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

IN RE UNISYS SAVINGS PLAN LITIGATION	:	MASTER FILE NO. 91-3067
THIS DOCUMENT RELATES TO ALL ACTIONS	:	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL JUDGMENT

HUTTON, J. **November 24, 1997**

Having considered all of the testimony and exhibits offered at trial, I now, pursuant to Fed.R.Civ.P. 52(a), make the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. This litigation involves Unisys' purchase of three Guaranteed Investment Contracts ("GICs") from the Executive Life Insurance Company of California ("Executive Life"), for its retirement savings plans. The purchase of the three GICs totaled some $217 million.

Guaranteed investment contracts are backed only by the credit worthiness of the insurance company offering them. In other words, GICs are nothing more than the unsecured credit of insurance companies. GICs became popular in the mid-1980s among corporate employees who opted for GICs in their pension plans because equity investment was considered too risky for the investment of retirement money. GICs usually mature within two to eight years and pay a fixed interest rate by investing in higher yielding assets such as junk bonds and speculative real estate. Guaranteed Investment Contracts are like bank certificates of deposit, promising a certain return often 0.5 to 1.5 percentage points above yields on money-market mutual funds - for a fixed period.

The GIC "guarantee" is limited to the return an investor is promised but not the safety of the principal. The U.S. government does not back GICs the way it backs federally insured bank deposits. By 1990, nearly two-thirds of every dollar in 401(k) plans - in excess of $100 billion - was in guaranteed investment companies which invested in assets that paid higher returns than Treasury Securities. Once again, money in a GIC is only as safe as the financial strength of the insurance company.

At issue in this litigation is Unisys' purchase of three Executive Life GICs. The Executive Life GICs were bought for the former Sperry Fixed Income Fund on June 9 and December 2, 1987, and for the Unisys Insurance Contract Fund on January 13, 1988.

2. On April 11, 1991, the California Insurance Commissioner placed Executive Life into conservatorship and temporarily froze all payments on the GICs issued by Executive Life, including those held by certain investment funds of the Unisys Savings Plan, the Unisys Retirement Investment Plan, and the Unisys Retirement

Investment Plan II (collectively referred to as the "Plan" or the "Savings Plan"). In re Unisys Sav. Plan Litig., 74 F.3d 420, 431 (3d Cir.), cert. denied, 117 S.Ct. 56 (1996) ("Unisys").[1]

3. Plaintiffs thereafter filed 12 putative class action lawsuits which were later consolidated in this Court. On January 26, 1995, this Court granted summary judgment on all of the claims, except those arising under the Labor Management Relations Act ("LMRA"). In re Unisys Sav. Plan Litig., No. CIV.A. 91-3067, 1995 WL 19048 (E.D. Pa. January 26, 1995). The Third Circuit reversed this Court's grant of summary judgment to Unisys, and remanded this case for trial.

4. Although this Court did not grant Unisys summary judgment on the LMRA claims, those issues have been severed from the trial of this matter. (See Order of September 18, 1996).

5. The Savings Plan is a participant-directed, defined contribution plan under ERISA section 3(34), 29 U.S.C. § 1002(34). Because of the preferential tax treatment given participant contributions to their individual accounts under Internal Revenue

[1]The three plans each provide their respective participants with the opportunity to direct their monies into the same investment options and are jointly administered. As more fully described below, the Unisys Retirement Investment Plan (the "RIP") and the Unisys Retirement Investment Plan II (the "RIP II") provide precisely the same benefits to certain unionized participants. Cf. Unisys, 74 F.3d at 426-27 ("In addition to the Unisys Savings Plan, Unisys established the Unisys Retirement Investment Plan ("RIP") and the Unisys Retirement Investment Plan II ("RIP II") for unionized employees, which for all intents and purposes were identical to the "Unisys Savings Plan.").

Code Section 401(k), such retirement plans are commonly referred to as "401(k) plans."

6. These plans must be distinguished from defined benefit plans where participants are typically promised, upon retirement, a benefit in the form of a fixed percentage of their pre-retirement salary. (See Tr. of 6/10/97 at 141-42; see also 29 U.S.C. § 1002(35)). Unisys employees also participate in a defined benefit pension plan, the Unisys Pension Plan. (See Unisys Ex. 1884).

7. During the relevant time period, the Unisys Saving Plan offered six different investment options into which participants could, in five percent increments, direct their contributions. The six funds were: (1) the Unisys Common Stock Fund; (2) the Short Term Investment Fund (the "STIF"); (3) the Indexed Equity Fund; (4) the Active Equity Fund; (5) the Diversified Fund; and (6) the Insurance Contract Fund ("ICF"). (Unisys Ex. 1884 at 75). Participation in the Plan was voluntary and, insofar as new contributions were concerned, there were no restrictions on how participants could direct these investments. (See Tr. of 6/9/97 at 176); (Unisys, 74 F.3d at 447) ("[W]e agree with Unisys that the evidence is uncontroverted that for all intents and purposes, a participant's ability to make initial contributions to the Plans' various investment funds were unfettered.").

8. The Unisys Plan also included the Fixed Income Fund or "FIF," a fund formerly included in the old Sperry 401(k) plan,

Sperry Retirement Plan Part B, and subsequently closed to new contributions. (See Unisys Ex. 1886 at 10). The Unisys Savings Plan emerged from the merger of the Sperry Plan and the Burroughs Employees Savings Thrift Plan (the "B.E.S.T."). (See Tr. of 6/9/97 at 155). Following the merger of these two plans, the Sperry FIF ceased to accept new contributions; proceeds from maturing contracts and all participant-directed contributions and transfers were reinvested in the ICF. (See Tr. of 6/9/97 at 44-45; Tr. of 6/17/97 at 20, 94). For all purposes, the two funds worked together as one. (See Tr. of 6/17/97 at 94).

9. These six diverse investment options provided a variety of investment choices ranging from the more aggressive Active Equity Fund, which sought to "[o]utperform the general stock market," to the Short-Term Investment Fund ("STIF"), which tracked lower yielding short-term market rates by investing in "U.S. Government and Federal Agency notes, U.S. Treasury Bills, bank obligations" and other short term investments. (See Unisys Ex. 1884 at 75).

10. The Plan allowed individual participants to decide which investment options to pursue, how much money to invest in total and how much money to place in each fund. As the Summary Plan Description ("SPD") explains, "[y]ou direct how your before-tax contributions are invested. You can choose from six funds, each with a different investment objective, level of risk and investment return." (See Unisys Ex. 1884 at 74). As class representative

McCarthy similarly admitted, his investment decisions were "personal" to him. (See Tr. of 6/23/97 at 70).

11. Plaintiffs could also transfer their money between the funds. (See Unisys Ex. 1884 at 80). Participants seeking to transfer their money from FIF and/or CIF to the STIF had to place their money in one of the equity funds for twelve months, the so-called "equity wash" provision. This requirement permitted the insurance carriers, the issuers of the GICs, to predict better their cash flows, prevented the participants from engaging in interest rate arbitrage and, therefore, led to higher rates of interest paid on the GICs. (See Tr. of 6/9/97 at 160-61, 177-78, 180; see also Tr. of 6/10/97 at 50).

12. Moreover, both retired Unisys personnel and former Unisys employees were free to move their money out of the Unisys Plan.

13. At issue in this litigation is Unisys' purchase of three Executive Life GICs for the FIF and ICF at a time when Executive Life held the highest available ratings from two well-regarded rating services, Standard & Poor's and A.M. Best. (See Pls.' Ex. 9 at 2). These services gave Executive Life ratings of AAA and A+ respectively for its claims-paying ability. Moreover, at the time of these purchases, Executive Life had an A3 rating from Moody's, an "investment grade" rating. (See Tr. of 6/11/97 at 146). In any event, on August 12, 1988, Moody's upgraded its rating of Executive

Life from A3 to A1. (Tr. of 6/10/97 at 176; Unisys Ex. 1128; see also Tr. of 6/10/97 at 8).

14. The Executive Life GICs were bought for the former Sperry FIF on June 9 and December 2, 1987, and for the Unisys ICF on January 13, 1988. Executive Life, however, was only one of many issuers from which Unisys had purchased GICs for the Plan.

15. After the purchase of the third Executive Life GIC in 1988, the GICs totaled some $217 million. (See Unisys Ex. 2674). The three Executive Life contracts then constituted about 20% of the combined assets of the FIF and ICF. On the seizure date in 1991, however, Executive Life totaled only about 15.5% to 15.3% of the combined FIF and ICF. Id.

16. The Plan specifically delegated to the Investment Committee the discretionary authority "to direct the Trustee with respect to the investment of the assets of the Plan and to make any decision respecting assets of the Plan." (See Unisys Ex. 2748 at 71). The authority to make the purchases at issue in this case, however, were delegated to Leon Level, then Unisys' vice president and treasurer, and David White, then Unisys' director of capital management and trust investments. (See Tr. of 6/11/97 at 24-27). Both Mr. Level and Mr. White testified to their experience in finance and investing, and I find that both had the education, experience and expertise needed to make these investment decisions.

17. Mr. Level graduated from the University of Michigan with an undergraduate and a masters degree in business. (See Tr. of 6/11/97 at 74). After completing his academic studies, Mr. Level went to the accounting firm then known as Haskins and Sells. He is a CPA. After leaving Haskins and Sells, Mr. Level spent ten years in corporate controllership activities at Bendix Corporation. He joined Burroughs Corporation in 1981 as vice president of financial planning. He was elected treasurer of Burroughs in 1982, and was then, following the merger of Burroughs and Unisys, named treasurer of Unisys. His duties at Burroughs and Unisys included management of the captive finance subsidiary, and he was responsible for the supervision of the domestic treasury and the international treasury operations. He oversaw the trust investments at both Burroughs and Unisys.

18. Mr. White holds a bachelor's degree from the University of Michigan in economics and mathematics, and has an MBA from the University of Michigan in operations research and finance. (See Tr. of 6/17/97 at 149-50). He worked at Burroughs as a financial analyst in international manufacturing, and was the company secretary for Burroughs' British subsidiary. Additionally, he served as finance director for Burroughs' international group for Europe, and then worked with the corporate strategic planning staff. In 1982, he was appointed Burroughs' director of capital management and trust investments. In that capacity, Mr. White was

charged with oversight of Burroughs' defined benefit pension plan, then some $350 million in assets. At the time of the Unisys-Burroughs merger, Mr. White's efforts led to the growth of these funds to approximately $800 million. Mr. White was similarly responsible for Burroughs' Employees Savings Thrift Fund, or BEST Plan, a 401(k) savings plan. Mr. White explained the steps he and his staff took to prepare and educate themselves prior to the implementation of the BEST Plan. He also explained his expertise with various complex investments, including derivatives and futures arbitrage. Id. At 160.

19. Each of the GICs purchased from Executive Life was selected pursuant to a competitive bidding process, among qualified bidders. Competitive bidding insured the highest rates from the competing insurance companies. (See Tr. of 6/10/97 at 140; Tr. of 6/17/97 at 167).

20. The first bid was held on June 9, 1987, under the auspices of a recognized GIC specialist, Murray Becker. Mr. Becker spent much of his career assisting plan sponsors in purchasing GICs for defined contribution pension plans (having handled more then 500 bids). (See Tr. of 6/10/97 at 139). Moreover, Mr. Becker has a degree from the Wharton School of the University of Pennsylvania, was an enrolled actuary, and spent the entirety of his career in the insurance industry (or acting as a GIC specialist). I find

that Mr. Becker was qualified to serve as an expert consultant to Unisys on the bid selection process on June 9, 1987.

Becker and his staff mailed bid specifications on behalf of Unisys to more than thirty companies on Becker's list of approved bidders in April, 1987. (See Tr. of 6/10/97 at 156; Unisys Ex. 1068).[2] Becker invited representatives of the bidding companies to make in-person presentations and to answer questions concerning the bids and their companies. (See Tr. of 6/10/97 at 117-18).

