No. _____

IN THE

Supreme Court of the United States

ROBERT LEIMKUEHLER, AS TRUSTEE
OF THE LEIMKUEHLER, INC. PROFIT SHARING PLAN
AND ALL OTHERS SIMILARLY SITUATED,
Petitioner,

v.

AMERICAN UNITED LIFE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

STEPHEN M. TILLERY
Counsel of Record
ROBERT L. KING
KOREIN TILLERY LLC
505 N. 7th Street
Suite 3600
St. Louis, MO 63101
(314) 241-4844
STillery@KoreinTillery.com

October 25, 2013

QUESTION PRESENTED

ERISA § 3(21)(A)(i) provides in relevant part that "a person is a fiduciary with respect to a plan to the extent (i) he … exercises any authority or control respecting management or disposition of [the plan's] assets …." The question presented is:

Whether the court below erroneously held, in conflict with the decisions of six other circuits, that a person who exercises some authority or control over the assets of a plan is a fiduciary with respect to that plan only if he is alleged to have "mismanaged" the plan's assets?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Robert Leimkuehler, as Trustee of the Leimkuehler, Inc. Profit Sharing Plan, was plaintiff in the district court and appellant in the court of appeals.

Respondent American United Life Insurance Company was defendant in the district court and appellee in the court of appeals.

TABLE OF CONTENTS

Page

QUESTION PRESENTED.......................................i

LIST OF PARTIES TO THE PROCEEDINGS...........ii

TABLE OF AUTHORITIES.......................................v

INTRODUCTION...1

OPINIONS BELOW...2

JURISDICTION...2

STATUTORY PROVISIONS INVOLVED.................3

STATEMENT OF THE CASE:

A. Regulatory and Industry Background.............3

B. Facts...6

C. Proceedings Below..8

REASONS FOR GRANTING THE PETITION:

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE D.C., SECOND, SIXTH, EIGHTH, NINTH AND TENTH CIRCUITS ON A FUNDAMENTAL ISSUE OF ERISA LAW 13

A. The D.C., Second, Sixth, Eighth, Ninth and Tenth Circuits Hold That The Act Of Holding or Transferring Plan Assets Are Fiduciary Acts..15

B. The Seventh Circuit Rejected The "Any Authority Or Control" Standard 20

C. The Seventh Circuit's Decision Disregards Long-Established Department Of Labor Policy Holding That Revenue Sharing Practices Like AUL's Are Subject To ERISA's Fiduciary Provisions 20

II. THIS COURT SHOULD REVERSE THE SEVENTH CIRCUIT'S DECISION 22

III. THIS CASE PRESENTS A RECURRING QUESTION OF EXCEPTIONAL IMPORTANCE WARRANTING THE COURT'S IMMEDIATE RESOLUTION 24

CONCLUSION 26

APPENDIX:

Order of the United States Court of Appeals for the Seventh Circuit Denying Rehearing and Rehearing *En Banc*, *Leimkuehler, et al. v. Am. United Life Ins. Co.*, No. 12-1081 (7th Cir. June 27, 2013) 1a

Opinion of the United States Court of Appeals for the Seventh Circuit, *Leimkuehler, et al. v. Am. United Life Ins. Co.*, No. 12-1081 (7th Cir. April 16, 2013) . 3a

Opinion of the United States District Court for the Southern District of Indiana, *Leimkuehler, et al. v. Am. United Life Ins. Co.*, No. 1:10-cv-0333-JMS-TAB (S.D. Ind. April 16, 2013) 23a

Complaint, *Leimkuehler, et al. v. Am. United Life Ins. Co.*, No. 1:10-cv-0333-JMS-TAB (S.D. Ind.) 56a

TABLE OF AUTHORITIES

Page

CASES:

Auer v. Robbins, 519 U.S. 452 (1997) 21

Briscoe v. Fine, 444 F.3d 478 (6th Cir. 2006) 19, 20

Chao v. Day, 436 F.3d 234 (D.C. Cir. 2006) 13, 18, 19

Coldesina v. Estate of Simper, 407 F.3d 1126 (10th Cir. 2005) 14, 17, 18

Commissioner v. Keystone Consol. Indus., Inc., 508 U.S. 152 (1993)..9

Cutaiar v. Marshall, 590 F.2d 523 (3d Cir. 1979). 23

Donovan v. Cunningham, 716 F.2d 1455 (5th Cir. 1983) 23

FirsTier Bank, N.A. v. Zeller, 16 F.3d 907 (8th Cir. 1994) 13, 15, 16

Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238 (2000)................9

Hecker v. Deere & Co., 556 F.3d 575 (7th Cir. 2009)...11

IT Corp. v. Gen. Am. Life Ins. Co., 107 F.3d 1415 (9th Cir. 1997).........................16, 17

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 9, 23

LoPresti v. Terwilliger, 126 F.3d 34 (2d Cir. 1997) 17

Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209 (2d Cir. 1987) 23

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 22

Pegram v. Herdrich, 530 U.S. 211 (2000) 14, 15

STATUTES:

28 U.S.C. § 1254(1) 3

ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i) .... passim

ERISA § 406(b), 29 U.S.C. § 1106(b) 9, 10, 23

OTHER AUTHORITIES:

Anne Tucker, *Retirement Revolution: Unmitigated Risks in the Defined Contribution Society*, 51 Hous. L. Rev. 153, 165 (2013) 4

Brief of the Secretary of Labor as *Amicus Curiae*, 2012 WL 3066710 .... 2, 21

Department of Labor Advisory Opinion No. 2003-09A, 2003 WL 21514170 (June 25, 2003) 5, 21

Department of Labor Advisory Opinion No. 97–15A, 1997 WL 277980 (May 22, 1997) .... passim

Department of Labor Advisory Opinion No. 97–19A, 1997 WL 540069 (Aug. 28, 1997) 5

U.S. DEPT. OF LABOR, PRIVATE PENSION PLAN BULLETIN: ABSTRACT OF 2010 FORM 5500 ANNUAL REPORTS (Nov. 2012) 2, 3

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-119, 401(K) PLANS: IMPROVED REGULATION COULD BETTER PROTECT PARTICIPANTS FROM CONFLICTS OF INTEREST 4-5 (2011). 4, 5

Robert Leimkuehler, as Trustee of the Leimkuehler, Inc. Profit Sharing Plan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

INTRODUCTION

Creating a conflict with six other circuits, with longstanding Department of Labor interpretations, and with the plain language of the Employee Retirement Income Security Act of 1974 (ERISA), the Seventh Circuit held in this case that a person's "control" over a pension plan's assets will "support a finding of fiduciary status *only if*" the plaintiff alleges mishandling of the plan's assets. Pet. App. 17a (emphasis added) ("control over the [plan's assets] can support a finding of fiduciary status only if Leimkuehler's claims for breach of fiduciary duty arise from AUL's handling of the separate account" and "Leimkuehler does not allege that AUL in any way mismanaged" plan assets).

ERISA provides in relevant part that "a person is a fiduciary with respect to a plan to the extent (i) he … exercises *any authority or control* respecting management or disposition of its assets." ERISA § 3(21)(A)(i) (emphasis added). Consistent with the plain language of that text, the D.C., Second, Sixth, Eighth, Ninth, and Tenth Circuits have all held that the exercise of *any* control over a plan's assets is, without more, sufficient to make a person a plan fiduciary. "In Congress's judgment, and consistent with general trust law, parties controlling plan assets are *automatically* in a position of confidence by virtue of that control, and as such they are obligated to act accordingly." *Coldesina v. Estate of Simper*, 407 F.3d 1126, 1132 (10th Cir. 2005) (emphasis in original).

The Secretary of Labor filed an *amicus* brief[1] in support of petitioner in the court of appeals, urging the court to apply the "any authority or control" standard for fiduciary status adopted by every other circuit to have addressed the question. Nevertheless, the panel broke with the Secretary and the six other circuits by holding that a service provider's undisputed control over plan assets is not enough to render the provider a plan fiduciary.

The proper interpretation of § 3(21) presents a question of surpassing importance to the 75 million employees who are currently active participants in defined contribution retirement plans with nearly $4 trillion in total assets.[2] This Court's immediate review is therefore warranted to resolve the square conflict in the circuits on whether a person who exercises "*any* authority or control" over plan assets is an ERISA fiduciary or, as the Seventh Circuit has now held, whether fiduciary status turns on whether a person is alleged to have "mismanaged" plan assets.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a), is reported at 713 F.3d 905. The opinion of the district court (Pet. App. 23a) is unreported but available at 2012 WL 28608.

JURISDICTION

The court of appeals entered its judgment on April 16, 2013, and denied a petition for rehearing on June

---

[1] Brief of the Secretary of Labor as *Amicus Curiae*, 2012 WL 3066710.

[2] U.S. DEPT. OF LABOR, PRIVATE PENSION PLAN BULLETIN: ABSTRACT OF 2010 FORM 5500 ANNUAL REPORTS 1 (Nov. 2012) (available at http://www.dol.gov/ebsa/PDF/2010pensionplanbulletin.pdf).

27, 2013. Pet. App. 1a-3a. On September 17, 2013, Justice Kagan granted petitioner's application for a thirty day extension in which to file this petition. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

ERISA § 3(21)(A)(i) provides in relevant part:

> a person is a fiduciary with respect to a plan to the extent
>
> (i) he … exercises any authority or control respecting management or disposition of its assets ….

ERISA § 406(b) provides in relevant part:

> A fiduciary with respect to a plan shall not—
>
> (1) deal with the assets of the plan in his own interest or for his own account,
>
> … or
>
> (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

STATEMENT OF THE CASE

A. Regulatory and Industry Background

1. Since the enactment of ERISA, the private pension system has undergone a sea change, shifting from employer-financed defined benefit plans to employee-financed defined contribution plans, typically 401(k) plans. U.S. DEPT. OF LABOR, PRIVATE PENSION PLAN BULLETIN: ABSTRACT OF 2010 FORM 5500 ANNUAL REPORTS 1 (Nov. 2012) (available at http://www.dol.gov/ebsa/PDF/2010pensionplanbulletin.pdf). When ERISA was enacted, "there were rela-

tively few defined contribution plans, and none were self-directed." Anne Tucker, *Retirement Revolution: Unmitigated Risks in the Defined Contribution Society*, 51 Hous. L. Rev. 153, 165 (2013). "Today, however, self-directed defined contribution plans dominate the retirement benefit landscape …." By 2010, defined contribution plans held $3.8 trillion in total assets, with 73.4 million active participants making $314.2 billion in plan contributions for that year alone. *DOL Private Pension Plan Bulletin*, *supra*, at 1.

Many employers, particularly smaller ones, hire third party service providers (like respondent) "[t]o address the challenges of investment risk in 401(k) plans," and "many plans rely heavily on the expertise and guidance" of their service providers who "provide a number of services necessary to operate a 401(k) plan." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-119, 401(K) PLANS: IMPROVED REGULATION COULD BETTER PROTECT PARTICIPANTS FROM CONFLICTS OF INTEREST 4-5 (2011). Service providers "can vary considerably in their business arrangements," and those "arrangements are often designed in a way that makes it difficult for conscientious plan sponsors to detect" a provider's potential conflicts of interest. *Id.* at 5, 54. Thus, unsurprisingly, "available evidence suggests that there are a broad range of potential conflicts of interests that may harm participants." *Id.* at 54.

One of those potential conflicts involves payments providers receive from mutual funds. These "third-party payments, also known as revenue sharing," are "a potential conflict of interest for service providers involved in the fund selection process for a 401(k) plan." *Id.* at 16. "Revenue sharing, in the pension plan industry, generally refers to indirect payments made from one service provider, such as the invest-

ment fund provider, to another service provider in connection with services provided to the plan, rather than payments made directly by the plan sponsor for plan services." *Id.* While "revenue-sharing payments can be used to offset expenses the plan has agreed to pay and thus be cost-neutral to the plan, such payments "may, depending on the circumstances, also create a conflict of interest if [they are] not structured to be cost-neutral to the plan and may result in increased compensation to service providers." *Id.* "Because of these conflicts of interest, the service provider may suggest funds that have poorer performance or higher costs for participants compared with other available funds. The amount of revenue-sharing payments can vary considerably, both across investment funds and within a fund through different share classes." *Id.*

2. Defined contribution plans, including 401(k) plans, are governed by ERISA. In the late 1990s, the Department of Labor addressed the propriety of revenue sharing payments in three advisory opinions. Department of Labor Advisory Opinion No. 97–15A, 1997 WL 277980 (May 22, 1997) ("*Frost Opinion*")); Department of Labor Advisory Opinion No. 97–19A, 1997 WL 540069 (Aug. 28, 1997); Department of Labor Advisory Opinion No. 2003-09A, 2003 WL 21514170 (June 25, 2003) ("*ABN-AMRO Opinion*"). Since then the Department has consistently taken the view that a 401(k) service provider acts as a fiduciary when it exercises any authority or control to cause a plan to invest in a mutual fund that pays a fee to the service provider in connection with the plan's investment. *See Frost Opinion*, 1997 WL 277980, at *4.

In the *Frost Opinion*, the Department recognized the propriety of revenue sharing by a fiduciary when the revenue sharing payments "are used to benefit

the Plans, either as a dollar-for-dollar offset against the fees the Plans would be obligated to pay to the [the provider] for its services or as amounts credited directly to the Plans." *Frost Opinion*, 1997 WL 277980, at *4. The arrangements in *Frost* "expressly provide[d] that any fees received by Frost as a result of the Plan's investment in such a mutual fund [would] be used to pay all or a portion of the compensation that the Plan [was] obligated to pay to Frost, and that the Plan [would] be entitled to any such fees that exceed the Plan's liability to Frost." *Id.* at *3. The Department also stressed the need for the plan sponsor to be informed of revenue sharing receipts in order to make an informed decision whether Frost's fees were reasonable, as well as "to assure, among other things, that any fee offsets to which the Plan is entitled are correctly calculated and applied." *Id.* at *4.

B. Facts

Petitioner is the Trustee of the Leimkuehler, Inc., Profit Sharing Plan, a 401(k) defined-contribution retirement plan. Petitioner hired respondent American United Life Insurance Company (AUL) as the Plan's 401(k) service provider in 2000. Pet. App. 5a.

Under AUL's 401(k) arrangement, plan participants do not directly invest their 401(k) contributions in mutual funds. Pet. App. 5a. "Rather, participants' contributions are deposited into a 'separate account' … that AUL owns and controls. AUL uses the funds in the separate account to invest in whatever mutual funds the Plan participants have selected; it credits the proceeds of these investments back to the participants." *Id.* "[F]rom the perspective of a Plan participant," however, "investing in the separate account is the equivalent … of investing in the funds directly," "[b]ecause the performance of the

separate account mirrors that of the mutual funds." *Id.*

Most mutual funds offer multiple share classes, and "[a]lthough each share class within a given fund is invested in an identical portfolio of securities, the [share] classes have differing price structures." Pet. App. 7a. "The share classes typically made available to 401(k) investors vary primarily (and possibly exclusively) in terms of expense ratio and revenue sharing," which "move in tandem: the higher a given share class's expense ratio, the more the [mutual] fund pays AUL in revenue sharing." *Id.* In addition to the mutual funds' investment fees (*i.e.*, expense ratio), AUL levies on plan assets its own administrative charges in the separate account. *Id.* at 28a.

Significantly, Plan participants do not select which share class within a mutual fund their contributions will be invested, and neither does the employer or the trustee. Instead, AUL alone selects which share class in which to invest the Plan's assets, and it does so on the basis of the amount of revenue sharing it will receive from a given share class. Pet. App. 8a. ("AUL also selected a particular share class, and thus a particular expense ratio and level of revenue sharing"). AUL did not disclose to petitioner or to Plan participants which share class it would invest the Plan's assets. *Id.* AUL also did not disclose that other, less expensive share classes were available to AUL for investment nor did it disclose that its share class selections were driven by the amount of revenue sharing it would receive. *Id.* at 27a, 29a.

Moreover, unlike the revenue sharing arrangement at issue in the DOL's *Frost Opinion*, the revenue sharing payments AUL receives from mutual funds are not cost-neutral to a plan because AUL does not provide a dollar-for-dollar offset against the fees the Plan would be obligated to pay AUL for its

services nor does it credit revenue sharing payments directly to the Plan. *Cf. Frost Opinion*, 1997 WL 277980, at *4 *and* Pet. App. 7a-8a (there is not "a one-to-one correspondence between the cost to AUL of providing participant-level services and the amount that AUL receives in revenue-sharing payments"); *see also* Pet. App. 34a (district court "evaluate[d] AUL's potential fiduciary status through the lens of Mr. Leimkuehler's stated theory of the case: When AUL chose which mutual fund share class to select for inclusion in its investment accounts, it did so on the basis of considerations of revenue-sharing implications, which it neither disclosed to the Plan nor specifically used to provide a dollar-for-dollar credit against the fees that the Plan paid directly to AUL."). Indeed, as the court of appeals itself recognized, "AUL may be making a profit, perhaps even a sizeable profit, from revenue sharing." *Id*. at 8a.

C. Proceedings Below

1. In August 2009, Petitioner sued AUL alleging that it had breached its fiduciary duties and engaged in "prohibited transactions" in violation of ERISA. Petitioner contended below that AUL is a fiduciary under ERISA because it exercises "authority or control respecting management or disposition of [plan] assets" in two ways. First, AUL exercises authority and control over plan assets through its unilateral selection of the mutual fund share classes into which it invests the Plan's assets. Second, AUL exercises authority and control over plan assets through its exclusive authority and control of its separate account into which plan assets are deposited.

