

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DENNIS M. LORENZ,  
Plaintiff,  
v.  
SAFEWAY, INC., et al.,  
Defendants.

Case No. 16-cv-04903-JST

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTIONS TO  
DISMISS**

Re: ECF Nos. 36, 38

Before the Court are Defendants’ motions to dismiss. The Court will grant the motions in part and deny them in part.

**I. BACKGROUND**

For the purpose of deciding this motion, the Court accepts as true the following allegations from Plaintiff’s Second Amended Complaint (“SAC”), ECF No. 31. See Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).

**A. Parties**

Plaintiff Dennis M. Lorenz participates in Safeway’s 401(K) Plan (“the Plan”). ECF No. 31 ¶ 8. Defendant Safeway, Inc. sponsors the Plan, and Defendant Safeway Benefit Plans Committee administers the Plan (collectively “Safeway Defendants”). Id. ¶¶ 10-11. Defendant Great-West Financial RPS LLC d/b/a Empower Retirement (“Great-West”) began providing record-keeping services for the Plan in September 2014 when it acquired the record-keeping business from JP Morgan Retirement Plan Services, and stopped providing recordkeeping services for the Plan in July 2016. Id. ¶¶ 12-14.

**B. Master Services Agreement**

On January 1, 2009, the Safeway Defendants entered into a master services agreement to

1 compensate JP Morgan Retirement Plan Services for its provision of recordkeeping services. ECF  
2 No. 37-2. Great-West continued to operate under that agreement when it acquired JP Morgan  
3 Retirement Plan Services' record-keeping business in September 2014. SAC, ECF No. 31 ¶¶  
4 12-14, 25; ECF No. 37-6 at 2 (amendment to the master services agreement).

5 Pursuant to the master services agreement, the Plan agreed to compensate the record-  
6 keeper through a "Contingent Per Participant Fee" of \$67 per year. ECF No. 37-2 at 22. This fee  
7 was lowered to \$65 per year in 2011. ECF No. 37-4. Under this arrangement, the record-keeper  
8 would initially receive a percentage of the fees charged for each investment as a credit toward  
9 record-keeping services. ECF No. 37-2 at 22, 30.<sup>1</sup> If the service fees that the record-keeper  
10 received for a particular quarter fell below one-quarter of the annual per-participant fee, Safeway  
11 was required to "make a lump sum payment to [the record-keeper] . . . in an amount equal to the  
12 difference between the foregoing amount and the amount of the actual annual service fees received  
13 by [the record-keeper]." *Id.* at 22. Conversely, "[i]n the event the annual service fees received by  
14 [the record-keeper] exceed \$65.00 per Participant at the end of the Plan Year, [the record-keeper]  
15 shall accumulate accruals under the Plan Expense Arrangement ("PEA") in accordance with the  
16 terms and conditions of the PEA Addendum to the Agreement." ECF No. 37-4 at 2-3; see also  
17 ECF No. 37-2 at 42 ("Accruals will be calculated and attributed to the PEA at the end of each  
18 calendar quarter for all service fees received by [the record-keeper] related to . . . investments in  
19 the Plan in excess of the applicable Contingent Per Participant Fee . . ."). The excess funds in the  
20 PEA account could only be used at the direction of the Safeway Defendants to reasonably  
21 compensate third-party service providers, in accordance with ERISA. ECF No. 37-2 at 38, 39-40.  
22 Any accruals in the PEA account "expire at 3:00 p.m. Central Time on the last business day, as  
23 determined by JPMorgan RPS, of each subsequent Plan Year, or upon the termination of the  
24 Agreement or this Addendum." ECF No. 37-2 at 38.

25 On November 1, 2013, the Safeway Defendants and the record-keeper amended the master  
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27 <sup>1</sup> Where a record-keeper recovers administrative costs from Plan participants in this way—that is,  
28 by assessing asset-based fees against the various investment options—it is sometimes referred to  
as asset-based revenue sharing. White v. Chevron Corp., No. 16-CV-0793-PJH, 2016 WL  
4502808, at \*14 (N.D. Cal. Aug. 29, 2016).

1 services agreement to replace the PEA with an “ERISA Spending Account.” ECF No. 37-5 at 2,  
 2 4-6. Pursuant to that amendment, any service fees that exceeded the annual per participant fee at  
 3 the end of the Plan year would be attributed to the Plan’s ERISA Spending Account. Id. at 2.  
 4 Unlike the PEA addendum that it replaced, the ERISA spending account addendum does not state  
 5 that these excess accruals expire. See id. The ERISA spending account addendum also provides  
 6 that, “[i]n the event Plan Sponsor does not exhaust the Account for a given calendar quarter, Plan  
 7 Sponsor may allocate such eligible unused amounts, held in the Account to Participant accounts.”  
 8 Id. at 5.

9 **C. JP Morgan Target Date Funds**

10 Between 2011 and July 2016, the Plan offered several target date funds<sup>2</sup> managed by JP  
 11 Morgan Chase Bank. SAC, ECF No. 31 ¶ 18. These funds, which are called “JPMCB Smartretire  
 12 Passiveblend” funds, were offered in five-year intervals (e.g., “JPMCB Smartretire Passiveblend  
 13 2015” and “JPMCB Smartretire Passiveblend 2020”), where the target year corresponds with the  
 14 participant’s anticipated retirement age. Id. ¶¶ 16, 18. Lorenz chose to invest his retirement  
 15 savings in the JPMCB Smartretire Passiveblend 2020 Fund. Id. ¶ 8.

16 **D. Second Amended Class Action Complaint**

17 In this putative class action, Lorenz asserts two claims against the Safeway 401(K) Plan’s  
 18 fiduciaries and parties in interest under the Employee Retirement Income Security Act (“ERISA”),  
 19 29 U.S.C. § 1001, *et seq.* SAC, ECF No. 31.<sup>3</sup>

20 First, Lorenz alleges that the Safeway Defendants breached their fiduciary duty of  
 21 prudence by: (1) selecting funds that charged higher fees than comparable, readily-available funds,  
 22 and which had no meaningful record of performance so as to indicate that higher performance  
 23 would offset this difference in fees; and (2) entering into and maintaining a revenue-sharing

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 25 <sup>2</sup> According to Lorenz’s complaint, “[t]arget date funds are investment funds designed to allow  
 26 retirement plan participants to invest in a single fund with a professionally-managed, broadly-  
 27 diversified portfolio that becomes more conservative as the participant approaches retirement age,  
 typically by shifting the proportion of the fund investing in stocks as compared to bonds.” SAC,  
 ECF No. 31 ¶ 16.

28 <sup>3</sup> This Court previously related this action to another action pending in this district, Maria Karla  
 Terraza v. Safeway, Inc., et al., Case No. 16-cv-03994, which asserts similar claims. ECF No. 26.

1 agreement with the Plan’s record-keepers (JP Morgan Retirement Planning Services and later  
2 Great-West) that resulted in excessive compensation to those entities. SAC, ECF No. 31 ¶¶ 66-73.

3 Second, Lorenz claims that the revenue-sharing agreement constituted a prohibited  
4 transaction under ERISA for which the Safeway Defendants (as fiduciaries) and Great-West (as a  
5 party in interest) are both liable. Id. ¶¶ 74-77.

6 As relief, Lorenz seeks reimbursement from the Safeway Defendants for all losses  
7 resulting from their breaches of fiduciary duty, as well as reimbursement from both the Safeway  
8 Defendants and Great-West for any compensation received as a result of transactions prohibited  
9 by ERISA. Id. at 18-19.

10 Lorenz seeks to certify a class of “[a]ll participants in any employee benefit plan governed  
11 by ERISA who invested in the JPM Smartretire Passiveblend Funds from 2011 to the present  
12 where JPMRPS/Great-West served as the recordkeeper for the plan and received an asset-based  
13 revenue sharing payment in connection with the JPM Smartretire Passiveblend Funds.” Id. ¶ 53.  
14 He also proposes a Safeway Subclass, which would include “[a]ll participants in the Plan who  
15 invested in any of the JPM Smartretire Passiveblend Funds from the time these funds were first  
16 offered by the Plan in 2011 until they ceased to be offered in the Plan in July 2016.” Id.

