UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

RONALD TUSSEY, et al., Plaintiffs, v. ABB, INC., et al., Defendants.	CIVIL ACTION No. 06-CV-04305 (Judge Nanette K. Laughrey)

FIDELITY DEFENDANTS' SUGGESTIONS OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

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INTRODUCTION

Despite the Court's narrow and distinct ruling against Fidelity, Plaintiffs now seek to hold Fidelity liable for *all* of their fees and costs that can legally be shifted under ERISA. This demand is contrary to law and should be refused.

Consistent with Eighth Circuit precedent, any award of fees and costs against Fidelity must reflect Plaintiffs' substantial lack of success against Fidelity and the strong relative merits of Fidelity's positions in the litigation as a whole. Plaintiffs' principal theories of liability against Fidelity were rejected by this Court, as they have been by other courts. Plaintiffs' success in establishing a discrete infraction by Fidelity with respect to the administration of "float" income does not justify forcing Fidelity to pay for Plaintiffs' unsuccessful claims as to Fidelity.

Nor should the Court hold Fidelity jointly and severally liable on any award of fees and costs, as Plaintiffs urge. Plaintiffs base their argument in favor of joint fee and cost liability on cases finding joint wrongdoing. Those cases have no application here, since the Court expressly rejected Plaintiffs' theories of joint substantive liability and instead found the Fidelity Defendants and the ABB Defendants liable on entirely distinct claims, for entirely distinct damages. Plaintiffs' effort to obligate Fidelity to pay fees and costs incurred in litigating claims for which Fidelity is not liable is without precedent.

Finally, as the ABB Defendants explain, Plaintiffs' fee petition is based on hourly rate assumptions that are unwarranted as a matter of law. Fidelity joins in the ABB Defendants' objections to Plaintiffs' hourly rates.

FACTUAL BACKGROUND

From the beginning, Plaintiffs asserted very broad claims against Fidelity. They challenged common industry practices including offering retail mutual funds as 401(k) investment options, offering actively managed funds rather than exclusively index funds, and using revenue sharing to compensate service providers. A crucial underpinning to virtually all their claims was the allegation that Fidelity had broad fiduciary responsibility for the Plans' investment selections, fees, and other challenged transactions. Based on these claims, Plaintiffs sought an aggregate of over $375 million in damages against all Defendants at trial. *See* FOF 83, Pls.' Corrected Proposed FOF/COL 33 [Dkt. #558].

While Fidelity was obliged to defend against all the claims asserted by Plaintiffs, and not just the claim of fiduciary status, the Court ultimately agreed with other courts that Fidelity was not an ERISA fiduciary for most purposes claimed by Plaintiffs, and therefore rejected every theory of liability advanced against Fidelity save one. Order of Mar. 31, 2012 [Dkt. #623] ("Opinion") at 31, 49-50. The Court also rejected most of Plaintiffs' broad challenges to industry practices, including the use of mutual funds in 401(k) plans and the use of revenue sharing to pay plan service providers. *See id.* at 30-31, 62.[1] And while the Court found the ABB Defendants liable for certain ERISA violations in selecting investment options, and in the payment of "recordkeeping" fees, the Court expressly found that "Fidelity is not liable for ABB's fiduciary breaches." *Id.* at 31.

The Court did find Fidelity liable on a completely distinct issue of first impression regarding the allocation of "float" interest. Opinion at 69-72, 78-79; Judgment (Mar. 31, 2012) [Dkt. #624] ("Judgment") at 2. Pursuit of this claim represented a small part of the overall effort in the litigation. In their post-trial briefing, Plaintiffs devoted only 8 paragraphs to the issue, and Defendants only 5, out of 154 and 185 proposed findings of fact and conclusions of law, respectively. Pls.' Corrected Proposed FOF/COL 6, 10-11, 34, 38, 44-45 [Dkt. #558]; Defs.'

[1] Plaintiffs dropped their challenge to the use of actively managed funds on the eve of trial.

