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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

MARK BURGESS, RHONDA JOHNSON,
LARRY LOPEZ, HOLGER MEYER, and
ALAN B. MUNNS

Plaintiffs,

v.

HP INC., FIDELITY MANAGEMENT TRUST
COMPANY, FIDELITY INVESTMENTS
INSTITUTIONAL OPERATIONS
COMPANY, and UNITED AIRLINES, INC.

Defendants.

Case No.:

COMPLAINT

CLASS ACTION (ERISA)

PRELIMINARY STATEMENT

1. Qualified retirement plans that are subject to the provisions of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), generate an abundance of cash. Plans acquire cash in a variety of ways: cash contributions; sales of investments such as interests in

1 collective investment trusts and redemptions of mutual fund shares; revenue sharing payments from
2 fund managers; repayment of participant loans; and interest earned on the cash, to name just the
3 principal sources.

4 2. The individual Plaintiffs in this case are employees of HP Inc. (“HP”) and United
5 Airlines, Inc. (“UAL”) and participants, respectively, in the Hewlett-Packard Company 401(k) Plan
6 (the “HP Plan”) and the United Airlines Ground Employee 401(k) Plan (the “UAL Ground Plan”),
7 both of which are profit-sharing plans with cash-or-deferred arrangements.

8 3. The HP Plan and the UAL Ground Plan are participant-directed individual account
9 plans as defined in ERISA § 3(34), 29 USC § 1003(34).

10 4. For calendar year 2012, the HP Plan received cash contributions of \$1,012,004,115,
11 and approximately \$20,000,000 in participant loan repayments, as reported on the Plan’s Annual
12 Return on Form 5500. During 2012, the HP Plan made “[b]enefit payment and payments to provide
13 benefits: . . . **[d]irectly to participants or beneficiaries**, including direct rollovers” of \$1,945,766,599.

14 5. The UAL Ground Plan is invested through a Master Trust arrangement and all of the
15 assets of the UAL Ground Plan, along with all the assets of the United Airlines Flight Attendant
16 401(k) Plan (the “Flight Attendant Plan”) and the United Airlines Management and Administrative
17 401(k) Plan (the “Admin Plan”) (collectively, the “UAL Plans”) are held in the United Airlines, Inc.
18 401(k) Plans Master Trust (the UAL Master Trust”).

19 For calendar year 2012, the UAL Master Trust received cash contributions of \$255 million
20 as reported on the UAL Plans’ Annual Returns on Form 5500. During 2012, as reported on the
21 UAL Plans’ Annual Returns, the Master Trust made “[b]enefit payment and payments to provide
22 benefits: . . . **[d]irectly to participants or beneficiaries**, including direct rollovers” (emphasis added)
23 of \$314 million.

1 6. Fidelity Management Trust Company (“FMTC”) serves as the Trustee for the UAL
2 Master Trust and served as Trustee for the HP Plan during most of the relevant period until January
3 2, 2013, and Fidelity Investments Institutional Operations Company (“FIIOC”) still serves as the HP
4 Plan’s recordkeeper.

5 7. As a general rule, cash contributions become “plan assets,” as that term is defined in
6 ERISA Section 3(42), 29 U.S.C. § 1002(42), and the regulations thereunder, no later than the date
7 those cash contributions are delivered to the Trustee of the Plan.
8

9 8. During 2014, the HP Plan offered participants the opportunity to invest their individual
10 accounts in any of approximately 28 different designated investment alternatives (“investment
11 options”). The UAL Master Trust offered participants approximately 30 different investment options,
12 including an employer stock fund and self-directed brokerage accounts.
13

14 9. Participants have the opportunity to allocate their existing account balances among the
15 available investment options. Participants also have the opportunity to designate how their current
16 and future contributions and current and future matching contributions will be invested.

17 10. Participants have the right to take certain withdrawals from the Plan while they are
18 employed and after termination of employment, and to borrow from their accounts. Withdrawals can
19 take the form of hardship withdrawals, in-service distributions, participant loans and lump-sum
20 distributions at retirement or termination of employment.
21

22 11. Withdrawals, loans and distributions are generally made in cash and require that all or
23 a portion of a participant’s investments be converted to cash.

24 12. A significant percentage of those withdrawals, loans and distributions are made by
25 check. Withdrawals, distributions and loans are also made by electronic funds transfers (“EFT”).

26 13. In large plan like the HP Plan and the UAL Master Trust, there are hundreds if not
27 thousands of transactions occurring on a daily basis that require a transfer of cash. For simplicity and
28

1 operational efficiency, all of these cash transactions are managed through an omnibus account that,
2 for purposes of this Complaint, will be referred to as the “cash management account” or CMA.

3 14. From a legal, financial accounting, and logical perspective, all of the cash generated
4 as a result of plan operations—employer and employee contributions, loan repayments and sales of
5 securities owned by a plan—should belong to the plan and be held in trust by or for the benefit of the
6 plan. Cash contributions to qualified retirement plans, such as the HP and UAL Plans, clearly become
7 plan assets when deposited into trust. When those plan assets are used to purchase investment
8 securities, including mutual funds shares, securities held in separately managed accounts and interests
9 in collective investment trusts, those investments are plan assets and are registered in the name of the
10 Plan’s Trust. When those investments are liquidated to provide cash for distributions, loans and
11 withdrawals to participants, the cash received by the Plans, or by Fidelity as Trustee for the Plans, is
12 also a plan asset.
13

14 15. The cash received from the liquidation of plan assets is recorded on the books of the
15 Trust as having been received by the Trust, and should be managed by the Trustee solely in the interest
16 of the Plans and their participants for the purpose of providing them plan benefits.
17

18 16. But that is not how Fidelity, as trustee and fiduciary to the HP and UAL Plans and the
19 putative Float Plans Class and HP and UAL Plan Participant Class, manages the cash generated by
20 its qualified retirement plan customers. After the cash generated by a Plan transaction is credited to
21 the account of the Plan, Fidelity effectively withdraws that cash from the Plan and deposits that cash
22 into an account maintained in the name of or for the benefit of Fidelity, and Fidelity uses that cash
23 for its own benefit or for its own account, in violation of its fiduciary obligations under Section 404
24 and the prohibited transaction rules of Section 406 of ERISA, 29 USC §§ 1104 and 1106.
25
26
27
28

17. The Plaintiffs bring this action on behalf of the HP Plan and all other similarly-situated individual account plans subject to the terms of ERISA and for which Fidelity acts as Trustee (the “Plans”).

