IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Yvonne Becker, Plaintiff, v. Wells Fargo & Co.; Employee Benefit Review Committee; Human Resources Committee of the Board of Directors of Wells Fargo & Co.; Ronald L. Sargent; Wayne M. Hewett; Donald M. James; Maria R. Morris; Wells Fargo Bank, National; and Galliard Capital Management, Defendants.	Case No. 0:20-cv-02016 (DWF/BRT)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE CLASS ACTION COMPLAINT

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PRELIMINARY STATEMENT

Wells Fargo & Company offers its employees the opportunity to save for retirement by contributing a portion of their earnings into a 401(k) individual account plan. Like many other recently filed lawsuits, including against Wells Fargo, this putative class action commenced by Plaintiff Yvonne Becker ("Becker") alleges violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), based on allegations that several plan investments—only two of which she actually invested in—resulted in monetary losses.

In many respects, the Complaint here resembles the most recent of the lawsuits commenced against Wells Fargo, which was brought by the same law firm on behalf of another plan participant and was dismissed by Judge Doty, with the approval of the Eighth Circuit, for failure to state a viable claim. *Meiners v. Wells Fargo & Co.*, 898 F.3d 820 (8th Cir. 2018). It bears *no* resemblance to complaints that have withstood motions to dismiss where courts have found a basis for inferring that there were plausible allegations that the plan sponsor profited by including in the plan's investment lineup funds affiliated with the plan sponsor that charged participants excessive fees or underperformed relative to their peers. Here, Wells Fargo avoided any possible inference of impropriety by paying any fees charged by Wells Fargo affiliates in connection with the challenged funds. The only challenged funds for which this was not the case are two mutual funds that had *lower* fees than Becker herself considers reasonable. Under these circumstances, this Court could not possibly infer that the inclusion of the investments

was the result of any imprudent or disloyal decision-making process, which is necessary to state a viable claim for fiduciary-breach under ERISA.

As a preliminary matter, Becker's claims can only even be considered insofar as they are directed at the Wells Fargo target date collective trusts. With respect to all of the other challenged funds, she lacks standing to assert her claims because she did not invest in them and thus could not have suffered any harm from their inclusion in the plan.

With respect to the target date collective trusts for which she has standing to assert a claim, Becker comes nowhere near pleading allegations giving rise to an inference of imprudence or disloyalty. Becker contends that the target date collective trusts were improperly selected because they had no performance history prior to becoming a plan investment alternative, which leads Becker to speculate that they were offered to generate "seed money" to encourage other investments. But this conjecture does not form a plausible basis for inferring imprudence or disloyalty because: (i) the funds were designed exclusively for the Wells Fargo 401(k) plan, and thus could not possibly have been a source of future investment by third parties; and (ii) they were modeled after two other substantially similar investments with extensive track records. Nor can imprudence or disloyalty be inferred from the fees associated with these funds or their performance because: (i) as noted, any fees related to these funds that were paid to Wells Fargo affiliates were paid by Wells Fargo—not plan participants; (ii) the fees paid to third parties were considerably lower than fees for the Wells Fargo target date mutual funds that previously were offered by the plan and that were found not to be imprudently

excessive in *Meiners*; and (iii) the funds routinely outperformed their benchmarks. And since Wells Fargo paid any fees that its affiliates charged in connection with these investments, there is no basis for a prohibited transaction claim either. In fact, a prohibited transaction exemption specifically insulates these funds from such a challenge.

Even if not dismissed for lack of standing, Becker's challenges to the other funds in which she did *not* invest fare no better. Becker's fiduciary-breach and prohibited transaction claims rest on allegations of excessive fees or underperformance that are flatly contradicted by documents embraced by the Complaint. And, like the target date collective trusts, these investments are exempt from prohibited transaction claims.

Finally, Becker's claim against Wells Fargo for knowing participation in a prohibited transaction fails, among other reasons, because there was no underlying prohibited transaction.

In short, Becker has failed to plead allegations that can support a viable claim under ERISA and, accordingly, the Complaint should be dismissed with prejudice.

BACKGROUND

The facts recited herein are based on the allegations in the Complaint and documents embraced by the Complaint, all of which were available to Becker while she was a participant in the Plan, and additional copies were produced to Becker's counsel after this lawsuit was commenced (Dkt. No. 82 at 5). Significantly, in deciding a Rule 12(b)(6) motion to dismiss like this one, courts routinely consider plan documents, comparative fee disclosures, investment fund disclosures, and prospectuses. *Meiners*,

898 F.3d at 822–23.[1] As Judge Doty has ruled, "when a written instrument contradicts allegations in the complaint . . . [it] trumps the allegations." *Elkharwily v. Mayo Holding Co.*, 955 F. Supp. 2d 988, 996 (D. Minn. 2013) (citation omitted).