Petitioner further contended that AUL's receipt of undisclosed revenue sharing payments, without providing the Plan a dollar-for-dollar offset against the fees the Plan would be obligated to pay AUL for its services and without crediting the revenue shar-

ing payments directly to the Plan constituted both a breach of fiduciary duty and "prohibited transactions." ERISA § 406(b) forbids two kinds of transactions relevant here:

> A fiduciary with respect to a plan shall not—
>
> (1) deal with the assets of the plan in his own interest or for his own account, … or
>
> (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

ERISA § 406(b)(1) & (3). Such prohibited transactions are "categorically" barred. *Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996) ("Congress enacted § 406 'to bar categorically a transaction that [is] likely to injure the pension plan.'") (quoting *Commissioner v. Keystone Consol. Indus., Inc.,* 508 U.S. 152, 160 (1993)); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241-42 (2000) (§ 406 "supplements the fiduciary's general duty of loyalty to the plan's beneficiaries, by categorically barring certain transactions").

2. AUL moved for summary judgment arguing that its control over plan assets in AUL's separate account was insufficient to render it a fiduciary because the requisite "authority or control" under ERISA § 3(21)(A)(i) "must be discretionary in nature to potentially come within the definition." Pet. App. 37a. AUL argued that it exercised no *discretionary* control over the Plan's assets in the separate account. It also argued that it was not a fiduciary at the time it selected share classes as part of its menu design, which was before any of the Plan's assets were deposited in AUL's separate account.

Petitioner opposed AUL's motion, contending that under § 3(21)(A)(i)'s plain language, "*any* authority

or control" of the Plan assets was sufficient to render AUL a fiduciary, thus triggering not only ERISA fiduciary duties, but also § 406(b) 's "prohibited transactions" provision that "categorically" bars a plan fiduciary from engaging in any of the specified transactions. Petitioner also argued that AUL's selection of mutual fund share classes constituted the necessary exercise of "authority or control" over the Plan's assets, and was additionally an exercise of "discretionary" authority and control

The district court granted AUL's motion, holding that "AUL cannot be a fiduciary under 29 U.S.C. § 1002(21)(A)(i) if AUL exercised only non-discretionary authority and control respecting the management or disposition of the Plan's assets." Pet. App. 38a-39a. The court concluded that AUL's "authority or control" over the Plan's assets in AUL's separate account was not discretionary because there was "no evidence of that AUL absconded with any Plan assets, that AUL provided accumulation units for one fund when the participants thought they were buying another, that AUL purchased a share class that resulted in higher expenses than the expenses disclosed to the participant, or that AUL failed to properly apply the valuation formula to the accumulation units." Pet. App. 45a-46a.

In addition, despite finding as a matter of undisputed fact that "AUL alone decides which share class that it will make available through the investment account" and "does not specifically disclose to the Plan, or its participants, the different share classes available or the one that it has selected," Pet. App. 27a, the district court held that AUL does not exercise the requisite "authority or control" over plan assets to render it a fiduciary under ERISA § 3(21)(A)(i). The court cursorily explained that because "a provider can limit the mutual funds it will

offer to plan sponsors, it can likewise select to only deal with particular share classes." Pet. App. 42a.

3. A panel of the Seventh Circuit affirmed the district court's judgment. The court first addressed Petitioner's claim that AUL's share class selection constitutes an exercise of "authority or control" over plan assets rendering AUL a fiduciary. "The problem with this theory," the court held, "is that it is functionally indistinguishable from the one this court rejected in *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009)." Pet. App. 11a. In *Hecker*, the Seventh Circuit had rejected the view that a retirement plan provider's selection of mutual funds for inclusion on a menu of investment options constituted the requisite control to render the provider an ERISA fiduciary[3] because "the final say on which investment options [would] be included" rested with the plan sponsor, not the provider. *Id.* at 583. In this case, the Seventh Circuit extended *Hecker*, holding that "the act of selecting both funds and their share classes for inclusion on a menu of investment options offered to 401(k) plan customers does not transform a provider … into a functional fiduciary under Section 1002(21)(A)(i)." Pet. App. 13a-14a.

The panel next considered Petitioner's claim that AUL is a plan fiduciary by virtue of its undisputed control over the Plan assets AUL holds in its separate account. First it rejected the district court's reading of section 3(21)(A)(1) to require discretionary "authority or control." Noting that "a number of our sister circuits have … concluded that discretionary control is not required with regard to the management or disposition of plan assets," *id.* at 15a, the

---

[3] As in the present case, the Department of Labor filed an *amicus* brief in support of the view rejected by the *Hecker* court.

court agreed, holding that "there is no separate requirement of discretionary authority or control." *Id.* at 16a.

The Seventh Circuit then proceeded to impose a "mismanagement" requirement on the definition of "fiduciary" that closely resembles the district court's "discretion" requirement. "AUL's control over the separate account can support a finding of fiduciary status *only if* Leimkuehler's claims for breach of fiduciary duty arise from AUL's handling of the separate account." Pet. App. 17a. The court justified this requirement on the basis of ERISA's "to the extent" requirement: "a person is a fiduciary with respect to a plan *to the extent* (i) he … exercises any authority or control" over plan assets. ERISA § 3(21)(A)(i). The court then concluded that Petitioner's revenue sharing claims "do not" arise from AUL's handling of the separate account. Much like the district court's rationale, the panel reasoned that "Leimkuehler does not allege that AUL in any way mismanaged the separate account—say, by losing track of participants' contributions or withdrawing funds in the separate account to pay for a company-wide vacation to Las Vegas." *Id.* at 17a.

> Rather, Leimkuehler's claims focus on share-class selection and revenue sharing, and AUL's maintenance of the separate account involves neither. As we noted earlier and as Leimkuehler concedes, AUL selects share classes and decides how much it will receive in revenue sharing when it designs its investment-options menu. Those steps occur well before a Plan participant deposits her contributions in the separate account and directs AUL where to invest those contributions. Because the actions Leimkuehler complains of do not implicate AUL's control over the separate account, the

> separate account does not render AUL a fiduciary under the circumstances of this case.

Id.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE D.C., SECOND, SIXTH, EIGHTH, NINTH AND TENTH CIRCUITS ON A FUNDAMENTAL ISSUE OF ERISA LAW

The Seventh Circuit's decision in this case created a conflict with six other circuits by holding that a plan provider's undisputed exercise of control over plan assets is not, standing alone, dispositive of the provider's fiduciary status. itself enough to render the provider a plan fiduciary. Every other circuit to have addressed the question has concluded that the mere exercise of *any* "authority or control" over a plan's assets confer fiduciary status, which is a straightforward application of the ERISA definition: "a person is a fiduciary with respect to a plan to the extent (i) he … exercises any authority or control respecting management or disposition of its assets." ERISA § 3(21)(A)(i). As the D.C. Circuit put it, "'[*A*]*ny* authority or control' is enough." *Chao v. Day*, 436 F.3d 234, 236 (D.C. Cir. 2006) (emphasis added).

Those circuits also agree on the necessity and logic of ERISA's imposition of fiduciary duties *whenever* one controls a plan's assets. "[I]t reflects the high standard of care trust law imposes upon those who handle money or other assets on behalf of another." *FirsTier Bank, N.A. v. Zeller*, 16 F.3d 907, 911 (8th Cir. 1994). "In Congress's judgment, and consistent with general trust law, parties controlling plan as-

sets are *automatically* in a position of confidence by virtue of that control, and as such they are obligated to act accordingly." *Coldesina v. Estate of Simper*, 407 F.3d 1126, 1132 (10th Cir. 2005).

> As a general matter, a relationship of trust is established when one acquires possession of another's property with the understanding that it is to be used for the owner's benefit, and in these circumstances an obligation arises on the part of the one in possession to act in the owner's bests interests rather than his own.

Id. at 1134 . Anyone who controls plan assets *could* use "the plan's money to pay his business expenses or go on vacation," and "this practical reality is precisely why control over assets is treated differently than control over management." *Id.* at 1133-34.

The Seventh Circuit (like the district court) injected into this bright-line definition of "fiduciary" an entirely separate issue of whether AUL actually misused the plan's money in some illegitimate way, as opposed to whether it was in a position to do so by virtue of its control of plan assets. The court justified this gloss on the definition based on § 3(21)(A)'s limitation on fiduciary status "only 'to the extent' [an entity] exercises its authority or control"; that language requires "that an entity exercise authority or control with respect to the action at issue in the suit in order to be subject to liability as a fiduciary under this section." Pet. App. 16a (citing *Pegram v. Herdrich*, 530 U.S. 211 (2000)).

But whether AUL "mismanaged" the Plan's assets is distinct from the antecedent question of whether AUL exercised *any* control over the Plan's assets. It is beyond question that an entity is only a fiduciary

"to the extent" it performs one of the fiduciary functions enumerated in the statute, but "to the extent … he … exercises any authority or control" over plan assets, ERISA § 3(21)(A)(i), he is an ERISA fiduciary. There can be a disconnect between a plaintiff's allegations of fiduciary status arising from control of plan assets and her allegations of a fiduciary breach, if the alleged breach has nothing to do with plan assets. In that situation, however, the defendant is still a fiduciary by virtue of its control of plan assets. The plaintiff will merely have failed to state claim for breach of that defendant's fiduciary obligations. *See Pegram*, 530 U.S. at 226 (to be liable as an ERISA fiduciary, a "person [must be] acting as a fiduciary (that is, … performing a fiduciary function) *when taking the action subject to complaint*"). That, however, is not what the Seventh Circuit did here. It rested its holding squarely on ERISA'S definition of "fiduciary," and it unmistakably held that AUL's control over plan assets in "the separate account does not render AUL a fiduciary under the circumstances of this case." Pet. App. 17a. In so doing, it parted ways with six other circuits.

A. The D.C., Second, Sixth, Eighth, Ninth and Tenth Circuits Hold That The Act Of Holding or Transferring Plan Assets Are Fiduciary Acts

1. *The Eighth Circuit*. In *FirsTier Bank*, plan participants alleged that the bank violated ERISA by making improper plan participant loans. 16 F.3d at 910. The bank "argue[d] that it had no fiduciary duty with respect to these participant loans because it made the loans 'at the direction of the Company'" in accordance with the terms of the Plan and it "therefore did not exercise fiduciary discretion." *Id*. at 911.

The Eighth Circuit rejected the bank's arguments, holding that making loans from plan assets to plan participants was a fiduciary function, irrespective of whether the bank made the loans at the direction of another plan fiduciary. *Id.* The bank's fiduciary status arose from its handling of plan assets, and while its handling of those assets at the direction of another plan fiduciary in accordance with the Plan's terms "does not eliminate, the trustee's fiduciary duty when handling plan assets." *Id.* "[A]n ERISA trustee who deals with plan assets in accordance with proper directions of another fiduciary is not relieved of its fiduciary duties to conform to the prudent man standard of care; to attempt to remedy known breaches of duty by other fiduciaries; and to avoid prohibited transactions." *Id.* (citations omitted).

2. *The Ninth Circuit.* In *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415 (9th Cir. 1997), an employer hired an insurance company "to process claims, and pay or deny them," although "contested or doubtful claims" were to be referred to the employer for resolution. *Id.* at 1417-18. The insurance company argued it was not a fiduciary on the grounds that "its duties were purely ministerial." *Id.* at 1419.

The Ninth Circuit rejected the insurance company's argument because "General American controlled the money in the plan's bank account." *Id.* at 1421. "'Any' control over disposition of plan money makes the person who has the control a fiduciary." *Id.* ("as a practical matter, a substantial amount of money would be under the control of General American, in the form of a bank account which it could deplete by writing checks"). "The right to write checks on plan funds is 'authority or control respecting management or disposition of its assets.'" *Id.* "The words of the ERISA statute, and its purpose of assuring that people who have practical control over an ERISA plan's

money have fiduciary responsibility to the plan's beneficiaries, require that a person with authority to direct payment of a plan's money be deemed a fiduciary." *Id.*

3. *The Second Circuit.* In *LoPresti v. Terwilliger*, 126 F.3d 34 (2d Cir. 1997), a plan trustee sued the employer company's president for using plan assets to pay the company's creditors after the company fell on hard times financially. *Id.* at 37. The district court dismissed the complaint because the company president had not used the assets for himself but rather to pay company creditors. *Id.*

The Ninth Circuit reversed. "[T]he district court overlooked the fact that an individual also may be an ERISA fiduciary by, as just stated, 'exercis[ing] *any* authority *or* control respecting management *or* disposition of [plan] assets.'" *Id.* at 40 (emphasis in original). The company president was a signatory on the company's checking account, he "signed checks on that account," and he "had 'a role in determining which bills to pay.'" *Id.* His "commingling of plan assets with the Company's general assets, and his use of those plan assets to pay Company creditors, rather than forwarding the assets to the Funds means that he 'exercise[d] ... authority or control respecting ... disposition of [plan] assets,' and hence is a fiduciary ...." *Id.*

4. *The Tenth Circuit.* In *Coldesina*, a plan's investment advisor directed the plan's accountant to transfer plan contributions to the advisor on the understanding that the advisor would then transfer those assets to the appropriate investment managers. 407 F.3d at 1130. The accountant began "writing checks on behalf of the plan payable to" the advisor. *Id.* It later came to light that the advisor "had stolen over $600,000 from the plan," and the plan sued the accountant. *Id.* at 1131.

The accountant argued that he was not a fiduciary because he was "not in control of the plan's assets," and was "simply performing a ministerial, check-writing service." *Id.* at 1134. The Tenth Circuit rejected that argument because "the dichotomy between discretionary and ministerial authority is not determinative regarding control over assets," *id.*, because "*any authority or control* over plan assets is sufficient to render fiduciary status." *Id.* at 1133 (emphasis in original).

> [T]he practical reality is that Mr. Madsen had total control over the plan's money while it was in his account. By way of example only, though not authorized to do so, he could have withdrawn the plan's money to pay his business expenses or go on vacation, and certainly if he had done either it would have been appropriate to treat his actions as a breach of fiduciary duty.

Id.

> The facts here are even more compelling [than in *IT Corp.*] because the account at issue belonged to the accountant … and not to the plan itself. … Here, where the plan was not affiliated with the account and had no authority to oversee its activities, it depended upon Mr. Madsen to ensure the funds were handled properly. Indeed, to say that the accountant defendants did not control the money while it was in their account is to say that no one had control during that time.

Id.

5. *The D.C. Circuit*. In *Chao*, an insurance broker accepted payments from "ERISA-covered employee benefit plans for the purpose of purchasing insurance for the plans." 436 F.3d at 235. The broker "deposited the checks into his corporate account," but "[i]nstead

of using the plans' checks to purchase insurance," he "kept the money and provided the plans with fake insurance policies." *Id.* Day argued that he was not a plan fiduciary because "he did not exercise any discretion over the plans' assets—he was under strict instructions to use the plans' funds to purchase insurance coverage for the plans' members." *Id.* at 236.

The D.C. Circuit rejected "Day's interpretation of § 1002(21)(A)(i) because it does violence to the statutory text." *Id.* "[I]n order to qualify as a 'fiduciary' with respect to a plan's 'assets,' a person must simply exercise '*any* authority or control' over their management or disposition." *Id.* "Day undeniably had 'authority or control' over the 'disposition' of the plans' 'assets.' The plans sent to Day checks made payable to him. Day then deposited the plans' funds into his account." Although "Day absconded with the funds," it was not "his thievery" that the D.C. Circuit held rendered him an ERISA fiduciary but rather his control over plan assets. *Id.* "[A]ny authority or control" is enough. *Id.*

6. *The Sixth Circuit*. In *Briscoe v. Fine*, 444 F.3d 478 (6th Cir. 2006), an employer in financial straits stopped making payments necessary to support a company healthcare plan, and the plan's third party administrator, PHP, cancelled its contract with the company. When it did so, it "[r]etain[ed] for itself an administrative fee," and sent the remaining funds in the plan account to the employer. *Id.* at 484.

Citing all of the cases discussed above, the Sixth Circuit held that "PHP both had the power to write checks on the plan account (which was partially in PHP's name) and exercised that power before and after its contractual relationship with the Company ended. Because PHP exercised control over plan assets, it qualifies as an ERISA fiduciary to the extent that it did so." *Id.* at 494.

B. The Seventh Circuit Rejected The "Any Authority Or Control" Standard

Although the Seventh Circuit said that it agreed with its sister circuits' holdings that "there is no separate requirement of discretionary authority or control" under the § 3(21)(A)(i) definition of "fiduciary," the court clearly did not accept its sister circuits' rationale for their holdings: that the exercise of "any control or authority" over plan assets is sufficient to make a person a plan fiduciary. Otherwise, the court would not have held that AUL is not an ERISA fiduciary, even though (i) plan assets "are deposited into a 'separate account' … that AUL owns and controls," (ii) "AUL uses the funds in the separate account to invest in" mutual funds, (iii) "AUL selects [the particular mutual fund] share classes" into which those assets are invested, and (iv) AUL's share class selections are based on "how much [AUL] will receive in revenue sharing" payments, which are payments mutual funds make to AUL for investing assets in certain share classes. Pet. App. 5a, 17a.

