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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Julio C. Alas, et al.,  
Plaintiffs,  
v.  
AT&T Services, Inc., et al.,  
Defendants.

Case No. 2:17-cv-8106-VAP-RAOx

**Order GRANTING Defendants’  
Motion for Summary Judgment  
(Dkt. 164) and DENYING  
Plaintiffs’ Motion for Partial  
Summary Judgment (Dkt. 176)**

REDACTED

United States District Court  
Central District of California

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

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

**I. BACKGROUND**

On November 12, 2018, Plaintiffs filed the Third Amended Complaint (“TAC”) against Defendants with claims for (1) breaches of fiduciary duties of prudence, candor, and prohibited transactions under ERISA § § 404(a) and 29 U.S.C. § 1104(a); (2) prohibited transactions under ERISA § 406(a) and 29 U.S.C. § 1106(a); and (3) breaches of fiduciary duties of prudence

1 and candor and self-dealing prohibited transactions under ERISA § §  
2 404(a), 406(b)(1), and 29 U.S.C. § § 1104(a) and 1106(b)(1). (TAC, 24-27).  
3 Plaintiffs later voluntarily dismissed Count 3. (Dkt. 161).  
4

5 In the TAC, Plaintiffs alleged Defendants failed to implement a  
6 process to control the administrative expenses that participants in the AT&T  
7 Retirement Savings Plan (“Plan”) paid to the Plan’s recordkeeper, Fidelity  
8 Investments Institutional Operations Company, Inc. (“Fidelity”). Plaintiffs  
9 also alleged Defendants failed to analyze and evaluate compensation paid  
10 to Fidelity from Financial Engines Advisors L.L.C. (“Financial Engines”),  
11 which provided computer-based investment advice to Plan participants. As  
12 a result of Defendants’ failure to perform their fiduciary duties, Plaintiffs  
13 alleged that Plan participants paid grossly excessive fees to Fidelity.  
14

15 On similar grounds, Plaintiffs alleged that Defendants engaged in a  
16 prohibited transaction with Fidelity in defiance of ERISA § 406(a). According  
17 to Plaintiffs, Defendants failed to obtain from Fidelity the required  
18 disclosures of direct and indirect compensation in connection with all the  
19 services that Fidelity was providing, which resulted in Defendants failing to  
20 ascertain whether Fidelity’s total compensation was reasonable.  
21

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

1  
2 In response to the TAC, Defendants filed two motions: a Motion for  
3 Reconsideration regarding an earlier Motion to Dismiss, and a Motion to  
4 Dismiss the TAC. (Dkt. 100). The Court declined to reconsider its previous  
5 ruling and granted Defendants' Motion to Dismiss only as to newly named  
6 individual defendants in the TAC. (Dkt. 106). Defendants subsequently  
7 filed an Answer to the TAC on April 08, 2019. (Dkt. 112).

8  
9 On June 14, 2021, Defendants filed a Motion for Summary Judgment  
10 as to all claims in the TAC ("Defs.' Motion," Dkt. 165), along with a  
11 Statement of Undisputed Facts ("Defs.' SUF," Dkt. 165.1) containing 49  
12 facts, and the Declarations of Julianne Galloway, John Phipps, and Nancy  
13 Ross, including Exhibits 1-57. ("Defs.' Ex.," Dkt. 165.2-61).

14  
15 On June 15, 2021, Plaintiffs filed a Motion for Partial Summary  
16 Judgment ("Pls.' Motion," Dkt. 167) as to Defendants' breach of fiduciary  
17 duty and prohibited transactions, along with a Statement of Undisputed  
18 Facts containing 128 facts, ("Pls.' SUF," Dkt. 167.1), and the Declaration of  
19 John J. Nestico (Dkt. 167.2), including exhibits 2-56 and four unnumbered  
20 deposition transcripts. ("Pls.' Ex.," Dkt. 168.1-42). On August 9, 2021,  
21 Plaintiffs submitted a reply brief in support of their Motion for Partial  
22 Summary Judgment ("Pls.' Reply," Dkt. 195) along with new evidence,  
23 including a Supplemental Statement of Undisputed Facts ("Pls.' SSUF," Dkt.  
24 195.1) with 31 new facts. Defendants filed a response to the new summary  
25 judgment evidence on August 30, 2021. (Defendants' Response to New  
26 Summary Judgment Evidence, "Defs.' Response", Dkt. 207).

1  
2 **II. LEGAL STANDARD**

3 A motion for summary judgment or partial summary judgment shall be  
4 granted when there is no genuine issue as to any material fact and the  
5 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.  
6 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

7  
8 “[W]hen parties submit cross-motions for summary judgment, each  
9 motion must be considered on its own merits.” *Fair Hous. Council of*  
10 *Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001)  
11 (internal quotations and citations omitted). Thus, “[t]he court must rule on  
12 each party’s motion on an individual and separate basis, determining, for  
13 each side, whether a judgment may be entered in accordance with the Rule  
14 56 standard.” *Id.* (quoting Wright, et al., *Federal Practice and Procedure* §  
15 2720, at 335-36 (3d ed. 1998)). If, however, the cross-motions are before  
16 the court at the same time, the court must consider the evidence proffered  
17 by both sets of motions before ruling on either one. *Riverside Two*, 249 F.3d  
18 at 1135-36.

19  
20 Generally, the burden is on the moving party to demonstrate that it is  
21 entitled to summary judgment. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir.  
22 1998). “The moving party may produce evidence negating an essential  
23 element of the nonmoving party’s case, or . . . show that the nonmoving  
24 party does not have enough evidence of an essential element of its claim or  
25 defense to carry its ultimate burden of persuasion at trial.” *Nissan Fire &*  
26 *Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000)

United States District Court  
Central District of California

1 (reconciling *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) and *Celotex*  
2 *Corp. v. Catrett*, 477 U.S. 317 (1986)). The nonmoving party must then “do  
3 more than simply show that there is some metaphysical doubt as to the  
4 material facts” but must show specific facts which raise a genuine issue for  
5 trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586  
6 (1986). A genuine issue of material fact will exist “if the evidence is such  
7 that a reasonable jury could return a verdict for the non-moving party.”  
8 *Anderson*, 477 U.S. at 248.

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

### 15 16 **III. FACTS**

#### 17 **A. Undisputed Facts**

18 The following material facts are supported adequately by admissible  
19 evidence and are uncontroverted. They are “admitted to exist without  
20 controversy” for the purposes of deciding Plaintiffs’ and Defendants’  
21 Motions, respectively. See C.D. Cal. L.R. 56-3.