17 **II. JURISDICTION**

18 The Court has subject matter jurisdiction over Plaintiff’s claims under 29 U.S.C.  
19 § 1132(e)(1) and 28 U.S.C. § 1331 because this action arises under the laws of the United States.

20 **III. REQUESTS FOR JUDICIAL NOTICE**

21 Pursuant to Federal Rule of Evidence 201(b), “[t]he court may judicially notice a fact that  
22 is not subject to reasonable dispute because it: (1) is generally known within the trial court’s  
23 territorial jurisdiction; or (2) can be accurately and readily determined from sources whose  
24 accuracy cannot reasonably be questioned.” The Court may also “consider materials incorporated  
25 into the complaint,” where “the complaint necessarily relies upon a document or the contents of  
26 the document are alleged in a complaint, the document’s authenticity is not in question and there  
27 are no disputed issues as to the document’s relevance.” Coto Settlement v. Eisenberg, 593 F.3d  
28 1031, 1038 (9th Cir. 2010). This is true even if the plaintiff does not explicitly allege the contents

1 of that document in the complaint. Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005). The  
2 Court “must take judicial notice if a party requests it and the court is supplied with the necessary  
3 information.” Fed. R. Evid. 201(c)(2).

4 The Safeway Defendants request that the Court take judicial notice of several Plan-related  
5 documents from the relevant time period, including the Safeway Plan itself, the summary plan  
6 descriptions, Form 5500 filings submitted to the Department of Labor, participant fee disclosure  
7 notices, the master services agreement between Safeway and JP Morgan Retirement Plan Services,  
8 and the 2011 amendment to that master services agreement. ECF No. 40. In addition, the  
9 Safeway Defendants request that the Court take judicial notice of the definition of a collective  
10 investment fund, which is publicly available on the Investopedia website. Id. Great-West also  
11 requests that the Court take judicial notice of the master services agreement between Safeway and  
12 JP Morgan Retirement Plan Services (later between Safeway and Great-West), as well as  
13 subsequent amendments to those documents. ECF No. 37.

14 The Court takes judicial notice of the Plan-related documents because the Plaintiff’s  
15 complaint incorporates each of those documents by reference, the complaint necessarily relies on  
16 those documents, and neither party questions their authenticity or relevance. Courts routinely take  
17 judicial notice of ERISA plan documents like those at issue here. See, e.g., Watkins v. Citigroup  
18 Ret. Sys., No. 15-CV-731 DMS (NLS), 2015 WL 9581838, at \*2 (S.D. Cal. Dec. 30, 2015)  
19 (taking judicial notice of a pension plan); Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth  
20 Grp., Inc., 99 F. Supp. 3d 1110, 1126 (C.D. Cal. 2015) (taking judicial notice of Form 5500  
21 filings).

22 In addition, the Court takes judicial notice of the definition of a collective investment fund,  
23 which is publicly available on the Investopedia website. Plaintiff does not oppose this request or  
24 otherwise contend that the document is inaccurate. Perkins v. LinkedIn Corp., 53 F. Supp. 3d  
25 1190, 1204–06 (N.D. Cal. 2014) (taking judicial notice of publicly accessible websites).

#### 26 **IV. MOTION TO DISMISS**

27 Defendants move to dismiss Lorenz’s complaint on the following grounds: (1) the claims  
28 are untimely; (2) Lorenz has failed to state a claim for breach of fiduciary duty because the

1 expense ratios of the JP Morgan Smartretirement Passiveblend funds were reasonable as a matter  
 2 of law and Great-West was not compensated through a revenue-sharing agreement, but rather  
 3 through a per-participant fee; (3) Lorenz has failed to state a prohibited transaction claim because  
 4 the transaction was exempt under ERISA; (4) even if Lorenz has stated a prohibited transaction  
 5 claim, he lacks constitutional standing to bring such claim; and (6) the Plaintiff may not seek  
 6 monetary damages against Great-West because it is a party in interest, not a fiduciary. ECF No.  
 7 38 at 7-10; ECF No. 36 at 7-9.<sup>4</sup>

8 **A. Legal Standards for Motions to Dismiss under Rules 12(b)(1) and 12(b)(6)**

9 A motion to dismiss under Rule 12(b)(1) tests the subject matter jurisdiction of the  
 10 Court. See Fed R. Civ. P. 12(b)(1). If a plaintiff lacks Article III standing to bring a suit, the  
 11 federal court lacks subject matter jurisdiction and the suit must be dismissed  
 12 under Rule 12(b)(1). Cetacean Cmty. v. Bush, 386 F.3d 1169, 1174 (9th Cir. 2004).  
 13 “A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack, the challenger  
 14 asserts that the allegations contained in a complaint are insufficient on their face to invoke federal  
 15 jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations  
 16 that, by themselves, would otherwise invoke federal jurisdiction.” Safe Air for Everyone v.  
 17 Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004) (citation omitted). In resolving a facial attack, the  
 18 court assumes that the allegations are true and draws all reasonable inferences in the plaintiff’s  
 19 favor. Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004) (citations omitted). A court  
 20 addressing a facial attack must confine its inquiry to the allegations in the complaint. See Savage  
 21 v. Glendale Union High Sch., Dist. No. 205, Maricopa Cty., 343 F.3d 1036, 1051 (9th Cir. 2003).

22 Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain “a short and plain  
 23 statement of the claim showing that the pleader is entitled to relief.” While a complaint need not  
 24 contain detailed factual allegations, facts pleaded by a plaintiff must be “enough to raise a right to  
 25 relief above the speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). To  
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27 \_\_\_\_\_  
 28 <sup>4</sup> The Defendants in the related case, Terraza v. Safeway, Inc. et al., Case No. 16-cv-03994, filed a  
 motion to dismiss that addresses overlapping factual and legal issues. Portions of this order are  
 identical to portions of the order in that case.

1 survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter that,  
 2 when accepted as true, states a claim that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662,  
 3 678 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that allows  
 4 the court to draw the reasonable inference that the defendant is liable for the misconduct  
 5 alleged.” Id. While this standard is not a probability requirement, “where a complaint pleads facts  
 6 that are merely consistent with a defendant’s liability, it stops short of the line between possibility  
 7 and plausibility of entitlement to relief.” Id. (internal quotation marks omitted). In determining  
 8 whether a plaintiff has met this plausibility standard, the Court must accept all factual allegations  
 9 in the complaint as true and construe the pleadings in the light most favorable to the  
 10 plaintiff. Kniesel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005).

#### 11 **B. Standing**

12 Great-West argues that Lorenz lacks constitutional standing to bring a prohibited  
 13 transaction claim because he has not yet advanced “a plausible theory that Great-West’s actual  
 14 compensation was excessive.”<sup>5</sup> ECF No. 36 at 8. As a result, Great-West argues, Lorenz has not  
 15 suffered any concrete harm, and “the mere existence of a technical violation of ERISA is not  
 16 enough to establish Article III standing.” ECF No. 36 at 8.

17 To have the requisite constitutional standing to bring a suit in federal court, a plaintiff must  
 18 (1) have suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the  
 19 defendant, and (3) that is likely to be redressed by a favorable judicial decision. Spokeo, Inc. v.  
 20 Robins, 136 S. Ct. 1540, 1547 (2016), as revised (May 24, 2016) (citing Lujan v. Defs. of  
 21 Wildlife, 504 U.S. 555, 560-561 (1992)). To establish an injury in fact, a plaintiff must show that  
 22 he suffered a “concrete” (i.e., “real”) injury that “affect[ed] the plaintiff in a personal and  
 23 individualized way.” Id. at 1548 (quoting Lujan, 504 U.S. at 560) (internal quotation marks  
 24 omitted)).

25 “The Supreme Court has made clear that when considering whether a plaintiff has Article  
 26 III standing, a federal court must assume *arguendo* the merits of his or her legal claim.” Parker v.

27 \_\_\_\_\_  
 28 <sup>5</sup> The prohibited transaction claim is the only claim brought against Great-West, and the Safeway Defendants do not argue that Lorenz lacks standing to pursue his breach of fiduciary duty claim.