Proposed FOF/COL 34, 40 [Dkt. #552]. Moreover, Plaintiffs' pre-trial and trial effort was devoted to proving an allegation that was demonstrably false—that Fidelity kept all float interest related to the Plans' cash flows as compensation for itself. Pls.' Trial Br. at 6 [Dkt. #498]. In fact, as the Court correctly found, Fidelity delivered all float income earned on cash flows between Plan participants and investment options proportionately to the investment options after paying related bank expenses. Opinion at 69. It was only after trial that Plaintiffs raised the theory of float-related liability accepted by the Court—that Fidelity violated ERISA *not* by pocketing float for its own account but rather by failing to tally and credit float income to the Plans on a plan-specific basis, instead directing float income to the Plans' investment options as well as to related bank expenses. FOF 18 & COL 38, Pls.' Corrected Proposed FOF/COL 6, 45 [Dkt. #558]; *see* Opinion at 69-72. In the end, the Court awarded Plaintiffs $1.7 million in damages against Fidelity, less than one half of one percent of the damages sought and less than five percent of the $36.9 million in total damages awarded. Opinion at 79.

The Court's decision was the first to examine this challenge to float practices, and the Court did not find that Fidelity undertook the practices in bad faith. Moreover, just as Fidelity was not liable for the ABB Defendants' breaches, so were the ABB Defendants "not liable for Fidelity's breaches." Opinion at 72. Rather, each group of Defendants was held liable for wholly distinct conduct, violations, and harm.

ARGUMENT

I. UNDER EIGHTH CIRCUIT STANDARDS, A FEE AWARD OF THE MAGNITUDE SOUGHT BY PLAINTIFFS AGAINST THE FIDELITY DEFENDANTS CANNOT BE JUSTIFIED.

When considering what award of fees, if any, would be "reasonable" under ERISA § 502(g)(1), courts in the Eighth Circuit closely examine the fee claimant's degree of success or lack thereof. *See Geissal v. Moore Med. Corp.*, 338 F.3d 926, 934 (8th Cir. 2003). Under

Eighth Circuit standards, any award of fees should be calibrated to the outcome on the underlying merits, and courts have therefore directed a reduction in the fee award when a claimant has achieved only limited success against a party. *See id.*; *Delcastillo v. Odyssey Resource Mgmt., Inc.*, 431 F.3d 1124, 1132 (8th Cir. 2005). In addition, courts do not shift any measure of fees and costs under § 502(g)(1) unless plaintiffs can justify their claim in light of factors that include the opposing party's bad faith and the merits of its litigation positions. *Lawrence v. Westerhaus*, 749 F.2d 494, 495-96 (8th Cir. 1984) (per curiam). Indeed, the Eighth Circuit reversed a district court's decision to award attorneys' fees where it found that the court had miscalculated the relative merits of the parties' positions when weighing the *Westerhaus* factors. *Eisenrich v. Minneapolis Retail Meat Cutters*, 574 F.3d 644, 651 (8th Cir. 2009). These considerations greatly disfavor a fee award against Fidelity of the magnitude sought by Plaintiffs.

A. Plaintiffs' Fees Must Be Discounted To Reflect Their Lack Of Success Against Fidelity.

The Eighth Circuit in *Geissal v. Moore Medical Corp.* affirmed the trial court's reduction of plaintiff's lodestar by 50 percent based on plaintiff's "limited success," explaining that a "reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." 338 F.3d at 935-36 (quotation omitted); *see also, e.g.*, *Delcastillo*, 431 F.3d at 1132 (a fee award should reflect a claimant's relatively limited success). Any award of fees against the Fidelity Defendants must likewise account for Plaintiffs' "limited success" against them. In particular, only fees associated with Plaintiffs' pursuit of the successful float claim should be awarded against Fidelity. *See, e.g.*, *White v. Martin*, 290 F. Supp. 2d 986, 991 (D. Minn. 2003) (no fees should be awarded for claims which ERISA plaintiff lost); *see also First Nat'l Bank & Trust Co. of Mt. Home v. Stonebridge Life Ins. Co.*, 619 F.3d 951, 956 (8th Cir. 2010) (fee award should exclude proceedings the plaintiff would have had to pursue even absent the defendant's presence in the case); *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1012-13 (8th Cir. 2004) (affirming district court's refusal to award fees incurred in pursuit of unsuccessful class claim).