#### 22 23 1. The AT&T Retirement Savings Plan

24 The Plan is an individual account, 401(k) defined contribution plan  
25 offered to eligible AT&T employees. (Defs.’ SUF, no.1; Pls.’ SUF, no. 1).  
26 Defendant AT&T Services is the administrator of the Plan and a fiduciary of

1 the Plan. (Pls.’ SUF, nos. 5-6). AT&T Services delegated responsibility for  
2 certain investment-related functions, like monitoring Plan investment  
3 expenses, to Defendant Benefit Plan Investment Committee (“BPIC”), which  
4 is comprised of AT&T’s CFO, Treasurer, Controller, Vice President of  
5 Investment Management, and Vice President – Benefits. (Pls.’ SUF, no. 9).

6  
7 AT&T engaged Fidelity to serve as the Plan’s recordkeeper in 2005, a  
8 role that gives Fidelity authority to track participant contributions and  
9 investments, process distributions, and perform other administrative  
10 functions. (Defs.’ Motion, at 2). At all relevant times, AT&T’s contracts with  
11 Fidelity included a [REDACTED] which provided that  
12 [REDACTED]  
13 [REDACTED] (Defs.’ SUF, no. 18).

14  
15 2. BrokerageLink

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

1       3. Financial Engines

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

12  
13           Fidelity and Financial Engines maintain a separate agreement  
14 through which Financial Engines pays Fidelity for access to the accounts of  
15 Plan participants. (Defs.' SUF, no. 35). The Services Agreement between  
16 AT&T Services and Financial Engines states that Financial Engines "has  
17 entered into an agreement with the Plan Recordkeeper [REDACTED]  
18 [REDACTED] and that [REDACTED]  
19 [REDACTED]  
20 [REDACTED] (*Id.* at no.36). A September 2014 letter  
21 from AT&T to Fidelity establishes that "Financial Engines compensates  
22 Fidelity for [REDACTED]  
23 [REDACTED]," with an additional [REDACTED]  
24 [REDACTED] (*Id.* at no. 37). Fidelity therefore receives  
25 "indirect compensation" from Financial Engines with respect to Plan  
26

1 participants who use Financial Engines' services. See, e.g., Defs.' Opp.  
2 SUF, no. 70.

3  
4 4. Form 5500s

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

13  
14 **B. Disputed Facts**

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

24  
25 The parties also dispute how to evaluate the total fees the Plan paid  
26 Fidelity for recordkeeping services on an annual basis from 2011 to 2018.



1 Plaintiffs allege that Defendants vastly over-compensated Fidelity by paying  
2 \$5.055 million for recordkeeping and administrative services in 2011, for  
3 example, and increasingly more in the years following. (Pls.' SUF, nos. 44-  
4 71). While Defendants do not dispute these figures, they argue these totals  
5 do not reflect total "recordkeeping and administrative" fees because they  
6 also include compensation for a variety of additional services, "as indicated  
7 by the Services Codes in element (b) [of Form 5500]." (Defs.' Opp. SUF,  
8 nos. 44-71). Since the parties disagree on what should be included in  
9 "recordkeeping and administrative services," they also dispute the amount  
10 the Plan paid to Fidelity for recordkeeping on a per participant basis.  
11 Plaintiffs allege the Plan paid, on average, roughly \$61 per participant per  
12 year in recordkeeping expenses from 2011 to 2018. (TAC, at 12).  
13 Defendants contend that the Plan spent at most [REDACTED] per participant per year  
14 (in 2011), down to [REDACTED] per participant in 2012, and only [REDACTED] per participant  
15 after the year 2018. (Defs.' Opp. SUF, nos. 44-71).

16  
17 The parties also dispute the nature of the agreement between Fidelity  
18 and Financial Engines. Plaintiffs allege that Financial Engines was paying  
19 Fidelity for mere "access to the accounts" of Plan participants who had  
20 signed up to use Financial Engines, while Defendants claim that Financial  
21 Engines was paying for [REDACTED] (Defs.'  
22 SUF, no. 35). This dispute becomes relevant as Plaintiffs argue that the  
23 amount of revenue Fidelity received from Financial Engines was excessively  
24 high. See Pls.' SUF, no 92; Pls.' Motion, at 9 [REDACTED]  
25 [REDACTED]  
26

1 [REDACTED] see *also* Pls.’ Motion, at 13 (questioning whether “the kickbacks  
2 Fidelity received from FE bore a reasonable relationship to such costs”).  
3

4 The parties next dispute whether Defendants accurately reported the  
5 indirect compensation Fidelity received from BrokerageLink and Financial  
6 Engines on Schedule C of the Form 5500s. According to Plaintiffs,  
7 Defendants incorrectly reported that Fidelity received “0” dollars in indirect  
8 compensation, failing to take into account the “indirect compensation with  
9 respect to participant investments through BrokerageLink and from  
10 Financial Engines.” See, e.g., Pls.’ SUF, nos. 65, 68. Defendants agree  
11 they reported “0” dollars on the Form 5500s, but argue the reporting was  
12 accurate because the form prompts filers to report the “total indirect  
13 compensation . . . *excluding eligible indirect compensation.*” (See, e.g.,  
14 Defs.’ Opp. SUF, no. 68) (emphasis added). On this point, the parties also  
15 disagree about what qualifies as “eligible” indirect compensation and what  
16 does not.  
17

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

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

#### 4 IV. EVIDENTIARY ISSUES

5 Defendants dispute the admissibility of Form 5500s Plaintiffs  
6 submitted in support of their Motion for Partial Summary Judgment. See  
7 Defs.’ Response. These Form 5500s concern four retirement plans from  
8 four companies--Costco, FedEx, HCA, Home Depot--and two trusts. (Pls.’  
9 Reply, Dkt. 195.2-26). Plaintiffs seek to use the Form 5500s as evidence of  
10 the amount of direct compensation that each company paid to its  
11 recordkeeper per plan participant. (*Id.* at 1-2). Defendants argue that the  
12 Form 5500s are inadmissible hearsay because they are statements  
13 prepared by non-parties offered for the truth of what they assert. Moreover,  
14 Defendants assert that Plaintiffs cannot draw conclusions about other plans’  
15 payments to their service providers because they have no “knowledge of the  
16 specific services those plans received, the quality of scope of those  
17 services, how the service providers were compensated, or how the Form  
18 5500s were completed.” (Defs.’ Response, at 3).

19  
20 In certain circumstances, a Form 5500 Annual Report would be  
21 admissible under Federal Rule of Evidence 803(6), the business record  
22 exception to hearsay evidence. “Rule 803(6) provides that records of  
23 regularly conducted business activity meeting the following criteria  
24 constitute an exception to the prohibition against hearsay evidence: [a] . . .  
25 report, record, or data compilation . . . made at or near the time by, or from  
26 information transmitted by, a person with knowledge, if kept in the course of

1 a regularly conducted business activity, and if it was the regular practice of  
2 that business activity to make the . . . report, record or data compilation, all  
3 as shown by the testimony of the custodian or other qualified witness . . . . “  
4 *U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040, 1043 (9th  
5 Cir. 2009), citing Fed. R. Evid. 803 (6).