A. <u>The Wells Fargo & Company 401(k) Plan</u>

At all relevant times, the Wells Fargo & Company 401(k) Plan (the "Plan") offered a diversified menu of between 26 and 30 investment funds in which participants could invest for retirement. Each fund was selected and is monitored by the Plan's fiduciary committee, the Employee Benefits Review Committee (the "Benefits Committee"). (¶¶ 24, 27; Declaration of Dee Dee Holland ("Holland") Ex. A at §§ 2.19, 8.1(b); Ex. B at 14–15.)[2]

The menu of investment options included: (i) collective trusts that are trusteed or managed by Wells Fargo Bank, National Association that were in turn advised by an unaffiliated third party; (ii) mutual funds that are managed by an affiliate of Wells Fargo, or an unaffiliated third party; and (iii) a separate account that is managed by Galliard Capital Management, Inc. ("Galliard"), an independent investment management subsidiary of Wells Fargo (¶¶ 43, 121, 154; Holland Ex. B at 17–22).[3] The offering of

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[1] *See Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 484 n.3 (8th Cir. 2020); *Anderson v. Intel Corp. Investment Committee*, No. 19-cv-4618, 2021 WL 229235, at *4 (N.D. Cal. Jan. 21, 2021); *Nelsen v. Principal Global Investors Trust Co.*, 362 F. Supp. 3d 627, 630 n.1 (S.D. Iowa 2019); *Wilcox v. Georgetown Univ.*, No. 18-cv-422, 2019 WL 132281, at *4 n.5 (D.D.C. Jan. 8, 2019).

[2] All "¶" references are to the Class Action Complaint (Dkt. No. 1).

[3] A collective investment trust "is a pooled investment vehicle similar to a mutual fund, but is exempt from registration under the Investment Company Act of 1940 and the

investments affiliated with Wells Fargo is consistent with guidance from Congress and the U.S. Department of Labor. *See* Point II.C, *infra*.

B. Investments Targeted In The Complaint

Becker is a former employee of Wells Fargo. (¶ 12.) Of the various investments challenged in the Complaint, Becker invested in only two of them: the 2020 and 2025 Wells Fargo/State Street Target Date Collective Trusts. (Holland Ex. C.) After this lawsuit was commenced, Becker liquidated all of her Plan holdings and thus is no longer a Plan participant. (*Id.*)

1. The Wells Fargo/State Street Target Date Collective Trusts

The Wells Fargo/State Street Target Date Collective Trusts ("**TD Collective Trusts**") are a suite of twelve investment funds that are offered in five-year target date increments and that were designed specifically for the Plan. (Declaration of Thomas Hooley ("Hooley") Ex. A at 1, Ex. B at 1; Holland Ex. B at 14.) Consistent with the profile of target date funds, each one automatically rebalances its mix of stocks and bonds to become more conservative as a participant approaches the designated "target date," which is often a participant's retirement date. (¶ 79; Holland Ex. B at 17–18.) This process of adjusting the asset mix as a participant ages is known as the "glidepath." (Hooley Ex. A at 3.) In the case of the TD Collective Trusts, the asset mix consists of

associated disclosure requirements." (¶ 43, n.1.) A separate account is an investment contract for an investor. *See Ferguson v. Ruane Cunniff & Goldfarb Inc.*, No. 17-cv-6685, 2019 WL 4466714, at *10, n.15 (S.D.N.Y. Sept. 18, 2019) (explaining the differences between mutual funds, collective trusts, and separate accounts).

equity index strategies, which are in the Wells Fargo/SSGA Global Equity Index CIT ("Global Equity Index Trust"), and fixed income strategies, which are in the Wells Fargo/SSGA Global Bond Index CIT ("Global Bond Index Trust"). (¶ 87; Hooley Ex. A at 2–3.) The TD Collective Trusts also maintain investments in money market instruments to facilitate liquidity needs. (*Id.*)