Plaintiffs do not address the issue of apportioning fees, even as an alternative measure, nor have they put in meaningful evidence by which the float-related work could be identified. Their time sheet entries are simply too general to show what portion of the asserted fees and costs were devoted to pursuit of the successful float claim. Other methods of allocation are available to the Court, however. The Court could, consistent with *Geissal*, reduce Plaintiffs' requested fee from Fidelity to reflect their limited success against Fidelity relative to their overall litigation demands. Since the judgment of $1.7 million is less than one half of one percent (0.5%) of Plaintiffs' $375 million demand, the Court could limit the fee award against Fidelity to one-half of one percent of Plaintiffs' $14 million fee claim. Alternatively, the Court could follow the approach adopted in *Finkel v. Triple A Group, Inc.* by awarding fees in proportion to Fidelity's responsibility for the overall damages awarded in the litigation. *See* 708 F. Supp. 2d 277, 291 & n.23 (E.D.N.Y. 2010); *cf. Hendrickson v. Branstad*, 934 F.2d 158, 164 (8th Cir. 1991) (apportioning fees in civil rights case based in part on relative fault). Under that metric, the $1.7 million judgment is about five percent (5%) of the total judgment in the case.[2] Whatever tack the Court takes, it is clear that ordering Fidelity to pay Plaintiffs the full amount of their claimed fees would be inconsistent with Eighth Circuit precedent under ERISA § 502(g).

Plaintiffs incorrectly suggest that "special circumstances" would be necessary to deny them full recovery of their fees and costs. Pls.' Mem. in Support of Motion for Attorney Fees

[2] A third option would be to award fees according to the portion of post-trial briefing committed to the issue of float. Because the issue arose in only 13 of 339 proposed findings of fact or conclusions of law, *supra* at 2, this measure would allow Plaintiffs to recover no more than 3.8% of their requested fees from Fidelity.

("Mem.") at 14 (citing a 1984 decision of the Ninth Circuit). In 2002, the Eighth Circuit sitting en banc roundly rejected that rule and held that, in contrast to the civil rights context, ERISA adopts no presumption favoring the recovery of fees. *Martin v. Ark. Blue Cross & Blue Shield*, 299 F.3d 966, 971-72 (8th Cir. 2002) (en banc). The Supreme Court has since confirmed the Eighth Circuit's interpretation of § 502(g)(1), holding that a court *may in its discretion* award fees and costs to either party in an ERISA action so long as the claimant has achieved some degree of success on the merits. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2152 (2010). Fidelity's successful defense against the vast majority of claims and theories advanced by Plaintiffs would therefore support its recovery of attorneys' fees *from Plaintiffs*. The Court certainly is not required to find "special circumstances" in order to decline Plaintiffs' outsized fee request. Courts have rejected fee awards in less equivocal ERISA victories than this one; the Court would be fully justified in doing the same here.

B. The Balance Of Westerhaus Factors Does Not Favor A Significant Fee Award Against Fidelity.

The other factors relevant to a potential ERISA § 502(g)(1) award in the Eighth Circuit confirm that Plaintiffs should not recover the full measure of their fees and costs from Fidelity. These non-exclusive factors include: (1) the opposing party's degree of culpability or bad faith; (2) its ability to pay; (3) the potential deterrent effect of a fee award; (4) whether the moving party sought to benefit all plan participants or beneficiaries or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. *Westerhaus*, 749 F.2d at 495-96.

1. Relative Merits of the Parties' Positions.

As noted, Fidelity prevailed on the merits with respect to almost all of Plaintiffs' claims. Indeed, the fiduciary status allegations on which Plaintiffs' excessive fee claims against Fidelity depended were rejected by the Seventh Circuit before this trial, and by the Third Circuit after this trial, in cases brought against Fidelity by the same lawyers. *See Hecker v. Deere & Co.*, 556 F.3d 575, 583 (7th Cir. 2009); *Renfro v. Unisys Corp*, 671 F.3d 314, 324 (3d Cir. 2011) (relying on *Hecker* for the proposition that a party "does not act as a fiduciary with respect to the terms in the service agreement if it does not control the named fiduciary's negotiation and approval of those terms," and holding that "Fidelity owes no fiduciary duty with respect to the negotiation of its fee compensation"); *see also Groussman v. Motorola, Inc.*, No. 10 C 911, 2011 WL 147710, at *4 (N.D. Ill. Jan. 18, 2011) (party can be functional fiduciary only if he *actually exercised* discretionary authority or control over management of the Plans, disposition of Plan assets, or administration of the Plans (citing *Hecker*)). Plaintiffs' broadside attacks on mutual funds and revenue sharing have likewise proved unsuccessful here and elsewhere. *See, e.g.*, Opinion at 30-31, 62; *Renfro*, 671 F.3d at 327; *Hecker*, 556 F.3d at 585-86. Fidelity should not be compelled to pay for Plaintiffs' pursuit of defective theories. *See, e.g.*, *Parke*, 368 F.3d at 1012-13.