OPERATION OF INDIVIDUAL ACCOUNT PLANS

18. In order to understand the complexity of qualified retirement plan operations, and the manner in which Fidelity has manipulated operations for its own benefit, it will be useful to examine those operations through a simplified hypothetical 401(k) plan sponsored by an employer with ten employees. All active employees are eligible to participate by making a deferral election, authorizing the employer to withhold a specified percentage of their pay and to contribute the amount withheld to the Plan. The Plan has five investment choices: three mutual funds, a stable value fund that is operated as a managed separate account¹; and an employer stock fund. The plan allows participants to direct the investment of their accounts into any of the available investment options. Participants can direct how their deferral elections will be invested and they can reallocate their account balances on a daily basis. Participants can borrow up to fifty percent of their account balances and the loan will be repaid to their account through additional payroll deductions. Participants can elect to receive a lump sum distribution of their accounts upon termination of employment. All employees earn \$60,000 per year and are paid monthly on the first day of the month.

19. At the inception of the plan, five employees have elected to participate and all five elect to defer ten percent of their pay, or \$500 per month, and allocate their contributions among the investment choices in accordance with the following table:

¹ A managed separate account is not like a mutual fund. There is no legal entity like a registered investment company in which the plan invests. The plan hires an investment manager to invest plan assets in accordance with a set of investment guidelines and the plan directly owns all of the assets of that account. A stable value fund is essentially a managed bond fund, and in a stable value managed separate account, the plan will directly invest in a portfolio of government and corporate fixed income securities.

<u>Employees</u>	<u>Mutual Fund A</u>	<u>Mutual Fund B</u>	<u>Mutual Fund C</u>	<u>Stable Value</u>	<u>Co. Stock</u>
Joe	\$100	\$100	\$100	\$100	\$100
Jane	\$100	\$100	\$100	\$100	\$100
John		\$250			\$250
Jim		\$250	\$250		
Jill				\$500	
TOTALS	\$200	\$700	\$450	\$700	\$450

20. In securities trading parlance, mutual fund trades settle (meaning the cash price is delivered) the day after the trade date and stock trades settle on the third day after the trade date, which affects the way in which plan cash is managed. In the hypothetical plan (and assuming complete efficiency), employee deferrals are withheld from participants' pay on payday and deposited into the plan trust on that same day.

21. On the first day of operation of the hypothetical Plan, deferrals are withheld from participants' pay and contributions are deposited into the Trust (Day 1). That same day, the trustee executes trades in accordance with participants' instructions, and in our example, executes a "buy" order for \$200 of Mutual Fund A, \$700 of Mutual Fund B, \$450 of Mutual Fund C, \$450 of Company Stock, and a \$700 interest in the Stable Value fund. The cash required for all these transactions, however, is not immediately paid to the mutual funds or the seller of the Company Stock because of the trade settlement rule recited above. Nonetheless, Fidelity withdraws the total amount of cash from the plan and deposits it into an account that is maintained for the benefit of Fidelity and held overnight. The account earns interest on the overnight investment.

22. The following day (Day 2), Fidelity transfers \$200 in cash to Mutual Fund A, \$450 in cash to Mutual Fund B, \$450 in cash to Mutual Fund C, and \$700 in cash to the Stable Value manager.

23. On Day 4, Fidelity transfers \$450 in cash to the seller of the Company Stock.²

24. During the time between the trade date and the settlement dates, Fidelity and not the plan has the use of the cash.

25. At the end of one year of Plan operation with no changes (and assuming no earnings), participants have accumulated account balances as represented in the following table:

<u>Employees</u>	<u>Mutual Fund A</u>	<u>Mutual Fund B</u>	<u>Mutual Fund C</u>	<u>Stable Value</u>	<u>Co. Stock</u>
Joe	\$1,200	\$1,200	\$1,200	\$1,200	\$1,200
Jane	\$1,200	\$1,200	\$1,200	\$1,200	\$1,200
John		\$3,000			\$3,000
Jim		\$3,000	\$3,000		
Jill				\$6,000	
TOTALS	\$2,400	\$8,400	\$5,400	\$8,400	\$5,400

26. During that one year period, as a result of monthly contributions and trades described above, Fidelity would have had the use of \$24,600 for a total of 12 days (regular monthly contributions used to purchase mutual fund shares or interests in the stable value fund), and \$5,400 for a total of 36 days (contributions used to purchase employer stock).

27. Suppose that on the first day of the second year (Day 1.1), John retires and requests a lump sum distribution of his account to be paid to him by check. On the same day, the remaining five employees (Anna, Benny, Bjorn, Frieda and David) decide they are going to start participating

² This is the procedure used for employer stock funds that use share accounting in which the employer stock fund holds only shares of employer stock and all participant trading transactions are effected on the exchange. Many plans use unit accounting, a method of operating an employer stock fund in which the fund holds approximately two percent of the fund's assets in cash for liquidity purposes rather than only employer stock, so that participant transactions can be settled in cash at the same time as mutual fund transactions.

in the plan at the same 10% deferral rate as the other employees. Anna directs the investment of her contributions into Mutual Fund A, Benny, Bjorn and Frieda invest in Mutual Fund B, and David invests all of his contributions in Company Stock. Finally, on the same day, Joe elects to move his existing balance out of the stock fund (but does not change the investment allocation for his on-going contributions) and reallocates his stock fund account to Mutual Fund C, and Jane decides to move her account out of Mutual Fund C and into Mutual Fund A (but does not change the investment allocation for her on-going contributions). Those transactions are represented in the following table:

<u>Employees</u>	<u>Mutual Fund A</u>	<u>Mutual Fund B</u>	<u>Mutual Fund C</u>	<u>Stable Value</u>	<u>Co. Stock</u>
Joe	\$1,200 +\$100	\$1,200 +\$100	\$1,200 +\$1,200 \$100	\$1,200 +100	\$1,200 -\$1,200 +\$100
Jane	\$1,200 +\$1,200 +100	\$1200 +100	\$1,200 -\$1,200 +100	\$1,200 +\$100	\$1,200 +\$100
John		\$3,000 -\$3,000			\$3,000 -\$3,000
Jim		\$3,000 +\$250	\$3,000 +\$250		
Jill				\$6,000 +\$500	
Anna	+\$500				
Benny		+\$500			
Bjorn		+\$500			
Frieda		+\$500			
David					+\$500
TOTALS	\$4,300	\$7,350	\$5,850	\$9,100	\$1,900

1 28. As a result of those changes, the following steps occur:

2 a. On Day 1.1:

3 i. \$4,5000 in cash is contributed to the plan and deposited in trust to the CMA;