The TD Collective Trusts were designed exclusively for the Plan in December 2016 as a less expensive investment alternative than the Wells Fargo target date mutual funds ("TD Mutual Funds") that the Plan previously offered as investment alternatives. (¶ 78; Hooley Ex. A at 1, Ex. B at 1.) A prior lawsuit (brought by the same law firm) alleging that it was imprudent for the Benefits Committee to offer the TD Mutual Funds because of their fees and performance was dismissed. *Meiners*, 898 F.3d 820. The fees charged to the TD Mutual Funds, some of which were paid to Wells Fargo affiliates, were approximately three times greater than the fees charged to the TD Collective Trusts. (Hooley Ex. C at 6–8 (comparing in 2016 the net expense ratios of the TD Mutual Funds which ranged from 30 to 37 basis points ("bps") to the TD Collective Trusts at 12 bps); *see* Ex. D at 5 (showing that in 2019 the net expense ratio was 8.5 bps).)[4] Significantly, there were no fees related to the TD Collective Trusts that were paid to Wells Fargo affiliates by Plan participants; to the extent there were any such fees, they were paid by Wells Fargo. (Holland Ex. B at 22, Ex. E at 27.)

[4] Each of the Plan's investments has an "expense ratio," which currently ranges from 2 bps, *i.e.*, 0.02% or $0.20 for each $1,000 invested, to 90 bps, *i.e.*, 0.90% or $9.00 for each $1,000 invested. (Hooley Ex. D.)

The TD Collective Trusts were designed exclusively for the Plan and, when they were established, they utilized the same equity and fixed income underlying funds as other Wells Fargo-sponsored target date funds that have been available to other investors for many years. (*Compare* Hooley Ex. B at 5 ("Major asset classes") *with* Ex. E at 5 ("Major asset classes").)[5] Furthermore, the TD Collective Trusts had substantially similar glidepaths as these other target date collective trusts and the TD Mutual Funds that previously were the Plan investment alternative. (*Compare* Hooley Ex. B at 3–4 *with* Ex. E at 4 *with* Ex. F at 76.)

2. Other Investments Targeted By The Complaint

Becker *never* invested in the other funds that the Complaint alleges were improperly maintained in the Plan. They include two investment alternatives: the Wells Fargo Stable Value Fund ("**Stable Value Fund**"), which is a separately managed account managed by Galliard (¶ 154); and the Wells Fargo 100% Treasury Money Market Fund ("**Money Market Fund**"), a mutual fund managed by a Wells Fargo affiliate. (¶ 121.) (Holland Ex. B at 18.)

They also include three subfunds of other investment alternatives (but not the investment alternatives themselves): the Wells Fargo/Causeway International Value Fund-F Class ("**Causeway Fund**"), which is a collective trust and is one of three

[5] It is those other Wells Fargo-sponsored target date funds that use the Wells Fargo/BlackRock Short-Term Investment Fund ("BlackRock STIF") as the cash component (Hooley Ex. E at 3), not the TD Collective Trusts as the Complaint alleges (¶ 87). (*See* Hooley Exs. A–B, omitting any reference to the BlackRock STIF.)

subfunds of the International Equity Fund (¶¶ 99, 102); the Wells Fargo Emerging Growth Fund ("**Emerging Growth Fund**"), which is a mutual fund and is one of five subfunds of the Wells Fargo Small Cap Fund ("Small Cap Fund") (¶¶ 131–32, 135); and (iii) the Wells Fargo/Federated Total Return Bond Fund ("**Total Return Bond Fund**"), which is a collective trust and is one of three subfunds of the Global Bond Fund (¶ 158). (*See* Holland Ex. B at 18–21, Ex. D at 4.)

C. <u>Fees Related To The Investments Targeted In The Complaint</u>

To the extent there were any fees paid to Wells Fargo affiliates related to the Wells Fargo-sponsored collective trusts and the separate account, such fees were paid by Wells Fargo and not the Plan participants. (Holland Ex. B at 22, Ex. E at 27.) The only fees paid by the Plan participants related to these funds are to unaffiliated service providers. (Holland Ex. B at 22, Ex. E at 27; Hooley Ex. A at 8, Ex. G at 5, Ex. H at 6, Ex. I at 10, Ex. J at 11–13, Ex. K at 5, Ex. L at 9–10, Ex. M at 11.)

The only Wells Fargo affiliate that received fees from the investments related to the two mutual funds—the Money Market Fund and the Emerging Growth Fund. As discussed below, the documents embraced by the Complaint clearly establish that the fees charged to these mutual funds related to the Plan's investments are (i) less than what was charged to other investors as a result of a partial fee waiver provided to the Plan, and (ii) less than what the Complaint alleges is reasonable. *See* Point III.A., *infra*.

D. The Complaint

The Complaint asserts claims on behalf of a class of "[a]ll participants and beneficiaries in the [Plan] from March 13, 2014 through the date of judgment" (¶¶ 1, 170) for breach of fiduciary duty under ERISA § 404, 29 U.S.C. § 1104, and violation of ERISA's prohibited transaction rules under ERISA § 406, 29 U.S.C. § 1106.