C. The Seventh Circuit's Decision Disregards Long-Established Department Of Labor Policy Holding That Revenue Sharing Practices Like AUL's Are Subject To ERISA's Fiduciary Provisions

Even AUL acknowledged that since the late 1990s, the Department of Labor has consistently held the view that a 401(k) service provider acts as a fiduciary when it "exercise[s] any authority or control to cause a plan to invest in a mutual fund that pays a fee to the [service provider] in connection with the plan's investment." *See Frost Opinion*, 1997 WL 277980, at *4 (finding no ERISA violation because the service provider gave the plan a "dollar-for-dollar" credit for any revenue sharing it received); *accord ABN-AMRO*

Opinion, 2003 WL 21514170, at *1, *4, *6 (finding no ERISA violation because "the decision to invest in such funds is made by a fiduciary who is independent of AATSC and its affiliates, or by participants of such employee benefit plans"). In her *amicus* brief below, the Secretary advanced those same views:

> To be sure, AUL was a fiduciary only "to the extent" that it exercised the requisite authority .... The plaintiff's allegations—and AUL's revenue sharing—are directly tied to AUL's exercise of fiduciary authority. Neither the [contract between AUL and the Plan] nor participants' investment directions required investment in specific share classes, although the choice of share class determined how much revenue the Plan and AUL would receive from investing in a particular mutual fund—the higher the revenue sharing, the less the Plan would receive vis à vis AUL and vice versa.

Brief of the Secretary of Labor as Amicus Curiae, 2012 WL 3066710, at *17. Thus, "'[t]o the extent' that AUL instead exercised its authority to invest in more expensive classes in which it had a financial interest, about which the plaintiff had no knowledge and thus no control, it was a fiduciary." *Id.* at *18.

The Secretary's views were entitled to deference. *Auer v. Robbins*, 519 U.S. 452, 462 (1997). As in *Auer*, "[t]he Secretary's position is in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." *Id.* In this case, the Panel did not accord the Secretary's views the respect they were due.

II. THIS COURT SHOULD REVERSE THE SEVENTH CIRCUIT'S DECISION

The Seventh Circuit held that a ERISA plan provider's control over plan assets does not, without

more, establish the provider's fiduciary status under ERISA § 3(21)(A)(i). *See* Pet. App. 17a. Instead, for a provider's control over plan assets to make it a fiduciary, its alleged ERISA violation must arise from the provider's handling of the assets. *Id*. Indeed, for the provider's control of plan assets to render it a fiduciary, it must be alleged that the provider *mismanaged* the plan assets. *Id*. That holding cannot be reconciled with ERISA's text.

To paraphrase the D.C. Circuit, the Seventh Circuit's interpretation of § 3(21)(A)(i) "does violence to the statutory text." The Seventh Circuit's holding effectively rewrites the statute to provide that "a person is a fiduciary with respect to a plan to the extent (i) he … ~~exercises any~~ abuses his authority or control respecting management or disposition of its assets."

Moreover, the Seventh Circuit's holding that "Leimkuehler does not allege that AUL in any way mismanaged the separate account" conflicts with this Court's recognition that "the principal statutory duties" ERISA imposes on a fiduciary "relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, *and the avoidance of conflicts of interest*." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43 (1985) (emphasis added). Indeed, "[w]ith regard to loyalty, the principal provision is § 406, which in general prohibits self-dealing." *Id*. at 143 n.10.

Petitioner alleges that AUL invested the Plan's assets, held in AUL's separate account, in mutual fund share classes that benefited AUL to the detriment of plan participants. That is an allegation of "mismanagement" every bit as much as an allegation that AUL lost "track of participants' contributions" or used plan assets "to pay for a company-wide vacation

to Las Vegas." *See* Pet. App. 17a. The Seventh Circuit never mentioned Petitioner's claim that AUL's method of revenue sharing is a "prohibited transaction," so the court never explained how AUL's funneling of the Plan's assets into share classes that paid it revenue sharing did not constitute either "deal[ing] with the assets of the plan in [AUL's] own interest or for [its] own account" or "receiv[ing] any consideration for [its] own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan. ERISA § 406(b)(1) & (3). Clearly, AUL's investment of plan assets in share classes that paid it undisclosed revenue sharing violated one or both of these provisions.

Given that "Congress enacted § 406 'to bar categorically'" the enumerated transactions, *Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996), a fiduciary's participation in such prohibited transactions is "mismanagement" of the highest order. Section 406 erects "a blanket prohibition of certain transactions, no matter how fair, unless the statutory exemption procedures are followed." *Cutaiar v. Marshall*, 590 F.2d 523, 530 (3d Cir. 1979). Such transactions are "illegal per se" because they are "the types of transactions that experience had shown to entail a high potential for abuse," *Donovan v. Cunningham*, 716 F.2d 1455, 1465 (5th Cir. 1983), and they are prohibited "even where there is 'no taint of scandal, no hint of self-dealing, no trace of bad faith.'" *Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1213 (2d Cir. 1987) (quoting *Cutaiar*). "Fiduciaries … must either avoid the transactions described in Section 406(b) or cease serving in their capacity as fiduciaries …." *Id*. The Seventh Circuit's holding that "Leimkuehler does not allege that AUL in any way mismanaged the separate account" is the functional equivalent of holding that a § 406(b) prohibited transaction is not "mis-

management" of a plan's assets, and that is plainly wrong.

III. THIS CASE PRESENTS A RECURRING QUESTION OF EXCEPTIONAL IMPORTANCE WARRANTING THE COURT'S IMMEDIATE RESOLUTION

This case raises a question of vital importance to every American whose retirement savings are invested in a retirement plan—whether the persons who exercise authority or control over those retirement assets have fiduciary obligations to act in the best interests of the plan and to avoid conflicts of interest. The significant number of reported federal appellate opinions addressing the issue in recent years reflects that the issue is one of recurring significance. *See* Pet. App. 15a-16a (collecting cases). The question presented is ripe for this Court's review, and this case presents an ideal vehicle in which to resolve it.

Retirement plans play a critical role in the national economy. Nearly 75 million individuals were active participants in defined contribution plans in 2010, holding almost $4 trillion in total assets and contributing over $300 billion in a single year.

The Court will not benefit from further percolation of this issue in the lower courts. The proper standard for assessing the fiduciary status of a person who exercises "authority or control" over plan assets has now been discussed in the courts of appeals for more than a decade. Seven circuits have fully considered the issue, with six following the "any authority or control" standard. The Seventh Circuit has now reached a contrary conclusion, holding that a person's exercise of "authority or control" over plan as-

sets does not render it a fiduciary unless it has allegedly "mismanaged" those assets.

Furthermore, there is no realistic prospect of the conflict being resolved without this Court's intervention. The Seventh Circuit denied rehearing on the question. Pet. App. 2a There is no reason to believe that court will deviate from the standard set forth in this case, and there is no reason to think other circuits that have rejected reasoning like the Seventh Circuit's will reconsider their positions. Accordingly, the question presented is ripe for adjudication by this Court. Declining to intervene will only lead to further confusion and inconsistent results in the lower courts.

In addition, this case is an ideal vehicle for resolving the question presented. There is no preliminary or threshold issue that this Court would have to decide before reaching the question presented. Nor is there any alternative ground for affirming the district court's grant of summary judgment for AUL if the Court reverses the decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN M. TILLERY
Counsel of Record
ROBERT L. KING
KOREIN TILLERY LLC
505 N. 7th Street
Suite 3600
St. Louis, MO 63101
(314) 241-4844

October 25, 2013

APPENDIX

APPENDIX A — ORDER DENYING PETITION FOR REHEARING AND REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED JUNE 27, 2013

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 12-1081

June 27, 2013

Before

MICHAEL S. KANNE, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

ROBERT LEIMKUEHLER, as trustee of and on behalf of the LEIMKUEHLER, INC. PROFIT SHARING PLAN, and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

AMERICAN UNITED LIFE INSURANCE CO.,

Defendant-Appellee.

Appendix A

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 10-CV-333-JMS-TAB

Jane Magnus-Stinson, *Judge.*

ORDER

Plaintiff-Appellant filed a petition for rehearing and rehearing *en banc* on May 31, 2013. No judge[1] in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to DENY rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing and rehearing *en banc* is **Denied.**

---

1. Judge John Daniel Tinder did not participate in the consideration of this matter.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED APRIL 16, 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 12-1081, 12-1213 & 12-2536

ROBERT LEIMKUEHLER, as trustee of and on behalf of the LEIMKUEHLER, INC. PROFIT SHARING PLAN, and on behalf of all others similarly situated,

Plaintiff-Appellant/Cross-Appellee,

v.

AMERICAN UNITED LIFE INSURANCE CO.,

Defendant-Appellee/Cross-Appellant.

Argued November 28, 2012—Decided April 16, 2013

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 10-CV-333-JMS-TAB—**Jane Magnus-Stinson**, *Judge*.

Before KANNE, WOOD, and SYKES, *Circuit Judges*.

OPINION

WOOD, *Circuit Judge*. This case presents a challenge to the practice known in the 401(k) services industry as

"revenue sharing"—an arrangement allowing mutual funds to share a portion of the fees that they collect from investors with entities that provide services to the mutual funds, the investors, or both. Although the practice has been commonplace for years, until quite recently it was opaque to both individual investors and many 401(k) plan sponsors. As the existence and extent of revenue sharing has become more widely known, some have expressed concern that the practice unduly benefits mutual funds and 401(k) service providers to the detriment of plan participants. This concern has fueled a number of lawsuits alleging that the practice violates the Employee Retirement Income Security Act of 1974 (ERISA). This is one such suit.

The district court awarded summary judgment to the defendant, American United Life Insurance Company (AUL), which is an Indiana-based insurance company that offers investment, record-keeping, and other administrative services to 401(k) plans. The court ruled that AUL was not a fiduciary of the Leimkuehler, Inc. Profit Sharing Plan (the Plan) with respect to AUL's revenue-sharing practices. The Plan and Robert Leimkuehler, its Trustee, have appealed. Although very little about the mutual fund industry or the management of 401(k) plans can plausibly be described as transparent, we agree with the district court that AUL is not acting as a fiduciary for purposes of 29 U.S.C. § 1002(21)(A) when it makes decisions about, or engages in, revenue sharing. We find it unnecessary to express any view on the question whether revenue sharing yields net benefits to individual 401(k) investors, and we thus affirm the district court.

I

Leimkuehler, Inc., a small company that manufactures prosthetic limbs and braces, operates a 401(k) plan for its employees. (So-called 401(k) plans are, more formally, private, employer-based defined-contribution retirement plans that meet the requirements of Internal Revenue Code Section 401(k). 26 U.S.C. § 401(k). We commented on the importance to millions of people of this type of retirement plan in *Spano v. The Boeing Co.*, 633 F.3d 574, 576 (7th Cir. 2011).) Robert Leimkuehler, president of Leimkuehler, Inc., and Trustee of the Plan, brought this suit against AUL, which has provided services to the Plan since 2000.

One of the services AUL provides to the Plan is the use of a group variable annuity contract, which enables individual Plan participants to invest their 401(k) contributions "in" mutual funds. We use quotation marks because, as the contract is structured, no Plan participant invests in a mutual fund directly. Rather, participants' contributions are deposited into a "separate account"—distinct because state insurance law and ERISA require AUL to keep retirement contributions separate from other assets—that AUL owns and controls. AUL uses the funds in the separate account to invest in whatever mutual funds the Plan participants have selected; it credits the proceeds of these investments back to the participants. Because the performance of the separate account mirrors that of the mutual funds, investing in the separate account is the equivalent from the perspective of a Plan participant of investing in the funds directly.

While the separate account means little to a Plan participant, it makes quite a difference to the mutual fund companies. If every individual participant in the Plan were to invest directly in the mutual funds that AUL services, the funds would have to keep track of and service thousands of individual accounts, many of which would contain little money. By pooling individual contributions into the separate account, AUL radically simplifies matters for the participating funds. From the funds' perspective, AUL is a single investor. The use of the separate account thus substantially reduces the mutual funds' administrative, marketing, and service costs.

These costs do not, however, disappear altogether. Instead, AUL must perform many of the services that the mutual funds would otherwise handle themselves. Among other things, AUL keeps track of individual accounts, takes responsibility for calculating the daily value of assets in the separate account, distributes information to the Plan sponsor and participants, and provides a customer-service hotline.

In principle, AUL could cover the costs of providing these services in one of two ways. One way would be to bill the Plan sponsor or Plan participants directly. The other way would be to engage in a practice known as "revenue sharing," whereby the mutual fund companies pay a portion of the fees they charge investors—fees that are referred to as a fund's "expense ratio" and that are expressed as a percentage of a fund's assets—to AUL. Because a portion of a mutual fund's expense ratio is typically intended to cover the costs of providing the

participant-level services that the mutual fund would be furnishing if it were not for AUL, the mutual funds are willing to pay some of these fees to AUL as compensation for AUL's provision of these services.

One additional complication plays an important role in our case. Within a single mutual fund, there are often several different expense-ratio/revenue-sharing levels available, because most mutual funds offer multiple "share classes" to investors. Although each share class within a given fund is invested in an identical portfolio of securities, the classes have differing price structures. The share classes typically made available to 401(k) investors vary primarily (and possibly exclusively) in terms of expense ratio and revenue sharing (if any).

As a general matter, expense ratios and revenue-sharing payments move in tandem: the higher a given share class's expense ratio, the more the fund pays AUL in revenue sharing. It is also generally the case that the more AUL receives in revenue sharing, the less it charges plan sponsors or participants directly for its services. AUL employees stated in deposition testimony (and Leimkuehler does not contest) that AUL offers a range of 401(k) investment products, some of which offer mutual funds with relatively high expense ratios and relatively low billed fees, and others with relatively low expense ratios and relatively high billed fees.

None of this is meant to suggest that there is necessarily a one-to-one correspondence between the cost to AUL of providing participant-level services and the

amount that AUL receives in revenue-sharing payments. AUL may be making a profit, perhaps even a sizeable profit, from revenue sharing (just as it may be making a profit when it bills a plan directly for its services). The foregoing discussion simply places AUL's revenue sharing in context. (We note as well that to the extent Leimkuehler's concerns about revenue sharing arise from AUL's historical failure to disclose its revenue-sharing practices, that issue has been addressed recently. The Department of Labor (DOL) promulgated a final rule, effective July 1, 2012, that requires entities like AUL to disclose their revenue-sharing arrangements. 29 C.F.R. § 2550.408b-2 (2012).)

AUL's contract with the Leimkuehler Plan did not enable Plan participants to invest in all of the roughly 7,500 mutual funds currently available on the market. Instead, Plan participants had a significantly narrower range of investment options for their 401(k) contributions. The winnowing of investment options occurred in two stages. At stage one, AUL selected a "menu" of mutual funds and presented this menu to Leimkuehler, in his capacity as Plan Trustee. As of 2010, this investment menu contained 383 funds. For each fund on the menu, AUL also selected a particular share class, and thus a particular expense ratio and level of revenue sharing. As counsel for Leimkuehler conceded at oral argument, share classes were selected at the time AUL developed the menu; they did not change thereafter. Although AUL did not disclose to Leimkuehler or to Plan participants which share class was associated with each fund on the menu, all parties agree that AUL did disclose each fund's expense

ratio. Leimkuehler therefore knew how much each mutual fund cost, though he did not know how those costs were allocated between the fund companies and AUL.

At stage two, Leimkuehler selected from the menu the specific funds that he wished to make available to Plan participants. Plan participants could then direct their contributions to one or more of the investment options that Leimkuehler had selected. Under the contract, Leimkuehler retained the right to change his selections, and he in fact did make changes to the mix of available funds at least twice between 2000 and 2010. AUL also reserved the right to make substitutions to or deletions from Leimkuehler's selections; it exercised this right twice—once in 2000 to substitute one S&P 500 index fund for another, and again in 2011 to substitute one Vanguard fund for another.

Leimkuehler filed this suit against AUL on behalf of the Leimkuehler Plan individually and as a class action, alleging that AUL's revenue-sharing practices breached a fiduciary duty to the Plan under ERISA. The district court granted AUL's motion for summary judgment, concluding that AUL did not owe any fiduciary responsibility to the Plan with respect to its revenue-sharing practices and that it therefore was not a "functional fiduciary" within the meaning of 29 U.S.C. § 1002(21)(A). In a separate ruling, the district court declined to grant AUL's motion for either attorney's fees and costs under ERISA, or costs under Federal Rule of Civil Procedure 54(d). Both parties now appeal: the Plan challenges the grant of summary judgment for AUL; and AUL challenges the rulings on fees and costs.

II

AUL is not named as a fiduciary to the Leimkuehler Plan. Accordingly, any fiduciary responsibility that AUL owes to the Plan must stem from its status as a "functional fiduciary." The general term "fiduciary" is defined as follows:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A).

Focusing on the second clause of subpart (i), Leimkuehler offers two theories of how AUL satisfies its requirements. First, he asserts that AUL exercises authority or control over the management or disposition of the Plan's assets by selecting which mutual fund share classes to include on its investment menu. Second, he asserts that AUL exercises authority or control through the various activities associated with maintaining the

separate account. DOL, which appeared in this appeal as *amicus curiae* on behalf of Leimkuehler, offers a third theory: it argues that AUL's contractual reservation of the right to substitute or delete funds made available to the Leimkuehler Plan's participants is itself an exercise of authority or control over the Plan's assets, even if AUL never affirmatively exercises its contractual right in a way that gives rise to a claim. We address each argument in turn.

A

Leimkuehler's first theory of AUL's fiduciary status might broadly be termed a "product design" theory, as it centers on actions that AUL takes when designing the products it offers to its 401(k) plan customers. In crafting its menu of investment options, AUL decides which mutual funds to include and which share classes of those funds to select. In making both these decisions, AUL is also setting the stage for any revenue sharing in which it wishes to engage. These product-design decisions shape the disposition of Plan assets: they limit the universe of funds, as well as the share classes within those funds, in which Plan assets are invested. Leimkuehler urges that this suffices to make AUL a fiduciary under the terms of Section 1002(21)(A)(i).