6  
7 In the summary judgment context, “the evidence presented . . . does  
8 not yet need to be in a form that would be admissible at trial, [instead] the  
9 proponent must set out facts that it will be able to prove through admissible  
10 evidence.” *Norse v. City of Santa Cruz*, 629 F.3d. The Court thus must  
11 consider whether Plaintiffs *could* properly introduce the Form 5500s at trial  
12 under the business record exception. *See Fraser v. Goodale*, 342 F.3d  
13 1032, 1037 (9th Cir. 2003) (holding that because the contents of a diary  
14 “could be admitted into evidence at trial in a variety of ways,” the contents  
15 could be considered at the summary judgment stage).

16  
17 In their Reply, Plaintiffs attempt to introduce the Form 5500s through  
18 the Declaration of John J. Nestico, Plaintiffs’ counsel, who attests that each  
19 of the documents attached as exhibits are “publicly available documents  
20 obtained from the website of the Employee Benefit Security Administration  
21 of the U.S. Department of Labor.” (Dkt. 195.2, at 3). This does not lay the  
22 foundation to introduce a record under the business records exception  
23 because Nestico is neither a custodian of the records nor a qualified  
24 witness. *Contra United States v. Evans*, 178 F. App'x 747 (9th Cir. 2006)  
25 (holding that manager of local store of cellular telephone service provider  
26 was qualified to authenticate cellular telephone bill and admit it under

1 business records exception); *United States v. Miller*, 771 F.2d 1219 (9th Cir.  
2 1985) (holding that telephone company billing supervisor could introduce  
3 telephone bills under business records exception).

4  
5 Plaintiffs could, however, introduce the Form 5500s at trial by  
6 subpoenaing the record custodian from each company to testify, which  
7 would be sufficient to lay a foundation under the business records  
8 exception. *See, e.g., Begaren v. Sec'y of Corr.*, No. SACV1702178DMG  
9 (SHKx), 2019 WL 3210100, at \*10 (C.D. Cal. May 15, 2019), *report and*  
10 *recommendation adopted*, No. CV1702178DMG (SHKx), 2020 WL 4820700  
11 (C.D. Cal. Aug. 19, 2020) (finding that an AT&T records custodian's  
12 testimony identifying a phone bill laid a foundation for the business records  
13 exception). Therefore, while the Court agrees with Defendants that Plaintiffs  
14 could have, and indeed should have, hired an expert witness to introduce  
15 the Form 5500s in their Motion, or to introduce general evidence about other  
16 companies' recordkeeping practices, the Court finds that Plaintiffs still could  
17 properly introduce the forms at trial. *See* Defs.' Response, at 5.

18  
19 Even if Plaintiffs were to lay a foundation for the Form 5500s,  
20 however, the forms are not probative of the point Plaintiffs are trying to  
21 prove, i.e., that other retirement plans report direct and/or indirect  
22 compensation differently than the Plan. The forms themselves do not reveal  
23 the underlying services that each company's retirement plans used, nor the  
24 processes that those plans used to calculate their recordkeeping expenses.  
25 *See* Defs.' Response, at 3 (noting that Plaintiffs have no "knowledge of the  
26 specific services those plans received, the quality of scope of those

1 services, how the service providers were compensated, or how the Form  
2 5500s were completed”). Form 5500s are merely a tool to report annual  
3 financial information to the EBSA—they do not serve as detailed accounts  
4 of retirement plans’ recordkeeping services. The Court therefore finds that,  
5 while the Form 5500s could be admissible at trial under the business  
6 records exception, Plaintiffs’ conclusions about the forms are unsupported  
7 and can not be accepted as true. *See, e.g., Pulse Elecs., Inc. v. U.D. Elec.*  
8 *Corp.*, No. 318CV00373BEN (MSBx), 2021 WL 981123, at \*33 (S.D. Cal.  
9 Mar. 16, 2021) (determining that certain photographs proffered as evidence,  
10 even if admitted, “proved nothing dispositive” to the instant motion).

11  
12 The Court can also take judicial notice of the Form 5500s. Pursuant to  
13 Federal Rule of Evidence 201, a court may properly take judicial notice of  
14 matters in the public record. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th  
15 Cir. 2006). A court may take judicial notice of a public record not for the  
16 truth of the facts recited in the document, but for the existence of the  
17 matters therein that cannot reasonably be questioned. *See Fed. R. Evid.*  
18 *201*. A court “may take notice of proceedings in other courts, both within  
19 and without the federal judicial system, if those proceedings have a direct  
20 relation to matters at issue.” *U.S. ex rel. Robinson Rancheria Citizens*  
21 *Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (citation omitted).  
22 If a court takes judicial notice of a document, it must specify what facts it  
23 judicially noticed from the document. *Id.*

24  
25 Here, the Court finds the Form 5500s to be records that are publicly  
26 available and relevant to the issues raised in the Motions. The Form 5500s

1 provide a sample of how other companies reported fees, including what  
2 service codes are selected and what boxes are filled out on Schedule C.  
3 The Court cannot, however, determine that the Form 5500s prove the  
4 matters for which Plaintiffs proffer them. The Court therefore takes judicial  
5 notice of Exhibits 84-107 but will not consider them for the truth of the  
6 matters contained therein, i.e, that the fees reported reflect the “direct  
7 compensation” each company paid to its recordkeeper. (Dkt. 195).

### 8 9 **C. DISCUSSION**

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

#### 13 14 **A. Breach of Fiduciary Duty Claims**

##### 15 1. Whether the BPIC has authority over recordkeeping and 16 administrative issues

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

21  
22 Defendants argue that the BPIC does not have responsibility for  
23 monitoring administrative expenses. In support, they point to the deposition  
24 of Marty Roy Webb,<sup>1</sup> who testified that the BPIC is responsible for Plan

25 \_\_\_\_\_  
26 <sup>1</sup> Webb was the Vice President-Benefits from the start of the class period  
until December 2019. Defs SUF no. 7.

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

8  
9 Plaintiffs argue the BPIC does have responsibility for administrative  
10 issues, including monitoring recordkeeping expenses. They point to  
11 Defendants’ Exhibit 11, the document outlining the Board of Directors of  
12 AT&T Services’ delegation of authority to the BPIC, which states that the  
13 BPIC has “all powers and authority that may be necessary or appropriate to  
14 the establishment, qualification, administration and operation of each of the  
15 trusts established as part of any [employee benefit] plan . . . .” (Defs.’ Ex.  
16 11, at 2). They also point out that Defendants admitted in their Answer that  
17 AT&T was the “Plan administrator” and that “AT&T Services, and its  
18 authorized delegates, are involved in the selection and appointment of the  
19 Plan’s recordkeeping and administrative service providers.” (Plaintiffs’  
20 Opposition, “Pls.’ Opp’n,” Dkt. 185, at 7). Finally, Plaintiffs argue that the  
21 relevant individual executives, whether acting as BPIC members or not,  
22 were agents of AT&T services whenever they made decisions related to the  
23 Plan’s recordkeeping. (*Id.* at 7).