4 ii. Fidelity as Trustee executes the following trades:

5 1. Buy \$1,900 of Mutual Fund A (Joe's and Jane's monthly allocation of \$100,
6 plus Jane's transfer of \$1200 from Mutual Fund C, plus Anna's new monthly
7 allocation of \$500);

8 2. Sell \$1,050 of Mutual Fund B (John cashes out \$3,000 due to his retirement,
9 but Joe, Jane, Jim, Benny, Bjorn and Frieda are buying \$1,950 of Mutual Fund
10 B for their monthly allocations. The Plan is effectively re-allocating \$1,950 of
11 Mutual Fund B shares that had been allocated to John's account to the accounts
12 of Joe, Jane, Jim, Benny, Bjorn, and Frieda, which avoids any transaction fees
13 related to that transfer);

14 3. Buy \$450 of Mutual Fund C (Joe's, Jane's, Jim's monthly allocations. Joe's
15 transfer out of the Stock Fund and into Mutual Fund C is netted against Jane's
16 transfer from Mutual Fund C to Mutual Fund A. So the plan is effectively re-
17 allocating \$1,200 of Mutual Fund C shares from Jane's account to Jim's
18 account);

19 4. Sell \$3,300 of Company Stock (John and Joe are cashing out of the Stock Fund
20 due to John's retirement and Joe's investment transfer from the Stock Fund to
21 Mutual Fund C, while Joe, Jane and David are buying a total of \$700 of
22 Company Stock as part of their monthly allocation. So the Plan is effectively
23 re-allocating \$700 in Company Stock that had been allocated to John's account
24 to Joe, Jane and David);

5. Fidelity transfers \$4,500 in cash from the Plan's CMA to an account maintained by or for the benefit of Fidelity.

b. The following day (Day 1.2), the following transactions occur:

- i. Fidelity as Trustee transfers \$1,900 to Mutual Fund A and \$450 to Mutual Fund C in settlement of the previous day's buy trades;
- ii. Fidelity as Trustee transfers \$500 to the Stable Value manager;
- iii. Fidelity, as Trustee of the Plan, receives \$1,050 in cash from Mutual Fund B in settlement of the sell trades executed the previous day, which is deposited into the plan's CMA;
- iv. Fidelity as Trustee transfers \$1,050 in cash from the Plan's CMA to an account maintained for the benefit of Fidelity;

c. Two days later (Day 1.4) the following transactions occur:

- i. Fidelity, as Trustee for the Plan, receives \$3,300 in cash in settlement of the Company Stock trades, which is deposited into the plan's CMA;
- ii. Fidelity transfers \$3,300 in cash from the CMA to an account maintained for the benefit of Fidelity.

d. On or about the following day (Day 1.5) Fidelity writes a distribution check to John in distribution of his plan account balance. On information and belief, distribution checks like John's distribution check remain outstanding for an average of 22 days.

29. As a result of the contribution, fund transfer and distribution transactions for the hypothetical plan described in the preceding paragraphs, Fidelity would have had the use of \$4,500 in cash belonging to the Plan for one day, \$1,650 of the Plan's cash for 24 days, and \$3,300 of the plan's cash for 22 days, at which time John's distribution check would have been presented for payment.

1 30. It should be easy to see from this simplified hypothetical plan why all of a plan's cash
2 assets are managed through an omnibus cash management account in order to efficiently net offsetting
3 transactions and reduce transaction costs, and to ensure proper accounting of all plan transactions.

4 31. As alleged above, during 2012, the HP Plan received more than \$1.1 billion in cash
5 contributions and loan repayments. Because buy and sell orders for plan investments are netted
6 against each other, it is reasonable to assume that a significant amount of the \$1,945 billion in cash
7 needed for HP Plan distributions was derived from contributions and loan repayments.

8 32. As alleged above, the UAL Master Trust received \$255 million in cash contributions
9 during the 2012 plan year and paid out \$314 million in distributions. It is, therefore, reasonable to
10 assume that a significant amount of the \$314 million in cash needed for UAL Plan distributions was
11 derived from contributions and loan repayments.

12 33. The calculations get more complicated when participants have taken loans from the
13 Plan and are repaying those loans through additional monthly payroll deduction contributions.

14 34. If only 50% of that \$2.25 billion in cash distributions made from the HP Plan and UAL
15 Master Trust was distributed to participants by check, Fidelity would have had the use of \$1.125
16 billion in cash generated by the HP Plan and the UAL Plans for an average of 22 days during 2012,
17 and the unrestricted use of the other \$1.125 billion transferred by EFT for a period of at least two
18 days.

19 35. Likewise, during 2012 alone, Fidelity earned interest on the overnight investment of
20 \$1.13 billion in contributions to the HP Plan and \$255 million to the UAL Plans.

21 36. On information and belief, Fidelity (i) invests the cash generated by plan operations
22 and retains all the earnings with respect to those investments, or (ii) uses that cash for other
23 operational purposes, effectively reaping the benefits of an interest-free loan from all of its plan
24

1 customers, (the combination investment earnings and the benefit of having unrestricted and exclusive
2 use of Plan cash, for purposes of this Complaint, will be referred to as “float income”).

3 FIDELITY’S ROLE AS TRUSTEE

4 37. Fidelity Management Trust Company ("Fidelity") acts as the trustee for the UAL Plans
5 and all other Plans in the Class, and served as the trustee for the HP Plan until January 2, 2013.
6 Fidelity Investments Institutional Operations Company serves as the HP Plan’s recordkeeper.
7

8 38. Pursuant to Section 2 of the Trust Agreement between HP and Fidelity Trust (the
9 “Trust Agreement”), “[t]he Trust shall consist of an initial contribution of money or other property,
10 all investments made therewith **[and all proceeds thereof, and all earnings and profits thereof]** less
11 payments that are made by the Trustee as provided herein.” Emphasis added.
12

13 39. On information and belief, the provisions of the Trust Agreement for the UAL Master
14 Trust contains provisions that are virtually identical to the provisions of the HP Trust Agreement.

15 40. There should be no doubt, therefore, that the cash proceeds of the redemption of
16 mutual fund shares or the sale of any other security owned by the Plans and held in Trust by Fidelity
17 are part of the aforementioned Trust.

