

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GABRIEL F. NAGY,

Plaintiff,

v.

HARRIS M. DEWESE *et al.*,

Defendants.

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CIVIL ACTION NO. 09-3995

FINDINGS OF FACT AND CONCLUSIONS OF LAW

YOHN, J.

June 23, 2011

From May 2, 2011 to May 9, 2011, the court conducted a bench trial in this action.

Plaintiff, Gabriel F. Nagy, brought the action individually and on behalf of the Compass Capital Partners Ltd. Defined Benefit Retirement Plan (the “Plan”), against defendants Harris M.

DeWese (“DeWese”), the Plan’s trustee, Compass Capital Partners, Ltd. (“Compass”), the Plan’s sponsor, and Citigroup Global Markets, Inc. (“Citi”).¹ Plaintiff asserts claims for breach of fiduciary duties under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 *et seq.*

Plaintiff and Citi filed cross-motions for summary judgment under Federal Rule of Civil Procedure 56, which the court ruled on by memorandum and order dated February 23, 2011 (the “Summary Judgment Decision”). In the Summary Judgment Decision, based on the undisputed evidence, I concluded as a matter of law that: (1) DeWese was a fiduciary of the Plan and

¹ Although plaintiff named Morgan Stanley Smith Barney, LLC, as defendant in the complaint instead of Citi, the parties now agree—and have stipulated—that Citi is the proper defendant. For convenience I refer only to Citi herein.

breached his fiduciary duties to the Plan under 29 U.S.C. § 1104; (2) Citi was a fiduciary of the Plan because it provided investment advice for a fee under 29 U.S.C. § 1002(21)(A)(ii); (3) Citi did not directly breach its fiduciary duties to the Plan because it did not act in a fiduciary capacity when transferring the Plan's funds to DeWese pursuant to his instructions as trustee; and (4) plaintiff's state-law claims were preempted by ERISA. *Nagy v. DeWese*, No. 09-3995, 2011 U.S. Dist. LEXIS 18123, at *18-23, *40, *46, *58-59 (E.D. Pa. Feb. 23, 2011). I also concluded that there remained disputed issues of fact as to (1) the amount of damages to the Plan resulting from DeWese's breach;² and (2) whether Citi was liable as a co-fiduciary for DeWese's breaches of fiduciary duty under 29 U.S.C. § 1105(a)(1) or 29 U.S.C. § 1005(a)(3).³ *Nagy*, 2011 U.S. Dist. LEXIS 18123, at *24-25, *50. Thus, the major issues remaining for determination at trial were whether Citi was liable as a co-fiduciary, and the extent of the damages suffered by the Plan.⁴

Having considered the testimony offered at trial and the exhibits introduced into evidence, pursuant to Federal Rule of Civil Procedure 52(a) I make the following findings of fact and conclusions of law.

² The Summary Judgment Decision made clear that plaintiff was not entitled to damages in his individual capacity; rather, any liability would be for harm to the Plan itself. *Nagy*, 2011 U.S. Dist. LEXIS 18123, at *24.

³ Because I determined in the Summary Judgment Decision that Citi did not directly breach its fiduciary duties, 29 U.S.C. § 1105(a)(2) is not applicable. *See Nagy*, 2011 U.S. Dist. LEXIS 18123, at *47 n.10.

⁴ I took no action with respect to Compass in the Summary Judgment Decision. The parties having agreed at the beginning of trial that Compass should be dismissed without prejudice, I will dismiss Compass now.