In *Count I*, Becker contends that the Benefits Committee breached its ERISA fiduciary duties of prudence and loyalty by selecting the TD Collective Trusts and the Causeway Fund (¶ 184(a), *see* ¶¶ 78–97), and failing to remove the Causeway Fund, Money Market Fund, and Emerging Growth Fund from the Plan (¶¶ 184(b)-(c), *see* ¶¶ 98–119, 120–30, 131–48).

In *Counts II* and *III*, Becker asserts that the Plan's investments in the TD Collective Trusts, Causeway Fund, Total Return Bond Fund, Stable Value Fund, Stable Return Fund, BlackRock STIF, Money Market Fund, and Emerging Growth Fund violated ERISA's prohibited transaction rules under sections 406(a)(1)(A) and (D) and sections 406(b)(1) and (3). (¶¶ 191–202, 203–13, *see* ¶¶ 149–66.)

In *Count V*, Becker contends that Wells Fargo knowingly participated in prohibited transactions in violation of ERISA section 406(a). (¶¶ 226–39.)[6]

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[6] The HRC and its individual members, along with Count IV, were dismissed by stipulation of the parties. (Dkt. No. 40.)

ARGUMENT

I. BECKER LACKS STANDING TO ASSERT CLAIMS RELATING TO FUNDS IN WHICH SHE DID NOT INVEST.

Before considering the viability of Becker's claims, the Court should dismiss all of her claims insofar as they challenge investments other than the TD Collective Trusts because she did not invest in these funds and thus lacks Article III standing.

To have standing, "a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020) (citation omitted). A plaintiff who gains "not a penny more" by prevailing on a claim and receives "not a penny less" from losing on that claim has "no concrete stake in [the] lawsuit." *Id.* at 1619. Furthermore, a plaintiff must assert her "own legal rights and interests, and cannot rest [her] claim to relief on the legal rights or interests of third parties." *Mosby v. Ligon*, 418 F.3d 927, 933 (8th Cir. 2005) (citation omitted). Thus, even when bringing a putative class action, the district court must determine that "at least one named class representative [has] Article III standing to raise each class subclaim." *In re Express Scripts, Inc.*, No. 05-cv-1672, 2015 WL 128073, at *3 (E.D. Mo. Jan. 8, 2015) (citation omitted).

Several courts have concluded that a plaintiff does not have standing to assert claims under ERISA concerning 401(k) plan investment alternatives in which she never invested—even where she had viable claims concerning other investments in the plan.

See Brown-Davis v. Walgreen Co., No. 19-cv-5392 (N.D. Ill. Mar. 16, 2020) (no standing to assert claims concerning 2 of the 10 funds); *Patterson v. Morgan Stanley*, No. 16-cv-6568, 2019 WL 4934834, at *5–7 (S.D.N.Y. Oct. 7, 2019) (no standing to assert claims concerning 7 of the 13 funds); *Wilcox*, 2019 WL 132281, at *8–10 (no standing to assert claims concerning 3 of the 10 funds); *Troudt v. Oracle Corp.*, No. 16-cv-175, 2019 WL 1006019, at *12 (D. Colo. Mar. 1, 2019) (no standing to assert claims concerning 1 of the 12 funds); *Dezelan v. Voya Ret. Ins. & Annuity Co.*, No. 16-cv-1251, 2017 WL 2909714, at *6 (D. Conn. July 6, 2017) (no standing to assert claims concerning 1 of the 2 funds); *see also Brown v. Medtronic, Inc.*, 628 F.3d 451, 454 (8th Cir. 2010) (concluding that plaintiff lacked standing to assert claims concerning the purchase of company stock where plaintiff sold his shares before public negative disclosures about the company and the price of stock declined).

Consistent with these authorities, Becker lacks standing to pursue her claims with respect to all of the investments targeted in the Complaint other than the TD Collective Trusts because she *never* invested in them and thus could not have suffered any financial harm as a result of them being offered in the Plan.

Braden v. Wal-Mart Stores, Inc. is not to the contrary. 588 F.3d 585 (8th Cir. 2009). There, the Court determined that the plaintiff pled plausible allegations that the defendants' management of the plan *as a whole* was imprudent. *See id.* at 590 (challenging recordkeeping fees affecting all participants). Here, the Complaint is devoid of any such allegations, and instead alleges imprudence only with respect to specific

investments that did not affect Becker and never will since she is no longer a Plan participant. The rationale of *Braden* must in any event be questioned in light of the Supreme Court's decision in *Thole*, which makes clear that "[t]here is no ERISA exception to Article III." 140 S. Ct. at 1622. *See Anderson*, 2021 WL 229235, at *14 (concluding that *Thole* applies to claims relating to 401(k) plans).