The problem with this theory is that it is functionally indistinguishable from the one this court rejected in *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009). In *Hecker*, participants in Deere & Company's 401(k) plan sued two Fidelity entities that provided investment

services to the plan. *Id*. at 578. Fidelity offered a menu of mutual funds and other investment options to Deere, which then selected which of those investment options it wished to make available to plan participants. *Id*. The menu of funds presented to Deere did not include every mutual fund on the market; rather, it was a select, though still expansive, list compiled by Fidelity in advance. *Id*. at 581, 583. The plaintiffs alleged that Fidelity's control over which funds made it onto the list gave it authority or control over the plan's assets, because the menu limited the universe of funds in which a plan participant could invest. *Id*. at 583. This court concluded that the act of selecting which funds will be included in a particular 401(k) investment product, without more, does not give rise to a fiduciary responsibility, both because there is "no authority that holds that limiting funds . . . automatically creates discretionary control sufficient for fiduciary status," and because, in any event, "the Trust Agreement gives Deere, not Fidelity Trust, the final say on which investment options will be included." *Id*.

Although *Hecker* did not address share classes specifically, its facts are otherwise strikingly similar to those in this case. Indeed, we perceive only two factual distinctions that might even conceivably be of any practical significance. First, AUL, unlike Fidelity, is an insurance company and therefore operates through the separate account. As discussed below in part II.B, however, this difference does not alter the result. Second, AUL reserves the right to make substitutions to the funds that Leimkuehler chooses to offer to Plan participants, and thus there is at least some basis for questioning whether

Leimkuehler has "the final say on which investment options will be included." But Leimkuehler concedes that AUL has never exercised this contractual right in a way that could give rise to a claim, and so on the present record this distinction falls away as well. (As mentioned above, AUL has exercised this right on two occasions; one instance fell outside the limitations period, and the other involved a substitution of Vanguard funds, neither of which made revenue-sharing payments to AUL.)

Nor does adding the concept of share classes to the mix meaningfully differentiate this case from *Hecker*. We grant that the failure to offer every share class of every fund that AUL includes on its menu results in the limitation of the universe of investment options available to Plan participants. But we fail to see how this is significantly different from Fidelity's limiting the universe of investment options by offering certain mutual funds and not others. True, some share classes are more expensive than others, but the cheapest option may not inevitably be the best option. There is also no particular reason to think that AUL would not seek to make up the revenue it missed by offering cheaper share classes by charging higher direct fees to plans like Leimkuehler's. Furthermore, given that AUL does disclose the bottom-line cost of every fund that it offers, Leimkuehler was free to seek a better deal with a different 401(k) service provider if he felt that AUL's investment options were too expensive. In short, we see no basis for distinguishing AUL's actions here from those in *Hecker*. We therefore confirm that, standing alone, the act of selecting both funds and their share classes for inclusion on a menu of

investment options offered to 401(k) plan customers does not transform a provider of annuities into a functional fiduciary under Section 1002(21)(A)(i).

B

Leimkuehler argues, however, that AUL does more than merely select funds and share classes for its investment menu: AUL, he says, exercises control over the management and disposition of the Plan's assets by maintaining the separate account, which AUL alone controls. In order to manage that account, AUL must keep track of individual Plan participants' contributions and investment directions. It then must invest participants' funds in the mutual funds they select and credit returns from the funds to the participants' accounts. Although these tasks are essentially ministerial, Leimkuehler argues that they are nevertheless sufficient to make AUL a fiduciary, because Section 1002(21)(A)(i) requires only that AUL exercise "*any* authority or control respecting management or disposition of its assets." (Emphasis added.)

The district court concluded that Leimkuehler was reading too much into the word "any," and that fiduciary status arises only if the authority or control permits the exercise of discretion. Although Section 1002(21)(A)(i) does not spell out such a limitation, the district court read several of this court's prior decisions as holding that discretion is an essential prerequisite for finding a fiduciary duty under ERISA, rather than a characteristic that is often present but is not an ironclad requirement. We recognize

that some imprecise language in our prior decisions in this area has generated confusion. *See*, *e.g.*, *Hecker*, 556 F.3d at 583 ("In order to find that they were 'functional fiduciaries,' we must look at whether either Fidelity Trust or Fidelity Research exercised discretionary authority or control over the management of the Plans, the disposition of the Plans' assets, or the administration of the Plans."); *Pohl v. National Benefits Consultants*, 956 F.2d 126, 129 (7th Cir. 1992) ("At all events, ERISA makes the existence of discretion a sine qua non of fiduciary duty."). Our prior decisions tended to discuss Section 1002(21)(A) (which does make frequent mention of "discretion") as a whole. That section, however, not only contains three subparts, but subpart (i) identifies two different situations: "[first] [the person] exercises any *discretionary* authority or *discretionary* control respecting management of such plan or [second] [the person] exercises *any* authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A)(i) (emphasis added). The concept of discretion is thus integral to Plan management, but it is conspicuously missing when it comes to asset management or disposition.

A number of our sister circuits have taken note of this distinction and concluded that discretionary control is not required with regard to the management or disposition of plan assets. *See Briscoe v. Fine*, 444 F.3d 478, 492-94 (6th Cir. 2006); *Chao v. Day*, 436 F.3d 234, 237-38, 369 U.S. App. D.C. 272 (D.C. Cir. 2006); *Coldesina v. Estate of Simper*, 407 F.3d 1126, 1132 (10th Cir. 2005); *Board of Trustees of Bricklayers & Allied Craftsmen Local 6 of N.J. Welfare Fund v. Wettlin Assocs., Inc.*, 237 F.3d 270,

273 (3d Cir. 2001); *Herman v. NationsBank Trust Co., (Georgia)*, 126 F.3d 1354, 1365 (11th Cir. 1997); *LoPresti v. Terwilliger*, 126 F.3d 34, 40 (2d Cir. 1997); *IT Corp. v. General Am. Life Ins. Co.*, 107 F.3d 1415, 1421 (9th Cir. 1997); *FirsTier Bank, N.A. v. Zeller*, 16 F.3d 907, 911 (8th Cir. 1994). We agree with them that this reading is most faithful to the language of the statute, and we now make explicit that insofar as "management or disposition of assets" is concerned, there is no separate requirement of discretionary authority or control.

Unfortunately for Leimkuehler, however, this does not help him as much as he might think. Critically, Section 1002(21)(A) additionally states that an entity is a fiduciary only "to the extent" it exercises its authority or control. The Supreme Court has interpreted this phrase as requiring that an entity exercise authority or control with respect to the action at issue in the suit in order to be subject to liability as a fiduciary under this section. In *Pegram v. Herdrich*, 530 U.S. 211, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000), the Court explained:

> In every case charging breach of ERISA fiduciary duty, [] the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) *when taking the action subject to complaint*.

Id. at 226 (emphasis added); *see also Chicago Dist. Council of Carpenters Welfare Fund v. Caremark, Inc*., 474 F.3d

463, 471-72 (7th Cir. 2007) (ERISA plaintiff must show that entity "was acting in its capacity as a fiduciary at the time it took the actions that are the subject of the complaint"). Thus, AUL's control over the separate account can support a finding of fiduciary status only if Leimkuehler's claims for breach of fiduciary duty arise from AUL's handling of the separate account.

They do not. Leimkuehler does not allege that AUL in any way mismanaged the separate account—say, by losing track of participants' contributions or withdrawing funds in the separate account to pay for a company-wide vacation to Las Vegas. *Cf. Chao*, 436 F.3d at 235 (defendant that received plan assets for purposes of purchasing insurance policies was a fiduciary under Section 1002(21)(A)(i) when he kept the money and provided fake insurance policies). Rather, Leimkuehler's claims focus on share-class selection and revenue sharing, and AUL's maintenance of the separate account involves neither. As we noted earlier and as Leimkuehler concedes, AUL selects share classes and decides how much it will receive in revenue sharing when it designs its investment-options menu. Those steps occur well before a Plan participant deposits her contributions in the separate account and directs AUL where to invest those contributions. Because the actions Leimkuehler complains of do not implicate AUL's control over the separate account, the separate account does not render AUL a fiduciary under the circumstances of this case.

C

Finally, DOL proposes that AUL is a fiduciary because, in section 3.3 of its contract with the Plan, it retains the right to delete or substitute the funds Leimkuehler has selected for the Plan. DOL acknowledges that AUL can be liable as a fiduciary only "to the extent" it exercises this contractual authority. DOL also acknowledges that neither of the two occasions on which AUL exercised its right under section 3.3 gives rise to an ERISA claim. In DOL's view, however, AUL need never affirmatively exercise its section 3.3 authority in order to incur fiduciary responsibilities to the Plan. Instead, it "exercises" this authority in a negative sense every time it invests a participant's contributions in one of the chosen mutual fund share classes, as opposed to a less expensive share class of that same mutual fund. This is effectively a "non-exercise" theory of exercise: because AUL *could* unilaterally substitute less expensive share classes, its failure to do so amounts to an exercise of its authority.

This theory is unworkable. It conflicts with a commonsense understanding of the meaning of "exercise," is unsupported by precedent, and would expand fiduciary responsibilities under Section 1002(21)(A) to entities that took no action at all with respect to a plan. In contrast to a named fiduciary, a functional fiduciary under Section 1002(21)(A) owes a duty to a plan through its actions, regardless of whether it chose to assume fiduciary responsibilities or even anticipated that such responsibilities might arise. Section 1002(21)(A)'s "reach is limited to circumstances where the individual actually

exercises some authority," *Trustees of the Graphic Commc'ns Int'l Union Upper Midwest Local 1M Health & Welfare Plan v. Bjorkedal*, 516 F.3d 719, 733 (8th Cir. 2008), and "people may be fiduciaries when they do certain things but be entitled to act in their own interests when they do others," *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994). We agree with the Eighth Circuit that "[a]n act of omission fails to satisfy the requirement that the individual *exercise* discretionary authority over plan assets." *Bjorkedal*, 516 F.3d at 733 (emphasis in original). This means that AUL's decision *not* to exercise its contractual right to substitute different (less expensive) funds for the Leimkuehler Plan does not make it a fiduciary.

III

In its cross-appeal, AUL challenges the district court's order denying its motion for attorney's fees and costs under ERISA, 29 U.S.C. § 1132(g), or costs under Federal Rule of Civil Procedure 54(d). The decision to award fees and/or costs under either provision is committed to the discretion of the district court, and we will reverse only in the case of an abuse of discretion. *See Holmstrom v. Metropolitan Life Ins. Co.*, 615 F.3d 758, 779 (7th Cir. 2010) (fees and costs under ERISA); *Rivera v. City of Chicago*, 469 F.3d 631, 636 (7th Cir. 2006) (costs under Rule 54(d)).

Although it acknowledged that AUL was entitled to a "modest presumption" that it would recover its fees and costs under ERISA, *see, e.g., Herman v. Central States, Se. & Sw. Areas Pension Fund*, 423 F.3d 684, 695-96 (7th

Cir. 2005), the district court declined to do so because it concluded that Leimkuehler's position was "substantially justified." (Although the Supreme Court's decision in *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 130 S. Ct. 2149, 176 L. Ed. 2d 998 (2010), has generated some confusion about the test that governs fee and costs determinations under Section 1132(g), compare *Kolbe & Kolbe Health & Welfare Benefit Plan v. Medical Coll. of Wis., Inc.*, 657 F.3d 496, 505-06 (7th Cir. 2011), with *Loomis v. Exelon Corp.*, 658 F.3d 667, 675 (7th Cir. 2011), AUL stated to the district court that it preferred the substantial justification test, and AUL does not challenge the district court's use of that test on appeal.) The district court found that Leimkuehler's suit was substantially justified for four reasons: that there were legitimate arguments for distinguishing this case from *Hecker*; that case law in other circuits supported Leimkuehler's position; that AUL officials had themselves expressed reservations about disclosing revenue sharing; and that DOL had threatened AUL with suit over its revenue-sharing practices. AUL notes that this last point is incorrect (DOL was, in fact, threatening suit over something unrelated), but this error is not enough to undermine the district court's substantial justification finding. The district court's remaining reasons fall well within the bounds of its discretion and are enough by themselves to justify its denial of fees and costs under Section 1132(g).

We are likewise disinclined to disturb the district court's denial of costs under Rule 54(d), which provides that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's

fees—should be allowed to the prevailing party." At times, we have taken the view that Section 1132(g) "provides otherwise," and that costs are therefore unavailable under Rule 54(d) in ERISA actions. *See Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 121 (7th Cir. 1989). That approach must be reconsidered in light of the Supreme Court's recent decision in *Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 185 L. Ed. 2d 242 (2013). In *Marx*, the Court was faced with the question whether Section 1692k(a)(3) of the Fair Debt Collection Practices Act "provided otherwise" than Rule 54(d)(1), or if instead the two could be harmonized. *Id.* at 1170-71. The Court opted for the latter approach. It began by noting that despite the "venerable presumption" in favor of granting costs under Rule 54(d), "the decision whether to award costs ultimately lies within the sound discretion of the district court." *Id.* at 1172. It then held that a statute "provides otherwise" for purposes of Rule 54(d) only if it is literally contrary to the rule, in the sense that it constricts discretion that the rule recognizes. *Id.* at 1173. Applying that approach to Section 1132(g), we see nothing contrary to Rule 54(d) in the statute.

The district court anticipated all of this, however, when it proceeded under the assumption that costs were available under Rule 54(d). The only question was thus whether, as a matter of discretion, costs *should* be awarded. The court thought not, because it found that Leimkuehler (who was a party to the suit only in his capacity as Plan trustee) was unable to satisfy a costs award. The district court noted in this regard that AUL had advised the court that neither the Plan nor any individual Plan participants

were necessary parties, and that the court had refrained from joining additional parties in partial reliance on AUL's assurances. Because the district court had no authority to order an award of costs against a non-party, *see In re Cardizem CD Antitrust Litig.*, 481 F.3d 355, 359 (6th Cir. 2007), and because Leimkuehler holds no assets in his capacity as trustee, the district court did not abuse its discretion in concluding that the losing party was unable to pay and that a costs award under Rule 54(d) was therefore unwarranted. *See Rivera*, 469 F.3d at 636 (inability to pay can overcome Rule 54(d)'s "heavy presumption" that the losing party should pay costs).

The judgment of the district court is AFFIRMED.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION, FILED JANUARY 5, 2012

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

1:10-cv-0333-JMS-TAB

ROBERT V. LEIMKUEHLER, as trustee and on behalf of Leimkuehler, Inc., Profit Sharing Plan,

Plaintiff,

vs.

AMERICAN UNITED LIFE INSURANCE COMPANY,

Defendant.

ORDER

Presently before the Court in this action alleging breaches of fiduciary duty under the Employee Retirement Security Act ("*ERISA*"), 29 U.S.C. §§ 1001 *et seq.*, is the Defendant American United Life Insurance Company's ("*AUL*") motion for summary judgment. [Dkt. 127.]

I.
Standard of Review

A motion for summary judgment asks that the Court find that a trial based on the uncontroverted and admissible evidence is unnecessary because, as a matter of law, it would conclude in the moving party's favor. *See* Fed. R. Civ. Pro. 56. To survive a motion for summary judgment, the non-moving party must set forth specific, admissible evidence showing that there is a material issue for trial. Fed. R. Civ. Pro. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

As the current version Rule 56 makes clear, whether a party asserts that a fact is undisputed or genuinely disputed, the party must support the asserted fact by citing to particular parts of the record, including depositions, documents, or affidavits. Fed. R. Civ. Pro. 56(c)(1)(A). A party can also support a fact by showing that the materials cited do not establish the absence or presence of a genuine dispute or that the adverse party cannot produce admissible evidence to support the fact. Fed. R. Civ. Pro. 56(c)(1)(B). Affidavits or declarations must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on matters stated. Fed. R. Civ. Pro. 56(c)(4). Failure to properly support a fact in opposition to a movant's factual assertion can result in the movant's fact being considered undisputed, and potentially the grant of summary judgment. Fed. R. Civ. Pro. 56(e).

The Court need only consider the cited materials, Fed. R. Civ. Pro. 56(c)(3), and the Seventh Circuit Court of Appeals has "repeatedly assured the district courts that they are not required to scour every inch of the record for evidence that is potentially relevant to the summary judgment motion before them," *Johnson v. Cambridge Indus.*, 325 F.3d 892, 898 (7th Cir. 2003). Furthermore, reliance on the pleadings or conclusory statements backed by inadmissible evidence is insufficient to create an issue of material fact on summary judgment. *Id.* at 901.

The key inquiry is whether admissible evidence exists to support a plaintiff's claims or a defendant's affirmative defenses, not the weight or credibility of that evidence, both of which are assessments reserved to the trier of fact. *See Schacht v. Wis. Dep't of Corrections*, 175 F.3d 497, 504 (7th Cir. 1999). When conducting this inquiry, the Court must give the non-moving party the benefit of all reasonable inferences from the evidence submitted and resolve "any doubt as to the existence of a genuine issue for trial . . . against the moving party." *Celotex*, 477 U.S. at 330.

II.
Background

Consistent with the applicable standard of review, the facts that follow are presented in the light most favorable to Plaintiff Robert V. Leimkuehler, who is the trustee of the Leimkuehler, Inc., Profit Sharing Plan (the "*Plan*").

