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Defined Benefit Plan Litigation: Emerging Strategies to Challenge Pension Plan Investments

Avoiding and Defending Breach of Fiduciary Duty Claims for Pension Investment and Other DB Plan Decisions

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THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL PALMASON, Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. WEYERHAEUSER COMPANY, WEYERHAEUSER ASSET MANAGEMENT LLC, MORGAN STANLEY, NORTHWATER CAPITAL MANAGEMENT, INC., PATRICIA M. BEDIENT, SALIM SHARIFF, RICHARD J. TAGGART AND JOHN AND JANE DOES 1-20, Defendants.	No. 2:11-cv-00695 RSL **WEYERHAEUSER DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT** **NOTE ON MOTION CALENDAR: Friday, September 23, 2011** **ORAL ARGUMENT REQUESTED**

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I. INTRODUCTION

Plaintiff Michael Palmason is a participant in a defined benefit pension plan sponsored by Weyerhaeuser Company. In this type of pension plan, the company guarantees the payment of specific pension benefits to its employee-participants. Thus, in the retirement plans at issue, Weyerhaeuser – not its employees – assumes the risk of loss on investments made by the plans. If the investment returns are insufficient to meet pension obligations, Weyerhaeuser must cover any underfunding.

Plaintiff contends that Weyerhaeuser breached its fiduciary duties by assuming too much risk in the plans' investments. However, Plaintiff does not (and cannot) allege that Weyerhaeuser failed to pay any benefit owed to him or any other participant, that the plans' assets have ever fallen short of ERISA funding requirements, or that Weyerhaeuser could not satisfy its guarantee of benefits in any event. Indeed, the documents incorporated into the Complaint demonstrate that Weyerhaeuser's investment strategy – which has been in place for over twenty-six years – has been very successful, and that the plans are overfunded under ERISA.

Plaintiff's Complaint fails to plead a viable claim against Defendants Weyerhaeuser, Weyerhaeuser Asset Management LLC ("WAM"), Patricia M. Bedient, Salim Shariff and Richard J. Taggart (collectively, the "Weyerhaeuser Defendants"). The Weyerhaeuser Defendants hereby move to dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

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II. FACTUAL BACKGROUND

A. OVERVIEW OF THE COMPLAINT.

As set forth in the Complaint and its incorporated materials, over twenty-six years ago, the Weyerhaeuser Investment Committee, with the help of expert analysis and extensive research, adopted a sophisticated investment strategy for its defined benefit pension plans. These plans include the Weyerhaeuser Retirement Plan for Salaried Employees (the "Salaried Plan") and the Weyerhaeuser Retirement Plan for Hourly Employees (the "Hourly Plan") (together the "Plans"). (*See* Complaint, filed Apr. 25, 2011 (hereinafter "Compl.") ¶ 72.) Effective December 31, 2010, the Salaried Plan and the Hourly Plan merged, creating the Weyerhaeuser Pension Plan (the "Pension Plan"). (Compl. ¶ 1 n.1.)

Weyerhaeuser's investment strategy, aimed at exploiting market inefficiencies, has generated impressive returns over the last twenty-six years, dwarfing the performance of peer plans and outperforming the market. Given the resounding success of this approach, the Investment Committee continues to invest the Plans' assets according to this strategy. As a result of the successful investment strategy and Company contributions, the Plans have been consistently overfunded, meaning that their assets exceed their liabilities, as determined under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. The Plans have paid full benefits to participants, even amidst the severe economic recession that began in 2008 in the United States.

Defined benefit pension plans are regulated by ERISA, which through enforcement by the Department of Labor ("DOL") and the Pension Benefit Guaranty Corporation ("PBGC") protects plan participants. Central to the regulatory scheme is Form 5500, whereby pension plans disclose important financial, funding, and tax-related information to participants and

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beneficiaries, as well as the DOL and other government agencies. *See* U.S. Dep't of Labor, Employee Benefits Security Admin., Form 5500 Series, *available at* http://www.dol.gov/ebsa/5500main.html. Forms 5500 (e.g., Compl. ¶¶ 2, 11) ensure that employee benefit plans are managed in accordance with certain prescribed standards and that participants and beneficiaries, as well as regulators, have access to sufficient information to determine whether benefits are protected. Information reported on Form 5500 includes the plan's funded status, as determined by actuarial standards prescribed by the statute and its regulations. Notably, Congress amended ERISA's minimum funding requirements when it passed the Pension Protection Act of 2006 ("PPA"), Pub. L. No. 109-280, 120 Stat. 780 (codified in scattered sections of 29 U.S.C.). In doing so, Congress deliberately struck a balance between protecting employees' retirement benefits on the one hand and, on the other hand, shielding companies offering such plans from overly stringent funding requirements that would discourage companies from sponsoring such plans. The result – clearly defined standards on which pension plan sponsors, participants and government regulators can rely – serves both interests Congress sought to protect.

Mr. Palmason, a former employee of Weyerhaeuser, alleges that he is a participant in the Salaried Plan and is entitled to receive benefits when he turns fifty-five based on his twelve years of Weyerhaeuser service. Plaintiff has not yet reached retirement age and, as such, his benefits are not yet payable. Nonetheless, he brings this action alleging that defendants breached their fiduciary duties under ERISA. Plaintiff generally contends that the Weyerhaeuser Defendants violated their fiduciary duties by employing a risky investment strategy relying on "hedge funds" and "private equity" investments, which, he speculates, may jeopardize participants' benefits at some point in the future. To support his theory,

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Mr. Palmason focuses on only the twelve-month period from December 2007 to December 2008, and the corresponding reduction in value of the Plans' assets, when the world economy faced unprecedented challenges. Plaintiff ignores entirely the Company's duty to pay the benefits in the event that the Plans' assets somehow fall short.

Plaintiff's Complaint fails to state a cognizable legal claim. First, Plaintiff has suffered no injury and lacks standing to sue. The Plans remained fully funded, and were in fact *overfunded* for the entire proposed class period. Plaintiff's claim is based on a mistaken reliance on the Company's Form 10-K Annual Report to the Securities and Exchange Commission ("SEC"). The SEC's financial reporting standards have no bearing on the duties of fiduciaries under ERISA. Rather, the Forms 5500 demonstrate that the Plans were at all times fully funded. As a result, Mr. Palmason's alleged injury – risk of loss to his retirement benefits – is entirely speculative, and precludes a finding of constitutional standing at the threshold.

Moreover, Plaintiff cannot and does not allege that any of the Plans' investments were substantively imprudent (a discrete causation inquiry under ERISA). Mr. Palmason ignores the long-term nature of pension plan investments, and focuses instead on the temporary drop in the value of plan assets coinciding with the precipitous decline of the global economy. He overlooks the fact that the alleged drop in value in this one-year period – forty-one percent – largely mirrors the movement of the S&P 500 for the same brief period, demonstrating that the Plans' investments moved in tandem with the market.

Turning a blind eye to the documented returns on the Plans' investments, Mr. Palmason appears to claim that hedge funds, private equity, and so-called "alternative

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1 investments" are inherently imprudent, or that the number of investments alone establishes
2 imprudence. Neither assertion states a cognizable claim.
3
4 **B. WEYERHAEUSER COMPANY.**

5 Weyerhaeuser is one of the world's largest and most successful forest products
6 companies. Recently reorganized into a real estate investment trust, Weyerhaeuser grows and
7 harvests trees, owns more than six million acres of forestland, and makes a range of wood
8 products, including softwood lumber, engineered building materials, industrial hardwood
9 products, cellulose fibers and packaging materials. The Company has business operations in
10 ten countries, and employs approximately 14,250 employees. *See* Weyerhaeuser Company
11 Annual Report (Form 10-K), at 1, 3, 8, 12, 14 (Feb. 25, 2011) (hereinafter, "2010 10-K").[1]
12 Weyerhaeuser is a profitable enterprise. In 2010, the Company generated $6.6 billion in net
13 sales and $468 million in operating income, resulting in net earnings of $1.28 billion or
14 $4.00 per share. *Id.* at 36. Currently, Weyerhaeuser's market capitalization is more than
15 $11 billion.[2]
16
17
18 **C. THE WEYERHAEUSER PENSION PLANS.**

19 The Weyerhaeuser Pension Plans are "employee pension benefit plans" within the
20 meaning of ERISA Section 3(2)(A), 29 U.S.C. § 1002(2)(A), and, more specifically,
21 noncontributory "defined benefit plans" within the meaning of ERISA Section 3(35),
22 29 U.S.C. § 1002(35). (Compl. ¶ 28.) As such, the Plans provide specified retirement
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[1] Plaintiff relies heavily on Weyerhaeuser's SEC filings. (*See* Compl. ¶¶ 1 n.1, 5 n.4, 11, 77, 100, 101 n.10, 105, 119 n.13, 120, 121 n.14.) As a result, the Court may properly consider them in determining whether the allegations of the Complaint state a claim for relief. *See Concept Dorssers v. Pac. N.W. Title Ins. Co., Inc.*, No. C09-1692, 2010 WL 1141462, at *1 (W.D. Wash. Mar. 19, 2010). These SEC filings, and other documents incorporated into the Complaint, are attached to the Weyerhaeuser Defendants' Request for Judicial Notice ("RJN"), filed with this motion.

[2] *See* Bloomberg Market Snapshot, *available at* http://www.bloomberg.com/apps/quote?ticker=WY:US. Market capitalization refers to the total value of all shares outstanding at their current market price.

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1 benefits in the form of a life annuity to eligible Weyerhaeuser employees and former
2 employees. (Compl. ¶¶ 35-36.) Unlike participants in 401(k) defined contribution savings
3 plans, participants do not make contributions to the Plans, do not select the Plans'
4 investments, and do not have individual Plan accounts. Moreover, participants' benefits are
5 not based on the performance of the Plans' investments. Weyerhaeuser pays the entire cost of
6 their benefits by making contributions to a Master Retirement Trust ("Master Trust")
7 maintained for the benefit of the Plans, and benefits are based on a formula that does not
8 depend on the investment performance of the Plans' assets. (Compl. ¶¶ 2, 34.) If the Plans'
9 assets somehow prove insufficient to pay benefits to participants, Weyerhaeuser assumes that
10 obligation. There is no allegation in the Complaint, nor could there be, that Weyerhaeuser
11 could not satisfy the guarantee.

D. WEYERHAEUSER SUCCESSFULLY INVESTS MASTER TRUST ASSETS.

The Weyerhaeuser Investment Committee is charged with management and investment of the Plans' assets for the benefit of participants. (Compl. ¶¶ 54, 61.) Pursuant to that authority, the Investment Committee developed and implemented an Investment Policy that has two critical components.

First, Weyerhaeuser invests directly in a diversified mix of investments, including hedge funds, private equity, and real estate funds. 2010 10-K at 76. Second, the Plans hold indirect investments, known as derivatives, to promote the effective use of capital, increase returns and manage associated risk. *Id.* To further manage risk, Weyerhaeuser also diversifies investment managers and strategies, uses limited-liability vehicles, and places limits on the percentage of Master Trust assets that can be invested in certain categories. *Id.* at 77.

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This Investment Policy has been in place for more than twenty-six years. *Id.* at 82. (*See also* Compl. ¶¶ 5, 66, 72, 77.) According to Weyerhaeuser's 2010 Form 10-K, cited in the Complaint, the Investment Policy has achieved a net compound annual rate of return of *15.3%* since its inception. 2010 10-K at 82. This means that $100 invested in 1985 would have grown to $4,051 by 2010. Over that same twenty-six-year period, the S&P 500 achieved a compound annual rate of return of just 10.6%.[3] That is, $100 invested in the S&P 500 would have grown to only $1,424 over the same twenty-six-year time period. According to the DOL, *the average private defined benefit pension plan only returned approximately 9.3% during roughly the same period*. *See* U.S. Dep't of Labor Private Pension Plan Bulletin Historical Tables and Graphs, February 2009, *available at* http://www.dol.gov/ebsa/pdf/1975-2006historicaltables.pdf.

E. WEYERHAEUSER'S PLANS ARE FULLY FUNDED UNDER ERISA STANDARDS.

The funded status of a plan under ERISA is a measure of the difference between the present value of the plan's benefit obligations and the actuarial value of the plan's assets. 29 U.S.C. § 1083(a), (d). The Plans' funded status is reported on Schedule B to the Plans' annual Forms 5500, the actuarial statement required under ERISA Section 104(d), 29 U.S.C. § 1024(d). Among other things, Schedule B sets forth the amount of any funding shortfall under ERISA's minimum funding standards, and any contribution required by the employer.

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[3] Bloomberg Professional Service, S&P 500 Total Return Analysis, available by subscription, attached as Exhibit P to the RJN.

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29 U.S.C. § 1023(d). According to the Plans' Forms 5500,[4] each Plan was more than 100% funded in plan years 2006 through 2009:[5]

Chart A - Funding Target Attainment Percentage of the Hourly Plan

(in millions as of January 1)	2009	2008	2007	2006
Actuarial value of Plan assets	2,088	3,048	2,744	2,339
Funding target	1,475	1,841	1,893	1,776
Surplus (shortfall)	613	1,207	851	563
Funding target attainment (assets/funding target)	141.6%	165.6%	145.0%	131.7%
Minimum funding requirement for plan year	0	0	0	0

Chart B - Funding Target Attainment Percentage of the Salaried Plan

(in millions as of January 1)	2009	2008	2007	2006
Actuarial value of Plan assets	1,607	2,573	2,460	2,160
Funding target	1,493	1,926	1,908	1,867
Surplus (shortfall)	114	647	552	293
Funding target attainment (assets/funding target)	107.6%	133.6%	128.9%	115.7%
Minimum funding requirement for plan year	0	0	0	0

F. THE COMPLAINT'S BREACH OF FIDUCIARY DUTY CLAIMS.

Mr. Palmason filed his Complaint on April 25, 2011, alleging fiduciary breach claims against the Weyerhaeuser Defendants, Morgan Stanley, and Northwater Capital Management,

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[4] The Plans' Forms 5500 were filed with the Department of Labor and have been incorporated by reference into the Complaint. (Compl. ¶¶ 2, 11, 70, 112 n.12.) The Plans' Forms 5500 for the plan years 2006 through 2009 are attached to the RJN.

[5] For plan years 2008 and 2009, the actuarial values of Plan assets, funding targets, funding target attainment percentages and minimum funding requirements were taken from Schedule SB to the Plans' Forms 5500 (lines 2b, 3d(2), 15 and 34) for those plan years. The Forms 5500 for plan years 2006 and 2007 were prepared before the PPA went into effect. Accordingly, the actuarial values of Plan assets, funding targets, funding target attainment percentages and minimum funding requirements presented for those plan years correspond to the actuarial value of assets, current liability, "Gateway" percentage and contribution necessary to avoid an accumulated funding deficiency (lines 1b(2), 1d(2)(a), 12a and 10, respectively). All figures have been rounded to the nearest million or tenth of a percent. The surplus (shortfall) represents the difference between the actuarial value of Plan assets and the funding target. The funding target equals the present value of all Plan benefits accrued or earned as of the beginning of the plan year. *See* 29 U.S.C. § 1083(d). Forms 5500 for the 2010 plan year have not yet been filed.

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1 Inc. ("Northwater"). Specifically, Count I alleges that the Weyerhaeuser Defendants
2 breached fiduciary duties set forth in ERISA Section 404, 29 U.S.C. § 1104, including their
3 duties of prudence, diversification, and loyalty. (Compl. ¶ 136(a-c).) Count II alleges that
4 WAM, Morgan Stanley, and Northwater breached their duties of prudence by failing to
5 adhere to the Investment Policy, chronically miscalculating the portfolio's beta, investing in
6 an "imprudently large number of alternative investments (330)," and failing to perform
7 adequate due diligence. (Compl. ¶ 143(a-d).) Finally, Counts III and IV assert derivative
8 claims that the Weyerhaeuser Defendants breached their fiduciary obligation to monitor the
9 Investment Manager Defendants and that all Defendants are liable for the alleged breaches as
10 co-fiduciaries. (Compl. ¶¶ 151-59.)

11 **III. ARGUMENT**

12 Pursuant to Rule 12(b)(1), a court must dismiss a claim when the plaintiff fails to
13 establish that he has constitutional standing to bring the claim. *Schmier v. U.S. Ct. App. for*
14 *the Ninth Cir.*, 279 F.3d 817, 821-22 (9th Cir. 2002). In fact, the Court must *sua sponte*
15 dismiss a claim if it "determines at any time that it lacks subject matter jurisdiction."
16 Fed. R. Civ. P. 12(h)(3). Plaintiff bears the burden of establishing that he has constitutional
17 standing. *See, e.g.*, *Impress Commc'ns v. Unumprovident Corp.*, 335 F. Supp. 2d 1053, 1061
18 (C.D. Cal. 2003).

19 A court reviewing a complaint under Rule 12(b)(6) must "accept factual allegations in
20 the complaint as true and construe the pleadings in the light most favorable to the non-moving
21 party." *Fayer v. Vaughn*, -- F.3d --, No. 10-15520, 2011 WL 1663595, at * 2 (9th Cir. May 4,
22 2011). Nevertheless, a court will dismiss any claim that fails to plead sufficiently all required
23 elements of a cause of action. *See id.* But the "grounds" of a plaintiff's "entitlement to relief"

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must include "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[T]he non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). Accordingly, the court may properly "insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed," *Twombly*, 550 U.S. at 558, and when the allegations "could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.* (citation omitted) .

A. ERISA ACCOMMODATES A VARIETY OF INVESTMENTS, AND IN A DEFINED BENEFIT PLAN THE EMPLOYER BEARS THE INVESTMENT RISK.

ERISA was adopted to regulate employee benefit plans and protect the assets invested in such plans. 29 U.S.C. § 1302(a). Title I of ERISA was enacted in 1974 to address concerns that private pension plan funds were being mismanaged and abused. It assigns to plan fiduciaries "a number of detailed duties and responsibilities, which include 'the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest.'" *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251-52 (1993) (citation omitted). ERISA accommodates a variety of investments and investment strategies, which represents a departure from the more stringent common law of trusts. Congress chose not to impose rigid requirements such as the "legal lists" that limited permissible trust investments under English

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law and in some states.[6] Instead, ERISA codifies a flexible standard – the duty of prudence – focusing on the process of investing rather than specifying permissible investments. In accord with congressional intent, courts have held that "the prudence requirement is flexible, such that the adequacy of a fiduciary's independent investigation and ultimate investment selection is evaluated in light of the character and aims of the particular type of plan he serves." *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996).[7]

In a defined benefit pension plan, "[t]he asset pool may be funded by the employer, employee, or both, but 'the employer typically bears the entire investment risk and . . . must cover any underfunding' that might occur as a result of the plan's investments." *Hurlic v. S. Cal. Gas Co.*, 539 F.3d 1024, 1029 (9th Cir. 2008) (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999)). Because the plan sponsor guarantees the benefits, participants, like Mr. Palmason, have a limited interest in the underlying assets.

As the Second Circuit explained in *Lonecke v. Citigroup Pension Plan*, 584 F.3d 457, 462 (2d Cir. 2009), investment risk in such circumstances is borne solely by the employer:

> In a defined contribution plan, the employee bears the risks, while in a defined benefit plan, "the employer typically bears the entire investment risk." *Hughes Aircraft*, 525 U.S. at 439. In a defined benefit plan, the employer is obligated to "cover any underfunding as the result of a shortfall that may occur from the plan's investments." *Id.* And, if a defined benefit plan is overfunded, the employer "may reduce or suspend [its] contributions." *Id.* at 440.

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[6] *See* Howard R. Williams, *The Prudent Man Rule of the Pension Reform Act of 1974*, 31 Bus. Lawyer 99, 100 (1975) (discussing rejection of the "legal list" rule in favor of the prudent fiduciary standard). Express limitations on investments in employer securities and employer real property, 29 U.S.C. § 1107, are exceptions that prove the general rule that ERISA does not impose per se limitations on plan investments.

[7] Title IV of ERISA establishes insurance for defined benefit pension plans and is administered by the PBGC. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 637 (1990).

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Mindful of the plan sponsor's responsibility for a plan's funded status and its shouldering of the investment risk, the Seventh Circuit similarly held:

> Misconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan. *It was that default risk that prompted Congress to require defined benefit plans (but not defined contribution plans) to satisfy complex minimum funding requirements*, and to make premium payments to the Pension Benefit Guaranty Corporation for plan termination insurance.

Spano v. The Boeing Co., 633 F.3d 574, 580 (7th Cir. 2011) (citing *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255-56 (2008)) (emphasis added).

Against this legal framework, Plaintiff asserts his claims for breach of ERISA's fiduciary duties. Plaintiff did not, and indeed cannot, plausibly allege: i) that the Plans failed to meet ERISA's minimum funding requirements; ii) that he or any participant has been denied a benefit under the Plans; iii) that the Plans' Investment Policy – the risks of which are borne by Weyerhaeuser – is objectively imprudent; or iv) that the Company – the guarantor of any benefits – was in danger of failing. As a result, this lawsuit should be dismissed.

B. PLAINTIFF HAS NOT BEEN INJURED AND LACKS STANDING TO BRING HIS CLAIMS.

Under Article III of the United States Constitution, this Court's jurisdiction extends only to "cases" and "controversies." U.S. Const. Art. III § 2. To establish a cognizable "case" or "controversy" within the meaning of Article III, a plaintiff must allege facts demonstrating a sufficiently personal stake in the outcome of the litigation to warrant the invocation of federal jurisdiction and to justify exercise of the court's remedial powers on his behalf. *Thomas v. Mundell*, 572 F.3d 756, 760 (9th Cir. 2009). To do so, the plaintiff must

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allege that he has "suffered an 'injury in fact.'" *Mayfield v. United States*, 599 F.3d 964, 969 (9th Cir. 2010) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Plaintiff has not suffered an "injury in fact" sufficient to establish an actual "case" or "controversy." The Complaint should be dismissed.

