No. 08-3798

In the United States Court of Appeals
for the Eighth Circuit

JEREMY BRADEN,

Plaintiff-Appellant,

vs.

WAL-MART STORES, INC., *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Missouri (Fenner, J.)

Dist. Ct. Case No. 08-3109-CV-S-GAF

Brief of The ERISA Industry Committee, the Chamber of Commerce of the United States of America, and the American Benefits Council as *Amici Curiae* in Support of Appellees

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Fed. R. App. P. 26.1 and Circuit Rule 26.1A Disclosure Statement

The undersigned, counsel of record for *Amici* The ERISA Industry Committee, the Chamber of Commerce of the United States of America, and the American Benefits Council hereby furnish the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1A:

The ERISA Industry Committee, the Chamber of Commerce of the United States of America, and the American Benefits Council have no parent corporations.

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*

The ERISA Industry Committee ("ERIC"), the Chamber of Commerce of the United States of America (the "Chamber"), and the American Benefits Council (the "Council") (collectively, the "Associations") are associations whose members maintain, administer, and provide services to pension and other employee benefit plans governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq.* **Having received consent to its filing by all parties in accord with Federal Rule of Appellate Procedure 29(a),** the Associations respectfully submit this brief as *amici curiae* in support of Appellees.

ERIC is a non-profit corporation representing America's largest private employers. The Chamber is the world's largest business federation, representing an underlying membership of over three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Council is a broad-based non-profit organization with approximately 270 members, which either directly sponsor or provide services to retirement and health benefit

plans covering more than 100 million Americans. The Associations' respective members[1] provide benefits to millions of active and retired workers and their families through benefit plans governed by ERISA, including defined contribution plans.

The Associations participate as *amici curiae* in cases with the potential for far-reaching effects on employee benefit plan design or administration.[2] The decision for ERIC to file an *amicus* brief is made by its Legal Committee based on criteria that limit such participation to significant cases in which ERIC will present views not presented by the parties or other *amici*. The Chamber and the Council follow similar criteria to decide whether to participate as *amici*. The Associations believe that this case meets those criteria.

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[1] Lists of ERIC's and the Council's members are available at www.eric.org/public/resources/Membership/kit.pdf and www.americanbenefitscouncil.org/about/memberlist.cfm.

[2] *See*, *e.g.*, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 1026 (2008) (Roberts, C.J., concurring in part and in judgment) (citing ERIC's *amicus* brief); *Hecker v. Deere & Co.*, 556 F.3d 575, 581 (7th Cir. 2009) (noting ERIC and the Council's *amicus* brief).

DISCUSSION

I. Features of Defined Contribution Plans, Their Service Providers, and Fiduciary Breach Litigation

The Associations believe that they can assist the Court in this case by providing background information that will place the actors and issues presented by this appeal in context.

A. Relevant Features of 401(k) Plans and Mutual Funds

As defined by ERISA, a defined contribution plan is a pension plan that provides benefits to a participant based solely on the balance in the bookkeeping account that the plan maintains for the participant. The participant's account reflects her interest in the contributions made to the plan and her share of the plan's investment experience and expenses.[3]

The fastest growing retirement plans are defined contribution plans with cash or deferred arrangements, commonly referred to as 401(k) plans after Internal Revenue Code section 401(k), 26 U.S.C.

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[3] Other pension plans are defined benefit plans; typically, the benefit under such a plan is determined primarily by a formula set forth in the plan document. As a result, the plan's investment experience and the administrative expenses it bears directly affect a participant's benefit under a defined contribution plan, but not typically under a defined benefit plan. *See* 29 U.S.C. §§ 1002(34), (35).

§ 401(k).[4] A 401(k) plan is a defined contribution plan that contains a qualified cash or deferred arrangement that allows participants to elect to contribute part of their compensation to the plan on a pre-tax basis; employer contributions are often made to the plan as well.[5] The tax-advantages of pre-tax contributions make 401(k) plans very efficient and attractive means of saving for retirement.

The day-to-day operation of a 401(k) plan requires administrative services such as recordkeeping, accounting, legal, and trustee services.[6] Recordkeeping consists of enrolling employees in the plan, processing participants' investment allocation decisions, preparing and mailing participants' periodic account statements, and other related

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[4] *See* Gov't Accountability Office, Testimony of Barbara Bovbjerg before House Committee on Education and Labor, at 2 (Mar. 6, 2007) ("Bovbjerg Testimony"), *available at* http://edlabor.house.gov/testimony/030607BarbaraBovbjergtestimony.pdf (viewed Apr. 13, 2009).

[5] Joint Committee on Taxation, *Present Law and Background Relating to Employer-Sponsored Defined Contribution Plans and Other Retirement Arrangements*, at 7 (Feb. 26, 2002) ("Joint Comm. Report"), *available at* www.house.gov/jct/x-9-02.pdf (viewed Apr. 13, 2009).

[6] *See* U.S. Department of Labor ("DOL"), Employee Benefits Security Admin., *A Look at 401(k) Plan Fees*, at 4 ("*401(k) Plan Fees*"), *available at* www.dol.gov/ebsa/pdf/401kFeesEmployee.pdf (viewed Apr. 13, 2009).

administrative activities.[7] For large 401(k) plans, this requires the maintenance of individual accounts for many thousands of participants and beneficiaries—in this case, over one-million—as well as liaison among the employer, trustee, and investment managers. In addition, 401(k) plans may offer other services, "such as telephone voice-response systems, access to a customer service representative, educational seminars, retirement planning software, investment advice, electronic access to plan information, daily valuation and online transactions."[8]

Most 401(k) plans allow each participant to allocate all or part of the participant's account balance among several designated investment options.[9] The investment options offered by plans that allow participants to give investment directions vary from plan to plan, but frequently include a mix of stable value products (such as guaranteed investment contracts), money market funds, employer stock funds, bond funds, and equity funds, and funds that include a mixture of investments. Investment funds may be offered through structures such

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[7] Bovbjerg Testimony at 12.

[8] *401(k) Plan Fees* at 4.

[9] *See* Joint Comm. Report at 11; Bovbjerg Testimony at 2.

as separate accounts (holding just one plan's assets) and collective trusts (holding assets of multiple plans).

Because mutual funds offer diversified investment portfolios and publicly-available information that can help participants to make informed investment decisions, mutual funds are especially common investment options.[10] Most mutual funds invest using a specified investment strategy or invest in a specified category of assets (*e.g.*, "growth stocks," "emerging markets," etc.). The mutual fund's manager chooses particular investments for the fund in accord with the specified strategy or asset class. Provisions of ERISA and DOL regulations explicitly contemplate that plan assets may be invested in mutual funds established pursuant to the Investment Company Act of 1940.[11]

The investors in a mutual fund are considered shareholders of the fund but are not deemed owners of the underlying assets in the fund's portfolio. In addition to investment management, mutual funds provide numerous services to shareholders, including communications with

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[10] Recent data showed that 55% of all 401(k) plan assets nationwide were invested in mutual funds. Investment Company Institute, 2008 Investment Company Factbook at 91-92, *available at* www.icifactbook.org/pdf/2008_factbook.pdf (viewed Apr. 13, 2009).