1 D.C., 478 F.3d 370, 377 (D.C. Cir. 2007), aff'd sub nom. D.C. v. Heller, 554 U.S. 570 (2008)  
2 (citing Warth v. Seldin, 422 U.S. 490, 501-02 (1975)). And “[a]t the pleading stage, general  
3 factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to  
4 dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary to  
5 support the claim.’” Lujan, 504 U.S. at 561 (1992) (quoting Lujan v. National Wildlife  
6 Federation, 497 U.S. 871, 889 (1990)).

7 Applying these principles to the case at hand, the Court finds that Lorenz has adequately  
8 alleged a concrete injury sufficient to establish Article III standing. Lorenz alleges that he  
9 invested in the JP Morgan target date funds, that a portion of the amount he invested was used to  
10 compensate Great-West, that the compensation was excessive, and that, as a result, he received  
11 lower investment returns. SAC, ECF No. 31 ¶¶ 8, 21, 25, 39. Regardless of whether Lorenz has  
12 advanced a plausible theory that Great-West did in fact receive excessive compensation, the Court  
13 assumes the merits of his legal claim for purposes of the standing analysis. Therefore, Lorenz  
14 does not allege a mere technical violation of ERISA; he alleges that the prohibited transaction  
15 between the Safeway Defendants and Great-West caused him to suffer real financial injury.

16 The cases that Great-West cites are inapposite. Two of the cases do not even address the  
17 injury in fact requirement that Great-West argues is lacking here. See Paulsen v. CNF Inc., 559  
18 F.3d 1061, 1073 (9th Cir. 2009) (holding that plan participants lacked constitutional standing to  
19 pursue ERISA breach of fiduciary duty claims because any potential recovery would benefit the  
20 plan as a whole, but the plan had already been terminated, so a favorable decision was not likely to  
21 redress their claims); Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc., 465  
22 F.3d 1123, 1125 (9th Cir. 2006) (also addressing the likelihood of redressability requirement for  
23 Article III standing). Great-West also cites the Slack decision for the proposition that “Plaintiffs  
24 do not have Article III standing to allege an ERISA cause of action for monetary damages simply  
25 based on the alleged violation of an ERISA trustee’s breach of fiduciary duties.” Slack v. Int’l  
26 Union of Operating Engineers, No. C-13-5001 EMC, 2014 WL 4090383, at \*12 (N.D. Cal. Aug.  
27 19, 2014). However, as explained above, Lorenz does not claim to have standing based solely on  
28 a statutory violation of ERISA; he claims that the ERISA violation at issue here caused him to

1 suffer a concrete financial injury sufficient to confer standing.

2 The Court concludes that Lorenz has standing under Article III.

3 **C. Timeliness**

4 The Safeway Defendants and Great-West argue that both of Lorenz’s claims are untimely.  
5 ECF No. 38 at 25-27; ECF No. 36 at 24-26.

6 ERISA requires that an action be commenced within (1) “six years after . . . the date of the  
7 last action which constituted a part of the breach or violation, or . . . in the case of an omission the  
8 latest date on which the fiduciary could have cured the breach or violation, or (2) “three years after  
9 the earliest date on which the plaintiff had actual knowledge of the breach or violation,” whichever  
10 is earlier. 29 U.S.C. § 1113. The timeliness analysis therefore hinges on when the alleged breach  
11 or violation occurred and when the plaintiff had actual knowledge of the breach or violation.

12 Ziegler v. Connecticut Gen. Life Ins. Co., 916 F.2d 548, 550 (9th Cir. 1990).

13 **1. Breach of Fiduciary Duty Claim**

14 Lorenz’s breach of fiduciary duty claim is timely under both the six-year statute of repose  
15 and the three-year statute of limitations.

16 First, the Safeway Defendants’ had a continuing duty of prudence that went beyond their  
17 initial decision to include the JP Morgan target date funds in 2011 or their initial decision to enter  
18 into a revenue-sharing arrangement with the record-keeper in 2009. See Tibble v. Edison Int’l,  
19 135 S. Ct. 1823, 1828–29 (2015) (holding that “[t]he Ninth Circuit erred by applying a 6-year  
20 statutory bar based solely on the initial selection of the three funds without considering the  
21 contours of the alleged breach of fiduciary duty”). Rather, “a fiduciary normally has a continuing  
22 duty of some kind to monitor investments and remove imprudent ones” that “exists separate and  
23 apart from the trustee’s duty to exercise prudence in selecting investments at the outset.” Id.  
24 Fiduciaries also have a continuing duty to act prudently in deciding whether to continue a revenue-  
25 sharing arrangement with a third-party service provider. See Employee Benefits Security  
26 Administration of the U.S. Department of Labor, Advisory Opinion 2013-03A. Accordingly,  
27 where the plaintiff “allege[s] that a fiduciary breached the duty of prudence by failing to properly  
28 monitor investments and remove imprudent ones,” the claim is timely “so long as the alleged

1 breach of the continuing duty occurred within six years of suit.” Tibble, 135 S. Ct. at 1828-29.  
2 Because Lorenz alleges that the Safeway Defendants breached their continuing duty of prudence  
3 by retaining the JP Morgan target date funds until 2016 and remaining in the revenue-sharing  
4 arrangement, this claim is timely under the six-year statute of repose.

5 Defendants contend that this claim is nevertheless barred under the three-year statute of  
6 limitations because the 2011 participant disclosure notice, which Lorenz received no later than  
7 2012,<sup>6</sup> gave him actual knowledge of both the JP Morgan target date funds’ expense ratios and the  
8 revenue-sharing arrangement. ECF No. 38 at 25-26; ECF No. 36 at 24-25.

9 The Ninth Circuit rejected this exact argument in Tibble I. 729 F.3d at 1120-21. It held,  
10 and the Supreme Court did not disagree on appeal, that “mere notification that retail funds were in  
11 the Plan menu falls short of providing ‘actual knowledge of the breach or violation’” of the  
12 fiduciary duty of prudence. Tibble I, 729 F.3d at 1121 (quoting Brown v. Am. Life Holdings, Inc.,  
13 190 F.3d 856, 859 (8th Cir. 1999)). The court explained that a breach of the duty of prudence  
14 “hinge[s] on infirmities in the selection process for investment” and a failure to investigate  
15 alternatives. Id. As a result, “[w]hen beneficiaries claim the fiduciary made an *imprudent*  
16 investment, actual knowledge of the breach [will] usually require some knowledge of how the  
17 fiduciary selected the investment.” Id. (internal quotation marks omitted) (emphasis in original).  
18 Although the 2011 participant disclosure notice gave Lorenz notice that the Plan had added the JP  
19 Morgan target date funds and entered into a revenue-sharing arrangement with the record-keeper,  
20 it did not provide him with actual knowledge regarding the Safeway Defendants’ decision to  
21 include these investment options or consideration of alternative compensation arrangements.  
22 Therefore, the 2011 participant disclosure notice did not trigger the three-year statute of  
23 limitations.

## 24 2. Prohibited Transactions Claim

25 Lorenz’s prohibited transaction claim is time-barred under the three-year statute of  
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27 <sup>6</sup> The Safeway Defendants contend that the 2011 Participant Disclosure Notices were distributed  
28 to Lorenz and all other Plan participants no later than 2012, and Lorenz does not dispute this  
contention in his briefing. ECF No. 38 at 27.

1 limitations.

2 Unlike a claim for breach of fiduciary duty, which turns on the prudence of a fiduciary's  
3 decision-making process, a violation of Section 1106(a)(1)(C) occurs when "[a] fiduciary with  
4 respect to a plan . . . cause[s] the plan to engage in a transaction, if he knows or should know that  
5 such transaction constitutes a direct or indirect . . . furnishing of goods, services, or facilities  
6 between the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(C).

7 Here, Lorenz had actual knowledge that the Safeway Defendants had caused the Plan to  
8 engage in such a transaction for services with its record-keeper no later than 2012, when the 2011  
9 Participant Disclosure Notice was available to him. That disclosure provides that the record-  
10 keeper will receive fees from the Plan for its services, and therefore gave Lorenz actual knowledge  
11 of the prohibited transaction alleged here. ECF No. 39-11 at 11. This is true regardless of  
12 whether Lorenz actually read the Participant Disclosure Notice. Brown v. Owens Corning Inv.  
13 Review Comm., 622 F.3d 564, 571 (6th Cir. 2010) ("Actual knowledge does not 'require proof  
14 that the individual Plaintiffs actually saw or read the documents that disclosed' the allegedly  
15 harmful investments."). Despite having actual knowledge of the alleged prohibited transaction,  
16 Lorenz did not file suit until four years later in 2016. Therefore, his prohibited transaction claim is  
17 untimely under ERISA's three-year statute of limitations.