1. Plaintiff's Claimed Injury Is Speculative.

An "injury in fact" is the "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted). Accordingly, the mere theoretical possibility that challenged conduct might cause injury at some point in the future is not enough. *Mayfield*, 599 F.3d at 970 (holding that neither mere speculation nor a "subjective apprehension about future harm" will support standing) (internal quotations omitted). Instead, a plaintiff seeking to rely on some prospective injury must show a "concrete risk" or "credible threat" that the injury will in fact occur. *See Covington v. Jefferson County*, 358 F.3d 626, 638 (9th Cir. 2004). Importantly, the mere fact that ERISA permits plan participants to recover losses on behalf of a benefit plan does not relieve them of the obligation to demonstrate an individual injury sufficient to confer constitutional standing. *See Glanton ex rel. ALCOA Prescription Drug Plan v. Advance PCS Inc.*, 465 F.3d 1123, 1127 (9th Cir. 2006).

Mr. Palmason alleges that the Weyerhaeuser Defendants breached their fiduciary duties by implementing an excessively risky investment strategy that caused the Plans to become underfunded, which he says injured him by increasing the risk to his future pension benefits. (*See* Compl. ¶¶ 5, 116, 119, 121 n.14, 138, 145, 151.) However, the materials incorporated into the Complaint demonstrate that the Plans were overfunded throughout the

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1 proposed class period. Speculation regarding future harm to pension benefits is not a
2 cognizable injury for standing purposes.
3 In *McDermott v. Potter*, No. C09-0776, 2009 WL 2971585 (W.D. Wash. Sept. 11,
4 2009) (Lasnik, J.), the plaintiff claimed that the U.S. Postal Service violated ERISA by
5 closing a mail processing facility without following certain procedures. *Id.* at *2. The
6 government moved to dismiss on the ground that he lacked standing. In response, the plaintiff
7 argued that the potential impact of the Postal Service's actions on his retirement benefits was
8 a cognizable "injury in fact." Specifically, he claimed that the Postal Service was depleting
9 its pension fund by allowing some of its employees to retire early, thereby putting his
10 retirement benefits at risk. *Id.* This Court rejected his argument, holding that the asserted
11 injury was "nothing more than unsupported speculation, which is insufficient to establish
12 standing." *Id.* According to the Court, a plaintiff "must show a 'credible threat' that he will
13 suffer the harm he alleges," a standard that cannot be met on the basis of "future
14 contingencies that may or may not occur." *Id.* As a result, plaintiff's alleged injury was "too
15 hypothetical to confer standing." *Id.* ; *see also McDermott v. U.S. Postal Serv.*, No. C05-
16 0860, 2006 WL 2473493, at *2 (W.D. Wash. Aug. 28, 2006) (Lasnik, J.).
17 The same analysis is applicable to this case. As in *McDermott*, Plaintiff does not
18 claim that he has suffered an actual loss, but that the Weyerhaeuser Defendants' actions have
19 put his pension benefits at greater risk, which may cause him to suffer an indeterminate injury
20 at some unknown point in the future. (*See* Compl. ¶¶ 5, 16, 119, 122.) Whether he will in
21 fact suffer such an injury depends on a series of "future contingencies that may or may not
22 occur." *McDermott*, 2009 WL 2971585, at *2. Indeed, Mr. Palmason's claimed injury is
23 contingent upon his benefits becoming payable under the Plan, and the Plan thereafter
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becoming unable to pay those benefits. While the Plans' overfunded status and Weyerhaeuser's viability cannot seriously be challenged, neither fact is necessary for dismissal under the *McDermott* opinion, given this Court's ruling that the claims only become actionable upon the passage of future events. As a matter of law, Plaintiff's asserted injury is "too hypothetical to support standing." *Id. See also Bova v. City of Medford*, 564 F.3d 1093, 1097 (9th Cir. 2009) ("[U]nless and until contingent events occur, [no plaintiff seeking retirement health benefits] will have suffered an injury that is concrete and particularized enough to survive the standing/ripeness inquiry.").[8]

2. The Plans Were Overfunded Throughout the Proposed Class Period.

As noted, the crux of Plaintiff's Complaint is that the investment strategy for the Plans led to "losses" of $2.4 billion in 2008, which he contends caused the Plans to become underfunded by $450 million in 2008, $600 million in 2009 and $494 million in 2010. (Compl. ¶¶ 4-5, 108, 113, 117, 119.) To support these allegations, Plaintiff relies on Weyerhaeuser's SEC filings, rather than the Forms 5500 that are filed with the DOL and are publicly available. (*See, e.g.*, *id.* ¶¶ 5 n.4, 119 n.13, 121 n.14.) The SEC filings report the funded status of all of the Company's pension plans collectively, including its nonqualified domestic pension plans and its Canadian registered and nonregistered pension plans, the

[8] Plaintiff's alleged injury is also not "likely to be redressed by a favorable decision." *Mayfield v. United States,* 599 F.3d 964, 969 (9th Cir. 2010). Plaintiff claims that the Weyerhaeuser Defendants are liable "to restore to the Plans the losses suffered by the Plans as a result of their breaches and to cause the Plans to again be fully funded to satisfy the accumulated benefit obligations to the participants of the Plan[s]." (Compl. ¶¶ 138, 145, 151.) It is well settled that "recovery for a violation of 29 U.S.C. § 1109 for breach of fiduciary duty inures to the benefit of the plan as a whole, and not to an individual beneficiary." *Paulsen v. CNF Inc.,* 559 F.3d 1061, 1074 (9th Cir. 2009) (citing *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-42 (1985)). Because Weyerhaeuser is under no obligation to pay Plan participants more than their "accrued benefits," Plaintiff has "no stake in the recovery and cannot satisfy the redressibility requirement of constitutional standing." *Id.*

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assets of which are held in a separate Canadian trust. *See, e.g.*, Weyerhaeuser Company Annual Report (Form 10-K), at 81-84 (Feb. 27, 2009) (describing the types of pension plans Weyerhaeuser sponsors and reporting the funded status of those plans collectively). Those filings say nothing about the funded status of any individual plan, let alone bear on the Plans' funded status as measured under ERISA.

For both compliance and tax purposes, the funded status of a single-employer defined benefit pension plan is determined according to the minimum funding standards set forth in ERISA Section 303, 29 U.S.C. § 1083. *See Cress v. Wilson*, No. 06 Civ. 2712, 2008 WL 5397580, at *9 (S.D.N.Y. Dec. 29, 2008) (the existence of a funding deficiency under ERISA's minimum funding standards is "*the exclusive way*" to determine whether a pension plan was underfunded) (emphasis added). Pursuant to ERISA Section 104, 29 U.S.C. § 1024, a plan's compliance with those standards is reported to the plan participants, the DOL, the Internal Revenue Service and the PBGC annually on its Form 5500. As the DOL has explained, Form 5500 is "the principal source of information and data available to [those agencies] concerning the operations, funding, and investments" of defined benefit pension plans. 72 Fed. Reg. 64,731, 64,731 (Nov. 16, 2007).

Schedule B of Form 5500 was "designed to allow the Agencies to evaluate the plan's compliance with the funding requirements" of ERISA, as amended by the PPA. *Id.* at 64,753; 29 U.S.C. § 1023(d) (requiring plan's actuary to report the amount of any funding deficiency as well as the amount of any required minimum contribution by the employer). Specifically, Schedule B includes both the actuarial value of the plan's assets and the plan's "funding target," defined as "the present value of all benefits accrued or earned under the plan as of the beginning of the plan year." 29 U.S.C. § 1083(d)(1); *see also supra* Charts A, B & n.1.

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Dividing the plan's assets by its funding target yields the "funding target attainment percentage," a measure of how well the plan is funded. 28 U.S.C. § 1083(d)(2). If the funding target attainment percentage is less than 100%, the plan is considered to have a funding shortfall and the employer may be required to make a contribution. 29 U.S.C. § 1083(a).[9]

Forms 5500 for the Plans at issue in this case unequivocally demonstrate that they were both fully funded under ERISA every year during the proposed class period. *See supra* Charts A, B. In fact, the Plans were significantly overfunded, even as of January 1, 2009, when they enjoyed a combined surplus of more than $720 million over their funding targets. *See id.* Contrary to the central premise of the Complaint, neither of *these* Plans was underfunded within the meaning of ERISA at any time during the class period.

3. Because The Plans Were Overfunded, Plaintiff Lacks Standing.

The fact that Weyerhaeuser's viability is not challenged is alone sufficient to preclude a finding that Plaintiff's benefits are at "concrete risk" or subject to a "credible threat." *Covington v. Jefferson County*, 358 F.3d 626, 638 (9th Cir. 2004). Plaintiff cannot allege an "injury in fact" sufficient to give him constitutional standing for the additional reason that the Plans are overfunded. Indeed, because defined benefit plan participants are entitled only to the benefits they have accrued under the plan's terms, they do not have standing to secure by judgment in this lawsuit additional plan assets in excess of those accrued benefits.

The Supreme Court's opinion in *Hughes Aircraft*, 525 U.S. 432, sets forth the limits on participants' interests in a pension plan's assets:

[9] *See also* Joint Committee on Taxation, Technical Explanation of H.R. 4, The "Pension Protection Act of 2006," as Passed by the House on July 28, 2006, and as Considered by the Senate on August 3, 2006, at 9-11 (Aug. 3, 2006), *available at* http://www.dol.gov/ebsa/pdf/x-38-06.pdf.

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> A defined benefit plan . . . consists of a general pool of assets rather than individual dedicated accounts. Such a plan, "as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment." The asset pool may be funded by employer or employee contributions, or a combination of both. But the employer typically bears the entire investment risk and – short of the consequences of plan termination – must cover any underfunding as a result of a shortfall that may occur from the plan's investments. Conversely, if the defined benefit plan is overfunded, the employer may reduce or suspend his contributions.
>
> The structure of a defined benefit plan reflects the risk borne by the employer. Given the employer's obligation to make up any shortfall, no plan member has a claim to any particular asset that composes a part of the plan's general asset pool. Instead, members have a right to a certain defined level of benefits, known as "accrued benefits." . . . . Since a decline in the value of a plan's assets does not alter accrued benefits, members . . . have no entitlement to share in a plan's surplus – even if it is partially attributable to the investment growth of their contributions.

Id. at 439-41 (internal citations omitted) (emphasis added). Relying on *Hughes*, the Eighth Circuit has twice held that pension plan participants do not have standing to recover losses to pension plan surplus.

In *Harley v. Minnesota Mining and Manufacturing Co.*, 284 F.3d 901 (8th Cir. 2002), pension plan participants claimed that the defendant company, 3M, failed to adequately investigate and monitor a $20 million investment in a hedge fund (one of the many investments held by the plan) that declared bankruptcy. Notwithstanding that loss, the plan remained overfunded, and the Eighth Circuit affirmed the district court's dismissal on standing grounds:

> [I]f plan assets are depleted but the remaining pool of assets is more than adequate to pay all accrued or accumulated benefits, then any loss is to plan surplus. As *Hughes Aircraft* made clear, plaintiffs as Plan beneficiaries have no claim or entitlement to its surplus. If the Plan is overfunded, 3M may reduce or suspend its contributions. If the Plan's surplus disappears, it is 3M's obligation to make up any underfunding with additional contributions. If the Plan terminates with a surplus, the surplus may be distributed to 3M. Thus, the

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> reality is that a relatively modest loss to Plan surplus is a loss only to 3M, the Plan's sponsor.

Id. at 906 (internal citations omitted).

Accordingly, in the face of evidence that "the ongoing Plan had a substantial surplus before and after the alleged breach and a financially sound settlor responsible for making up any future underfunding," the plaintiffs could not satisfy their burden to prove "an actual injury to themselves." *Id.* at 907-08. In fact, the actuarial value of the plan's assets exceeded its actuarial accrued liabilities (both as required by ERISA) before and in every year after the challenged investment. *Id.* at 908. Under these circumstances, the participants' rights under ERISA were "fully protected," and they lacked standing to sue. *Id.* at 907.

The Eighth Circuit reaffirmed *Harley* in *McCullough v. AEGON USA, Inc.*, 585 F.3d 1082, 1085 (8th Cir. 2009), holding, once again, that pension plan participants lacked standing to bring breach of fiduciary duty claims against fiduciaries of a plan that was "substantially overfunded." According to the court, "allowing participants in an overfunded plan to bring an action under § 1132(a)(2) would not advance ERISA's primary purpose of protecting individual pension rights, because the pension rights of such plaintiffs are 'fully protected,' and 'would if anything be adversely affected by subjecting the Plan and its fiduciaries to costly litigation.'" *Id.* at 1087 (internal citations omitted); *see also David v. Alphin*, No. 07-0011, 2008 WL 5244504, at *2 (W.D.N.C. Dec. 15, 2008) (participants lacked standing to sue fiduciaries of an overfunded pension plan where they failed to explain how the

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1 plan's allegedly excessive fees affect their benefits or how any recovery would result in
2 greater benefits).[10]
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4 As the Eighth Circuit recognized, ERISA's purposes would be ill served under
5 circumstances like those present here, where the Weyerhaeuser Plans have satisfied
6 Congress's carefully crafted minimum funding standards. Allowing participants to sue
7 employers and fiduciaries for "losses" to a plan that surpasses federal funding standards
8 would be inconsistent with the careful regulatory balance Congress has struck in ERISA.[11]
9 *Cf. Conkright v. Frommert*, 130 S. Ct. 1640, 1649 (2010) (courts applying ERISA have
10 sought to avoid "creat[ing] a system that is . . . so complex that administrative costs, or
11 litigation expenses, unduly discourage employers from offering [ERISA] plans in the first
12 place"). As the Supreme Court has further held in like circumstances, courts construing
13 ERISA duties should "not attempt to adjust the balance between those competing goals that
14 the text adopted by Congress has struck." *Mertens*, 508 U.S. at 263. Indeed, ERISA is "an
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[10] To the extent Plaintiff argues that Eighth Circuit authority requires a showing of both overfunding and plan sponsor viability for dismissal on standing grounds, the contention cannot be reconciled with Ninth Circuit case law. Plaintiff's inability to plead that the plan sponsor has not satisfied the minimum funding requirements *or* the plan sponsor's incapability to make good on its guarantee to pay benefits each alone compel immediate dismissal. In other words, regardless of the funding status of the Plans, Plaintiff cannot show a concrete risk or credible threat to his benefits if Weyerhaeuser's viability is unchallenged. *Covington v. Jefferson County*, 358 F.3d 626, 638 (9th Cir. 2004). Similarly, no such risks or threats arise if the Plans are adequately funded under ERISA sections 302 and 303, yet the Company's prospects are somehow in doubt.

[11] *See* Senate Proceedings and Debates, Pension Protection Act of 2006, 152 Cong. Rec. S8747-01, at S8747 (2006) (statement of Sen. Enzi) ("The new rules we craft should not be so draconian that they become the cause of more bankruptcies and pension plan terminations."); *id.* at S8760 (statement of Sen. Kohl) ("We must ensure that traditional pensions remain a viable option for companies and at the same time ensure that companies keep their promises . . . . *This compromise strikes the right balance*.") (emphasis added); *id.* (statement of Sen. Levin) (Congress must "encourage the recovery and strengthening, rather than the termination, of underfunded and vulnerable pension plans"); *id.* at S8762 (statement of Sen. Baucus) (the PPA "strikes a balance between getting plans funded and not forcing employers out of the defined benefit pension system"). Congress's concern was well founded. Traditional pension plans, long the mainstay of employee retirement income, have become exceedingly scarce. Indeed, between 1975 and 2009, the number of defined benefit plans in the United States declined by seventy-five percent. 2009 PBGC Pension Ins. Data Book 25 (2010) (reporting a decline from 112,000 plans to 27,650 plans), *available at* http://www.pbgc.gov/docs/2009databook.pdf.

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enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests – *not all in favor of potential plaintiffs*." *Id.* at 262 (emphasis added).

Here, the Plans' Forms 5500 demonstrate that they were substantially overfunded throughout the proposed class period. As in *Harley*, the actuarial value of each Plan's assets consistently exceeded its funding target by at least $100 million – and in most years by more than $500 million. *See supra* Charts A, B. Since neither Plan has ever had a funding shortfall under ERISA's minimum funding standards, any alleged losses attributable to the Weyerhaeuser Defendants' allegedly imprudent investment strategy were to the Plans' surplus, in which Mr. Palmason has no legal interest. As a result, Plaintiff cannot show that he has suffered a cognizable "injury in fact." He therefore lacks constitutional standing to bring this lawsuit, and the Court should dismiss the Complaint.

4. Plaintiff's Prudence Claim Fails Because Weyerhaeuser Satisfied ERISA's Funding Requirements.

The Supreme Court has recognized that ERISA reflects Congress's effort to accommodate at times competing interests and that some provisions protect plan sponsors and fiduciaries. As relevant here, Congress defined precisely ERISA's funding obligation as set forth in Sections 302 and 303, 29 U.S.C. §§ 1082 and 1083, and, despite the challenges that yielded the PPA, chose not to specify the types of investments that fiduciaries could employ to fund those benefits. Both the protections extended to fiduciaries and the certainty of the statutory obligations, including Sections 302 and 303, facilitate the voluntary offering of benefit plans. *Conkright*, 130 S. Ct. at 1649 (Congress chose to encourage employers to establish benefit plans voluntarily "by assuring a predictable set of liabilities, under uniform

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standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred."). As the legislative history accompanying the passage of the PPA specifically states, Congress was concerned that overly stringent funding standards would discourage the offering of or accelerate the termination of defined benefit pension plans, to the detriment of employees.

Despite the fact that Weyerhaeuser consistently satisfied the specific funding requirements of ERISA Sections 302 and 303, 29 U.S.C. §§ 1082 and 1083, Plaintiff invokes the general prudence requirements of ERISA Section 404(a), 29 U.S.C. § 1104(a), to argue that the use of alternative investments is per se imprudent and that a "remedial" payment is now owed the Plans, to address the "underfunding" he mistakenly gleans from SEC filings. The general prudence standards cannot augment the specific funding requirements and limitations of Sections 302 and 303. The Ninth Circuit has applied the fundamental principle of statutory construction to ERISA – a specific statutory provision should govern over the more general provision – and that rule applies with particular force here. *Trs. of the Amalgamated Ins. Fund v. Geltman Indus.*, 784 F.2d 926, 930 (9th Cir. 1986). The Supreme Court reached a similar conclusion, looking at two ERISA provisions set out in different sections of the statute. *Curtiss Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). The Supreme Court has "been especially 'reluctant to tamper with [the] enforcement scheme' embodied in the statute by extending remedies not specifically authorized by its text." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (quoting *Mertens*, 508 U.S. at 254).

Enacting the PPA's amendments to ERISA's minimum funding requirements in 2006, Congress reached a "difficult compromise," "striking [a] delicate balance" between ensuring

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1 the retirement benefits of American workers and protecting plans from termination and
2 corporate sponsors from bankruptcy. *See* 152 Cong. Rec. S8747-01 at S8759, S8760.
3 Expressly recognizing the danger more stringent funding standards would pose to
4 corporations (and the continued offering of these types of plans), Congress chose instead to
5 limit corporate funding obligations under ERISA. *Id.* at S8747.[12]
6
7 These express limitations on Weyerhaeuser's funding obligations preclude reliance on
8 the general prudence standards of Section 404(a) particularly where, as here, there can be no
9 doubt about the Company's ability to pay benefits should trust assets somehow fall short, and
10 the Complaint does not allege that Weyerhaeuser failed to satisfy ERISA's minimum funding
11 requirements.
12
13 ### C. PLAINTIFF FAILS TO STATE A PLAUSIBLE CLAIM FOR IMPRUDENT INVESTMENTS.
14
15 The Complaint should be dismissed for the additional reason that it does not and
16 cannot adequately allege that any of the Plans' investments were substantively imprudent. To
17 the contrary, Plaintiff makes vague and conclusory allegations relating to the Weyerhaeuser
18 Defendants' administration of the Plans. These allegations fail to satisfy the standards
19 established by the Supreme Court in *Twombly*, 550 U.S. 544, and *Ashcroft v. Iqbal*, 129 S. Ct.
20 1937 (2009).
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[12] Reductions to plan funding requirements in 2010 set forth in the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, Pub. L. 111–192, 124 Stat. 1280 (June 25, 2010), to specifically reduce plan sponsor burdens stemming from investment asset declines experienced in 2008 – the focus of Plaintiff's Complaint – conclusively demonstrate the exclusive nature of ERISA sections 302 and 303, and Plaintiff's mistaken reliance upon section 404(a). As explained in the Congressional Record, that legislation "provides temporary, targeted funding relief for single employer and multiemployer pension plans that suffered significant losses in asset value due to the steep market slide in 2008." 156 Cong. Rec. H4829-05, at H4839-40 (June 24, 2010). Congress carefully calibrated the funding obligations under Sections 302 and 303, taking into account the very economic slowdown precipitating this lawsuit. Plaintiff cannot circumvent this mechanism by invocation of Section 404(a).

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1. Plaintiff Fails to Allege That Specific Plan Investments Were Objectively Unreasonable.

Twombly instructs that pleading a plausible entitlement to relief requires "more than labels and conclusions." 550 U.S. at 555. "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* *Twombly* establishes two working principles critical here. First, a court considering a motion to dismiss does not credit merely conclusory allegations. *Id.* at 545. Second, a plaintiff cannot rely on speculative inferences lacking foundation in well-pleaded facts. *Id.* ; *see also Iqbal*, 129 S. Ct. at 1949-50 (reiterating the "working principles" that merely "conclusory statements" do not suffice and well-pleaded facts must permit the court "to infer more than the mere possibility of misconduct"). The allegations in Plaintiff's Complaint fail to meet these pleading standards.

Under the Ninth Circuit's substantive or objective prudence standard, fiduciaries will not be liable, regardless of the process used to arrive at an investment decision, if that decision was objectively reasonable. That authority is grounded in the statutory causation requirements of section 409(a) which preclude imposition of fiduciary liability where, as here, there can be no finding that the supposed missteps caused harm. 29 U.S.C. § 1109(a) (providing that a fiduciary is liable for "losses to the plan resulting from each such breach" of its fiduciary duty). In order to state a claim against the Weyerhaeuser Defendants for fiduciary breach under ERISA § 404(a), 29 U.S.C. § 1104(a), Plaintiff must specifically allege a causal connection between the alleged breach and the alleged "losses." *Friend v. Sanwa Bank Cal.*, 35 F.3d 466 (9th Cir. 1994) (section 1109(a) "clearly indicates that a causal connection is required between the breach of fiduciary duty and the losses incurred"); *see also Wright v. Or. Metallurgical Corp.*, 360 F. 3d 1090, 1099 (9th Cir. 2004); *Herman v.*

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Mercantile Bank, N.A., 143 F.3d 419, 421 (8th Cir. 1998); *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 919 (8th Cir. 1994). Further, if the investment decision is one that a prudent person would make at the time it was made, there is no liability for loss. *See In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996).