[11] *See*, *e.g.*, 29 U.S.C. §§ 1002(21)(B), 1101(b)(1); 29 C.F.R. §§ 2509.75-3, 2550.401c-1(e)(1)(i).

shareholders, compliance with regulations and bylaws, and accounting services (*e.g.*, the valuation of shares on a daily basis and preparation of tax papers). The administrative expenses of the mutual fund include expenses incurred in providing such services to shareholders. For example, mutual funds regularly use part of the funds they derive from their expense ratios to pay agents for keeping shareholder records, processing dividend distributions, and distributing prospectuses. Similarly, mutual funds typically use part of the money derived from their expense ratios to pay fees for services provided by their investment advisors.[12]

The Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.*, and implementing regulations require each mutual fund to provide to shareholders a prospectus containing extensive information about the fund's organization, its fees and expenses, its investment strategy, investment risks, and past performance of the fund.[13] The prospectus must identify the fund's total expense ratio and the allocation of the fund's expenses among investment management fees, distribution or

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[12] *See generally* www.sec.gov/answers/mffees.htm ("Mutual Fund Fees and Expenses") (viewed Apr. 13, 2009).

[13] *See* 15 U.S.C. §§ 77j(a), 80a-8(b); 17 C.F.R. § 274.11A.

service fees (including so-called "12b-1 fees"), and other administrative expenses.[14]

In a 401(k) plan that offers mutual funds as investment options, the plan trustee is generally the owner of the mutual fund shares, while the participants whose plan accounts are invested in the mutual funds are the beneficial owners of those shares. Accordingly, mutual funds in which 401(k) plans invest need keep track only of the plan's aggregate interest in the mutual fund. Nonetheless, administration of the plan requires keeping track of each participant's investment in each fund, communicating this information to participants, and making fund prospectuses available to participants; these services are typically performed by the plan's recordkeeper or trustee. Some mutual funds compensate 401(k) plan recordkeepers for performing such services for a fund's beneficial shareholders by paying a fee out of the money

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[14] *See* SEC Form N-1A, *available at* www.sec.gov/about/forms/formn-1a.pdf (viewed Apr. 13, 2009). A mutual fund may offer multiple share classes to investors, with each class having a different expense structure (*e.g.*, differing expense ratios, "load" fees, etc.). The availability of a share class to an investor generally depends on the size of the investor's anticipated investment. Regulations prohibit a mutual fund from charging the shareholders within each share class more or less than the expenses based on the total expense ratio disclosed for that share class. *See* 17 C.F.R. § 270.18f-3.

derived from the mutual fund's expense ratio—a practice Plaintiff calls "revenue sharing."[15]

Compensation to vendors for services provided to 401(k) plans can be paid through fixed fees, asset-based fees, or a mixture of both, which can be charged in a variety of ways.[16] Where a plan offers mutual funds as investment options, in the absence of cost allocation among the plan's service providers such as revenue sharing, the recordkeeper or trustee can be expected to seek compensation for mutual fund-related administrative services it provides in another fashion—*e.g.*, higher fixed fees charged to the plan. As a consequence of such give-and-take, fiduciaries may appropriately take a plan's entire fee structure into account, rather than focusing on a single expense element in isolation.

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[15] *See 401(k) Plan Fees* at 9 (noting that mutual funds may "pay various service providers of a 401(k) plan pursuant to a bundled services arrangement"); *id.* at 14 ("these costs may be subsidized by the asset-based fees charged on investments"); *see also Taylor v. United Technologies Corp.*, No. 3:06cv1494, 2009 WL 535779, at *5 (D. Conn. Mar. 3, 2009) (discussing fees paid by mutual funds to plan recordkeepers).

[16] *See 401(k) Plan Fees* at 4.

B. ERISA Fiduciary Duty Litigation Can Engender Costly Discovery Processes

In contrast to typical ERISA benefit disputes with which courts are most familiar, this case involves allegations of breach of fiduciary duty—allegations that have been made more and more often in recent years. In fiduciary breach litigation concerning 401(k) plans, plaintiffs have routinely sought to undertake wide-ranging fishing expeditions, using the tools of discovery to demand roomfuls of documents, gigabytes of data, and dozens of depositions in hopes of finding actionable wrongdoing. Notably, those efforts often have not been confined to the topics of revenue sharing and investment fund selection addressed by the Complaint here: plaintiffs have applied post-filing investigatory efforts toward top-to-bottom scrutiny of plans' administration and investments over lengthy periods of time.

Inevitably, such discovery campaigns become very expensive for defendants. For example, in the *Hecker* case, which was dismissed within seven months of filing and before discovery was completed, the defendants incurred more than $200,000 in *taxable costs alone*—excluding their attorneys' fees. *See Hecker*, 556 F.3d at 591. Absent a threshold dismissal, the discovery process in such cases routinely

imposes millions of dollars in defense costs, including attorneys' fees, paper and electronic discovery costs, deposition expenses, and expert witness fees. These costs are asymmetrical, because the plaintiffs are individual plan participants with few discoverable records and attorneys working on contingent fee bases.

As the Supreme Court observed in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), when allegations in a complaint do not (even if true) give rise to a plausible claim for relief, "this basic deficiency should … be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.* at 1966 (citations omitted). Otherwise, a plaintiff with a largely groundless claim could take up "'the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'" *Id.* at 1959 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). The Supreme Court acknowledged that "discovery can be expensive," and reminded courts of their obligation to take their gate-keeping function seriously. *Id.*

The concerns that prompted the Supreme Court to decide *Twombly* as it did also apply to fiduciary breach claims under ERISA.

Claims concerning the administration of 401(k) plans typically include decisions and events that occurred over long periods of time.[17] These 401(k) lawsuits also concern the conduct of multiple actors—the plans' fiduciaries, recordkeepers, trustees, and investment managers. Because of their temporal scope and the multiplicity of actors, these lawsuits can engender massive, costly discovery. In those respects, these ERISA fiduciary breach suits resemble antitrust conspiracy cases like *Twombly* much more than they resemble typical tort or civil rights actions.

II. Plaintiff Advocates Pleading Standards That Are Incompatible With ERISA Liability Standards

The Court must determine whether the allegations of the Complaint, if true, would constitute violations of ERISA. While Defendants have addressed the specific allegations in detail, it is useful to put Plaintiff's arguments about the viability of his claims into a broader perspective, if only briefly.

[17] *See*, *e.g.*, *Hecker*, 556 F.3d at 578, 585 (plaintiffs challenged arrangements dating back to 1990); *Taylor*, 2009 WL 535779, at *2 (case involved fiduciary decisions dating back to 1996).

A. The Duty to Make Investments Prudently

The Complaint alleges that fiduciaries caused assets of the 401(k) plan sponsored by Wal-Mart (the "Wal-Mart Plan") to be invested "imprudently … by selecting unreasonably expensive retail mutual funds." Joint Appendix at 14 (Complaint ¶ 6); *id.* at 55 ("Count I"); *id.* at 56 (¶ 120).[18] The Complaint does *not* challenge the funds' prudence on the bases of aspects such as their risks or the expertise of their investment managers. Instead, the imprudence claim is based solely on allegations concerning the costs incurred by the accounts of participants who chose to invest in the mutual funds. The Complaint alleges that for each of the Wal-Mart Plan's mutual funds, a less-expensive fund with a similar investment strategy could have been chosen. Although the Complaint is bereft of factual, non-conclusory allegations about the process followed to select the Wal-Mart Plan's investment options, Plaintiff contends that a deficient process may be inferred from the alleged failure to select the cheaper alternatives.

[18] Insofar as the Complaint may be read to allege a distinct claim premised on the payment of unreasonable expenses by the Plan, *see* Joint Appendix at 14 (Complaint ¶ 6), such a claim is discussed below.