Unless otherwise stated, all factual disputes are resolved in favor of Mr. Leimkuehler.[1]

A. The Plan's Investments in AUL's Separate Account

In 2000, the Plan entered into a group variable annuity contract with AUL. [Dkt. 128-11.] Through it, AUL agreed to permit Plan participants to invest their assets "in" certain mutual funds through a "separate account" maintained with AUL, and to perform certain recordkeeping and other administrative services for the Plan. [*See id.* § 1.15; dkt. 128-1 ¶3.]

The separate account is an account for trading mutual funds that is, for regulatory reasons, separate from AUL's other assets—hence the name "separate account." [*See* dkt. 134-3 at 7.][2] AUL divided the separate account into

1. Very few facts are actually in dispute, and no material ones. Indeed, Mr. Leimkuehler argues that but for his pending class-certification motion, he would have filed a cross-motion for summary judgment on the issue of AUL's fiduciary status. [Dkt. 136 at 23 n.11.] At oral argument, the parties agreed that the Court could and should resolve the motion for summary judgment before turning to the motion for class certification. [Dkt. 163 at 96, 111.]

2. Insurance is a highly-regulated industry, for the benefit of policyholders. State law explicitly contemplates allowing insurance companies to provide variable annuities, like the one at issue here, via a separate account—which are "not chargeable with liabilities arising out of any other business the [insurance] company may conduct...which has no specific relation to or dependence upon such account." Ind. Code § 27-1-5-1 Class 1(c). ERISA itself also contemplates the use of separate accounts. *See* 29 C.F.R. § 2510.3-101(h)(1)(iii).

sub-accounts that correspond to the mutual funds that AUL offered to the Plan. [*Id.*] For example, the "Alger American Growth" investment account invests only in the "Alger American Growth" mutual fund. [Dkt. 128-11 at 17.] AUL's investment accounts are then unitized into "accumulation units," which correspond to the value of shares in the mutual fund and which AUL assigns to participants—from this Plan and others—who invest in the particular investment account. [*Id.* at 22; dkt. 134-5 at 11.] Thus, rather than buying "shares" in a mutual fund, participants buy investment units in an account in AUL's name, which in turn buys the shares in the fund, as disclosed in the group variable annuity contract and its marketing materials. [*See* dkt. 128-11 134-3 at 7.] AUL calculates the daily values of the accumulation units on the basis of a contractually disclosed formula, which accounts for expenses associated with the mutual funds. [Dkt. 128-11 at §§ 5.3-5.4.]

B. AUL's Selection of Share Classes

A mutual fund sells several classes of shares, which differ by the fees and expenses—termed "expense ratio"—that the mutual fund will charge against the fund's assets. [*See* dkt. 89 at 8; 134-3 at 11.] Although Plan participants control which mutual fund they want to "buy," via the separate-account procedure described above, [*see* dkt. 128-3 ¶5], AUL alone decides which share class that it will make available through the investment account, [dkt. 135-1 at 8]. It does not specifically disclose to the Plan, or its participants, the different share classes available or the one that it has selected. [*See* dkt. 134-2 at 35-36.]

AUL does not claim that it selects for inclusion in its 401(k) offerings the share class with the lowest expense ratio. Rather it claims, and Mr. Leimkuehler does not dispute, that it discloses the total expenses associated with the class of shares it has selected for each mutual fund, in other words, the bottom-line figure that participants who choose to invest in the fund must pay. [*See id*. at 36; 128-10 at 3; 128-16 ¶13. *See also* dkt. 163 at 29 ("MR. BRUNO: The trustee gets an annual investment report that discloses...the net expense of the investment...[T]he total number doesn't just include the fund expense ratio, but also includes the administrative charge...that AUL collects.").]

C. "Revenue" or "Expense" Sharing

Most, but not all, of the mutual funds that AUL makes available to trustees like Mr. Leimkuehler engage in so-called "revenue," or perhaps more accurately "expense," sharing. [Dkt. 128-1 ¶13 (noting that the Vanguard funds do not pay revenue sharing); 134-3 at 13.] Under that arrangement, mutual fund companies will remit a portion of the expense ratio charged against shares to entities like AUL that agree to invest in the mutual fund companies by letting 401(k) participants "buy" the shares. [Dkt. 128-9 at 4.] AUL's proffered justification for engaging in revenue sharing is that the revenue reflects the value AUL provides to the mutual fund for performing administrative services that the mutual fund would otherwise have to perform—and may not in fact want to perform, for example, keeping track of many small accounts. [Dkt. 128-16 ¶14.] While Mr. Leimkuehler does not dispute that at least some of the expenses that were shared with AUL

offset some of the costs the Plan would have otherwise had to pay AUL, he argues, and AUL does not dispute, that the offset was not completely one-to-one over the period in question. [*See* dkt. 135-1.] AUL did not disclose the existence of, or amount to which it engaged in, revenue sharing to Mr. Leimkuehler. [Dkt. 135-3 at 8.] Indeed, Mr. Leimkuehler unearthed an internal AUL email in which AUL employees expressed "significant reservations about disclosing revenue sharing" to clients, like Mr. Leimkuehler. [Dkt. 134-6 at 2-3.] Among other reasons provided there, the author worried that disclosure would "only confuse[] the analysis of expenses—how the overall fund expense is split has no[] bearing on the total cost to the participants." [*Id.*]

D. AUL's Universe of Mutual Funds

Trustees like Mr. Leimkuehler who choose to have their plans do business with AUL must choose from the limited universe of mutual funds that AUL makes available. In 2000, when Mr. Leimkuehler first contracted with AUL, it offered only thirty-four funds, a number that grew over time to 383 by 2010. [Dkt. 128-11 at 17; 128-18 at 15.] Other than mutual funds offered by Vanguard, [*see* dkt. 128-1 ¶13], AUL requires mutual fund companies who wish to do business with AUL, and by extension with the 401(k) plans it services, to engage in some form of revenue sharing with AUL, [dkt. 134-2 at 20-21].

From the universe of funds that AUL potentially made available, Mr. Leimkuehler had the option to refine the choices and to select the specific funds that he wanted to offer to Plan participants as investment options. On at

least two occasions, [dkt. 128-12; 128-14], Mr. Leimkuehler changed the mix of mutual funds made available for the Plan. He did so in consultation with his investment advisor, Mr. Mazzone. [Dkt. 128-6 at 7.]

On two occasions, AUL unilaterally, as permitted under the contract, substituted one fund that it offered for another: In 2000, it swapped S&P 500 funds, and in 2011, it swapped funds from Vanguard. [Dkt. 128-1 ¶13.]

III.
Discussion

Mr. Leimkuehler has two remaining substantive ERISA claims against AUL.[3] The first arises under 29 U.S.C. § 1104(a)(1)(A), which requires a fiduciary of a plan to "discharge his duties with respect to [the] plan solely in the interest of the participants and beneficiaries and...for the exclusive purpose of...providing benefits to participants and their beneficiaries; and...defraying reasonable expenses of administering the plan." His second claim arises under 29 U.S.C. § 1106(b)(3), the so-called prohibited-transaction statute. That latter statute provides: "A fiduciary with respect to a plan shall not... receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." *Id.*

3. In a previous ruling on AUL's motion for judgment on the pleadings, the Court held that a third claim sought only injunctive relief and would "only survive in connection with the substantive claims" set forth above, and the Court dismissed a fourth claim. [Dkt. 63 at 24.]

Mr. Leimkuehler contends that AUL violated both those statutes through its undisclosed revenue sharing that did not result in a dollar-for-dollar credit against the Plan's expenses payable to AUL.[4] Through the present motion, AUL seeks to establish that it could not have violated the statutes because they only apply to a "fiduciary," and it was not a "fiduciary" with respect to the revenue sharing.

A person, including a corporation like AUL, 29 U.S.C. § 1002(9), can be a fiduciary under ERISA in three ways:

> [A] person is a fiduciary with respect to a plan to the extent
>
> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,
>
> (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or
>
> (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

4. The U.S. Department of Labor has promulgated a final rule that will go into effect in April 2012 that will generally require plan administrators to disclose revenue sharing, like that which AUL received in this action. *See* 76 Fed. Reg. 42542 (July 19, 2011) (to be codified at 29 C.F.R.§ 2550.408b-2).

29 U.S.C. § 1002(21)(A). According to the U.S. Department of Labor (the "*DOL*"), which has ERISA rulemaking and enforcement authority, applying those provisions "requires an analysis of the types of functions performed and actions taken by the person on behalf of the plan to determine whether particular functions or actions are fiduciary in nature....[The application of the provisions] is inherently factual...." U.S. D.O.L. Opinion Letter 97-16A, 1997 ERISA LEXIS 17, *10-11 (May 22, 1997). As the Court considers the potential applicability of each subsection of 29 U.S.C. § 1002(21)(A), the Court must and will adhere to the evidentiary record the parties have provided.

Before discussing the three subsections of 29 U.S.C. § 1002(21)(A), the Court must first discuss the "to the extent" limitation that appears in the main text of the section.

A. How Does the "To the Extent" Limitation Apply to AUL?

ERISA's inclusion of the "to the extent" limitation in its definition of "fiduciary" reflects a congressional desire to make "people...fiduciaries when they do certain things but...entitle[] [them] to act in their own interests when they do others." *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994) (citation omitted). Accordingly, when evaluating alleged breaches of fiduciary duty, "the threshold question is...whether [the defendant] was acting as a fiduciary (that is, was performing a fiduciary function)

when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000).

As Mr. Leimkuehler clarified at oral argument, his theory of the case is "share class, share class, share class." [Dkt. 163 at 24.] That is, when AUL chose which mutual fund share class to select for inclusion in its investment accounts, it did so on the basis of considerations of revenue-sharing implications, which it neither disclosed to the Plan nor specifically used to provide a dollar-for-dollar credit against the fees that the Plan paid directly to AUL.

Mr. Leimkuehler has argued that the to-the-extent limitation only applies to his claim under 29 U.S.C. § 1104(a)(1)(A) and not to his claim under 29 U.S.C. § 1106(b)(3). In other words, if AUL is a fiduciary for one purpose then he asks the Court to find it a fiduciary for all purposes for the prohibited-transaction statute. [*See* dkt. 136 at 38-41.] The Court cannot do so. The Seventh Circuit has been clear that 29 U.S.C. § 1002(21), which is incorporated by reference into the prohibited transaction statute via its use of the term "fiduciary," 29 U.S.C. § 1106(b)(3), "does not make a person who is a fiduciary for one purpose a fiduciary for every purpose." *Johnson*, 19 F.3d at 1188. Indeed, the only Seventh Circuit case that Mr. Leimkuehler has attempted to cite in support of that argument, *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984), actually reinforces the importance of the focus on the to-the-extent limitation—the "key language in the statutory definition," *id*. at 133. *See also id*. at 134 ("Because Engle and Libco were fiduciaries with respect to the selection

and retention of the plan administrators, the issue here is not whether they were fiduciaries but instead whether their fiduciary duties extended to the Reliable Trust investments in Berkeley, OSI and Hickory.").[5]

In the analysis that follows, the Court will, therefore, evaluate AUL's potential fiduciary status through the lens of Mr. Leimkuehler's stated theory of the case: When AUL chose which mutual fund share class to select for inclusion in its investment accounts, it did so on the basis of considerations of revenue-sharing implications, which it neither disclosed to the Plan nor specifically used to provide a dollar-for-dollar credit against the fees that the Plan paid directly to AUL.

B. Does AUL's Revenue Sharing Implicate "Authority or Control Respecting the Management or Disposition of Plan Assets" under 29 U.S.C. § 1002(21)(A)(i)?

As indicated above, 29 U.S.C. § 1002(21)(A)(i) makes a person a fiduciary "to the extent...[(1)] he exercises any discretionary authority or discretionary control respecting management of such plan or [(2)] exercises any authority or control respecting management or disposition of its assets." Because Mr. Leimkuehler does not argue

---

5. The language that Mr. Leimkuehler quotes in his brief—that the "*per se* rules of [29 U.S.C. § 1106(b)(3)] make much simpler the enforcement of ERISA's more general fiduciary duties," *id.* at 123 (citation omitted)—does nothing to advance his argument because it does not specify *when* a person is a fiduciary. That analysis is, of course, governed by 29 U.S.C. § 1002(21)(A), which includes the to-the-extent limitation.

that AUL had any discretionary authority or control over the management of the Plan, [*see* dkt. 136 at 20], the Court will only discuss the latter alternative. In so doing, the Court will first identify the Plan assets at issue and then consider the "extent" to which the evidence shows that the revenue-sharing at issue results from AUL's "exercise[] [of] any authority or control respecting [their] management or disposition."

1. The Plan Assets at Issue

Mr. Leimkuehler argues that AUL exercises authority or control respecting the management or disposition of two types of Plan assets: the accumulation units that Plan participants receive in exchange for their contributions and the separate accounts funded with participant contributions. [*See* dkt. 136 at 20-21.]

AUL does not dispute, [*see* dkt. 143 at 11-12], that both items are Plan assets under ERISA, *see also* 29 C.F.R. § 2510.3-101(h)(1)(iii) ("[W]hen a plan acquires or holds an interest in any of the following entities its assets include its investment and an undivided interest in each of the underlying assets of the entity...[a] separate account of an insurance company...."); *id.* § 2510.3-102(a)(1) ("[T]he assets of the plan include amounts...that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his wages by an employer, for contribution...to the plan....").

AUL does, however, argue that Mr. Leimkuehler may not rely on a fiduciary theory founded upon AUL's use of

separate accounts, which in its view was never pleaded in the Complaint. [Dkt. 143 at 11.]

While AUL is correct that Mr. Leimkuehler generally may not use his response to the motion for summary judgment to constructively amend his Complaint, *e.g., Berry v. Chicago Transit Auth.*, 618 F.3d 688, 693 (7th Cir. 2010) (collecting cases), Mr. Leimkuehler is not attempting to do so. His Complaint referenced AUL's use of separate accounts. [*See* dkt. 1 ¶¶11, 15, 64.] AUL had notice that they may be, and now are, at issue on summary judgment. Accordingly, in the analysis that follows, the Court will consider 29 U.S.C. § 1002(21)(A)(i)'s applicability vis-à-vis both the money that AUL receives from the participants (plus any matching employer contributions) and the mutual fund shares that AUL maintains in the separate account.

2. The "Extent" to Which AUL "Exercis[es] any Authority or Control Respecting Management or Disposition of [Plan] Assets"

With respect to the remaining part of 29 U.S.C. § 1002(21)(A)(i), which makes a person a fiduciary "to the extent he exercises any authority or control respecting management or disposition of its assets," the parties dispute several aspects of the definition as it applies to AUL's revenue sharing. For analytical convenience, the Court will work backwards through the legal standards governing definition. It will then address the DOL's recent enforcement letter against AUL concerning the United Concrete Waukegan, Inc. 401(k) Retirement Plan (the

"*United Concrete letter*"), [filed at dkt. 151-2], which Mr. Leimkuehler contends should significantly control the Court's analysis.

a. "Any Authority or Control"

The parties dispute what "any authority or control" means. Specifically, AUL argues that the authority or control over the Plan's assets must be discretionary in nature to potentially come within the definition, thereby precluding instances in which AUL's authority or control is merely ministerial in nature—as when AUL carries out the Plan participants' instructions. [Dkt. 129 at 15.] By contrast, Mr. Leimkuehler argues that "any" authority or control means what it says, so even ministerial authority or control will suffice.

While Mr. Leimkuehler has identified several out-of-Circuit authorities that he claims support his interpretation of the statute, his authorities are not controlling here. The Seventh Circuit has, on multiple occasions, made clear that discretion lies at the heart of ERISA fiduciary status:

> A fiduciary is an agent who is required to treat his principal with utmost loyalty and care—treat him, indeed, as if the principal were himself. The reason for the duty is clearest when the agent has a broad discretion the exercise of which the principal cannot feasibly supervise, so that the principal is at the agent's mercy. The agent might be the lawyer, and

> the principal his client; or the agent might be an investment adviser, and the principal an orphaned child. If the agent has no discretion and the principal has a normal capacity for self-protection, ordinary contract principles should generally suffice. *At all events, ERISA makes the existence of discretion a sine qua non of fiduciary duty.* 29 U.S.C. § 1002(21)(A).

Pohl v. Nat'l Benefits Consultants, 956 F.2d 126, 128-129 (7th Cir. 1992) (emphasis added and one citation omitted). *Accord Hecker v. Deere & Co.* ("*Hecker I*"), 556 F.3d 575, 583 ("In order to find that they were 'functional fiduciaries,' we must look at whether either Fidelity Trust or Fidelity Research exercised discretionary authority or control over the management of the Plans, the disposition of the Plans' assets, or the administration of the Plans.") *reh'g denied Hecker v. Deere & Co.* ("*Hecker II*") 569 F.3d 708 (7th Cir. 2009); *Baker v. Kingsley*, 387 F.3d 649, 660 (7th Cir. 2004) ("[A] person is deemed a fiduciary only 'to the extent' he or she exercises discretionary authority...." (citation omitted)); *Midwest Cmty. Health Serv. v. Am. United Life Ins. Co.*, 255 F.3d 374, 376-377 (7th Cir. 2001) ("[B]ecause AUL had discretionary authority over the contract in its ability to amend the value of the contract, AUL is an ERISA fiduciary." (collecting cases)).

In light of the relevant authority from the Seventh Circuit, the Court need not and will not discuss Mr. Leimkuehler's other authorities. Until the Seventh Circuit or the Supreme Court hold otherwise—and he makes no argument that either has yet done so—AUL cannot be a

fiduciary under 29 U.S.C. § 1002(21)(A)(i) if AUL exercised only non-discretionary authority and control respecting the management or disposition of the Plan's assets.

b. "Exercises" that Authority and Control

The parties also dispute what it means for a person to "exercise[] any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A)(i).