18 This claim is time-barred regardless of whether the Safeway Defendants had a continuing  
19 duty not to engage in prohibited transactions. Unlike the six-year statute of repose, which turns on  
20 "*the date of the last action* which constituted a part of the breach or violation," the three-year  
21 statute of limitations "requires the plaintiff's knowledge to be measured from the '*earliest date*' on  
22 *which he or she knew of the breach.*" Phillips v. Alaska Hotel & Rest. Employees Pension Fund,  
23 944 F.2d 509, 520 (9th Cir. 1991), as amended on denial of reh'g (Dec. 6, 1991) (quoting 29  
24 U.S.C. § 1113(a) (emphases added)). And where, as here, the challenged conduct "may be viewed  
25 as "a series of breaches . . . of the same character," "[t]he earliest date on which a plaintiff became  
26 aware of any breach would thus start the limitation period of § 1113(a)(2) running." Id.

27 Because Lorenz's prohibited transaction claim is untimely under the three-year statute of  
28 limitations, the Court need not address whether it is timely under the six-year statute of repose.

1 See 29 U.S.C. § 1113 (requiring that an action be commenced “after the earlier of” the six-year  
 2 statute of repose or the three-year statute of limitations). The Court further concludes that  
 3 amendment would be futile, and accordingly grants the motion to dismiss this claim without leave  
 4 to amend. Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990) (“It is not an abuse of  
 5 discretion to deny leave to amend when any proposed amendment would be futile.”).<sup>7</sup>

6 **D. Failure to State a Claim for Breach of Fiduciary Duty**

7 The central purpose of ERISA is to “protect the interests of participants in employee  
 8 benefit plans and their beneficiaries.” Schikore v. BankAmerica Supplemental Ret. Plan, 269 F.3d  
 9 956, 963 (9th Cir. 2001) (quoting 29 U.S.C. § 1001(b)). To that end, ERISA requires that a  
 10 pension plan fiduciary act “with the care, skill, prudence, and diligence under the circumstances  
 11 then prevailing that a prudent [person] acting in a like capacity and familiar with such matters  
 12 would use in the conduct of an enterprise of a like character and with like aims.” 29 U.S.C. §  
 13 1104(a)(1)(B).

14 Under this “prudent person” standard, courts must determine “whether the individual  
 15 trustees, at the time they engaged in the challenged transactions, employed the appropriate  
 16 methods to investigate the merits of the investment and to structure the investment.” Donovan v.  
 17 Mazzola, 716 F.2d 1226, 1232 (9th Cir. 1983). The prudence analysis “focus[es] on a fiduciary’s  
 18 conduct in arriving at an investment decision, not on its results.” In re Unisys Sav. Plan Litig., 74  
 19 F.3d 420, 434 (3d Cir. 1996). “Because the content of the duty of prudence turns on ‘the  
 20 circumstances . . . prevailing’ at the time the fiduciary acts, the appropriate inquiry will  
 21 necessarily be context specific.” Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2471  
 22 (2014) (quoting 29 U.S.C. § 1104(a)(1)(B)). This duty of prudence extends to both the initial  
 23 selection of an investment and the continuous monitoring of investments to remove imprudent  
 24 ones. Tibble v. Edison Int’l, 135 S. Ct. 1823, 1828–29 (2015).

25 To state a claim for breach of fiduciary duty, a complaint does not need to contain factual  
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27 <sup>7</sup> Because the Court dismisses the prohibited transaction claim as time-barred, it does not need to  
 28 address whether Lorenz’s complaint properly states a prohibited transaction claim or whether  
 Lorenz seeks improper relief against Great-West with respect to that claim.

1 allegations that refer directly to the fiduciary’s knowledge, methods, or investigations at the  
 2 relevant times. Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v.  
 3 Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 718 (2d Cir. 2013). Even in the absence of such  
 4 direct allegations, the court may be able to reasonably infer from the circumstantial factual  
 5 allegations that the fiduciary’s decision-making process was flawed. Id. (quoting Braden v. Wal-  
 6 Mart Stores, Inc., 588 F.3d 585, 596 (8th Cir. 2009)). After all, “the circumstances surrounding  
 7 alleged breaches of fiduciary duty may frequently defy particularized identification at the pleading  
 8 stage.” Concha v. London, 62 F.3d 1493, 1503 (9th Cir. 1995) (“Where a fiduciary exercises  
 9 discretionary control over a plan, and assumes the responsibilities that this control entails, the  
 10 victim of his misconduct often will not, at the time he files his complaint, be in a position to  
 11 describe with particularity the events constituting the alleged misconduct.”).

#### 12 **1. Excessive Fees**

13 First, Lorenz alleges that the Safeway Defendants breached their duty of prudence by  
 14 offering the JP Morgan target date funds because “these funds charged higher fees than  
 15 comparable funds, had no meaningful record of performance so as to indicate that higher  
 16 performance would offset this difference in fees, and was managed by a company affiliated with  
 17 the Plan’s recordkeeper, [JP Morgan Retirement Planning Services], and trustee, Chase.” ECF  
 18 No. 31 ¶ 68. Lorenz alleges that Plan participants who invested in these funds were charged a  
 19 management fee that was between 47 and 50 basis points—i.e., between 0.47 per cent and .50 per  
 20 cent of the amount invested—whereas the alternative target date fund offered by Vanguard in  
 21 2011 charged a fee of only 15 basis points, or .15 percent of the amount invested. Id. ¶¶ 21-22.<sup>8</sup>  
 22 Lorenz further alleges that “the Vanguard target date funds substantially outperformed the  
 23 comparable JPM Smartretire Passiveblend Funds” between 2010 and 2015. Id. ¶ 23. In light of  
 24 this, Lorenz concludes that, “[h]ad the Safeway Defendants conducted an adequate investigation  
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26 <sup>8</sup> Lorenz also alleges that the Blackrock Lifepath Index funds, which the Plan began to offer after  
 27 July 2016, had an expense ratio of only .056 per cent. Id. ¶ 24. However, the prudent person  
 28 standard focuses on the fiduciary’s conduct “at the time they engaged in the challenged  
 transactions,” so the Court does not find this allegation relevant to the Safeway Defendants’  
 prudence between the time period of 2011 to July 2016. Donovan v. Mazzola, 716 F.2d 1226,  
 1232 (9th Cir. 1983).

1 of available alternatives, without the influence of [JP Morgan Retirement Planning Services] and  
2 Chase, they would have selected target date funds with an established record of performance and  
3 lower fees, such as the Vanguard target date funds,” thus resulting in higher investment returns for  
4 Plan participants. Id. ¶ 38-39.

5 The Safeway Defendants’ failure to offer the investment option with the lowest expense  
6 ratio is not enough, on its own, to plausibly state a claim for breach of the duty of prudence. As  
7 the Seventh Circuit has repeatedly explained, “[t]he fact that it is possible that some other funds  
8 might have had even lower ratios is beside the point; nothing in ERISA requires every fiduciary to  
9 scour the market to find and offer the cheapest possible fund (which might, of course, be plagued  
10 by other problems).” Hecker v. Deere & Co., 556 F.3d 575, 586 (7th Cir. 2009); Loomis v.  
11 Exelon Corp., 658 F.3d 667, 670 (7th Cir. 2011) (quoting Hecker, 556 F.3d at 586). The Ninth  
12 Circuit has agreed with this approach, noting that “[t]here are simply too many relevant  
13 considerations for a fiduciary, for that type of bright-line approach to prudence to be tenable.”  
14 Tibble v. Edison Int’l, 729 F.3d 1110, 1135 (9th Cir. 2013), vacated on other grounds, 135 S. Ct.  
15 1823 (2015). Courts in this district have similarly cautioned that “[i]t is inappropriate to compare  
16 distinct investment vehicles solely by cost, since their essential features differ so significantly.”  
17 See, e.g., White v. Chevron Corp., No. 16-CV-0793-PJH, 2016 WL 4502808, at \*12 (N.D. Cal.  
18 Aug. 29, 2016). Therefore, the Court cannot reasonably infer from the fee differential on its own  
19 that the Safeway Defendants acted imprudently in selecting the JP Morgan target date funds.