21. Murray Becker primarily relied upon the Standard & Poor's rating to determine the creditworthiness and suitability of an insurance company for inclusion in the Johnson & Higgins' universe of approved bidders. Furthermore, Mr. Becker explained the confidence that he and other professionals in the industry had in Standard & Poor's, stating that the advent of the Standard & Poor's rating afforded GIC purchasers the tools needed to access properly the creditworthiness of insurance companies:

> Q: Could you describe for the Court the -- what you said to the Society of Actuaries back in '87 about the advent of Standard and Poor's in the credit rating business?
>
> A: Well, it was a welcomed development, because prior to the advent of Standard and Poor's, we were trying to set a triple-A standard without having the ammunition to do it. So we were saying

[2]Unisys reviewed Becker's bid specifications and provided historical cash flow data prior to the June 9, 1987 bid. (See Unisys Ex. 1069; Tr. of 6/18/97 at 67-68).

> to our clients, we believe that the leading insurance companies are probably triple-A credits, and that there are probably plenty of triple-A credits, and you should try to find insurance companies that somehow or other, if Poor's, or Moody's, or any of the recognized credit rating agencies, that agency would develop a triple-A rating. But in the absence of the rating service, there was really no satisfactory way to make the determination.
>
> So when Standard and Poor's went into the business of rating insurance companies for their claims paying ability, it filled a void, and we viewed it as a very fortuitous event.

(Tr. of 6/10/97 at 149-50).

Mr. Becker also explained the multitude of analyses performed by Standard and Poor's before issuing a rating of an insurance company. These tests included: industry risk; earnings performance; capitalization; liquidity; management; asset mix; diversification; interest rate risk management and liquidity risk. (See Tr. of 6/10/97 at 160-64). Furthermore, Standard & Poor's interviewed the management of the insurance companies then being rated to gain further insights into the creditworthiness issue. The extent to which the ratings services afforded subscribers reliable information was further explained by Messrs. Level and White. Both Level and White explained the standing that the ratings services enjoy in the investment/finance community, based on their personal observations on the competence and thoroughness of these services. (See, Tr. of 6/17/97 at 173-74; Tr. of 6/11/97 at 89-93, 131, 137-40).

22. Mr. Becker also testified that while Executive Life had an "aura of controversy" stemming from the fact that Executive Life had a relatively high concentration of high yield bonds in its investment portfolio compared to other insurance companies, (see Tr. of 6/10/97 at 108), he believed that the controversy posed no added default risk for GIC purchasers. In other words, the inclusions of such bonds in the Executive Life portfolio did not make the selection of the GIC imprudent. In that regard, I note the evidence at trial that all insurance companies had high yield bonds in their investment portfolios. (See Tr. of 6/11/97 at 108).

23. Mr. Becker also explained that Standard and Poor's, on a number of occasions, reaffirmed its AAA rating to meet questions regarding the appropriateness of assigning such a rating to an insurer having high yield bonds in its investment portfolio (and in the face of regulatory actions taken by insurance officials in New York). (See Tr. of 6/10/97 at 159-60, 165-66).

24. As an insurance company then having an AAA rating from Standard and Poor's, the rating service opined that Executive Life would likely satisfy its obligations:

> Insurers rated triple A offer superior financial security on both an absolute and relative basis. They possess the highest safety and have an overwhelming capacity to meet policyholder obligations.

(See Tr. of 6/10/97 at 154; Unisys Ex. 2116).[3] A.M. Best also gave Executive Life its highest rating, A+. (See Pls.' Ex. 9 at 2).[4]

25. Mr. White further explained that the decision to purchase the Executive Life contracts followed consideration of Executive Life's "barbell" investment strategy (using other investments, including a high percentage of government bonds, to offset the risks of junk bonds in the portfolio), (see Tr. of 6/17/97 at 170), the fact that Executive Life included no real estate mortgages or derivatives in its portfolio, and that Executive Life had a relatively low proportion of commercial real estate. White further explained that an investment in Executive Life posed no problem of an asset-liability "mismatch." Moreover, Unisys also considered the rates that the bidders were offering, mindful of the fact higher rates could, over time, yield dramatic differences in the

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[3]The bid materials also contained a list of other Executive Life GIC purchasers, including well known plan sponsors such as Xerox, National Can Company, Reynolds Metals, Hammermill Paper Company, American Honda Motor Company, Pacific Lumber, Champion Spark Plug, Blue Cross of California and the states of Alaska, Maryland, Michigan and Washington. (See Pls.' Ex. 9 at 13).

[4]The A.M. Best A+ rating similarly described Executive Life's prospects:

> Assigned to those companies which in our opinion have achieved superior overall performance when compared to the norms of the life/health insurance industry. A+ (Superior) rated insurers generally have demonstrated the strongest ability to meet their respective policyholder and other contractual obligations.

(See Unisys Ex. 1450).

amount of money available at retirement.[5] Nevertheless, although Unisys sought high returns for participants, the fiduciaries were constrained by their standards of risk tolerance. (See Tr. of 6/18/97 at 50).

26. White also explained the other considerations animating the decision to purchase contracts from Executive Life, including the maturity of the contracts (to achieve a proper "laddering" of the investment portfolio) and that Executive Life's bond portfolio was balanced against the portfolios of the other issuers in the Plan. (See Tr. of 6/11/97 at 87, 121). In that manner, Unisys sought to diversify the FIF and ICF portfolios by insuring that the asset holdings of the various insurance companies, many of which were then steeped in real estate, were diversified against one another. (See Tr. of 6/17/97 at 171).

27. White also testified that in his capacity as manager of the Burroughs and Unisys defined benefit pension plans, he had carefully considered the use of high yield bonds in pension investing and knew well the risks involved. (See Tr. of 6/17/97 at 53-54). White further explained the prevailing view at the time: that a diversified portfolio of high yield bonds promised a relatively high rate of return, with relatively low risk of default. (See Tr. of 6/17/97 at 53, 172; see also Tr. of 6/17/97

[5]See Tr. of 6/17/97 at 157 ("In other words, for typical 20 year career, an extra 20 basis points of return becomes quite significant in the long term as to the value of the retirement accounts."). See also Tr. of 6/11/97 at 98.

at 204) ("Well, it was high yield bonds and I think academic research has shown that the high yield bonds are safer, return more on a risk adjusted basis than treasuries.").

28. The Court of Appeals directed this Court to make further inquiry, at trial, into whether Unisys breached its fiduciary duties by purchasing Executive Life GICs despite the fact that its expert consultant, Murray Becker, believed that Executive Life could not sustain its AAA rating from Standard & Poor's, if the holdings of high yield bonds exceeded 35 percent of the issuer's investment portfolio. See Unisys, 74 F.3d at 427. At trial, Mr. Becker testified that he made no such statement and held no such belief. (See Tr. of 6/10/97 at 118, 128). In sum, there can be no finding that the purchase of the Executive Life GIC that day violated any of Mr. Becker's standards, one of the factual issues to be resolved on remand from the Court of Appeals. Unisys, 74 F.3d at 427. Becker specifically testified that he relied on Standard & Poor's, not the representations made by the Executive Life representative. (See Tr. of 6/10/97 at 119).

29. Stated differently, the inclusion of junk bonds in the Executive Life portfolio did not, in Becker's view, present a higher default risk regardless of the maturity of the GICs. (See Tr. of 6/10/97 at 126-29). Moreover, Becker believed that fiduciaries had no credible basis to challenge the AAA rating of Standard & Poor's. (See Tr. of 6/10/97 at 113).

30. Further, the Court of Appeals instructed this Court to determine whether, in fact, Unisys selected the GIC despite Mr. Becker's recommendation that a shorter maturity was appropriate. Unisys, 74 F.3d at 427. Mr. Becker specifically testified that he did not recommend a shorter maturity because Executive Life was not the highest bidder at the shorter maturities. (See Tr. of 6/10/97 at 172-75). He further testified that he and David White had only a general, philosophical discussion about maturities. In other words, the discussion regarding contract maturities did not relate to the decision whether to select a five year Executive Life GIC in June, 1987.

31. After the June 9, 1987 bid, the professional managers at Unisys replaced Mr. Becker, believing that they could now do an equally competent job at selecting GIC issuers for the FIF and ICF. (See Tr. of 6/17/97 at 176-77; Tr. of 6/10/97 at 96; and Tr. of 6/11/97 at 37). Moreover, by replacing Mr. Becker with the in-house personnel at Unisys, the professional managers saved the Plan participants approximately $25,000 per bid. (See Tr. of 6/17/97 at 177-78).

32. Unisys employees then assumed the responsibility for the compilation of the list of potential bidders. Unisys sought to broaden the list of bidders to maximize the amount of market information then available to the decision-makers. (See Tr. of 6/17/97 at 69-70).

33. Between bids, Unisys engaged in an ongoing process of reviewing and updating the information on potential bidders. As Mr. Level explained:

> A: The selection process was done in part on bid day, but the selection process occurred over -- over the entire period we had a fund. We reviewed potential candidates to bid, we reviewed the portfolio and the types of maturities and insurance companies that we sought to include in the portfolio. There was a clear understanding prior to bid day to what maturities and what insurance companies would qualify and the like.

(See Tr. of 6/11/97 at 46).[6] Mr. White also analyzed the portfolio of the insurance carriers. (See Tr. of 6/11/97 at 54). The risk of the bidders was also evaluated.

34. Unisys also sought guidance from an advisory firm to its defined benefit pension plan. Unisys would, "as a matter of

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[6]Mr. Level also explained the other steps taken prior to bid day:

> Certainly we had minimum rating standards for the three principal [ratings] agencies that rated this type of situation. We reviewed current publications, technical magazines and articles, and we reviewed materials submitted by the carriers concerning -- their companies in -- into our facilities and interviewed management, and reviewed their strategies. One specific occasion, I recall personally visiting one of the insurance carriers that bid on one of the funds, and meeting with the senior management -- of that carrier.

(See Tr. of 6/11/97 at 48).

course," meet with executives of bidders and winners of bids, to further assess their suitability for inclusion in the Plan.

35. Moreover, as Mr. White testified, Unisys relied on the ratings of Standard & Poor's, A.M. Best and Moody's in evaluating the creditworthiness of the issuers, (see Tr. of 6/17/97 at 105; Tr. of 6/11/97 at 89), and sought to purchase only AAA ratings for the Plan. Id. ("We wanted A plus, triple-A, when we would get it, everything being equal, etc."). Unisys also had available SEC forms 10K and 10Q and the issuers' annual reports to review prior to the selection of a GIC. (See Tr. of 6/17/97 at 80-81; see also Tr. of 6/11/97 at 62). The A.M. Best rating was a source of information on the asset composition of the bidding insurance companies. (See Tr. of 6/17/97 at 71).

36. On December 2, 1987, pursuant to a second competitive bidding conducted by Unisys, an Executive Life contract was one of three purchased for the FIF. Thereafter, on January 13, 1988, Unisys purchased another such GIC, this time pursuant to a competitive bidding held for the new ICF. Executive Life enjoyed the AAA rating from Standard & Poor's through all of the relevant bids. Unisys, 74 F.3d at 427-28.

37. Although Moody's initially assigned Executive Life an A3 rating, while still an "investment grade" rating, that fact is of

no compensation.[7] Moody's later, on August 12, 1988, upgraded Executive Life from A3 to A1. Mr. Level explained, "[t]o move two steps in rating is a very, very meaningful and positive, in this case, conclusion." (See Tr. of 6/11/97 at 146). Executive Life was not selected at subsequent bids, however, due to diversification concerns. (See Tr. of 6/10/97 at 9).

38. Unisys' Plan participants had information to make informed choices regarding their investments. In 1988, every Plan participant was notified, through the new prospectus which accompanied the adoption of the new Unisys Plan, that Executive Life GICs had been purchased for the FIF and ICF.[8] The 1988 prospectus also informed the Plan participants of the risks associated with their election to invest in GICs:

> The fund is invested contracts with insurance companies and other financial institutions which guarantee repayment of principal with interest at a fixed or fixed minimum rate for specified periods of up to ten years. The Company [Unisys] does not guarantee the repayment of principal or interest.