Liability for imprudent investment of plan assets depends on a fiduciary's failure to exercise requisite care in discharging her duties—*i.e.*, failure to follow an appropriate process for choosing investments. *See* 29 U.S.C. § 1104(a)(1)(B); *see also Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917-18 (8th Cir. 1994) ("Section 404's prudent person standard is an objective standard … that focuses on the fiduciary's conduct preceding the challenged decision" (citation omitted)). No particular investment decision is mandated by the duty of prudence. "[S]o long as the 'prudent person' standard is met, ERISA does not impose a 'duty to take any particular course of action if another approach seems preferable.'" *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006) (quoting *Diduck v. Kaszycki & Sons Contractors, Inc.*, 874 F.2d 912, 917 (2d Cir. 1989)). In particular, ERISA does not require a fiduciary "to scour the market to find and offer the cheapest possible fund …." *Hecker*, 556 F.3d at 586. Given these standards, allegations that cheaper alternative investments exist (even if true) simply do not state a claim for relief.

Plaintiff asks this Court to hold that the allegation that a cheaper investment alternative[19] existed is sufficient to state a claim, avoid Rule 12 dismissal, and commence the discovery process. If the Court were so to hold, similar actions could be brought against the vast majority of 401(k) plans. Simply put, in every Morningstar category of mutual fund, *only one* fund will have the lowest expense ratio. Plaintiff advocates a rule whereby every fiduciary that has chosen any other fund in that category would be vulnerable to litigation on that basis alone. Besides inviting a flood of litigation and waste of resources, such a result would create an incentive to select the cheapest investment alternatives, with potentially disastrous results.[20]

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[19] Even this allegation depends upon an untenable premise: that two mutual funds in the same Morningstar category are fungible. With the exception of passively-managed index funds, mutual funds pursuing the same investment strategies nonetheless assemble different portfolios and have materially different investment results. For that reason, the investment return, *net of expenses*, provided by a mutual fund with a lower expense ratio will not necessarily exceed the *net* investment return of a fund in the same category with a higher expense ratio.

[20] Plaintiff also attempts to rely upon the allegation that some of the Wal-Mart Plan's mutual funds have not performed favorably compared to alternatives. *See* Brief of Appellant at 24. It is well established, however, that the prudence of investments must be evaluated on the basis of the selection process, rather than from the vantage point of hindsight. *See Roth*, 16 F.3d at 918.

B. The Duty to Pay No More Than Reasonable Fees for Services

On appeal, Plaintiff primarily contends that the alleged existence of cheaper investment alternatives should be sufficient to state a claim that a fiduciary has unlawfully allowed a plan to pay excessive fees. Yet the existence of a cheaper alternative, even if true, does not establish a plausible basis for relief. Under ERISA, fiduciaries may allow plans to pay reasonable expenses, with reasonableness evaluated in light of the services provided and what other providers would charge to provide services of similar kind and quality. *See* 29 U.S.C. § 1104(a)(1)(A)(ii) (fiduciaries may use plan assets to "defray[] reasonable expenses of administering the plan"); *Reich v. Lancaster*, 55 F.3d 1034, 1052 (5th Cir. 1995) (comparing plan service provider's compensation to that of a predecessor); *Brock v. Robbins*, 830 F.2d 640, 645, 648 (7th Cir. 1987) (assessing reasonableness of fees by comparing them to what other vendors would have charged the plan). The DOL has stated that, in choosing service providers, fiduciaries must "assess the qualifications of the service provider, the quality of the work product, and the reasonableness of the fees charged in light of the

services provided."[21] Furthermore, a fee may fall within a range of reasonableness; no principle or precedent supports the assertion that only the lowest possible expense is reasonable. "The requirement that fees be reasonable does not mean, of course, that the fiduciary must only or always select those products or vendors with the lowest cost." Pamela D. Perdue, *Satisfying ERISA's Fiduciary Duty Requirements with Respect to Plan Costs*, 25 J. PENSION PLAN. & COMPLIANCE 1, 9 (1999).[22]

Once again, the rule Plaintiff advocates would place all plan fiduciaries at risk of litigation unless they choose the lowest-cost providers for plan services, including investment managers. In effect, Plaintiff contends that a plan participant may sue the fiduciaries of virtually any 401(k) plan and launch the pretrial discovery process with no more than an allegation that the plan paid a vendor "too much" for the services the vendor provided. If valid, this approach would allow colorable actions against all fiduciaries except those who have exclusively chosen lowest-cost funds for their 401(k) plans. The Court

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[21] DOL, Information Letter (July 28, 1998), *available at* www.dol.gov/ebsa/regs/ILs/il072898.html (viewed Apr. 13, 2009).

[22] *See also 401(k) Plan Fees* at 1, 17.

should reject that outcome for the same reasons it should reject Plaintiff's prudence theory.

Plaintiff contends that his Complaint is sufficient because it contains specific allegations concerning so-called revenue sharing paid by the Wal-Mart Plan's mutual funds to the Plan's trustee. Plaintiff posits that a mutual fund's willingness and ability to make such a payment to the trustee demonstrates that the mutual fund's expense ratio is too high. Yet this theory has no principled stopping place; *any* allegation that a disbursement by a mutual fund manager was unnecessary would invoke the same reasoning. Moreover, Plaintiff ignores the fact that revenue sharing payments compensate the 401(k) plan's trustee or recordkeeper for administrative services provided to the plan and the thousands (or tens of thousands) of plan participants who direct that all or part of their plan accounts be invested in the relevant mutual fund.

C. The Duty of Disclosure (Or, Rather, the Duty of Loyalty)

ERISA and its implementing regulations enumerate disclosures that must be made to plan participants; Plaintiff does not allege that

Defendants failed to make those disclosures.[23] Instead, Plaintiff contends that the fiduciary duty to "discharge … duties with respect to a plan solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1), gives rise to an uncodified duty to inform participants of a variety of facts: revenue sharing between mutual funds and the Wal-Mart Plan's trustee; the "impact" of "excessive fees"; and the Wal-Mart Plan's "access" to alternative mutual funds. Brief of Appellant at 46.

Given ERISA's detailed financial reporting and disclosure requirements, its fiduciary duty provisions should not be interpreted to require different or additional disclosure obligations. *See Porto v. Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987).[24] As the Second Circuit observed, it is "inappropriate to infer an unlimited disclosure obligation on the basis of [ERISA's] general provisions that say nothing

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[23] Thus, for example, Plaintiff does not allege that Defendants failed to make available the prospectus for each of the Wal-Mart Plan's mutual funds, which contain extensive disclosures about the funds' investment strategies, risks, and total expenses.

[24] *Accord Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 102-03 (2d Cir. 2005); *Ehlmann v. Kaiser Found. Health Plan*, 198 F.3d 552, 555 (5th Cir. 2000); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 405 (6th Cir. 1998); *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 657 (4th Cir. 1996).

about disclosure." *Board of Trs. of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 146-47 (2d Cir. 1997) (citation omitted). With regard to mutual fund investment options, abundant disclosures of information relevant to investors—including the expenses of investments—are provided to plan participants through prospectuses whose contents are extensively regulated under federal law.[25]

When the courts have recognized that ERISA's "duty of loyalty" includes the duty to inform participants of material information, they have done so in circumstances that were very different from those alleged here.[26] That duty should not be interpreted to require fiduciaries to inform participant about revenue sharing among plan service providers, nor to mandate disclosure of the (self-evident) fact

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[25] Plaintiff's contentions are ironic in light of the fact that mutual fund prospectuses are among the most comprehensive of all investment-related disclosures. *See generally* www.sec.gov/answers/mfprospectustips.htm ("Mutual Fund Prospectus, Tips for Reading One").