18 41. Section 3 of the Trust Agreement provides that “Except as provided by applicable law,
19 no part of the Trust may be used for, **or diverted to**, purposes other than the exclusive benefit of the
20 Participants in the Plan or their beneficiaries or the reasonable expenses of Plan Administration.”
21 Emphasis added.
22

23 42. Fidelity’s duties as Trustee include the effectuation of trades directed by plan
24 participants, the withdrawal of cash from the Plans’ Trusts to settle purchases of securities, the receipt
25 of the proceeds of redemptions of mutual fund shares and the sales of other securities on behalf of
26 the Plans as the Plans’ Trustee and fiduciary, and the deposit of those proceeds into the Trust for the
27 exclusive benefit of plan participants.
28

1 43. Fidelity diverted part of the Trust—the cash contributions to the Plans and the
2 proceeds of the sale of Plan assets—for a purpose other than the exclusive benefit of the participants
3 in the Plans. In fact, the diversion had no purpose other than to benefit Fidelity. There is no reason
4 why a contribution account or disbursement account cannot be maintained in the name of or for the
5 benefit of the Plans and their participants.

6 44. Fidelity's practice violates every common notion of how banking practice works when
7 paying any obligation by check. In a normal situation, the obligor writes a check on its bank account
8 and mails the check to the payee. The payee deposits the check into his account and the check is
9 processed through the banking system until it is ultimately presented to the obligor's bank for
10 payment. The money does not leave the obligor's account until the check is presented for payment.

11 45. Under Fidelity's benefit payment procedure, the Plan as obligor writes a check to the
12 participant. More specifically, Fidelity, as the Plans' bookkeeper and agent, writes the check on
13 behalf of the Plan. But a couple of days before the check is written, Fidelity takes the money out of
14 the Plan's account and deposits it into an account controlled by or maintained for the benefit of
15 Fidelity. On information and belief, Fidelity then writes the participant's distribution check on a
16 different Fidelity account that is not funded until the check is presented for payment. Between the
17 time the check is written (in fact, before the check is written), and the time the check is presented for
18 payment, Fidelity has unrestricted use of the cash, and uses it for purposes other than the exclusive
19 benefit of plan participants. It is the equivalent of a bank taking money out of a customer's checking
20 account as soon as, if not before, the check is actually written rather than when the check is presented
21 for payment.

22 **FIDELITY'S FIDUCIARY OBLIGATIONS AND BREACHES**

23 46. ERISA imposes certain fiduciary duties on persons or entities that exercise "any
24 discretionary authority or control respecting management of such plan or exercising any authority or
25

1 control respecting management or disposition of its assets.” ERISA § 3(21)(A)(i), 29 U.S.C. §
2 1002(21)(A)(i). Under the instant circumstances, Fidelity is a fiduciary because it exercised
3 discretionary authority over cash assets of the HP and UAL Plans by either removing those cash
4 assets from the Plans’ Trusts, or failing to deposit those cash assets into the Plans’ Trusts after
5 receiving those cash assets as Trustee on behalf of the HP and UAL Plans.

6
7 47. Among these fiduciary duties is the duty of loyalty, by which “a fiduciary shall
8 discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries
9 and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and
10 (ii) defraying reasonable expenses of administering the plan.” ERISA § 404, 29 U.S.C. §
11 1104(a)(1)(A).

12 48. Fidelity violated its duty of loyalty by engaging in a process for the management of
13 billions of dollars of plan cash assets that was designed to benefit Fidelity by giving Fidelity
14 unrestricted use and control of those cash assets which it exercised for the benefit of Fidelity rather
15 than for the benefit of the Plans and their participants.

16
17 49. Furthermore, ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1), expressly provides that a
18 fiduciary shall not “deal with the assets of the plan in his own interests or for his own account.”

19 50. Fidelity violated the prohibition of ERISA § 406(b)(1) by transferring plan assets to
20 an account that was subject to Fidelity’s exclusive control and managing those assets for its exclusive
21 benefit.

22
23 51. ERISA § 406(a)(1), 29USC § 1106(a)(1), prohibits a fiduciary from causing a plan to
24 engage in a transaction that, *inter alia*, constitutes either (i) a lending of money or other extension of
25 credit between a plan and a party in interest, or (ii) a transfer to, or use by or for the benefit of a party
26 in interest.

27 52. Fidelity, as Trustee, is a fiduciary to the Plans.
28

1 53. Fidelity Investments Institutional Operations Company (“FIIOC”) is the recordkeeper
2 for the HP and UAL Plans and, therefore, a service provider to the Plans.

3 54. Section 3 of ERISA, 29 USC § 1002(14) provides in pertinent part, that the term
4 “party in interest” means, *inter alia*, (i) any fiduciary and (ii) a person providing services to such plan.
5 Therefore, Fidelity Management Trust Company, and FIIOC are both parties in interest, as is any
6 other Fidelity affiliate that is providing services to the Plans.
7

8 55. Fidelity violated the prohibitions of ERISA § 406(a)(1) by causing the Plans to either
9 (i) loan money or extend credit to Fidelity by providing Fidelity exclusive use and control of billions
10 of dollars in cash that was held awaiting investment or held while distribution, withdrawal and loan
11 transactions were pending, or (ii) by transferring plan assets to an account that was subject to
12 Fidelity’s exclusive control and managing those assets for its exclusive benefit.
13

14 56. Section 403 of ERISA, 29 USC § 1103, requires that all assets of an employee benefit
15 plan shall be held in trust by one or more trustees. Fidelity violated ERISA § 403 by diverting plan
16 assets out of or away from the Plans’ Trusts and into accounts maintained by or for the benefit of
17 Fidelity.

18 57. Section 404(a)(1)(D) of ERISA, 29 USC § 1104(a)(1)(D), requires that “a fiduciary
19 shall discharge his duties with respect to a plan solely in the interest of the participants and
20 beneficiaries and— . . . in accordance with the documents and instruments governing the plan”
21 Fidelity violated the provisions of ERISA § 404(a)(1)(D) by diverting plan assets for purposes other
22 than the exclusive benefit of the Participants in the Plan or their beneficiaries or the reasonable
23 expenses of Plan Administration, contrary to the explicit requirements of Section 3 of the Trust
24 Agreement.
25

26 58. Since there is no legal, logical or prudential reason for Fidelity to transfer the Plans’
27 cash assets out of Trust and into an account managed for the benefit of Fidelity during the period in
28

1 which distribution, withdrawal, or loan checks are outstanding, the transaction (transferring assets
2 from the Plans' Trusts to a Fidelity-controlled account, or diverting cash that should have been
3 deposited into trust into a Fidelity-controlled account) can only be characterized as either a prohibited
4 interest-free loan from the Plans to a party in interest (Fidelity) or a prohibited transfer of plan assets
5 to, or use by or for the benefit of a party in interest (Fidelity).