I. Findings of Fact

A. Background

1. Plaintiff is an attorney who is now retired. (Nagy test.) He practiced law at Morgan, Lewis & Bockius and served as chief counsel for the Pennsylvania Securities Commission, before working at multiple investment firms and eventually coming to work with DeWese. (Nagy Test.)
2. DeWese is an investment banker who provides mergers-and-acquisitions advice primarily with respect to the purchase and sale of printing companies. (DeWese Test.)
3. Compass is a corporation for which DeWese and plaintiff worked together until plaintiff's retirement, providing mergers-and-acquisitions advice and business valuation services, respectively. (Nagy Test.; DeWese Test.) Compass was not formally dissolved but is now defunct and has no assets. (DeWese Test.)
4. John Jason Bish ("Bish") is a financial advisor who holds a variety of securities licenses. He now works independently under contract with a large investment firm and is no longer affiliated with Citi, but he was the financial advisor to the Plan during the events central to this action. (Bish Test.)
5. Plaintiff and DeWese both worked for a business called Keeley Management, the predecessor to Compass; when the owner of the business died in 1997, plaintiff and DeWese purchased the business from his widow. (Nagy Test.)
6. Plaintiff and DeWese owned Compass until plaintiff retired and sold his shares back to the company. (Nagy Test.) DeWese owned 60% of Compass's voting stock and was its chairman and chief executive officer, while plaintiff owned the remaining 40% and was

Compass's president and chief operating officer.

7. Plaintiff managed Compass and provided business valuation services to its clients. (Nagy Test.)
8. DeWese provided mergers-and-acquisitions advice to Compass's clients with respect to the purchase and sale of printing companies. (DeWese Test.)
9. The Plan is a defined benefit retirement plan sponsored by Compass for the benefit of its employees. (Nagy Test.) It was created in January 1998, at plaintiff's suggestion. (Nagy Test.)
10. The Plan was frozen in early 2002, at which time it had five participants comprising plaintiff, DeWese, and three other Compass employees. (Nagy Test.) DeWese has since renounced any interest in the Plan. (DeWese Test.; Def.'s Ex. 5 (letter from DeWese to Christina M. Barcoski, dated July 25, 2007).)
11. In February 2003, plaintiff resigned as trustee of the Plan and DeWese became the Plan's trustee. (Nagy Test.; DeWese Test.)
12. Section 1.02 of the Plan's terms and conditions names Compass as the administrator of the Plan, and section 9.01 states that the administrator has "complete control of the administration of the Plan" and that its "decisions upon all matters within the scope of its authority shall be final." (Def.'s Ex. 1.) DeWese acted on behalf of Compass as administrator of the Plan. (DeWese Test.)
13. In November 2003, plaintiff and DeWese agreed on a retirement plan for plaintiff under which plaintiff would receive deferred compensation quarterly for ten years, sell his stock in Compass back to the company, resign, and begin to draw his pension. (Nagy Test.)

14. Nagy continued to work for Compass part-time after his resignation until June 30, 2004, at which time he fully retired, although he continued to consult for Compass until May 2008. (Nagy Test.)
15. At the time DeWese took over as the Plan's trustee, the Plan's assets were invested with Principal Mutual in a single S&P 500-linked fund. (Nagy Test.)
16. Around the time DeWese assumed responsibility for managing the Plan, the Plan's assets were moved to an investment account with Legg Mason Wood Walker, Inc. ("Legg Mason"), where DeWese's son Andrew DeWese worked at the time. (DeWese Test.; Nagy Test.)
17. Legg Mason was acquired by Citi in 2005.⁵
18. The Plan's account with Legg Mason—and Citi, after its acquisition of Legg Mason—was a non-discretionary brokerage account. (Bish Test.; Gill Test.)
19. DeWese certified to Legg Mason that he was the sole fiduciary for the Plan, and that he and three other individuals—Kathryn Shoenfelt, Andrew DeWese and Peter Schaefer—were authorized to give instructions on behalf of the Plan. The certification states that Legg Mason may assume that any instruction given by DeWese pertaining to the Plan is authorized under the terms of the Plan. The certification also states that Legg Mason may restrict the Plan from pursuing any investment strategy as it deems appropriate. (Def.'s Ex. 20 (fiduciary certification); Bish Test.)

⁵ The exact nature of the relationships among Citi, Morgan Stanley Smith Barney, LLC (the originally-named defendant), and Legg Mason, is not important to this case because the parties have agreed that Citi is the proper defendant with respect to the plaintiff's claims that Bish and his employer during the relevant time period breached their duties to the Plan.