Even as to the float claim on which Plaintiffs prevailed, Fidelity had legitimate, non-frivolous arguments that supported its defense. The Eighth Circuit has time and again approved the refusal to award fees against an unsuccessful party whose litigating position was, though incorrect, not "egregiously so." *Eisenrich*, 574 F.3d at 651 (reversing grant of attorney's fees to prevailing plaintiff in ERISA case when the "relative merit of the parties' arguments [we]re more evenly balanced than the [district] court described"; the defendant's position was "mistaken" but not "egregiously so"; and there was "little or no federal case law that explore[d] the legal question raised in th[e] dispute"); *see Willcox v. Liberty Life Assur. Co.*, 368 F. App'x 700, 702 (8th Cir. 2010) (per curiam) (affirming denial of fees where the merits of the parties' positions were relatively balanced, even though the plaintiff ultimately won summary judgment); *Seitz v.*

Metro. Life Ins. Co., 433 F.3d 647, 652 (8th Cir. 2006) (granting summary judgment to the plaintiff but denying fees where the court did "not find [the defendant's] interpretation [of the Plan's language] to be without merit or a demonstration of bad faith"); *Fletcher-Merrit v. NorAm Energy Corp.*, 250 F.3d 1174, 1181 (8th Cir. 2001) (reversing fee award along with judgment on the merits, noting that "both parties' positions had merit"); *see also Cont'l Assur. Co. v. Cedar Rapids Pediatric Clinic*, 957 F.2d 588, 594-95 (8th Cir. 1992) (holding that district court did not abuse its discretion in declining to award fees to prevailing defendants where the legal question at issue had divided the circuits); *Consol. Beef Indus., Inc. v. New York Life Ins. Co.*, 949 F.2d 960, 966 (8th Cir. 1991) (affirming denial of attorneys' fees to prevailing defendant where the plaintiff's claims "were serious and involved complicated legal issues that were sufficiently debatable to justify plaintiff's pursuit of the claims").

The same assessment applies here. Fidelity successfully opposed the theory advanced by Plaintiffs before and during trial, that Fidelity expropriated the float for its own account. And Fidelity's position with respect to Plaintiffs' post-trial float theory was hardly "egregious." This is the first case finding a violation of this nature. Fidelity did not heedlessly defend the legality of its administration of float, and Eighth Circuit authority fully supports rejecting (or at least substantially curtailing) Plaintiffs' fee claim against Fidelity for this reason.

2. Degree of Culpability.

Fidelity credited float to the Plans' investment options in proportion to the cash flows to and from those investment options, as with other client plans' investment options. While Fidelity used float earnings to defray certain banking expenses associated with the movement of money to and from Plan investments options, under the Trust Agreement Fidelity was required to allocate to Plan participants the expenses associated with "acquisition and disposition" of Plan investments. *See* Trust Agreement § 6 [JD-0041] ("All expenses of the Trustee relating directly to the acquisition and disposition of investments constituting part of the Trust … shall be a charge against and paid from the appropriate Plan participants' accounts."). There is no suggestion of bad faith in the record as to Fidelity's float administration practices, and this factor weighs against the award of fees. *See, e.g.*, *Martin*, 299 F.3d at 973.

Neither was Fidelity "culpable" for purposes of a fee award. Culpability under § 502(g)(1) requires not only that a party be liable but also that "the party's position was not 'substantially justified,'" *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 831 (7th Cir. 1984), meaning it "must be something more than nonfrivolous, but something less than meritorious—and taken in good faith." *Bender v. Xcel Energy, Inc.*, No. 04-3117, 2008 WL 2042521, at *3 (D. Minn. May 12, 2008) (quoting *Stark v. PPM Am., Inc.*, 354 F.3d 666, 673 (7th Cir. 2004)); *see Eisenrich*, 574 F.3d at 651 (reversing district court's award of attorneys' fees where Plan's losing position was "not as untenable, indefensible, overbroad, or unwarranted as the district court thought"). Fidelity was not culpable *at all* with respect to Plaintiffs' unsuccessful claims (having been found not liable), and the post-trial float theory raised novel legal and factual issues never before explored by any court.