[26] The alleged circumstances here do not resemble those in cases in which fiduciaries were alleged to have caused participants to change position—*e.g.*, to retire at a particular time—by making affirmative, material misrepresentations about benefits under a plan. *See*, *e.g.*, *Varity Corp. v. Howe*, 516 U.S. 489 (1996), *aff'g* 36 F.3d 746 (8th Cir. 1994); *cf. Christensen v. Qwest Pension Plan*, 462 F.3d 913, 917-18 (8th Cir. 2006) (affirming judgment in favor of fiduciaries who allegedly caused participant to receive inaccurate, but non-binding, estimate of pension benefits).

that alternative mutual funds were not selected. To be actionable under ERISA, misrepresentations and omissions must concern material information. *See Nelson v. Hodowal*, 512 F.3d 347, 350-51 (7th Cir. 2008); *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 122 (2d Cir. 1997). Plaintiff, however, advocates a duty to disclose non-material information, while hiding behind the erroneous contention that materiality cannot be determined at the pleadings stage. *See Dobson v. Hartford Fin. Servs. Group, Inc.*, 389 F.3d 386, 402 (2d Cir. 2004) (affirming summary judgment ruling that information was not material and thus not required to be disclosed by ERISA plan fiduciary); *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 162 (2d Cir. 2000) (concluding, in analogous securities law context, that alleged misrepresentations were immaterial as a matter of law).

Participants in 401(k) plans have access to the total expense ratio of any mutual fund they select for investment, because prospectuses provide such information. For reasons cogently explained in a number of district court decisions, how a mutual fund manager spends or distributes the fees it collects from mutual fund shareholders is not

objectively material to reasonable investors.[27] The Seventh Circuit recently reached the same conclusion. *Hecker*, 556 F.3d at 586 ("The later distribution of the fees by [the mutual funds' manager] is not information participants needed to know to keep from acting to their detriment.").[28]

Although Plaintiff relies, *inter alia*, on the Rule 12 decision in *Taylor v. United Technologies Corp.*, No. 3:06cv1494, 2007 WL 2302284 (D. Conn. Aug. 9, 2007), for the proposition that "failure to disclose revenue sharing can constitute a material misrepresentation actionable under ERISA," Brief of Appellant at 45, the court in that same case recently granted summary judgment against that claim, *Taylor*, 2009 WL 535779, at *13 (D. Conn. Mar. 3, 2009) ("Plaintiffs have also failed

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[27] *See In re Smith Barney Fund Transfer Agent Litig.*, No. 05 Civ. 7583 (WHP), 2007 WL 2809600, at *3 (S.D.N.Y. Sept. 26, 2007) ("Where the total amount of fees paid by a mutual fund for various services is disclosed, other information about the fees, such as their allocation or the transfer agent's profit margin, is not material."); *In re Merrill Lynch Inv. Mgmt. Funds Sec. Litig.*, 434 F. Supp. 2d 233, 238 (S.D.N.Y. 2006) ("The precise allocation of those fees is not material information under the securities laws").

[28] *See also* Brief of Secretary of Labor at 25 n.11 (expressing DOL's "skepticism" that revenue sharing between a mutual fund manager and a plan trustee-recordkeeper is material to plan participants).

to demonstrate the materiality of the alleged nondisclosure concerning investment fund fees and sub-transfer agent fees.").

D. Prohibited Transactions

Count IV of the Complaint alleges that Defendants allowed the Wal-Mart Plan to engage in prohibited transactions in violation of ERISA Section 406, 29 U.S.C. 1106, because "Plan assets invested in the mutual funds the Plan offered were funneled to" the trustee as revenue sharing. Brief of Appellant at 37.

As Plaintiff thus concedes, this claim depends upon the premise that the money allegedly paid by mutual fund managers to the trustee were assets of the Wal-Mart Plan. The claim therefore fails because ERISA specifies that dollars invested by a 401(k) plan in a mutual fund—the source of money used to pay the fund's expenses (including any payment made to the plan's trustee)—are no longer plan assets once they are invested in the fund. *See* ERISA Section 401(b)(1), 29 U.S.C. § 1101(b)(1). "Once the fees are collected from the mutual fund's assets and transferred to one of the Fidelity [*i.e.*, mutual fund manager] entities, they become Fidelity's assets—again, not the assets of the Plans." *Hecker*, 556 F.3d at 584. In accord with the Associations'

position, the Secretary of Labor states in her in *amicus* brief that "the revenue sharing payments described in the complaint do not constitute plan assets for purposes of section 406(a)(1)(D)." Brief of Secretary of Labor at 26 n.12.

To support the prohibited transaction claim, Plaintiff relies upon the reasoning of a district court in an interlocutory decision denying summary judgment, *Haddock v. Nationwide Financial Services, Inc.*, 419 F. Supp. 2d 156 (D. Conn. 2006). The *Haddock* decision entertained the contention that payments received by a plan fiduciary from a third-party (such as a mutual fund) could be deemed plan assets if received "at the expense" of plan participants or beneficiaries. *Id.* at 170. This decision has been aptly criticized by observers for applying an amorphous test for identifying plan assets that lacks a statutory basis and disregards Section 401(b)(1). *See, e.g.*, Craig C. Martin & William L. Scogland, Something Fishy This Way Comes: *Haddock v. Nationwide Financial Services*, 32 Emp. Relations L.J. 109 (2006).[29]

[29] *See also* Gregory L. Ash, Nationwide Wins One, Loses One, in Fee Litigation: Troubling Definition of "Plan Assets" Survives (Oct. 4, 2007) (noting that the *Haddock* decision "ignores Section 401(b)(1) of ERISA"), a*vailable at*

This Court should reject the free-form definition of plan assets advocated by Plaintiff, which could have pernicious effects far beyond the context of this case. Because the exercise of discretionary control over plan assets is one test of fiduciary status, 29 U.S.C. § 1002(21)(A), creating more uncertainty concerning the identification of plan assets would introduce yet more confusion into the already complex question of identifying plan fiduciaries. *See*, *e.g.*, *Chicago Dist. Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463 (7th Cir. 2007) (rejecting argument that plan's pharmacy benefits manager was a fiduciary with regard to discounts and rebates received from pharmacists and manufacturers, which were alleged to be plan assets).

Finally, even if ERISA Section 401(b)(1) did not preclude the functional test proposed by *Haddock* for identifying plan assets, the test would not be satisfied by the alleged facts here. Because mutual funds are required to charge the same expense ratio to all investors in a share class, *see* 17 C.F.R. § 270.18f-3, participant accounts invested with a mutual fund will bear the same annual expense ratio *regardless* of whether the mutual fund manager distributes part of the fees it collects

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www.spencerfane.com/Publication/Publication.asp?Key=367&~= (viewed Apr. 13, 2009).

to a plan trustee or recordkeeper.[30] Consequentially, such payments by mutual funds to trustees or recordkeepers are not "at the expense of" participants.