24  
25 The Court finds there is a genuine dispute as to the scope of the  
26 BPIC’s authority and the roles of individual executives in monitoring



1 recordkeeping expenses. Defendants do not point to any specific language  
2 from Exhibits 13 or 14 that demonstrates a delegation of authority over  
3 recordkeeping expenses away from the BPIC. Webb's deposition  
4 statements are inconclusive and vague about the precise responsibilities of  
5 the BPIC in connection with recordkeeping. Moreover, at least one person  
6 who allegedly was delegated authority over recordkeeping was also a  
7 member of the BPIC (the Vice President- Benefits). See Pls.' SUF, no. 9;  
8 Defs.' SUF, no 5. Defendants have not demonstrated that the BPIC lacked  
9 authority with respect to the challenged actions.

10  
11 Defendants have not met their burden of showing no factual dispute  
12 exists as to whether they have a fiduciary duty regarding the Plan's  
13 recordkeeping expenses. Therefore, the Court denies Defendants' motion  
14 insofar as it is based on this theory.

15  
16 2. Whether Defendants breached their fiduciary duties

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

22  
23 "ERISA is designed to 'protect . . . the interests of participants in  
24 employee benefit plans and their beneficiaries . . . by establishing standards  
25 of conduct, responsibility, and obligation for fiduciaries of employee benefit  
26 plans.'" *Marshall v. Northrop Grumman Corp.*, No. 2:16-CV-06794-AB

1 (JCx), 2019 WL 4058583, at \*6 (C.D. Cal. Aug. 14, 2019), quoting *Wright v.*  
2 *Oregon Metallurgical Corp.*, 360 F.3d 1090, 1093 (9th Cir. 2004); *see also*  
3 29 U.S.C. § 1001(b). Under ERISA § § 404(a) and 1104(a)(1), “a fiduciary  
4 shall discharge his duties with respect to a plan solely in the interest of the  
5 participants and beneficiaries.” *Acosta v. Pac. Enterprises*, 950 F.2d 611,  
6 617 (9th Cir. 1991), as amended on reh'g (Jan. 23, 1992), citing 29 U.S.C. §  
7 1104(a)(1). Fiduciaries must “(1) discharge their duties with 'prudence’; (2)  
8 act ‘solely in the interest of the participants’ and for the ‘exclusive purpose’  
9 of providing benefits to those participants; (3) diversify investments to  
10 ‘minimize the risk of large losses’; and (4) act in accordance with the terms  
11 of the plan.” *Marshall*, 2019 WL 4058583, at \*6; ERISA § 404(a)(1); 29  
12 U.S.C. § 1104(a)(1).

13  
14 **i. Duty of Prudence**

15 In earlier pleadings, Plaintiffs contended that Defendants violated the  
16 duty of prudence by failing to monitor and oversee the recordkeeping  
17 expenses paid to Fidelity.<sup>2</sup> (TAC, at 25). Defendants in response argued  
18 they maintained a process to evaluate and control recordkeeping expenses  
19 paid to Fidelity. (Defs.’ Motion, at 8).

20  
21 The duty of prudence requires that a fiduciary exercise his responsi-  
22 bility “‘with the care, skill, prudence, and diligence’ that a prudent person  
23  
24

---

25 <sup>2</sup> Plaintiffs do not renew this argument in this fashion in their Motion for Par-  
26 tial Summary Judgment. Nonetheless, the Court addresses it here for the  
sake of comprehensiveness.

1 ‘acting in a like capacity and familiar with such matters would use.’” *Mar-*  
2 *shall*, 2019 WL 4058583, at \*8, quoting 29 U.S.C. § 1104(a)(1)(B).  
3 “The prudence analysis ‘focus[es] on a fiduciary’s conduct in arriving at an  
4 investment decision, not on its results.’” *Id.* (citation omitted). To enforce  
5 the duty of prudence, “courts focus not only on the merits of the transaction,  
6 but also on the thoroughness of the investigation into the merits of the trans-  
7 action.” *Tibble v. Edison Int’l*, 843 F.3d 1187 (9th Cir. 2016), quoting *Howard*  
8 *v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996). “This duty of prudence ex-  
9 tends to both the initial selection of an investment and the continuous moni-  
10 toring of investments to remove imprudent ones.” *Marshall*, 2019 WL  
11 4058583, at \*8, quoting *Terraza v. Safeway Inc.*, 241 F. Supp. 3d 1057,  
12 1069-70 (N.D. Cal. 2017).

13  
14 Defendants present extensive evidence that they acted prudently in  
15 monitoring the Plan’s recordkeeping expenses. The facts show that  
16 members of AT&T Services Benefits team periodically reviewed 408(b)(2)  
17 disclosures<sup>3</sup> and invoices from Fidelity to ensure the compensation for  
18 recordkeeping was reasonable. (Defs.’ SUF, no. 16). Defendants also hired  
19 outside experts to evaluate the reasonableness of Fidelity’s compensation.  
20 Specifically, in 2016 Defendants hired Deloitte to consult on the negotiation  
21 of a new contract with Fidelity, at which time Deloitte confirmed that the Plan  
22 had [REDACTED] (*Id.* at no. 22). After new  
23 negotiations in 2017, AT&T obtained an [REDACTED]  
24 [REDACTED] (*Id.* at no. 23).

25  
26 <sup>3</sup> The significance of 408(b)(2) disclosures is discussed in Section iii, *infra*.

1 Moreover, Defendants' contracts with Fidelity included [REDACTED]

2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED] (*Id.* at no. 8).

5  
6 Plaintiffs do not dispute these facts. Hence, Defendants have met  
7 their burden of showing no factual dispute exists as to whether they  
8 breached their duty of prudence in evaluating and monitoring the record-  
9 keeping fees paid to Fidelity, as required by ERISA § 1104(a)(1). The moni-  
10 toring that Defendants engaged in, both through periodic reviews and  
11 through the hiring of outside experts, suffices to show "care, skill, prudence,  
12 and diligence" in negotiating the Plan's recordkeeping fees. *Marshall*, 2019  
13 WL 4058583, at \*8, quoting 29 U.S.C. § 1104(a)(1)(B). Plaintiffs produce no  
14 evidence from which a reasonable jury could find that Defendants acted im-  
15 prudently. *See White v. Chevron Corp.*, No. 16-CV-0793-PJH, 2016 WL  
16 4502808, at \*15 (N.D. Cal. Aug. 29, 2016) (finding there was no "indicia of  
17 imprudence" when "Plaintiffs have alleged no facts suggesting that the Plan  
18 fiduciaries could have obtained less-expensive recordkeeping services").  
19

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

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

8  
9 Defendants respond that these arguments fail as a matter of law and  
10 fact. First, they argue that the recent decision in *Marshall v. Northrop*  
11 *Grumman Corp.* forecloses Plaintiffs' claim because it held that fees paid by  
12 Financial Engines to the recordkeeper "are not subject to fiduciary control"  
13 under ERISA. (Defs.' Mot. at 11). Defendants also rely on *Marshall* to  
14 argue that Plaintiffs need expert evidence to prove that a prudent fiduciary  
15 would monitor the compensation at issue in negotiating recordkeeping fees.  
16 *Id.*; see *Marshall*, 2019 WL 4058583.