Mr. Leimkuehler first argues that if a provider like AUL restricts the universe of mutual funds that the provider offers to plan sponsors to choose for inclusion in their plans, the provider has exercised discretionary authority and control over how the plan can invest its assets. [*See* dkt. 136 at 26-32.] AUL maintains that *Hecker I*, an ERISA revenue-sharing case, forecloses Mr. Leimkuehler's argument.

AUL is correct. The Seventh Circuit suggested in *dicta* that plan sponsors can limit the selection of funds available to their plan participants without implicating "authority or control" over plan management or assets. *Id.* ("We see nothing in [ERISA] that requires plan fiduciaries to include any particular mix of investment vehicles in their plan. That is an issue, it seems to us, that bears more resemblance to the basic structuring of a Plan than to its day-to-day management. We therefore question whether Deere's decision to restrict the direct investment choices in its Plans to Fidelity Research funds is even a

decision within Deere's fiduciary responsibilities.").[6] By implication, the Seventh Circuit should express the same skepticism when vendors like AUL restrict the products that they are willing to sell to plan sponsors.[7] Given Mr. Leimkuehler's inability to point to any Seventh Circuit or Supreme Court authority that would affirmatively approve his argument, [*see* dkt. 136 at 24-30], the Court will follow the Seventh Circuit's technically non-binding lead and reject it, *cf. Hendricks County Rural Electric Membership Corp. v. NLRB*, 627 F.2d 766, 768 n.1 (7th Cir. 1980) ("A *dictum* in a Supreme Court opinion may be brushed aside by the Supreme Court as *dictum* when the exact question is later presented, but it cannot be treated lightly by inferior federal courts until disavowed by the Supreme Court.").

---

6. Mr. Leimkuehler has argued that such a proposition is inconsistent with the DOL's official commentary of its regulations. [*See* dkt. 136 at 27 (discussing "footnote 27" in the Final Regulation Regarding Participant Directed Individual Account Plans (ERISA 404(c) Plans), 57 FR 46906-01).] The Seventh Circuit has obviously, though implicitly, concluded otherwise. Indeed, the Fifth Circuit has explicitly refused to give that particular commentary any weight. *See Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 311 (5th Cir. 2007).

7. In its opinion denying rehearing, the Seventh Circuit stressed that the plaintiffs did not allege that the mutual funds that were included within the investment universe "were unsound or reckless....They argued...that the Plans were flawed because Deere decided to accept 'retail' fees and did not negotiate presumptively lower 'wholesale fees.'" *Hecker II*, 569 F.3d at 711. The Court notes that Mr. Leimkuehler here makes no argument that the mutual funds that AUL offered to him were in any way unsound investments.

Otherwise, under Mr. Leimkuehler's view of ERISA, entities like AUL would be forced to offer every mutual fund in the marketplace or face the increased costs—to be passed on to plan participants—that come with being a fiduciary. Both are unpalatable outcomes not required by the plain text of ERISA or binding precedent. *See Hecker II*, 569 F.3d at 711 (emphasizing that *Hecker I* was not meant to endorse the notion that "any Plan fiduciary can insulate itself from liability by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among them" because such a strategy "would place an unreasonable burden on unsophisticated plan participants who do not have the resources to pre-screen investment alternatives."). And persuasive precedent from other jurisdictions likewise suggests the same. [*See* dkt. 143 at 4 (collecting out-of-Circuit cases holding that selecting a universe of funds to offer to a plan is not a fiduciary function).]

AUL does, however, concede—and the Court finds—that the requisite authority and control would be present when it exercises its contractual "right to eliminate the shares of any of the eligible Mutual Funds, Portfolios, or other entities and to substitute shares of, or interest in, another Mutual Fund, Portfolio, or another investment vehicle, for shares already purchased" by Plan Participants, [dkt. 128-11 at 6]. [*See* dkt. 129 at 19.]

While Mr. Leimkuehler contends that the failure to exercise a contractual power to substitute or delete mutual funds that participants have already "purchased"

constitutes an exercise of authority of control, [*see* dkt. 136 at 30 (arguing that "[t]he act of limiting the universe is not something AUL does at one discrete point in time; it does so on a constant, ongoing basis.")], the Court must reject that proposition. He was unable to cite to any Seventh Circuit or Supreme Court authority for that novel reading of what it means to "exercise[]" authority or control. *See American Heritage College Dictionary* (3d ed. 1997) (defining "to exercise" as "[t]o put into play or operation; employ"). Absent such authority, the Court finds that Congress was clear that affirmative action is required; omissions do not suffice. *Trs. of the Graphic Commun. Int'l Union v. Bjorkedal*, 516 F.3d 719, 733 (8th Cir. 2008) ("An act of omission fails to satisfy the requirement that the individual exercise discretionary authority over plan assets.").

Furthermore, again without citing any authority, Mr. Leimkuehler also argues that when 401(k) plan providers like AUL choose among share classes for inclusion in their pre-selected menu of options for plan sponsors, the providers are exercising authority and control for the purposes of 29 U.S.C. § 1002(21)(A)(i). But the Court agrees with AUL, [dkt. 143 at 5 n.2], that if a provider can limit the mutual funds it will offer to plan sponsors, it can likewise select to only deal with particular share classes.

In summary, under existing Seventh Circuit law, when a provider offers plan sponsors a pre-selected universe of mutual funds of pre-selected share classes that plan sponsors can choose to include in their plans or not, the provider is not exercising "authority or control respecting

management or disposition of plan assets" under 29 U.S.C. § 1002(21)(A)(i). Providers do, however, exercise such authority and control when they unilaterally change the investment choices that participants have already made.

c. The United Concrete Letter

After the briefing on summary judgment had been completed, Mr. Leimkuehler requested and received leave to file supplemental evidence concerning the DOL's United Concrete Letter. [*See* dkt. 152.] There, a DOL regional office sent a preliminary enforcement letter dated September 28, 2011, to AUL concerning an AUL offered 401(k) plan that is in all material respects the same as the one at issue here. [*See* dkt. 153-2 *to* -5.] The DOL had been investigating allegations that AUL had knowingly transferred certain plan assets directly to the plan sponsor, in violation of ERISA. [*See* dkt. 151-2 at 3.] According to the enforcement letter, AUL was prohibited from doing so not only because it was a "party in interest" to the plan under 29 U.S.C. § 1002(14)—a status not relevant to this motion—but also because AUL was a "fiduciary" under 29 U.S.C. 1002(21)(A)(i). The only reasoning that the United Concrete letter offered regarding the assertion of fiduciary status was that "AUL was responsible for the selection of investment options that were made available under the [contract] and for adding and deleting investment options available to the Plan." [Dkt. 151-2 at 2.] In Mr. Leimkuehler's view, the DOL's finding should likewise control here with respect to the issue of AUL's fiduciary status under 29 U.S.C. § 1002(21)(A)(i).

After having considered the letter, the Court does not find that it alters any of the legal conclusions above, for several reasons. First, and perhaps most importantly, the letter is only preliminary—a warning of possible litigation rather than a formal ruling of the DOL. Consequently, the letter is not subject to *Chevron* deference.[8] *See Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000) (citations omitted) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."). Second, it is essentially conclusory with respect to the fiduciary-status issue, which forms the heart of this action. As such, the letter does not provide the Court with reasoning that might help situate the letter within the contours of existing Circuit precedent. Finally, insofar as the DOL maintains that diverting plan assets renders a person a fiduciary under 29 U.S.C. § 1002(21)(A)(i), the Court agrees, as did AUL at oral argument, because, as explained above, a diversion constitutes an exercise of discretion. In this action, however, Mr. Leimkuehler has presented neither argument nor evidence that AUL ever diverted assets from whether Plan participants directed that they be sent.

3. The Evidence Here

Mr. Leimkuehler presents two theories as to why AUL qualifies as a fiduciary under 29 U.S.C. § 1002(21)

8. Like all agency documents, it is still "entitled to respectful consideration," *Carter v. AMC LLC*, 645 F.3d 840, 844 (7th Cir. 2011), which the Court has provided to it.

(A)(i). First, AUL "established, owns and controls the separate account and its 'investment accounts,' and AUL determines the value of investment account accumulation units." [Dkt. 136 at 2.] Second, "AUL selects and limits the investment options available to the Plan." [*Id.*]

a. The Separate Accounts and Investment Accounts

With respect to the first theory, the undisputed evidence establishes that Mr. Leimkuehler is correct as a factual matter. AUL receives Plan contributions and places them in a separate account, held under AUL's own name, and then allocates the contributions into investment accounts according to the mutual fund that Plan participants choose to "buy." [*See, e.g.*, dkt, 128-11 at §§ 1.15, 9.1; dkt. 134-3 at 7.] AUL then determines the value of the accumulation units that participants receive according to a pre-determined, contractually disclosed formula. [Dkt. 128-11 at §§ 5.3-5.4.]

Except in two instances, which the Court will set aside for the moment, none of those activities render AUL a fiduciary under 29 U.S.C. § 1002(21)(A)(i) as a matter of law. While the separate accounts and investment accounts are Plan assets, the evidence does not show any exercise of discretion on AUL's part, meaning that AUL exercised none of the required "authority and control." There is no evidence that AUL absconded with any Plan assets, that AUL provided accumulation units for one fund when the participants thought they were buying another, that AUL purchased a share class that resulted in higher expenses than the expenses disclosed to the participant,

or that AUL failed to properly apply the valuation formula to the accumulation units—a ministerial calculation, *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 20 (1st Cir. 1998) ("Without more, mechanical administrative responsibilities (such as retaining the assets and keeping a record of their value) are insufficient to ground a claim of fiduciary status." (citations omitted)).

The narrow two exceptions, which ultimately do not create an issue of fact precluding summary judgment either, occurred when AUL unilaterally substituted one mutual fund that Plan participants had purchased for another. AUL did so in 2000, when it "substituted the SSGA 500 Fund for the Fidelity S&P 500 Fund." [Dkt. 128-1 ¶13.] The other occurred in 2011, when "AUL substituted the Vanguard Insurance Fund Small Company Growth Portfolio for the Vanguard Explorer Fund." [*Id.*] AUL argues, [*see* dkt. 129 at 20], and Mr. Leimkuehler does not dispute, [*see* dkt. 136], that any liability for the first substitution is barred by ERISA's statute of repose, 29 U.S.C. § 1113(1),[9] and that no liability under 29 U.S.C. § 1106(b)(3) can attach for the second because to the extent that AUL exercised control over the Plan assets involving Vanguard funds, neither Vanguard fund involved revenue sharing.

---

9. In connection with the pending motion for class certification, Mr. Leimkuehler briefly argued that no time limit was required for the class definition because of the potential for tolling. [*See* dkt. 122 at 47.] Given that neither Mr. Leimkuehler's papers on summary judgment, nor his oral argument, dispute the time-barred status of the 2000 substitution, the Court can forgo any further discussion of it. *See* Fed. R. Civ. Pro. 56(c)(3) ("The court need consider only the cited materials....").

The Court, therefore, finds that AUL is entitled to summary judgment on Mr. Leimkuehler's first theory as to why AUL is a fiduciary under 29 U.S.C. § 1002(21)(A)(i).

b. The Menu of Mutual Funds

Mr. Leimkuehler also correctly argues that the undisputed evidence establishes that AUL limits the mutual funds that he may select for inclusion in the Plan. In 2000, when Mr. Leimkuehler initially contracted with AUL, he understood and agreed that AUL's universe of mutual funds was limited to thirty four, which were disclosed. [Dkt. 128-11 at 17.] By 2010, that universe had grown to 383, [dkt. 128-18 at 15], still a small fraction of the thousands of funds available in the marketplace, *Hecker I*, 556 F.3d at 586.

As discussed above, however, merely limiting the universe of funds an entity will offer, and their share classes, do not render the entity a fiduciary under 29 U.S.C. § 1002(21)(A)(i). When AUL did so here, it did not exercise the requisite discretionary authority and control over the ultimate disposition of Plan assets because Plan participants ultimately decided for themselves whether or not to invest in a particular mutual fund. AUL merely followed their directions.

C. Does AUL's Revenue Sharing Implicate any "Investment Advice" Under 29 U.S.C. § 1002(21)(A)(ii)?

The definition of fiduciary under 29 U.S.C. § 1002(21)(A)(ii) contains several elements, but only one is ultimately

relevant here: the statutory requirement that the person "render[] investment advice." The other elements do not matter, and will not be discussed, because the Court finds that the evidentiary record fails to create an issue of fact about whether AUL rendered investment advice for the Plan. It did not.

The DOL has promulgated a regulatory gloss for 29 U.S.C. § 1002(21)(A)(ii), which among other things, requires that the person "render[] advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property." 29 C.F.R. § 2510.3-21(c)(1)(i). Only the second of those alternatives—making a "recommendation as to the advisability of investing in, purchasing, or selling securities or other property"—is potentially at issue. [*See* dkt. 136 at 34 (only arguing the second alternative).]

According to Mr. Leimkuehler, and confirmed at oral argument, the only "recommendation" that he claims AUL made about whether the Plan should purchase mutual funds was an implicit one: By marketing a discrete menu of mutual funds that trustees like Mr. Leimkuehler could choose from, AUL was, in his view, implicitly recommending that the Plan buy those funds, as compared to all others. [*See* dkt. 163 at 102.] The Court must reject that claim, on both legal and factual grounds.

As a matter of law, simply offering a discrete menu of funds does not constitute investment advice here in the Seventh Circuit. In *Hecker I*, the Seventh Circuit held that Fidelity Trust was not a fiduciary to the plan at issue even

though it provided a "menu" of mutual funds that the plan sponsor could choose to include in the ERISA plan. 556 F.3d at 583. If the implicit-recommendation-theory that Mr. Leimkuehler advances were correct, *Hecker I* would have been decided differently.

As a matter of fact, based on the uncontroverted evidence in the record, Mr. Leimkuehler's claim that AUL was providing implicit investment advice also fails. From the beginning of the Plan's relationship with AUL, Mr. Leimkuehler used a third-party advisor, Marco Mazzone, "for advice [as] to what stocks and items should be in the plan...." [Dkt. 128-6 at 7.] Furthermore, the annual reports that AUL provided about the mutual funds that he could select for inclusion in the Plan had no evaluative commentary about the appropriateness of particular funds, instead presenting only information like expenses and historical return information, [*see* dkt. 134-12, 134-13, 138], information that the DOL has determined fall outside the scope of investment advice, *see* 29 C.F.R. § 2509.96-1(d)(1)(ii) (excluding from "investment advice" information about "investment alternatives under the plan (*e.g.*, descriptions of investment objectives and philosophies, risk and return characteristics, historical return information, or related prospectuses objectives and philosophies, risk and return characteristics, historical return information, or related prospectuses)." (footnote omitted)). Indeed, the Court notes that Mr. Leimkuehler's Statement of Material Facts in Dispute contains no assertion that Mr. Leimkuehler himself believed that AUL implicitly recommended the "advisability" of the mutual funds it had partnered with.

Accordingly, the Court finds that the uncontroverted evidence establishes that AUL is not a fiduciary under 29 U.S. § 1002(21)(A)(ii).

D. Does AUL's Revenue Sharing Implicate any "Discretionary Authority or Discretionary Responsibility" in the Plan's Administration under 29 U.S.C. § 1002(21)(A)(iii)?

As previously indicated, § 1002(21)(A)(iii) requires that AUL have "discretionary authority or discretionary responsibility in the administration of [the] plan." Before the Court can decide whether the evidence would support such a finding, however, the Court must first address AUL's argument that Mr. Leimkuehler may not rely upon that theory because he did not timely disclose it.

1. Untimely Disclosure of § 1002(21)(A)(iii) as a Theory

Invoking cases holding that a party may not inject new claims into a case once it has reached summary judgment, *see, e.g., Auston v. Schubnell*, 116 F.3d 251, 255 (7th Cir. 1997), AUL seeks to preclude Mr. Leimkuehler from relying upon § 1002(21)(A)(iii) in response to AUL's motion for summary judgment. [Dkt. 143 at 14.] As Mr. Leimkuehler freely concedes via surreply, he "did not plead this theory of fiduciary status in his complaint, and he did not describe it in his [contention] interrogatory answer," which merely objected to having to provide any contentions and referred AUL back to the Complaint. [Dkt. 146 at 1.]

AUL is right to criticize Mr. Leimkuehler for hiding the ball regarding this legal theory that he wished to pursue. No litigant in federal court should ever have to guess what claims or defenses are at issue. *See United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S. Ct. 983, 2 L. Ed. 2d 1077 (1958) (explaining that liberal discovery under the Federal Rules was designed to make "trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."). Had the Court been presented with Mr. Leimkuehler's objection to answering a contention interrogatory before it became at issue here, the Court would have overruled it and ordered him to answer based on what he knew at the time and supplement it later if discovery implicated additional theories. *See* Fed. R. Civ. Pro. 33(b)(2) ("An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact...."); Fed. R. Civ. Pro. 26(e) (requiring parties to update their responses to discovery requests when new material information becomes available). *See also Ryan v. Mary Immaculate Queen Ctr.*, 188 F.3d 857, 860 (7th Cir. 1999) (explaining that, given the liberal notice-pleading standards in federal court, defendants should be able to pose contention interrogatories "at the outset of litigation, before costly discovery is undertaken").