The Complaint's allegations, taken as true, cannot establish imprudence under this standard. *See Twombly*, 550 U.S. at 558 ("when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court"). The Complaint relies on a sweeping indictment of "the hedge fund industry," "alternative investments," and "private equity," complaining that the Plans' assets were spread among "over 330" investments. Such conclusory allegations are insufficient. Indeed, the 2008 GAO Report upon which Plaintiff relies specifically states that there is nothing wrong with these categories of investments. *See infra* at 29. Absent allegations plausibly challenging discrete investments, the Complaint is deficient. Nor does the Complaint plausibly allege how the Investment Policy that consistently outperformed its peers and the market, causing the Plans to continuously meet ERISA's minimum funding standards, could be deemed imprudent or its investments deemed unreasonable.

2. Plaintiff Wrongly Ignores the Long-Term Nature of Pension Plan Investments.

By focusing inappropriately on investment declines that occurred exclusively in 2008, the Complaint ignores the long-term nature of pension plan investments in a misguided effort to demonstrate imprudence. Such a narrow temporal focus cannot be employed to demonstrate imprudence. *See Quan v. Computer Sci. Corp.*, 623 F.3d 870, 882 (9th Cir.

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2010) (recognizing long-term nature of retirement investment); *see also Rogers v. Baxter Int'l Inc.*, 521 F.3d 702, 705 (7th Cir. 2008) ("People who pursue *a buy-and-hold strategy, one particularly appropriate for pension investments*, are unaffected by the volatility in market prices that accompanies the announcement of particular pieces of good and bad news.") (emphasis added).

The challenged investments are not short-term investments in stocks, where investors can liquidate the investments as needed, or even 401(k) investments, in which individual participants structure their portfolios along their own timelines. Rather, these are assets held for the long term, with investment horizons extending well beyond any one participant's timeline. Scrutinizing the performance of the Plans' investments across an abbreviated, artificially prescribed "class period" misconstrues the fundamental goals of a pension plan and its investments (and further compels dismissal). *See Ward v. Avaya, Inc.*, No. 07-3246, 2008 WL 4888494, at *4 n.5 (3d Cir. Nov. 13, 2008) ("Because plaintiffs define the relevant class period, adopting [] a rule [excluding post-class-period stock performance] would allow plaintiffs to bring breach of fiduciary duty claims based entirely on a narrow window of financial difficulty, potentially eviscerating the abuse of discretion standard.").

Mr. Palmason's allegations in that respect are particularly wanting because the Complaint admits that the Plans enjoyed *gains* from 2000 through 2007, as well as "losses" in 2008. (Compl. ¶ 110 (referencing the Master Trust's "outperformance from 2000 to 2007" relative to its benchmark); ¶ 118 ("Defendants achieved outsized returns when the broad market performed well").) And, of course, 2008 – the only year in which Plaintiff alleges any "losses" – is a year that saw the near collapse of the world's entire financial system and the worst worldwide economic conditions since the Great Depression. Of particular note, in

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2008, the Plans allegedly lost forty-one percent of their value. In that same year, the S&P 500 experienced similar declines, down thirty-seven percent. *See* Yahoo! Finance, S&P 500, Historical Price Chart, *available at* http://finance.yahoo.com.

Perhaps more importantly, publicly available information reveals that the Plans' investments *outperformed* both the market and other defined benefit pension plans over the long term. In other words, a long-term performance review, critical to the prudence of a pension plan's investment strategy, validates the Plans' investment decisions and demonstrates that the investment strategy was substantively prudent. *Nelson v. Hodowal*, 512 F.3d 347, 349 (7th Cir. 2008) ("[f]or long-term investors, a stock's volatility may be a benefit, as higher risk usually is associated with higher return," and stating that "[a] pension fund can ride out the ups and downs and reap the rewards of risk-taking"). *See* 2010 10-K at 82 (Weyerhaeuser Plans' net compounded annual return from 1985 to 2010 was 15.3%).

Because the investment strategy is objectively prudent, the Complaint does not state a viable claim.

3. Plaintiff's Generic Allegations Regarding Hedge Funds, Private Equity and Other "Alternative" Investments Are Insufficient.

Allocating trust assets among hedge funds, private equity, and other alternative investments is permissible under ERISA and not per se imprudent. Despite Plaintiff's suggestions to the contrary, ERISA contains no blanket prohibition against variously described "alternative investments," including hedge funds and private equity, and for good reason. *Cf.* 29 C.F.R. § 2550.404a-1 (establishing factors fiduciaries are to consider in carrying out their investment duties, but declining to proscribe any particular type of investment).

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Hedge funds, by definition, invest in myriad types of investments, and the term can refer to a virtually limitless combination of investment vehicles and strategies. As explained by the 2008 GAO Report relied upon at length in the Complaint:

> Although *there is no statutorily or universally accepted definition of hedge funds*, the term is commonly used to describe pooled investment vehicles that are privately organized and administered by professional managers and that often engage in *active trading of various types of securities*, *commodity futures, options contracts, and other investment vehicles*. . . . Over time, hedge funds diversified their investment portfolios and engaged in a wider variety of investment strategies. . . . They *may invest in a wide variety of financial instruments*, including stocks and bonds, currencies, futures contracts, and other assets.

See GAO Report to Congressional Requestors, *DEFINED BENEFIT PENSION PLANS – Guidance Needed to Better Inform Plans of the Challenges and Risks of Investing in Hedge Funds and Private Case Equity*, GAO-08-692 (Aug. 14, 2008) (the "2008 GAO Report"), at 8-9 (emphasis added).

Further, "[l]ike hedge funds, there is no legal or commonly accepted definition of private equity investments, but the term generally includes privately managed pools of capital that invest in companies." *Id.* at 10. "[S]trategies of private equity funds vary," and "[e]ach private equity fund generally focuses on only one type of investment opportunity." *Id.*

Despite the array of investment vehicles and strategies to which the label "alternative investments" can attach, Plaintiff launches a broad attack on their use, insisting that the mere fact of these investments renders the Investment Policy imprudent. Plaintiff's own sources, however, endorse the prudent use of alternative investments in defined benefit plans; hence, such broadside allegations of imprudence are insufficient. *Id*, at 18-39. Indeed, despite the economic setbacks of 2008 central to the Complaint, the GAO again endorsed the use of these investments to fund benefit obligations in 2010. *See also* GAO Report to Congressional

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Requestors, *DEFINED BENEFIT PENSION PLANS – Plans Face Valuation and Other Challenges When Investing in Hedge Funds and Private Equity*, GAO-10-915T (July 21, 2010) (the "2010 GAO Report"), at 16 (even following the financial crisis of 2008, "such assets may serve useful purposes in a well thought out investment program, offering plan sponsors advantages that may not be as readily available from more traditional assets"). Plaintiff's philosophical challenge to the use of hedge funds, derivatives and private equity investments, therefore, finds no support in ERISA, his own literature, or the case law. Given the broad array of investments falling into these categories, his conclusory allegations are insufficient under *Twombly* and *Iqbal*.

Moreover, the GAO specifically recognized that the statute prescribes no particular categories of allowable investments. *See* 2008 GAO Report at 5 ("Under [ERISA], plan fiduciaries are expected to meet general standards of prudent investing and no specific restrictions on investments in hedge funds or private equity have been established."). The fact that allegedly less risky or more readily valued investments exist in the market for pension plan investors, as Plaintiff asserts, is not sufficient to label any other investment as inherently imprudent. *Cf. Hecker v. Deere & Co.*, 556 F. 3d 575, 586 (7th Cir. 2009) (availability of less expensive investment options did not render allegedly expensive mutual funds per se imprudent). Indeed, courts have held that "an investment in a risky security as part of a diversified portfolio is, in fact, an appropriate means to increase return while minimizing risk." *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 423 (4th Cir. 2007); *see also Young v. Gen. Motors Invest. Mgm't Corp.*, No. 08-1532, 2009 WL 1230350, at *3 (2d Cir. May 6, 2009). The DOL similarly recognizes the value of higher risk investments with higher expected rates of return as part of a larger diversified portfolio – and an investment with a

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relatively higher level of risk "may be entirely proper under [ERISA's] 'prudence' rule," following "modern portfolio" theory and practice. 44 Fed. Reg. 37,221, 37,222 (June 26, 1979).

Plaintiff's suggestion that the Defendants acted imprudently because they invested the Plans' assets in too many different investments (Compl. ¶¶ 6-7, 112, 143(c)) is nonsense. Pension plans have a duty to diversify their investments. *See* 29 U.S.C. § 1104(a)(1)(c). The "shear [sic] number" of the Plans' investments Plaintiff complains of (Compl. ¶¶ 7, 112) hardly makes this initial requisite showing of failure to diversify. Further, Defendants are aware of no court – anywhere – that has imposed liability for having *too many* investments. *See Hecker*, 556 F. 3d at 586 (affirming dismissal of breach of fiduciary duty claims in part because defined contribution plan offered more than 2,500 investment options).

D. PLAINTIFF'S FAILURE TO MONITOR AND CO-FIDUCIARY LIABILITY CLAIMS ARE DERIVATIVE OF COUNTS I AND II AND, THEREFORE, NECESSARILY FAIL.

Plaintiff's claims for failure to monitor and co-fiduciary liability are entirely derivative of his breach of fiduciary duty claims in Counts I and II. Because the Complaint fails to state a claim for breach of fiduciary duty by any of the Plans' fiduciaries, Plaintiff's derivative claims must also be dismissed.[13]

Furthermore, to state a monitoring claim, a plaintiff must allege facts demonstrating that "(1) [the] entity charged with the breach was responsible for appointing and removing fiduciaries responsible for fiduciary conduct in question; and (2) [the] entity charged with this duty to monitor also had knowledge of or participated in fiduciary breaches by the

[13] *See In re Computer Sci. Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1144 (C.D. Cal. 2009) (holding that because plaintiffs' prudence claim fails, "their monitoring claim also fails"); *Edgar v. Avaya, Inc.*, 503 F.3d 340, 349 n.15 (3d Cir. 2007).

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appointees." *In re Bausch & Lomb Inc. ERISA Litig*., No. 06-6297, 2008 WL 5234281, at *10 (W.D.N.Y. Dec. 12, 2008). The Complaint's conclusory allegations fall far short of the requisite plausibility standard in *Twombly* and *Iqbal. See In re Wash. Mut., Inc. Securities, Derivative & ERISA Litig*., No. 07-1874, 2009 WL 3246994 (W.D. Wash. 2009).

Like his monitoring claim, Plaintiff's co-fiduciary liability claim is also insufficiently pled. To state a claim for co-fiduciary liability, Plaintiff must allege actual knowledge by Defendants that their co-fiduciaries breached their duties, or knowing participation in such breaches. *See* 29 U.S.C. § 1105(a). "Kitchen sink" allegations that "impermissibly lump[] all Defendants together without explaining how a particular Defendant enabled another fiduciary to commit a breach or took no reasonable efforts to remedy a knowledge of the breach" do not state a claim. *In re Sears, Roebuck & Co. ERISA Litig*., No. 02-8324, 2004 WL 407007, at *8 (N.D.Ill. Mar. 3, 2004).

IV. CONCLUSION

Plaintiff has suffered no injury and therefore lacks standing to bring his claims. Plaintiff does not allege that he or any other participant has been denied benefits owed under the Plans, that the Plans have been underfunded under ERISA, or that Weyerhaeuser would be incapable of meeting its pension obligations even if the Plans were underfunded. Moreover, Plaintiff does not allege that any particular investment was imprudent, and relies instead on impermissibly vague and conclusory allegations relating to so-called "alternative investments" and isolated losses to the Plans' surpluses in 2008. Mr. Palmason's Complaint does not state a plausible claim for relief, and should be dismissed.

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I hereby certify that on the 12th day of July, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

8 MICHAEL PALMASON, Individually and On Behalf of All Others Similarly Situated, 9 Plaintiff, 10 v. 11 WEYERHAEUSER COMPANY, WEYERHAEUSER ASSET MANAGEMENT LLC, MORGAN STANLEY, NORTHWATER CAPITAL MANAGEMENT, INC., PATRICIA M. BEDIENT, ANNE E. GIARDINI, JEANNE M. HILLMAN, STEPHEN M. MARGOLIN, JEFFREY W. NITTA, PETER W. SHERLAND, THOMAS M. SMITH, SALIM SHARIFF, RICHARD J. TAGGART and JOHN AND JANE DOES 1-20, 12–16 17 Defendants.	**Case No. 2-11-cv-00695-RSL** CLASS ACTION AMENDED COMPLAINT FOR VIOLATIONS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

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I. INTRODUCTION

1. This is a class action brought on behalf of the Weyerhaeuser Retirement Plan for Salaried Employees (the "Salaried Plan") and the Weyerhaeuser Retirement Plan for Hourly Employees (the "Hourly Plan") (together the "Plans") pursuant to §§ 502(a)(2) and (a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(2) and (a)(3), against the fiduciaries of the Plans for violations of ERISA.[1]

2. Weyerhaeuser Company ("Weyerhaeuser" or "the Company") is the sponsor and administrator of the Salaried Plan and the Hourly Plan. The assets of these Plans were pooled together for investment purposes in a Master Retirement Trust ("Master Trust") until August 2008. After August 2008, the Master Trust held assets of the Salaried Plan and the Hourly and, according to the 2009 Form 5500 filed with the Department of Labor on October 11, 2010 for the Weyerhaeuser Company Master Trust ("2009 Master Trust 5500") had approximately $3.75 billion in net assets as of December 31, 2009.

3. Plaintiff's claims arise from the failure of the Principal Defendants,[2] who are fiduciaries of the Plans, to act solely in the interest of, and for the exclusive purpose of providing benefits to, the participants and beneficiaries of the Plans, and to exercise the required skill, care, prudence, and diligence in administering the Plans and the Plans' assets from January 1, 2006 to the present (the "Class Period").

4. Plaintiff alleges that during the Class Period the Principal Defendants breached their fiduciary obligations of prudence and loyalty to the Plans by causing or permitting the Master Trust to invest more than 81% of its assets in alternative investments (including 53% in hedge funds and 24% in private equity) by December 2007, even though they knew or should have known, for the reasons set forth herein, that such investments in the aggregate were unduly risky and represented an inappropriate investment allocation for pension assets. This

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[1] Effective December 31, 2010, the Hourly Plan was merged into the Salaried Plan, resulting in the Weyerhaeuser Pension Plan. *See* p. 73 of the 2010 10-K.

[2] The Principal Defendants are: Weyerhaeuser, the Investment Committee Defendants (defined below), Weyerhaeuser Asset Management LLC ("WAM"), Morgan Stanley and Salim Shariff.

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1 inappropriately large allocation to alternative investments was adopted as part of a "portable
2 alpha strategy," where the selected "alpha" producing managers theoretically outperform the
3 return that would be predicted based on the correlation of each of manager's portfolio to the
4 benchmark portfolio. The "beta" of the entire portfolio (a measure of correlation to the
5 benchmark) is then readjusted through the purchase of derivatives to match pre-selected
6 benchmark portfolio (the "targeted benchmark")[3] while limiting risk to match that targeted
7 benchmark. Because the fiduciaries of the Plans whose assets comprised the Master Trust
8 dramatically miscalculated the risk and correlation to the targeted benchmark of the alternative
9 investments chosen to generate "alpha," this strategy as executed exposed the Master Trust to
10 excessive risk causing it to lose $2.4 billion (or 41% of its value) in 2008 including a loss of
11 approximately 30% in the 4th quarter alone. In fact, rather than outperforming its benchmark, as
12 a portable alpha strategy is designed to do, the Master Trust *underperformed* its benchmark by
13 27% in 2008, and did not yield any material outperformance in 2009 or 2010 despite the excess
14 risk taken on by the Principal Defendants in what was a rising market.

15 5. By their actions the Principal Defendants failed to adopt and implement an
16 investment policy that properly minimized the risk of loss. Instead, the Principal Defendants
17 exposed the Master Trust to an inherently risky alternative investments strategy and magnified
18 that risk with the purchase of derivatives, which allowed the Company to gamble with retirement
19 assets held for the benefit of the Plans' participants and beneficiaries in an attempt to achieve
20 higher returns and outperform the market.[4] This over-allocation to alternative investments and
21 the concomitant difficulty of assessing the risk presented by those investments, which was part
22 of a portable alpha strategy, conferred no actual or potential benefit to the Plans' participants and
23 beneficiaries; if it failed (and it did), the Plans' participants and beneficiaries paid the price in the

24 [3] According to Defendant Richard J. Taggart, Weyerhaeuser's former vice president and treasurer, and who was the head of the pension fund's investment committee from 2003-2007, the Master Trust's risk is measured against a
25 portfolio of 60% S&P 500 index, 35% Lehman Brothers Long T-Bond index and 5% U.S. Treasury bonds. *See*
Anand, Vineeta, TURBOCHARGED PORTFOLIO: Weyerhaeuser uses derivatives to justify assumed return of
26 11.5%, Pensions & Investments, June 25, 2001.

[4] Because the Plans are defined benefit plans, the participants and beneficiaries do not reap the rewards of higher returns. Those returns are booked as additional income to the Company.

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1 increased risk to their pensions and if it succeeded the Company would profit on what had been
2 significantly overfunded pension plans. The Principal Defendants sought higher returns to
3 improve the Company's financial statements (not to benefit the participants of the Plans), by
4 either lowering the Company's pension costs or increasing its pension income, which would
5 improve the Company's bottom line and earnings per share.

6 6. As described below, in order to justify the Company's assumption that the return
7 on pension assets would outperform the market, the Principal Defendants adopted and
8 implemented an investment policy (the "Investment Policy," defined further below) that utilized
9 a portable alpha strategy and bet on risky alternative investments, such as hedge funds and
10 private equity, to generate the alpha (or excess return). This inappropriately risky investment
11 strategy caused Weyerhaeuser's pension plan assets (including the assets of the Master Trust) to
12 fall from being overfunded by $2.1 billion at the end of 2007 to being underfunded by $450
13 million just one year later, thereby jeopardizing the retirement benefits of the Plaintiff.[5] As a
14 result of the sharp change in funded status and the illiquidity of the alternative investments in the
15 Master Trust totaling approximately 80%, in 2009 the Company's pension plans were forced to
16 borrow $285 million from the Company in order to pay its annual benefits.

17 7. In particular, the Principal Defendants breached their fiduciary duties by investing
18 (or allowing the investment) in a stunningly large number of alternative investments
19 (approximately **330** different hedge funds, private equity investments, and real estate funds at the
20 end of 2008[6]). As discussed below, the magnitude of the number of alternative investments
21 prevented the Investment Manager Defendants[7] from properly ascertaining the degree of
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[5] The overfunded status of the Company's pension plans as of 2007 is calculated as the difference between the fair value of the Company's pension plan assets and the benefit obligation of the Company's pension plans as reported on pp. 82-83 of the Company's 2008 10-K. The underfunded status of the Company's pension plans as of 2008 is calculated as the difference between the fair value of the Company's pension plan assets (as updated in the Company's first quarter 2009 10-Q) and the benefit obligation of the Company's pension plans as reported in the 2008 10-K.

[6] As reported in the 2008 Form 5500, the Master Trust had approximately 91 different hedge fund investments, 208 different private equity investments and 29 different real estate investments, totaling 328 alternative investments (approximately 330).

[7] The Investment Manager Defendants are: Morgan Stanley, WAM, and Shariff Salim.

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correlation each alternative investment had with the targeted benchmark and properly rebalancing that correlation using derivatives. In essence it was nearly impossible for the Investment Manager Defendants to properly manage the risk of 330 alternative investments to ensure that such investments resulted in no more risk than the targeted benchmark.[8]

8. The Investment Manager Defendants also breached their fiduciary duties of prudence by failing to perform adequate due diligence. As further described below, alternative investments (*e.g.*, hedge funds and private equity) pose significant risks and challenges that demand greater expertise and effort on the part of fiduciaries than traditional investments. These include among other things: lack of transparency because fiduciaries have limited information about the underlying investments and/or the valuation of such investments; limited liquidity due to the absence of a public market; greater exposure to operational risks including trading errors and/or outright fraud by any of the hundreds of managers utilized by the Master Trust; and the inherent risk that comes with greater reliance upon the skill and strategies of individual investment managers as compared to the market as a whole. Again, given the sheer number of alternative investments, it would be prohibitively expensive and time consuming for the Investment Manager Defendants to perform adequate due diligence on each of the nearly 330 alternative investments that they managed.

9. Specifically, Plaintiff alleges in Count I that Weyerhaeuser and the Investment Committee Defendants (defined below) breached their fiduciary duties to the Plans in violation of ERISA by failing to establish and maintain a prudent investment policy for the assets of the Master Trust. In Count II, Plaintiff alleges that Northwater Capital breached its fiduciary duty to follow the Plan Documents in violation of ERISA by failing to follow the performance and liquidity provisions of its Investment Guidelines. In Count III, Plaintiff alleges that the Investment Manager Defendants breached their fiduciary duties to the Plans in violation of ERISA by failing to properly implement the Investment Policy and prudently invest the Assets of

[8] As described below, the Investment Manager Defendants, not Northwater Capital, were responsible for assessing the risk of the portfolio in the aggregate for all investments including those managed by Northwater Capital.

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1 the Master Trust. In Count IV, Plaintiff alleges that Weyerhaeuser and the Investment
2 Committee Defendants, who were responsible for the selection, monitoring and removal of the
3 Plans' other fiduciaries responsible for the management and investment of the Plans' assets,
4 failed to properly monitor the performance of their fiduciary appointees and remove and replace
5 those whose performance was inadequate. In Count V, Plaintiff alleges that the Principal
6 Defendants breached their duties and responsibilities as co-fiduciaries by failing to prevent
7 breaches by other fiduciaries of their duties to the Plans. The above breaches of fiduciary duty
8 caused significant losses to the Plans, which has jeopardized Plaintiff's future retirement benefits
9 and his entitlement to a lump-sum distribution.

