exs. 9, 29.

Defendants have carried their burden of showing no factual dispute exists as to their reporting of indirect compensation on the Form 5500s.

Plaintiffs, on their end, present no facts to support their claim that the Form 5500 disclosures were inaccurate or incorrect. As Defendants point out, Plaintiffs do not allege that "any other plan that reported the indirect compensation [did so] differently than the Plan," and "[n]or do they cite evidence that the Department of Labor thought the Plan's Form 5500s were inaccurate." (Defs.' Reply, at 12). Plaintiffs conclude, without citing to any evidence, that because the Plan reports compensation paid to Financial Engines as "direct," then payment from Financial Engines to Fidelity cannot be treated as "eligible indirect compensation." (Pls.' Opp'n, at 25). It is entirely unclear where Plaintiffs are gleaning this understanding from, and it seems to contravene the Form 5500 instructions cited in Defendants' Exhibit 9.

Plaintiffs also attempt to argue that Defendants failed to address reporting for BrokerageLink in their Motion, and that "it is absolutely clear from the 5500 rules that revenue sharing payments made to a plan service provider . . . constitute indirect compensation that must be reported on Form 5500." (Pls.' Opp'n, at 25). Defendants do not cite to any language in the Form 5500 instructions that make it "absolutely clear" that such payments must be disclosed on the form.

A detailed analysis of the duty of candor under ERISA is not required here. In contrast to Defendants' detailed, thorough application of the

Department of Labor's instructions for the Form 5500s, Plaintiffs have not met their burden of showing there is a triable issue of fact pursuant to the forms. The Court finds that "the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial," and Defendants are entitled to summary judgment. *Nissan Fire & Marine Ins.,* 210 F.3d at 1106.

The Court **GRANTS** summary judgment to Defendants on the duty of candor claims arising from the Form 5500 reporting obligations.

Although the Court must Virginia A. Phillips judgment on its own merits and e *Cty., Inc. v. Riverside Two*, 249 has already addressed each of these arguments in ruling on Defendants' Motion, *supra*. The evidence presented in support of, and in opposition to, Defendants' Motion is the same as that presented with respect to Plaintiffs' Motion. As no new arguments or evidence have been raised in support of, or in opposition to, Plaintiffs' Motion that the Court did not already consider above, the Court **DENIES** Plaintiffs' Motion for the same reasons that it rejected Plaintiffs' arguments that Defendants breached their fiduciary duties or engaged in prohibited transactions.

C. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment and **DENIES** Plaintiffs' Motion for Partial Summary Judgment.

The Court enters judgment in favor of Defendants and against Plaintiffs on all claims.

IT IS SO ORDERED.

Dated: 9/28/21

Virginia A. Phillips
Virginia A. Phillips
United States District Judge