(Defs'. Ex. 2109 at 9) (emphasis added).

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[7] An "investment grade" rating, as the name suggests, is an investment of sufficient quality to meet ERISA's fiduciary standards. See Glennie v. Abiti-Price Corp., 912 F.Supp. 993, 1002 (W.D. Mich. 1996) ("a fiduciary of a plan would almost certainly violate the fiduciary duty if the fiduciary caused the plan to purchase a GIC in an insurance company with ratings below investment grade.").

[8] Class representative Henry Zylla acknowledged that the prospectus informed him that Executive Life was in the Plan, which, in turn, prompted him to complain of these investments (with their use of high yield bonds) to Unisys.

39. Consistent with Unisys' disclosures on the topic, class representative McCarthy specifically admitted that he understood that the insurance company issuing the GICs, and not Unisys, was alone obligated to make the promised payments under the contract. (Tr. of 6/23/97 at 66-67).

40. The SPD also explained to participants that they assumed the risk of loss for their investments:

> Benefits available are based on your savings plan value at the time of distribution. Your payments from the Plan are subject to the performance of the funds in which your accounts are invested. <u>If the value declines, you may receive less from the Plan than you and the Company contributed</u>.

(emphasis added). This explanatory language was repeated in the SPDs for the RIP and RIP II Plans.

41. The SPD also told participants that the "investment objective" for the Insurance Contract Fund was to "preserve the amount invested while earning interest income ...." (Defs.' Ex. 1884 at 75). In that regard, the plaintiffs similarly described the Plan's objectives in terms of how the funds would perform, rather than looking to the returns on the individual GICs themselves. (Tr. of 6/18/97 at 141; Tr. of 6/12/97 at 35).[9]

[9]Plaintiffs' damages expert, Dr. Tsetsekos, also admitted that the participants could not choose to invest in any one GIC; rather, they were constrained to invest their money into the Funds. (Tr. of 6/16/97 at 54).

42. Some two years after the final Executive Life GIC purchase, in January of 1990, Executive Life announced a write-down of its high yield bond portfolio which, in turn, resulted in its downgrading by the major ratings services. (Tr. of 6/9/97 at 73-74).

43. Upon learning of the write-down in the Executive Life portfolio, representatives of Unisys met with officials from Executive Life to gain insight into the situation at the insurer. (Tr. of 6/9/97 at 74). More specifically, Mr. White and others from Unisys explored whether additional write-downs to the Executive Life portfolio were likely, and whether additional policy surrenders would force a liquidity crisis or cause the insurer to default. (Tr. of 6/10/97 at 10-12). Present on behalf of Executive Life were Betsy Niemeyer, Garland Wilson and Alan Chapman, senior vice president of Executive Life, who participated by phone. Based on that meeting, Mr. White circulated a memorandum to Unisys' management concluding that Executive Life would likely survive the crisis.

44. The Pension Investment Committee met on February 5, 1990. The Committee members debated the various considerations surrounding the Executive Life situation, including the fiduciaries' obligation to disclose appropriate information to participants. The members of the Committee agreed that the need for additional disclosures had to be balanced against the fact that

fiduciaries could not give investment advice to participants and, in so doing, potentially assume additional fiduciary liability. (Tr. of 6/9/97 at 111, 126). A determination was then made to take a two step approach to communicating with Plan participants. First, a series of "Q's" and "A's" were published in BENINFO, an internal Unisys electronic communications tool. Moreover, a letter from the chairman of Executive Life, Fred Carr, would be re-sent to the participants through the BENINFO system.[10] Second, the company would send to participants a cover letter along with the new 1990 Prospectus.

45. The company representatives then decided that these questions and answers should be circulated through BENINFO, to make certain that human resource personnel, skilled in dealing with participant inquiries, would soon have this information available to them. (Tr. of 6/11/97 at 183-84, 192). Moreover, a cover letter, accompanying the new prospectus and giving further details of the Executive Life situation, would highlight the issue for the benefit of the participants.

46. Aside from providing information to its field benefits administrators and responding to individual participant letters and meeting with union representatives, Unisys sent the new prospectus

[10]The Department of Labor Regulations requires fiduciaries to publish this type of information to savings plan participants. 57 Fed. Reg. 46910 ("In this connection, it should be noted that, to the extent that copies of prospectuses, financial statements and reports, or similar materials relating to the investment alternatives available under the plan, are furnished to the plan, such information would be required to be made available to the participant ....").

to every participant in March of 1990. (<u>See</u> Defs.' Exs. 2126, 2127, 1886, 1887).

47. That prospectus was accompanied by a letter from Jack A. Blaine, vice president, human resources. Mr. Blaine's letter stated, in part:

> The decisions you make with respect to which investment fund or funds are appropriate for you and how much to invest in any one fund are particularly personal to you. <u>Neither Unisys nor any Plan representative can advise you as to which investment strategy is appropriate for your situation. So we urge you to carefully review your Plan prospectus, particularly the description of the investment funds</u>.
>
> We also would like to respond to a number of questions that have arisen with respect to recent news events concerning the troubled "junk bond" market and the effect, if any, that such problems may have on the Insurance Contract Fund, Fixed Income Fund (formerly available at Sperry Retirement Program -- Part B Participants) and the Guaranteed Investment Contract Fund (formerly available to Burroughs Employees' Savings Thrift Plan Participants). You should be aware of the following points, which are described in you Plan prospectus:
>
> * * *
>
> <u>The repayment of principal and interest necessarily depends totally on the ability of the insurance company or financial institution backing the obligation under the investment contract to repay such amounts when due</u>.
>
> <u>Unisys does not guarantee the repayment of principal or interest under any investment contract</u>.

> The financial stability of each of the insurance companies and other financial institutions depends on the success of its own investment portfolio and a downturn or loss in one or more areas of the investment portfolio, such as an investment in "junk bonds," could have an adverse effect on the stability of the financial institution.
>
> <u>Please review carefully your copy of the updated Prospectus, since it provides the most up-to-date description of the Plan and your investment options</u>.

(Defs.' Ex. 1887) (emphasis added).

48. Attached to Mr. Blaine's letter was a two-page chart showing that, as of January 2, 1990, the FIF held more than $161 million worth of Executive Life GICs and that the ICF held one Executive Life GIC worth more than $47 million. In addition, the chart showed the value of other contracts and the rating of each issuer on the date of purchase and its rating as of March 20, 1990. As the chart shows, Executive Life had been downgraded from AAA to A by Standard & Poor's; from A1 to Ba2 by Moody's; and from A+ to A by A.M. Best.

49. The accompanying 1990 Prospectus, which participants were admonished to read carefully, reiterated the cautions set out in Mr. Blaine's letter. Specifically, under the heading "<u>investment options</u>" the 1990 Unisys Savings Plan, RIP and RIP II Prospectuses stated:

> An investment in any of the investment funds involves some degree of risk. Many factors, including market changes, interest rate fluctuations, the financial stability of the

> institutions in which plan assets are invested, the quality of the investment portfolios of these institutions, and other economic developments, will affect the performance of the invest funds and the value of a member's investments in those funds. As a result, there is no assurance that at any point in time the value of an investment in any fund will not be lower than the original amount invested.[11]

(Defs.' Ex. 1886 at 7).

50. After the transmission of the new prospectus with the accompanying cautionary letter, Unisys noted an increase in participant transfer out of the FIF and ICF. (Tr. of 6/10/97 at 44-47).

51. Unisys provided this cautionary language in the letter to its participants a full year before the seizure of Executive Life. Unisys also maintained contact with representatives of Executive Life through the relevant time period.

52. The plaintiffs tendered class representative Henry Zylla in support of their claim that Unisys had failed to disclose adequate information regarding the Executive Life contracts and/or lulled the participants into not transferring their money out of the FIF and ICF prior to the April 11, 1991 conservatorship.

The class representatives admitted at trial that they put their money into equities both before and after the

[11]In the descriptions of both the ICF and the FIF, the 1990 Prospectuses repeat that the repayment of principal is necessarily dependent upon a GIC issuer's ability to pay such amounts and that this ability is, in turn, dependent upon the financial stability of the GIC issuer. (Defs.' Ex. 2126 at 8, Ex. 2127 at 6).

conservatorship. Thus, the plaintiffs have moved their money and avoided the temporary freezing of their assets.[12] Although the plaintiffs have asserted that the class members are uniformly conservative in their investments, Mr. Zylla admitted that such generalization about investment preferences cannot be made. (See Tr. of 6/18/97 at 150; Tr. of 6/11/97 at 27-28).

53. During the relevant time period, Mr. Zylla amassed a substantial amount of information regarding Executive Life, wholly separate and apart from the disclosures made by Unisys. Despite his admissions that the public information he gathered was not comforting, he took no further action to transfer his funds prior to the imposition of the conservatorship. Having found that Unisys took no steps to lull him into inaction, I do not find credible his claim that he justifiably ignored these public disclosures on the status of his investments. In fact, his claims are belied entirely by the admissions of his co-class representative, Richard Silver, that Messrs. Silver and Zylla affirmatively warned other participants to transfer out of Executive Life before the April 11, 1991 conservatorship.

54. Mr. Zylla admitted that he knew that Executive Life was included in the Savings Plan as early as February of 1988, and that

[12]Class representative Zylla admitted that despite his claim that the plaintiffs would never purchase such investments, he spread the money returned to him from the Executive Life conservatorship across three of the Plan's stock funds. (See Tr. of 6/19/97 at 24-25). Similarly, class representative Kean also admitted to putting his Executive Life money into stocks. (See Tr. of 6/12/97 at 62-63.

Executive Life's portfolio included high yield bonds. (See Tr. of 6/18/97 at 82). By letter dated March 4, 1988, Mr. Zylla complained to Unisys regarding the inclusion of Executive Life in the Savings Plan Portfolio. On that date, Zylla wrote to Richard Barley of Unisys, specifically voicing his concerns:

> Members of the Engineers Union, Local 444 IUE are among those employees scheduled to be included in the Unisys Retirement Investment Plan to be effective April 1, 1988. The Appendix to the Prospectus for the Plan states that during the April 1st to June 30th period, funds directed into the Insurance Contract Fund are to be invested exclusively with Executive Life Insurance Company. Executive Life is known to specialize in acquiring and dealing in high risk "junk bonds."
>
> The Fixed Fund, the predecessor to the Insurance Contract Fund, has historically been selected by those who seek safety of principal with a reasonable rate of return and the Engineers Union believes that this proposed Corporation action will subject many employees to a degree of risk which they may be unprepared to accept. In view of this, the Engineers Union urges you to diversify Insurance Contract Funds among insurance companies less inclined to engage in high risk investments.

(Pls.' Ex. 110) (emphasis added). Despite this specific awareness of the selection of Executive Life and the stated concern about junk bonds in the Executive Life investment portfolio, the first complaint in this matter was not filed until more than three years after Mr. Zylla drafted this letter, on May 9, 1991.

55. Mr. Zylla testified to a March 5, 1990 meeting with Unisys representatives, after the write down of the Executive Life portfolio, wherein, it is asserted, he was reassured about the status of his investments such that he took no action in the following eleven months (notwithstanding the massive amounts of information Mr. Zylla compiled about Executive Life, described below). (See Tr. of 6/18/97 at 104-108).[13]

56. Mr. Zylla further testified that at that meeting, Charles Service of Unisys referred to Murray Becker as a "phoney," although the contemporaneous notes Mr. Zylla relied upon in recalling the events of that meeting include no such language. (Tr. of 6/19/97 at 6-7).[14] Again, given the contradictory nature of Mr. Zylla's testimony on the circumstances of that day, I find the evidence insufficient to support his contention that he was comforted or assured by Unisys regarding the status of his Executive Life investments.