17  
18 Next, Defendants contend they did monitor the compensation Fidelity  
19 received from Financial Engine and BrokerageLink, pointing to the  
20 statements in Mr. Phipp's<sup>4</sup> deposition as evidence. See Defs.' Mot. at 12;  
21 Defs.' SUF nos. 44, 45-47 (Mr. Phipps testified that AT&T "took note" of the  
22 fee arrangement between Financial Engines and Fidelity, and the company  
23 leveraged this information to help obtain a reduction in recordkeeping fees  
24 in 2017).

25 \_\_\_\_\_  
26 <sup>4</sup> John Phipps was AT&T Services' Assistant Vice President for Retirement  
from 2008 to March 2020. (Defs.' SUF, no. 9).

1  
2 Although not binding authority, the Court finds the reasoning in  
3 *Marshall v. Northrop Grumman Corp.* particularly persuasive. As  
4 Defendants point out, *Marshall* is factually similar to the instant case. In  
5 *Marshall*, plaintiffs brought a putative class action under ERISA arguing that  
6 defendants, fiduciaries of a retirement plan, breached their duty of prudence  
7 by overcompensating the plan’s recordkeeper and failing to account for  
8 payments the recordkeeper received from Financial Engines. In rejecting  
9 this argument, *Marshall* emphasized that “ERISA does not require, as a  
10 matter of law, that fiduciaries leverage the type of third-party fees at issue  
11 here in order to reduce recordkeeping fees.” *Marshall*, 2019 WL 4058583,  
12 at \*11. Moreover, data connectivity fees between the recordkeeper and  
13 Financial Engines “are not subject to fiduciary control,” and “the fees are not  
14 paid out of plan assets,” because those services are provided as part of an  
15 independent business arrangement. *Id.* Any overarching agreement  
16 between the recordkeeper and Financial Engines was “separate” and  
17 “freestanding” from the recordkeeper’s agreements with the retirement plan  
18 itself. *Id.*

19  
20 Just as in *Marshall*, Plaintiffs here cannot maintain an ERISA claim  
21 based on the fiduciaries’ purported failure to consider compensation  
22 between Fidelity and Financial Engines, because that compensation exists  
23 independent of the Plan and stems from an agreement to which the Plan is  
24 not a party. Plaintiffs’ claim therefore fails as a matter of law, and there is no  
25 triable issue of fact for a jury to consider. The Court **GRANTS** summary  
26

1 judgment on the breach of duty of prudence claims under ERISA § §  
2 1104(a) and 404(a).

3  
4 **ii. Duty of Candor**

5 Plaintiffs bring a duty of candor claim concerning Defendants'  
6 purported failure to report all direct and indirect compensation received by  
7 Fidelity on Form 5500. The Court agrees with Defendants that the duty of  
8 candor claim duplicates Plaintiffs' injunctive relief claim as to the Form  
9 5500s. (Defs.' Motion at 7, n.1). The Court will analyze all claims  
10 concerning Form 5500 reporting obligations in Discussion Subsection B.

11  
12 **iii. Prohibited Transactions**

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

15  
16 ERISA § 406(a)(1)(D) "prohibits a fiduciary from causing a plan to  
17 engage in a transaction that transfers plan assets to a party in interest or  
18 involves the use of plan assets for the benefit of a party in interest."  
19 *Lockheed Corp. v. Spink*, 517 U.S. 882, 886, 116 S. Ct. 1783, 1787, 135 L.  
20 Ed. 2d 153 (1996). Parties in interest have been defined as "those entities  
21 that a fiduciary might be inclined to favor at the expense of the plan's  
22 beneficiaries. *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530  
23 U.S. 238, 242, 120 S. Ct. 2180, 2185, 147 L. Ed. 2d 187 (2000), citing §  
24 3(14), 29 U.S.C. § 1002(14). "In order to sustain an alleged transgression  
25 of § 406(a), a plaintiff must show that a fiduciary caused the plan to engage  
26 in the allegedly unlawful transaction. Unless a plaintiff can make that

1 showing, there can be no violation of § 406(a)(1) to warrant relief under the  
2 enforcement provisions. *Lockheed Corp.*, 517 U.S. at 888-89.

3  
4 “Section 406's prohibitions are subject to both statutory and regulatory  
5 exemptions.” *Harris Tr. & Sav. Bank*, 530 U.S. at 242, citing §§ 408(a), (b),  
6 29 U.S.C. §§ 1108(a), (b). Of relevance to this case, ERISA § 408 (b)  
7 provides an exemption for “[c]ontracting or making reasonable  
8 arrangements with a party in interest for . . . services necessary for the  
9 establishment or operation of the plan, if no more than reasonable  
10 compensation is paid therefor.” 29 U.S.C.A. § 1108 (b).

11  
12 Plaintiffs argue that the § 408 (b) exemption does not apply to  
13 Fidelity’s services to the plan because “Defendants cannot show they  
14 contracted to pay no more than reasonable compensation.” (Pls.’ Motion, at  
15 18). Defendants respond that the services Fidelity and Financial Engines  
16 provided were necessary and the fees paid were reasonable. (Defs.’  
17 Motion, at 17).

18  
19 There is no dispute that Fidelity and Financial Engines’ services to the  
20 Plan were necessary. The question whether the fees were reasonable turns  
21 largely on the parties' disagreement about how to evaluate Fidelity’s total  
22 compensation. For recordkeeping and administrative services, Defendants  
23 allege that the Plan paid █████ per participant to Fidelity in 2011, which was  
24 negotiated down to █████ as of August 1, 2012. (Defs.’ SUF nos. 20-22).  
25 Defendants allege they subsequently negotiated a further reduction that  
26 resulted in recordkeeping fees of █████ per participant, effective January 1,



1 2018. (*Id.* at no. 20-23). Plaintiffs argue that these figures do not reflect the  
2 true compensation paid for recordkeeping and administrative services to  
3 Fidelity because “the . . . per participant charge is simply one of many  
4 charges for Plan services.” (Plaintiffs’ Response to Defendants’ SUF, “Pls.’  
5 Opp. SUF,” Dkt. 206, no. 20). Plaintiffs argue that other large plans include  
6 fees for a much wider variety of services under the umbrella of  
7 “recordkeeping expenses,” including fees for recordkeeping, trust services,  
8 loan processing, communications, distribution and redemption fees, account  
9 maintenance, and others. (*Id.* no. 20). In addition, Plaintiffs argue again  
10 that Defendants’ figures fail to take into account the undisclosed “indirect”  
11 compensation Fidelity received from Financial Engines and BrokerageLink.  
12 (*Id.* at 21).