10 10. This action is brought on behalf of the Plans and seeks to recover losses to the
11 Plans for which Defendants are personally liable pursuant to ERISA §§ 409 and 502(a)(2),
12 29 U.S.C. §§ 1109 and 1132(a)(2). In addition, under § 409, 502(a)(2) as well as 502(a)(3) of
13 ERISA, 29 U.S.C. § 1132(a)(3), Plaintiff seeks other equitable relief from Defendants, including,
14 without limitation, injunctive relief, a court-appointed fiduciary, and, as available under
15 applicable law, constructive trust, restitution, equitable tracing, and other monetary relief.

16 11. ERISA §§ 409(a), 502(a)(2), and 502(a)(3) authorize participants such as the
17 Plaintiff to sue in a representative capacity for losses suffered by the Plans as a result of breaches
18 of fiduciary duties. Pursuant to that authority, Plaintiff brings this action as a class action under
19 Fed. R. Civ. P. 23 on behalf of all participants and beneficiaries of the Plans during the Class
20 Period.

21 12. Plaintiff Michael Palmason ("Plaintiff") alleges the following based upon his own
22 personal information and the investigation of Plaintiff's counsel, which included a review of U.S.
23 Securities and Exchange Commission ("SEC") filings by Weyerhaeuser, including
24 Weyerhaeuser's annual reports (Form 10-K), quarterly reports (Form 10-Q), current reports
25 (Form 8-K), proxy statements, a review of the Forms 5500 filed by the Weyerhaeuser with the
26 U.S. Department of Labor ("DOL"), a review of Corporate Governance Guidelines for the Board

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1 of Directors of Weyerhaeuser ("Corporate Governance Guidelines"), interviews with participants
2 of the Plans, and a review of available documents governing the operations of the Plans, the
3 Defendants' Initial Disclosures and other documents filed as attachments to Defendants'
4 pleading and of which they have asked the Court to take judicial notice.

5 13. Because the information and documents on which Plaintiff's claims are based are,
6 for the most part, solely in Defendants' possession, certain of Plaintiff's allegations are made by
7 necessity upon information and belief. Plaintiff believes that substantial additional evidentiary
8 support will exist for the allegations. At such time as Plaintiff has had the opportunity to conduct
9 discovery, Plaintiff will, to the extent necessary and appropriate, amend this Complaint, or, if
10 required, seek leave to amend, to add such other additional facts as are discovered that further
11 support Plaintiff's claims.

12 **II. JURISDICTION AND VENUE**

13 14. **Subject Matter Jurisdiction.** This Court has subject matter jurisdiction over this
14 action pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

15 15. **Personal Jurisdiction.** ERISA provides for nationwide service of process.
16 ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2). All of the Defendants are either residents of the
17 United States or subject to service in the United States and this Court therefore has personal
18 jurisdiction over them.

19 16. **Venue.** Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U.S.C.
20 § 1132(e)(2), because the Plans are administered in this district, some or all of the fiduciary
21 breaches for which relief is sought occurred in this district, and Weyerhaeuser has its principal
22 place of business in this district.

23 **III. PARTIES**

24 **A. Plaintiff**

25 17. **Plaintiff Michael Palmason** is a resident of Centralia, Washington. He worked
26 for Weyerhaeuser beginning in January, 1990, and left the Company in May, 2002. On

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1 information and belief, during his employment with Weyerhaeuser, Palmason accumulated over
2 12 years of vesting service and became vested in the Salaried Plan. He is currently entitled to
3 receive a benefit and to elect a lump-sum benefit from the Salaried Plan when he reaches the age
4 of 55. Palmason is, therefore, a participant of the Salaried Plan within the meaning of ERISA
5 § 3(7), 29 U.S.C. § 1002(7).

6 **B. Defendants**

7 18. The Defendants are identified below. All of the Defendants are fiduciaries of the
8 Plans within the meaning of ERISA, as is explained below in Section V ("Defendants' Fiduciary
9 Status"), and all of them breached their fiduciary duties in various ways as is explained in
10 Section VIII ("Causes of Action").

11 19. **Defendant Weyerhaeuser Company** is organized under the laws of Washington
12 State with its principal place of business in Federal Way, Washington. Weyerhaeuser is one of
13 the world's leading suppliers of paper and packaging products and involved in almost every facet
14 of the forest products industry. Its current market capitalization is approximately $11.1 billion.
15 As further discussed below, Weyerhaeuser's financial outlook is uncertain and its stock has
16 fallen almost 50% in the last year.

17 20. **Members of the Weyerhaeuser Investment Committee (the "Investment**
18 **Committee" and the "Weyerhaeuser Investment Committee").** The Investment Committee
19 has the responsibility and authority for (i) approving the appointment and termination of
20 Investment Manager Defendants and Northwater, (ii) setting the Investment Policy[9] for the assets
21 held under the Master Trust Agreement, (iii) monitoring and overseeing the performance of the
22 Investment Manager Defendants and Northwater, and (iv) the management, acquisition,
23 disposition and investment of assets of the Plans to the extent such responsibility and authority is
24 not delegated to one or more of the Investment Managers or the Trustee. *See* Section 10.1(f) of
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[9] The term "Investment Policy" refers to the policy set by the Investment Committee as described herein. The term "investment strategy" refers more generally to the strategy adopted and implemented by the Principal Defendants to invest and manage the assets of the Master Trust.

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1 the Salaried Plan Document. The members of the Investment Committee during the Class Period
2 include:
3 21. **Defendant Patricia M. Bedient ("Bedient")** has been Executive Vice President
4 and Chief Financial Officer of Weyerhaeuser since 2007. As the Chief Financial Officer she is
5 the Chairperson of the Investment Committee for the Plans. During the Class Period, Bedient
6 also served as Senior Vice President, Finance and Strategic Planning, from February 2006 to
7 2007, and as Vice President, Strategic Planning from February 2003 to 2006. Prior to joining the
8 Company, Bedient was a partner with Arthur Andersen LLP (Independent Accountant) from
9 1987 to 2002 and served as the managing partner for the Seattle office and as the partner in
10 charge of the firm's forest products practice from 1999 to 2002. Under Section 10.1(f) of the
11 Salaried Plan Document, Bedient, as Chief Financial Officer of Weyerhaeuser had the authority
12 and responsibility to select the members of the Investment Committee.
13 22. **Defendant Anne E. Giardini** ("**Giardini**") has been the President of
14 Weyerhaeuser Co. Ltd. (a Canadian subsidiary) since October of 2008. Giardini served as Vice
15 President and General Counsel of Weyerhaeuser Co. Ltd. from September of 2006 to October of
16 2008.
17 23. **Defendant Jeanne M. Hillman** ("**Hillman**") has been a Weyerhaeuser Vice
18 President and the Controller for Operations since January of 2006. Hillman joined
19 Weyerhaeuser in 1984.
20 24. **Defendant Stephen M. Margolin** ("**Margolin**") served as the President and CEO
21 of Weyerhaeuser Realty Investors from 2001 to 2009. Margolin also has served as President of
22 Weyerhaeuser Venture Company and President Orcas Capital, LLC.
23 25. **Defendant Jeffrey W. Nitta** ("**Nitta**") has been a Weyerhaeuser Vice President
24 and the Treasurer since October of 2001. Nitta joined Weyerhaeuser in 1984 after working for
25 the Congressional Budget Office.
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1 26. **Defendant Peter W. Sherland** ("**Sherland**") served as the Vice President of
2 Procurement and Transportation since February of 2006.
3 27. **Defendant Thomas M. Smith** ("**Smith**") has been a Weyerhaeuser Vice
4 President and the Director of Taxes since June of 2003. Smith joined Weyerhaeuser in 1979 and
5 is a certified public accountant (CPA).
6 28. **Defendant Richard J. Taggart ("Taggart")** served as Executive Vice President
7 and Chief Financial Officer of Weyerhaeuser from April 2003 to April 2007. During the Class
8 Period, Taggart served as the Chairperson of the Investment Committee for the Plans. Under
9 Section 10.1(f) of the Salaried Plan Document, Taggart, as Chief Financial Officer of
10 Weyerhaeuser, had the authority and responsibility to select the members of the Investment
11 Committee. Defendant Taggart was also the head of the pension fund's investment committee
12 from 2003-2007.
13 29. **Defendant Salim Shariff ("Shariff")** was named chief investment officer (CIO)
14 of the Plans in April 2004. Shariff also oversees the company's Canadian defined benefit plan.
15 The CIO post was created internally to combine the investment committees that oversee the U.S.
16 and Canadian defined benefit plans. *See Weyerhaeuser selects Shariff to be firm's first defined*
17 *benefit plan CIO*, Pensions & Investments, April 19, 2004. Accordingly, Shariff is believed to
18 be a member of the Investment Committee.[10] Mr. Shariff is also the President of a Company
19 investment subsidiary, Weyerhaeuser Asset Management LLC ("WAM") (also a Defendant, as
20 described below). Prior to joining Weyerhaeuser in 2004, Mr. Shariff was a Managing Director
21 and Portfolio Manager at Northwater Capital Management (also a Defendant, as described
22 below) and an Executive Director at Morgan Stanley Alternative Investment Partners. Before
23 Shariff was named CIO, plan manager Morgan Stanley (also a Defendant, as described below)
24 had handled that function.
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[10] Defendant Weyerhaeuser did not name Defendant Shariff as a member of the Investment Committee in its initial disclosures, but as described herein, Plaintiff has reason to believe Shariff was a member of the Investment Committee during the Class Period. However, if Shariff is not, Defendant Shariff is a fiduciary based on his position at WAM, one of the Investment Manager Defendants as described below.

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30. **Defendant Members of the Weyerhaeuser Investment Committee - John and Jane Doe 1-10.** Other than the individual Investment Committee Defendants named above, Plaintiff does not currently know the identity of the remaining members of the Weyerhaeuser Investment Committee during the Class Period. Therefore, the remaining members of the Weyerhaeuser Investment Committee are named fictitiously, as Defendants John and Jane Doe 1-10. Once their true identities are ascertained, Plaintiff will seek leave to join them under their true names.

31. Defendants Bedient, Giardini, Hillman, Margolin, Nitta, Sherland, Smith, Shariff, Taggart, and John and Jane Does 1-10 all served as members of the Investment Committee during the Class Period and are collectively referred to as the "Investment Committee Defendants."

32. **Defendant Morgan Stanley** is an Investment Manager of the Plans with authority and responsibilities as provided in a written agreement, as approved and/or amended from time to time by the Investment Committee, including the authority and responsibility to invest funds of the Plans in accordance with Investment Policy approved by the Weyerhaeuser Investment Committee. Morgan Stanley operates as a Qualified Professional Asset Manager (QPAM) under the Department of Labor's Prohibited Transaction Class Exemption 84-14 (PTE 84-14).

33. **Defendant Northwater Capital Management, Inc. ("Northwater")** is an Investment Manager of the Plans with authority and responsibilities as provided in a written agreement between Northwater, Weyerhaeuser, and the Investment Committee, dated October 5, 2001, including the authority and responsibility to invest funds of the Plans in accordance with Investment Policy approved by the Weyerhaeuser Investment Committee. Northwater also operates as a QPAM under the Department of Labor's Prohibited Transaction Class Exemption 84-14. Effective July 1, 2009, Northwater's investment management duties were transferred to WAM.

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1 34. **Defendant Weyerhaeuser Asset Management LLC ("WAM")** is a wholly
2 owned subsidiary of Weyerhaeuser is registered with the Securities and Exchange Commission
3 as an investment advisor under the Investment Advisors Act of 1940. WAM acts as the third
4 Investment Manager of the Master Trust along with Morgan Stanley and Northwater with the
5 authority and responsibilities as provided in the investment management agreement effective
6 June 29, 2004, between the Investment Committee and WAM, including the authority and
7 responsibility to invest funds of the Plans in accordance with the Investment Policy approved by
8 the Weyerhaeuser Investment Committee. WAM operates as an in-house asset manager
9 (INHAM) under Department of Labor's Prohibited Transaction Class Exemption 96-23 (PTE 96-
10 23).

11 35. Defendant Shariff is the President of WAM and is in charge of the day-to-day
12 management of the Plans' assets managed by WAM.

13 36. **Investment Manager Defendants.** Defendants Morgan Stanley, WAM, and
14 Shariff are collectively referred to as the "Investment Manager Defendants." Northwater is not
15 included in the Amended Complaint's definition of "Investment Manager Defendants."

16 **IV. THE PLANS**

17 **A. Nature of the Plans**

18 37. The Plans, sponsored by Weyerhaeuser Company, are "employee pension benefit
19 plans," as defined by ERISA § 3(2)(A) of 29 U.S.C. § 1002(2)(A). Each is a noncontributory
20 "defined benefit plan" within the meaning of ERISA § 3(35) of 29 U.S.C. § 1002(35) and a legal
21 entity that can sue and be sued, ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1). While the Plans are
22 not parties to this action, pursuant to ERISA, the relief requested in this action is for the benefit
23 of the Plans, pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).

24 **B. The Plan Documents**

25 38. The assets of an employee benefit plan, such as the Plans here, must be "held in
26 trust by one or more trustees." ERISA § 403(a), 29 U.S.C. § 1103(a). During the Class Period,

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the assets of the Plans were held in the trust by Mellon Bank, N.A. in the Master Trust pursuant to the Master Trust Agreement.

39. An employee benefit plan, such as the Plans, must be "established and maintained pursuant to a written instrument." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

40. During the Class Period, the Salaried Plan was maintained pursuant to the Weyerhaeuser Retirement Plan for Salaried Employees Restatement Effective as of January 1, 2005 (the "Salaried Plan Document").

41. Plaintiff does not have copies of the plan documents pursuant to which the Hourly Plan is maintained. On information and belief, Plaintiff asserts that the applicable provisions of such plan documents as they relate to the investment policies of the Trusts and assets held under the Master Trust for such plans, the investment performance of the investments of such plans, and the monitoring and oversight of investment performance of such plans, is substantially identical to comparable provisions of the Salaried Plan Document described herein.

C. The Purpose of the Plans

42. The purpose of the Plans is to provide retirement benefits to the eligible employees of participating companies who are participants in the Plans and their beneficiaries. *See* Salaried Plan Document, Introduction.

D. Plan Contributions

43. The Salaried Plan is a noncontributory plan under which the Company makes all contributions to the Plan. The Salaried Plan Document provides that:

> Weyerhaeuser, on behalf of itself and other Participating Companies, shall make, or shall cause one or more other Participating Companies to make, such contributions to the Trust as Weyerhaeuser determines, with the advice of its actuary, are required to maintain the Plan on a sound actuarial basis.

Salaried Plan Document § 11.2.

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E. Retirement Benefits and Entitlement to a Lump-Sum

44. Section 4.9 of the Salaried Plan Document, "Vested Retirement Benefit," provides, "A Participant shall be eligible for Vested Retirement if the Participant has 100% vested interest in his or her Accrued Benefit as of the date of Termination of employment ," and Section 4.9(b)(ii) states, "If the Participant not covered by a Mandatory Lump-Sum Terminates employment on or after January 1, 2002, and if the Participant's Accrued Benefit (expressed as a Single Life Annuity commencing at age 65) is then less than $500 per month, the Participant may elect to commence his or her benefit immediately (as of the first day of the first month following the vested Retirement date), either in a Lump-Sum or in any of the other alternate forms of benefit described in Section 6.2 of the Plan except Installments. In such a case, the benefit shall be subject to Actuarial reduction from Age 65 and any Actuarial reduction application to the elected form of benefit." *See* Salaried Plan Document.

45. Section 6.2(d)(i) states "A Participant for whom an optional Lump-Sum is available (as described in paragraph (d) above) shall be eligible to elect a Lump-Sum so long as the election is made at the time of Retirement. For purposes of this Section, an election will be considered to have been made 'at the time of Retirement' only if it is communicated in writing in a form acceptable to the Benefit Administrator not later than the 90th day following the Participant's date of Retirement." *Id.*

46. On information and belief and based on his years of service and average monthly income, Plaintiff Palmason's pension benefit will be less than $500 per month at the time he retires and is therefore entitled to elect to take a lump-sum when he reaches retirement age.

F. Weyerhaeuser Retirement Plan for Salaried Employees

47. The Notes to the Financial Statement for the Weyerhaeuser Company Retirement Plan for Salaried Employees for December 31, 2009 and 2008 ("2009 Salaried Plan Financial Statement") describes the Salaried Plan as follows:

Plan Description

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> The Weyerhaeuser Company Retirement Plan for Salaried Employees (the Plan) is a defined benefit, noncontributory plan maintained by Weyerhaeuser Company (the company or plan sponsor) for salaried employees of the company and participating subsidiaries. The Plan also covers certain hourly-production employees that are covered by the Company's salaried benefit programs. The Plan is subject to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA).
>
> * * *
>
> The Plan provides pension benefits based on the employee's highest monthly earnings for five consecutive years during the final 10 years before termination of employment. The benefit formula is an excess formula integrated with Social Security Covered Compensation determined in the year of termination. The Plan has a minimum defined benefit dollar amount equal to $25 per month for each year of credited service. Eligible earnings for benefit accrual are generally derived from base pay plus certain bonuses.
>
> Effective January 1, 2010, the Plan was amended to reflect the following changes:
>
> a. **Benefits accrued** under the Plan for service on or after January 1, 2010 **are reduced**.
>
> * * *
>
> c. The **lump sum payment option will be eliminated** for benefits accrued on or after January 1, 2010. Participants will also have the option to receive benefits accrued for service on or after January 1, 2010 in seven annual installments.
>
> d. The **minimum monthly pension benefit available under the Plan will be increased** from $25 per year for all years of credited service to $35 per year for all years of credited service.
>
> Participants are vested in their accrued benefits after accruing five years of vesting service, attaining age 65, or if they are involuntarily terminated except for violations of certain Company employee conduct standards as set forth in the Plan. Participants who were active during 2002 are fully vested. Participants are first eligible for retirement after attaining age 55 and accruing at least 10 years of vesting service. Normal retirement is at age 65.
>
> The normal form of benefit under the Plan is a single life annuity for unmarried participants, and a 100% joint and survivor benefit for married participants. Lump sum payouts are generally only available to those eligible to retire under the Plan. Certain other participants may also qualify to receive lump sum payouts if the values of their plan benefits do not exceed an amount as specified under the Plan.

(emphasis added)

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G. Weyerhaeuser Retirement Plan for Hourly Employees

48. The Notes to the Financial Statement for the Weyerhaeuser Company Retirement Plan for Hourly Employees for December 31, 2009 and 2008 ("2009 Hourly Plan Financial Statement") describes the Hourly Plan as follows:

> **Plan Description**
>
> The Weyerhaeuser Company Retirement Plan for Hourly Rated Employees (the Plan) is a defined benefit noncontributory plan maintained by Weyerhaeuser Company (the company or plan sponsor) for hourly rated employees at multiple locations throughout the United States of America who are not participants in any other company retirement plan. Employees subject to collective bargaining are only eligible if the terms of their collective bargaining agreement provide for retirement benefits under the Plan. The Plan is subject to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA).
>
> * * *
>
> The Plan is composed of a base document and 38 separate plan parts which generally provide a retirement benefit based on a specified benefit dollar amount per month for each year of credited service. The dollar amount and benefit eligibility varied depending on the specific plan part. Participants are vested in their accrued benefits after accruing five years of vesting service or attaining age 65. Immediate, full vesting is provided for specified locations for involuntary terminations, except for violations of certain Company employee conduct standards as set forth in the Plan.
>
> The normal form of benefit under the Plan is a single life annuity for unmarried participants, and a 100% joint and survivor benefit for married participants. Lump sum payouts are available to employees of certain locations specified under the Plan.

H. The Investments of the Plans In the Master Trust

49. As of December 31, 2009, the Master Trust reported total investments of $4,067,700,000. *See* 2009 Financial Statement of the Salaried Plan. As of December 31, 2009, 82% of the assets of the Master Trust were invested in alternative investments, including 46% in hedge funds, 33% in private equity funds, and 2% in real estate funds. *Id.*

V. FIDUCIARY STATUS OF THE DEFENDANTS

50. ***Named Fiduciaries.*** ERISA requires every Plan to provide for one or more named fiduciaries of the Plans pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). The person named as the "administrator" in the Plans instrument is automatically a named fiduciary,

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1 and in the absence of such a designation, the sponsor is the administrator. ERISA § 3(16)(A),
2 29 U.S.C. § 1002(16)(A). As further described below, Weyerhaeuser Company, the sponsor and
3 administrator of the Plans, is a named fiduciary of the Plans. *Id.*

4 51. ***Investment Managers***. Under ERISA, an investment manager is a fiduciary.
5 ERISA defines investment manager as:

6 (38) any fiduciary (other than a trustee or named fiduciary, as defined in section
7 1102 (a)(2) of this title)—

8 (A) who has the power to manage, acquire, or dispose of any asset of a plan;

9 (B) who

10 (i) is registered as an investment adviser under the Investment Advisers Act of 1940 [15 U.S.C. 80b-1 et seq.];

11 (ii) is not registered as an investment adviser under such Act by reason of
12 paragraph (1) of section 203A(a) of such Act [15 U.S.C. 80b-3a (a)], is registered as an investment adviser under the laws of the State (referred to in such paragraph
13 (1)) in which it maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the
14 fiduciary with such State in order to maintain the fiduciary's registration under the laws of such State, also filed a copy of such form with the Secretary;

15 (iii) is a bank, as defined in that Act; or

16 (iv) is an insurance company qualified to perform services described in
17 subparagraph (A) under the laws of more than one State; and

18 (c) has acknowledged in writing that he is a fiduciary with respect to the plan.