20. Andrew DeWese was the financial advisor for the Plan account at Legg Mason until he left Legg Mason in 2005 or late 2004.⁶
21. Bish became the financial advisor to the Plan when Andrew DeWese left the firm, and was the Plan's financial advisor throughout the events central to this action, in 2005, 2006, 2007, and 2008. (Bish Test.) Bish resigned from Citi in March 2009. (Bish Test.)
22. Andrew DeWese had invested the Plans's funds in a small number of stocks and bonds, and Bish determined that the Plan was not sufficiently diversified. Bish thought that "because of the size of the account" a diversified portfolio of mutual funds would be more appropriate. Bish recommended investing in a small number of diversified mutual funds,⁷ and the Plan's portfolio was restructured in accordance with his recommendation after approval by DeWese as trustee. (Bish Test.; *see also* Pl.'s Ex. 4. (Legg Mason account statement dated July 2005).)
23. In February 2005, plaintiff elected to receive his pension as a monthly payment of \$2,111.07, to continue until his and his wife's deaths. On Feb. 11, 2005, DeWese instructed Bish/Citi to pay \$2,111.07 to plaintiff each month. (DeWese Test.; Def.'s Ex. 2 (letter from DeWese to Bish, dated Feb. 11, 2005). The letter instructed Citi to make such

⁶ DeWese testified that he did not believe that Andrew DeWese was ever the financial advisor to the Plan, but that Bish and Andrew DeWese worked together. Bish testified that he took over as financial advisor to the Plan when Andrew DeWese left Legg Mason. Although it is unnecessary to resolve this issue, DeWese seemed unsure of his testimony, and plaintiff and defendants' jointly agreed findings of fact state that "one of Andrew DeWese's accounts was the Plan" (Pl.'s and Defs.' Jointly Agreed Findings of Fact and Conclusions of Law). I find Bish's testimony on this matter to be more specific and more credible than DeWese's.

⁷ Bish did not recall the specific discussions, but testified that he would have provided a report to DeWese on the proposed restructuring.

payments “from available cash, then liquidate such mutual funds as [DeWese would] separately direct.” (Def.’s Ex. 2).

B. Misappropriation of Plan Assets

24. In April 2005 DeWese accepted stock in lieu of cash as his accomplishment fee for providing investment-banking services to a Tampa, Florida-based business called Hillsboro Printing (“Hillsboro”).⁸ (DeWese Test.)
25. In May 2006, DeWese purchased additional shares of Hillsboro stock for \$285,000 such that he owned at least 40% of Hillsboro. (DeWese Test.; *see also* Pl.’s Ex. 5 (stock purchase agreement.)
26. Hillsboro was a troubled company, but the full extent of Hillsboro’s financial difficulties was concealed from DeWese and not disclosed on the company’s financial statements. (DeWese Test.) DeWese believed the company could be turned around and sold for a substantial profit. (DeWese Test.)
27. Bish was named the broker of record for Hillsboro’s 401k plan in 2004 or 2005, after being invited to make a presentation in Tampa by DeWese. (Bish Test.)
28. At the time Bish became the broker for Hillsboro’s 401k plan he knew that Hillsboro was a “client” of Compass Capital, but was not sure what the precise nature of that relationship was. (Bish Test.)⁹

⁸ The legal entity in which Dewese acquired an interest was Hillsboro Acquisition Corporation.