II. BECKER'S CLAIMS CONCERNING THE TD COLLECTIVE TRUSTS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM FOR RELIEF.

Because Becker lacks standing to assert claims with respect to the other challenged investments, the Court need only consider the viability of the claims asserted with respect to the TD Collective Trusts. As to these investments, none of the claims asserted in the Complaint satisfy the pleading requirements.

A. Legal Standards For Pleading A Viable Breach Of Fiduciary Duty Claim Under ERISA.

In the ERISA class action context, the Supreme Court has emphasized that a motion to dismiss is an "important mechanism for weeding out meritless claims" of breach of fiduciary duty, and that a court's evaluation of whether a plausible claim has been pled is "context specific." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). A claim is plausible if the plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Meiners*, 898 F.3d at 822 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "If the pled facts are merely consistent with liable acts, the complaint 'stops short of the line

between possibility and plausibility.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

An ERISA plaintiff claiming a breach of fiduciary duty has a "challenging pleading burden." *Id.* (citing *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc*. ("*PBGC*"), 712 F.3d 705, 718–19 (2d Cir. 2013)). To state a fiduciary-breach claim, a plaintiff must plausibly allege that the defendant acted as a fiduciary, breached its fiduciary duties, and thereby caused a loss to the plan. *See id.* The duty of prudence is based on "'an objective standard' that focuses on 'the process by which' decisions are made, 'rather than the results of those decisions.'" *Davis*, 960 F.3d at 482 ("A prudently made decision is not actionable . . . even if it leads to a bad outcome.") (citation omitted); *see Divane v. Northwestern Univ.*, 953 F.3d 980, 992 (7th Cir. 2020) ("this court has determined 'the ultimate outcome of an investment is not proof of imprudence'"); *PBGC*, 712 F.3d at 721 ("an allegation that an investment's price dropped, even precipitously, does not alone suffice to state a claim under ERISA").

Where, as here, a complaint lacks direct allegations about the fiduciary's decision-making process, a plaintiff must "use the data about the selected funds and some circumstantial allegations about methods to show that 'a prudent fiduciary in like circumstances would have acted differently.'" *Meiners*, 898 F.3d at 822 (citing *PBGC*, 712 F.3d at 720)); *see Braden*, 588 F.3d at 597 (ruling that if the facts the plaintiff "points to are precisely the result one would expect from lawful conduct in which the defendant is known to have engaged," they do not plausibly allege imprudence). ERISA plaintiffs

thus "must provide a sound basis for comparison—a meaningful benchmark." *Davis*, 960 F.3d at 484 (quoting *Meiners*, 898 F.3d at 822). For instance, ERISA plaintiffs may state a claim by alleging that "the *same* fund" the fiduciaries offered was available at a lower price, but cannot do so merely by "finding a less expensive alternative fund or two with some similarity." *Id.* at 484, 486 (emphasis in original). It is plainly insufficient for ERISA plaintiffs to rest on conclusory allegations. *See id.*; *see Laboy v. Bd. of Trs. of Bldg. Serv. 32 BJ SRSP*, 513 F. App'x 78, 80 (2d Cir. 2013) (concluding that plaintiff cited no authority for his excessive fee and underperformance allegations); *Anderson*, 2021 WL 229235, at *8 (concluding that plaintiff failed to plead facts establishing that allegedly comparable funds were a meaningful benchmark); *Davis v. Salesforce.com, Inc.,* No. 20-cv-1753, 2020 WL 5893405, at *4 (N.D. Cal. Oct. 5, 2020) (same); *Cervantes v. Invesco Holding Co. (U.S.), Inc.*, No. 18-cv-2551, 2019 WL 5067202, at *6 (N.D. Ga. Sept. 25, 2019) (concluding that plaintiff only offered "spotty" data for some years); *Patterson*, 2019 WL 4934834, at *11 (concluding that plaintiffs failed to provide details about why their comparable was appropriate).