6
7 59. The US Department of Labor ("DOL") has made its position clear that the retention
8 of "float" earned when a benefit check is issued to a participant constitutes prohibited self-dealing.
9 See DOL Adv. Op. 93-24A (Sept. 13, 1993); ("[W]here a fiduciary (e.g. Trust Company) exercises
10 discretion with regard to plan assets, its receipt of income from the 'float' on benefit checks under a
11 repurchase agreement with a national bank in connection with the investment of such plan assets
12 would result in a transaction described in ERISA section 406(b)(1)."

13
14 60. The DOL reiterated its position in Field Assistance Bulletin 2002-3 (Nov. 5, 2002)
15 (confirming the DOL's view that "a trustee's exercise of discretion to earn income for its own account
16 from the float attributable to outstanding benefit checks constitutes prohibited self-dealing under
17 section 406(b)(1) of ERISA.").

18
19 61. As a result of Fidelity's breach of its fiduciary duties, over the relevant period, the HP
20 and UAL Plans and the Float Plans Class have lost hundreds of millions of dollars from the diversion
21 of plan assets that would otherwise have been used to provide benefits to participants as earnings of
22 the Plans' Trusts.

23 **UNITED'S AND HP'S FIDUCIARY OBLIGATIONS AND BREACHES**

24
25 62. On information and belief, Defendants HP Inc. and United Airlines, Inc. are the Plan
26 Administrators and named fiduciaries of the HP Plan and the UAL Plans, respectively.

27 63. As fiduciaries to the HP and UAL Plans, HP and UAL are obligated to deal with the
28 assets of the Plans subject to a "duty of loyalty" and a "duty of prudence."

1 64. The duty of loyalty requires Plan fiduciaries to act solely in the interests of the Plan
2 and its participants and beneficiaries when making decisions regarding the use or disposition of plan
3 assets, as well as in connection with contracting for services.

4 65. The duty of prudence imposes a very high standard of care and has been described as
5 a “prudent expert” requirement. It requires an investigation of the merits of any proposed use or
6 disposition of Plan assets, including the hiring of any service provider and a thorough understanding
7 of the fees being paid for the service being provided, which includes any direct or indirect
8 compensation to be received by the service provider. Having a prudent process for decision making
9 is a key factor in satisfying the duty of prudence.
10

11 66. As plan fiduciaries, HP and UAL are prohibited from causing the HP and UAL Plans
12 from engaging in any transaction prohibited by ERISA § 406(a) unless that transaction is subject to
13 an applicable exemption.
14

15 67. ERISA § 408(b)(2) provides an exemption for necessary services, which includes
16 recordkeeping and brokerage services, provided that no more than reasonable compensation is paid
17 for such services.

18 68. For many years, the DOL has provided guidance to plan fiduciaries regarding the
19 performance of their obligations, including guidance regarding contracting for plan services:
20

21 In selecting a service provider, plan fiduciaries must, consistent with the requirements
22 of section 404(a), act prudently and solely in the interest of the plan’s participants and
23 beneficiaries and for the exclusive purpose of providing benefits and defraying
24 reasonable expenses of administering the plan. Except as provided in section 408, plan
25 fiduciaries also have an obligation under section 406(a) not to cause the plan to engage
26 in certain transactions, including a direct or indirect furnishing of goods, services or
27 facilities between the plan and a party in interest. Section 408(b)(2) exempts from the
28 prohibitions of section 406(a) any contract or reasonable arrangement with a party in
interest, including a fiduciary, for office space, or legal, accounting or other services
necessary for the establishment or operation of the plan, if no more than reasonable
compensation is paid therefor.⁽²⁾ In carrying out these responsibilities, the Department
has indicated that a plan fiduciary must engage in an objective process designed to
elicit information necessary to assess the qualifications of the provider, the quality of

1 services offered, and the reasonableness of the fees charged in light of the services
2 provided.³

3 DOL Field Assistance Bulletin 2002-3 states explicitly that “[t]he primary issue for service
4 providers with float arrangements is whether the provider has disclosed to its employee benefit plan
5 customers sufficient information concerning the administration of its accounts holding float so that
6 the customer can reasonably approve the arrangement based on an understanding of the service
7 provider’s compensation.”

8 69. Since Fidelity has failed to provide sufficient information about the use of the Plans’
9 cash assets, especially during periods in which distribution, withdrawal and loan checks remain
10 outstanding, HP and UAL have, *a fortiori*, failed to obtain sufficient information from Fidelity to
11 appropriately assess the amount of Fidelity’s compensation in relation to the services being provided.

12 70. Even after the initial selection of Fidelity, HP and UAL failed to monitor and supervise
13 Fidelity in connection with Fidelity’s management and use of the Plans’ cash assets to the detriment
14 of the Plans’ participants. *See Tibble v. Edison International*, __ U.S. __, 135 S. Ct. 1823, 1828
15 (2015).

16 71. HP’s and UAL’s failure to obtain sufficient information from Fidelity to thoroughly
17 understand the nature and extent of Fidelity’s compensation allowed Fidelity to conceal the amount
18 of its compensation and to continue to receive excessive compensation in relation to the services
19 provided for years, and resulted in a failure of the conditions required under ERISA § 408(b)(2) for
20 the transaction with Fidelity to be exempt from the prohibitions of ERISA § 406(a).
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27 ³ DOL Field Assistance Bulletin 2002-3, available at <https://www.dol.gov/ebsa/regs/fab2002-3.html>,
28 last viewed August 16, 2016.

73. Plaintiffs bring this action pursuant to ERISA §§ 502(a)(2) and 502(a)(3), 29 U.S.C. §§ 1132(a)(2), (3). This Court has subject matter jurisdiction over Plaintiffs' claims pursuant to ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331 because this action arises under the laws of the United States.

74. Venue lies in the Northern District of California pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because Defendant HP resides within or may be found in this District, the HP Plan is administered in this District, and/or the alleged breaches of the duties imposed by ERISA took place in this District.

75. During the class period (defined below), Plaintiffs Mark Burgess, Holger Meyer, and Alan B. Munns have been participants, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in the HP Plan. Burgess resides in Frisco, TX. Meyer resides in Helena, MT. Munns resides in Ft. Collins, CO.

76. At all relevant times, Plaintiffs Rhonda Johnson and Larry Lopez have been participants in the UAL Ground Plan. Lopez currently resides in Northglenn, CO and Johnson currently resides in Compton, CA.

77. At all relevant times, the HP Plan was an employee pension benefit plan within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), and an individual account plan within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34). Those ERISA-governed individual account retirement plans for which Fidelity serves as Trustee are referred to collectively as “the Plans.”