19 Section 3(38), 29 U.S.C. § 1002(38).

20 52. ***De Facto Fiduciaries***. ERISA treats as fiduciaries not only persons explicitly
21 named as fiduciaries under § 402(a)(1), but also any other persons who in fact perform fiduciary
22 functions. Thus, a person is a fiduciary to the extent: "(i) he exercises any discretionary
23 authority or discretionary control with respect to management of such Plans or exercises any
24 authority or control with respect to management or disposition of its assets, (ii) he renders
25 investment advice for a fee or other compensation, direct or indirect, with respect to any moneys
26 or other property of such Plans, or has any authority or responsibility to do so, or (iii) he has any

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1 discretionary authority or discretionary responsibility in the administration of such Plans."
2 ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

3 53. Each of the Defendants was a fiduciary with respect to the Plans and owed
4 fiduciary duties to the Plans and its participants under ERISA in the manner and to the extent set
5 forth in the Plans' documents, through their conduct, and under ERISA.

6 54. As fiduciaries, Defendants were required by ERISA § 404(a)(1), 29 U.S.C.
7 § 1104(a)(1) to:

8 (A) act solely in the interest of the participants and beneficiaries of the plan they
9 serve and "(A) for the exclusive purpose of : (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering
10 the plan";

11 (B) to manage and administer the Plans investments "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent
12 man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims";

13 (C) to diversify the investments of the Plans so as to minimize the risk of large
14 losses; and

(D) to act in accordance with the documents and instruments governing the plan.

15 **A. Weyerhaeuser's Fiduciary Status**

16 55. Under Section 11.1 of the Salaried Plan Document, "Weyerhaeuser has
17 established the [Master] Trust and appointed the [Master] Trustee to hold and administer the
18 assets of the Plan in such [Master] Trust, in accordance with the terms of the Master Trust."
19 On information and belief, the Hourly Plan Document similarly provides that the assets of the
20 Hourly Plan are held in the Master Trust and appoints the Master Trustee to hold and administer
21 the Assets of the Hourly Plan in accordance with the terms of the Master Trust.[11] By
22 appointment of the Master Trustee, Weyerhaeuser exercised fiduciary powers with respect to the
23 Plans.

24

25

26

[11] The Master Trust Agreement names Mellon Bank, N.A. as the "Master Trustee".

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56. Weyerhaeuser is identified in the Master Trust Agreement as the "Named Fiduciary." Under the Master Trust Agreement, which defines "Asset Manager" as "the Named Fiduciary or Investment Manager," Weyerhaeuser is also is an "Asset Manager."

57. Weyerhaeuser's powers, duties and responsibilities as a Named Fiduciary and Asset Manager of the Master Trust are set forth in Section 5.1 entitled, "Investment Discretion and Appointment of Investment Managers," which provides:

> The Funds [of the Master Trust] shall be invested and reinvested at such times or times in such investments and pursuant to such investment strategies or course of action and in such shares and proportions as the Asset Managers, in their sole discretion, shall deem advisable. The Named Fiduciary shall have the power to appoint and remove one or more Investment Manager, which may be an affiliate of the Master Trustee.

58. As an Asset Manager, Weyerhaeuser exercised discretion in the investment and reinvestment of the Funds of the Master Trust.

59. On information and belief, Weyerhaeuser exercised its appointment power and appointed the Investment Manager Defendants (Morgan Stanley, Shariff, and WAM) and Northwater. By appointing The Investment Manager Defendants and Northwater, Weyerhaeuser had an ongoing fiduciary responsibility to monitor them to ensure that they: (1) acted prudently in managing the assets of the Master Trust and (2) acted in compliance with the Investment Policy and the appropriate Investment Guidelines.

60. In light of the foregoing duties, responsibilities, and actions, Weyerhaeuser was a named fiduciary of the Plans pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) in that Weyerhaeuser exercised discretionary authority or discretionary control over the management of the Plans and exercised authority and control over the Plans' assets.

B. Fiduciary Status of Northwater, Morgan Stanley, WAM, and Shariff

61. Northwater, Morgan Stanley, and WAM are all named as "Investment Managers" under Section 10.1(f)(iii) of the Salaried Plan Document, which provides that: "Each Investment Manager shall have such duties and responsibilities as shall be stated in the terms of its respective investment management agreement, as approved by the Investment Committee,

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1 including, without limitation, the authority and responsibilities to (1) Manage the investment of
2 funds [in the Master Trust] in accordance with the investment policy approved by the Investment
3 Committee, applicable investment guidelines and other agreed terms; . . ."

4 62. Under Section 1.39 of the Salaried Plan Document, each "Investment Manager"
5 is, by definition, an Investment Manager within the meaning of §3(38) of ERISA and a "party to
6 which fiduciary discretion is delegated for the investment of designated Plan Assets."
7 Accordingly, Northwater Capital, Morgan Stanley, and WAM are all named fiduciaries of the
8 Plans.

9 63. Defendant Shariff has been the President of WAM since April of 2004 and carries
10 out the fiduciary functions of WAM. Shariff was also named Chief Investment Officer (CIO) of
11 the Plans in April 2004 and oversees the company's Canadian defined benefit plan. Shariff is in
12 charge of the day-to-day management of the Plans' assets held in the Master Trust. Shariff's
13 duties include but are not limited to: implementing the investment strategy of the Plans,
14 evaluating and selecting new investments and managers; monitoring, managing and exiting from
15 existing investments and managers; assessing the performance, risks and liquidity of individual
16 investments and the portfolio as a whole; monitoring the Investment Managers and other service
17 providers hired by the Plans (including Morgan Stanley, Northwater and WAM); and performing
18 due diligence on all the investments in the Master Trust's portfolio.

19 64. Additionally, under Section 10.1(f)(iii)(B) and (C), Morgan Stanley and
20 Northwater, in their capacity as Investment Managers, have "the authority, responsibility and
21 discretion to appoint Investment Managers with respect to any assets for which [each] is acting
22 as Investment Manager."

23 65. The Master Trust Agreement also provides that an "Asset Manager" "means the
24 Named Fiduciary or Investment Manager, individually or collectively as the context shall
25 require, with respect to those Fund assets over which it exercises, or to the extent it is authorized
26 to exercise, discretionary investment authority or control." *See* Section 1.1(b) of the Master

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1 Trust Agreement. The powers, duties and responsibilities of the Asset Manager of the Master
2 Trust are set forth in Section 5.1, entitled "Investment Discretion and Appointment of Investment
3 Managers," which provides:

4 The Fund[s] [of the Master Trust] shall be invested and reinvested … at such time
5 or times in such investments and pursuant to such investment strategies or courses of action and in such shares and proportions as the Asset Managers, in their sole
6 discretion, shall deem advisable. The Named Fiduciary shall have the power to appoint and remove one or more Investment Managers, which may be an affiliate
7 of the Master Trustee.

8 66. As Asset Managers, Nortwater Capital, Morgan Stanley, WAM, and Shariff
9 exercised discretion in the investment and reinvestment of the Funds of the Master Trust.

10 67. Consequently, in light of the foregoing duties, responsibilities, and actions,
11 Morgan Stanley, Northwater, and WAM are named fiduciaries of the Plans pursuant to ERISA
12 § 402(a)(1), 29 U.S.C. § 1102(a)(1). In addition, Morgan Stanley, Northwater, WAM and
13 Shariff and fiduciaries within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that each
14 exercised discretionary authority or discretionary control over the management of the Plans and
15 exercised authority and control over the Plans' assets.

16 **C. The Fiduciary Status of the Defendant Members of the Investment Committee**

17 68. Section 10.1(f) of the Salaried Plan Document states in relevant part:

18 The Investment Committee shall consist of a Chairperson, who shall be the Chief
19 Financial Officer, and no less than three other voting members. The Chief Financial Officer shall select the voting members of the Investment Committee
20 and the committee shall have the authority and responsibility to:

21 (i) Periodically monitoring the investment performance of the Plan assets held in Trust;

22 (ii) Adopt, maintain, and modify an investment policy for the Trust
23 and the assets held under the Master Trust Agreement, as further described in Section 10.2 below;

24 (iii) Monitor and oversee the performance of each Investment Manager.

25 69. From 2007 to the present Defendant Bedient has served as Executive Vice
26 President and Chief Financial Officer of Weyerhaeuser.

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1 70. As the Chief Financial Officer of Weyerhaeuser, Bedient is the Chairman of the
2 Investment Committee and the fiduciary responsible for selecting and monitoring the Defendant
3 Members of the Investment Committee.

4 71. From 2005 to 2007 Defendant Taggart served as Executive Vice President and
5 Chief Financial Officer of Weyerhaeuser.

6 72. As the Chief Financial Officer of Weyerhaeuser, Taggart was the Chairman of the
7 Investment Committee and the fiduciary responsible for selecting and monitoring the Defendant
8 Members of the Investment Committee.

9 73. As set forth above, Defendants Giardini, Hillman, Margolin, Nitta, Shariff,[12]
10 Sherland, Smith, and John and Jane Does 1-10 also served on the Investment Committee.

11 74. The Members of the Investment Committee were responsible under Section 10.2
12 of the Salaried Plan Document for the establishment of "an investment policy consistent with the
13 purposes of the Plan and the requirements of applicable law, as appropriate from time to time,"
14 and, on information and belief, during the Class Period participated in the establishment and
15 implementation of the Investment Policy of the Plans adhered to by the Investment Manager
16 Defendants.

17 75. Under Section 10.2 of the Salaried Plan Document the Members of the
18 Investment Committee also had "responsibility and authority with respect to the management,
19 acquisition, disposition or investment of Plan Assets to the extent such responsibility and
20 authority is not delegated to one or more Investment Managers or the Trustee."

21 76. Under Section 11.8 of the Salaried Plan Document, the Members of the
22 Investment Committee "ha[ve] the power to appoint, remove, or change from time to time an
23 Investment Manager to direct the investment of all or a portion of the [Master] Trust Fund held
24 by the Trustee."

25

26 [12] Defendant Weyerhaeuser did not name Defendant Shariff as a member of the Investment Committee in its initial disclosures. As described above, Plaintiff has reason to believe Shariff is a member of the Investment Committee.. However, if Shariff is not a member of the Investment Committee, Defendant Shariff is still a fiduciary based on his position at WAM, one of the Investment Manager Defendants as described above.

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77. The Investment Committee Defendants were also responsible under Section 10.1(f) of the Salaried Plan Document for establishing the duties and responsibilities of the Investment Manager Defendants and Northwater and approving investment management agreements with each of the Investment Manager Defendants and Northwater setting forth their duties and responsibilities.

78. Finally, under the terms of the Master Trust Agreement, each member of the Investment Committee is a Named Fiduciary as the "Investment Committee" is defined as "the committee acting as a Named Fiduciary with respect to the investment of assets under the Plans."

79. Consequently, in light of the foregoing duties, responsibilities, and actions, the Investment Committee Defendants were named fiduciaries of the Plans pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and fiduciaries within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that each exercised discretionary authority or discretionary control with respect to management of the Plans, exercised authority or control with respect to management or disposition of the Plans' assets and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

VI. FACTS BEARING ON FIDUCIARY BREACH

A. Defendants Adopt a Portable Alpha Strategy & Invest Heavily in Hedge Funds and Private Equity to Enhance the Returns of the Master Trust

80. By no later than 2005, the Investment Committee Defendants or their predecessors had adopted, and the Investment Manager Defendants and Northwater Capital implemented, the Investment Policy which used a "portable alpha" investment strategy designed to outperform a chosen benchmark index while limiting risk to match that pre-selected portfolio (the "targeted benchmark"). In general terms, a portable alpha strategy is one where the portfolio manager separates alpha from beta by investing in securities that differ from the stated benchmark index from which the beta is derived. Alpha is the return achieved over and above the return that results from the correlation between the portfolio and the targeted benchmark (the correlation with the benchmark is the beta).

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81. According to Defendant Richard J. Taggart, Weyerhaeuser's former Chief Financial Officer and Member of the Investment Committee, the Master Trust's risk is measured against a portfolio of 60% S&P 500 index, 35% Lehman Brothers Long T-Bond index and 5% U.S. Treasury bonds. *See* Anand, Vineeta, TURBOCHARGED PORTFOLIO: Weyerhaeuser uses derivatives to justify assumed return of 11.5%, Pensions & Investments, June 25, 2001.

82. The success of a portable alpha strategy requires the achievement of two goals. The first is alpha generation, where alpha is the excess return of each alpha generating manger's portfolio relative to the expected return of a hypothetical portfolio with the same beta. An alpha of zero provides no excess return, a positive alpha of 1.0 means the fund has outperformed its benchmark by 1%, and an alpha of -1.0 would indicate an underperformance of 1%. Simply stated, alpha is often considered to represent the value that the skill of a portfolio manager adds to or subtracts from his portfolio's return.

83. The second aspect of a portable alpha strategy is the proper evaluation and management of the portfolio's beta, which is the extent to which the portfolio moves with a targeted benchmark. Beta measures the degree of correlation between the portfolio of each alternative investment manager and the benchmark. Beta is calculated using regression analyses. A beta of 1.0 indicates that the portfolio's returns will track almost exactly that of the benchmark. A beta of less than 1.0 means that the portfolio will be less volatile than the benchmark. A beta of greater than 1.0 indicates that the portfolio's return will be more volatile than the benchmark. For example, if a given alternative investment manager's portfolio's beta is 1.2, it is 20% more volatile than the benchmark. Simply stated, beta is a measure of the risk and return conferred on a portfolio by virtue of its correlation with the targeted benchmark portfolio as a whole. In the absence of alpha, if the targeted benchmark portfolio rises by 10%, a portfolio with a beta of 1.2 is expected to rise 12%. If the targeted benchmark declines by 10%, the portfolio with a beta of 1.2 is expected to decline by 12%.

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1 84. John S. Coates [13], who was vice president of Weyerhaeuser and managing director
2 of the pension fund investments group until early 2000, helped to implement the Master Trust's
3 shift away from traditional investments. As Coates has written, a portable alpha strategy
4 involves "compiling a well-diversified portfolio of alpha-generating managers regardless of the
5 asset classes in which they operate." *See* "Transporting Alpha to Enhance Institutional Portfolio
6 Results," *Morgan Stanley Investment Management Issues of Interest*, John S. Coates, Spring
7 2004, at 3. In the Master Trust, the alpha-generating portion of the portfolio is the 81-88%
8 allocation to hedge funds, private equity and real estate funds (collectively the alternative
9 investments). Coates further explains the second part of a portable alpha strategy: "Once an
10 attractive mix of managers is selected, the embedded betas, if any, in the portfolio are assessed
11 and the [portfolio manager] then creates an overlay employing futures, options, swaps or other
12 contracts to add or subtract exposures to particular asset classes in order to achieve the desired
13 total asset allocation." *Id*. The description of the investment strategy employed by the
14 Investment Manager Defendants in Form 5500s filed by Plans is very similar to the strategy
15 described by Coates above: "When implementing the investment strategies of the Master Trust,
16 the portfolio managers of the Master Trust utilize swaps, futures or options, to help manage the
17 liquidity of the Master Trust, to achieve a target asset mix, and to gain exposure to the return
18 characteristics of specific financial strategies. The resulting asset mix achieved is intended to
19 allow the assets of the Master Trust to perform comparably with established benchmarks. . . .
20 Each investment and overlay position's exposure to the asset classes in the target asset mix is
21 determined separately and the portfolio is re-balanced to the target asset mix as needed. The
22 Master Trust utilizes options and swaps to manage liquidity, to rebalance the portfolio to its core
23 asset allocation targets which are set forth in the Master Trust's investment policy and to
24 maintain exposure to core investment strategies." *See* p. 13-14 of December 2008 Master Trust
25 Financial Statements filed with the Form 5500 for the Salaried Plan and the Form 5500 for the
26

[13] Coates is currently a managing director and chief investment officer of Morgan Stanley Dean Witter Alternative Investment Partners.

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Hourly Plan. In accordance with this strategy, the Master Trust reported holding $2.9 and $2.0 trillion (notional value) of swaps and other forward contacts as of December 2007 and 2008 respectively.

85. For a portable alpha strategy to be successful in practice, the portfolio manager must pick alpha-generating investments that really do outperform a hypothetical portfolio with the same beta while at the same time properly assessing the betas (or risk) of the alpha generating investments and managing that risk through derivatives to ensure that the total risk in the portfolio is no greater than that of the targeted benchmark. As discussed below, Morgan Stanley and Northwater Capital were the alpha generating portfolio managers, with Morgan Stanley managing the majority of the assets of the Master Trust. The Investment Manager Defendants (Morgan Stanley and WAM) were responsible for assessing betas/risk of all the assets in the portfolio and properly rebalancing that risk using derivatives.

86. However, a portable alpha strategy adds extra costs: not only does the Master Trust pay the active manager's fees, but it also absorbs the costs of the derivative transactions needed to rebalance the embedded betas. Therefore, it is not clear that a portable alpha strategy benefits investors when costs are taken into account. The value of the cost tradeoff for participants and beneficiaries is even more doubtful because the benefits paid to participants and beneficiaries are fixed so that excess returns will not increase benefits but all declines in value that are disproportionate to the target benchmark can lead to lost benefits.

87. As part of their portable alpha strategy, the Investment Manager Defendants and Northwater Capital sought alpha, *i.e.*, returns in excess of the targeted benchmark, by dramatically increasing the Master Trust's allocation to alternative investments including hedge funds, private equity, and real estate funds. As reported by Pensions & Investments:

> In the mid-1980s, Weyerhaeuser's pension fund began turbocharging its investment strategy by developing a fund-of-funds approach in which all the pension assets are invested in hedge funds and private equity funds. The pension fund does not invest in stocks and bonds directly. Rather, it uses derivatives such as equity and fixed-income futures overlaid upon the hedge funds and private equity funds to give it exposure to the equity and fixed-income markets,

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1 according to sources who are familiar with the pension fund's strategy and who spoke on condition of anonymity.

2

....*

3 One reason Weyerhaeuser invests in hedge funds and private equity funds is because it theoretically justifies the company's assumption that its pension fund
4 will average a long-term rate of return of 11.5%. The investment return corporations assume on their pension funds is important because it is one of the
5 key drivers of their pension cost. A higher return on pension assets automatically lowers a company's pension cost, or can boost a company's pension income –
6 which flows through to a company's bottom line and, in turn, to earnings per share.

7

8 Weyer's assumed return of 11.5% is the highest of more than 1,000 of the nation's corporations, including those in the Standard & Poor's 500 stock index. It's also
9 230 basis points above the 9.2% average in a Watson Wyatt Worldwide survey of more than 400 corporations last year, and higher than the S&P 500's average
10 return for the past 74 years.

11 Anand, Vineeta, TURBOCHARGED PORTFOLIO: Weyerhaeuser uses derivatives to justify

12 assumed return of 11.5%, *Pensions & Investments*, June 25, 2001.

13 88. Indeed, the current Investment Policy adopted by the Investment Committee

14 Defendants and implemented by the Investment Manager Defendants and Northwater Capital,

15 who were responsible for the management, acquisition and disposition of the majority of the

16 assets of the Master Trust during the Class Period, includes a "mix of nontraditional strategies,

17 including ***hedge funds***, ***private equity***, opportunistic real estate, and ***other externally managed***

18 ***alternative investment funds***" (the "Investment Policy").

19 89. The Investment Management Weekly similarly reported that on March 17, 2000,

20 Morgan Stanley Dean Witter & Co. of New York ("Morgan Stanley") hired six investment

21 managers from Weyerhaeuser to help launch a new venture to expand the firm's alternative

22 investment products, such as hedge funds and venture capital. John Coates, then manager of the

23 Weyerhaeuser pension fund, became the chief investment officer of the new firm, while Putnam

24 Coes, then a vice president in Morgan Stanley's investment management group, became its chief

25 operating officer. The new venture was intended to boost Morgan Stanley's alternative asset

26 management business by responding to rising demand from institutional clients and wealthy

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1 individuals. *Weyerhaeuser Team Joins Morgan Venture*, Investment Management Weekly,
2 March 27, 2000.

3 90. The Year 2000 Form 5500 for the Salaried Plan similarly reported that "Effective
4 April 14, 2000, the Weyerhaeuser Pension Fund Investment Committee assigned the investment
5 management of approximately 85% of the assets within the Master Trust to Miller Anderson
6 Sherrerd (MAS) a subsidiary of Morgan Stanley Dean Witter. Concurrent with the assignment,
7 the investment professionals previously employed by Weyerhaeuser Company became the
8 employees of MAS. The remaining assets within the Master Trust are managed by other
9 managers." *See* 2000 Financial Statements filed with the Form 5500 for the Salaried Plan Form
10 5500.

11 91. In October of 2001, Northwater Capital was hired as an Investment Manager for
12 the Plans to implement the Investment Policy. At that time, Northwater Capital and the
13 Investment Committee entered into two Investment Management Agreements, whereby
14 Northwater Capital was a "Named Fiduciary" for the Weyerhaeuser Salaried and Hourly Plans
15 (as well as other plans) and would manage the assets in "Account A" and "Account B." As a
16 Named Fiduciary to both the Salaried and Hourly Plans, Northwater Capital was required to act
17 prudently, loyally and in accordance with ERISA when investing the assets of Plans, including
18 Accounts A and B.

19 92. The Investment Guidelines[14] for Account B provide, in relevant part:

20

21 "**Performance Guidelines**: The investment returns for Account B (when considered on an aggregated basis with Account A) will be measured on a rolling 4-year basis with a
22 performance target of LIBOR plus 300 basis points."

23 "**Liquidity**: The investments in Account B (when considered on an aggregated basis with Account A) shall be ones that reasonably can be expected to be liquidated if
24 necessary, over the following periods: 75% of such aggregated assets, over a period not

25

26 [14] As discussed below, the May 2006 Investment Guidelines for Account A are substantially similar to the Investment Guidelines for Account B. In addition, the Investment Guidelines entered into in 2001 for Accounts A and B are substantially similar to the May 2006 Guidelines. *See* 2001 Investment Agreement for Accounts A&B, Exs. 1-2 to Declaration of Michael S. Schachter, July 12, 2011 (Dkt. No. 48-1-3).