B. Becker Fails To Plausibly Claim that it was Imprudent to Offer The TD Collective Trusts.

The replacement of the affiliated TD Mutual Funds with the TD Collective Funds achieved precisely the objectives that one would expect of prudent fiduciaries: while maintaining the successful investment strategy of the TD Mutual Funds, it eliminated entirely the fees paid by Plan participants to Wells Fargo affiliates, and reduced by approximately two-thirds the fees paid to third parties. (Background § B.1.) Becker

nevertheless alleges that it was imprudent for the Plan to offer the TD Collective Trusts as investment alternatives because they had no performance history and were selected in order to seed other Wells Fargo investment products. (¶¶ 83, 85.) She also alleges that the fees charged by these funds were excessive and that they underperformed their benchmarks. (¶¶ 90, 95–96.) None of these assertions give rise to a plausible claim of imprudence.

To begin with, the TD Collective Trusts could not have been offered to generate seed money for other investments because they were designed exclusively for the Plan. (Background § B.1.) The alleged lack of performance history is similarly misguided; there is nothing suspect in offering investment options that are custom-made for a 401(k) plan, particularly since at the time they were established the TD Collective Trusts had a substantially similar investment strategy as other Wells Fargo target date collective trusts offered to other plans and the TD Mutual Funds at issue in *Meiners*—both of which had extensive records. (*Id.*) *See Patterson*, 2019 WL 4934834, at *14 (concluding that the use of an "untested" fund did not establish imprudence).

Becker's allegation that the TD Collective Trusts had excessive fees because another target date suite sponsored by State Street Global Advisors is "nearly 20% cheaper" (¶ 90) is implausible because she fails to identify that fund, let alone explain why it is a suitable comparator—the same shortcoming that the Eighth Circuit held was fatal in *Meiners*, 898 F.3d at 823, and *Davis*, 960 F.3d at 485–86. In any event, the mere fact that the funds are allegedly more expensive than one other cherry-picked fund would

not, standing alone, support an inference of imprudence. *Meiners*, 898 F.3d at 823 ("The fact that one fund with a different investment strategy ultimately performed better does not establish anything about whether the [TD Mutual Funds] were an imprudent choice at the outset."); *see Davis*, 960 F.3d at 486 ("Nor are they required to pick the *lowest*-cost fund") (emphasis in original); *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) ("[N]othing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund"); *Anderson*, 2021 WL 229235, at *9 ("failure to select the investment with the lowest fees is not sufficient to plausibly state a claim"); *Patterson*, 2019 WL 4934834, at *14 (dismissing claim where fees of the alleged comparable were "marginally higher"); *Dorman v. Charles Schwab Corp.*, No. 17-cv-285, 2018 WL 6803738, at *3 (N.D. Cal. Sept. 20, 2018) (dismissing claim where there were only "modest" differences in fees); *Patterson v. Capital Grp. Cos., Inc.*, No. 17-cv-4399, 2018 WL 748104, at *5 (C.D. Cal. Jan. 23, 2018) (concluding that modestly higher fees are "not so obviously excessive as to meet the plausibility test standing alone").

Becker's allegations of underperformance similarly fail to give rise to an inference of imprudence. Courts have routinely dismissed fiduciary-breach claims premised on modest or temporary periods of underperformance. In so ruling, they have recognized that, because markets and investments are in a constant state of flux, retention of investments through a period of underperformance is no more indicative of imprudence than adherence to a long-range investment horizon. *See, e.g.*, *Davis*, 960 F.3d at 486 (concluding that merely because a fund may perform more poorly than other funds over a

certain period does not support an inference of imprudence); *Laboy*, 513 F. App'x at 80–81 ("poor performance relative to comparable funds over the last five years [was] . . . not adequate to permit a plausible inference that the Defendants breached their fiduciary duties"); *PBGC*, 712 F.3d at 721 (concluding that a bare allegation that an investment's price dropped during a single year was insufficient to state a claim); *Salesforce.com, Inc.*, 2020 WL 5893405, at *4 (holding that five year returns "are not sufficiently long-term"); *Birse v. CenturyLink, Inc*, No. 17-cv-2872, 2019 WL 1292861, at *4–5 (D. Colo. Mar. 20, 2019) (dismissing claim that fund underperformed by an average of 2.11% over five years); *Dorman v. Charles Schwab Corp.*, No. 17-cv-285, 2019 WL 580785, at *6 (N.D. Cal. Feb. 8, 2019) (concluding that underperformance over a three to five year period was an insufficiently "short period"); *Patterson*, 2019 WL 4934834, at *11 (dismissing challenge to fund that underperformed its benchmark by 1.14% (7.73% vs. 6.59%) over a five-year period); *White v. Chevron Corp.*, No. 16-cv-0793, 2016 WL 4502808, at *16–17 (N.D. Cal. Aug. 29, 2016) (holding that four years of underperformance was insufficient).