⁹ DeWese testified that Bish knew of DeWese’s personal stake in Hillsboro at this time, whereas Bish testified that he did not. I find Bish more credible on this point, but even if I were

29. Shortly after his May 2006 share purchase, DeWese discovered that Hillsboro's financials were inaccurate, and that it was not making the profits that had been reported. (DeWese test.)
30. DeWese helped keep Hillsboro afloat by providing money to pay Hillsboro's suppliers and guaranteeing various Hillsboro obligations. (DeWese Test.; *see also* Pl.'s Ex. 6 checks to Hillsboro suppliers.)
31. Although DeWese testified that he lent the money to Hillsboro and promissory notes were executed for that debt, he was unable to produce any promissory notes or other evidence of the terms of any loans to Hillsboro. (DeWese Test.) Moreover, there is no evidence that any alleged loans to, or investments in, Hillsboro were made in the name of the Plan, rather than by DeWese individually.¹⁰
32. Compass was also struggling as DeWese suffered from serious health problems that affected his ability to work throughout much of the relevant time period. (DeWese Test.)
33. DeWese used personal funds, as well as funds from the Plan, to finance Compass and Hillsboro, juggling funds from different sources to keep them afloat. DeWese and the Plan "became the bank" for Hillsboro. (DeWese Test.)
34. DeWese made the first withdrawal of Plan funds in early October 2006. Bish was about to get a haircut when he got a phone call from DeWese. (Bish Test.) DeWese said he

to conclude that Bish knew that DeWese invested his own money in Hillsboro, it would not otherwise change these findings of fact.

¹⁰ DeWese testified at trial that he had a computer spreadsheet, which he prepared, detailing his advances to Hillsboro. However, DeWese did not produce that spreadsheet at any time during discovery or at trial, lessening his credibility.

needed a check from the Plan for \$200,000. DeWese said it was for a “private equity” investment; Bish learned soon after that it was for Hillsboro. (Bish Test.)¹¹

35. After executing trades to fund the first request for cash, Bish went to his manager, Tom Simcik, and explained that DeWese was making a private equity investment with the withdrawn funds. Bish was asked if he had recommended any private investment, because Bish and his colleagues were generally instructed not to get involved in private equity investments without the approval of the firm. (Bish Test.) When Bish said he had not recommended any private investment he was told that the transaction was appropriate. (Bish Test.) Bish eventually told management that the private investment was in Hillsboro. (Bish Test.)¹²

36. Bish tried to be as uninvolved as possible in DeWese’s purported private investment because he was not permitted to become involved in private equity investments, and he believed that DeWese was an investment professional with particular expertise in the printing business, and capable of making investment decisions. (Bish Test.) But Bish

¹¹ Bish testified that DeWese *may* have told him, at the time DeWese requested the \$200,000 withdrawal, that it was intended for Hillsboro; but Bish testified that he believed that DeWese only described it as a “private equity” investment at that time, and that he learned soon after that the investment was Hillsboro. DeWese testified at trial that he discussed with Bish before the first withdrawal whether he could invest the Plan’s money in Hillsboro, but gave seemingly inconsistent statements in his deposition on this point. (*Compare* DeWese Dep. 29:24-30:5 *and* DeWese Dep. 81:2-82-9). It is unimportant for purposes of this decision whether he learned at the time of the first withdrawal or soon after because I find that even after learning that the money was intended for Hillsboro, Bish did not know that DeWese was breaching his duty to the Plan.

¹² Plaintiff contended at trial that Citi’s internal guidelines required “extreme caution” when a fiduciary transfers funds to himself. But the relevant guideline requiring “extreme caution” does not apply to ERISA accounts. (*See* Pl.’s Ex. 9.)

eventually warned DeWese—at some point near the end of the depletion of the Plan’s account—that he was putting a lot of eggs in one basket. (Bish Test.)

37. DeWese always spoke very positively of Hillsboro to Bish, but also described it as a “turnaround” from the time of the first withdrawal of Plan funds. (Bish Test.) Bish knew nothing of Hillsboro’s financials or financial condition until after Hillsboro had shut down and the Plan’s assets had been lost, when a Hillsboro 401k participant asked him, in 2008, “what will happen to my 401k now the doors are locked?” (Bish Test.)
38. DeWese subsequently requested more withdrawals of funds from the Plan’s account. From October 2006 to October 2007, DeWese withdrew a total of \$536,417.53 from the Plan’s account. (Bowen Test.; Pl.’s Ex. 7 (checks).)
39. The individual withdrawals comprised: \$200,000.00 on October 9, 2006; \$100,000.00 on November 2, 2006; \$50,000.00 on December 5, 2006; \$101,417.53 on January 12, 2007; \$50,000.00 on February 28, 2007; \$20,000.00 on April 3, 2007; \$10,000.00 on April 18, 2007; and \$5,000 on October 10, 2007. (Pl.’s Ex. 7.)
40. The checks were payable to “Harris M. DeWese TTEE” (*Id.*)
41. Each check was issued to DeWese pursuant to his verbal instructions to Bish. DeWese would ask Bish for an amount of money from the Plan account, and Bish would propose a liquidation of securities sufficient to provide that amount, which DeWese would approve. (Bish Test.)¹³