20 However, Lorenz alleges more than that, and the remaining allegations in the complaint  
21 create a plausible inference that the Safeway Defendants’ decision-making process was flawed.  
22 See Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 601, n.7 (8th Cir. 2009) (noting that, although  
23 “a bare allegation that cheaper alternative investments exist in the marketplace” is not sufficient on  
24 its own to state a claim for a breach of fiduciary duty under ERISA, a court ruling on a motion to  
25 dismiss must rest its conclusions “on the totality of the specific allegations in [the] case”). For  
26 example, Lorenz alleges that, at the time the Safeway Defendants selected the JP Morgan target  
27 date funds, they “had no meaningful record of performance so as to indicate that higher  
28 performance would offset this difference in fees.” ECF No. 31 ¶ 37. He further alleges that the

1 Vanguard target date funds, in addition to charging lower management fees, “substantially  
2 outperformed the comparable JPM Smartretire Passiveblend Funds” between 2010 and 2015. Id. ¶  
3 23. This allegation does not, as the Safeway Defendants contend, invite the Court to rely on “the  
4 impermissible benefit of hindsight.” ECF No. 51 at 5. While it is true that “we judge a fiduciary’s  
5 actions based upon information available to the fiduciary at the time of each investment decision  
6 and not from the vantage point of hindsight,” St. Vincent, 712 F.3d at 716 (internal citations and  
7 quotation marks omitted), a fiduciary also “has a continuing duty of some kind to monitor  
8 investments and remove imprudent ones” that “exists separate and apart from the trustee’s duty to  
9 exercise prudence in selecting investments at the outset.” Tibble, 135 S. Ct. at 1828-29. Lorenz  
10 alleges that, despite its underperformance between 2010 and 2015, the Safeway Defendants acted  
11 imprudently by retaining this fund until July 2016. ECF No. 31 ¶¶ 18, 23. Lorenz also alleges a  
12 potential reason why the Safeway Defendants might have selected and retained this relatively new,  
13 expensive, underperforming investment option: At the time the Safeway Defendants selected the  
14 JP Morgan target date funds, JP Morgan Retirement Plan Services was recordkeeper for the Plan  
15 and JP Morgan Chase Bank was trustee of the Plan. SAC, Id. ¶ 19. While it is true that bundling  
16 services is a common industry practice that is not “automatically improper,” courts have found  
17 that such a practice may support a claim for breach of fiduciary duty where, as here, there are  
18 additional reasons to suspect that the fiduciaries failed to reasonably investigate alternatives. See  
19 Tussey v. ABB, Inc., 746 F.3d 327, 336 (8th Cir. 2014). When viewed collectively, the Court can  
20 reasonably infer from these allegations that the Safeway Defendants engaged in a flawed decision-  
21 making process by selecting and retaining the JP Morgan target date funds. See Braden, 588 F.3d  
22 at 596-98 (holding that the plaintiff stated a claim for breach of fiduciary duty where he alleged  
23 that the Plan offered funds that charged higher fees than available alternatives, that  
24 underperformed during the relevant time period, and that were included in the Plan because they  
25 would provide the Plan’s trustee with revenue sharing payments).

26 The Safeway Defendants respond that it is inappropriate to compare the JP Morgan target  
27 date funds to the Vanguard target date funds because the former “consisted of an underlying mix  
28 of actively managed and passively managed funds,” whereas the latter “are exclusively index

1 funds.” ECF No. 38 at 20. Although the Safeway Defendants “could have chosen funds with  
2 higher fees for various reasons,” “Rule 8 does not require a plaintiff to plead facts tending to rebut  
3 all possible lawful explanations for a defendant’s conduct.” Braden, 588 F.3d at 596 (holding that  
4 the district court erred by requiring that plaintiff “to rule out potential lawful explanations for [the  
5 fiduciaries’] conduct”). Such a rule “would invert the principle that the complaint is construed  
6 most favorably to the nonmoving party, and would impose the sort of probability requirement at  
7 the pleading stage which *Iqbal* and *Twombly* explicitly reject.” Id. (internal citations and  
8 quotation marks omitted). Although the Safeway Defendants may ultimately persuade the Court  
9 that they had legitimate reasons to select the JP Morgan target date funds, and thus did not act  
10 imprudently, Lorenz has satisfied his burden at this stage of the litigation by alleging facts from  
11 which the Court can reasonably infer that their decision-making process was flawed.

12 The Safeway Defendants also argue that the challenged expense ratios are within a range  
13 that other courts have found to be “reasonable as a matter of law.” ECF No. 38 at 8, 19. This  
14 argument suffers from several infirmities.

15 First, this approach would effectively carve out a presumption of prudence for expense  
16 ratios that fell within a certain range. But the Supreme Court has rejected presumptions of  
17 prudence in the ERISA pleading context, advocating instead for “careful, context-sensitive  
18 scrutiny of a complaint’s allegations” as a means to “divide the plausible sheep from the meritless  
19 goats.” Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2470 (2014). The Ninth Circuit  
20 has similarly rejected a “bright-line approach to prudence” that hinges exclusively on cost, noting  
21 that “[t]here are simply too many relevant considerations for a fiduciary” for that approach to be  
22 tenable. See Tibble I, 729 F.3d at 1135. Even the Safeway Defendants argue elsewhere in their  
23 briefing that cost should not be dispositive of the prudence inquiry. But they cannot have their  
24 cake and eat it, too. Just as the plaintiff cannot plausibly allege a breach of fiduciary duty by  
25 simply pointing to the cost of the challenged investment in isolation, the defendants cannot defeat  
26 a claim for breach of fiduciary duty by doing the same thing. In other words, the prudence inquiry  
27 is “fact intensive.” Tussey, 746 F.3d at 336. And, because it involves the application of a  
28 reasonableness standard, “[r]arely will such a determination be appropriate on a motion for

1 summary judgment,” let alone a motion to dismiss. Bd. of Trustees of S. California IBEW-NECA  
2 Defined Contribution Plan v. Bank of N.Y. Mellon Corp., No. 09 CIV. 6273 RMB, 2011 WL  
3 6130831, at \*3 (S.D.N.Y. Dec. 9, 2011). The Court therefore refuses to adopt an approach that  
4 would immunize an investment from scrutiny simply because its expense ratio fell within a certain  
5 range.

6 The Ninth Circuit’s decision in Tibble I is consistent with this fact intensive approach to  
7 the prudence inquiry. There, the Ninth Circuit affirmed the district court’s *summary judgment*  
8 order, not a dismissal under Rule 12(b)(6). Tibble v. Edison Int’l (“Tibble I”), 729 F.3d 1110,  
9 1135 (9th Cir. 2013), vacated on other grounds, 135 S. Ct. 1823 (2015). In deciding to grant the  
10 defendant’s motion for summary judgment, the district court below had relied on a wealth of  
11 evidence to assess whether the inclusion of the challenged fund was prudent, including expert  
12 testimony regarding whether the alternative investment option was an appropriate comparator.  
13 See Tibble v. Edison Int’l, 639 F. Supp. 2d 1074, 1115 (C.D. Cal. 2009), aff’d, 711 F.3d 1061 (9th  
14 Cir. 2013), and aff’d, 729 F.3d 1110 (9th Cir. 2013), and aff’d, 820 F.3d 1041 (9th Cir. 2016), and  
15 vacated and remanded on other grounds, 843 F.3d 1187 (9th Cir. 2016). The district court  
16 ultimately concluded that “Plaintiffs [had] not identified any evidence” to suggest that “the retail  
17 mutual funds that were actually chosen for inclusion in the Plan underperformed as compared to  
18 other retail mutual funds that were available on the market.” Id. at 1116. On appeal, the Ninth  
19 Circuit referenced the lower court’s post-trial findings of fact, and then went on to note, “[n]or is  
20 the particular expense ratio range [of .03 to two percent] out of the ordinary enough to make the  
21 funds imprudent.” Tibble I, 729 F.3d 1110, 1135. This sentence, when viewed in its context and  
22 in light of the procedural posture of the case, does not suggest that an investment is necessarily  
23 prudent as a matter of law just because its expense ratio falls within a particular range. Rather, the  
24 Ninth Circuit was simply noting, after relying primarily on the district court’s extensive post-trial  
25 findings of fact, that the challenged expense ratios were not so excessive on their face that they  
26 could create a triable issue regarding breach of fiduciary duty absent any other evidence that  
27 would otherwise suggest imprudence.