Notwithstanding Mr. Leimkuehler's erroneous refusal to answer a legitimate contention interrogatory and failure to seek an appropriate amendment of his complaint, the Court will not preclude him from seeking to invoke § 1002(21)(A)(iii). He disclosed that fiduciary

theory in his briefing on class certification, which predated AUL's motion for summary judgment. [*See* dkt. 122.] Consequently, AUL appropriately conceded at oral argument that it has suffered no prejudice from Mr. Leimkuehler's earlier nondisclosure. Absent prejudice to AUL from his misstep, Mr. Leimkuehler is entitled to be heard on the merits. Fed. R. Civ. Proc. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); *Hatmaker v. Memorial Med. Ctr.*, 619 F.3d 741, 743 (7th Cir. 2010).

2. Applying § 1002(21)(A)(iii)

Turning now to the merits of 29 U.S.C. § 1002(21)(A)(iii), Mr. Leimkuehler argues that because AUL has contractually reserved for itself multiple powers to unilaterally alter the Plan's administration, it "has... discretionary authority or discretionary responsibility in the administration of such plan," 29 U.S.C. § 1002(21)(A)(iii). Specifically, Mr. Liemkuehler cites, [dkt. 136 at 37-38], AUL's contractual rights to do the following as implicating discretionary authority in the Plan's administration:

- AUL's right "to make additions to, deletions from, substitution for, or combinations of, the securities that are held by the Investment Account," [dkt. 128-11 at § 3.3(a)];

- AUL's right "to eliminate the shares of any of the eligible Mutual Funds, Portfolios...if further investment in any or all eligible Mutual Funds...

becomes inappropriate in view of the purposes of the contract," [*id.*];

- AUL's right "to transfer assets from any Investment Account to another separate account of AUL or Investment Account," [*id.* at § 3.3(b)]; and

- AUL's right "to combine one or more Investment Accounts and [to] establish a committee, board or other group to manage one or more aspects of the Investment Accounts," [*id.* at § 3.3(c)].

AUL does not deny that those contractual rights implicate discretionary administration of the Plan. [*See* dkt. 143 at 14-15.]

AUL does, however, correctly argue that it is entitled to summary judgment because Mr. Leimkuehler has not demonstrated how any of that discretion implicates the selection of share classes, and resulting revenue sharing, alleged here. *See generally Chicago Bd. Options Exchange, Inc. v. Conn. Gen. Life Ins. Co.*, 713 F.2d 254, 259 (7th Cir. 1983) ("It is important to remember that if Connecticut General is a fiduciary because of the power to amend [the contract], this status only governs actions taken in regard to amending the contract and does not impose fiduciary obligations upon Connecticut General when taking other actions."). For both 29 U.S.C. § 1104(a)(1)(A) and 29 U.S.C. § 1106(b)(3), the to-the-extent limitation inherent in the statutory definition of "fiduciary" precludes a finding that AUL was acting as a fiduciary with respect to the

revenue sharing that took place here. Mr. Leimkuehler has introduced no evidence that AUL's used its discretionary administrative power—which he does not contend it ever used—to impact Plan participants' decisions about whether they wanted to invest in the mutual funds that Mr. Leimkuehler decided to make available to them, given the total expenses disclosed to them. Some participants chose to invest in Vanguard funds, which never paid revenue sharing. Others invested in funds that, unbeknownst to them, engaged in revenue sharing with AUL—a practice that, from this record, did not result in Plan participants paying more in expenses than was disclosed and which may, in fact, have ultimately reduced overall expenses of the Plan.

Accordingly, the Court finds that AUL is entitled to summary judgment as a matter of law that it could not have violated any of the claimed fiduciary duties that ERISA imposes. *See generally* Opinion 97-15A, 1997 ERISA LEXIS 18, at *10-11 (May 22, 1997) ("[I]t is generally the view of the Department that if a trustee acts pursuant to a direction...and does not exercise any authority or control to cause a plan to invest in a mutual fund, the mere receipt by the trustee of a fee or other compensation from the mutual fund in connection with the investment would not in and of itself violate section 406(b)(3)."); *Tibble v. Edison Intern.*, 639 F. Supp. 2d 1074, 1091 (C.D. Cal. 2009) (holding that where "decisions that resulted in the generation of...revenue sharing" did not arise from the exercise of the defendant's discretionary authority, the defendant "cannot be a fiduciary with respect to those decisions, and therefore, cannot be liable for simply receiving the consideration from those transactions.").

IV.
Conclusion

In light of *Hecker*, 401(k) providers do not become fiduciaries merely by limiting the universe of mutual funds providers offer to 401(k) plans. Nor do they become fiduciaries merely by receiving shared revenue from those funds upon execution of plan participants' investment instructions to whom the total expense of the investment was accurately disclosed. *See Hecker*, 556 F.3d at 585 (rejecting "the proposition that there is something wrong, for ERISA purposes," with that type of arrangement). Given those legal propositions and the other Seventh Circuit authority governing the issues raised, Mr. Leimkuehler has failed to present evidence or argument that would enable him to prevail in this action. AUL's motion for summary judgment, [dkt. 127], is **GRANTED**.

01/05/2012

/s/
Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

APPENDIX D — CLASS ACTION COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER EQUITABLE RELIEF OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, FILED AUGUST 4, 2009

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:09-cv-1822

JUDGE

ROBERT V. LEIMKUEHLER, as Trustee of the
LEIMKUEHLER, INC. PROFIT SHARING PLAN
LEIMKUEHLER, INC.
4625 Detroit Avenue
Cleveland, Ohio 44102,

On Behalf of Itself and
All Others Similarly Situated,

Plaintiffs,

vs.

AMERICAN UNITED LIFE INSURANCE CO.
One American Square, Suite 1201C
Indianapolis, Indiana 46206,

Defendant.

CLASS ACTION COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER EQUITABLE RELIEF

Plaintiff, Robert V. Leimkuehler ("Leimkuehler"), as Trustee of and on behalf of the Leimkuehler, Inc. Profit Sharing Plan (the "Plan"), and on behalf of all others similarly situated, for his Class Action Complaint for injunctive, declaratory and other equitable relief against Defendant, American United Life Insurance Co. ("AUL"), hereby claims, alleges and states as follows:

PARTIES

1. Leimkuehler is a trustee of the Plan and brings this action in such capacity. Leimkuehler, Inc. has its principal place of business in Cleveland, Ohio.

2. The employee-participants of the Plan are employees of Leimkuehler, Inc.

3. AUL is a full-service retirement plan provider having its principal place of business in Indianapolis, Indiana. AUL advertises its services, solicits retirement plan business and actually does business within this judicial district.

JURISDICTION AND VENUE

4. This Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1)(2), codified at 29 U.S.C. § 1132 (e)(1)(2).

5. Venue is proper within this judicial district, pursuant to the provisions of ERISA § 502(e)(2), codified at 29 U.S.C. § 1132(e)(2), because AUL does business in this District and many of the events or transactions alleged herein occurred within this judicial district, including without limitation AUL's solicitation of business from, and its ongoing business with, the Plan.

ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

A. *AUL's Employer-Sponsored 401(k) Plan "Full Service" Packages*

6. AUL offers "full service" 401(k) retirement plans to employers that wish to provide retirement plans for their employees.

7. AUL furnishes all plan documents and related services necessary for employers to establish and provide 401(k) retirement plans for their employees.

8. AUL provides employers with complete plan administration services, legal compliance services and consulting services. Those services include daily updates of plan records, a program for distribution of benefits to employees, investment reports to employees, pre-printed employee newsletters, and signature-ready government forms. AUL provides such services so that "plan sponsors don't need to have all the answers, just our phone number to give to their participants." [citation]

9. From approximately 8,000 mutual funds available for investment in the United States, AUL negotiates agreements with a much smaller, select group of mutual funds that AUL then offers as investment options in its pre-packaged 401(k) retirement plans.

10. In addition to such mutual funds, AUL has its own proprietary funds that it also offers as investment options in its pre-packaged 401(k) retirement plans. These funds are "proprietary" in the sense they are established, owned and/or managed by AUL or an AUL-affiliated company.

11. Some of AUL's proprietary funds are "investment companies" within the meaning of the Investment Company Act of 1940 and are accordingly registered with the SEC under that Act. Conversely, other AUL proprietary funds are not "investment companies" within the meaning of the Investment Company Act of 1940 and are not registered with the SEC under the Act. These funds are referred to as "separate accounts" rather than "mutual funds." AUL's proprietary mutual funds and separate accounts are collectively referred to herein as AUL's "proprietary funds."

12. After AUL is chosen as an employer's 401(k) service provider, AUL selects and presents to the employer a menu of investment options, including non-proprietary mutual funds and/or AUL's proprietary funds. The menu of investment options consists of a select and very small fraction of the total investment options AUL has available to offer to 401(k) plans and sponsors.

13. When deciding which investment options to include in its 401(k) plan, an employer must chose from the menu of investment options AUL has pre-selected and presented to the employer.

14. When AUL selects and presents a menu of investment options to an employer, AUL does not disclose to the employer the available share classes of the investment option because AUL selects the share class of investment option to be included in a 401(k) plan's lineup of available investment options.

15. The difference between share classes of a mutual fund or separate account are the fees associated with that mutual fund or separate account.

16. Employees who participate in their employer-sponsored 401(k) plan select investment options from the menu of investment options already jointly pre-selected by AUL and the employer.

17. AUL retains the discretion to (i) delete investment options, (ii) close them to future investments, or (iii) substitute other funds for those an employer chose to include in its 401(k) plan, all without the employer's consent.

18. AUL exercises ultimate control over the investment options it makes available to the 401(k) plans it serves.

B. *AUL Takes "Revenue Sharing" Fees From Its Funds*

19. Investment advisors to mutual funds charge fees to the funds they advise for the advisors' investment management services. Such investment management fees are simply a percentage (expressed as "basis points") of the assets the advisor has under management in its mutual fund.

20. As a condition for a mutual fund's inclusion in AUL's pre-packaged 401(k) plans, AUL requires each mutual fund portfolio (or each fund's advisors, sub-advisors, distributors or affiliates) to pay a kickback to AUL, which AUL euphemistically describes as a "revenue sharing" fee.

21. With very few (if any) exceptions, AUL selects for inclusion in its pre-packaged 401(k) plans only those mutual funds whose advisors (or distributors) agree to make "revenue sharing" kickback payments to AUL.

22. Due to the large number of 401(k) plans that AUL serves, AUL represents an extremely large amount of plan assets when it negotiates "revenue sharing" payments or fees which mutual funds and their advisors are eager to tap into. Thus, AUL's ability to exact "revenue sharing" deals with mutual funds (or their advisors) is a direct result of AUL's representation of such massive amounts of employer-sponsored 401(k) plan assets.

23. When the mutual fund advisors (or distributors) agree to pay "revenue sharing" kickbacks to AUL, they

effectively agree to take a reduced fee for their investment management services. Nevertheless, AUL and the mutual fund falsely represent to 401(k) plans, sponsors, trustees and participants that the mutual fund advisor's fee for its services to AUL's 401(k) plans is the full amount of the advisor's usual and customary fee.

24. The mutual fund advisor charges an amount equal to its usual fee, but the amount includes both the advisor's true fee plus the "revenue sharing" component which the advisor does not take as compensation for its services but instead takes strictly on behalf of and for the benefit of AUL.

25. AUL and the mutual funds misrepresent the advisor's fee as being more than it actually is to hide the "revenue sharing" component which the advisor does not take as compensation for its services but instead takes strictly on behalf of and for the benefit of AUL.

26. AUL takes and keeps such "revenue sharing" payments or fees for its own benefit.

27. AUL does not offset the fees that the 401(k) plans owe AUL for its services with the "revenue sharing" payments that AUL takes or receives. AUL also does not credit the 401(k) plans it serves for any "revenue sharing" payments that AUL takes or receives which exceed the total fee a 401(k) plan would owe AUL for its services.

28. AUL exercises exclusive control and discretion over the negotiation of such investment management fees and "revenue sharing" payments or fees.

29. With respect to AUL's proprietary funds (as defined in Paragraph 11 above), on information and belief, AUL also takes undisclosed or inadequately disclosed "revenue sharing" payments or fees similar to those described above, although the details of how AUL negotiates, takes and/or receives those payments or fees are presently unknown to Plaintiff.

30. With respect to AUL's proprietary funds, AUL determines for itself (or in conjunction with AUL-affiliated companies) the "revenue sharing" amounts that AUL receives.

31. As a direct result of AUL's "revenue sharing" practices, AUL controls or influences its own compensation for the services it renders to 401(k) plans.

C. *AUL is an ERISA Fiduciary to the 401(k) Plans It Serves.*

32. ERISA makes certain persons "fiduciaries" based upon their functions without regard to whether they are formally designated as fiduciaries in plan documents:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, [or] (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect

> to any moneys or other property of such plan, or has any authority or responsibility to do so ….

29 U.S.C. § 1002(21)(A).

33. A special relationship of confidence, trust and/or superior knowledge or control existed between AUL and (i) employers who retained AUL for its pre-packaged 401(k) plans, and (ii) employees participating in an AUL 401(k) plan, as a result of one or more of the following events or circumstances:

(a) AUL holds itself out to employers and employees as highly-skilled financial experts, possessing special knowledge and expertise;

(b) AUL encourages employers and participating employees to place their utmost trust and confidence in AUL's management of their 401(k) plans;

(c) AUL encourages employers and participating employees to place their utmost trust and confidence with their retirement savings in AUL's financial expertise and advice;

(d) AUL claims to assume a position of trust and confidence, with respect to both employers and employees, by servicing and managing employer-sponsored 401(k) plans;

(e) AUL claims to assume the responsibility of providing unbiased expertise and 401(k) plan management to employers and employees;

(f) AUL claims to assume the responsibility of providing unbiased, expert investment advice to employers and employees;

(g) AUL claims to assume the responsibility on negotiating on behalf of employers and employees favorable investment management fees with funds as a result of AUL's control over the selection of funds made available to its 401(k) plans; and/or

(h) AUL's exclusive control over and knowledge of the negotiations of investment management fees and "revenue sharing" arrangements with funds.

34. As explained below, AUL is an ERISA fiduciary because it:

(a) exercises discretionary authority or discretionary control over the management of the 401(k) plans it serves;

(b) exercises authority or control over the management or disposition of assets of the 401(k) plans it serves; and/or

(c) provides investment advice for a fee to the 401(k) plans it serves.

D. *AUL is a Fiduciary Because It Exercises Discretionary Authority or Discretionary Control Respecting Plan Management.*

35. AUL exercises discretionary authority or discretionary control respecting plan management by one or more of the following acts:

(a) selecting which non-proprietary mutual funds to offer to 401(k) plans;

(b) selecting the specific share class of non-proprietary mutual funds in which plan participants may invest;

(c) selecting which AUL proprietary funds to offer to 401(k) plans;

(d) selecting the specific share class of AUL proprietary funds in which plan participants may invest;

(e) retaining the authority to delete investment options, close them to future investments, or substitute other funds for those an employer had chosen to include in its 401(k) plan without that employer's consent;

(f) controlling or influencing AUL's own compensation through "revenue sharing" without full disclosure to, and the knowing, voluntary and arms- length approval of, an independent fiduciary of the 401(k) plans AUL serves; and/or

(g) providing complete plan management services so that "plan sponsors don't need to have all the answers, just our phone number to give to their participants."

E. *AUL is a Fiduciary Because It Exercises Authority or Control Respecting the Management or Disposition of Assets of the 401(k) Plans It Serves.*

36. AUL exercises authority or control respecting the management or disposition of assets of the 401(k) plans AUL serves by one or more of the following acts:

(a) selecting which non-proprietary mutual funds to offer to 401(k) plans;

(b) selecting the specific share class of non-proprietary mutual funds in which plan participants may invest;

(c) selecting which AUL proprietary funds to offer to 401(k) plans;

(d) selecting the specific share class of AUL proprietary funds in which plan participants may invest;

(e) retaining the authority to delete investment options, close them to future investments, or substitute other funds for those an employer chose to include in its 401(k) plan without that employer's consent; and/or

(f) controlling or influencing AUL's own compensation through "revenue sharing" without full disclosure to, and the knowing, voluntary and arms- length approval of, an independent fiduciary of the 401(k) plans AUL serves.

F. *AUL is a Fiduciary Because It Provides Investment Advice For a Fee.*

37. As part of its marketing of pre-packaged plans, AUL touts to employers its "retirement expertise … services to make your life easier … and full-service solutions for your retirement needs."

38. AUL represents to employers that it "add[s] value by offering flexible products and services that assist a plan sponsor's employees with preparing for their future."

39. AUL also touts its "retirement industry leadership" and "top-notch investment portfolio" to employers, and represents that its "quality retirement plan products and trusted investment options … deliver value to clients and help individuals reach their financial goals."

40. Thus, AUL holds itself out to employers, participating employees, and the 401(k) plans AUL serves as a highly-skilled financial expert, possessing special knowledge and expertise.

41. AUL provides investment advice to employers, participating employees, and the 401(k) plans AUL serves by one or more of the following acts:

a. explicitly recommending particular investment options to employers and their 401(k) plans;

b. representing (either explicitly or implicitly) that the funds AUL pre-selects and offers are appropriate, sound retirement investments for 401(k) plans and their participants;

c. implicitly representing that the funds AUL continued to make available to 401(k) plans continued to be appropriate, sound retirement investments for 401(k) plans;

d. selecting the specific share class of funds in which plan participants may invest;

e. providing to employee-participants AUL's "Investor Profile Questionnaire," which helps employees to determine their risk tolerance on a scale of 1 to 50; and/or

f. through "Retirement Needs Worksheet" which it used to help employees determine their investment risk tolerance and matching specific mutual funds to the employees' tolerance.