78. Defendant Fidelity is the Trustee of the UAL Plans, was the Trustee of the HP Plan until January 2, 2013 and is or was the Trustee of the Float Plans Class (as defined below) for all or part of the relevant period. As Trustee, Fidelity was and is a fiduciary to the Plans and has or had primary responsibility for effective administration of the Plans' trading activities and management of the Plans' cash assets generated through that trading activity. These services involve both the grant and exercise of discretionary control by Fidelity over the management of the significant cash flows generated by the Plans and the administration of the Plans' benefit distribution process. Because it has discretionary authority and control over the Plans' cash assets, which are "plan assets" as described above, Fidelity is a fiduciary to the Plans. Fidelity is headquartered in Boston, Massachusetts.

79. Defendant HP Inc. is the plan sponsor, plan administrator and named fiduciary of the HP Plan. HP is headquartered in Palo Alto, CA.

80. Defendant United Airlines, Inc. is the plan sponsor, plan administrator and named fiduciary of the UAL Plans. United Airlines, Inc. is headquartered in Chicago, IL.

CLASS ACTION ALLEGATIONS

a. Plaintiffs bring this action as a class action pursuant to Rules 23(a) and 23(b)(1), 23(b)(2), or 23(b)(3) of the Federal Rules of Civil Procedure on behalf of the following classes of similarly situated persons ("the Classes"):

b. **The Float Plans Class:** All defined contribution individual account plans within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34), for which Fidelity Management Trust Company or its affiliate served as Trustee and/or recordkeeper and for which it had, or for which it exercised, authority to (A) withdraw assets from the Plan's Trust in connection with the investment of Plan assets, prior to the settlement date with respect to such investments; or (B) prepare and deliver

1 distribution, withdrawal and/or loan checks and in connection therewith to
2 withdraw funds from the Plan's trust and deposit those funds into an account or
3 accounts held in the name of Fidelity or its affiliate or maintained by or for the use
4 of Fidelity or its affiliate, at any time from the earlier of (i) six years before the
5 filing of this action, or (ii), in the event the Court determines that Fidelity has
6 concealed the facts and circumstances that would have apprised Plaintiffs and the
7 Class of the existence of Fidelity's breach, the first date on which Fidelity
8 commenced services as Trustee, and in either case, through the date of judgment
9 (the "Float Plans Class Period").
10

- 11 c. **The HP and UAL Plan Participant Class:** All individuals who were participants
12 in either the HP Plan or the UAL Plans while Fidelity Management Trust Company
13 or its affiliate served as Trustee and/or recordkeeper and for which it had, or for
14 which it exercised, authority to: (A) withdraw assets from the HP and UAL Plans'
15 Trusts in connection with the investment of Plan assets, prior to the settlement date
16 with respect to such investments; or (B), prepare and deliver to participants
17 distribution, withdrawal and/or loan checks and in connection therewith to
18 withdraw funds from the Plan's trust and in either case to deposit those funds into
19 an account or accounts held in the name of Fidelity or its affiliate or maintained
20 by or for the use of Fidelity or its affiliate, at any time from the earlier of (i) six
21 years before the filing of this action, or (ii), in the event the Court determines that
22 Fidelity has concealed the facts and circumstances that would have apprised
23 Plaintiffs and the Class of the existence of Fidelity's breach, the first date on which
24 Fidelity commenced services as Trustee, and in either case, through the date of
25 judgment.
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27
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1 81. The members of the class are so numerous that joinder of all members is impracticable.
2 While the exact number of Class members is unknown at this time and can only be ascertained
3 through appropriate discovery, Plaintiffs believe that there are, at a minimum, several thousands of
4 members of the Class.⁴

5 82. Common questions of law and fact exist as to all members of the Class and
6 predominate over any questions solely affecting individual members of the Class. Among such
7 questions are:
8

- 9 a. Whether Fidelity was a fiduciary of the Plans;
- 10 b. Whether Fidelity breached its fiduciary duties with respect to the management of the
11 Plans' cash assets received in trust as plan contributions and cash assets received in trust as a result
12 of the liquidation of plan assets in connection with Plan distributions, loans and withdrawals;
- 13 c. Whether the Defendants breached their duty of loyalty by engaging in a process for
14 the management of billions of dollars of plan cash assets that was designed to benefit Fidelity and not
15 for the benefit of the Plans and their participants;
- 16 d. Whether the Defendants engaged in a prohibited transaction under ERISA § 406(a)(1)
17 by causing the Plans to either (i) loan money or extend credit to Fidelity by providing Fidelity
18 exclusive use and control of billions of dollars in cash that was held awaiting investment or held while
19 distribution, withdrawal and loan transactions were pending, or (ii) by transferring plan assets to an
20 account that was subject to Fidelity's exclusive control and managing those assets for its exclusive
21 benefit;
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27 ⁴ Fidelity provides defined contribution, defined benefit, health and welfare and stock plan services
28 to nearly 20,000 employers. See "Fidelity By The Numbers: Corporate Statistics," available at
<https://www.fidelity.com/about-fidelity/fidelity-by-numbers/corporate-statistics>; last viewed Aug.
12, 2016.

1 e. Whether the Fidelity Defendants breached their fiduciary duties by receiving
2 excessive compensation in relation to the service provided;

3 f. Whether the Defendants' acts proximately caused losses to the Plans;

4 g. Whether the Class is entitled to damages and injunctive relief;

5 h. Whether Defendants' conduct is permitted based upon any prohibited transaction
6 exemption or other authority.
7

8 83. There are no substantial individual questions among the Class claims on the merits of
9 this action.

10 84. **Rule 23(b)(1)(A) & (B) Requirements.** Class action status in this action is warranted
11 under Rule 23(b)(1)(A), because prosecution of separate actions by the members of the Class would
12 create a risk of establishing incompatible standards of conduct for the Defendants. Class action status
13 is also warranted under Rule 23(b)(1)(B), because prosecution of separate actions by the members of
14 the Class would create a risk of adjudications with respect to individual members of the Class that,
15 as a practical matter, would be dispositive of the interests of other members not parties to this action,
16 or that would substantially impair or impede their ability to protect their interests.
17

18 85. **Rule 23(b)(2) Requirements.** Certification under Rule 23(b)(2) is warranted because
19 Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making
20 appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class
21 as a whole.
22

23 86. **Rule 23(b)(3) Requirements.** Certification under Rule 23(b)(3) is also appropriate
24 because common questions of law and fact clearly predominate over any questions affecting only
25 individual members. Fidelity's system for processing contributions, distributions and transfers was
26 the same for all of its plan clients. Moreover, a class action is superior to the other available methods
27 for the fair and efficient adjudication of this controversy since joinder of all members of the Class is
28

1 impracticable. Furthermore, because the injury suffered by the individual Class members may be
2 relatively small, the expense and burden of individual litigation makes it impracticable for the Class
3 members individually to redress the wrongs done to them. There will be no difficulty in the
4 management of this action as a class action.