Here, Becker's only allegation is that the TD Collective Trusts underperformed their benchmarks by approximately 2% at some unidentified intervals. (¶¶ 95–96.) But the documents embraced by the Complaint demonstrate that the funds *outperformed* their benchmarks at other points in the years following their selection. In fact, as of 2018, virtually all of the funds had outperformed their benchmarks since inception (Hooley

Ex. N at 1–2).[7] In any event, for the reasons stated, this modest amount of alleged underperformance over a temporary period fails to raise an inference that retaining the TD Collective Trusts was the result of a flawed decision-making process.

In short, Becker's imprudence claim related to the TD Collective Trusts fails to state a claim and should be dismissed.

C. Becker Fails To State A Claim For Breach Of Duty Of Loyalty Concerning The TD Collective Trusts.

Having failed to sustain a claim of imprudence, Becker cannot resort to an alternative claim for breach of the duty of loyalty based on the same allegations.

To state a claim for breach of the duty of loyalty, Becker must allege that a fiduciary did not "discharge his duties . . . solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1)(A); *see Allen v. Wells Fargo & Co.*, 967 F.3d 767, 775 (8th Cir. 2020). As numerous courts have recognized, the mere fact that some of the offered investments are proprietary in nature does not give rise to a viable duty of loyalty claim. *Meiners v. Wells Fargo & Co.*, No. 16-cv-3981, 2017 WL 2303968, at *3 (D. Minn. May 25, 2017) (rejecting disloyalty allegations based on the selection of higher cost affiliated funds), *aff'd*, 898 F.3d at 820; *Patterson*, 2019 WL 4934834, at *12 (same); *see also Larson v. Allina Health Sys.*, 350 F. Supp. 3d 780, 805 (D. Minn. 2018) ("all of Plaintiffs' claims alleging Defendants' breach of the duty of loyalty are identical to their breach of the duty of prudence claims"). In rejecting such claims, those courts

[7] In 2019, the funds had underperformed their benchmarks by less than 1% since inception. (Hooley Ex. D at 1–2.)

have observed that Congress and the Department of Labor have recognized that financial services companies may have good reasons for offering their own investment products as investment alternatives in their own plans. *See* H.R. Conf. Rep. No. 93-1280 (Aug. 12, 1974) ("[I]t would be contrary to normal business practice for a bank to invest its plan assets in another bank."); Notice of Proposed Rulemaking, Participant Directed Individual Account Plans, 56 Fed. Reg. 10724, 10730 (Mar. 13, 1991) (same); *Dupree v. Prudential Ins. Co. of Am.*, No. 99-cv-8337, 2007 WL 2263892, at *10 (S.D. Fla. Aug. 10, 2007) (recognizing that plan fiduciaries may have deep familiarity and confidence with the investment managers).

Here, the only allegation of disloyalty pled by Becker is that the TD Collective Trusts were selected as Plan investment alternatives to provide seed money for other investments and that Wells Fargo affiliates earned fees from those investments. (¶¶ 85–87.) As discussed above, that is simply not a plausible basis for sustaining a claim because the TD Collective Trusts were designed exclusively for the Plan and, to the extent there were any fees paid to a Wells Fargo affiliate related to these investments, they were paid by Wells Fargo, not Plan participants. (Background §§ B.1, C.) Accordingly, Becker's disloyalty claim should be dismissed.

D. Becker Fails To State A Viable Prohibited Transaction Claim Concerning The TD Collective Trusts.

The prohibited transaction provisions in ERISA section 406 supplement a plan fiduciary's duties to plan participants by barring certain transactions deemed likely to injure the plan. *See Harris Tr. & Sav. Bank v. Salmon Smith Barney Inc.*, 530 U.S. 238,

241–42 (2000). They prohibit fiduciaries from: engaging in transactions involving parties who are affiliated with the plan fiduciaries ("party-in-interest transactions"), 29 U.S.C. § 1106(a); and managing the plan in their own interests ("self-dealing transactions"), 29 U.S.C. § 1106(b). Becker claims that offering the TD Collective Trusts constituted prohibited party-in-interest transactions in violation of ERISA sections 406(a)(1)(A) and (D) (Count II),[8] and self-dealing transactions in violation of ERISA sections 406(b)(1) and (3) (Count III).[9] Becker's prohibited transaction claims fail for multiple reasons.