57. Mr. Zylla described for the Court the contents of a file he created, comprised of newspaper clippings and Executive Life materials (notably press releases and correspondence to Executive Life agents), that were collected by Mr. Zylla or passed along to him by other participants. (See Tr. of 6/18/97 at 156-57, 178-79).

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[13]Mr. Zylla requested that meeting with Unisys representatives. (See Tr. of 6/10/97 at 23).

[14]Although class representative Richard Silver also attending this meeting, he did not testify that Mr. Service called Mr. Becker a "phoney." (See Tr. of 6/23/97 at 97-99).

He also explained the varied disclosures Unisys made to him about the status of the Executive Life investments.

58. More specifically, on February 19, 1990, Unisys told Mr. Zylla of the downgrade by Moody's and that Executive Life's ability to meet its obligations was "moderate." Zylla admitted that this communication was not "comforting."

59. On March 11, 1990, Zylla read in the New York Daily News that:

> To be sure, the troubles facing the Executive Life Insurance Co. of New York, and its parent company, First Executive Corp. of Los Angeles, have been fodder for the financial pages. Both companies were tied to the junk bond factory at Drexel Burnham Lambert Inc. and invested heavily in high-risk junk bonds in the 1980s to ensure rapid growth. Now they are suffering from the fallout of publicity. In January, both firms had their ratings downgraded to A from A-plus by the insurance rating company A.M. Best and Co.

(See Unisys Ex. 2020). Mr. Zylla admitted "[t]his particular statement is not a comforting statement." (See Tr. of 6/19/97 at 9). Moreover, after reviewing this article, Mr. Zylla did not request another meeting with representatives from Unisys.

60. On March 12, 1990, Mr. Zylla read in the New York Times that "Lawyers for First Executive have for the moment scotched subpoenas issued by a California state legislative committee investigating, among other things, the company's big junk bond holdings." (See Unisys Ex. 2020; Tr. of 6/19/97 at 10-11). Again,

Zylla admitted this was not comforting news and that he did not request another meeting with Unisys representatives.

61. Similarly, on April 9, 1990, Newsweek reported that:

> A handful of insurers own sizeable junk bond portfolios, to largest holder Executive Life. In January the parent company, First Executive, announced a $515 million charge against earnings to cover its losses. Last week, the rating firm Standard & Poor's downgraded the company -- to BBB, from AAA early in January. Moody's also puts the company at near-junk levels.

(See Unisys Ex. 2020; see also Tr. of 6/19/97 at 13-14). Nevertheless, Mr. Zylla did not request another meeting with Unisys, nor did he transfer his money out of the FIF and ICF.

62. Next, on May 20, 1990, Newsday told the plaintiffs:

> Last week, four months into Carr's year of grace, a musical sound began emanating from First Executive's headquarters -- but it wasn't the king's horse reaching for a high note. It was the sound of public relations men whistling past the graveyard, hoping that optimism would convince everyone that First Executive has gotten stronger, when in fact it seems to be getting weaker.

(See Unisys Ex. 2020; see also Tr. of 6/19/97 at 15-16). The article also includes a graph plotting the falling price of First Executive's common stock which, according to Newsday, "indicates a low life expectancy among investors." (See Unisys Ex. 2020). Again, this information was admittedly discomforting to Mr.

Zylla (See Tr. of 6/19/97 at 16). Although the conservatorship was some eleven months away, he did not transfer his money.

63. On April 3, 1990, a Wall Street Journal headline told participants that "First Executive Posts a 4th-Quarter Loss of $835.7 million; SEC Probe Disclosed." (See Unisys Ex. 2020). According to Mr. Zylla, at the time that this Wall Street Journal article was published, there was still "plenty of time" to transfer his money out of those funds holding Executive Life contracts. (See Tr. of 6/19/97 at 17).

64. On March 5, 1990, a Wall Street Journal article reported the regulatory efforts then made by the California Department of Insurance:

> California's Department of Insurance, concerned about junk-bond laden First Executive Corp., has installed full-time examiners at the company's largest unit and ordered outside consultants to make a detailed review of an apparently substantial surge in policy redemptions.

(See Unisys Ex. 2020; see also Tr. of 6/19/97 at 18). Although the plaintiffs argue that Unisys should have passed along this information to participants, Mr. Zylla's admissions reveal that this fact was already known to the plaintiffs. Further, like most of the claimed failures in Unisys' disclosures, not a single plaintiff testified that had he known this information, it would have made a difference to his investment decisions. Once again, Mr. Zylla admitted that this information from the Wall Street Journal was discomforting.

65. The New York Times, on November 25, 1990, told participants: "The First Executive Corporation, a life insurance company dragged down by investments in high risk junk bonds, said last week that it might hold or substantially reduce dividend payments, and cut or defer payment on its huge debts." (See Tr. of 6/18/97 at 172-73). Again, according to Mr. Zylla, this information was not comforting. Mr. Zylla acknowledged that when he read this, he still had the right to transfer his money, but he chose not to.

66. On December 24, 1990, Business Week reported that:

> Carr seems to have tried some fancy accounting. First Executive appears to have understated the amount of writedowns it is required to make when customers surrender policies. The day of reckoning is December 31st, when the company's accountants begin the annual audit that could force the writedowns. That could drive First Executive's net worth down sharply, triggering a nasty series of reactions that ultimately could prove the company's undoing.

(See Unisys Ex. 2020; see also Tr. of 6/19/97 at 20). Mr. Zylla admitted that this information he gathered on Executive Life was not reassuring.

67. Once again, on October 4, 1990, the Wall Street Journal reported to Mr. Zylla and the class:

> S&P also cut its rating on the claims-paying ability of First Executive's principal unit, Los Angeles-based Executive Life Insurance Co., to double-B from triple-B, a three-notch drop. The same lower rating also applies to about $1.8 billion of municipal issues supported by Executive Life's guaranteed

> investment contracts, non-insurance obligations offered by many insurers. Executive Life had $60.4 billion of insurance in force at the end of 1989, but policy redemptions since then have reduced that total.

(See Unisys Ex. 2020; Tr. of 6/19/97 at 21-22). Mr. Zylla also admitted that his collection of articles informed him of the rating downgrades.

68. The other class representatives also admitted that they did not read or rely on Unisys' representations regarding Executive Life investments and that a host of other factors animated their investment decisions.

69. More specifically, the plaintiffs admitted that they did not read the Plan documents. (See Tr. of 6/12/97 at 37, 48) ("probably didn't read them").[15] Moreover, the participants admitted that Unisys did not guarantee these investments. (See Tr. of 6/23/97 at 65-67). Plaintiffs also admitted that, rather than reading Plan documents to inform their investment decisions, they relied upon discussions with co-workers:

> Q. Now when you made that change in your allocation, do you recall what documents you may have consulted, if any at the time?
>
> A. Not -- not documents. I don't recall any kind of documents that I -- that I [considered]. Like I say, I think that I -- it was just a -- through conversation with fellow workers and so on, that if I

[15]Class representative Kean testified that he would "casually" look over Plan prospectuses. (See Tr. of 6/12/97 at 60). Class representative Collins stated that he "certainly" did not read Plan documents. (See Tr. of 6/11/97 at 9).

recall, why we did something as far as the
percentage.

(See Tr. of 6/23/97 at 68-69). That same class representative admitted that the pursuit of his investment objectives was personal to him and was not influenced by Unisys' documents.

70. Class representative Gary Vala further admitted that nothing Unisys might have told him during the relevant time period would have caused him to handle his investments in a different manner:

Q: And again, the reason for that was that the
money was, as you put it earlier this
morning, tied up?

A: Tied up, and I'm also still a believer in
insurance investing with insurance companies.

Q: That's right, this morning you said that.
For example, you didn't read the prospectus
because it wasn't going to change your mind?

A: Exactly.

Q: No information was going to change your mind
at that point in time?

A: Correct.

(See Tr. of 6/23/97 at 116-17).

71. Mr. Vala similarly explained that Unisys' disclosures in March of 1990 could not have influenced his decisions, no matter what Unisys might have then said:

Q: Mr. Vala, the transmittal letter asks
the reader to read the prospectus which it
is transmitting.

A: Mm-hmm.

Q: Which is the March 23rd, 1990 prospectus.
Did you read the prospectus?

A: No.

Q: You did not?

A: No.

Q: Did you think the prospectus was an
important document to read?

A: No, I had already made my mind up.

Q: Okay and when you say you already made up
your mind up, what had you made your mind
to do?

A: I was already in the insurance aspect
and that's the way, the way I've always
dealt, so that's the way I would stay.

Q: So, no matter what was said in the
prospectus or document, you were going
stay.

A: In the insurance.

Q: In the insurance fund?

A: Correct.

(See Tr. of 6/23/97 at 109-110).

72. Mr. Vala also admitted his losses, if any, were the fault of non-disclosures on the part of the Plan's auditor's Ernst & Young, and not necessarily Unisys' fault:

Q: Did you believe at that point in time
that any other individual or entity
had caused you this injury?

A: The accounting firm, Ernst & Young.

(See Tr. of 6/23/97 at 103).

73. Class representative Mr. Colby similarly disavowed reliance on Plan documents in framing his investment choices, in favor of conversations with his co-workers:

> Q: In making investment decisions with respect to the RIP, did you make those decisions on your own?
>
> A: Yes.
>
> Q: Did you ever receive advice from an outside advisor?
>
> A: No.
>
> Q: In making these decisions on your own, did you investigate the various investment options in any way in terms of maybe reading brochures or doing outside research?
>
> A: No.
>
> Q: Did you receive literature from Unisys and before that, Sperry, on these various investment options?
>
> A: There was literature, yes.
>
> Q: Do you remember whether you received that literature in making your decision
>
> A: No, not in any great detail.
>
> Q: The investment decisions you ended up making, how did you come to decide where to place your money?
>
> A: At the time we made those decisions, it was just discussed by people on the floor where you worked, where you would put it.

(<u>See</u> Tr. of 6/23/97 at 73).

74. Class representative Richard Silver testified that he had class representative Henry Zylla warn many Unisys participants to transfer their money (despite Mr. Zylla's contention that Unisys has assured him of the safety of his investments). (See Tr. of 6/23/97 at 91) ("And what we did is we essentially raised the flag. And I think that we felt both Henry and I felt that we had done all that we could have done to warn the people by that time without directly telling them to do it, to get their money out.") (emphasis added). Again, this testimony is entirely at odds with Mr. Zylla's claim that Unisys had lulled Zylla and the class members into not timely transferring their money out of the FIF and the ICF. This testimony is inconsistent with plaintiffs' claims that the class members did not have enough information about their investments.

75. Moreover, class representative Silver readily admitted that his failure to transfer his money was his fault, and not Unisys':

> Q: Why did you believe that everyone else
> had their money out at that point?
>
> * * *
>
> A: Probably because if they didn't they
> were stupid as I was.

(See Tr. of 6/23/97 at 91-92).

76. Separate and apart from whether Unisys' disclosures on Executive Life were adequate, plaintiffs' damages expert, Dr. Tsetsekos, admitted that he did no calculation on whether

defendants' alleged failure to disclose information to the participants caused any loss:

> Q: Sure, I'd be happy to. <u>You don't have any -- you have not calculated any damages, have you, which relate to the alleged failure of Unisys to make adequate disclosures to the plan participants in 1990</u>? Isn't that right?
>
> A: Yes.

(<u>See</u> Tr. of 6/16/97 at 56).

77. In fact, plaintiffs did not offer Dr. Tsetsekos in support of the individualized claims of damages flowing from an alleged non-disclosure of material information. As Mr. Malone explained to the Court, Dr. Tsetsekos's expert testimony was limited to losses incurred by the Plan from the purchase of Executive Life GICs:

> Mr. Malone: Your Honor, we would offer this witness as an expert in the field of finance. We believe his testimony would be of assistance to you in determining the financial consequences <u>to the Unisys savings plan, the Retirement Investment Plan or Retirement Investment Plan II</u> in analyzing what the consequences were of the acquisition of the Executive Life GICs and, more particularly, what the potential damages are.