5
6 87. **Typicality.** The Plaintiffs' claims are typical of the claims of the members of the
7 Class because the Plaintiffs and members of the Class sustained injury arising out of the Defendants'
8 wrongful conduct in breaching their fiduciary duties and violating ERISA as complained of herein.
9 The Plaintiffs' claims are also typical of the claims of the members of the Class inasmuch as the
10 Plaintiffs seek relief on behalf of the Plans pursuant to ERISA § 502(a)(2), and, thus, the Plaintiffs'
11 claims on behalf of the Plans, participants and beneficiaries are not only typical of, but identical to,
12 the claims of Class members. If cases were brought and prosecuted individually, each member of the
13 Class would be required to prove the same claims based upon the same facts, pursuant to the same
14 remedial theories, and would be seeking the same relief.

15
16 88. Plaintiffs have been injured by the breaches of fiduciary duty alleged in this Complaint
17 and are committed to fairly, adequately, and vigorously representing and protecting the interests of
18 the members of the class.

19
20 89. Plaintiffs have retained counsel competent and experienced in class action litigation
21 of this nature for this purpose.

22
23 90. Neither Plaintiffs nor their counsel have any interests that might cause them to refrain
24 from vigorously pursuing the claims in this class action. Thus, Plaintiffs are adequate representatives
25 of the class.

26
27 91. On information and belief, the names and addresses of the class members are available
28 from Fidelity and/or the Plans, and adequate notice can be provided to members of the class to the
extent required by Fed. R. Civ. P. 23.

FIRST CLAIM FOR RELIEF

(Fidelity Defendants' Breaches of Fiduciary Duty Under ERISA § 404(a), 29 U.S.C. § 1104(a))

92. Plaintiffs incorporates each of the proceeding paragraphs as if set forth fully herein.

93. ERISA defines a fiduciary as anyone who exercises authority or control over the management or disposition of plan assets. 29 U.S.C. § 1002(21)(a).

94. As set forth above, Fidelity, as Trustee for the Plans, was an ERISA fiduciary for the Plans and their participants and beneficiaries, including Plaintiffs and the members of the Float Plans Class, with respect to the management and control of cash belonging to the Plans.

95. A fiduciary must discharge his duties "solely in the interest of the plan's participants and beneficiaries" and "for the exclusive purpose" of providing benefits and defraying reasonable expenses of administration. ERISA § 404(a)(1)(A). This rule is based on the common law trust duty of undivided loyalty.

96. Fidelity's conduct with respect to the management of the cash assets of the Plans directly violated its fiduciary duties to act solely in the interests of plan participants by engaging in a convoluted process for managing cash contributions and cash generated from the liquidation of plan investments that did not incidentally benefit Fidelity while also benefitting the Plans, but which benefitted Fidelity exclusively at the expense of the Plans.

97. In short, Fidelity diverted billions of dollars of the Plans' assets to Fidelity's exclusive use and control for which the Plans received no compensation or discernible benefit.

98. Fidelity's breaches caused the Plans to lose substantial amounts of income they would have received had Fidelity engaged in a cash management process that was designed to benefit the Plans. Conversely, Fidelity profited substantially from the unrestricted use of billions of dollars in cash for which it paid nothing.

99. ERISA § 409, 29 U.S.C. § 1109, provides, *inter alia*, that any person who is a fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or duties imposed on fiduciaries by Title I of ERISA shall be personally liable to make good to the plan any losses to the plan resulting from each such breach, and additionally is subject to such other equitable or remedial relief as the court may deem appropriate, including removal of the fiduciary.

100. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), permits a plan participant to bring an action for relief under ERISA § 409.

101. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), permits a plan participant to bring an action to obtain appropriate equitable relief to enforce the provisions of Title I of ERISA or to enforce the terms of a plan.

102. Fidelity's actions caused the Plans and thus the Plaintiffs and the members of the Float Plans Class to incur losses from diminution of investment returns as well as excessive fees in an amount to be proven at trial and Fidelity is liable for such losses.

103. Furthermore, Fidelity and its affiliates profited from Fidelity's breaches of fiduciary duty in an amount to be proven at trial and are liable to disgorge such profits wrongfully made through use of the Plans' assets.

SECOND CLAIM FOR RELIEF

(Prohibited Transactions Under ERISA § 406(a) and 406(b), 29 U.S.C. §§ 1104(a) and (b) Caused By Fidelity Defendants)

104. The Plaintiffs repeat and reallege each of the allegations set forth in the foregoing paragraphs as if fully set forth herein.

105. ERISA § 406(a)(1) provides that a fiduciary "shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . lending of money or other extension of credit between the plan and a party in interest; . . . [or] transfer to, or use by or for the benefit of a party in interest, of any assets of the plan" ERISA defines a

1 “party in interest” to include “any fiduciary (including, but not limited to, any . . . trustee).” ERISA
2 § 3(14)(H).

3 106. As discussed above, the Fidelity Defendants were at all relevant times ERISA
4 fiduciaries and/or service providers with respect to the HP and UAL Plans and the Float Plans Class.
5 Thus, each Fidelity Defendant was a “party in interest” pursuant to ERISA § 3(14)(H).
6

7 107. FMTC, as Trustee and fiduciary, exercised its discretionary authority with respect to
8 cash belonging to the Plans and diverted that cash into accounts that were maintained by or for the
9 use of, and subject to the exclusive control of, the Fidelity Defendants.

10 108. The Fidelity Defendants’ diversion of plan assets into accounts controlled by the
11 Fidelity Defendants, and the unrestricted use of those cash assets constitute transactions between a
12 plan and a party in interest within the meaning of ERISA § 406(a)(1).
13

14 109. FMTC knew or should have known that the diversion of plan assets to the exclusive
15 control and benefit of FMTC and/or its affiliates constituted either (i) a prohibited loan or other
16 extension of credit between the Plans and a party in interest, or (ii) a prohibited transfer of plan assets
17 to, or use by or for the benefit of a party in interest. Accordingly, FMTC caused the Plans to engage
18 in a prohibited transaction under ERISA § 406(a)(1).
19

20 110. Additionally, ERISA § 406(b)(1) prohibits a fiduciary from dealing with the assets of
21 a plan for its own interest or its own account.