28 Unlike the district court in Tibble I, this Court is not being asked to decide whether the

1 evidence sufficiently backs up Lorenz’s claims at this early stage in the litigation. Rather, it must  
2 accept Lorenz’s allegations as true and construe any inferences reasonably flowing from those  
3 allegations in the light most favorable to him. As explained above, Lorenz’s complaint, when read  
4 as a whole, plausibly alleges that the Safeway Defendants acted imprudently by offering the JP  
5 Morgan target date funds. Tibble I is therefore distinguishable.

6 The out-of-circuit cases that the Safeway Defendants rely on are also distinguishable  
7 because they involved challenges to the overall range of investment options offered in the  
8 portfolio as a whole, rather than a challenge to the fiduciary’s decision to include a particular  
9 investment option. For example, the plaintiffs in Renfro challenged the “plan’s mix and range of  
10 investment options,” not “the prudence of the inclusion of any particular investment option.”  
11 Renfro v. Unisys Corp., 671 F.3d 314, 325–28 (3d Cir. 2011) (dismissing the plaintiffs’ claim  
12 because the plan offered “a reasonable range of investment options with a variety of risk profiles  
13 and fee rates,” including an expense ratio range between .1 percent to 1.21 percent). Given the  
14 nature of the plaintiffs’ claim, the Renfro court framed its holding in the following way: “[T]he  
15 range of investment options and the characteristics of those included options—including the risk  
16 profiles, investment strategies, and associated fees—are highly relevant and readily ascertainable  
17 facts against which the plausibility of *claims challenging the overall composition of a plan’s mix  
18 and range of investment options* should be measured.” Id. at 327 (emphasis added). The plaintiffs  
19 in Hecker similarly challenged “the fee distribution,” alleging that the fiduciaries “offered *only*  
20 investment options with excessively high fees.” Hecker v. Deere & Co., 556 F.3d 575, 584–85  
21 (7th Cir. 2009) (emphasis added) (dismissing plaintiffs’ claim because “the undisputed facts leave  
22 no room for doubt that the Deere Plans offered a sufficient mix of investments for their  
23 participants,” including a “wide range of expense ratios” between .07 percent and just over one  
24 percent). Later, in Loomis, the Seventh Circuit characterized its holding in Hecker in the  
25 following way: “We held that as a matter of law that was an acceptable array of investment  
26 options.” Loomis v. Exelon Corp., 658 F.3d 667, 670 (7th Cir. 2011). In other words, those  
27 courts held that the *range* of expense ratios offered was reasonable, not that a fiduciary’s decision  
28 to include an investment option that has an expense ratio within that range is always reasonable as

1 a matter of law.

2 Because Lorenz does not challenge the prudence of the overall mix of investment options  
3 available in the Plan, but rather the prudence of the decision to include the JP Morgan target date  
4 funds in particular, the overall expense ratio range is less relevant in this case. “Under ERISA, the  
5 prudence of investments or classes of investments offered by a plan must be judged individually.”  
6 Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299, 325 (5th Cir. 2007) (citing In re Unisys Sav.  
7 Plan Litig., 74 F.3d 420, 438–41 (3d Cir. 1996)). In other words, “a fiduciary must initially  
8 determine, and continue to monitor, the prudence of *each* investment option available to plan  
9 participants.” DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 423 (4th Cir. 2007) (emphasis in  
10 original). While it is true that, consistent with “modern portfolio theory,” fiduciaries must also  
11 give appropriate consideration to “the role [an] investment or investment course of action plays in  
12 that portion of the plan’s investment portfolio,” courts have cautioned that, “[s]tanding alone,  
13 [modern portfolio theory] cannot provide a defense to the claimed breach of the ‘prudent [person]’  
14 duties . . . .” Id. (quoting 29 C.F.R. § 2550-404a-1). Therefore, the Safeway Defendants cannot  
15 point to the prudence of the portfolio as a whole to evade their duty of prudence with respect to the  
16 JP Morgan target date funds in particular.

17 Moreover, to the extent Hecker and its progeny are relevant, they are nonetheless  
18 distinguishable on another ground: Safeway’s Plan offered a much narrower range of investment  
19 options and higher minimum expense ratios. According to the annual participant fee disclosure  
20 notices, the Plan offered a total of eighteen to twenty-two investment options during the relevant  
21 time period, with expense ratios that ranged from .15 percent to 1.21 percent. ECF Nos. 31 ¶¶  
22 21-22; ECF Nos. 39-11, 39-12, 39-13, 39-14. This limited menu of options pales in comparison to  
23 the over 2,500 mutual funds offered by the plan in Hecker and the seventy-three options offered  
24 by the plan in Renfro. Hecker, 556 F.3d at 578; Renfro, 671 F.3d at 318. With respect to the  
25 number of investment options offered, this case is more analogous to Braden, where the plan  
26 offered just thirteen investment options. Braden, 588 F.3d at 589. There, the court concluded that  
27 “[t]he far narrower range of investment options available in this case makes more plausible the  
28 claim that this Plan was imprudently managed.” Id. at 596, n. 6. The lowest expense ratio offered

1 during the relevant time period, .15 percent, is also higher than the lowest expense ratios offered  
2 by the plans at issue in the Hecker line of cases. Hecker, 556 F.3d at 581 (minimum expense ratio  
3 of .07 percent); Loomis, 658 F.3d at 669 (minimum expense ratio of .03 percent); Renfro, 671  
4 F.3d at 319 (minimum expense ratio of .1 percent).

5 The Hecker line of cases is distinguishable for yet another reason. See Tussey, 746 F.3d at  
6 336 (noting that the courts in Hecker, Loomis, and Renfro “carefully limited their decisions to the  
7 facts presented”). The Eighth Circuit has distinguished Hecker and its progeny where the  
8 complaint includes “allegations of wrongdoing with respect to fees.” Id. (“The facts of this case,  
9 unlike the cited cases, involve significant allegations of wrongdoing, including allegations that  
10 [the fiduciaries] used revenue sharing to benefit [the fiduciaries] and [the recordkeeper] at the  
11 Plan’s expense.”). Like the plaintiffs in Braden and Tussey, Lorenz alleges that the fiduciaries  
12 engaged in wrongdoing by agreeing to a revenue sharing arrangement that resulted in  
13 unreasonable compensation to the Plan’s record-keeper. ECF No. 31 ¶ 4. He also alleges that the  
14 fiduciaries erred by allowing the Plan’s trustee to improperly “influence” the investment options  
15 offered by the Plan. Id. ¶ 38. These allegations further support Lorenz’s claim that the fiduciaries  
16 acted imprudently.

17 Finally, lacking support from the federal circuit courts, the Safeway Defendants point to a  
18 decision from a court in this district, White v. Chevron Corp., No. 16-CV-0793-PJH, 2016 WL  
19 4502808, at \*1 (N.D. Cal. Aug. 29, 2016). The analogy to that case fails for the same reasons. As  
20 an initial matter, it is unclear whether that case dealt with a challenge to the overall investment  
21 lineup, the inclusion of particular funds, or some combination of the two. Id. at \*8, \*12 (“This  
22 cause of action challenges the defendants’ decisions with regard to the selection and maintenance  
23 of the Plan’s mix and range of investment options. . . . [w]hile plaintiffs appear to be challenging  
24 the entire lineup of funds, the challenge is primarily based on speculation that the Plan fiduciaries  
25 “could have” provided lower-cost versions of the funds, . . .”). In any event, the White court relied  
26 on Hecker and its progeny for the proposition that “[t]he breadth of investments and range of fees  
27 the Plan offered participants fits well within the spectrum that other courts have held to be  
28

1 reasonable as a matter of law.” Id. at \* 11.<sup>9</sup> The court concluded that “the Plan fiduciaries  
2 provided a diverse mix of investment options and expense ratios for participants.” Id. As  
3 explained above, the breadth and range of investment options is less relevant here because, unlike  
4 the plaintiff in White, Lorenz does not challenge the overall investment lineup. Moreover, to the  
5 extent the overall range is relevant to Lorenz’s claim regarding the inclusion of the JP Morgan  
6 target date funds, the plan at issue in White offered thirty-one investment options, almost one-third  
7 more than the maximum number of options offered by Safeway’s Plan, and the lowest expense  
8 ratio offered by the plan in White was just .05 percent, compared to the .15 percent minimum  
9 expense ratio offered here. Id. at \*2, \*11. White is also distinguishable because there were no  
10 allegations of wrongdoing. Id. For all of these reasons, the White court concluded that the claims  
11 at issue there were “more akin to the claims that failed in Loomis, Renfro, and Hecker.” Id. at  
12 \*12.