(<u>See</u> Tr. of 6/16/97 at 19) (emphasis added).

78. Unisys also presented the testimony of George Strong, a partner at Price Waterhouse LLP, on the issue of the participants' damages. As more fully explained below, this issue is related to the threshold question concerning whether the purchase of Executive

Life GICs was prudent in the first instance, and whether the investments were properly diversified. If the participants suffered no damages then, of course, there can be no finding of a fiduciary breach.

79. Mr. Strong plotted the percentage of the Executive Life GICs as part of the combined assets of the FIF and ICF. (See Tr. of 6/20/97 at 21-23; Unisys Ex. 2624). Such an inquiry was appropriate given the fact that the FIF and ICF worked together as one fund. (See Tr. of 6/20/97 at 23). While the Executive Life investment exceeded the 20% level in 1988, the amount of Executive Life investments in these funds totaled between 15.5% and 15.3% on the date of the seizure of Executive Life. (See Unisys Ex. 2624).[16]

80. Each of the Executive Life contracts has returned all of the principal invested, with interest. Stated differently, contract #1238 yielded a 5.56% return; contract #1267 realized a 4.59% return; and contract #1279 earned a 3.88% return. (See Unisys Ex. 2664). These returns evidence the fact that the Executive Life contracts returned the participants' principal, and earned some interest income.

81. Mr. Strong further explained that the correct way to analyze the claimed damages is to assess how the portfolio

[16]Again, although plaintiffs claimed that Unisys did not have written investment guidelines, including a diversification limit, they failed to offer any proof on how this caused them harm. In that regard, Mr. White further explained his understanding of the guidelines Unisys then followed, even in the absence of a writing on the subject. (See Tr. of 6/17/97 at 24-25).

performed in the aggregate, rather than looking to the assets making up the portfolio, i.e., the individual Executive Life contracts. (See Tr. of 6/20/97 at 22-23). The aggregate performance of the funds must be compared to an appropriate benchmark, here treasury bill rates, to determine whether, in fact, the participants have suffered any losses. If the return on the participants' investments exceeded these norms, there can be no finding of damages.

82. This portfolio approach is particularly appropriate given the plaintiffs admissions that they looked to the performance of the funds, rather than the individual GICs, to determine the success of their investments. Plaintiffs' damages expert, Dr. Tsetsekos, similarly testified that the participants could not invest in any particular GIC, but had to spread their money across the GICs that made up the portfolio of investments in the ICF and the FIF. (See Tr. of 6/16/97 at 54).

83. Even accounting for the fact that the Executive Life GICs did not return to participants as much interest on the contracts as promised, the portfolio's performance exceeded the appropriate benchmarks. Mr. Strong explained that, using 90-day and five-year treasury bill rates as a means for comparison, the combined FIF and ICF exceeded these benchmarks by $248.62 million and $85.41 million, respectively. (See Unisys Exs. 2745, 2746; Tr. of 6/20/97 at 23-25). Mr. Strong further explained that the "benefits

responsiveness" nature of the contracts, allowing for the return of money to the participants in certain instances, required the examination of the portfolio against these two standards. In other words, the appropriate benchmark lies somewhere between the 90-day and five-year treasury rates but, in any event, the combined ICF and FIF returns well exceeded both benchmarks.

84. Mr. Strong also compared the combined ICF/FIF performance to a reference work on the historical returns on GICs. Mr. Strong found that his treasury bill benchmarks yielded a favorable result, demonstrating that the FIF/ICF outperformed comparable GIC funds. (See Tr. of 6/20/97 at 56-58). This comparison showed that the Unisys funds exceeded the performance of the historical norms by some 30 to 65 basis points. In sum, Unisys demonstrated that, even accounting for the fact that the Executive Life contracts did not return as much interest as promised at the time of purchase, the participants did not suffer any legally-cognizable injury because their investments outperformed the appropriate benchmark comparisons.

85. In that regard, I note that Dr. Tsetsekos did not examine the portfolio of investments, despite his admission that Unisys participants could not invest in any particular GIC (and had to spread their money across the funds' investments). (See Tr. of 6/16/97 at 53-54).

86. Dr. Tsetsekos testified that his damages calculation started from the presumption that Executive Life posed the highest level of risk to participants. (See Tr. of 6/16/97 at 67). Moreover, Dr. Tsetsekos testified that the relative rate offered by a GIC bidder may reflect the level of risk. He then admitted, however, that the Executive Life bids, at the shorter maturities, were lower than other bids. In other words, it cannot be said that Executive Life necessarily posed the highest risk to participants. This is particularly important given Tsetsekos' further admission that, unless the predicate to his methodology is true, i.e., that Executive Life was consistently the highest bidder and posed the highest risk to participants, the rationale for his approach to calculating damages "disappears."

87. Dr. Tsetsekos also admitted that in determining his representative rate, from which he calculates damages, he did not determine whether the representative bidders he selected could have accepted the amounts of money Unisys was then bidding. Moreover, Tsetsekos' approach did not properly account for the risk of default within the group of issuers used to determine his representative rate.

88. Dr. Tsetsekos further testified that he adopted the triple-A Solomon Brothers bond index to determine the damages owed to participants after the expiration of the contracts, without having made actual inquiry into the investment strategies and

propensities of the participants. Indeed, Dr. Tsetsekos admitted that the assumption he made regarding the participants' likely use of the money was "quite subjective."[17]

89. Dr. Tsetsekos also admitted that he failed to conduct calculations to determine the "confidence" of his results, and, as such, his damages calculation was, at best, "an estimate."

90. It is also significant that Dr. Tsetsekos stated that he did no specialized calculation of the damages allegedly caused by a failure to diversity:

> Q: Before the break -- well, let me start this way. I asked you this morning about the act that gives rise to damages and <u>am I correct that the purchase was the act That gives rise to damages in your view</u>?
>
> A: Yes, it is.
>
> Q: Okay. <u>Now, I take it that none of your damages are the result of any claims that that the plaintiffs are making about diversification, is that right, or the failure of the fiduciaries to adequately diversity</u>? You don't measure damages with that --
>
> A: <u>No, not in terms -- no, I haven't been asked to do that</u>.

(<u>See</u> Tr. of 6/16/97 at 99) (emphasis added).

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[17]Mr. Zylla and class representative Kean both put the money return from Executive Life into equity investments, <u>see</u> <u>supra</u> at 26 n.12, and Dr. Tsetsekos failed to incorporate this testimony into his analysis. (<u>See</u> Tr. of 6/16/97 at 96-98). Stated differently, Tsetsekos simply assumed that the plaintiffs would reinvest their money into the same risk class, despite plaintiffs' admission to the contrary. (<u>See</u> Tr. of 6/16/97 at 112-13).

91. In sum, as the trier of fact, I credit the testimony of Mr. Strong over that of Dr. Tsetsekos and find that the plaintiffs suffered no damages as the result of Unisys' decision to purchase the Executive Life GICs (the only claim upon which plaintiffs offered evidence of damages).

92. Plaintiffs complain that Unisys replaced an Executive Life annuity, used to fund the non-qualified retirement benefit of Michael Blumenthal, Unisys' former chairman. From this premise plaintiffs maintain that Mr. Blumenthal's actions should have prompted Unisys to give different or additional warnings to participants regarding their investments in Executive Life.

93. Mr. Blumenthal's benefits were paid pursuant to a non-qualified plan, not subject to ERISA. (See Tr. of 6/11/97 at 175-76) ("Mr. Blumenthal's contractual arrangements with the board of directors was a personal matter."). (See also 6/12/97 at 21). Assuming this evidence has some relationship to the Plan, the best that can be said of plaintiffs' proffer is that one executive-level "participant" exercised his right to be rid of Executive Life, a right enjoyed by each of the plaintiffs. Nothing in ERISA requires a plan sponsor to communicate to participants information regarding the investment decisions of other participants.

94. Moreover, there is absolutely no evidence offered at trial that Mr. Blumenthal's actions were motivated by "inside" information or special knowledge regarding the circumstances at

Executive Life. In that regard, I note further that Mr. Charles Service, perhaps the Unisys executive then enjoying the most information about Executive Life in 1990 and 1991, did <u>not</u> transfer his money prior to the imposition of the conservatorship. (<u>See</u> Tr. of 6/10/97 at 52).

95. In any event, not one plaintiff testified that had he access to this information, he would have transferred his money. Moreover, given Mr. Silver's admissions that he had ample information about Executive Life and that he and Mr. Zylla instructed other participants to transfer their money, the circumstances regarding Mr. Blumenthal are immaterial to the question of whether Unisys' disclosures were adequate.

96. According to Mr. Service, formerly vice president of capital management and trust investments at Unisys, the company considered reducing the "equity wash," or time period that a participant, looking to transfer his money out of the FIF and/or ICF, had to keep the money in one of the equity funds offered by the Plan. (<u>See</u> Tr. of 6/9/97 at 119-20, 160-62, 177-80). In other words, to reduce the likelihood of the participants engaging in interest rate arbitrage, by transferring the money between the FIF and/or the ICF and the STIF to capitalize on interest rate fluctuations, participants had to keep their money in an equity fund for twelve months.

97. Because the cash flows on each of the GICs would necessarily be influenced by the change in the twelve month equity waiting period, or "equity wash," Unisys sought the approval of each of the issuers of the ICF and FIF. (See Plaintiffs' Ex. 5). Reduction of this waiting period worked, of course, to the benefit of the participants.

98. An agreement was later reached on October 17, 1990 with Executive Life allowing for the reduction of the equity wash from twelve to six months. The document further provided that:

> Unisys Corporation hereby further agrees that neither it nor its affiliates, employees, agents or representatives will communicate with Plan participants regarding the financial condition or prospects of Executive Life nor issue any other communication regarding Executive Life which could be reasonably viewed as attempting to influence the investment choices of Plan participants without first obtaining Executive Life's written approval of such communications. In the event such prior written approval is not obtained, Executive Life may elect to not honor employee requests for withdrawals or reallocations provided that Executive Life reasonably believes that such requests were the direct result of such communication. The above restrictions shall not be construed to prohibit Unisys Corporation from distributing its usual quarterly statements to Plan participants, from publishing monthly earnings results of the various investment options available under the Plan, from distributing in the normal course of business any other employee communication, not regarding Executive Life, regarding the savings plan or from distributing any other

communications required by law, regulation or directive of any federal agency.

Id. (emphasis added).[18]

99. Unisys was already contractually obligated to avoid attempts to influence participant transfers; hence, Unisys, with the letter agreement, did not give up anything new. In other words, withdrawals from the ICF and FIF had to be accomplished pro rata from all of the issuers in the portfolio. (See Tr. of 6/9/97 at 159). As Mr. Service explained, "the insurance contract fund was a portfolio of contracts and one bought a -- units within the fund and, so, that meant one had a pro rata share of every contract in that fund." (See also Tr. of 6/10/97 at 29).[19] Unisys had already promised, in several of the other GICs, not to influence

[18]I note further that the quotation of this letter in the Court of Appeals opinion omitted the qualifying language expressly permitting Unisys to make disclosure "required by law." See Unisys, 74 F.3d at 431. Given the task then before the Court of Appeals, reviewing a grant of summary judgment, the exclusion of this particular language may have been appropriate. However, at trial the balance of the paragraph now properly informs this Court regarding the issue at hand and underscores the evidence that Unisys was already contractually obligated not to make disclosures of the sort arguably proscribed by the letter agreement with Executive Life.

[19]See also Unisys, 74 F.3d at 426 ("Contributions to the Insurance Contract Fund were allocated on a pro rata basis among the various GICs held therein.").

participant transfers.[20] As such, Unisys merely promised Executive Life to avoid conduct it had already promised to refrain from.