¹³ DeWese testified that Bish decided unilaterally which mutual funds to liquidate in order to distribute funds to DeWese from the Plan account; Bish testified that, although he could not remember specific discussions, he would not have decided unilaterally which funds to liquidate because it would be improper to make discretionary trades without authorization, and his practice has always been to obtain proper authorization. According to Bish’s testimony, he would have

42. DeWese and Bish offered conflicting testimony of their discussions regarding DeWese's withdrawals from the Plan's account. DeWese testified that he made clear that the money was destined for Hillsboro and that Hillsboro was a troubled company that had difficulty paying its bills and needed funds to pay suppliers; and that he discussed with Bish, before the first withdrawal, whether he could use the Plan's funds for that purpose. Bish testified that DeWese only told him, at the time of the first withdrawal, that he wanted the funds for a "private equity" investment; that although he learned, soon after, that the private investment was Hillsboro, and although DeWese did describe Hillsboro as a "turnaround," DeWese always spoke positively about Hillsboro and the likely returns from the investment, and did not tell him that Hillsboro had any problems paying suppliers or ask him whether he could use Plan funds to pay Hillsboro's suppliers. On these issues I find Bish's testimony more credible than that of DeWese and I find that Bish had no particular knowledge of Hillsboro's financial condition beyond DeWese's statements that it was a good investment and a "turnaround," and no knowledge that DeWese was using Plan funds to pay Hillsboro's suppliers. In addition to the factors described above that lessen DeWese's credibility, I note that DeWese testified that he was

proposed liquidations and DeWese would have been required to approve his proposals before any Plan assets were sold. Because there are no allegations that Bish improperly chose which funds to liquidate, and because I find that Citi was a fiduciary to the Plan whether or not it had authority or control over Plan assets, it is not essential to resolve this discrepancy. However, I find DeWese less credible than Bish on this point. DeWese's credibility in general is vitiated by his having committed and concealed—by deceiving plaintiff, his friend of many years—breaches of his fiduciary duty to the Plan, and his credibility is further damaged by inconsistencies in his testimony. For example, DeWese testified that most of Compass's records were lost when Compass was evicted from its offices, but Kathryn Shoenfelt, his bookkeeper and office manager, testified credibly that she and Andrew DeWese delivered all of the records in Compass's offices to DeWese and Andrew DeWese's homes.

severely ill during much of the relevant time period and taking a number of medications, and that he had difficulty remembering events from that period at trial; that DeWese testified at trial that he discussed with Bish, before the first withdrawal of Plan funds, whether he could use the funds for Hillsboro, but in his deposition DeWese gave inconsistent statements on this point, stating both that he was unsure whether he explained the purpose of the first withdrawal to Bish (DeWese Dep. 29:24-30:5 (“I might have told him what I needed to do with the money or what I was going to do with the money, to kind of update his interest in how the company was doing. But I don’t specifically remember what I told him.”)), and that he discussed with Bish prior to the first withdrawal whether he could “reinvest” the Plan’s money in Hillsboro in return for promissory notes (DeWese Dep. 81:2-82:9); and that DeWese testified, remarkably, that he did not realize that it was inappropriate to commingle Plan funds in the Compass bank account and his personal bank account, and use them to pay Hillsboro’s bills, but might have if he had focused on it.