III. Individualized Injury-in-Fact is Required for Article III Standing, Even in ERISA Cases Seeking Relief "On Behalf of" a Plan

Although the Complaint seeks relief based on a "Class Period" that began January 31, 2002, Joint Appendix at 74 (Complaint ¶ 181), Plaintiff was not employed by Wal-Mart until May 2002, *id*. at 18 (¶ 20), and he concedes that he did not make any contributions to the Wal-Mart Plan before October 31, 2003, Brief of Appellant at 54. The district court correctly ruled that Plaintiff lacked Article III standing to prosecute any claim for relief based on events before October 31, 2003, because he could not personally have suffered any injury-in-fact during the earlier period. Although not dispositive of the case, the district

[30] For example, if the American Europacific Growth Fund collects a total annual expense ratio of 0.87% from all R4 share class investors, as alleged in the Complaint (Joint Appendix at 35, Complaint ¶ 73), then investments by plan participants who choose to invest in that fund will pay 0.87% of their investment *whether or not* that fund pays any fee to the Wal-Mart Plan trustee.

court's correct holding on this threshold issue has potentially far-reaching implications and should be affirmed by this Court.[31]

Plaintiff contends that ERISA authorizes any "participant" in a 401(k) plan to prosecute a claim, on behalf of that plan, for any injury suffered by the plan and without regard to whether the participant's plan account was affected by the alleged fiduciary breach. But the provisions of ERISA Sections 409(a) and 502(a)(2), 29 U.S.C. §§ 1109(a), 1132(a)(2), do not authorize every participant in a 401(k) plan to police all fiduciary conduct, including that which has not affected the participant. *See Central States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 199 (2d Cir. 2005) (holding that statutory standing under ERISA does not necessarily provide constitutional standing); *accord Kendall v. Employees Ret. Plan of Avon Prods.*, __ F.3d __, 2009 WL 763991, at *4 (2d Cir. Mar. 25,

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[31] The constitutional standing issue here—*i.e.*, whether Article III requires a participant to have suffered an injury-in-fact caused by an alleged fiduciary breach in order to prosecute a claim based on that breach—does not concern the separate issue of whether persons who have taken distributions from pension plans or ceased to be covered by welfare plans continue to be "participants" entitled to bring suit under ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2). *Cf. Adamson v. Armco, Inc.*, 44 F.3d 650, 654 (8th Cir. 1995) (holding that former employees were no longer "participants" with statutory standing to bring ERISA claims).

2009) ("A plan participant suing under ERISA must establish both statutory standing and constitutional standing," including injury-in-fact)[32]; *Glanton v. AdvancePCS Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006).

Plaintiff's argument cannot be reconciled with established precedents requiring constitutional standing in ERISA cases. The ERISA provisions on which he relies are generic ones that address liability for losses caused to any type of employee benefit plan (including welfare benefit plans and defined benefit plans) by a breach of fiduciary duty. 29 U.S.C. §§ 1109(a), 1132(a)(2). In the defined benefit plan context, this Court has held that the standing requirements of Article III preclude permitting a participant who has not suffered an injury-in-fact to sue to enforce ERISA fiduciary duties on behalf of a plan. *Harley v. Minnesota Min. & Mfg. Co.*, 284 F.3d 901, 906 (8th Cir. 2002). The Court should affirm that this conclusion applies equally in the defined contribution plan context.

Finally, bringing suit as the proposed representative of a putative class does not eliminate the constitutional standing requirement or

[32] Judge Gibson of this Court, sitting by designation, was a member the panel that decided *Kendall*. 2009 WL 763991, n.1.

allow suit by a plaintiff who was not "personally affected by the alleged breach of fiduciary duty." *See Merck-Medco*, 433 F.3d at 200 (holding that a class representative lacks standing to bring an ERISA claim for monetary relief unless the alleged breach caused that plaintiff an injury-in-fact). In order to assert a claim on behalf of a class, proposed class representatives "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth v. Seldin*, 422 U.S. 490, 502 (1975); *see also Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) ("[A] named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury …. Standing cannot be acquired through the back door of a class action.") (Burger, C.J., concurring in the result in part and dissenting in part).

IV. Open Season for Meritless Claims Against Plan Fiduciaries Would Harm Workers Seeking to Save for Retirement

A. This Case Is One of Many Recent Lawsuits Making Essentially Similar Allegations

Court dockets reveal that between September 2006 and November 2007—before this action began in March 2008—at least eighteen

similar lawsuits were filed against major employers, alleging fiduciary breaches concerning the expenses of 401(k) plans sponsored by those employers.[33] Such cases continue to be filed.[34]

The 401(k) plans at issue in these cases differ in the number and types of investments offered to participants, in the degree to which the employers subsidize plan expenses, and in the third-party vendors and

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[33] *Will v. General Dynamics Corp.*, No. 06-698-WDS (S.D. Ill.), filed Sept. 11, 2006; *Abbott v. Lockheed Martin Corp.*, No. 06-701-MJR (S.D. Ill.), Sept. 11, 2006; *Beesley v. International Paper Co.*, No. 06-703-DRH (S.D. Ill.), Sept. 11, 2006; *Kanawi v. Bechtel Corp.*, No. 06-5566 (N.D. Cal.), Sept. 11, 2006; *Loomis v. Exelon Corp.*, No. 06CV4900 (N.D. Ill.), Sept. 11, 2006; *Martin v. Caterpillar Inc.*, No. 1:07cv1009 (C.D. Ill.), originally No. 2:06-cv-04208-SOW (W.D. Mo.), Sept. 11, 2006; *Taylor v. United Technologies Corp.*, No. 3:06-cv-01494 (D. Conn.), Sept. 22, 2006; *Waldbuesser v. Northrop Grumman Corp.*, No. 06-cv-06213 (C.D. Cal.), Sept. 28, 2006; *Spano v. Boeing Co.*, No. 06-743-JLF (S.D. Ill.), Sept. 28, 2006; *George v. Kraft Foods Global, Inc.*, No. 1:07cv1713 (N.D. Ill.), originally No. 06-798-DRH (S.D. Ill.), Oct. 16, 2006; *Hecker v. Deere & Co.*, No. 06-C-0719-S (W.D. Wis.), Dec. 8, 2006; *Renfro v. Unisys Corp.*, No. 2:07-cv-02098-BWK (E.D. Pa.), originally No. 2:06-cv-08268-FMC-FFM (C.D. Cal.), Dec. 28, 2006; *Kennedy v. ABB, Inc.*, No. 2:06-cv-04305-NKL (W.D. Mo.), Dec. 29, 2006; *Nolte v. CIGNA Corp.*, No. 2:07-cv-02046-HAB-DGB (C.D. Ill.), Feb. 27, 2007; *Young v. General Motors Investment Mgmt. Corp.*, No. 07 Civ. 1994 (BSJ) (S.D.N.Y.), Mar. 8, 2007; *Cormier v. RadioShack Corp.*, No. 4:07-cv-00285-Y (MDL No. 1875), originally No. 4-07CV-285-Y (N.D. Tex.), May 14, 2007; *Tibble v. Edison Int'l*, No. CV07-05359-SVW-AGR (C.D. Cal.), Aug. 27, 2007; *Gipson v. Wells Fargo & Co.*, No. 08-4546 (PAM/FLN) (D. Minn.), originally No. 07-cv-1970 (D.D.C.), Nov. 1, 2007.

