

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN  
GREEN BAY DIVISION

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LORIE M. GUYES, individually,  
and as representative of a Class of  
Participants and Beneficiaries of the  
Nestle 401(k) Savings Plan,

Case No. 20-cv-1560

Plaintiff,

v.

**CLASS ACTION COMPLAINT  
FOR CLAIMS UNDER 29 U.S.C.  
§ 1132(a)(2)**

NESTLE USA, INC.,

and

BOARD OF DIRECTORS OF  
NESTLE USA, INC.,

and

JOHN AND JANE DOES 1-30,

Defendants

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**COMPLAINT**

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COMES NOW Plaintiff, Lorie M. Guyes, individually and as representative of a Class of Participants and Beneficiaries on behalf of the Nestle 401(k) Savings Plan (the “Plan”), by her counsel, WALCHESKE & LUZI, LLC, as and for a claim against Defendants, alleges and asserts to the best of her knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the following:

## INTRODUCTION

1. The essential remedial purpose of the Employee Retirement Income Security Act (“ERISA”) is “to protect the beneficiaries of private pension plans.” *Nachwalter v. Christie*, 805 F.2d 956, 962 (11th Cir. 1986).

2. The law is settled that ERISA fiduciaries have a duty to evaluate fees and expenses when selecting investments *as well as* a continuing duty to monitor fees and expenses of selected investments and remove imprudent ones. *Tibble v. Edison Int’l*, 135 S. Ct. 1823, 1828 (2015); 29 U.S.C. §1104(a)(1)(A) (fiduciary duty includes “defraying reasonable expenses of administering the Plan;” 29 C.F.R. §2250.404a-1(b)(i) (ERISA fiduciary must give “appropriate consideration to those facts and circumstances” that “are relevant to the particular investment.” It is for good reason that ERISA requires fiduciaries to be cost-conscious:

Expenses, such as management or administrative fees, can sometimes significantly reduce the value of an account in a defined-contribution Plan.” *Tibble*, 135 S. Ct. at 1826, by decreasing its immediate value, and by depriving the participant of the prospective value of funds that would have continued to grow if not taken out in fees.

*Sweda v. Univ. of Pa.*, 923 F.3d 320, 328 (3d Cir. 2019).

3. Defendants, Nestle USA, Inc. (“Nestle”), the Board of Directors of Nestle USA, Inc. (“Board Defendants”), and John and Jane Does 1-30 (collectively, “Defendants”), are ERISA fiduciaries as they exercise discretionary authority or discretionary control over the 401(k) defined contribution pension plan – known as the Nestle 401(k) Savings Plan (“The Plan”) – that it sponsors and provides to its employees.

4. Plaintiff alleges that during the putative Class Period (October 9, 2014 through the date of judgment), Defendants, as fiduciaries of the Plan, as that term is defined under ERISA, 29 U.S.C. §1002(21)(A), breached the duties they owed to the Plan, to Plaintiff, and to the other

participants of the Plan by, among other things: (1) authorizing the Plan to pay unreasonably high fees for recordkeeping and administration (RK&A); (2) authorizing the Plan to pay unreasonably high fees for managed account services; and (3) engaging in self-dealing with regard to administration of the Plan.

5. These objectively unreasonable RK&A and managed account fees, as well as the self-dealing, cannot be justified. Defendants' failures breached the fiduciary duties they owed to Plaintiff, Plan Participants, and beneficiaries. Prudent fiduciaries of 401(k) Plans continuously monitor fees against applicable benchmarks and peer groups to identify objectively unreasonable and unjustifiable fees. Defendants did not engage in a prudent decision-making process, as there is no other explanation for why the Plan paid these objectively unreasonable fees for RK&A and managed account services. Engaging in self-dealing is also inconsistent with fiduciary duties of loyalty owed by Defendants to the Plaintiff, Plan Participants, and beneficiaries.