43. The Plan’s funds were deposited into the Compass business account or DeWese’s personal bank account, and he used the money for a variety of improper purposes, primarily to fund the operations of Compass and Hillsboro. (DeWese Test.)¹⁴

¹⁴ Citi offered evidence—including the testimony of Joseph Kistner, a forensic accountant—showing that much of the Plan funds that were deposited in Compass’s bank account and DeWese’s personal bank accounts were not used for any purposes attributable to Hillsboro. (Kistner Test.; Def.’s Ex. 35 (Kistner report); Def.’s Ex. 26 (DeWese personal bank statements).) Based on that evidence, Citi contends that even if DeWese had told Bish that he was using the Plan’s funds to prop up Hillsboro, they could not have known that he was in fact using those funds for different—but still improper—purposes. The evidence clearly shows that DeWese commingled Plan, Compass and personal funds and used the money for purposes other than to benefit the Plan. Citi’s argument appears to be that, even if I were to conclude that Citi

44. DeWese never told Bish that he was commingling Plan funds with Compass funds, or his personal funds. (Bish Test.)
45. Plaintiff has not proved, by a preponderance of the evidence, that Bish, or Citi, knew that DeWese was breaching his fiduciary duty when he made the withdrawals of Plan funds. Although Bish had sufficient knowledge of DeWese's activities that he *might reasonably* have concluded that DeWese was violating his fiduciary duties, plaintiff has not proved by a preponderance of the evidence that Bish—or Citi—*in fact knew* that DeWese was violating his fiduciary duty. I find Bish's testimony that he believed DeWese—whom he knew to be an experienced investment-banking professional—was making a promising private investment in a business in which he had particular expertise, and did not know that DeWese was violating his duties to the Plan, credible and consistent with these findings of fact. And plaintiff has not proved that any other Citi employee knew DeWese was violating his fiduciary duties.
46. Plaintiff received his pension payment on time each month until December 2007, after which the payments began to arrive late. (Nagy Test.)
47. The last payment plaintiff received was the payment scheduled for June 2008, which he received in July 2008. (Nagy Test.)
48. When plaintiff's pension payments became irregular, plaintiff asked DeWese what was causing the delay, and DeWese initially blamed Citi. (Nagy Test.)

believed DeWese intended to breach his fiduciary duty by improperly using Plan funds on behalf of Hillsboro, no liability could arise under 29 U.S.C. § 1105(a)(1) or 29 U.S.C. § 1105(a)(3) to the extent Citi was mistaken as to the manner of DeWese's actual breach. I need not resolve this issue, as I find that Citi did not know that DeWese intended to misuse the Plan's funds in any way.

49. Plaintiff attempted to obtain information about the late payments from Bish, but Bish told him that he could not discuss the account with anyone but DeWese, the trustee (Bish Test.; Nagy Test.)
50. Around July 2008, Bish informed his compliance officer, Meenu Gill (“Gill”), that plaintiff was not receiving his monthly pension payment and wanted information about the Plan’s account; Bish asked if he was permitted to speak with plaintiff, and Gill informed Bish that he was not because the firm prohibits communication with anyone but the account holder. (Gill Test.)
51. DeWese informed plaintiff in 2008 that Compass was experiencing financial difficulties and asked plaintiff to lend him \$30,000. Plaintiff agreed to lend DeWese the money if he would assure plaintiff that his pension payments would be made on schedule. (Nagy Test.; Def.’s Ex. 11 (email from DeWese to plaintiff, dated June 3, 2008).)
52. Plaintiff did not receive his pension payment scheduled for June 2008 on time, and he informed DeWese that he was no longer willing to lend him the \$30,000. (Def.’s Ex. 14 (email from plaintiff to DeWese, dated June 16, 2008).)
53. On July 6, 2008, plaintiff emailed Bish to complain about the irregular pension payments and ask Bish to make his compliance officer aware of the problem; DeWese was copied on the email. (Def.’s Ex. 15 (email from DeWese to plaintiff, dated July 7, 2008).)
54. On July 7, 2008, DeWese admitted to plaintiff by email that the he had used the Plan’s funds to finance Compass and Hillsboro and that the Plan was broke. (Def.’s Ex. 15 (email from DeWese to plaintiff, dated July 7, 2008).) In the email, DeWese said “there is no need to involve the [Citi] compliance officer or to chastise John Bish. I am to blame

for the late payments due to stupid decisions and for not working.” (Def.’s Ex. 15.)