3. Deterrence Considerations.

As explained, the float questions ultimately addressed by the Court were questions of first impression. *Supra* at 2-3. Because there was no authority specifically addressing the float allocation practices at issue, and because Fidelity clearly did not keep the float income for its own account, Fidelity was not acting in bad faith or in calculated defiance of a well-established rule by handling float earnings as it did. Moreover, Plaintiffs offered no reason to believe that there is a widespread industry problem related to the administration of float, as Plaintiffs' challenge specifically concerned Fidelity's conduct under its contract with ABB, not industry practices generally. Accordingly, there is no need to impose attorneys' fees to encourage compliance by other service providers. *See, e.g.*, *Bender*, 2008 WL 2042521, at *4 ("[G]iven the unique facts of this case, particularly Xcel's mistakes regarding the applicability of the 2000 Statement, the Court finds that Plaintiffs' claims were substantially justified. Therefore, it is unnecessary to deter conduct similar to Plaintiffs'.").

4. The Remaining Factors.

Fidelity does not dispute that it has the ability to pay a fee award or that Plaintiffs brought their claims to benefit other Plan participants as well as themselves. But the ability to pay cannot alone justify an award of fees, *see, e.g.*, *Willcox*, 368 F. App'x at 703 (citing *Cont'l Assur. Co.*, 957 F.2d at 595), and Plaintiffs' substantial lack of success against the Fidelity Defendants calls into question whether their efforts were well-placed. Given that Plaintiffs' successful claim against Fidelity confers a relatively modest benefit on the Plan, which is dwarfed by the unsuccessful claims they also forced Fidelity to litigate, Plaintiffs' desire to benefit the Plan does not justify a fee award based almost entirely on claims that failed against Fidelity. *See, e.g.*, *Sturges v. Hy-Vee Employee Benefit Plan & Trust*, 991 F.2d 479, 481 (8th Cir. 1993) (affirming reduced fee award that excluded hours "not reasonably expended").

* * *

The *Westerhaus* considerations foreclose an award against Fidelity of the magnitude pressed by Plaintiffs. Indeed, Fidelity submits that those considerations would support a wholesale denial of fees to the Plaintiffs against Fidelity. But if Plaintiffs are awarded fees against Fidelity at all, those fees should reflect Plaintiffs' near-complete lack of success against Fidelity.

II. PLAINTIFFS' DEMAND THAT ALL FEE-SHIFTING AWARDS AGAINST ANY DEFENDANTS BE IMPOSED "JOINTLY AND SEVERALLY" AGAINST FIDELITY IS UNSUPPORTABLE.

Plaintiffs urge the Court to ignore the Eighth Circuit's criteria for assessment of fees, and instead to hold Fidelity jointly and severally liable for fees and costs awarded against any of the Defendants. Their requested approach—which would effectively impose joint fee liability against Fidelity for claims on which Fidelity *prevailed*—cannot be squared with the applicable criteria for imposition of attorneys' fees.

A. Joint Liability For An Award Of Fees Under ERISA § 502(g)(1) Requires Common Liability On The Merits.

Plaintiffs' bid for joint fee liability, where Defendants were found liable for entirely distinct acts and entirely distinct damages, would require departing from ERISA precedent. Joint fee liability in ERISA litigation uniformly follows a finding of common fault on the merits.[3] Here, Fidelity and the ABB Defendants were found liable for distinct damages awards on distinct claims based on distinct conduct. The Court expressly declined to hold the Fidelity and ABB Defendants jointly and severally liable on the merits. Fidelity has identified no ERISA case where the court expressly rejected joint merits liability and nevertheless imposed joint and several fee liability. This Court should decline Plaintiffs' invitation to be the first to do so.

In the context here at issue—where distinct liability and damages awards have been entered against unrelated ERISA defendants—courts track the underlying determination of substantive liability and impose separate and distinct fee awards. Thus, in *Finkel v. Triple A Group, Inc.*, 708 F. Supp. 2d 277 (E.D.N.Y. 2010), for example, the court refused to hold one defendant in an action for unpaid contributions liable for the "full amount of fees and costs,"

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[3] *See, e.g.*, *PM Grp. Life Ins. Co. v. W. Growers Assur. Tr.*, 953 F.2d 543, 549 (9th Cir. 1992) (holding two plans jointly liable for damages, fees, and costs arising from delay caused by their "collective intransigence").

finding that the plaintiff had failed "to provide any basis on which to hold him jointly and severally liable for the full amount." *Id.* at 291 n.23 (magistrate recommendation adopted by the district court). Instead, the court held the defendant liable only for his proportionate share of the prevailing party's fees and costs, calculated by multiplying the total fees and costs by the percentage of damages for which he was personally liable. *Id.* at 291 & n.23 (applying § 502(g)(2)).[4] Plaintiffs' assertion that differences in the parties' assessed liability and fault have no bearing on their responsibility for the prevailing party's fees and costs under ERISA, *see* Mem. at 25, is therefore incorrect.