42. AUL was therefore a fiduciary of plans such as the Plan within the meaning of ERISA § 3(21)(A), codified at 29 U.S.C. § 1002(21)(A).

43. Accordingly, AUL owed certain fiduciary duties to plans such as the Plan and their plan participants

under ERISA § 404(a)(1)(A) and (B), codified at 29 U.S.C. § 1104(a)(1)(A) and (B), including a duty to discharge its "duties with respect to a plan solely in the interest of the participants and beneficiaries and … for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan."

CLASS ACTION ALLEGATIONS

44. Plaintiff brings this class action in his capacity as Trustee of the Plan and on behalf of a class of all similarly situated trustees and/or plan sponsors of 401(k) retirement plans that AUL has served and from which it has received and kept "revenue sharing" fees or payments. Plaintiff proposes the following tentative class definition, subject to refinement after discovery:

> All trustees and plan sponsors of (and on behalf of) 401(k) retirement plans governed by the Employee Retirement Income Security Act of 1974 (ERISA) to which AUL provided services and which either included mutual funds from which AUL received revenue sharing payments or included AUL proprietary funds established, owned and/or managed by AUL or an AUL affiliated company.
>
> Excluded from the Class are Defendant, AUL, all affiliated AUL companies and any 401(k) plans for which the excluded companies serve as plan sponsor.

45. Plaintiff is a member of the proposed Class and will fairly and adequately assert and protect the interests of the Class.

46. Plaintiff's interests are coincident with, and not antagonistic to, those of other Class members.

47. Plaintiff's claims are typical of those of the Class.

48. Plaintiff has retained counsel experienced in ERISA class action litigation.

49. The members of the Class are so numerous that joinder of all members is impracticable. While Plaintiff cannot ascertain the exact number and identity of Class members prior to discovery, on information and belief there are thousands of Class members and their identity can be ascertained from AUL's books and records.

50. This case presents questions of law or fact common to all Class members, and those common questions predominate over any questions affecting only individual members of the Class, including:

i. whether AUL held itself out to employers and participating employees as a highly- skilled financial expert, possessing special knowledge and expertise;

ii. whether AUL encouraged employers and participating employees to place their utmost trust and confidence in AUL's management of their 401(k) plans;

iii. whether AUL encouraged employers and participating employees to place their utmost trust and confidence with their retirement savings in AUL's financial expertise and advice;

iv. whether AUL assumed a position of trust and confidence, with respect to both employers and employees-participants, through AUL's management of their employer-sponsored 401(k) plans;

v. whether AUL assumed the responsibility to provide unbiased expertise and 401(k) plan management to employers and employees;

vi. whether AUL assumed the responsibility to provide unbiased, expert advice to employers and employees to the extent AUL provided investment advice to employers and employees;

vii. whether AUL assumed the responsibility to employers and employees to negotiate favorable investment management fees with mutual funds and their advisors as a result of AUL's exclusive control over the selection of mutual funds to be included and available in its 401(k);

viii. whether AUL's exclusive control over and knowledge of the negotiations of investment management fees and "revenue sharing" arrangements with funds;

ix. whether AUL assumed a position of confidence, trust, or superior knowledge or control with respect to employers and participating employees, AUL's exclusive control over and knowledge of the negotiations of investment management fees and "revenue sharing" arrangements with funds;

x. whether AUL rendered investment advice to plans such as the Leimkuehler Plan and their participants;

xi. whether AUL was a fiduciary to plans like the Leimkuehler Plan and their participants;

xii. whether AUL breached a fiduciary duty to plans like the Leimkuehler Plan and their participants by demanding and keeping "revenue sharing" fees or payments from funds;

xiii. whether AUL committed "prohibited transactions" in violation of ERISA § 406(b) by taking and keeping for its own benefit "revenue sharing" fees or payments;

xiv. whether AUL should be permanently enjoined from engaging in unlawful forms of "revenue sharing" (*i.e.*, without full disclosure to and knowing, voluntary, arms- length approval of an independent fiduciary of the 401(k) plans AUL serves, without offsetting "revenue sharing" payments or fees against amounts plans owe to AUL, and without crediting plans with "revenue

sharing" payments or fees to the extent they exceed the amounts the plans owe to AUL);

xv. whether plans like the Leimkuehler Plan and their participants sustained damages as a consequence of AUL's misconduct; and/or

xvi. the amount of any such damages to the Class.

51. A class action is a superior means for the fair and efficient adjudication of this action because individual actions would or might result in:

(a) inconsistent or varying adjudication with respect to individual class members; and/or

(b) hundreds or thousands of cases creating a substantial and unnecessary burden for the courts.

52. The trial of this class action will be manageable because the claims and defenses will be subject to class-wide proof.

FIRST CLAIM FOR RELIEF
(*Breach of Fiduciary Duty*)

53. Plaintiff repeats and incorporates by reference the allegations set forth in Paragraphs One (1) through Fifty-two (52), inclusive, above as if the same were fully rewritten herein.

54. AUL does not disclose, or does not adequately disclose, to the 401(k) plans AUL serves such as the Leimkuehler Plan, the fact that AUL negotiates and takes or accepts "revenue sharing" payments or fees with the funds that are included in its pre-packaged 401(k) plans.

55. AUL does not disclose, or does not adequately disclose, to the 401(k) plans AUL serves such as the Plan, the amount of the "revenue sharing" payments or fees AUL negotiates with and receives from funds that are included in its pre-packaged 401(k) plans.

56. Plans such as the Plan receive no extra services from AUL (in addition to the services for which the plans already pay) in consideration for the "revenue sharing" payments or fees AUL receives from funds.

57. The "revenue sharing" payments or fees AUL takes are thus windfalls to AUL that serve only to increase AUL's income at the expense of the plans such as the Plan and ultimately at the expense of the participating employees.

58. AUL breached the fiduciary duties it owed, pursuant to ERISA § 404(a)(1), codified at 29 U.S.C. § 1104(a)(1), to plans such as the Plan and its participants in one or more of the following ways:

(a) failing to disclose (or to disclose adequately) to plans such as the Plan, to employers, or to participating employees the fact that AUL negotiates "revenue sharing" payments or fees

with funds included in AUL's pre- packaged 401(k) plans;

(b) failing to disclose (or to disclose adequately) to plans such as the Plan, to employers, or to participating employees the fact that AUL takes "revenue sharing" payments or fees from funds included in AUL's pre-packaged 401(k) plans;

(c) failing to disclose (or to disclose adequately) to plans such as the Plan, to employers, or to participating employees the amount of the "revenue sharing" payments or fees that AUL takes from funds included in AUL's pre-packaged 401(k) plans;

(d) keeping "revenue sharing" payments or fees from funds for AUL's own benefit;

(e) failing to offset the fees 401(k) plans owe AUL for its services with the "revenue sharing" payments or fees AUL takes;

(f) failing to credit to the 401(k) plans it serves any "revenue sharing" payments AUL takes which exceed the total fee a 401(k) plan owes to AUL for its services;

(g) failing to use the "revenue sharing" payments or fees to defray the reasonable expenses of administering the plan; and/or

(h) failing to act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

59. The Plan and the Class members have sustained and continue to sustain damages as a direct and proximate result of AUL's breaches of fiduciary duty.

60. Pursuant to ERISA § 409(a) (29 U.S.C. § 1109(a)), AUL is liable to the Plan and to the Class for its breaches of fiduciary duties to make good to such plans all losses resulting from each such breach, is liable to restore to each such plan all profits AUL realized as a result of each such breach, and is subject to such other equitable and remedial relief as the Court deems appropriate.

WHEREFORE, Plaintiff prays that this Court enter judgment in favor of Plaintiff and the Class for:

(i) a declaration that AUL's "revenue sharing" practices violate ERISA;

(ii) preliminary and permanent injunctive relief requiring AUL to pay monetary damages and otherwise make good to Plaintiff's and Class members' plans any losses to the plans resulting from each such breach; to restore to such plans any profits of such fiduciary which have been made through use of assets of the plan by AUL;

(iii) preliminary and permanent injunctive relief requiring AUL to disgorge to the Plan and to the Class all such "revenue sharing" fees AUL has accepted in violation of ERISA;

(iv) the costs of this action, including reasonable attorneys' fees, together with prejudgment interest at the maximum rate permitted by law; and

(v) such other and further relief as the Court deems just and proper.

SECOND CLAIM FOR RELIEF
(*Prohibited Transactions*)

61. Plaintiff repeats and incorporates by reference the allegations set forth in Paragraphs One (1) through Sixty (60), inclusive, above as if the same were fully rewritten herein.

62. ERISA § 406(b)(1), codified at 29 U.S.C. § 1106(b)(1), prohibits fiduciaries from "deal[ing] with the assets of the plan in his own interest or for his own account."

63. ERISA § 406(b)(3), codified at 29 U.S.C. § 1106(b)(3), prohibits fiduciaries from "receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan."

64. AUL violated ERISA §§ 406(b)(1) and/or 406(b)(3) in one or more of the following ways:

(a) taking "revenue sharing" payments or fees from plan assets held in AUL's proprietary, unregistered "separate accounts" for AUL's own interest and for its own account; and/or

(b) receiving consideration in the form of "revenue sharing" payments or fees for AUL's own interest and for its own account from funds in connection with the 401(k) plans' investments of plan assets in such mutual funds.

WHEREFORE, Plaintiff prays that this Court enter judgment in favor of Plaintiff and the Class for:

(i) a declaration that AUL's "revenue sharing" practices violate ERISA;

(ii) preliminary and permanent injunctive relief requiring AUL to pay monetary damages and otherwise make good to Plaintiff's and Class members' plans any losses to the plans resulting from each such breach;

(iii) preliminary and permanent injunctive relief restoring to such plans any profits of such fiduciary which have been made through use of assets of the plan by AUL;

(iv) preliminary and permanent injunctive relief requiring AUL to disgorge to the Plan and to the Class all such "revenue sharing" fees AUL has accepted in violation of ERISA;

(v) the costs of this action, including reasonable attorneys' fees, together with prejudgment interest at the maximum rate allowed by law; and

(vi) such other and further relief as the Court deems just and proper.

THIRD CLAIM FOR RELIEF
(*AUL as ERISA Fiduciary*)

65. Plaintiff repeats and incorporates by reference the allegations set forth in Paragraphs One (1) through Sixty-four (64), inclusive, above as if the same were fully rewritten herein.

66. AUL's "revenue sharing" practices violate ERISA §§ 404(a)(1), 406(b)(1) and 406(b)(3) as alleged above with respect to plans such as the Plan.

67. Pursuant to ERISA § 409(a), codified at 29 U.S.C. § 1109(a), the Court may and should enjoin AUL's unabated and unlawful "revenue sharing" practices (*i.e.*, without full disclosure to, and the knowing, voluntary and arms-length approval of, an independent fiduciary of the 401(k) plans AUL serves, without offsetting "revenue sharing" payments or fees against amounts plans owe to AUL, and without crediting plans with "revenue sharing" payments or fees to the extent they exceed the amounts the plans owe to AUL).

WHEREFORE, Plaintiff prays that this Court enter judgment in favor of Plaintiff and the Class for:

(i) a declaration that AUL's "revenue sharing" practices violate ERISA;

(ii) preliminary and permanent injunctive relief enjoining AUL's unlawful "revenue sharing" practices;

(iii) preliminary and permanent injunctive relief requiring AUL to disgorge to the Plan and to the Class members' 401(k) plans all such "revenue sharing" fees AUL has accepted in violation of ERISA; and/or

(iv) the costs of this action, including reasonable attorneys' fees, together with prejudgment interest at the maximum rate permitted by law; and

(v) such other and further relief as the Court deems just and proper.

FOURTH CLAIM FOR RELIEF
(*AUL as Non-Fiduciary*)

68. In the alternative, and irrespective of AUL's status as an ERISA fiduciary, through AUL's "revenue sharing" it is subject to liability under ERISA for two distinct reasons:

(a) AUL prevents Plaintiff and the Class members from discharging their ERISA § 404(a) fiduciary duty to their 401(k) plans — in many (if not most)

cases, like Plaintiff's, unwittingly and in all cases without any way of avoiding that violation as a customer of AUL; and/or

(b) AUL has entered into transactions with Plaintiff's and Class members' 401(k) plans which constitute direct or indirect transfers to, or uses by or for the benefit of a party in interest, of assets of the plans.

69. Therefore, AUL is a party to an ERISA § 406(a) "prohibited transaction."

70. AUL has failed and continues to fail to disclose or adequately disclose sufficient information for Plaintiff and Class members to determine:

(a) the existence of AUL's "revenue sharing" payments or fees;

(b) the terms of AUL's "revenue sharing" payments or fees;

(c) the amounts of AUL's "revenue sharing" payments or fees;

(d) the amount of the total fees AUL receives for its 401(k) services to their respective plans;

(e) the reasonableness of the total fees AUL receives for its 401(k) services to their respective plans;

(f) whether AUL has offset its fees for its 401(k) services with the "revenue sharing" payments or fees it receives; and/or

(g) the amounts AUL has received in "revenue sharing" payments or fees that exceeds AUL's total fee for its 401(k) services, and thus how much AUL should credit to Plaintiff's and Class members' respective 401(k) plans.

71. AUL knows or should know that it has failed, and continues to fail, to provide sufficient information to Plaintiff and the Class members for them to determine the foregoing.

72. Accordingly, AUL's misrepresentations and/or "revenue sharing" practices prevent Plaintiff and Class members from effectively discharging their duty to "defray[] reasonable expenses of administering" their plans, as is their duty under ERISA § 404(a).

73. In addition, AUL is a "party in interest" because AUL is "a person providing services to [a] plan." ERISA § 402(14)(B), codified at 29 U.S.C. § 1102(14)(B).

74. As a direct or indirect result of the contracts that AUL enters into with the Plan and the Class members' plans, AUL receives "revenue sharing" payments or fees.

75. The "revenue sharing" payments or fees AUL receives belong to Plaintiff's and Class member's 401(k) plans and are thus plan assets because:

(a) AUL is able to negotiate lower fees and is able to extract "revenue sharing" payments or fees with funds their advisors, sub-advisors, distributors or other affiliates (with respect to mutual funds unrelated to AUL as well as AUL's proprietary funds (as defined in Paragraph 11 above)) only because AUL represents Plaintiff's and Class members' 401(k) plans in those negotiations, and the collective plan assets of those 401(k) plans are an enormous sum which mutual funds and their advisors are eager to tap into;

(b) the total amounts the mutual funds or AUL's proprietary funds charge as the fees of advisors, sub-advisors, distributors or other affiliates exceed the amounts those entities accept as compensation for their services, but AUL misrepresents the total amounts those entities charge as constituting their actual compensation for their services; accordingly, AUL should not in fairness and good conscience be permitted to retain the excess amounts which AUL has misrepresented as "investment management fees" (or as similar kinds of fees) when, in reality, they were surreptitiously charged on behalf of, for the benefit of, and as a windfall to AUL in the form of "revenue sharing" payments or fees;

(c) but for AUL's misrepresentations as alleged above and but for AUL's failure to disclose or adequately disclose the existence, terms, and amounts of the "revenue sharing" payments or fees AUL receives, Plaintiff and the Class

members would be able to demand that those savings be applied toward AUL's total fees for its 401(k) services and that any amounts in excess of AUL's total fees be credited to the 401(k) plans; and

(d) AUL is not entitled to more compensation than its total, reasonable fee.

76. As a result of the foregoing, Plaintiff and the Class members have caused their 401(k) plans to enter into transactions with AUL, and those transactions constitute direct or indirect transfers to, or uses by or for the benefit of AUL, a party in interest, of assets of the plans.

77. Therefore, AUL is a party to an ERISA § 406(a) "prohibited transaction."

78. ERISA § 502(a)(3) authorizes Plaintiff and the Class members to bring suit against AUL for its knowing participation in the ERISA violations alleged in this count, and to obtain appropriate equitable relief to redress such violations.

WHEREFORE, Plaintiff prays that the Court enter judgment in favor of Plaintiff and the Class for:

(i) a declaration that AUL's "revenue sharing" practices violate ERISA;

(ii) preliminary and permanent injunctive relief enjoining AUL's unlawful "revenue sharing" practices;

(iii) preliminary and permanent injunctive relief requiring AUL to disgorge to the Plan and to the Class members' 401(k) plans all such "revenue sharing" fees AUL has accepted in violation of ERISA;

(iv) the costs of this action, including reasonable attorneys' fees, together with prejudgment interest at the maximum rate allowed by law; and

(v) such other and further relief as the Court deems just and proper.

/s/ Eric H. Zagrans
Eric H. Zagrans (0013108)
ZAGRANS LAW FIRM LLC
474 Overbrook Road
Elyria, Ohio 44035
(440) 452-7100 (telephone)
(440) 914-9601 (facsimile)
eric@zagrans.com (e-mail)

Klint L. Bruno
KOREIN TILLERY LLC
205 N. Michigan Ave., Suite 1940
Chicago, IL 60601
(312) 899-5065 (telephone)
(312) 641-9555 (facsimile)
kbruno@koreintillery.com (e-mail)

Robert L. King
505 N. 7th Street, Suite 3600
St. Louis, Missouri 63101
(314) 863-6902 (telephone)
(314) 863-7902 (facsimile)
rking@koreintillery.com (e-mail)

Attorneys for Plaintiff, Robert V. Leimkuehler and the Leimkuehler, Inc. Profit Sharing Plan