13 In sum, this case is more analogous to the Braden line of cases than the Hecker line. The  
14 Safeway Defendants argue that, when viewed in isolation, each of Lorenz’s allegations do not  
15 plausibly suggest a flawed decision-making process. However, “the complaint should be read as a  
16 whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible.”  
17 Braden, 588 F.3d at 594 (citing Vila v. Inter-Am. Inv. Corp., 570 F.3d 274, 285 (D.C. Cir. 2009)).  
18 When read in this way, and when construed in the light most favorable to him, Lorenz’s  
19 allegations plausibly suggest that the Safeway Defendants acted imprudently in selecting and  
20 retaining the JP Morgan target date funds.

## 21 2. Revenue Sharing Arrangement

22 Second, Lorenz alleges that the Safeway Defendants breached their duty of prudence by  
23 entering into a revenue sharing arrangement with the Plan’s record-keepers. SAC, ECF No. 31 ¶¶  
24 25-34.

25 Revenue sharing arrangements are not *per se* prohibited under ERISA. See White, 2016  
26

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27 <sup>9</sup> Notably, the White court granted the plaintiff leave to amend the complaint, suggesting that the  
28 challenged expense ratios were not actually *per se* reasonable as a matter of law. Id. at \*19. If  
they were, any amendment would have been futile.

1 WL 4502808 at \*14 (rejecting “plaintiffs’ conclusory assertion that fees under a revenue-sharing  
2 arrangement are necessarily excessive and unreasonable” as “without support”); Rosen v.  
3 Prudential Ret. Ins. & Annuity Co., No. 3:15-CV-1839 (VAB), 2016 WL 7494320, at \*10 (D.  
4 Conn. Dec. 30, 2016) (“Plaintiffs’ allegations that Prudential engaged in revenue sharing, without  
5 more, do not state a claim for a violation of ERISA.”).<sup>10</sup> However, the Employee Benefits  
6 Security Administration of the United States Department of Labor has opined that, to comply with  
7 their fiduciary duties under ERISA, “the responsible plan fiduciaries must assure that the  
8 compensation the plan pays directly or indirectly to [the service provider] for services is  
9 reasonable, taking into account the services provided to the plan as well as all fees or  
10 compensation received by [the service provider] in connection with the investment of plan assets,  
11 including any revenue sharing.” Employee Benefits Security Administration of the U.S.  
12 Department of Labor, Advisory Opinion 2013-03A (July 3, 2013).

13 Lorenz alleges that the revenue sharing arrangement at issue here “resulted in  
14 compensation to [JP Morgan Retirement Planning Services]/Great-West far in excess of  
15 reasonable compensation for such services.” SAC, ECF No. 31 ¶¶ 25-34. He alleges that this  
16 compensation was unreasonable because the amount invested in these funds—and thus the record-  
17 keepers’ revenue-sharing compensation—more than doubled between 2011 and 2014, whereas the  
18 number of participants in the Plan steadily declined. Id. “In other words, [JP Morgan Retirement  
19 Planning Services]/Great-West received greater and greater revenue for providing the same  
20 services . . . to a smaller number of participants.” Id. He further alleges that “[t]he Safeway  
21 Defendants could have obtained record-keeping services at a much lower rate, had they: (1)  
22 negotiated a per-participant payment for record keeping rather than an asset-based charge . . . ; or  
23 (2) negotiated a lower asset-based charge when it became clear that the amounts invested in the  
24 JPM Smartretire Passiveblend Funds were growing so quickly as to generate a windfall for [JP  
25 Morgan Retirement Planning Services]/Great-West.” Id.

26  
27  
28 <sup>10</sup> In fact, courts have noted that revenue sharing is a “common and acceptable investment industry  
practice[] that frequently inure[s] to the benefit of ERISA plans.” Tussey, 746 F.3d at 336  
(internal quotation marks omitted).

1           The Safeway Defendants respond that they took the very course of action that Lorenz says  
2 they should have taken—that is, they compensated Great-West through an annual per-participant  
3 fee. ECF No. 38 at 20-21. They contend that “the revenue sharing arrangement between the  
4 recordkeeper and the Plan was simply the mechanism by which that per-participant fee was  
5 collected.” *Id.* They further argue that, “[i]n the event payments through the revenue sharing  
6 arrangement exceeded \$65 per participant at the end of the Plan Year, JPM would accumulate the  
7 amounts under a ‘Plan Expense Arrangement,’” and those funds “could only be used to pay  
8 expenses that otherwise could have been paid from Plan assets and charged directly to  
9 participants’ accounts.” *Id.* at 13-14.

10           Although the Court construes all allegations in the complaint as true when ruling on a  
11 motion to dismiss, it is “not required to accept as true conclusory allegations which are  
12 contradicted by documents referred to in the complaint.” *Warren v. Fox Family Worldwide, Inc.*,  
13 328 F.3d 1136, 1139 (9th Cir. 2003) (quoting *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293,  
14 1295-96 (9th Cir. 1998)). Therefore, the Court also considers the extent, if any, to which the  
15 judicially-noticed documents contradict Lorenz’s allegations or otherwise render them  
16 implausible.

17           Some aspects of the master services agreement support the Defendants’ compensation  
18 theory. In that document, Safeway agreed to compensate JP Morgan Retirement Planning  
19 Services, and later Great-West, for their record-keeping services through an annual “Contingent  
20 Per Participant Fee.” ECF No. 37-2 at 22. Under this arrangement, the record-keeper would  
21 initially be “compensated from . . . the service fees or other compensation paid to [the record-  
22 keeper] with respect to the Plan’s investment options.” *Id.* That is, the record-keeper would  
23 receive a percentage of the fees charged for each investment as a credit toward record-keeping  
24 services. *Id.* at 30. This is what Lorenz refers to as the revenue-sharing payments. However, the  
25 agreement goes on to provide that these payments were simply used to offset the annual per-  
26 participant fee: If the service fees that the record-keeper received for a particular quarter fell below  
27 one-quarter of the annual per-participant fee, Safeway was required to “make a lump sum payment  
28 to [the record-keeper] . . . in an amount equal to the difference between the foregoing amount and

1 the amount of the actual annual service fees received by [the record-keeper].” *Id.* at 22.  
2 Conversely, “[i]n the event the annual service fees received by [the record-keeper] exceed \$65.00  
3 per Participant at the end of the Plan Year, [the record-keeper] shall accumulate accruals under the  
4 Plan Expense Arrangement (“PEA”) in accordance with the terms and conditions of the PEA  
5 Addendum to the Agreement.” ECF No. 37-4 at 2-3; see also ECF No. 37-2 at 42 (“Accruals will  
6 be calculated and attributed to the PEA at the end of each calendar quarter for all service fees  
7 received by [the record-keeper] related to . . . investments in the Plan in excess of the applicable  
8 Contingent Per Participant Fee . . .”). The excess funds in the PEA account could only be used at  
9 the direction of the Safeway Defendants to reasonably compensate third-party service providers, in  
10 accordance with ERISA. ECF No. 37-2 at 38, 39-40. Notably, the Safeway Defendants expressly  
11 chose the “Contingent Per Participant Fee” option in lieu of a “No Recordkeeping Fee” option,  
12 under which the record-keeper would have been compensated “solely from . . . the service fees or  
13 other compensation paid or credited to [the record-keeper] with respect to the Plan’s investment  
14 options”—that is, a true revenue sharing compensation arrangement. *Id.* at 22-23. These  
15 provisions suggest that Great-West did not, as Lorenz contends, receive increasing compensation  
16 during the relevant time period to provide the same services because its compensation remained  
17 capped at the annual per-participant fee. And the Defendants argue that, absent any allegations  
18 that the annual per-participant fee is itself unreasonable, Lorenz has failed to plausibly allege that  
19 Great-West received excessive compensation.