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1 in excess of 18 months and as to 25% of such aggregated assets, over a period not in
2 excess of four years"

3 "**Diversification and Concentration**: [T]he Named Fiduciary may, but is not obligated hereunder to diversify the assets under its management. . . .
4

5 The Plans are subject to certain overall concentration limitations (collectively, the 'Concentration Limit' on investments in particular Funds and strategies, which apply not only to Accounts A and B, but to all assets of the Plans. . .
6

7 The Plans are subject to certain overall limitations on investments in swap transactions as set by the Committee (collectively, the 'Swap Limit' on investments in particular Funds and strategies, which apply not only to Accounts A and B, but to all assets of the Plans."
8

9 Investment Agreement for Accounts A&B, Exs. 3-4 to Declaration of Michael S. Schachter, July
10 12, 2011 (Dkt. No. 48-4-5).

11 93. In order to comply with the Concentration Limit and Swap Limit, and Northwater
12 Capital is required to notify WAM of all new investments and to seek approval on any
13 investment greater that $100 million in value or any new or additional swap transaction.

14 94. The Investment Guidelines for Account A are substantially similar except that the
15 permitted investments for Account A are "hedge funds that are not publicly offered in the United
16 States and that hold "plan assets" within the meaning of ERISA," whereas the permitted
17 investments for Account B are much broader, including publicly traded or private hedge funds
18 that do not hold "plan assets" within the meaning of ERISA, equity securities, guaranteed
19 investment contracts, certificates of deposit, cash, or "any other security or investment
20 instrument with the prior written approval of the [Investment] Committee . . . directly or
21 indirectly through derivative structures including, but not limited to: swaps, forwards, futures,
22 options and notes." Inv. Agreements for Account A&B, at App. B.

23 95. According to the schedule of assets appended to the Northwater Capital
24 Investment Guidelines, by May of 2006, there were no assets in Account A and all of the assets
25 of Account B were invested in eleven (11) alternative investments (hedge funds, private equity
26 and real estate funds). *Id.* at App. A. On information and belief, currently all the assets of

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1 Account B are invested in alternative investments even though the Guidelines permit Account B
2 to be invested in conventional investments such as equity securities and certificates of deposit.
3 96. Based on the schedule of assets for Account B attached to the May of 2006
4 Investment Agreement, Northwater Capital failed to adhere to the "Performance Guidelines"
5 because the assets of Account B (Account A had not investments) are likely too volatile to
6 conform to a target of LIBOR plus 300 basis points over a rolling four year period.
7 97. Northwater Capital also failed to adhere to the "Liquidity" provisions of the
8 Investment Guidelines by investing only in alternative investments, many of which take
9 substantially longer than four years to liquidate.[15] As reported by GAO and discussed above,
10 private equity investments usually require commitments of approximately 10 years or more.
11 98. On information and belief and as described above, Morgan Stanley was the
12 Investment Manager responsible for managing the assets in the Master Trust not managed by
13 Northwater Capital, which was approximately 270 alternative investments at the end of 2006.[16]
14 99. Beginning with the 2003 Weyerhaeuser 10-K, the Company began disclosing the
15 allocation of the assets of its "Qualified and Registered Pension Plans" by asset categories. The
16 10-K stated that as of December 2002, over 92% of the assets of the Weyerhaeuser pension plans
17 were invested in alternative investments: 32.2% in private equity funds, 43.3% in hedge funds,
18 and 16.9% in real estate funds. As of December 2006, 84% of the assets of the Weyerhaeuser
19 pension plans were invested in alternative investments: 26.3% in private equity funds, 53.4% in
20 hedge funds, and 3.9% in real estate funds. The allocations to alternative investments were
21 substantially similar in 2007, 2008, 2009, and 2010.
22 100. In short, the Investment Policy adopted by the Investment Committee Defendants
23 and implemented by the Investment Manager Defendants and Northwater Capital utilized a
24
25
26

[15] The Guidelines require that all the assets of Accounts A and B "shall be ones that reasonably can be expected to be liquidated if necessary, . . . over a period not in excess of four years."

[16] According the to 2006 Form 5500, the Master Trust was invested in 287 different hedge funds, private equity and real estate funds in 2006 and, as of May of 2006, Northwater Capital's Account A had no investments and Account B had eleven (11) investments. Accordingly Morgan Stanley managed approximately 270 of the 287 alternative investments.

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1 portable alpha strategy and was heavily reliant on hedge funds and private equity for alpha
2 generation, in an attempt to outperform the market, despite the increased risks and costs
3 associated with these types of alternative investments. The actions of the both the Investment
4 Committee Defendants, the Investment Manager Defendants and Northwater Capital caused the
5 losses to the Plans as further described below. *See* discussion *infra*.

6 **B. The Increased Risk & Costs Associated with Investing in Hedge Funds**

7 101. "Pension plans face a number of challenges in hedge fund investing beyond those
8 of more traditional investing, including specific investment risks, limited transparency, and
9 liquidity, and risks related to the operations of the hedge fund." *See* GAO Report of
10 Congressional Requestors, "DEFINED BENEFIT PENSION PLANS – Guidance Needed to
11 Better Inform Plans of the Challenges and Risks of Investing in Hedge Funds and Private
12 Equity" GAO-08-692, a report to congressional requestors (August 14, 2008) (the "GAO
13 Report"), at 22.

14 102. Frequently, investors in hedge funds cannot get their money out easily because
15 hedge funds usually impose "lock-up" periods that require investors to commit their money for
16 periods of one or two years or more. The lock-up period allows managers to invest in less-liquid
17 assets without having to worry that investors will want their money back before the investments
18 have matured. Moreover, even after the lock-up period has ended, investors in hedge funds
19 frequently cannot redeem their investments at will. Rather, redemptions are limited to specified
20 window periods with a pre-notification requirement. Liquidity limitations can inhibit a plan's
21 ability to minimize investment loss and increase the risk of investing in hedge funds.

22 103. As one commentator explained about hedge funds:

23 The investment strategies of hedge funds are often not well known, or are so
24 lacking in transparency – even to their own investors (prospectuses are often
written to allow funds a great deal of latitude in crafting their investment
25 strategies) – that the investors cannot adequately assess the hedge fund
investment's contribution to their overall portfolio risk. Without a thorough
26 knowledge of the hedge fund investment strategy, the investor can [not] determine
whether they are diversifying into independent, uncorrelated assets or not.

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1 Testimony of Randall Dodd, Director of the Financial Policy Forum, Washington D.C., before
2 the U.S. Department of Labor, Employee Benefits Security Administration: Advisory Council
3 on Employee Welfare and Pension Benefit Plans, September 20, 2006 ("Dodd Testimony").
4 104. Because the investment holdings and investment strategies of many hedge funds
5 are often not well known, it makes it difficult for the fund assets to be marked to market. As the
6 GAO Report explains:

7 > Because many hedge funds may own thinly traded securities and derivatives
8 > whose valuation can be complex, and in some cases subjective, a plan may not be able to obtain timely information on the value of assets owned by a hedge fund.
9 > Further hedge fund managers may decline to disclose information on asset holdings and the net value of individual assets largely because release of such
10 > information could compromise their trading advantage. In addition, even if hedge fund managers were to provide detailed positions, plan sponsors might be unable
11 > to fully analyze and assess the prospective return and risk of a hedge fund. As a consequence, a plan may not be able to independently ascertain the value of its
12 > hedge fund investment or fully assess the degree of investment risk posed by its hedge fund investments.

13 GAO Report at 25.
14 105. Hedge funds also present investment risks beyond those posed by traditional
15 investments. These include over-reliance upon on the skills of the hedge fund manager, who
16 often has broad latitude to engage in complex investment techniques that can involve various
17 financial instruments in various financial markets, as well as the use of leverage and short
18 selling, which amplifies potential gains and losses.
19 106. Pension plans investing in hedge funds are also exposed to greater operational
20 risks. "Operational risk is the possibility of losses from systems, processes, technology,
21 individuals or events." Investor's Working Group Report at 34. "Operational problems can arise
22 from a number of sources, including inexperienced operations personnel, inadequate internal
23 controls, lack of compliance standard and enforcement, efforts in analyzing, trading or recording
24 positions, or out right fraud." GAO Report at 27.
25 107. Hedge fund managers are not subject to the same registration and reporting
26 requirements as securities brokers and other investment fund managers. Unlike mutual funds,

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hedge funds are not registered with the SEC and are therefore subject to very few regulatory controls. The absence of such regulatory controls, coupled with the fact that many hedge funds make it difficult to for funds' assets to be marked to market, make hedge fund investments "especially prone to financial fraud." *See* Dodd Testimony.

108. "[P]articular care should be exercised in due diligence of hedge funds, because of the complex investment strategies they employ; the fact that hedge fund organizations are frequently young and small; their use of leverage and the associated risks; the possibilities of concentrated exposure to market and counterparty risks, and the generally more lightly regulated nature of these organizations." Investor's Working Group Report at 12. "The process of selecting and monitoring hedge fund investments requires additional resources and continuous support from experienced professionals, which may be substantially more expensive than those required to select and monitor traditional investments. Fiduciaries should understand the effort and costs that will be required, and should commit these resources prior to investing in hedge funds." *Id.* at 7.

109. Finally, unlike most traditional investment products, hedge funds typically charge both a management fee (typically 1-2%) based upon the amount of assets under management (the "Management Fee") and an annual performance fee (typically 20%) based on the success of the fund (the "Performance Fee"). "This fee structure typically exceeds the fees of traditionally managed funds substantially. The higher fee structure implies that an extra standard of care should be undertaken by investors in hedge funds to determine if the higher fee is justified by the risk adjusted value added potential of the investment." Principles and Best Practice for Hedge Fund Investors, Report of the Investor's Committee to the President's Working Group on Financial Markets ("Investor's Working Group Report"), at 11.[17]

[17] Defendant Shariff is member of the Investors' Practices Committee that authored the Investors' Working Group Report. *See id.* at 63.

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C. The Increased Risk & Costs Associated with Investing in Private Equity Investments

110. The GAO Report describes private equity funds as follows:

> [T]he term generally includes privately managed pools of capital that invest in companies, many of which are not listed on a stock exchange. Although there are some similarities in the structure of hedge funds and private equity funds, the investment strategies employed are different. Unlike many hedge funds, private equity funds typically make longer-term investments in private companies and seek to obtain financial returns not through particular trading strategies and techniques, but through long-term appreciation based on corporate stewardship, improved operating processes and financial restructuring of those companies, which may involve a merger or acquisition of companies. Private equity is generally considered to involve a substantially higher risk than traditional investment, such as stocks and bonds, for a higher return.

GAO Report at 10.

111. As with investments in hedge funds, pension plans investing in private equity face many challenges and risks beyond the risks of traditional investments. Private equity funds are prone to concentration risk in the underlying holdings because the funds typically hold a limited number of underlying companies in their portfolio and often the companies are in the same industry or sector. *See* GAO Report at 33.

112. Because private equity funds typically use leverage, their returns are susceptible to substantial variation. For example, it has been reported recently that private equity funds who used borrowed funds to buy up public companies in the past are now finding it difficult in the current credit crunch to refinance the loans and bonds sold to finance these deals. "Pension funds and college endowments that invested their money into these funds in recent years hoping for big returns are likely to suffer as well, and many of those investors could face a cash squeeze, as they are forced to hold onto their investments for years until the economy recovers." Andrew Ross Sorkin and Michael De La Merced, *Debt Linked to Buyouts Tightens the Economic Vise*, New York Times, November 2, 2008.

113. A further challenge of investing with private equity funds — regardless of how they perform — is that they often require commitments of 10 years or more. A plan may not

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1 redeem invested capital or see any return on its investment for at least several years and in some
2 cases may be called upon by an equity fund manager to commit additional capital. For example,
3 it was recently reported that Goldman's Sachs Group, Inc.'s biggest real-estate private equity
4 fund, the Whitehall Global Real Estate Limited Partnership 2007, informed its investors that
5 $1 billion in additional committed capital was due from investors to repay $677 million on a line
6 of credit and "finance a business plan that Whitehall says will recover 71% of investors' total
7 equity over the fund's holding period." Anton Troianovski and Lingling Wei, *Whitehall Cash*
8 *Call Adds Insult to Losses,* The Wall Street Journal, May 15, 2009.

9 114. Private equity funds provide the additional challenge that the assets of private
10 equity funds are often hard to value. Unlike stocks and bonds, the prices of which can obtained
11 on publicly traded markets, plans have limited information on the value of private equity
12 investments. As a consequence, it may be difficult to assess how the fund has performed until
13 the underlying investments are actually sold.

14 115. As in the case of hedge funds, private equity funds typically charge an annual fee
15 of 2% of invested capital and 20% of returns, whereas mutual fund managers typically charge a
16 fee of about 1% or less of assets under management.

17 116. Generally speaking, greater effort and expertise is required in order to mitigate the
18 challenges of investing in private equity as compared to making traditional investments.
19 Because of the complexities of investment strategies and the variations in performance among
20 private equity funds, significant due diligence is required in the initial selection of such funds as
21 well as in the ongoing monitoring of such investments. As a result, private equity investments
22 are more costly and time-intensive to manage than traditional investments.

23 **D. Investments by Pension Plans and Other Trusts in Hedge Funds and Private Equity Investments**
24

25 117. Although investments in hedge funds and private equity by private and public
26 pension plans has grown in recent years, several recent surveys conducted of pension funds (both
public and private) showed that fewer than half the pension funds surveyed have investments in

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1 private equity and about one quarter have investments in hedge funds. *See* GAO Report at
2 13 through 19.

3 118. Among those pension plans that do invest in hedge funds and/or private equity,
4 the investments generally represent a small share of the total plan assets. According to the GAO
5 Report one survey showed that "the average allocation to hedge funds among plans with such
6 investments was about 4 percent in 2007" and "among plans with investments in private equity,
7 the average was about 5 percent." *Id.* at 13.

8 119. The GAO Report summarized the level of pension plan investments in alternative
9 investments as follows:[18]

10 Although the majority of plans with investments in hedge funds or private equity
11 have small allocations to these assets, a few plans have relatively large allocations
. . . . . Of the 62 plans that reported investments in hedge funds in 2007, 12 plans
12 had allocations of 10 percent or more and, of those, 3 plans had allocations of 20
percent or more. The highest reported hedge fund allocation was 30 percent of
13 total assets. Large allocations to private equity were even less common. A total
of 106 surveyed plans reported investments in private equity in 2007, of which 11
14 plans had allocations of 10 percent or more and, of those, 1 plan had an allocation
of about 20 percent.

15 *Id.* at 13-14.

16 120. Under the Investment Policy established by the Investment Committee, the
17 Investment Manager Defendants have allocated significantly larger percentages of the Plans'
18 assets held in the Master Trust to hedge funds and private equity investments than any of the
19 plans surveyed in the GAO Report.

20 121. Based on the GAO study, Weyerhaeuser's portfolio mix is a dramatic outlier, with
21 a 53% allocation to hedge funds and 24% allocation to private equity in 2007. Based on the
22 findings in the GAO Report and on information and belief, no other pension fund comes
23
24
25
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[18] The data on hedge fund and private equity allocations set forth in the GAO Report was based on a survey conducted by Pension and Investments in 2007 of the largest 200 plans, ranked by combined defined benefit and defined contribution plan assets. Of the 200 plans surveyed, only 133 completed the survey and provided asset allocation information. These 133 plans constituted the universe for which GAO reported asset allocations and did not include the Weyerhaeuser Plans that are the subject of this Complaint. On information and belief, the plan that reported a 30% allocation to hedge funds (the highest in the GAO Report) was the Walt Disney Plan. *See* "Appendix I: Objectives, Scope and Methodology" of the GAO Report.

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1 anywhere close to the Weyerhaeuser's outsized allocation of pension assets to hedge funds and
2 private equity.

3 **E. Overfunding of the Weyerhaeuser Plans**

4 122. As reported in the annual 10-K, the Plans were overfunded from 2003 to 2007.

5 123. By the end of 2007, the pension plans sponsored by the Company (the majority of
6 whose assets were composed of the assets of the Plans held in Master Trust) were collectively
7 overfunded by **$2.1 billion**.[19]

8 124. However, despite being overfunded by over $2 billion, Defendants continued to
9 allocate 80%+ of the Master Trust to alternative investments. Defendants continued this
10 aggressive, risky and costly investment strategy to enhance the Company's financial reporting,
11 not to benefit the participants of the Plans, who rely on the Master Trust to pay their retirement
12 benefits.

13 125. A New York Times article dated November 27, 2005, reported:

14–17
> Weyerhaeuser's big position [in hedge funds] has significant benefits for the company. Accounting rules let companies factor expected pension returns into their operating income; Weyerhaeuser's hedge-fund-laden portfolio allows it to claim expected annual returns of 9.5 percent. By comparison, the 100 largest companies that sponsor pension funds predicted last year that their average long-term returns would be 8.5 percent, according to Milliman Inc., an actuarial firm.

18 Riva D. Atlas and Mary Williams Walsh, "Pension Officers Putting Billions Into Hedge Funds,"
19 New York Times, Nov. 27, 2005.

20 126. As explained in the Herald Tribune on November 28, 2005:

21–25
> Accounting rules let companies factor expected pension returns into their operating income, and Weyerhaeuser's portfolio, which is heavy on hedge funds, allows it to claim expected annual returns of 9.5 percent. For Weyerhaeuser, each increase of 0.5 percentage points in the expected rate of return is worth an additional $21 million to the company's pretax income this year, according to filings with the U.S. Securities and Exchange Commission.

26
[19] As reported in the 2008 Weyerhaeuser 10-K, the actual value of Weyerhaeuser's pension assets at December 30, 2007 was $6.9 billion. The 2007 Weyerhaeuser 10-K reported that the benefit obligations of the plans sponsored by the Company were $4,793,000,000.

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1 Mary Williams Walsh and Riva D. Atlas, "Pension plans turn to richer, shakier ground"
2 International Herald Tribune, Nov. 28, 2005.
3 127. The significant accounting policies summarized in the "Notes to the
4 Weyerhaeuser Consolidated Statement" for the period ended December 30, 2007, contained in
5 the 2007 10-K, state:
6 We recognize the overfunded and underfunded status of our defined benefit pension and other postretirement plans on our balance sheet and recognize
7 changes in that funded status, in the year in which the changes occur, through comprehensive income.
8 128. The Weyerhaeuser 2007 Financial Statement states that the Company included in
9 Consolidated Statement of Shareholders Interest and Comprehensive Income under the heading
10 "Other Comprehensive Income" $644 million, which amount represented the "changes in
11 unamortized net pension and other post retirement benefit gain, net of tax expense of $438
12 [million] in 2007." Of this amount $584 million represented the "Net gain (net of taxes)" for the
13 Company's pension plans, the majority of which gains were experienced by the Plans. The
14 inclusion of the net gain experienced by the Company's pension plans, which largely resulted
15 from the gains to the Plans as a result of the implementation of the Investment Policy, increased
16 the total "Comprehensive income" reported on the Company's Financial Statements by $584
17 million from $1.1 billion to $1.7 billion.
18 129. The assets statement on the 2007 Financial Statement of the Company listed
19 among the Company's "Current assets" $2.5 billion in "Deferred pension and other assets,"
20 which amount, on information and belief, included the $1.9 billion in overfunding in the
21 Company's pension plans, most of which amount represented the overfunding in the Plans. As a
22 consequence the Company reported total assets of $23.8 billion as of December 30, 2007. On
23 information and belief, without the inclusion of the overfunding in the Company's pension plans
24 in the Asset Statement, most of which overfunding was that of the Plans, the total assets of the
25 Company as of December 30, 2007, would have been 9% less or approximately $22 billion.
26

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F. The Decline in the Value of the Assets of the Weyerhaeuser Plans in the Fourth Quarter of 2008 and the Resulting Underfunding of the Plans

130. As a result of the excessive risk in the Master Trust's portfolio and the overconcentration in alternative investments (including 53% in hedge funds, 24% in private equity as of December 2007), the Master Trust lost $2.4 billion (or 41% of its value) in 2008 including a loss of approximately 30% in just the 4th quarter alone. Rather than outperforming its targeted benchmark, the Master Trust underperformed its benchmark by 27% in 2008 and was essentially flat with the benchmark in 2009 and 2010.

131. A regression analysis of the Master Trust's portfolio from 2000 to 2010 as compared to its targeted 60/35/3 benchmark produces a beta of 1.78 with a negative though insignificant alpha of -1.5%. The beta of 1.78 means that the Master Trust had almost twice the risk of its benchmark between 2000 to 2010, which indicates that the Investment Manager Defendants have systematically underestimated the amount of risk in the portfolio and thus failed to appropriately rebalance that risk to be no greater than its targeted benchmark. As a result from 2000 to 2010, the portfolio had significantly greater volatility and market exposure than is allowed by the investment policy.[20]

132. The negative but insignificant alpha term indicates that, over time, no excess return or performance (alpha) is being generated. Indeed, the negative alpha indicates that the outperformance from 2000 to 2007 (when compared to the benchmark) was the result of excess beta or risk in the portfolio, not alpha. If the Investment Manager Defendants were actually assessing the risk of the portfolio properly, they knew or should have known that the Master Trust consistently had almost twice as much risk as its targeted benchmark and thus would significantly underperform the benchmark in a market downturn as it did in 2008.

[20] As discussed *supra*, the portfolio is "intended to allow the assets of the Master Trust to perform comparably with established benchmarks. . . . The Master Trust utilizes options and swaps to manage liquidity, to rebalance the portfolio to its core asset allocation targets which are set forth in the Master Trust's investment policy and to maintain exposure to core investment strategies."