6. To remedy, Plaintiff brings this action on behalf of the Plan under 29 U.S.C. §1132(a)(2) to enforce Defendants' liability under 29 U.S.C. §1109(a) to make good to the Plan all losses resulting from their breaches of fiduciary duty.

### **JURISDICTION AND VENUE**

7. This Court has subject matter jurisdiction in this ERISA matter under 28 U.S.C. §1331 and pursuant to 29 U.S.C. §1332(e)(1), which provides for federal jurisdiction of actions brought under Title I of ERISA, 29 U.S.C. §1001 et seq.

8. This Court has personal jurisdiction over Defendants because they transact business in this District, reside in this District, and have significant contacts with this District, and because ERISA provides for nationwide service of process.

9. Venue is appropriate in this District within the meaning of 29 U.S.C. §1132(e)(2) because some or all of the violations of ERISA occurred in this District and Defendants reside and may be found in this District. Venue is also proper in this District pursuant to 28 U.S.C. §1391 because Defendants do business in this District and a substantial part of the events or omissions giving rise to the claims asserted herein occurred within the District.

10. In conformity with 29 U.S.C. §1132(h), Plaintiff served the Complaint by certified mail on the Secretary of Labor and the Secretary of the Treasury.

### **PARTIES**

11. Plaintiff, Lorie M. Guyes, is a resident of the State of Wisconsin and currently resides in Appleton, Wisconsin, and during the Class Period, was a participant in the Plan under 29 U.S.C. § 1002(7).

12. In approximately April 2008, Plaintiff commenced employment with Nestle USA in the position of General Laborer.

13. On or about April 13, 2020, Plaintiff's employment with Nestle ended.

14. Plaintiff has Article III standing to bring this action on behalf of the Plan because she suffered an actual injury to her own Plan account in which she is still a Participant, that injury is fairly traceable to Defendants' unlawful conduct, and the harm is likely to be redressed by a favorable judgment.

15. It is well settled, moreover, that recovery may be had for the Class Period before Plaintiff personally suffered injury, as that turns on ERISA §502(a)(2) on which his claim rests. This claim is brought in a representative capacity on behalf of the Plan as a whole and remedies under ERISA §409 protect the entire Plan. Courts have recognized that a plaintiff with Article III standing, like Plaintiff, may proceed under ERISA §502(a)(2) on behalf of the Plan and all

participants in the Plan. Plaintiff may seek relief under ERISA §502(a)(2) that sweeps beyond his own injury and beyond any given investment he has held as a Participant in the Plan.

16. The named Plaintiff and all Participants in the Plan suffered ongoing financial harm as a result of Defendants' continued imprudent and unreasonable investment and fee decisions made with regard to the Plan.

17. Plaintiff did not have knowledge of all material facts (including, among other things, the cost of the Plan's recordkeeping services compared to similarly-sized plans, the Plan's leverage to negotiate lower recordkeeping expenses, the cost of the Plan's managed account service compared to similarly situated plans, and the Plan's leverage to negotiate managed account expenses) necessary to understand that Defendants breached their fiduciary duties and engaged in other unlawful conduct in violation of ERISA, until shortly before this suit was filed.

18. Further, Plaintiff did not have actual knowledge of the specifics of Defendants' decision-making processes with respect to the Plan (including Defendants' processes for selecting and monitoring the Plan's recordkeeper and Defendants' processes for selecting and monitoring the Plan's managed account service provider) because this information is solely within the possession of Defendants prior to discovery. For purposes of this Complaint, Plaintiff has drawn reasonable inferences regarding these processes based upon (among other things) the facts set forth above.

19. The named Plaintiff and all participants in the Plan, having never managed a large 401(k) Plan such as the Plan, lacked actual knowledge of reasonable fee levels and prudent alternatives available to such Plans.

20. Nestle USA Inc. ("Nestle"), under the Plan Sponsor name of Nestle USA, Inc. Savings Plan Administration, is located at 30500 Bainbridge Road, Solon, OH 44139-2216. In this Complaint, "Nestle" refers to the named defendant and all parent, subsidiary, related, predecessor,

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