13  
14 As a preliminary matter, the Court can dispose of Plaintiffs’ second  
15 claim about indirect compensation on the grounds articulated above as to  
16 the fiduciary duty of prudence. Defendants had no duty to investigate or  
17 consider the third-party compensation Fidelity was receiving from Financial  
18 Engines and/or BrokerageLink, and therefore their failure to do so does not  
19 make their compensation agreement unreasonable. As to Plaintiffs’ first  
20 claim, they have failed to carry their burden of showing a triable issue of fact  
21 regarding the reasonableness of Fidelity’s compensation from the Plan.

22  
23 On the first claim, Plaintiffs do not present competent evidence of  
24 other companies’ recordkeeping expense reporting practices, or evidence  
25 showing that companies routinely factor in the wide variety of services that  
26

1 Plaintiffs allege should be included.<sup>5</sup> They point to Appendix B of the Plan’s  
2 Service Agreement with Fidelity, which lists a range of services Fidelity  
3 provides to the Plan and their prices. (Defs.’ Motion., Ex. 16, at Appendix B-  
4 1C; Pls.’ Opp. SUF, no. 20). The Appendix shows, for example, that Fidelity  
5 charges the Plan various additional fees for loan transaction, cash dividend  
6 processing and mailing documents, among other services. The significance  
7 of this price list is unclear, however, because Plaintiffs present no evidence  
8 that these various services should be characterized as “recordkeeping  
9 expenses.”

10  
11 In their Motion, Plaintiffs draw broad conclusions about other  
12 companies’ recordkeeping expenses based on their Form 5500s, but they  
13 produce no credible evidence showing how those expenses were  
14 computed. See, eg., Pls.’ Motion, at 4-5 (“[D]irect compensation paid in  
15 2016 by the Costco 401(k) Plan to T. Rowe Price for all recordkeeping and  
16 administrative services was \$5,530,542, or \$34.78 for each of its 158, 937  
17 participants . . . . Those mega-plans report compensation paid to the plan’s  
18 recordkeeper as a single amount for all services . . . .”). As discussed  
19 *supra*, Plaintiffs cannot draw such conclusions based on the Form 5500s  
20 alone. Plaintiffs fail to produce any other evidence showing how  
21 recordkeeping expenses are generally evaluated or reported as an industry  
22 practice. As Defendants note, “Plaintiffs did not take any discovery from

23  
24 \_\_\_\_\_  
25 <sup>5</sup> Even if Plaintiffs had provided competent evidence about other compa-  
26 nies’ recordkeeping expenses, the Court is not persuaded that it would  
prove the unreasonableness of Defendants’ expenses. Evidence of what  
other companies pay, even if considerably less, does not establish that  
those payments are prima facie “reasonable.”

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

3  
4 Apart from debating the method of calculation, Plaintiffs present no  
5 other evidence disputing the reasonableness of the Plan’s recordkeeping  
6 fees. The recordkeeping expenses that Defendants report, ranging from  
7 between ██████████ fall within the range that Plaintiffs themselves suggest  
8 is reasonable. See TAC, at 10 (“Generally, very large plans pay no more  
9 than roughly \$30 per participant for comparable recordkeeping services,  
10 although some large plans pay even less than that.”).

11  
12 On their end, Defendants present substantial evidence that their  
13 recordkeeping fees were both accurately computed and reasonable. They  
14 provide copies of the Plan’s services agreements with Fidelity, along with  
15 quarterly invoices showing how much the Plan was paying for  
16 recordkeeping expenses. See, eg., Defs.’ Motion, Ex. 38 (showing a 2011  
17 Q4 invoice charging ██████████ per participant quarterly maintenance fee). They  
18 also demonstrate that in 2016, “AT&T Services and Deloitte determined that  
19 other large plans (45,000 or more participants) paid ██████████ per  
20 participant for recordkeeping, with an average of ██████████” (Defs.’ SUF, no 22.)  
21 Deloitte ultimately concluded that “current financial terms in both Fidelity  
22 Agreements remain competitive compared to market trends and well aligned  
23 to AT&T’s size and complexity.” (*Id.*) Plaintiffs do not dispute these facts or  
24 provide evidence to the contrary. See Pls.’ Opp. SUF, no. 22.

1           The Court therefore concludes Defendants have met their burden of  
2 showing that no factual dispute exists as to whether the Plan’s  
3 recordkeeping compensation was reasonable. See *Cryer v. Franklin Res.,*  
4 *Inc.*, No. 16-CV-04265 (CWx), 2018 WL 6267856, at \*11 (N.D. Cal. Nov. 16,  
5 2018) (“Because Plaintiffs have identified no evidence that the seventy  
6 dollars per participant fee was not reasonable and not comparable to similar  
7 plans, and appear to concede that the fees were reasonable, it follows that  
8 Plaintiffs have not presented evidence that they were harmed by any  
9 alleged “unreasonable” recordkeeping process.”).

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

21  
22           To resolve whether Defendants met their disclosure obligations, the  
23 Court must determine what 29 § C.F.R. 2550.408b-2 requires. The parties  
24 do not dispute that Fidelity’s “indirect compensation” from Financial Engines  
25 and BrokerageLink must be disclosed under the regulation. “Indirect  
26 compensation” is defined as “compensation received from any source other

1 than the covered plan, the plan sponsor, the covered service provider, or an  
2 affiliate.” 29 C.F.R. § 2550.408b-2. The regulation provides that  
3 Defendants must offer “a description of all indirect compensation” that the  
4 service provider “reasonably expects to receive in connection with the  
5 services,” including “identification of the services for which the indirect  
6 compensation will be received, identification of the payer of the indirect  
7 compensation, and a description of the arrangement between the payer and  
8 the covered service provider, an affiliate, or a subcontractor, as applicable,  
9 pursuant to which such indirect compensation is paid.” *Id.*

10  
11 29 C.F.R. § 2550.408b-2 further provides an explanation of what  
12 suffices as a “description” of indirect compensation:

13 A description of compensation or cost may be ex-  
14 pressed as a monetary amount, formula, percentage of the  
15 covered plan's assets, or a per capita charge for each par-  
16 ticipant or beneficiary or, if the compensation or cost can-  
17 not reasonably be expressed in such terms, by any other  
18 reasonable method. The description may include a rea-  
19 sonable and good faith estimate if the covered service pro-  
20 vider cannot otherwise readily describe compensation or  
21 cost and the covered service provider explains the meth-  
22 odology and assumptions used to prepare such estimate.  
23 Any description, including any estimate of recordkeeping  
24 cost under paragraph (c)(1)(iv)(D), must contain sufficient  
25 information to permit evaluation of the reasonableness of  
26 the compensation or cost. 29 C.F.R. § 2550.408b-2.