[34] *Salyer v. Honda of Am. Mfg., Inc.*, No. 2:08cv1060 (S.D. Ohio), filed Nov. 10, 2008.

investment managers that provide services to the plans. Despite such differences, the central allegations in all these lawsuits are substantially alike. Most make allegations about "revenue sharing" among plan service providers. *See*, *e.g.*, *Hecker*, 556 F.3d at 578; *Taylor*, 2009 WL 535779, at *11. Many also allege that mutual funds were improper investment options for plan participants because of excessive fees. *See*, *e.g.*, *Hecker*, 556 F.3d at 578; *Taylor*, 2009 WL 535779, at *10.

These cases have come about, in part, because law firms have publicly solicited 401(k) plan participants to become plaintiffs in such plan expense lawsuits. Plaintiff's counsel here, for example, issued a press release to announce an "investigation" of the Wal-Mart Plan in November 2007 (four months before filing this action) and invited Plan participants to contact their firm.[35] Other law firms have placed advertisements in newspapers around the nation, requesting participants of targeted plans to contact them.[36] Lax pleading

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[35] *See* www.reuters.com/article/pressRelease/idUS16430+28-Nov-2007+PRN20071128 (press release of Nov. 27, 2007)(viewed April 13, 2009) (reproduced in Addendum hereto).

[36] *See, e.g.*, *Santa Monica (Cal.) Daily Press*, Feb. 26, 2007, at 9 ("Attention … If you participate in Aetna's 401k Plan, we would like to speak with you about the expenses in your plan."); *Daily Herald (Chicago)*, Apr. 9, 2006, § 1, p. 11 ("Attention … United Technologies");

standards would further encourage such activities, because the enlistment of a plan participant would be all that would stand between an enterprising lawyer and the commencement of ERISA litigation against fiduciaries of virtually any 401(k) plan.

B. The Pleading and Liability Standards Advocated by Plaintiff and His Counterparts Endanger 401(k) Plans

Litigation outcomes that reduce the desirability of defined contribution plans pose a more general threat to the employer-sponsored retirement plan system. "Nothing in ERISA requires employers to establish employee benefit plans." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). As the Seventh Circuit noted, in a case where the employer had ceased to offer the disputed defined benefit program (even though the defendants were vindicated on appeal), "[i]t is possible … for litigation about pension plans to make everyone worse off." *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006).

The risk (or perception) that ERISA allows participants merely to second-guess diligently made decisions by fiduciaries concerning

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Daily Herald (Chicago), Mar. 6, 2006, § 1, p. 7 ("Attention … Northrop Grumman") (reproduced in Addendum).

services or investment options for 401(k) plans is as likely to deter benefit plans as it is to deter excessive fees. Rather than mitigating risk by exercising more caution in selecting and negotiating with plan vendors, employers may be motivated to avoid risk altogether by dropping their employee benefit plans.

Even the most careful fiduciaries sometimes make decisions that can be said, with the benefit of hindsight, to have failed to optimize or even to have adversely affected the value of plan assets. These circumstances do not imply a lack of requisite fiduciary process—especially where, as here, fiduciaries have made conventional choices in accord with those of fiduciaries of similar plans. If, nonetheless, courts entertain a barrage of armchair quarterbacks descending on the federal courts to second-guess fiduciary decisions, dockets will be clogged with vexatious litigation and capable persons will be discouraged from serving as ERISA fiduciaries. Congress clearly did not intend ERISA to have these consequences.

Given the fact that defined contribution plans are becoming the predominant non-governmental source of retirement income for today's workers, a legal regime that allows groundless allegations of fiduciary

misfeasance to trigger discovery and litigation costs hardly represents sound public policy. If full-blown litigation proceedings can be triggered merely by an allegation that fiduciaries have failed to engage vendors at the lowest possible prices, or failed to make cost the primary criterion in selecting investment managers, the resulting perverse incentives are obvious. At best, if vendors are required to be chosen solely on the basis of cost, plans will be exposed to the grave risk of receiving sub-standard services. *See Hecker*, 556 F.3d at 586 (noting that the cheapest mutual fund might be "plagued by other problems"). At worst, more employers will conclude that the risks attendant to sponsoring defined contribution plans are unwarranted, and employers' willingness to sponsor defined contribution plans will decline—just as it has for defined benefit pension plans.

CONCLUSION

The Associations urge the Court to affirm the judgment of the District Court.

Respectfully submitted,

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Certificate of Compliance

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the length limitation of Fed. R. App. P. 29(d). The brief is proportionally spaced, has typeface of 14 points or more, and excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B), contains 6,846 words (from the heading "Statement of Interest of the *Amici Curiae*" through the text paragraph of the Conclusion, including footnotes), as counted by Microsoft Word 97-2003, the word-processing software used to prepare this brief.

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Certificate of Service

The undersigned attorney hereby certifies that on April 15, 2009, I caused two hard copies and one electronic copy of the foregoing Brief of the ERISA Industry Committee, the Chamber of Commerce of the United States of America, and the American Benefits Council as *Amici Curiae* in Support of Appellants to be served via U.S. mail, postage paid, on each of the following:

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Addendum

Keller Rohrback L.L.P. Announces Ongoing ERISA Investigation of the Wal-Mart Profit...

Tue Nov 27, 2007 7:43pm EST

Keller Rohrback L.L.P. Announces Ongoing ERISA Investigation of the Wal-Mart Profit Sharing and 401(K) Plan

SEATTLE, Nov. 27 /PRNewswire/ -- Keller Rohrback L.L.P. (http://www.erisafraud.com) today announced its ongoing investigation of Wal-Mart Stores, Inc. ("Wal-Mart" or the "Company") (NYSE: WMT) regarding the various investment options currently being offered to the participants in the Wal-Mart Profit Sharing and 401(k) Plan (the "Plan"). In particular the investigation focuses on the fees and expenses pertaining to those options and the bases for the selection of investment options for the Plan.

If you are a participant in the Wal-Mart Profit Sharing and 401(k) Plan and are concerned about the fees and expenses you are currently paying for the investment options in your Plan, you may contact paralegal Jennifer Tuato'o or attorneys Gretchen Freeman Cappio, Derek Loeser or Lynn Sarko toll free at 800/776-6044, or via e-mail at investor@kellerrohrback.com.

Keller Rohrback is one of America's leading law firms handling ERISA retirement plan litigation. We are committed to helping employees and retirees protect their retirement savings. Keller Rohrback serves as lead and co-lead counsel in numerous ERISA class action cases, including cases against Enron, WorldCom, Inc., HealthSouth, and Marsh & McLennan Companies, as well as ERISA cash balance pension plan cases, including JPMorgan Chase & Co. Keller Rohrback has successfully provided class action representation for over a decade. Its trial lawyers have obtained judgments and settlements on behalf of clients in excess of seven billion dollars.

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SOURCE Keller Rohrback L.L.P.

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Hummus happy

Favorite has gone from the Middle East to middle America

BY MICHELE KAYAL
Associated Press

When a recent snowstorm threatened, David Durcsak didn't take chances. He stocked up on hummus.

"I bought some yesterday but I'm buying a second to keep on hand," he said while shopping in the deli aisle of an Arlington, Va. supermarket. "I like to see it in the house."

Not a sentiment you'd have been likely to hear a decade ago, when Durcsak — and most Americans — had yet to embrace the creamy puree of chickpeas, sesame seed butter and garlic then rarely seen outside Middle Eastern and vegetarian circles.

Today, hummus has grown into a more than $143 million business.

Mainstream grocers give it significant real estate, restaurant menus tout seemingly infinite varieties, and insiders speculate it is well on its way to becoming the next salsa.