100. In any event, at no time did Unisys' agreement with Executive Life cause Unisys to fail to pass along information concerning Executive Life which Unisys would otherwise have disclosed. (See Tr. of 6/9/97 at 147). Moreover, as explained above, there was voluminous public information already available on the status of Executive Life.

101. In support of the claim that Unisys breached its fiduciary duties in purchasing the Executive Life GICs, plaintiffs tendered, as a possible expert witness, Dr. George M. Gottheimer.[21] Dr. Gottheimer has a Ph.D. from the California Coastal University,

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[20]For example, the GIC between the Plan's trustee and the Hartford Insurance Company provided as follows:

> PARTICIPANT INVESTMENT COMMUNICATIONS. The term "Participant Investment Communications" means any communication concerning the investment made pursuant to the terms of this contract, either verbal or written, which is prepared for delivery to Participants. The Contractholder agrees not to deliver any communication concerning the investment made pursuant to the terms of this contract to Plan participants without The Hartford's prior determination that such communication will not have the effect of inducing Plan participants to elect to transfer all or part of their accounts into or out of this Contract.

(See Unisys Ex. 1027).

[21]It should be noted that plaintiffs offered no expert testimony on the issue of whether the purchase of these Executive Life GICs breached ERISA's diversification standards. Counsel for the plaintiffs stated that Gottheimer was to testify only on the tests "performed in conducting an analysis of the financial condition of insurance companies." (See Tr. of 6/19/97 at 63).

a "non-traditional" institution, or more simply, a correspondence school. (<u>See</u> Tr. of 6/19/197 at 44).

102. Dr. Gottheimer admitted during cross-examination in the <u>voir dire</u> process that his experience in insurance was largely, if not exclusively, dedicated to the property casualty area, and not to life insurance. Executive Life, as the name suggests, was a life insurance company. Gottheimer testified that he could not recall whether his previous expert witness engagements involved life insurance matters or property casualty matters. (<u>See</u> Tr. of 6/19/97 at 54). Again, on cross-examination, he was impeached with a deposition he gave in another matter:

> Q: Okay. Now, isn't it true that in every case in which you've testified as an expert, that all those assignments related to property and casualty -- the property and casualty business?
>
> A: I really don't recall whether any of them were on life insurance matters. Most of my work is in property and casualty. I just don't recall. I have been retained for a lot of life insurance matters, but I don't recall whether I actually testified in court of any of them. I just don't remember.
>
> Q: You recall that you testified at a deposition in a case involving the Budded Company, don't you?
>
> A: Yes.
>
> Q: Do you recall testifying there that 24 of the 25 testimonial assignments that you had involved the property and casualty business and not the life insurance business?

A: At that time, yes.

Q: Great, can you tell the Court whether
you've had any times that you've been
qualified as an expert in the life
insurance business since 1993?

A: When you say you qualified, do you mean
in court?

Q: Yes.

A: I just answered that, I cannot recall
ever having testified in court on a life
insurance case. I've been involved in a
lot of cases which I've been deposed on,
but not where it leads to trial.

(See Tr. of 6/19/97 at 54-55).

103. Dr. Gottheimer was similarly impeached with his deposition regarding the consulting work he had done for property casualty insurance companies, as opposed to life insurance companies. In this instance, Gottheimer disavowed his sworn deposition testimony:

Q: Now, isn't it also true that you've never
done consulting work for public or private
corporations that involved the financial
solvency of life insurance companies?

A: That's not true.

Q: Do you recall that on September 8th of
1994, your deposition was taken in this
case?

A: I do recall that.

Q: Page 53 at the bottom. And do you recall
being asked the following question: "Okay,
have you done consulting work for public
and private corporations involving the
financial solvency of life insurance

companies?" Answer, "Not that I can recall, no"? Do you recall that testimony?

A: Yes, I do.

Q: Does that refresh your recollection, Mr. Gottheimer --

A: Yes.

Q: -- that you've never been retained by a public or private corporation, at least, as of 1994 to evaluate the financial solvency of the life insurance company?

A: What I said at my deposition was not that I can recall. I can recall one now and since that time, I've done several.

Q: But in 1994, you couldn't recall any, now you can recall one?

A: I can recall one that I did prior to 1994, yes.

Q: All right, so from 1953 when you went in the insurance business until 1994, you can recall one time that you've provided consulting work for a public or private corporation involving the financial solvency of a life insurance company, right?

A: That's correct.

(See Tr. of 6/19/97 at 55-56).

104. On the critical question of whether Dr. Gottheimer's experience in the property casualty field was transferable to the life insurance area, Dr. Gottheimer was, once again, impeached with his deposition:

Q: Wouldn't you agree that there are significant differences between evaluating

a life insurance company and the property
and casualty insurance company?

A: There are some differences and there are
also some similarities in the way we do it.

Q: Do you recall also at the September 8, 1994
deposition on Page 57, Line 12, I asked you
the following questions. "Okay, by the way,
are there fundamental differences between
evaluating the solvency of a property and
casualty insurer on the one hand [and] a
life insurer on the other? Answer: "Yes."
Do you recall that testimony?

A: Yes, I do.

(See Tr. of 6/19/97 at 56-57).

105. Dr. Gottheimer's experience in the insurance area was limited to property casualty insurance and not life insurance. By his own admission, there are "fundamental differences" between the creditworthiness analysis for a property and casualty insurance company and the creditworthiness analysis of a life insurer. Plaintiffs did not tender an appropriate expert on the question of whether Unisys failed to evaluate adequately the creditworthiness of Executive Life.

II. CONCLUSIONS OF LAW

A. The General Prudence Standard

1. Under section 4049(a)(1)(B) of ERISA, a fiduciary must 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).

2. As the Court of Appeals further explained: "[T]he courts measure section 1104(a)(1)(B)'s prudence requirement according to an objective standard, focusing on a fiduciary's conduct in arriving at an investment decision, not on its results, and asking whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." Unisys 74 F.3d at 434. Moreover, hindsight cannot play a role in determining whether a fiduciary's actions were prudent. "Whether a trustee has acted properly in selecting an investment depends upon the circumstances at the time when the investment is made and not upon subsequent events." Id.

3. Based on the evidence at trial, I find that the Unisys fiduciaries undertook adequate and reasonable steps before purchasing the three Executive Life contracts. In the first bid, they were assisted by an experienced consultant who recommended reliance on Standard & Poor's ratings. In subsequent bids, Unisys similarly relied upon all of the standard rating services to analyze the creditworthiness of the bidders, including Executive Life. They also considered other important factors, both before and during the bids, before choosing to invest in Executive Life. As described in the above findings of fact, I find credible the

testimony of Messrs. White, Level and Becker on the reasonableness and thoroughness of the investigation conducted before the purchase of the Executive Life GICs.

4. Given the fact that these investments returned all of the principal with interest, and that the portfolios exceeded the relevant benchmarks, the risks taken were not imprudent. Cf. Mira v. Nuclear Measurements Corp., 107 F.3d 466, 473 (7th Cir. 1977) (adopting "no harm, no foul" rule, Seventh Circuit holds plaintiffs are not entitled to recovery of damages for that breach absent proof of an actual economic loss).

5. I note that the Court of Appeals' opinion describes an alternative basis for finding that the purchase of the Executive Life contracts was consistent with fiduciary standards. The Unisys opinion cites to two other opinions: Roth v. Sawyer-Cleater Lumber Co., 16 F.3d 915 (8th Cir. 1994) and Fink v. Nat'l Sav. and Trust Co., 772 F.2d 951 (D.C. Cir. 1985).

6. Both Roth and Fink recognize that ERISA's causation requirement, contained in section 409(a), 29 U.S.C. § 1109(a), commands an inquiry into whether there is any objective evidence of prudence.[22] If such evidence is present, a fiduciary cannot be held liable in damages. As Justice Scalia explained in Fink:

> I know of no case in which a trustee who has happened -- through prayer, astrology or just blind luck -- to make (or hold)

[22] Cf. Unisys, 74 F.3d at 434 (prudence measured "according to an objective standard").

> objectively prudent investments (e.g., an investment in a highly regarded "blue chip" stock) has been held liable for losses from those investments because of his failure to investigate and evaluate beforehand.

Fink, 772 F.2d at 962.

7. The Eighth Circuit, in one of the opinions cited with approval by the Court of Appeals in Unisys, explained further:

> Even if a trustee failed to conduct an investigation before making a decision, he is insulated from liability if a hypothetical prudent fiduciary would have made the same decision anyway.

Roth, 16 F.3d at 919.[23] Read together, Roth and Fink establish the fundamental principle that, if the Executive Life investment itself was reasonable and would have been made by a "hypothetical prudent fiduciary," there can be no finding of damages against Unisys.[24]

8. First, aside from the fact that the federal regulatory standard then in place reveals the prudence of Unisys' actions,[25]

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[23]See also Kuper v. Iovenko, 66 F.3d 1447, 1459 (6th Cir. 1995) ("[A] fiduciary's failure to investigate an investment decision alone is not sufficient to show that the decision was not reasonable.") (emphasis added).

[24]See also Glennie, 912 F.Supp. at 1001 ("Even if a fiduciary fails to make an adequate investigation, that fiduciary is not liable if a hypothetically prudent fiduciary would have made the same decision after making an adequate investigation.").

[25]More specifically, during the relevant time period the Pension Benefit Guaranty Corporation ("PBGC") and the Department of Labor established a flexible standard for the purchase of insurance annuities upon the termination of a defined benefit pension plan, pursuant to ERISA section 404(b)(3)(A)(I), 29 U.S.C. § 1341(b)(3)(A)(I). In that context, to satisfy the entirety of an individual's pension benefit for his lifetime, both of these regulatory agencies required only that the insurance company selected be state licensed. See 29 C.F.R. §§ 2617.4, 2617.22 (PBGC); 29 C.F.R. § 2510.3-3(d)(2)(ii)(A)(1)(DOL). A further explanation of the use of annuities to facilitate the termination of a defined benefit pension plan may be found in Riley

judicial decisions endorsing the purchase of Executive Life annuities demonstrate that a hypothetical prudent fiduciary could properly invest participant assets in Executive Life. E.g., Riley v. Murdock, 890 F.Supp. 444, 458-60 (E.D.N.C. 1995) (purchase of Executive Life annuities not a breach of fiduciary duty, even where fiduciary stands to recoup surplus pension assets in the defined benefit plan termination context).

9. I note also that Mr. Becker continued to include Executive Life on his approved list of GIC bidders until June, 1988, six months after Unisys made its third purchase of Executive Life GICs. (See Tr. of 6/10/97 at 176).

10. Moreover, and as found above, Unisys was presented with a list of the other well-known pension plan sponsors then purchasing

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v. Murdock, 890 F.Supp. 444 (E.D.N.C. 1955), aff'd, 83 F.3d 415 (4th Cir.), cert. denied, 117 S.Ct. 387 (1996). Moreover, the relevant regulatory community instructed fiduciaries that the state regulatory mechanism ensured that investments in insurance companies was a safe decision. As the PBGC told fiduciaries in 1981, insurance company investments are prudent given the strict regulatory milieu within which insurers operate:

> Such companies are subject to strict statutory requirements and administrative supervision. In fact, the reason insurance companies are so extensively regulated is to ensure that their obligations can be satisfied.

46 Fed. Reg. 9532, 9534 (1981). Further, it would be "unlikely ... than an insurance company should fail and its obligations cannot be satisfied." Id. Simply stated, the federal government told fiduciaries, during the time period relevant here, that, upon termination of a defined benefit pension plan, all of a participant's money could be put into one state licensed insurer, for that participant's lifetime. As such, Unisys cannot have breached its fiduciary duty in placing some 15% of participants' money into Executive Life for five years. Not only was Executive Life state licensed, it enjoyed an AAA rating from Standard & Poor's.