1  
2 Defendants argue their disclosures “expressed Fidelity’s indirect  
3 compensation in reasonable terms,” as “[c]onsistent with the Department of  
4 Labor’s guidelines.” (Defs.’ Opp’n, at 11). According to Defendants, “the  
5 BrokerageLink disclosure stated Fidelity’s transaction-based commissions  
6 and fees (direct compensation) and indicated that Fidelity would receive  
7 indirect compensation in the form of revenue sharing from funds in which  
8 participants invested.” (Defs.’ Motion, at 11; Defs.’ Ex. 34). Moreover, “[t]he  
9 Financial Engines disclosures provided a formula with the compensation  
10 Fidelity expected to receive for the services it provides to Financial  
11 Engines.” (Defs.’ Motion, at 11; Defs.’ Ex. 35-36).

12  
13 Having reviewed Defendants’ exhibits containing the disclosures, the  
14 Court agrees. Fidelity’s disclosures clearly provide a “reasonable”  
15 description of the indirect and direct compensation that it received from  
16 BrokerageLink and Financial Engines. See, e.g., Defs.’ Exhibit 34, (noting  
17 that the direct compensation and indirect compensation are both  
18 represented according to the 408(b)(2) regulation); Defs.’ Exhibit 35,  
19 (providing disclosures of indirect compensation “under the 408(b)(2)  
20 regulation”); Defs.’ Exhibit 36, (providing figures for “indirect compensation  
21 under the 408(b)(2) regulation”).

22  
23 Defendants have met their burden of showing that no factual dispute  
24 exists as to whether they engaged in prohibited transactions. Plaintiffs have  
25 failed to show a triable issue of fact pertaining to Defendants’ “fail[ure] to  
26

1 obtain” the disclosures of indirect compensation or the inadequacy of those  
2 disclosures. (Pls.’ Motion, at 14).

3  
4 The Court therefore **GRANTS** summary judgment to Defendants on  
5 the ERISA § 406(a) prohibited transactions claim.

6  
7 **B. Form 5500 Claims**

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

18  
19 i. Whether Plaintiffs have standing to sue for injunctive relief

20 The parties first dispute whether Plaintiffs have standing to seek  
21 injunctive relief regarding the Plan’s Form 5500 filings. Defendants rely  
22 primarily on *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020) to argue that  
23 plaintiffs seeking injunctive relief under ERISA must suffer concrete injury to  
24 meet Article III’s standing requirement. (Defs.’ Motion, at 18-19).  
25 Defendants assert that Plaintiffs have failed to show a concrete injury in this  
26 case. (*Id.*). In Opposition, Plaintiffs argue that *Thole*’s standing analysis

1 applies only to lawsuits over defined-benefit plans, while lawsuits seeking to  
2 obtain information about defined-contribution plans do not require a showing  
3 of actual injury. (Pls.’ Opp’n, at 17-20). Defendants in their Reply cite to  
4 another recent standing case, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190  
5 (2021) as proof that a statutory violation alone is insufficient to constitute  
6 concrete injury. (Defendants’ Reply, “Defs.’ Reply,” Dkt. 193, at 10-11).

7  
8 “[T]he party invoking federal jurisdiction . . . bear[s] the burden of  
9 demonstrating that they have standing.” *TransUnion LLC*, 141 S. Ct. at  
10 2207 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct.  
11 2130, 119 L.Ed.2d 351 (1992)). In this case, the Court previously held that  
12 Plaintiffs had standing to challenge the Form 5500s (Dkt. 106, 7-8) because  
13 Supreme Court and Ninth Circuit precedent did not require plaintiffs to prove  
14 individual harm when seeking injunctive relief under ERISA. *See Spokeo,*  
15 *Inc. v. Robins*, 136 S. Ct. 1540, 1549, (2016) (holding that “the violation of a  
16 procedural right granted by statute can be sufficient in some circumstances  
17 to constitute injury in fact”). *See also Shaver v. Operating Engineers Local*  
18 *428 Pension Trust Fund*, 332 F.3d 1198, 1203 (9th Cir. 2003); *Wells v.*  
19 *California Physicians’ Service*, No. C05-01229 (CRBx), 2007 WL 926490, at  
20 \*3 (N.D. Cal. Mar. 26, 2007) (“When plan participants seek injunctive relief  
21 for violations of ERISA’s disclosure or fiduciary requirements, they can  
22 demonstrate Article III standing by showing a violation of ERISA and need  
23 not prove actual injury.”).

24  
25 In light of the Supreme Court’s recent decisions in *Thole* and  
26 *TransUnion LLC*, the Court reconsiders the issue of standing. In *Thole*,



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

12  
13 The Court agrees with Plaintiffs that *Thole* is distinguishable from the  
14 present case because *Thole*’s reasoning does not apply to defined-  
15 contribution plans. The Supreme Court acknowledged that, unlike in the  
16 defined-benefit plan at issue in *Thole*, the benefits in a defined-contribution  
17 plan “are typically tied to the value of their accounts, and the benefits *can*  
18 turn on the plan fiduciaries’ particular investment decisions.” *Id.* (emphasis  
19 added). The Supreme Court also stated that *Thole* is specific to defined-  
20 benefit plans, explaining that it was “[o]f decisive importance to this case”  
21 that “the plaintiff’s retirement plan is a defined-benefit plan, not a defined-  
22 contribution plan.” *Id.* at 1618.

23  
24 It is particularly compelling that the *Thole* Court rejected plaintiffs’  
25 equitable-interest argument because the plan was a defined-benefit one.  
26 Plaintiffs had argued that “injuries to the plan are by definition injuries to the

1 plan participants” even if participants ‘have not suffered (and will not suffer)  
2 any monetary loss.’” The Supreme Court determined that an equitable-  
3 interest argument could not hold because “participants in a defined-benefit  
4 plan are not similarly situated to the beneficiaries of a private trust or “ the  
5 participants in a defined-contribution plan.” *Id.* at 1619. This reasoning  
6 suggests that in a defined-contribution plan, like the one at issue here, an  
7 equitable-interest argument still has merit.