20 Lorenz contends that the master services agreement is ambiguous as to whether Great-  
21 West received compensation in excess of the per-participant fee for two reasons. ECF No. 50 at  
22 14-15. First, Lorenz points to paragraph 5(d) of the agreement, which states the following:

23 As part of its compensation, Plan Administrator acknowledges that in addition to  
24 those fees charged directly by JPMorgan RPS for its services, JPMorgan RPS may  
25 receive fees and ancillary benefits from affiliates and outside sources in connection  
26 with the services it performs on behalf of the Plan and its Participants. Such fees  
27 and benefits may include, but are not limited to, servicing fees relating to  
28 investment funds utilized by the Plan. Where applicable, such fund-related service  
fees shall be described in the fee provisions of the Schedule. *JPMorgan RPS shall retain such fees for itself as payment for administrative and shareholder services specifically related to such investment funds.* Plan Administrator acknowledges that such fees may change without notice upon unilateral action taken by the investment fund. JPMorgan RPS shall provide, within 45 days after the end of the

1 calendar quarter, a reporting listing the rate and total dollar amount received of  
2 such fees.

3 ECF No. 37-2 at 6 (emphasis added); ECF No. 50 at 14-16.<sup>11</sup> Lorenz argues that the italicized  
4 language creates “an ambiguity that requires discovery to resolve.” ECF No. 50 at 15. The Court  
5 disagrees. Although this paragraph acknowledges that the record-keeper will receive some  
6 compensation in the form of revenue-sharing payments associated with particular investments, it  
7 in no way contradicts the capped, per-participant fee that appears later in the “Recordkeeping Fee”  
8 section of the agreement. ECF No. 37-2 at 22. Nor does this paragraph otherwise suggest that  
9 Great-West received compensation in excess of the per-participant fee.

10 Second, Lorenz argues that it is possible that the excess revenue sharing fees were not  
11 devoted solely to legitimate plan expenses because the PEA provides that, “[t]o the extent  
12 JPMorgan RPS is due payment by Plan Sponsor for services for any given calendar quarter and  
13 there exists a balance in the PEA account, such balance shall be first used to satisfy any amount  
14 owed JPMorgan RPS.” ECF No. 37-2 at 42. Again, the Court disagrees. This provision did not  
15 alter the amount of Great-West’s compensation under the agreement, but rather just gave it  
16 priority to be paid before other service providers. And this kind of compensation to a third-party  
17 service provider is a legitimate plan expense under ERISA, which can be paid using plan assets, as  
18 long as it is reasonable. See 29 U.S.C. § 1106(a) (generally prohibiting a plan fiduciary from  
19 entering into a transaction that would transfer any plan assets to a party in interest); 29 U.S.C. §  
20 1108(b)(2) (exempting such a transaction if the plan fiduciary contracts with a party in interest for  
21 “services necessary for the establishment or operation of the plan, if no more than reasonable  
22 compensation is paid therefor”). Again, this provision does not suggest that the compensation  
23 paid to Great-West was unreasonable, and therefore does not advance Lorenz’s argument.

24 \_\_\_\_\_  
25 <sup>11</sup> The Safeway Defendants argue that paragraph 5(d) did not apply to the JP Morgan target date  
26 funds because those funds were not offered when the agreement was executed in 2009, and  
27 therefore were not listed in the “Fund Fees” provision of the agreement that paragraph 5(d) refers  
28 to (the “fee provisions of the Schedule”). ECF No. 51 at 9-10. However, when the Plan did begin  
to offer the JP Morgan target date funds in 2011, those funds were added to the “Fund Fees”  
provision via an amendment, and therefore became subject to paragraph 5(d). ECF No. 37-4 (July  
18, 2011 amendment to the master services agreement, which added the JP Morgan target date  
funds to the “Fund Fees” provision and states that “all other provisions of the Agreement shall  
continue in full force and effect”).

1           However, there is at least one provision in the master services agreement that suggests that  
2 the record-keeper may have received compensation in excess of the per-participant fee, at least for  
3 some portion of the relevant time period. The PEA addendum provides that any accruals in the  
4 PEA account “expire at 3:00 p.m. Central Time on the last business day, as determined by  
5 JPMorgan RPS, of each subsequent Plan Year, or upon the termination of the Agreement or this  
6 Addendum.” ECF No. 37-2 at 38. The addendum does not explain what happens to the expired  
7 funds. See id. But, because the record-keeper (i.e., JP Morgan Retirement Plan Services)  
8 maintains the PEA account, it is plausible that any expired funds go to the record-keeper. See id.  
9 Such an arrangement would also explain why the Safeway Defendants and the record-keeper  
10 entered into an amendment on November 1, 2013 to create an “ERISA spending account” to  
11 replace the PEA. ECF No. 37-5 at 2. Pursuant to that amendment, if revenue-sharing fees exceed  
12 the annual per-participant fee at the end of the year they will be attributed to the ERISA spending  
13 account. Id. The ERISA spending account addendum materially differs from its PEA predecessor  
14 because (1) the accruals do not expire and (2) it provides that “[i]n the event Plan Sponsor does  
15 not exhaust the Account for a given calendar quarter, Plan Sponsor may allocate such eligible  
16 unused amounts, held in the Account to Participant accounts.” Id. at 5. Such an amendment  
17 would have been unnecessary if there were never any unused accruals in the PEA in the years  
18 prior.

19           The Court concludes that the judicially noticed documents do not refute Lorenz’s  
20 allegations or otherwise render them implausible. They do, however, create a factual dispute that  
21 cannot be resolved on a motion to dismiss. Lorenz has plausibly alleged that the record-keepers’  
22 compensation hinged, at least in part, on revenue-sharing payments that increased during the  
23 relevant time period, even though the record-keepers provided the same services to a decreasing  
24 number of participants. As explained above, these allegations, while not entirely supported by the  
25 master services agreement, are not completely contradicted by it, either. Accepting these  
26 allegations as true, and drawing all reasonable inferences in Lorenz’s favor for the purposes of this  
27 motion, Lorenz has plausibly alleged that the record-keeper’s compensation was unreasonable in  
28 light of the services rendered and, therefore, that the Safeway Defendants breached their fiduciary

United States District Court  
Northern District of California

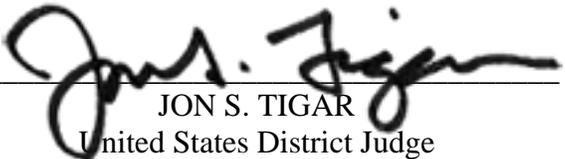
1 duty of prudence by entering into and maintaining such an agreement. Although the Defendants  
2 may ultimately defeat Lorenz's theory of excessive compensation by showing that they were not  
3 actually compensated in excess of the per-participant fee, or that their compensation was otherwise  
4 reasonable, the Court cannot resolve this factual issue at this stage of the litigation. This is  
5 especially true because Lorenz has not yet had the benefit of discovery, and therefore lacks inside  
6 information regarding the Safeway Defendants' decision-making process and the compensation  
7 actually provided to the record-keepers.

8 **CONCLUSION**

9 The Court dismisses the prohibited transaction claim against the Safeway Defendants and  
10 Great-West with prejudice because it is untimely under the three-year statute of limitations.  
11 Because this is the only claim asserted against Great-West, the Court directs the Clerk to terminate  
12 Great-West as a defendant in this action. The Court denies the motion to dismiss the claim against  
13 the Safeway Defendants for breach of fiduciary duty.

14 IT IS SO ORDERED.

15 Dated: March 13, 2017

16  
17   
18 JON S. TIGAR  
United States District Judge