"I don't see this thing slowing down any time soon," said Rick Schaffer, vice president of sales and marketing for Taunton, Mass.-based hummus maker Tribe Mediterranean Foods. He expects growth to push the industry to $250 million during the next four years.

And there's plenty of room — and precedent — for that. As ubiquitous a sandwich spread and dip hummus has become, Rubin estimates fewer than 5 percent of American households have tried it.

Yet just 10 years ago, hummus was about a $5 million business powered by just a handful of companies. Today there are more than 80 companies and last year sales increased 25 percent, according to ACNielsen.

Much of the growth is attributed to the strong interest in healthier eating and natural foods, trends that have benefited many ethnic — and especially Mediterranean — foods, said Bob Vosburgh, health and wellness editor at Supermarket News, a trade publication.

"In the case of something like hummus, many people see it as a healthier option than what's traditionally been out there," he said, referring to its high protein and low fat content

Arabic for chickpea, hummus began its commercial American life in Middle Eastern and Mediterranean restaurants. From there, it trickled into natural foods stores, then into bagel shops, where it got more mainstream exposure.

"When I came to the business in the early 1990s, hummus was an unknown commodity in the general market," said Yehuda Pearl, chairman of Astoria, N.Y.-based Blue & White Foods, which markets Sabra brand hummus.

"Most buyers wouldn't buy it. It was bought in ethnic areas and only in the ethnic food category," he said. "The same guy who bought Spanish food bought hummus. And the question was always 'What is that made out of?'"

The migration of hummus into mainstream grocers began in the mid-1990s. It was around this time that Tribe, then a herring and smoked fish manufacturer called Rite Foods, got in on the market.

"We were turned down by nobody," said Bruce Rubin, the company's general manager. "We couldn't get to customers fast enough." Within a year, he said, Tribe went from selling one flavor in Boston to selling eight flavors across the country.

Not that it was an entirely smooth transition, especially after the terrorist attacks of Sept. 11, 2001.

"We were told by some supermarkets that they would not be able to carry our product because it looked too Middle Eastern," said Rubin. In response, the company rid its hummus packages of an illustration showing men riding camels. Today, mainstream grocers such as Safeway and Harris Teeter sport large deli cases stocked with numerous brands.

Photo courtesy

MIDDLE EASTERN DELIGHT: **Making hummus isn't as difficult as it may appear at first.**

NOTICE OF PREPARATION OF A DRAFT ENVIRONMENTAL IMPACT REPORT FOR 1427 4TH STREET MIXED-USE DEVELOPMENT

City of Santa Monica

DATE: February 26, 2007

TO: State Clearinghouse, Responsible Agencies, Trustee Agencies, Organizations and Interested Parties

LEAD AGENCY: City of Santa Monica, 1685 Main Street, Santa Monica, CA 90401
Contact: Jing Yeo, AICP, Senior Planner Phone: (310) 458-8341

The City of Santa Monica intends to prepare an Environmental Impact Report for the 1427 4th Street Mixed-Use Development. In accordance with Section 15082 of the State CEQA Guidelines, the City of Santa Monica has prepared this Notice of Preparation to provide Responsible Agencies and other interested parties with information describing the proposal and its potential environmental effects. Environmental factors which would be potentially affected by the project are:

- Aesthetics (Shadows)
- Traffic and Circulation
- Air Quality
- Cultural Resources
- Noise
- Construction Effects
- Neighborhood Effects

PROJECT APPLICANT: SM Partners, Ltd. **PROJECT LOCATION:** 1427 4th Street

PROJECT DESCRIPTION: The project is located on a 15,000 square foot (0.3 acres) parcel on the east side of Fourth Street between Broadway and Santa Monica Boulevard. The site is currently developed with a three-story commercial building containing ground floor retail and offices above. The site is listed on the City's Historic Resources Inventory. The proposed project involves demolition of all existing structures on the site and construction of a new 4-story, 58-foot high mixed-use development consisting of 40,785 square feet of retail/office space, including the lobby. The proposed structure would result in first floor coverage of 14,175 square feet and an overall floor area ratio of 2.87. A total of 70 parking spaces would be provided in a two-level subterranean parking garage. The applicant has applied for the following discretionary permits: a Development Review permit (DR 06-005) for a project exceeding 7,500 square feet of floor area.

REVIEW PERIOD: As specified by the State CEQA Guidelines, the Notice of Preparation will be circulated for a 30-day review period. The City of Santa Monica welcomes agency and public input during this period regarding the scope and content of environmental information related to your agency's responsibility that must be included in the Draft EIR. **Comments may be submitted, in writing, by 5:30 p.m. on March 28, 2007** and addressed to: Jing Yeo, AICP, Senior Planner, City Planning Division, 1685 Main Street, Santa Monica, CA 90407. Fax: (310) 458-3380. E-mail: jing.yeo@smgov.net

ESPAÑOL: Esto es una noticia de la preparación de un reporte sobre los posibles efectos ambientales referente a la construccion propuesta de un edificio de 40,875 pies cuadrados de espacio comercial y oficina, lo cual puede ser de interes a usted. Para más información, llame a Carmen Gutierrez, al numero (310) 458-8341.

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Boeing fined $15 million for illegal sale

Associated Press

SEATTLE — The Boeing Co. has agreed to pay $15 million to settle State Department allegations that it violated the Arms Control Export Act by selling commercial airplanes equipped with a small gyrochip that has military applications.

The fine is the largest a company has ever faced for violations of the act. The Chicago-based company also agreed to oversight requirements, because settlements over previous violations didn't result in full compliance, The Seattle Times reported Saturday.

Steps have been taken to prevent the violations from occurring again, the company says.

"There is a greater awareness of what the regulations are," Boeing spokesman Tim Neale said Saturday.

The consent decree was signed March 28. The company faced a maximum fine of $43 million.

Under the settlement, Boeing must appoint an independent external officer to oversee companywide export-control compliance for two years and retain an outside firm to audit its efforts.

Neale said the company has been working closely with the State Department to "tighten up" its export process.

"We have taken a number of steps to put a more robust export compliance system in place," he said. "And what we're committing to do in this agreement is to continue working with them to make sure we are in compliance."

To ensure compliance, the company promises in the agreement to cooperate with onsite audits for three years.

According to the charges, Boeing shipped 94 commercial jets overseas between 2000 and 2003 that carried the QRS-11 gyrochip embedded in the flight boxes. At the time, the chip, used in the guidance system of the Maverick missile, was on a list of products that require a license for foreign sales.

Neale said the chip is part of a backup system that maintains an artificial horizon for the pilots.

The 2-ounce, 1-inch-diameter QRS-11 chip, made by a unit of BEI Technologies in Concord, Calif., sells for less than $2,000. Boeing executives argued that a military enemy seeking the chip would have alternatives to buying a $60 million jet and taking apart the flight box.

But the State Department said Boeing's sales weren't licensed. And 19 of the planes went to China, where the U.S. export of listed defense items is specifically prohibited.

Boeing sales that include the chips no longer require a license.

College Board sued over SATs

Lawsuit on behalf on Minnesota teen refers to scoring mistakes

Associated Press

ST. PAUL, Minn. — A high school senior whose SAT was incorrectly scored low is suing the board that oversees the exam and the testing company that was hired.

The lawsuit, filed late Friday in Minnesota, is the first since last month's announcement that 4,411 students got incorrectly low scores and that more than 600 had better results than they deserved on the October test.

It names the nonprofit College Board and the for-profit Pearson Educational Measurement, which has offices in Minnesota's Hennepin County.