8  
9 Hence, *Thole* does not disturb the standing requirements for  
10 participants in defined-contribution plans. To the extent that Defendants cite  
11 *Anderson v. Intel Corp. Investment Policy Committee*, 2021 WL 229235  
12 (N.D. Cal. Jan. 21, 2021) as support for extending *Thole* to defined-  
13 contribution plans, this Court declines to follow that nonbinding authority.

14  
15 Defendants next argue *TransUnion LLC* supports their challenge to  
16 Plaintiffs' standing. In *TransUnion LLC*, a class of plaintiffs sued under the  
17 Fair Credit Reporting Act alleging that a credit reporting agency “failed to  
18 use reasonable procedures to ensure the accuracy of their credit files,” and  
19 in some cases “provided misleading credit reports to third-party  
20 businesses.” 141 S. Ct. 2190 (2021). In finding that some members of the  
21 class lacked Article III standing, the Supreme Court held that inaccurate  
22 information in internal credit files did not constitute concrete harm; rather,  
23 only plaintiffs whose information had been disseminated to third parties  
24 could demonstrate injury, in the form of reputational harm. Moreover, the  
25 Supreme Court determined that formatting errors in some of the credit  
26 agency’s mailings did not constitute “informational injury” because the errors

1 did not deprive plaintiff of “required information” and did not cause negative  
2 “downstream consequences.” *Id.* at 2214.

3  
4 Defendants cite *TransUnion LLC* to argue that a violation of ERISA’s  
5 reporting requirements is insufficient to establish a concrete injury for  
6 standing purposes. (Defs.’ Reply, at 10-1). *TransUnion LLC* is factually  
7 distinguishable from the present case, and in light of the explicit language in  
8 *Thole* regarding the inapplicability of its holding to defined-contribution  
9 plans, the Court finds Plaintiffs have standing to seek injunctive relief with  
10 respect to the Form 5500 filings.

11  
12 ii. Whether Defendants failed to comply with ERISA’s Annual  
13 Reporting Requirements on Form 5500

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

1  
2 The Court turns to Defendants’ fifth argument because it is dispositive  
3 on this issue. Defendants present substantial evidence about the reporting  
4 requirements pursuant to item 2(g) of Form 5500. They present the Form  
5 5500 form itself, which states that filers should exclude “eligible” indirect  
6 compensation when reporting on element (g). (Defs.’ Motion, at 23; Defs.’  
7 Ex. 29 at -1480). They also present the instructions for Form 5500, which  
8 defines “eligible indirect compensation” as “fees charged to investment  
9 funds and reflected in the value of the investment,” . . . “that were not paid  
10 directly by the plan or plan sponsor.” (Defs.’ Motion at 24; Defs.’ Ex. 9).  
11 According to these instructions, if a Plan has received written disclosures  
12 from service providers that describe “the existence of the indirect  
13 compensation; the services provided . . . ; the amount (or estimate) of the  
14 compensation or a description of the formula . . . ; and the identity of the  
15 parties . . .” then the Plan may treat this compensation as “eligible indirect  
16 compensation.” *Id.*

17  
18 The Court agrees with Defendants that “[t]hese instructions show that  
19 any payments by Financial Engines to Fidelity . . . are ‘eligible indirect  
20 compensation’ pursuant to the Form 5500 reporting requirements. (Defs.’  
21 Motion, at 25). As discussed, Defendants received written disclosures of  
22 Fidelity’s indirect compensation during the relevant period, which meet all  
23 the requirements described in the Form 5500 instructions. See Defs.’  
24 Exhibits 34-37. Receiving these disclosures then allowed Defendants to  
25 characterize the compensation as “eligible indirect compensation,” which did  
26 not need to be reported on item 2(g) of Form 5500. See Defs.’ Exs. 9, 29.

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

3  
4 Plaintiffs, on their end, present no facts to support their claim that the  
5 Form 5500 disclosures were inaccurate or incorrect. As Defendants point  
6 out, Plaintiffs do not allege that “any other plan that reported the indirect  
7 compensation [did so] differently than the Plan,” and “[n]or do they cite  
8 evidence that the Department of Labor thought the Plan’s Form 5500s were  
9 inaccurate.” (Defs.’ Reply, at 12). Plaintiffs conclude, without citing to any  
10 evidence, that because the Plan reports compensation paid to Financial  
11 Engines as “direct,” then payment from Financial Engines to Fidelity cannot  
12 be treated as “eligible indirect compensation.” (Pls.’ Opp’n, at 25). It is  
13 entirely unclear where Plaintiffs are gleaning this understanding from, and it  
14 seems to contravene the Form 5500 instructions cited in Defendants’ Exhibit  
15 9.

16  
17 Plaintiffs also attempt to argue that Defendants failed to address  
18 reporting for BrokerageLink in their Motion, and that “it is absolutely clear  
19 from the 5500 rules that revenue sharing payments made to a plan service  
20 provider . . . constitute indirect compensation that must be reported on Form  
21 5500.” (Pls.’ Opp’n, at 25). Defendants do not cite to any language in the  
22 Form 5500 instructions that make it “absolutely clear” that such payments  
23 must be disclosed on the form.

24  
25 A detailed analysis of the duty of candor under ERISA is not required  
26 here. In contrast to Defendants’ detailed, thorough application of the

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

7  
8 The Court **GRANTS** summary judgment to Defendants on the duty of  
9 candor claims arising from the Form 5500 reporting obligations.

10  
11 Although the Court must consider each cross motion for summary  
12 judgment on its own merits and separately, *Fair Hous. Council of Riverside*  
13 *Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001), the Court  
14 has already addressed each of these arguments in ruling on Defendants’  
15 Motion, *supra*. The evidence presented in support of, and in opposition to,  
16 Defendants’ Motion is the same as that presented with respect to Plaintiffs’  
17 Motion. As no new arguments or evidence have been raised in support of,  
18 or in opposition to, Plaintiffs’ Motion that the Court did not already consider  
19 above, the Court **DENIES** Plaintiffs’ Motion for the same reasons that it  
20 rejected Plaintiffs’ arguments that Defendants breached their fiduciary duties  
21 or engaged in prohibited transactions.

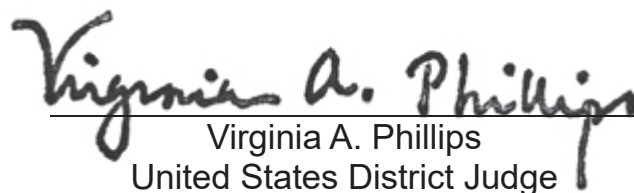
### 22 23 **C. CONCLUSION**

24 For the foregoing reasons, the Court **GRANTS** Defendants’ Motion for  
25 Summary Judgment and **DENIES** Plaintiffs’ Motion for Partial Summary  
26 Judgment.

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

3  
4 **IT IS SO ORDERED.**

5  
6 Dated: 9/28/21

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8 Virginia A. Phillips  
9 United States District Judge

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