Executive Life GICs. See supra. Such information may properly be considered by a fiduciary in discharging his responsibilities. Demoulis v. Sullivan, No. 91-12533-Z, 1993 WL 81500, at *6 (D. Mass. Feb. 26, 1993).

11. While the "hypothetical prudent fiduciary" analysis of Fink and Roth is grounded in ERISA's causation provision, equally important to any such inquiry is the simple fact that, because discretion is the hallmark of fiduciary conduct, a fiduciary's actions are judicially reviewed under a deferential standard. According to the Supreme Court, "only when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration, 'does a person become a fiduciary under [ERISA] § 3(21)(A)."[26] The investment of pension plan assets is, of course, a discretionary activity.[27]

12. The deferential "arbitrary and capricious" standard must be employed to scrutinize all of plaintiffs' fiduciary breach claims. The arbitrary and capricious standard of review, applied

[26] Lockheed Corp. v. Spink, 116 S.Ct. 1783, 1789 (1996) (quoting Siskind v. Sperry Retirement Program, Unisys, 47 F.3d 498, 505 (1995)).

[27] The commentary to section 187 of the Restatement (Second) of Trusts, the section relied on in Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989), extends this discretionary authority to investment decisions. See Restatement (Second) of Trusts § 187 cmt. C (1959) (the discretionary authority "is applicable . . . to powers to lease, sell or mortgage the trust property or to invest trust funds . . . .") (emphasis added). See also supra at ¶16 (Unisys plan documents gave discretion to fiduciaries).

originally to ERISA benefits claims brought under 29 U.S.C. §

1332(a)(1)(B),[28] applies with equal force to fiduciary breach claims, like those here:

> [C]haracterizing a denial of benefits as a breach of fiduciary duty does not necessarily change the standard a court would apply when reviewing the administrator's decision to deny benefits. After all, Firestone, which authorized deferential court review when the plan itself gives the administrator discretionary authority, based its decision upon the same common-law trust doctrines that govern standards of fiduciary conduct.

Varity Corp. v. Howe, 116 S.Ct. 1065, 1079 (1996). In other words, given the deference owing to the fiduciaries, if reasonable minds can differ on the prudence of Unisys' investments, Unisys is entitled to judgment in its favor.[29]

13. The Supreme Court's ruling in Varity, that fiduciary breach claims should be resolved under the deferential "arbitrary

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[28]See Firestone Tire and Rubber Co., 489 U.S. 101.

[29]As the Kuper court observed:

> [E]vidence submitted by Defendants confirmed that numerous established and presumably impartial investment advisors issued reports during the relevant time periods that encouraged investors either to buy or to continue to hold Quantum Stock. Indeed, evidence that independent, professional observers of market trends differed in their projections of future Quantum Stock performance merely underscores the fact that circumstances then existing would not have compelled reasonable persons to a singular conclusion about the stock's future prospects . . . . Defendants cannot be said to have been objectively imprudent for having acted in the same manner as impartial observers had recommended.

Kuper, 852 F.Supp. 1389, 1398 (S.D. Oh. 1994).

and capricious" standard, dovetails precisely with the Third Circuit's recent opinion in Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995), cert. denied, 116 S.Ct. 917 (1996):

> [W]e believe that after Firestone, trust law should guide the standard of review over claims, such as those here, not only under section 1132(a)(1)(B) but also over claims filed pursuant to 29 U.S.C. § 1132 (a)(2) based on violations of the fiduciary duties set forth in section 1104(a). After all, section 1104(a) also abounds with the language of trust law, and the Supreme Court previously has noted that "Congress invoked the common law of trusts to define the general scope of [fiduciaries'] authority and responsibility."

Moench, 62 F.3d at 565 (quoting Central States, S.E. and S.W. Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 570 (1985)). Measured by any standard, the Unisys fiduciaries' actions are consistent with the prudence requirements of ERISA.[30]

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[30]In fact, to allow these plaintiffs to recover would turn the distinction between defined contribution and defined benefit pension plans on its head. As discussed above (and as made clear in the Savings Plan documents), in defined contribution plans, participants, not Unisys, bear the risk of loss. To impress liability here would strip Unisys of the statutory protections owed to a savings plan sponsor. As the Seventh Circuit observed, in similar circumstances:

> The appellants are trying to convert a defined-benefits plan into a defined contributions plan -- or more precisely to have the best of both worlds, where the employer bears the entire downside risk from investment of the pension plan's assets but all the gains accruing from investment performance that creates surplus assets enure to the employees. This is an inequity of the heads I win, tails you lose variety that neither the ERISA statute nor the ... plan documents perpetrate.

Bash v. Firstmark Standard Life Ins. Co., 861 F.2d 159, 163 (7th Cir. 1988) (citations omitted) (emphasis added).

B. <u>Plaintiffs' Failure to Tender an Expert</u>

14. As the Court of Appeals held in its opinion remanding this matter for trial, courts measure ERISA's prudence requirement according to an objective standard. The analysis focuses on a fiduciary's conduct in arriving at an investment decision and asks "whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." <u>Unisys</u>, 74 F.3d at 434.

15. As noted above, after hearing all of the testimony at trial, I conclude that Unisys satisfied the fiduciary standards applicable to the selection of these investments for inclusion in the Plan. I find that Messrs. White and Level had the appropriate education and experience in such matters and explained the thoroughness of the investigation of creditworthiness done by Standard & Poor's. Defendants have also satisfactorily demonstrated the level of care they exercised both before and during the bids, as well as the multitude of analyses and considerations undertaken before the selection of the Executive Life GICs. I further find that Murray Becker, the consultant relied upon for the first relevant bid, was an expert in such matters, having handled more than 500 similar placements of pension monies. Unisys' reliance on Mr. Becker was consistent with its fiduciary responsibilities. Compatible with the hypothetical

prudent fiduciary standard, Mr. Becker kept Executive Life on its approved list of bidders until June, 1988.

16. Executive Life was state licensed and, further, the state regulatory system worked to ensure that each participant was returned his principal investment in Executive Life, with interest. I reach this conclusion without the assistance of an expert and find further, upon review of the entirety of the record, that no expert was needed under Federal Ruled of Evidence 702.

17. In any event, were a reviewing court to determine that expert assistance was necessary under Federal Rule of Evidence 702, plaintiffs failed to proffer an appropriate expert witness. As noted above, I refused to qualify Dr. Gottheimer as an expert under Rule 702, because Dr. Gottheimer's experience is not related to the issues regarding life insurance solvency.

18. Indeed, Dr. Gottheimer claims a doctoral degree from a correspondence school, an additional ground for my refusal to qualify him as an expert. As another court held, in like circumstances:

> Mr. Justino's educational background is insufficient to qualify him as an expert in this case. Mr. Justino explained to the court that Southwest University provides a non-traditional education with independent study projects -- in effect a correspondence school institution. The Court finds that an institution which dispenses degrees in such a manner, cannot be relied upon by a professional as a qualification to an be expert witness.

Van Blargan v. Williams Hospitality Corp., 754 F.Supp. 246, 249 (D.P.R. 1991). Further, if given the chance to testify, I could not find him to be a credible witness given his evasiveness, if not his propensity to state falsehoods. See supra ¶¶102-04.[31] In that regard, I note that during the expert qualification process, Dr. Gottheimer was impeached no fewer than four times on the relatively straight forward questions on his qualifications.

19. As noted above, Unisys tendered ample credible evidence that its actions were prudent. I can make this finding without expert assistance. The witness plaintiffs offered as an expert was not qualified to testify on these issues.

C. Communications to Plan Participants

20. The Third Circuit held further that Unisys had a fiduciary obligation to communicate to participants the information needed so that participants could "mak[e] an adequately informed decision about whether to place or maintain monies" in the FIF and/or ICF. Unisys, 74 F.3d at 442.

21. Nevertheless, the Court of Appeals carefully circumscribed those disclosure obligations. First, the Court did not "determin[e] whether Unisys had a duty under section 1104(a) to communicate anything at all to the Plan's participants about these

[31] See also Surace v. Caterpillar, Inc., 111 F.3d 1039, 1056 (3d Cir. 1997) (affirming district court's refusal to qualify witness as expert, because witness had neither reviewed appropriate literature nor participated in appropriate studies).

matters in the first place." Id. At 442-43. Moreover, "[w]e also note that we do not view the plaintiffs as claiming, nor do we hold, that Unisys was obligated to give investment advise, to opine on Executive Life's financial condition or to predict Executive Life's eventual demise." Id. at 443. In that regard, the court further stated, "[w]e hasten to add that ERISA does not impose a 'duty of clairvoyance' on fiduciaries." Id.[32]

22. Moreover, the disclosure obligation is limited by the materiality standard, "[w]e also hold that in this context, a misrepresentation is 'material' if there was substantial likelihood that it would have misled a reasonable participant in making an adequately informed decision about whether to place or maintain monies in the Fixed Income and/or Insurance Contract Funds." Unisys, 74 F.3d at 442.

23. Implicit in all of the aforementioned limitations on Unisys' disclosure obligations is the fact that ERISA fiduciaries need not pass along to participants information about which those participants are already aware. According to the Court of Appeals in Unisys, quoting the Restatement (Second) of Trusts:

> Even if the trustee is not dealing with the trustee's own account, he is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary

[32]Quoting Fischer v. Philadelphia Elec. Co., 994 F.2d 130, 135 (3d Cir.), cert. denied, 510 U.S. 1020 (1993).

> needs to know for his protection in dealing with a third person.

Unisys, 74 F.3d at 441 n.16 (quoting Restatement (Second) of Trusts § 173 cmt.d) (emphasis added); see also Glaziers and Glassworkers Local No. 252 Annuity Fund v. Newbridge Secs., 93 F.3d 1171, 1181 (3d Cir. 1996) (same).[33] As described above, there was ample publicly-available information on Executive Life, as the Third Circuit held. See Unisys, 74 F.3d at 431.

24. Again, as a fiduciary breach claim under ERISA, governing Supreme Court and Circuit authority teaches that the fiduciaries are entitled to use their discretion in discharging their obligations. The Third Circuit recently voiced its views on the competing considerations relevant to a court's review of an ERISA fiduciary breach claim raising an alleged failure to disclose. E.G. Fischer, 96 F.3d at 1541 ("Finally, as a matter of policy, we note that imposing liability too quickly for failure to disclose a potential early retirement plan could harm employees by deterring employers from resorting to such plans."), cert. denied, 117 S.Ct. 1247 (1997)). The ruling in Fischer dovetails the Supreme Court's

[33]Very recently, the Court of Appeals again underscored this limitation on a fiduciaries' disclosure obligation. See Jordan v. Federal Express Corp., No. 96-3103, 1997 U.S. App. LEXIS 14801, at *31 n.17 (3d Cir. June 19, 1997) (quoting Restatement (Second) of Trusts § 173, comment d).

holding Varity that all fiduciary breach claims are to be evaluated based on a deferential standard of review.[34]

25. Moreover, before Unisys can be found liable for fiduciary breach for failing to disclose information regarding the Plan's investments, the plaintiffs first must meet each element of their claim, including that Unisys' alleged misconduct somehow caused a loss. In other words, plaintiffs shoulder the burden of proving that each plaintiff relied upon Unisys' disclosures, or non-disclosures, to his detriment.[35]

26. The statue expressly requires such proof. Before liability for fiduciary breach may attach, a plaintiff must show that the fiduciaries' actions caused a loss:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan

[34]Mindful of the distinction drawn between business and fiduciary decisions, the Fischer court further held that "[a] corporation could not function if ERISA required complete disclosure of every facet of these on-going activities." Fischer, 96 F.3d at 1539. These considerations apply directly to those claims surrounding Mr. Blumenthal. To require disclosure of Mr. Blumenthal's circumstances would equally compel the disclosure of information about each Unisys executives' investments (including those not subject to ERISA). To adopt such "a standard could result in an avalanche of notices and disclosures." Id. Moreover, although plaintiffs maintain that Unisys should have disclosed a contingency plan it adopted prior to the conservatorship to properly account for the Executive Life GICs in the event of a freezing of withdrawals, this information was not material to the participants, given the wealth of information already available. In any event, no plaintiff testified that the failure to disclose this information influenced his investment decisions and, as such, there can be no finding that this claimed lack of disclosure caused any harm.