"Any type of a high-stakes test that impacts a life event like college, scholarships and financial aid has to be scored with 100 percent accuracy," St. Paul attorney T. Joseph Snodgrass said Saturday. "There is no room for error in this type of a situation."

Pearson spokesman David Hakensen said Saturday that the company won't comment on pending litigation. College Board spokeswoman Chiara Coletti also declined to comment.

The lawsuit, filed by attorneys for an unidentified high school senior in Dix Hills, N.Y., seeks class action status. Lawyers want to allow anyone who took the test in October except those who got a marked-up score to join the lawsuit.

The suit also seeks unspecified damages, an order requiring adjustment of the inflated scores and a refund of the test fee.

Test-takers whose scores were made too low had their results corrected, but the College Board has declined to fix the inflated scores. That has angered some college officials who say they could unfairly influence admissions and scholarship decisions.

The SAT is taken by more than 2 million students and used by many colleges as a factor in admissions. The 2,400-point exam measures reasoning skills in reading, writing and math.

The October test was taken by nearly a half-million students, so the error affected less than 1 percent of the results. The College Board maintains most were off by 100 points or less, but some students saw much wider swings.

Pearson has said the culprit may have been excessive moisture that caused answer sheets to expand and some marks to be unreadable. The error was discovered when the College Board asked the company to hand-score some tests.

Snodgrass' firm won a multi-million-dollar settlement from Pearson in 2002 for scoring errors in Minnesota that affected more than 8,000 students, some of whom missed graduation ceremonies after being told they failed a state-required exam.

The lawsuit alludes to the Minnesota mistake and others in alleging that Pearson has taken shortcuts.

"The College Board contracted with Pearson despite the fact that Pearson is no stranger to botching test scores," the lawsuit reads.

Campaign: Eisendrath tight-lipped about strategy

Continued from Page 1

his plan to win, shrugging off essentially all questions about financial backing and advertising and what he'd do if he won.

"We have all along kept our campaign strategy within the campaign," said Teague.

What Eisendrath has said is that he hasn't ruled out raising taxes, he'd support abolishing the death penalty if lawmakers ever mustered the votes, and he supports gun control efforts and protecting a woman's access to an abortion.

When he announced his candidacy, Eisendrath appeared poised to ride a rising tide of discontent regarding Blagojevich. Federal, state and local authorities were probing the Blagojevich administration's hiring and contracting methods, and there was no shortage of traditional Democratic groups unhappy with the governor's policies.

No bombshells have resulted from any of those investigations. And thus far Eisendrath has produced only one recently launched, narrowly-broadcast TV ad, parted ways with his campaign manager and his initial campaign finance reports show him with only $166,000.

Blagojevich has more than $15 million.

Barring dramatic fundraising efforts in the coming days, Eisendrath is likely to fall far short of the $3 million to $6 million he said he'd raise to field a credible challenge when he jumped in the race. Adding insult to injury, Blagojevich refuses to debate him.

Rather than talk about fundraising, Eisendrath steers conversations toward his experiences as a teacher in Chicago public schools, work as a regional administrator for the U.S. Department of Housing and Urban Development and how he won a seat on the Chicago City Council at age 28.

He's currently on leave from his job as vice president at Chicago's Kendall College, which offers degrees in culinary arts and hospitality fields.

His abbreviated campaign has focused on Blagojevich's ethical problems and finding a better way to fund schools. He says he's confident people will back him come March 21.

"I've talked about having a revolution in our politics. We need to change our revenue system. We need to change the regulatory environment. We need to manage the state well," said Eisendrath, "Those things, if we take them seriously, will turn Illinois around."

But again, time is running short for the Democratic upstart to wage a serious campaign that resonates with voters. At a recent news conference, Eisendrath described his campaign ads thus far as "fun and marginal."

It's a description that could end up fitting his entire campaign.

Edwin Eisendrath

Born: Feb. 3, 1958 (age 48)

Residence: Chicago

Career: Chicago Public Schools teacher, regional administrator for the U.S. Department of Housing and Urban Development, current vice president of academic affairs at Kendall College

Previous elected office: Chicago City Council, 1987-1993; lost 1990 bid for U.S. House

First job: Summer construction work

Cubs, Sox or Cardinals? Cubs

iPod favorite: Doesn't own one

Last movie watched? "Madagascar"

Last book read? "The Curious Incident of the Dog in the Night-Time," by Mark Haddon

Political heroes: Abraham Lincoln, Franklin Delano Roosevelt and former Illinois Govs. Richard Ogilvie and John P. Altgeld

What do you drive? Honda Accord

Closing: Expert says most juries see past emotion, rhetoric

Continued from Page 1

will deliver the rebuttal. He and Webb have made no secret in court of their disdain for one another.

"There's been a little bit of contention and acrimony," said Burns, who has followed the case in the papers. "They're competitors."

Shortly after the government put on its first witness, Scott Fawell, Webb crowed in open court that Collins had made a serious tactical error.

Later, Collins took the title former Gov. Jim Thompson has given Webb, "the greatest trial lawyer in America," and hurled it back as a sarcastic epithet.

Unlike when witnesses are giving testimony, Collins and Webb have little preview of what the other will say or do. The prosecution's rebuttal must be made instantaneously, crafted on the fly, and the judge already has admonished the sides not to interrupt each other unless absolutely necessary. So if the lawyers take liberties in their speeches, the other side will have to defeat it with argument alone, rather than getting the judge to put a stop to it.

Attorneys on both sides were arguing over the rules for closing arguments and jury instructions to the bitter end, in court as late as Saturday afternoon.

Both Collins and Webb have a lot riding on the outcome of the trial, but not more than Ryan and Warner, who at 72 and 67 years old, respectively, could spend the rest of their lives in prison should they be convicted on multiple counts.

Ryan and Warner face a total of 22 counts of racketeering, mail and tax fraud, extortion and making false statements to investigators.

Prosecutors allege Warner and others gave Ryan cash, gifts and favors for government contracts.

In opening arguments, both sides set up emotional themes that are likely to be touched on again in closings.

Assistant U.S. Attorney Zach Fardon portrayed Ryan as a corrupt official who unfairly doled out contracts to friends and took benefits and cash for doing so.

Ryan "gave Larry Warner the keys to the state government," Fardon said.

He also raised the specter that taxpayers (i.e. jurors) were the ones who footed the bill for Ryan's corruption in the form of bloated contracts.

Webb portrayed Ryan as a public servant and family man, guilty only, perhaps, of being too loyal a friend. He hinted at prosecutors' hardball tactics, and that theme could grow in closings, after witness Ed McNally testified he thought Collins was out to get Ryan.

Webb from Day 1 has harped on the fact that no witness would take the stand and say he gave Ryan money to influence a governmental decision.

That promise was borne out in trial, and Webb is likely to return to that theme.

"The prosecution has ... the hardest job of all. They have to go through every element of the case," said Leonard Cavise, a DePaul University law professor.

Because the burden of proof is on prosecutors, if they leave any element out, an acquittal on that charge could result.

And despite all the rhetorical bluster and emotion shown by both sides, it is those factual elements that juries pay attention to, Burns said.

In addition, the longer juries deliberate, "the emotion and the rhetoric of the closing argument starts to dim a little bit," Burns noted.

What usually takes precedence are the dry, legally based jury instructions that focus on fact, Burns said.

Still, he said, the closings are bound to be one heck of show.

"It'll be a great exercise in civics," Burns said.