DeWese also stated that he planned to restore the Plan’s funds from accomplishment fees he expected to receive in October 2008. (Def.’s Ex. 16 (email from DeWese to plaintiff, dated July 15, 2008).)

55. Compass was evicted from its offices in August 2008. (Shoenfelt Test.)
56. Hillsboro is now defunct. (DeWese Test.)
57. In September 2009, Nagy instituted this lawsuit.

D. Damages

58. DeWese withdrew a total of \$536,417.53 from the Plan’s Citi account. (Pl.’s Ex. 7; Bowen Test.)
59. Plaintiff’s expert witness, Glenn Bowen, a pension actuary, reviewed the Citi account statements for the Plan to determine which mutual fund securities were sold to finance each of DeWese’s withdrawals, and the amounts sold. He testified credibly that the mutual fund shares sold to finance DeWese’s withdrawals—scaled slightly so as to precisely match the cash withdrawals—would have appreciated, including dividends, to a value of \$636,752.67 as of April 29, 2011, based on publicly available prices. (*See also* Pl.’s Ex. 2 (account statements); Pl.’s Ex. 3 (Bowen Report).) No contradictory testimony or evidence was offered.
60. If DeWese had not withdrawn \$536,417.53 of the Plan’s money from the Plan’s account, and those funds had remained invested in the same portfolio of funds, the value of those assets as of April 29, 2011, would be \$636,752.67. (Bowen Test.; Pl.’s Ex. 3.)

II. Conclusions of Law

1. Plaintiff's remaining claims, pursuant to the Summary Judgment Decision, are under 29 U.S.C. § 1132(a)(2) and 29 U.S.C. § 1109. To support a claim for breach of fiduciary duty under those provisions plaintiff must prove that (a) each defendant was an ERISA fiduciary; (b) each defendant breached an ERISA-imposed duty; and (c) such breach caused a loss to the Plan. *Leckey v. Stefano*, 501 F.3d 212, 225-26 (3d Cir. 2007).

A. DeWese

2. As discussed in the Summary Judgment Decision, DeWese was a fiduciary to the Plan and breached his fiduciary duty to the Plan by using its assets for imprudent and otherwise improper purposes in violation of 29 U.S.C. § 1104 and 29 U.S.C. § 1106.
3. The correct measure of damages is the difference between actual plan performance and the performance of a hypothetical alternative prudent investment. *See Graden v. Conexant Sys. Inc.*, 496 F.3d 291, 301 (3d Cir. 2007) (stating that "the measure of damages is the amount that affected accounts would have earned if prudently invested"); *see also Moore v. Comcast Corp.*, 268 F.R.D. 530, 534 (E.D. Pa. 2010) ("In Graden . . . the [Third Circuit] adopted the alternative investment approach for the measurement of damages in cases for fiduciary breaches under ERISA.").
4. Thus, the damage to the Plan caused by DeWese's breach of his fiduciary duty was, as of April 29, 2011, \$636,752.67. This amount represents the appreciated value of the mutual fund shares that were liquidated to finance DeWese's withdrawals; *i.e.*, if DeWese had

not withdrawn the misappropriated funds and those funds had instead remained invested in the same mutual funds, they would be worth \$636,752.67 as of April 29, 2011. No evidence was introduced disputing that the Plan's funds were invested prudently when DeWese made his withdrawals, and I conclude that those investments provide an appropriate measure of the damage suffered by the Plan.

5. Therefore, the Plan is entitled to damages from DeWese in the amount of \$636,752.67, plus interest from April 29, 2011, and I will enter judgment in that amount against DeWese and in favor of plaintiff on behalf of the Plan.