The *Westerhaus* factors confirm the impropriety of allowing a joint fee award absent joint merits liability. As explained above, a court in the Eighth Circuit contemplating fee-shifting in an ERISA action should consider, among other things, the ability of a fee award to deter future violations. *Supra* at 6, 9-10. Requiring parties who were found not liable on a given claim to bear fees incurred in litigating it does nothing to deter future misconduct, however. Similarly, a joint fee award for distinct substantive violations does not reflect the parties' relative culpability, *see Westerhaus*, 749 F.2d at 496, but rather overrides that consideration entirely.[5] Numerous

[4] *Accord Cohen v. Metropolitan Life Ins. Co.*, No. 00 Civ. 6112, 2007 WL 4208979, at *3 (S.D.N.Y. Nov. 21, 2007), 485 F. Supp. 3d 399 (S.D.N.Y. 2007) (holding defendants liable on different claims liable for different portions of the attorneys' fee award); *Russo v. Unger*, 845 F. Supp. 124 (S.D.N.Y. 1994) (ordering an award of attorneys' fees against only one defendant despite having held the defendants jointly and severally liable for breach of ERISA duties).

[5] Fidelity has found a single, out-of-circuit decision in which the court approved joint fee liability against ERISA parties who pursued and defended some technically distinct claims, but unlike here the litigation centered in significant part on a common issue that all three parties ultimately lost. *See Fenster v. Tepfer & Spitz, Ltd.*, 301 F.3d 851, 855 (7th Cir. 2002). *Fenster* involved competing claims to the assets of a pension plan, pitting the current owner of a company against his former co-owner and two former employees, all three of whom benefited from an invalid plan amendment. *Id.* at 854-55. The three argued "the same legal positions throughout the litigation," which were substantially unjustified and frequently near-frivolous, and they not only retained the same attorney but also agreed to pay him in proportion to their plan account balances. *Id.* at 859-60. None of those unique circumstances is true of this case.

Eighth Circuit cases hold that the degree of relative merit in the parties' positions must be considered when assessing fees. *See, e.g.*, *Eisenrich*, 574 F.3d at 651-52; *Willcox*, 368 F. App'x at 702; *Seitz*, 433 F.3d at 652; *Fletcher-Merrit*, 250 F.3d at 1181. Here, joint and several liability for attorneys' fees would be inconsistent with that rule, because it would hold both sets of Defendants liable for all of Plaintiffs' claimed fees, despite significant differences in the relative merits of the positions they adopted.

The two ERISA cases cited by Plaintiffs do not support their assertion of joint fee liability. Each of the cases they cite involved unitary injuries jointly caused by the defendants. In *Essex v. Randall*, for instance, the plaintiffs (trustees of a health benefit plan) prevailed in their suit against a plan participant and his attorney for failure to comply with a subrogation agreement requiring both of them to reimburse the fund from any third-party settlement for benefits paid. No. Civ.A. DKC20033276, 2006 WL 83424, at *1 (D. Md. Jan. 11, 2006). The relevant question for the court was how to apportion the fee award given that one defendant defaulted and the other litigated to summary judgment. *See id.* at *6. Borrowing from cases in which "two or more defendants actively participated in a constitutional violation," the court imposed joint liability for the fees because the "nature of the injury is singular and was caused by the dereliction of both defendants." *Id.* at *6-*7 (quotation omitted); *see id.* at *5 (noting that the plaintiffs' claims "involve[d] a common core of facts" all "center[ing] on the fact that Defendants signed a subrogation agreement requiring them to pay back third-party funds, which they failed to do").