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1 133. In short, the regression analysis shows that in reality the portfolio of investments
2 selected and maintained by the Investment Manager Defendants was almost twice as risky as the
3 targeted benchmark but did not produce the excess returns/alpha that it was intended to produce.
4 As such, the Investment Manager Defendants failed to adhere to the Investment Policy, which
5 provided that the total risk or beta in the Master Trust's portfolio remain commensurate with the
6 risk of the targeted benchmark.
7 134. Moreover, the Investment Management Defendants and Northwater chose to
8 invest in approximately 330 different hedge funds, private equity investments, and real estate
9 funds. Even absent specific prohibitions on the number of investments, the stunningly large
10 number of alternative made it practically impossible for the Investment Manager Defendants to
11 properly assess and accurately rebalance the embedded risk associated with each of the 330
12 alternative investments, including the combined risk of the portfolio as a whole.[21]
13 135. As a result of the number of alternative investments chosen, it is not surprising
14 that the Investment Manager Defendants systematically miscalculated the amount of risk in the
15 alternative investment portion of the portfolio. This resulted in the Master Trust's assets being
16 exposed to almost twice as much risk as the targeted benchmark, which caused the Master Trust
17 to lose $2.4 billion (or 41% of its value) in 2008 alone.
18 136. In addition, the Investment Manager Defendants, the Investment Committee
19 Defendants and Weyerhaeuser knew or should have known that such a large allocation to
20 alternative investments presented significant investment challenges that demanded greater
21 expertise and effort on the part of the investment managers than more traditional investments and
22 exposed the assets of the Plans to inordinate operational and investment risks.
23 137. The predictably large losses suffered by the Plans in 2008 were in part the result
24 of the Investment Committee's adoption and maintenance of an Investment Policy that permitted
25 an imprudent allocation of the Plans' assets in risky, illiquid, and hard to manage alternative
26

[21] In the Form 5500, Defendants state that "Each investment and overlay position's exposure to the asset classes in the target asset mix is determined separately and the portfolio is re-balanced to the target asset mix as needed."

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1 investments, even though they knew or should have known that such investments in the
2 aggregate were unduly risky and represented an inappropriate investment allocation for pension
3 assets.

4 138. Had the Investment Committee Defendants adopted an Investment Policy that
5 protected the principal of the Master Trust's assets to ensure that it remained adequately funded
6 and able to pay benefits, the Plans would not have lost $2.4 billion in 2008 causing them to
7 become underfunded. In reality the Investment Committee Defendants adopted a complicated
8 and risky Investment Policy that allowed the Investment Managers to allocate approximately
9 80% of the Plans' assets to alternative investments in an effort enhance the financial statements
10 of the Company and decrease the Company's obligation to make contributions to the Plans, in
11 violation of their ERISA duties of prudence, loyalty, and diversification.

12 139. In sum, the Investment Manager Defendants failed to properly assess and manage
13 the risk in the 330 alternative investments, thereby exposing the Master Trust to excessive risk.
14 Under the circumstances, the resulting risks undertaken by the fiduciaries of the Plans, including
15 Northwater Capital, the Investment Manager Defendants, the Investment Committee Defendants,
16 and Weyerhaeuser, was inappropriate for the Plans, which, along with the other pension plans of
17 the Company, were collectively overfunded by more than $196 million at the end of 2005, $843
18 million at the end of 2006, and $2.1 **billion** at the end of 2007, and did not need to take on
19 excessive risk to remain fully funded to meet the benefit obligation of the Plans to their
20 participants and beneficiaries.

21 140. The end result of collective breaches of fiduciary duties by all the Defendants was
22 a complicated and expensive shell game, at the cost of enormous fees and exposing the plans to
23 risks of loss far in excess of the benchmark portfolio. The Defendants achieved outsized returns
24 when the broad market performed well, but assured a catastrophe when the market declined. As
25 explained below, Defendants' strategy as implemented separately exposed the Plans to disastrous
26 liquidity risks by investing almost the entire portfolio in illiquid assets. Disaster was averted

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1 only, by the Weyerhaeuser's willingness and ability to lend the Plans $200 million without
2 interest to allow the Plans to pay benefits.

3 141. In fact, together the Defendants caused the assets of the Master Trust to sharply
4 decline in value and caused the Company's pension plan assets (which include the assets of the
5 Master Trust) to dramatically shift from being overfunded by $2.1 billion to being underfunded
6 by $450 million just one year later, thereby jeopardizing the retirement income of the Plaintiff.[22]

7 142. Following the decline in the value of the assets of the Company's pension plans,
8 the Plans experienced liquidity problems. The Company reported in the 2008 10-K the
9 following:

10 . . . . recent market events have adversely affected liquidity [of the Company's
11 pension plans]. For instance, many of the funds in which plan assets are invested
have changed their redemption terms, delaying some of the pension trusts'
12 expected cash receipts. To avoid liquidating assets at depressed prices and, as
permitted by law, we elected to provide approximately $200 million of short-term
13 liquidity to the U.S. pension trust through short-term loans. These short-term
loans were made in the fourth quarter of 2008. Repayment by the pension trust is
14 planned in 2009.

15 143. The Company later reported that in the first quarter of 2009, it provided an
16 additional $85 million of short-term liquidity to the U.S. pension trust through short-term loans,
17 bringing the total receivable from the pension trust to $285 million.[23]

18 144. As of January 1, 2009, Schedule SB of the Form 5500 for the Salaried Plan
19 reported that the market value of Plan's assets was $1.461 billion and the funding target of the
20 Plan was $1.493 billion. *See* Schedule SB of the 2009 Form 5500 for the Salaried Plan. The
21 2010 Form 5500 for the Salaried Plan is not yet available.[24]

22 [22] In its 2008 10-K, the Company reported that the actual value of its pension plan assets was $6.9 billion and the
23 benefit obligation of the Company's pension plans was $4.793 billion as of 2007, resulting in an overfunding of $2.1 billion as of 2007. *See* pp. 82-83 of the Company's 2008 10-K. The value of the Company's pension plan assets as of 2008 was $4.132 billion and the benefit obligation of the Company's pension plans was $4.426 billion.
24 *Id*. However, the revised year-end value of the Company's pension plan assets, as stated in the 10-Q for the First Quarter of 2009, reflected a $150 million increase in the underfunding for the Company's pension plan, and brought the total underfunding for the pension plans at the end of 2008 to approximately $450 million.

25 [23] The Company's pension plans remain underfunded. As of December 31, 2009, the plans were underfunded by $600 million and as of December 31, 2010, the plans were underfunded by $494 million. *See* Weyerhaeuser's 2009 and 2010 Forms 10-K.

26 [24] To determine the actual funded status of a plan, it is appropriate to refer to the market value of its assets which reflects the real comparison between a plan's assets and the present value of its liabilities. ERISA allows, for

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145. As of January 1, 2009, Schedule SB of the Form 5500 for the Hourly Plan reported that the market value of Plan's assets was $1.898 billion and the funding target of the Plan was $1.475 billion. *See* Schedule SB of the 2009 Form 5500 for the Hourly Plan. The 2010 Form 5500 for the Hourly Plan is not yet available.

146. The merged Salaried and Hourly Plans are currently underfunded as reported in the 2010 10-K:

> The Weyerhaeuser Company Retirement Plan for Hourly Rated Employees was merged into the Weyerhaeuser Company Retirement Plan for Salaried Employees on December 31, 2010. This merger resulted in a net underfunded status for the plan in our consolidated results. Previously, the Weyerhaeuser Company Retirement Plan for Hourly Rated Employees was overfunded.

See p. 75 of the 2010 10-K.

G. Defendants' Breaches of Fiduciary Duty have Caused Plaintiff to Suffer Significant Harm and Injury

147. Defendants' breaches of fiduciary duty have caused substantial harm to Plaintiff and the members of the Class by: (1) jeopardizing their retirement benefits; (2) potentially extinguishing their right to lump sum payments of benefits; and (3) increasing the risk that benefit accruals will be mandatorily frozen.

148. As described above, the Plans were substantially overfunded from 2003 until 2007. Defendants' breaches of fiduciary duty caused substantial losses to the Plans, such that even if the Plans are not currently underfunded, Plaintiff suffered significant harm to the security of his retirement benefits. Congress intended to protect the integrity of all plan assets including an overfunding cushion to assure that plan assets will be sufficient to pay benefits years into the future. ERISA's structure and rules are designed to provide several layers of protection for defined benefit pension plans and give Plaintiff a stake in restoring plan assets to whatever level they would have been absent any breach of fiduciary duty.

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certain purposes, the use of a smoothed "actuarial value," primarily to protect employers against extreme and difficult to plan for swings in an employer's annual funding obligation based on sharp market movements. In the short run, however, this "actuarial value" of assets obscures a plan's true financial and actuarial condition.

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1 149. Further, Congress reinforced this scheme with the passage of the Pension
2 Protection Act ("PPA") in 2006. Pursuant to the PPA, a participant may lose his ERISA
3 protected right to elect a lump-sum distribution of his pension benefit if the Plan's Adjusted
4 Funding Target Attainment Percentage (AFTAP) falls below 80%. As discussed above, the
5 Salaried Plan document provides a lump-sum election to plan participants whose benefit will be
6 less than $500 per month (*see* Section 4.9(b)(ii) of Salaried Plan Document). Thus, participants
7 look to the Plan's assets (including any overfunding) as a safeguard against the loss of an
8 otherwise ERISA protected benefit—the right to a lump-sum. As such, Defendants' breaches of
9 fiduciary duty, puts at risk Plaintiff's entitlement to elect a lump-sum.
10 150. In addition, the PPA provides that plans must restrict benefits under certain
11 circumstances where funding falls below acceptable levels; this can result not only in limitations
12 on lump-sums but also on other benefit enhancements; it can even result in mandatory freezing
13 of benefit accruals. As such, participants face more exposure to lost benefits under PPA if their
14 plan is not well funded.
15 151. As described below, if the Plans are underfunded (either now or in the future), it
16 is far from certain that the Weyerhaeuser could cover the underfunding given the Company's
17 precarious financial condition.
18 152. Finally, the Pension Benefits Guaranty Corporation (PBGC) does not guarantee
19 all the benefits owed to participants and beneficiaries of the Plans. Moreover, as of 2002, the
20 present value of liabilities exceeds the assets of the PBGC. *See* "Challenges Facing Pension Plan
21 Funding: Hearing Before the Subcomm. on Select Revenue Measures of the H. Comm. on Ways
22 and Means," 108th Cong. 1 (2003) (statement of Steven A. Kandarian, Executive Director,
23 Pension Benefit Guar. Corp.), available at
24 http://www.pbgc.gov/news/testimony/page/tm043003.html.
25 153. Currently the PBGC's deficit for single employer plans is $21.6 billion. *See* Josh
26 Gotbaum, Pension Benefit Guar. Corp., 2010 pbgc Annual Report (2010), available at

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1 http://www.pbgc.gov/documents/ar2010.htm. As such, Defendants' breaches of fiduciary duty
2 could, in very real terms, put at risk the benefits owed Plaintiff and the Class.

3 **H. Financial Condition of Weyerhaeuser Company**

4 154. Weyerhaeuser's financial outlook is uncertain at best. Weyerhaeuser stock has
5 steadily fallen in the last 5 years from a high of $86.18 in February of 2011 to $20.64 on July 26,
6 2011. In fact the company's stock has lost almost half its value in the last year (since July 12,
7 2010) at a time when the S&P 500 was increased by 23.5%.

8 155. The Company, which has a market cap of approximately $10.7 billion, posted
9 significant losses in 2008 and 2009 and then converted itself to a Real Estate Investment Trust
10 (REIT), which means that its profits are not taxed. In order to complete this conversion, the
11 Company paid out a special dividend of $5.6 billion last year, which represented all the earnings
12 and profits the company has accumulated and not paid out in the form of dividends to investors
13 since its inception more than 100 years ago.

14 156. According to Peter Robison and Christopher Donville of Bloomberg News,
15 "Weyerhaeuser is in a financial crisis so deep the largest U.S. lumber producer turns down the
16 heat in its offices to save money. . . ." Moreover, the REIT conversion "may force the spinoff of
17 more non-timber assets. The company has been shedding them [assets] under CEO Daniel
18 Fulton, who has closed 10 wood-products mills this year, halved capital expenditures, sold off
19 packaging businesses, frozen salaries and eliminated almost half of the work force. . . ." "*Chilly*
20 *times push Weyerhaeuser closer to REIT*," Seattle Times, April 17, 2009.
21 http://seattletimes.nwsource.com/html/businesstechnology/2009072872_weyco17.html

22 157. Several analysts have also reported that cash is scarce at Weyerhaeuser. "A
23 record $1.2 billion loss on $8 billion in revenue last year and the likelihood of negative cash flow
24 through 2010 has put Fulton into 'conservation' mode, said Joshua Zaret, an analyst with
25 Independence, Ohio-based Longbow Research. "His [Fulton's] priorities are stemming the cash
26 leakage and battening down the hatches . . .The burning issue is how to minimize the cash

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1 bleed," said Zaret. 'Everything's going to depend on the timing of a housing recovery, and at
2 this point there's no light at the end of the tunnel.' *Id.*

3 158. In May of 2009, Moody's downgraded Weyerhaeuser's senior debt rating to "Ba1"
4 – a "junk bond" rating. Moody's reported that the downgrade was due to the Company's
5 weakened financial position and the expectation that it will continue to face challenging industry
6 conditions over the next 12 to 18 months. "The company's weakened credit profile is principally
7 due to its significant exposure to the protracted downturn in the U.S. residential construction
8 market. We anticipate that the company's performance will remain challenged until U.S. housing
9 starts recover [sic] towards trend levels," Moody's said in a statement. "*Moody's cuts*
10 *Weyerhaeuser's debt ratings to junk*", Marketwatch (May 6, 2009), Sue Chang
11 http://www.marketwatch.com/story/moodys-cuts-weyerhaeusers-debt-ratings-to-junk.

12 159. In September of 2009, Fitch also cut Weyerhaeuser's debt rating to junk (BB+)
13 and said it may lower them again on concerns about negative cash flow, a weak operating
14 environment and high debt level. "The action reflects negative free cash flow that is likely to
15 persist, even in the face of cost cutting," said Fitch. "The company has about $1.6 billion of debt
16 maturing in 2012 that may be tricky to refinance. A weak business profile, given the slump in
17 demand for housing and lumber, is another negative that's unlikely to improve quickly given the
18 faltering economy," it said. Fitch also warned that the special dividend which Weyerhaeuser is
19 obliged to pay to convert to a REIT could prove a further blow to bondholders' interests. "*Fitch*
20 *cuts Weyerhaeuser to junk on cash flow worries*," Reuters (Sept 3, 2009), Ciara Linnane,
21 http://www.reuters.com/article/2009/09/03/weyerhaeuser-ratings-fitch-
22 idUSNO39543220090903.

23 160. Weyerhaeuser's default risk of is real as described above and as shown by its debt
24 ratings that hover around junk bond status (see below); Moody's and Fitch maintain junk ratings,
25 while Standard and Poor's assigns the lowest possible investment grade rating (BBB-) to
26 Weyerhaeuser:

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Weyerhaeuser Issuer & Senior Unsecured Debt Ratings History					
S&P	**Effective**	**Fitch**	**Effective**	**Moodys**	**Effective**
BBB-	2/27/2009	BB+ (JUNK)	9/3/2009	Ba1 (JUNK)	5/6/2009
BBB*	11/21/2008	BBB-	11/4/2008	Baa2*	2/9/2009
BBB	3/17/2008	BBB	4/28/2004	Baa2*	2/11/2005
BBB*	5/7/2007	BB+ (JUNK)	10/13/2003		
BBB	2/15/2002	BBB-	2/12/2002		

6 161. While the Company has a duty to pay pension benefits if the Plans cannot, its
7 ability to pay is questionable given its unsteady financial outlook. Moreover, the fact that the
8 Company has paid out virtually all of its retained earnings as part of its conversion to a REIT,
9 leaves less cash on Weyerhaeuser's balance sheet to cover any funding shortfalls. As such, even
10 if the Plans are not currently underfunded, Plaintiff has a cognizable legal interest in protecting
11 the Plans from imprudent investment of its assets and the right to recover losses to such a plan
12 resulting from imprudence.

13 **I. Causation**

14 162. Had the Investment Committee Defendants adopted a prudent Investment Policy
15 that was only in the best interest of the Plans, the majority of assets of the Master Trust would
16 have been to safeguard principal rather than in risky and illiquid alternative investments.

17 163. Had the Investment Manager Defendants properly executed the Investment Policy
18 such that the risk in the Master Trust's portfolio matched that of its target benchmark (60%
19 stocks, 35% long term bonds and 5% U.S. treasury bonds), most of the dramatic losses in 2008
20 would not have occurred. The target benchmark returned -14.2% in 2008, compared with the
21 return of the Master Trust of - 41%.

22 164. Had Northwater Capital properly followed the Performance Guidelines and
23 Liquidity Requirements of the Investment Guidelines, the assets managed by Northwater Capital
24 would not have suffered such losses.

25 165. Had Weyerhaeuser or the Investment Committee Defendants properly monitored
26 the Investment Managers, including Morgan Stanley, WAM and Northwater, the assets of the

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1 Master Trust would have been invested in line with the target benchmark and the majority of the
2 2008 losses would have been avoided.

3
VII. CLASS ALLEGATIONS

4 166. **Class Definition**. Plaintiff brings this action pursuant to Fed. R. Civ. P.
5 23(b)(1)(A) and (2), on behalf of himself and the following Class:

6 All participants who are vested in accrued benefits in the Plans from January 1,
7 2006 to the present and their beneficiaries. Excluded from the Class are
Defendants and members of their immediate families or any of their heirs,
8 successors or assigns.

9 167. **Numerosity**. The members of the Class are so numerous that joinder of all
10 members is impracticable. There were more than ninety thousand participants in the Plans as of
11 December 31, 2006.

12 168. **Commonality**. As to the members of the Class, this case presents numerous
13 common questions of law and fact, among them:

14 a. Were the Defendants or any of them fiduciaries of the Plans within the
15 meaning of ERISA as a result of their roles with respect to the creation and/or
16 implementation of the Investment Policy of the Plan and/or the investment of the
17 Plans' assets in alternative investments, including hedge funds and private equity?

18 b. Did the Defendants or any of them breach their fiduciary obligations under
19 ERISA to prudently manage the Plans' assets by causing or allowing the Plans to
20 invest up to 81% of the Plans' assets in alternative investments, including hedge
21 funds and private equity investments?

22 c. Did the Defendants or any of them breach their fiduciary obligations under
23 ERISA to act loyally and solely in the interest of the participants and beneficiaries
24 of the Plans by causing or allowing the Plans to pursue an investment strategy
25 which exposed the assets of the Plans to inordinate risk in order to enhance the
26 Company's balance sheet by increasing annual returns and boosting earnings per
share?

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d. Were the Plans and the Class members harmed by the breaches of fiduciary duty committed by the Defendants or any of them as described herein?

e. Are the Plans entitled to recover losses from the Defendants or any of them caused by their breaches of fiduciary duty?

169. **Typicality**. Plaintiff's claims are typical of those of the Class they seek to represent because (a) to the extent that Plaintiff seeks relief on behalf of the Plans pursuant to § 502(a)(2) of ERISA his claims are not only typical of, but the same as a claim under this section brought by any other Class Member; (b) to the extent that Plaintiff seeks equitable relief, that relief would affect all class members equally; all of the Class members were injured and continue to be injured in the same manner by Defendants' breaches of fiduciary duty.

170. **Adequacy**. Plaintiff will fully and adequately protect the interests of all members of the Class. Plaintiff has retained counsel who are experienced in class action and ERISA litigation, and Plaintiff has no interests antagonistic to or in conflict with the interests of the Class.

171. **Rule 23(b) (1) Requirements**. Class action status in this ERISA action is warranted and appropriate under Rule 23(b)(1) because prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendants and create a risk of adjudications with respect to individual members of the Class that would, as a practical matter, be dispositive of the interests of the other members not parties to the actions, or substantially impair or impede their ability to protect their interests.

172. **Rule 23(b) (2) Requirements**. Class action status is also warranted under the Rule 23(b)(2) because Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole.

173. **Rule 23(b) (3) Requirements**. If the Class is not certified under Rule 23(b)(1) or (b)(2) then certification under (b)(3) is appropriate because questions of law or fact common to

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members of the Class predominate over any questions affecting only individual members and a class action is superior to the other available methods for the fair and efficient adjudication of this controversy.

VIII. CAUSES OF ACTION

A. COUNT I: Breach of ERISA Fiduciary Duties by Adopting and Maintaining the Investment Policy

(asserted against Weyerhaeuser and the Investment Committee Defendants)

174. Plaintiff hereby realleges and incorporates by reference the allegations of the preceding paragraphs.

175. This Count alleges fiduciary breaches against Weyerhaeuser and the Investment Committee Defendants.

176. ERISA § 404(a)(1)(A) requires that a fiduciary act solely in the interest of the participants and beneficiaries of the plan they serve and "(A) for the exclusive purpose of : (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A).

177. ERISA § 404(a)(1)(B) requires that a fiduciary discharge his duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B).

178. ERISA § 404(a)(1)(C) requires that a fiduciary diversify the investments of the Plans so as to minimize the risk of large losses. 29 U.S.C. § 1104(a)(1)(C).

179. As set forth in detail supra, Weyerhaeuser and the Investment Committee Defendants were fiduciaries within the meaning of ERISA § 3(21), with respect to the management and disposition of the assets in the Master Trust and as such owed duties of loyalty, prudence and diversification to the Plaintiff and Class members under ERISA. These Defendants breached those duties by, *inter alia*:

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1 a. Adopting and maintaining the Investment Policy which even if properly
2 implemented, allowed an imprudent allocation of the Plans' assets in alternative
3 investments that were unduly risky, illiquid, hard to manage, hard to value and
4 hard to assess for riskiness, even though they knew or should have known that
5 such investments in the aggregate represented an inappropriate investment
6 allocation for pension assets;
7 b. Adopting and maintaining the Investment Policy which permitted the over-
8 concentration of the 81% of the Plans assets in alternative investments by
9 December 2007 rather than properly diversifying the investments of the Master
10 Trust by including more traditional investments to assure the liquidity of the
11 Pension Fund portfolio so that hard to liquidate alternative investments did not
12 need to be sold or redeemed when market conditions were adverse;
13 c. Adopting and maintaining the otherwise risky and imprudent Investment Policy in
14 order to permit Weyerhaeuser to project the extraordinarily high rates of return for
15 the Plans' investments to enhance the Company's financial statements and benefit
16 the Company at the expense of the Plans; and
17 d. Maintaining an investment policy so difficult to monitor and implement that it
18 exposed the Plans to almost twice as much risk as the Master Trust portfolio's
19 targeted benchmark, at a time when the Plans were grossly overfunded and the
20 continued pursuit of such an investment policy to secure a high rate of return on
21 the Plans' investments would not result in any greater pension benefits or pension
22 security for the Plan participants and their beneficiaries, but would redound to the
23 benefit of Weyerhaeuser.
24 180. As a result of the above-described conduct, Weyerhaeuser and the Investment
25 Committee Defendants have:
26

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a. failed to act solely in the interest of the participants and beneficiaries of the Plans for the exclusive purpose of providing them benefits, in violation of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);

b. failed to act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B); and

c. failed to diversify the investments of the Plans so as to minimize the risk of large losses, in violation of ERISA § 404(a)(1)(C) , 29 U.S.C. § 1104(a)(1)(C).