B. Citi

6. As discussed in the Summary Judgment Decision, Citi was a fiduciary to the Plan by reason of providing investment advice for a fee under 29 U.S.C. § 1002(21)(A)(ii).¹⁵

¹⁵ At trial, Citi continued to argue that it should not be considered a fiduciary because it did not provide investment advice for a fee within the meaning of the statute and Department of Labor regulation. The Department of Labor regulation interpreting the statute requires—as relevant here, where discretionary authority or control over plan assets has not been established—that to be considered a fiduciary by reason of providing investment advice for a fee, one must provide “individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.” 29 C.F.R. § 2510.3-21(c)(ii)(B). Citi argues that the advice provided by Bish was not “particularized” to the Plan, because Bish testified that he provided recommendations to the Plan similar to those he gave to other clients. Citi also argues that there are no other indicia of particularized advice present in this case, such as knowledge of an investment policy statement or investment plan, or knowledge of the actuarial projections of the plan. Citi’s reasoning is similar to that rejected by the Western District of Michigan in *Ellis v. Rycenga Homes, Inc.*, 484 F. Supp. 2d 694, 708-10 (W.D. Mich. 2007). In *Ellis*, the defendant argued that its investment advice was not individualized within the meaning of the regulation “because it was based on general guidelines for retirement funds that [the defendant] formulated through its investment policy committee.” *Id.* at 709. The district court rejected that argument, noting that it “distorts the term ‘individualized’ beyond all recognition.” *Id.* The district court went on to say that individualized investment advice must

7. Citi did not directly breach its fiduciary duties to the Plan, as discussed in the Summary Judgment Decision. For Citi to have any liability to the Plan it must be as a co-fiduciary under 29 U.S.C. § 1105(a), which provides that

a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan . . .

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with [29 U.S.C. § 1104(a)(1)] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

8. Citi cannot be liable under 29 U.S.C. § 1105(a)(2) because there is no evidence that Citi directly breached any duty to the Plan under 29 U.S.C. § 1104(a)(1).

9. Liability under either 29 U.S.C. § 1105(a)(1) or 29 U.S.C. § 1105(a)(3) requires actual knowledge of a co-fiduciary's breach. *See Donovan v. Cunningham*, 716 F.2d 1455, 1475 (5th Cir. 1983) (citing H.R. Rep. No. 93-1280, at 41-42 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5080 (stating, with respect to liability for knowingly participating in

“address the individual needs of the plan” but “need not be arbitrary or divorced from general principles of investment generated by a firm.” *Id.* The district court in *Ellis* also noted that the defendant was the only source of investment advice for the plan throughout its history, and that the plan trustee never failed to accept the defendant's recommendations. *Id.* In this case, Bish testified that he recommended the initial restructuring of the Plan's portfolio among a selection of mutual funds “because of the size of the account” and because the Plan's holdings were insufficiently diversified. He also testified that he was generally aware at any given time of the Plan's investment positions, and that each liquidation of Plan assets was carried out according to his recommendations, which were always followed by DeWese. Citi has not pointed to any authority for its limited reading of the statute and regulation, and I see no reason to reconsider the conclusion, reached at summary judgment, that Citi was a fiduciary to the Plan.

a co-fiduciary's breach, that "the fiduciary must know the other person is a fiduciary with respect to the plan, and must know that he participated in the act that constituted a breach, and must know that it was a breach," and stating that liability for failing to take remedial action while knowing of a co-fiduciary's breach arises where "a fiduciary knows that another fiduciary of the plan has committed a breach, and the first fiduciary knows that this is a breach").

10. Because plaintiff has not proved, by a preponderance of the evidence, that Bish—or any other employee of Citi—knew that DeWese was breaching his fiduciary duty, plaintiff has not established liability under 29 U.S.C. § 1105(a)(1) or 29 U.S.C. § 1105(a)(3). I will therefore enter judgment in favor of Citi and against plaintiff.