United Steel Workers of Am. v. ASARCO, Inc. likewise involved a unitary offense and injury—the failure of a plan and employer/plan administrator to arbitrate a benefits grievance

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Plaintiffs did not prevail against Fidelity and the ABB Defendants on any common legal theories, and the Defendants did not retain common counsel. *See infra* at 16-17.

under a collective bargaining agreement. *See* 512 F.3d 555, 558-59 (9th Cir. 2008). After granting summary judgment to the plaintiffs, the district court held that attorneys' fees could be awarded against both defendants (even though the employer had since entered bankruptcy), and that the fees should be assessed jointly. *See United Steel Workers v. ASARCO,* No. CV 04-10, 2008 WL 3540152, at *1 (D. Ariz. Aug. 12, 2008). The court reasoned that a joint award was warranted because the claims underlying the grievance were based on common facts and legal theories involving both defendants, and both defendants used the same law firm and caused the legal costs collectively. *See id.*[6] The *United Steel Workers* court certainly did not have occasion to test the propriety of a joint fee award in a case involving distinct claims and damages awards.

B. The Civil Rights Cases Cited By Plaintiffs Are Inapplicable And Do Not Support Them In Any Event.

Plaintiffs purport to rely on two civil rights cases to support their argument for joint fee liability. But the Eighth Circuit has unambiguously distinguished ERISA § 502(g)(1) from the civil rights fee-shifting statute, 42 U.S.C. § 1988, holding that the two provisions should not be interpreted in tandem because they protect very different interests. *Martin*, 299 F.3d at 970-71. Whereas § 1988 vindicates "constitutionally-based dignitary and individual economic interests [that] are uniquely important," ERISA § 502(g)(1) is concerned with "statutorily-created economic interests." *Id.* at 971. Courts including this one have thus recognized time and again that "ERISA does not closely correspond with the fee-shifting scheme in the civil rights

[6] While the court also suggested that joint and several liability for fees is the "normal rule," 2008 WL 3540152, at *1, the rule in the Eighth Circuit is clearly to the contrary—the Eighth Circuit has limited that norm to costs. *See infra* at 17 n.7. In any event, the authorities cited by the *United Steel Workers* court for this purported rule cast some doubt on its accuracy even in the jurisdiction of decision. The cited Wright & Miller provision discusses apportionment of *costs* only, and the cited case addressed an award of fees under the fee-shifting provision of the Federal Communications Act, 47 U.S.C. § 605. *See* 10 Wright & Miller, *Federal Practice & Procedure* § 2668 n.31 (3d ed. 2008); *Cmty. Television Servs. v. Caruso*, 284 F.3d 430, 436-37 (2d Cir. 2002).

statutes." *Hiltibran v. Levy*, No. 10-4185, 2011 U.S. Dist. LEXIS 121413, at *7-*8 (W.D. Mo. Oct. 20, 2011) (quotation omitted). Plaintiffs' reliance on civil rights precedents is therefore misplaced.

In any event, the civil rights cases cited by Plaintiffs do not help them, because they likewise involved unitary injuries jointly caused by the defendants. *Walker v. U.S. Dep't of HUD*, for example, involved "joint wrongdoer[s]" and a "single indivisible" constitutional injury, and the court acknowledged that it would be an *abuse of discretion* to impose joint fee liability if the injuries instead were "personal, individual, and discrete." 99 F.3d 761, 772-73 (5th Cir. 1996) (quoting *Dean v. Gladney*, 621 F.2d 1331, 1339 (5th Cir. 1980)). In *Herbst v. Ryan*, the court *rejected* the plaintiffs' request for joint fee liability *notwithstanding the indivisible injury* because of the different roles of the defendants. *See* 90 F.3d 1300, 1305 (7th Cir. 1996) (noting that a court may "hold all defendants jointly and severally liable for attorneys' fees in cases in which two or more defendants *actively participated in a constitutional violation*" (emphasis added)). The Seventh Circuit noted that "joint and several liability is not appropriate in every case involving an indivisible injury," and stressed that joint fee liability must be used "consistently with the preexisting background of substantive liability rules." *Id.*

Moreover, even in civil rights cases involving joint violations, joint fee liability does not necessarily follow. *See Walker*, 99 F.3d at 773; *Herbst*, 90 F.3d at 1305. Rather, joint fee liability is but one of the modes of possible fee apportionment available for courts to choose from depending on the circumstances. Thus, in civil rights cases the Eighth Circuit has apportioned fee liability notwithstanding a common core violation. *See, e.g.*, *Hendrickson*, 934 F.2d at 164 (apportioning fees based on relative fault when time spent on respective claims could not be easily differentiated); *Jenkins v. Missouri*, 838 F.2d 260, 266 (8th Cir. 1988) (affirming allocation of fees among the defendants based in part on "the defendants' relative degrees of culpability" for a constitutional violation), *aff'd*, 491 U.S. 274 (1989); *Miller v. Moore*, 169 F.3d 1119, 1126 (8th Cir. 1999) (holding that "the district court should have taken into account 'the defendants' relative degrees of culpability'").