[35]Causation is an essential element of an ERISA claim for failure to disclose. E.g, Jordan, 1997 U.S. App. LEXIS 14801, at *34.

any losses to the plan resulting from each such breach . . . .

29 U.S.C. § 1109(a)(emphasis added). In other words, and as long recognized by the Court of Appeals,[36] ERISA mandates that a plaintiff demonstrate a "causal connection" between an alleged fiduciary breach and the losses claimed. Unisys, 74 F.3d at 445 ("Under 29 U.S.C.§ 1109, where 'a fiduciary ... who ... breaches ... shall be personally liable to make good ... any losses resulting from each such breach', a causal connection is required between the breach of the fiduciary duty and the losses alleged.") (emphasis added).[37]

27. In sum, ERISA requires that the plaintiffs prove not only that Unisys made "material misrepresentations" about Executive Life, but that the misrepresentations caused each plaintiff either to invest in Executive Life and/or keep their money with the insurer, notwithstanding emerging information about the decline in

[36]See also Fischer, 994 F.2d at 135 ("[A] misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision . . . ."); In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig., 57 F.3d 1255, 1266 (3d Cir. 1995), cert. denied, 116 S.Ct. 1316 (1966) (in evaluating the evidence adduced at trial, the court considered Unisys' misrepresentations and Unisys' knowledge that "its misrepresentations were material to the beneficiaries' circumstances because the misrepresentations influenced their decisions to retire"); Bixler v. Pennsylvania Teamsters Health and Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993) (describing the following facts of Eddy v. Colonial Life Ins. Co., 919 F.2d 747 (D.C. Cir. 1990), as quite similar to Bixler in that "[b]ecause of alleged misinformation provided by the insurer, Mr. Eddy did not convert his benefits to an individual policy and thus lost his health coverage").

[37]Quoting Brandt v. Grounds, 687 F.2d 895, 898 (7th Cir. 1982).

Executive Life's portfolio. On this record, plaintiffs cannot meet their burden.

28. In other words, the record reveals that plaintiffs had all the information they needed to make informed choices about their investments. Based on the record before me wherein the class representatives went so far as to warn other participants to move their money out of the FIF and ICF, I find that Unisys had no obligation to disclose to the participants that which they already knew. Moreover, the plaintiffs admitted they did not read the Plan documents to inform themselves when making their investment choices and also admitted that, no matter what Unisys might have then said, they would not transfer their money. The Third Circuit has recently held that ERISA plan participants have an affirmative obligation to read plan documents. Jordan, 1997 U.S. App. LEXIS 14801, at *35 ("We recognize that participants have a duty to inform themselves of the details provided in their plan.") (emphasis added). Unisys met its disclosure obligations and, further, any claimed non-disclosure could not possibly have caused the participants harm.

29. Moreover, plaintiffs did not submit any evidence of the damages supposedly caused by the claimed non-disclosures. Again, plaintiffs' damages expert's testimony was limited to determining what damages were caused to the Plan as a result of the alleged imprudence attendant to the initial purchase of the Executive Life

GICs. See supra. ERISA section 502(a)(2), and its counterpart section 409, contemplate remedies solely in favor of an ERISA plan, following a finding of breach (and a finding that the breach caused harm to the Plan). Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 14 (1985) ("And the entire text of § 409 persuades that Congress did not intend that section to authorize any relief except for the plan itself."). A participant may bring an individual claim for fiduciary breach and damages stemming from an alleged misrepresentation and/or non-disclosure, under ERISA section 502(a)(3), if any damages are owed to that participant, and not the plan. Varity Corp., 116 S.Ct. at 1076 ("The words of subsection three [502(a)(3)] -- 'appropriate equitable relief' to 'redress' any 'act or practice which violates any provision of this title' -- are broad enough to cover individual relief for breach of a fiduciary obligation.").

30. To the extent that these plaintiffs are suing for Unisys' alleged misrepresentations and/or non-disclosures, these claims are individual claims actionable only under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3). The Court of Appeals in Unisys so held:

> In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation, 57 F.3d 1255 (3d Cir. 1955, we also reaffirmed our conclusion in Bixler, 12 F.3d at 1298, that under section 1132(a)(3) of ERISA, equitable relief is available to an individual harmed by a breach of fiduciary duty. 57 F.3d at 1266-

69. The issue of relief is not raised in this appeal.

Unisys, 74 F.3d at 442 n. 17.

31. Again, plaintiffs' expert admitted that he did no such individualized damages calculation under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), and plaintiffs' counsel admittedly did not proffer such a calculation. Absent proof of damages, there can be no finding of fiduciary breach. Mira, 107 F.3d at 473 (absent proof of actual economic loss, no remedy proper under ERISA).

D. The Plan was Adequately Diversified

32. Plaintiffs further allege that Unisys failed to diversify adequately these investments. Whether a fiduciary has prudently diversified a plan will ultimately depend upon the facts and circumstances of each case, and not a particular arithmetic formula. Unisys, 74 F.3d at 438. Again, and as the statute makes clear, a fiduciary must "diversify[] the investments of the plan so as to minimize the risk of large losses." 29 U.S.C. § 1104(a)(1)(C) (emphasis added). Plaintiffs offered no expert testimony on the appropriate structure of the Unisys portfolio. Dr. Gottheimer was not tendered as an expert on this issue. This failure in proof is an additional ground for the entry of judgment in defendants' favor on the diversification claim.

33. Plaintiffs have offered no proof, expert or otherwise, that the alleged failure to diversify somehow caused any losses at

all, let alone the "large" losses required under 29 U.S.C. § 1109(a). Again, plaintiffs' expert admitted that he did no analysis of the damages claimed as a result of the alleged failure to diversify. In that regard, it should be noted that the Court of Appeals, in the Unisys opinion, cited to the Restatement (Second) of Trusts § 228, and the accompanying commentary, on the duty to diversify. See Unisys, 74 f.3d at 438 n.13. The commentary further reveals that a fiduciary can be held liable for failing to diversify only to the extent that such actions can be said to have caused some unique loss flowing specifically from the alleged failure to diversify:

> Extent of liability. If a breach of trust consists only in investing too large an amount in a single security or type of security, the trustee is liable only for such loss as results from the investment of the excess beyond the amount which it would have been proper so to invest.

Restatement (Second) of Trusts § 228 cmt.h (1959) (emphasis added). Again, plaintiffs offered no proof on the specific calculations needed under 29 U.S.C. § 1104(a)(1)(c) and the Restatement; hence, there can be no finding of liability on these grounds. Moreover, the Executive Life contracts totaled some 20% on April 11, 1991, the relevant date for examining the diversification claim.[38] The portfolio was properly diversified.

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[38]Again, because of ERISA's causation requirements, the Court's diversification inquiry properly focuses on the amount of the Executive Life holdings in the portfolio on the date that the California regulators moved against the insurer.

E. There are No Damages Stemming from the Initial Investment

34. This finding also bears upon the question of whether any damages are attributable to the initial decision to invest in Executive Life. The proper inquiry into whether any harm has been suffered by participants looks to the performance of the portfolio in the aggregate, here the ICF and FIF, and not to the performance of the individual contracts. E.g., Leigh v. Engle, 858 F.2d 361, 368 (7th Cir. 1988) (where fiduciaries seek to create a diversified portfolio, "it makes sense for courts to look at the whole portfolio to determine the investment strategy's success."), cert. denied, 489 U.S. 1078 (1989). See also 29 C.F.R. 2550.404a-1(b)(2)(DOL regulation recognizing that pension investments should be structured as "part of the portfolio"); Robert J. Aalberts and Perry S. Poon, The New Prudent Investor Rule and the Modern Portfolio Theory, 34 Am. Bus. L.J. 39, 46 (1996) ("[ERISA] also sanctioned diversification of investments, and therefore by implication, the modern portfolio view in which investors are encouraged to consider total return and total portfolio performance in governing pension plans.").

35. Indeed, the Restatement (Third) of Trusts similarly embraces the portfolio theory and incorporates it into the modern standard for determining whether a fiduciary breach has occurred (and the calculation of damages). The Restatement further explains that the modern prudent investor standard "requires the exercise

of reasonable care, skill and caution, <u>and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy</u>, which should incorporate risk and return objectives reasonably suitable to the trust." <u>Restatement (Third) of Trusts</u> § 227(a) (emphasis added).[39]

36. Again, the aggregate performance of the FIF and ICF exceeded all appropriate comparison benchmarks. As such, there was no fiduciary breach in selecting Executive Life for inclusion in the Savings Plan and, further, plaintiffs have suffered no damages.

F. <u>ERISA Section 404(c) Absolves Unisys</u>

37. Unisys cannot be found liable for another reason, ERISA section 404(c). ERISA provides that, in certain instances, a fiduciary cannot be held liable for fiduciary breach, even upon a finding that the participants' actions caused the alleged loss:

> (c) **Control over assets by participant or beneficiary**
>
> In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) --

[39]The Third Circuit recently cited <u>restatement</u> section 227 with approval in <u>Moench</u>, 62 F.3d at 571.

> (1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and
>
> (2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or fiduciary's exercise of control.

29 U.S.C. § 1104(c). According to the Third Circuit, "[T]he parties agree that the Unisys Savings Plan is an 'individual account plan' within the meaning of [ERISA]." Unisys, 74 F.3d at 426 n.1.

38. The Unisys Court also held that section 404(c) may relieve Unisys from liability, even if the initial selection of Executive Life was somehow imprudent. "There is nothing in section 1104(c) which suggests that a breach on the part of a fiduciary bars it from asserting section 1104(c)'s application." Id. at 445.

39. The Court of Appeals explained further the showing necessary to a finding that 404(c) applies:

> For Unisys to prevail under section 1104(c), however, it must establish that the Plans provided information sufficient for the average participant to understand and access: the control the Plans permitted a participant to exercise and the financial consequences he or she assumed by exercising that control; the rights that ERISA provided to participants and the obligations that the Act imposed upon fiduciaries; the Plans' terms and operating procedures; the alternative funds the Plans offered; the investments in which assets in each fund were placed; the financial condition and performance of the investments; and

> developments which materially affected the financial status of the investments.

Unisys, 74 F.3d at 447. In other words, Unisys must show proof "that a participant's or a beneficiary's control was a cause-in-fact, as well as a substantial contributing factor in bringing about the loss incurred." Id. At 445 (citation omitted).

40. As described above, the participants admit that they, alone, were responsible for their investment choices and affirmatively elected to stay with Executive Life, in the face of abundant ongoing public information regarding the problems at the insurer. In that regard, I note again the specific testimony of Mr. Silver, describing the efforts to which he and Mr. Zylla went to be certain that other participants timely transferred their money out of the FIF and ICF. Even if there was a finding of fiduciary breach in the first instance, which I do not find, ERISA section 404(c) absolves Unisys from plaintiffs' claims to fiduciary breach.

41. To the extent that the Court of Appeals determines that any of the foregoing Conclusions of Law are Findings of Fact, I hereby adopt said Conclusions of Law as Findings of Fact.

42. To the extent that the Court of Appeals determines that any of the foregoing Findings of Fact are Conclusions of Law, I hereby adopt said Findings of Fact as Conclusions of Law.

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

IN RE UNISYS SAVINGS PLAN LITIGATION	:	MASTER FILE NO. 91-3067
THIS DOCUMENT RELATES TO ALL ACTIONS	:	

FINAL JUDGMENT

AND NOW, this 24th day of November, 1997, upon consideration of the foregoing Findings of Fact and Conclusions of Law, **JUDGMENT** is entered in favor of all Defendants and against all Plaintiffs.

BY THE COURT:

HERBERT J. HUTTON, J.