22 111. Fidelity diverted the Plans’ cash assets away from the Plans’ trusts and into accounts
23 subject to the exclusive control of Fidelity, and invested those cash assets for its own benefit or used
24 those cash assets for other operational needs of Fidelity and for which the Plans received no
25 discernible or meaningful benefit. The benefit to Fidelity, on the other hand, was enormous.

26 112. The Department of Labor’s Field Assistance Bulletin 2002-3 indicates that a financial
27 service provider’s use of float income for its own benefit constitutes a prohibited transaction under
28

1 ERISA § 406(b)(1) unless the practice is disclosed and openly bargained-for at the time the service
2 provider is retained, and even then, only where the agreement does not permit the service provider to
3 affect (and in particular increase) the amount of its float compensation. The Fidelity Defendants here
4 (1) did not and still have not disclosed the value of the benefit to Fidelity of having unrestricted use
5 of billions of dollars of cash at no cost, (2) did not negotiate for extra compensation in the form of
6 the float income, or provide the Plaintiffs or the Plans with information sufficient for responsible Plan
7 fiduciaries to understand the Fidelity Defendants' compensation, and (3) had discretion to use the
8 float income to pay themselves excessive compensation. FAB 2002-3, therefore, confirms that the
9 Defendants' actions constitute prohibited transactions under ERISA § 406(b)(1).
10

11 113. As a result of the prohibited transactions caused by the Fidelity Defendants, the
12 Plaintiffs and the Float Plans Class suffered losses they would not have suffered had the Plans' cash
13 assets been prudently invested by the Fidelity Defendants for the benefit of the Plaintiffs and the Float
14 Plans Class.
15

16 114. As a result of the prohibited transactions engaged in by the Fidelity Defendants, the
17 Fidelity Defendants profited enormously and should be responsible for disgorgement of those profits
18 to the Plaintiffs and the Float Plans Class.
19

20 115. Pursuant to ERISA §§ 409, 502(a)(2) and 502(a)(3), the Fidelity Defendants are liable
21 to personally make good to the Plaintiffs and the Float Plans Class the damages sustained by the
22 Plaintiffs and the Float Plans Class.

23 116. Pursuant to ERISA § 502(a)(3), the Court should also award equitable relief to the
24 Float Plans Class.
25
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27
28

THIRD CLAIM FOR RELIEF**(Prohibited Transactions Under ERISA § 406(a) and 406(b), 29 U.S.C. §§ 1104(a) and (b)
Caused By HP and UAL)**

117. The Plaintiffs repeat and reallege each of the allegations in the foregoing paragraphs as if fully set forth in this Third Claim for Relief.

118. Under ERISA, a fiduciary has a duty investigate and thoroughly understand all of the terms and provisions of agreements for the provision of services to the plans for which it serves as fiduciary, especially the terms and provisions for the service provider's compensation, and a continuing duty to monitor the performance of the service provider and its compensation.

119. HP and UAL as responsible fiduciaries to the HP and UAL Plans had a duty to ensure that no more than reasonable compensation was paid for the services being provided by Fidelity, including the management of the Plans' cash and the distribution of plan benefits. The failure of HP and UAL to adequately investigate and understand the procedures used by Fidelity in connection with the HP and UAL Plans' trading activity and the distribution of benefits from the HP and UAL Plans, and the complete failure to evaluate and understand the value of the direct and indirect compensation Fidelity would receive in connection with those services, caused the HP and UAL Plans, respectively, to engage in transactions between a plan and a party in interest that were prohibited under ERISA § 406(a) and not eligible for any available exemption.

120. HP and UAL failed to make a thorough investigation of Fidelity's compensation received in connection with trust and recordkeeping services in general and specifically with respect to the services provided in connection with the Plan's trading activity and the management of the Plans' cash assets.

1 121. ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D), prohibits a plan fiduciary from
2 causing the plan to engage in a transaction that constitutes a transfer to, or use by or for the benefit of
3 a party in interest.

4 122. The failure of HP and UAL to effectively evaluate Fidelity's conduct in connection
5 with its management of cash assets belonging to the HP and UAL Plans allowed Fidelity to divert
6 those cash assets to the use or benefit of Fidelity and to engage in transactions prohibited by ERISA
7 § 406(a)(1)(D).

8 123. ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C), prohibits a plan fiduciary from
9 causing the plan to engage in a transaction that constitutes any furnishing of goods, services, or
10 facilities between the plan and a party in interest to that plan.

11 124. ERISA § 408(b)(2), 29 U.S.C. § 1108(b)(2), provides an exemption from the
12 prohibitions of ERISA § 406(a), 29 U.S.C. § 1106(a) for services that are necessary for the
13 establishment or operation of the plan, if no more than reasonable compensation is paid for those
14 services.

15 125. The failure of HP and UAL to effectively initially evaluate and regularly monitor
16 Fidelity's compensation in connection with its recordkeeping and trust services allowed Fidelity to
17 derive excessive compensation for those services, and caused the HP and UAL Plans to engage in
18 transactions prohibited by ERISA § 406(a)(1)(D), which caused the Plaintiffs and the HP and UAL
19 Participant Class to suffer losses.

20 126. Under ERISA §§ 409, 502(a)(2) and 502(a)(3), HP and UAL are liable to make good
21 to the Plaintiffs and HP and UAL Participant Class members the damages sustained by them.

22 127. Under ERISA § 502(a)(3), the Court should also award equitable relief to the Plaintiffs
23 and Class members.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for judgment as follows:

A. Certify this action as a class action and appoint Plaintiffs' counsel as Class Counsel pursuant to Federal Rule of Civil Procedure 23;

B. Declare that Defendant has breached its fiduciary duties to the Plans and engaged in prohibited transactions;

C. Enjoin Defendant from further violations of its fiduciary responsibilities, obligations, and duties and from further engaging in transactions prohibited by ERISA;

D. Order that Defendant make good to the Plans the losses resulting from its serial breaches of fiduciary duty;

E. Order that Defendants disgorge any profits that it has made through breaches of fiduciary duty and prohibited transactions and impose a constructive trust and/or equitable lien on any funds received by Defendant therefrom;

F. Award Plaintiffs reasonable attorneys' fees and costs of suit incurred herein pursuant to ERISA § 502(g), 29 U.S.C. § 1132(g), and/or for the benefit obtained for the common fund;

G. Order Defendant to pay prejudgment interest; and

H. Award such other and further relief as the Court deems equitable and just.

1 DATED this 18th day of August, 2016.

2
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