Plaintiffs' effort to extrapolate from the civil rights precedents is fruitless. The cases are not simply irrelevant, but also show the error of imposing joint liability in a case like this one, involving distinct claims, injuries, and fault.

C. Defendants' Joint Defense Arrangement Does Not Support Holding Them Jointly Liable For Fees.

Plaintiffs suggest that the mere fact that Defendants presented a "joint defense" on certain issues justifies joint fee liability. Mem. at 24. They offer no precedent for this suggestion, however, and it should be rejected here, where each group of Defendants had distinct defenses—including the fiduciary status defenses on which Fidelity was successful—and each Defendant group retained separate law firms to safeguard their divergent defenses. *Compare United Steel Workers*, 2008 WL 3540152, at *1 (imposing joint fee liability where the defendants used the same law firm); *Fenster*, 301 F.3d at 860 (noting that ERISA parties used the same lawyer in imposing joint fee liability). Moreover, much of the coordination in which Defendants engaged resulted from Fidelity's compliance with the Court's trial and case management orders, which required Defendants to share trial time and briefing pages. *See* Minute Sheet (Dec. 28, 2009) [Dkt. #493]; Trial Tr. 3857-58. Fidelity's compliance with those orders should not serve as a basis for the imposition of joint and several fee liability.

To be sure, Fidelity and the ABB Defendants advanced some of the same arguments in response to Plaintiffs' claims that they each committed breaches. *See* Mem. at 24-25. Yet having wrongly attributed to Fidelity fiduciary roles that belonged exclusively to others, Plaintiffs should not be able to premise joint fee liability on the theory that Fidelity—*in addition* to successfully establishing that it had no fiduciary status for purposes of Plaintiffs' fee claims—*also* was compelled to question Plaintiffs' theories of breach at trial. It would be illogical and inequitable to hold Fidelity jointly and severally liable for fees simply because Plaintiffs made inaccurate claims about Fidelity's role in the challenged conduct.

* * *

For the foregoing reasons, Plaintiffs' demand that the full measure of their fees and costs should be shifted jointly and severally to Fidelity must be rejected.[7]

CONCLUSION

The Fidelity Defendants respectfully request that if the Court shifts fees and costs to Fidelity at all, the award should be proportionate to Plaintiffs' narrow success against Fidelity on a single discrete claim representing a small fraction of their total claimed and awarded damages. In addition, any award should be based on an accurate lodestar, as developed in the ABB Defendants' separate opposition memorandum.

[7] Plaintiffs concede that Eighth Circuit precedent squarely forecloses shifting the bulk of their claimed costs to Defendants. Mem. at 24. The Court should also reject Plaintiffs' plea for joint cost liability as to the $349,078.78 they do seek to shift. While the Eighth Circuit has stated that in some circumstances "[j]oint and several liability for costs is the general rule," *Concord Boat Corp. v. Brunswick Corp.*, 309 F.3d 494, 497 (8th Cir. 2002), ERISA has its own fee-shifting provision, § 502(g), and its text strongly suggests that the Court's allocation of costs should follow its determination of fee responsibility. *See* 29 U.S.C. § 1132(g)(1) ("the court in its discretion may allow a reasonable attorney's fee *and costs* of action to either party" (emphasis added)).

Even if the joint cost liability norm could apply, it should not apply here because "equity otherwise dictates." *Concord Boat Corp.*, 309 F.3d at 497. Joint cost liability is not appropriate where "portions of a suit are not fairly attributable to other parties." *White v. McKinley*, No. 05-0203, 2009 WL 813372, at *10 (W.D. Mo. Mar. 26, 2009). As shown above, costs associated with Plaintiffs' unsuccessful claims against Fidelity and their wholly distinct successful claims against the ABB Defendants are not "fairly attributable" to Fidelity. Plaintiffs' application discloses costs that are plainly unrelated to the float claim. *See, e.g.*, Lea Decl. Exh. 3 (claiming expenses for depositions of witnesses who did not testify as to any issue related to float).

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Respectfully submitted,

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