181. As such, these Defendants are liable to restore to the Plans the losses suffered by the Plans as a result of their breaches and to cause the Plans to again be fully funded to satisfy their accumulated benefit obligations to the participants of the Plan.

B. COUNT II: Failure to Comply with the Investment Guidelines

(asserted against Northwater Capital)

182. Plaintiff hereby realleges and incorporates by reference the allegations of the preceding paragraphs.

183. This Count alleges a fiduciary breach against Northwater Capital.

184. As a fiduciary, Northwater Capital was required by ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) to act in accordance with the documents and instruments governing the plan, including the Investment Guidelines.

185. Northwater Capital breached its fiduciary duties by, *inter alia*:

a. Failing to adhere to the "Performance Guidelines" of the Investment Guidelines of Account B because the investments shown in the asset schedule for Account B are too volatile to conform to a target of LIBOR plus 300 basis points over a rolling four year period; and

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b. Failing to adhere to the "Liquidity" provisions of the Investment Guidelines by investing only in alternative investments, many of which take substantially longer than four years to liquidate.

186. As a result of the above-described conduct, Northwater Capital has failed to act in accordance with the documents and instruments governing the plan, including the Investment Guidelines in violation of ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

C. COUNT III: Breach of ERISA Fiduciary Duties by Failing to Properly Implement the Investment Policy and Prudently Invest the Assets of the Plans

(asserted against Morgan Stanley, WAM and Shariff)

187. Plaintiff hereby realleges and incorporates by reference the allegations of the preceding paragraphs.

188. This Count alleges fiduciary breaches against Morgan Stanley, WAM and Shariff (collectively the Investment Manager Defendants).

189. As fiduciaries, the Investment Manager Defendants were required by ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) to prudently invest and manage the Plans' assets.

190. As fiduciaries, the Investment Manager Defendants were also required by ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) to act in accordance with the documents and instruments governing the plan, including the Investment Policy.

191. The Investment Manager Defendants breached their fiduciary duties by, *inter alia*:

a. Failing to adhere to the Investment Policy, which provides that the total risk or beta in the Master Trust's portfolio remain commensurate with the risk of the targeted benchmark;

b. Systematically miscalculating the amount of risk in the alternative investment portion of the portfolio, which resulted in the Master Trust's assets being exposed to almost twice as much risk as the targeted

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benchmark, causing the Master Trust to lose $2.4 billion (or 41% of its value) in 2008;

c. Investing in an imprudently large number of alternative investments (nearly 330 different hedge funds, private equity investments, and real estate funds), which effectively prevented the Investment Manager Defendants from properly assessing the amount of risk in the alternative investment portion of the portfolio and properly rebalancing the total risk to ensure that as a whole, the portfolio was no more risky than the targeted benchmark;

d. Failing to assure adequate liquidity in the Master Trust's portfolio; and

e. Failing to perform adequate due diligence given the significant risks and challenges associated with hedge fund and private equity investments, which demand greater expertise and effort on the part of fiduciaries than traditional investments.

192. As a result of the above-described conduct, the Investment Manager Defendants:

a. failed to act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B); and

b. failed to act in accordance with the documents and instruments governing the plan, including the Investment Policy in violation of ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

193. As such, the Investment Manager Defendants are liable to restore to the Plans the losses suffered by the Plans as a result of their breaches and to cause the Plans to again be fully funded to satisfy their accumulated benefit obligations to the participants of the Plan.

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D. COUNT IV: Failure to Monitor Other Fiduciaries, Including the Investment Manager Defendants and Northwater

(asserted against Weyerhaeuser and the Investment Committee Defendants)

194. Plaintiff hereby realleges and incorporates by reference the allegations of the preceding paragraphs.

195. This Count alleges fiduciary breaches against Weyerhaeuser and the Investment Committee Defendants (collectively the "Monitoring Defendants").

196. As fiduciaries, these Defendants were required by ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) to manage and administer the Plans, and the Plans' investments "solely in the interest of the participants and beneficiaries" of the Plans and for the "exclusive purpose" of providing benefits to the participant and beneficiaries of the Plans.

197. Under ERISA, a fiduciary charged in a plan document with the authority to select and remove other fiduciaries has an ongoing duty to monitor the performance of those persons whom the fiduciary may remove at reasonable intervals to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan.

198. As previously alleged, the Monitoring Defendants were responsible for the appointment and removal of the Investment Managers, including Morgan Stanley, WAM and Northwater and for periodically monitoring the investment performance of the Investment Managers, including Morgan Stanley, WAM and Northwater who managed the assets of the Plan in accordance with the Investment Policy and Investment Guidelines adopted by the Investment Committee. The Monitoring Defendants breached that duty by, *inter alia*:

a. Permitting the Investment Manager Defendants and Northwater who managed the assets of the Plans to expose such assets to almost twice as much risk as the targeted benchmark and as a result to lose $2.4 billion (or 41% of its value) in 2008;

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b. Permitting the Investment Manager Defendants and Northwater to allocate more than 81% of the Plans' assets (by December 2007) to risky, hard to manage alternative investments, including hedge funds and private equity investments even though the Monitoring Defendants knew or should have known that such investments in the aggregate were unduly risky and represented an inappropriate investment allocation for pension assets;

c. Failing to ensure that the Investment Manager Defendants performed adequate due diligence given the significant risks and challenges associated with hedge fund and private equity investments, which demand greater expertise and effort on the part of fiduciaries than traditional investments; and

d. Failing, with respect to the Plans investments in alternative investments, to limit the numbers of hedge fund and private equity investments invested in by the Investment Managers, including Morgan Stanley, WAM and Northwater and to restrict the percentage of the Plans' total assets which were allocated by the Investment Managers to such investment categories.

199. As a result of the above-described conduct, the Investment Committee Defendants have breached their fiduciary obligations to monitor the Investment Managers, including Morgan Stanley, WAM and Northwater. As such, these Defendants are liable to restore to the Plans the losses suffered by the Plans as a result of their breaches and to a cause the Plans to again be fully funded to satisfy their accumulated benefit obligations to the participants of the Plan.

E. COUNT V: Co-Fiduciary Liability

(asserted against Weyerhaeuser, the Investment Committee Defendants, WAM, Morgan Stanley and Shariff)

200. Plaintiff hereby realleges and incorporates by reference the allegations of the preceding paragraphs.

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1 201. This Count alleges fiduciary breaches against Weyerhaeuser, the Investment
2 Committee Defendants, WAM, Morgan Stanley and Shariff (collectively the "Principal
3 Defendants").

4 202. As alleged above, during the Class Period the Principal Defendants were named
5 fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or *de facto* fiduciaries within
6 the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by
7 the duties of loyalty, exclusive purpose, and prudence.

8 203. Section 405(a)(1) of ERISA, 29 U.S.C. § 1105(a)(1) imposes liability on a
9 fiduciary, in addition to any liability which he may have had under any other provision of
10 ERISA, if he knowingly participates in a breach of fiduciary duty of another fiduciary. Section
11 405 (a)(2) of ERISA, 29 U.S.C. § 1105(a)(2) imposes liability if a fiduciary in the administration
12 of his fiduciary responsibilities enables another fiduciary to commit a breach. Section 405 (a)(3)
13 of ERISA, 29 U.S.C. § 1105(a)(3) imposes liability on a fiduciary, in addition to any liability
14 which he may have had under any other provision of ERISA, if he knows of a breach by another
15 fiduciary and fails to remedy it.

16 204. The Principal Defendants, each of whom were fiduciaries within the meaning of
17 ERISA, knew of each breach of fiduciary duty alleged herein against each of the others arising
18 from the imprudent investment of the assets of the Master Trust and took no steps to remedy
19 those breaches. As such, each is liable for the breaches of the others pursuant to ERISA
20 § 405(a)(3).

21 205. The Investment Committee Defendants, established and maintained an unduly
22 risky and inappropriate Investment Policy and Investment Guidelines, and are therefore liable for
23 the breaches of the Investment Manager Defendants and Northwater pursuant to ERISA
24 § 405(a)(2).

25 206. The Principal Defendants, by permitting the Investment Manager Defendants and
26 Northwater to expose the Plans' assets to excessive risk for the benefit of the Company and to

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1 the detriment of the Plans' participants, are liable for the breaches of the Investment Manager
2 Defendants and Northwater under pursuant to ERISA § 405(a)(3).
3 207. The Principal Defendants, who were responsible for the development of the
4 Investment Policy and Investment Guidelines adhered to by the Investment Manager Defendants
5 and Northwater and for monitoring the investment performance of the Investment Manager
6 Defendants and Northwater, each participated in the failure of the Investment Manager
7 Defendants to prudently invest the assets of the Plans and the failure of Northwater to comply
8 with the Investment Guidelines. As such, the Principal Defendants are each liable for the
9 breaches of the others in which they participated pursuant to § 405(a)(1) of ERISA.

10 **IX. PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiff prays for judgment against Defendant in the following manner:
12 A. Certification of Plaintiff as representative of a Class pursuant to Fed. R. Civ. P.
13 23(b)(1)(A)(B) & (b)(2);
14 B. A declaration that the Defendants have breached their fiduciary duties to the Class
15 in the manner described herein;
16 C. Payment by the Defendants of any losses suffered by the Plans as a result of the
17 violations of ERISA detailed above;
18 F. The costs and expenses of this suit, including expenses for expert witnesses and
19 reasonable attorneys' fees;
20 G. A court-appointed fiduciary to frame any revisions to the Investment Policy going
21 forward and to monitor the investment managers for compliance;
22 H. Except insofar as the any of the following functions are assigned to a court-
23 appointed fiduciary as prayed for in (G) above, an injunction requiring: (1) the Principal
24 Defendants to prudently manage the assets in accordance with appropriate risk and liquidity
25 guidelines, (2) the Investment Committee Defendants to review and revise the Investment Policy,
26 (3) the Investment Manager Defendants to properly implement the revised Investment Policy,

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1 and (4) Weyerhaeuser and the Investment Committee Defendants to monitor the performance of
2 all investment managers to ensure compliance with the Investment Policy; and
3 I. Such other and further relief as the Court deems just and necessary.
4 DATED: August 2, 2011.

5 KELLER ROHRBACK L.L.P.

6
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CIGNA Corp. v. Amara: Changing the Landscape of ERISA Litigation

By Myron Rumeld & Nicole A. Eichberger[1]

On May 16, 2011, the U.S. Supreme Court issued its long awaited opinion in *CIGNA Corp. v. Amara*, Case No. 09-804. Certiorari was granted to address the question of what showing of harm, if any, a participant must demonstrate to recover on a claim where the Summary Plan Description (SPD) conflicts with the terms of the plan document. Related to this question was the issue of what cause of action the plaintiffs could proceed under in these circumstances.

The Court specifically addressed these issues by rejecting the district court's finding that relief was available on a claim for benefits under Section 502(a)(1)(B) of ERISA and that plaintiffs were entitled to relief on a showing of "likely prejudice." Instead, the Court stated that the relief that the district court ordered may be available under Section 502(a)(3) of ERISA, to the extent the relief ordered coincided with, and plaintiffs satisfied the conditions for, relief that would be available in a traditional court of equity. Although the Supreme Court, in dicta, discussed what remedies might be available in equity, and what showing would be required for such relief, the decision left many questions unanswered. As a result, the decision left both the plaintiffs' and defendants' bar with opportunities to claim "victory" for the moment, while leaving many crucial issues to be decided another day.

Factual Background

Plaintiff Janice C. Amara and the other plaintiffs (Plaintiffs) were, when the lawsuit was filed, current or former employees of defendant CIGNA Corp. (CIGNA). In 1998, CIGNA amended the CIGNA Pension Plan (Plan) from a traditional defined benefit formula to a cash balance formula. Under CIGNA's traditional defined benefit formula, employees earned benefits over time based on their service and salary and, upon retirement, received an annuity with their annual benefit payable for life. Following the amendment to the Plan, each participant was provided with a starting balance in his/her cash balance account, which was calculated by taking the frozen annual benefit earned under the prior defined benefit plan and discounting it into a lump sum amount using prescribed interest rate and mortality assumptions that were less favorable to participants than the assumptions required by statute to calculate a lump sum retirement benefit. Thereafter, participants earned annual service and salary credits plus quarterly interest credits. Because the balance in the cash balance account could be worth less than the present value of

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the frozen defined benefit calculated under the statutorily prescribed rates, the Plan provided that participants would receive the greater of their frozen defined benefit or their cash balance benefit. For many participants, there was a period of time, known as the "wear-away" period, during which their benefits did not increase because their frozen benefit under the defined benefit plan remained greater than the benefit accrued under the cash balance plan.

Both before and following the Plan's conversion to a cash balance formula, CIGNA issued communications to participants regarding the operation of that formula. The disclosures included those that are required by statute, such as the ERISA Section 204(h) notice of amendments that may reduce benefit accruals, the summary of material modification (SMM), SPDs, annual benefit statements and, upon request, a copy of the Plan itself.

Procedural History

In 2001, Plaintiffs filed a class action lawsuit against CIGNA and the CIGNA Pension Plan (Defendants), alleging that the conversion of the Plan to a cash balance formula discriminated on the basis of age and violated ERISA's non-forfeiture and anti-backloading rules. In addition, Plaintiffs alleged that the SPD was deficient for failing to properly communicate the wear-away effect. According to Plaintiffs, the SPD mistakenly led participants to believe that they would receive the full value of their frozen benefit under the defined benefit plan *plus* whatever new benefits were accrued under the cash balance plan. Plaintiffs sought certification of a class of approximately 27,000 participants, which was later certified, and relief for the putative class under ERISA Section 502(a)(1)(B), which permits a participant to sue to recover benefits due under the terms of the plan, and ERISA Section 502(a)(3), which entitles participants to recovery equitable relief for breaches of the Plan or ERISA, including deficient SPDs, fiduciary breaches for material misrepresentations, and/or equitable estoppel.

Following a bench trial, the district court issued two opinions, one as to liability and one as to damages. In the liability opinion, the district court concluded that the Plan's cash balance formula was not age discriminatory and did not violate ERISA's anti-backloading and non-forfeiture rules. However, the district court concluded that the Plan's SPDs were deficient under ERISA because they failed to adequately disclose the "wear-away" phenomenon to participants. For the same reason, the district court also held that CIGNA's 204(h) notice and SMM were deficient as well.

Following the opinion as to liability, the district court issued its opinion as to remedies. The district court determined that it should fashion relief for the deficient SPD claim, rather than the deficient 204(h) notice and SMM claims because: (i) the statutorily-mandated relief for the 204(h) violation would place the participants in a worse position by invalidating entirely the cash balance benefits, without restoring the prior benefits (which were frozen pursuant to a separate amendment); and because the court believed that monetary relief was unavailable under ERISA Section 502(a)(3), the vehicle for relief for a deficient SMM. With respect to the deficient SPD claim, the court determined that, pursuant to ERISA Section 502(a)(1)(B), the cause of action for contractual benefit claims, it could award each participant the benefit that the SPD purported to offer: the frozen traditional defined benefit *plus* his/her cash balance benefits. It awarded such relief via the issuance of an injunction to reform the plan, and another injunction directing payment to the retirees of the amount due them under the plan as reformed.

The court determined that all members of the class were entitled to this relief because they were "likely harmed" by the notice violations. The district court applied a "likely harm" standard because that it found that standard to be akin to the "likely prejudice" applied by the Second Circuit in other instances of statutory or regulatory violations. *See, e.g., Burke v. Kodak Retirement Income Plan*, 336 F.3d 103 (2d Cir. 2003). As a result, the court made no participant-by-participant evaluation of injury.

Both parties appealed the district court's opinions as to liability and relief to the Second Circuit. Following briefing by the parties, the Second Circuit issued an unpublished, summary opinion affirming the district court's rulings.

Both parties filed writs of certiorari with the Supreme Court. Defendants petitioned for certiorari from the U.S. Supreme Court on the issue of what showing of harm, if any, a participant must demonstrate to recover on a claim when the SPD conflicts with the terms of the plan document. Plaintiffs petitioned for certiorari on two questions: (1) whether CIGNA's challenge to the "likely harmed" standard is proper for appeal; and (2) whether after a finding of misleading statements in the SMM and SPD, a district court is precluded from finding a violation of ERISA's disclosure requirements unless the district court conducts individual hearings into how each individual participant detrimentally relied on the misleading statements.

On June 28, 2010, the U.S. Supreme Court granted Defendants' petition for certiorari as to the following issue: When a corporation's summary plan description and actual retirement benefit plan are inconsistent, is the proper standard for measuring harm a standard of "likely harm" rebuttable by the defendant after a showing of "harmless error," or must a plaintiff show "detrimental reliance" on the inconsistency. The Supreme Court held Plaintiffs' petition in abeyance, pending decision as to Defendants' certiorari petition. On May 23, 2011, following its ruling on Defendants' petition, the Supreme Court granted plaintiffs' writ of certiorari with respect to the relief for the 204(h) and SMM claims, and vacated and remanded that part of the district court's decision, so as to permit further consideration of those issues consistent with the Supreme Court's ruling.

The Supreme Court's Opinion

On November 30, 2010, the Supreme Court heard oral argument from the respective parties and the Department of Labor, which filed an amicus curiae brief supporting the plaintiffs' position. On May 16, 2011, the Supreme Court handed down a unanimous decision (8-0, with Justice Sotomayor not participating), which (i) rejected the district court's holding that reformation of the plan was appropriate relief under ERISA Section 502(a)(1)(B), and remanded the decision for consideration of whether the relief the district court ordered was available under Section 502(a)(3). The opinion of the Court was written by Justice Breyer. Justice Scalia filed a concurring opinion, joined by Justice Thomas, which joined Justice Breyer's opinion insofar as it rejected the Plaintiffs' claim under Section 502(a)(1)(B) but disagreed with the opinion insofar as it proceeded to discuss the standards for relief under Section 502(a)(3) of ERISA.

The Supreme Court rejected the argument that an SPD could be a binding contract that trumps the underlying plan document. Rather, the Court stated, an SPD is meant to be a summary of the underlying plan document, written by a different entity (the plan administrator) than the entity responsible for the plan document (the corporate plan sponsor), with the entity responsible for the SPD being subject to ERISA's fiduciary provisions while the entity responsible for the plan document not subject to ERISA's fiduciary provisions. Because an SPD is not the plan document, the Supreme Court held that the district court erred in ordering relief under ERISA Section 502(a)(1)(B), which only authorizes relief for enforcement of a plan's terms.

The Supreme Court then stated, however, that the relief the district court entered might be available as "other equitable relief" under Section 502(a)(3), pursuant to one of the following theories: "estoppel," "reformation," or "surcharge." Rather than impose a specific, uniform burden of proof for sustaining a claim for such relief, the Supreme Court stated that the required burden of proof would depend on the specific equitable remedy being sought.

According to the Court, equitable reformation, the remedy that appeared to the Court to most closely resemble the lower court's direction that the plan be reformed to provide a benefit pursuant to an "A plus B" formula, was appropriate where "'fraudulent suppression, omission, or insertions…materially…affect[ed]' the 'substance' of the contact."

The Court further observed that, insofar as the lower court also issued an injunction directing that retired participants receive additional payments to comport with the plan as revised, such relief might be available under the equitable theory of "surcharge." To sustain a claim for surcharge, the Court stated, a plaintiff must prove actual harm by a preponderance of the evidence. The Court clarified that "actual harm may sometimes consist of detrimental reliance, but it might also come from the loss of a right protected by ERISA or its trust-law antecedents, however, that actual harm might not take the form of detrimental reliance on the terms of the SPD."

In ruling that monetary relief may be available under a surcharge theory, the Supreme Court distinguished its prior rulings in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), stating that while these decisions precluded monetary relief for claims against non-fiduciaries, monetary relief was available in trust law where there is a breach of trust.

Justice Scalia in his concurring opinion observed that the surcharge remedy must be calibrated to the harm alleged, and thus would not necessarily take the form of the remedy ordered by the district court.

Proskauer's Perspective

It is important to separate out the holdings contained in the Supreme Court's decision, which will likely have a broad impact, and the dicta, the impact of which is far less clear.

The Court clearly held that the SPD is not a contract and cannot supersede the plan document, and, thus, there is no relief available under Section 502(a)(1)(B) for a faulty communication. This holding presumably extinguishes any efforts by plaintiffs' attorneys to obtain automatic relief, absent any showing of harm, for a miscommunication, whether it is contained in an SPD or elsewhere. The ruling also should serve to encourage plan sponsors to issue SPDs that, consistent with the statutory intent, summarize the terms of the plan, rather than re-state all the intricacies contained in the formal plan document for fear that any omission, re-characterization or simplification will effectively lead to a claim that alters the plan's terms.

With respect to the relief available under Section 502(a)(3) for a miscommunication, the Court's dicta leaves many questions unanswered. On the one hand, it is clear that there is no presumption of harm; rather, the plaintiff will bear the burden of proving whatever harm is required to sustain the elements of an equitable claim for relief. However, the Court said little on what evidence would constitute "fraud," sufficient to sustain a reformation claim. With respect to the "surcharge" theory, the vehicle identified for awarding monetary relief to the retirees, the Court stated that "actual harm" was required, but it is far from clear what evidence would sustain a showing of actual harm in a cash balance conversion case, let alone in other contexts. As Justice Scalia pointed out, relief under a "surcharge" theory should be calibrated to the actual harm shown, which should call into question whether the district court should award payment of the "A plus B" benefit, as it originally ordered. Finally, the Supreme Court's opinion makes no mention of the suitability of these equitable claims for relief to class certification, even though the issue was mentioned in passing during the oral argument.

In short, *CIGNA Corp. v. Amara* laid the groundwork for future litigation. It outlined the battlefield, but not the victor.