Becker fails to plead plausible allegations of self-dealing or that Defendants used assets of the Plan for their own benefit. Becker's prohibited transaction claims are based on the mistaken assumption that Wells Fargo and its affiliates stood to gain financially by offering their own TD Collective Trusts within the Plan's investment line-up. (¶¶ 160, 194.) As discussed, there was no gain to be had from "seeding" these investments because they were designed exclusively for the Plan. (*See* Point II.B, *supra*.) There is thus no basis for Becker's allegations that the commercial viability of the TD

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[8] These provisions prohibit a plan fiduciary from engaging in a transaction if he knew or should have known that the transaction constitutes a direct or indirect "(A) sale or exchange, or leasing, of any property between the plan and a party-in-interest;" and "(D) transfer to, or use by or for the benefit of a party-in-interest, of any assets of the plan." 29 U.S.C. § 1106(a)(1)(A) and (D).

[9] These provisions provide a plan fiduciary shall not: "(1) deal with the assets of the plan in his own interest or for his own account;" and "(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." 29 U.S.C. § 1106(b)(1) and (3).

Collective Trusts would improve through Plan investments, or that Wells Fargo executives benefited by virtue of the Plan having invested in the TD Collective Trusts. (¶ 205.) *See Cervantes*, 2019 WL 5067202, at *13 (dismissing section 406(b) claim because plaintiffs failed to allege more than basic or general assertions); *Leber v. Citigroup, Inc.*, No. 07-cv-9329, 2010 WL 935442, at *10 (S.D.N.Y. Mar. 16, 2010) (same); *In re Honda of Am. Mfg., Inc. Erisa Fees Litig.*, 661 F. Supp. 2d 861, 869 (S.D. Ohio 2009) (same).

Furthermore, any fees paid to Wells Fargo affiliates related to the TD Collective Trusts were paid by Wells Fargo, not Plan participants. (Background § C.) Because there is no plausible allegation that Plan assets were used to pay Wells Fargo or its affiliates—and thus there were no plan assets used *for the benefit of* Defendants or any self-dealing—Becker has failed to state a prohibited transaction claim under sections 406(a)(1)(D), 406(b)(1), and 406(b)(3). *See Dezelan v. Voya Ret. Ins. & Annuity Co.*, No. 16-cv-1251, 2018 WL 3962924, at *8–9 (D. Conn. Aug. 17, 2018) (concluding that there was no violation of sections 406(a) or (b) where plaintiff failed to plausibly allege that defendant used plan assets for its own benefit); *see also Divane*, 953 F.3d at 992–93 (affirming dismissal of section 406(a)(1)(D) claims because the fees paid were not assets of the plan) (citing *Hecker*, 556 F.3d at 584); *Sprague v. Cent. States, Se. & Sw. Areas Pension Fund*, 269 F.3d 811, 817–18 (7th Cir. 2001) (finding no violation of section 406(a)(1)(D) because, in the absence of an obligation to contribute to a multiemployer fund, there was no impermissible extension of credit for failure to collect the

contributions and thus no transfer of plan assets); *Bakner v. Xerox Corp. Emp. Stock Ownership Plan,* No. 98-cv-230, 2000 WL 33348191, at *8 (W.D. Tex. Aug. 28, 2000) ("for the provisions of § 406 to apply, there must be a transaction involving the monies, property, or other assets of the fund") (citing *Donovan v. Bierwirth*, 680 F.2d 263, 270 (2nd Cir. 1982)).

Becker's claims under sections 406(a)(1)(D) and 406(b)(1) fail for the additional reason that she nowhere pleads that Defendants had a "subjective intent" to benefit a party-in-interest or to engage in self-dealing. *See Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 858–59 (6th Cir. 2000) (holding that a section 406(a)(1)(D) claim requires a subjective intent to benefit a party-in-interest); *Reich v. Compton*, 57 F.3d 270, 279 (3d Cir. 1995) (same); *Hans v. Tharaldson*, No. 05-cv-115, 2011 WL 7179644, at *7–8 (D.N.D. 2011) (concluding that claims alleging violations of the sections 406(a)(1)(D) and 406(b)(1) require a subjective intent to benefit a party-in-interest). Here, Becker fails to plausibly allege any benefit to Wells Fargo or its affiliates in selecting or maintaining the TD Collective Trusts.

Becker fails to plausibly plead that her investments in the TD Collective Trusts constituted a prohibited transaction with a party-in-interest. The only prohibited transaction claim that does not depend on establishing that there was a financial benefit to Wells Fargo or its affiliates paid by the Plan is ERISA section 406(a)(1)(A). But, Becker does not allege any basis for concluding that offering the TD Collective Trusts as a Plan investment alternative constituted a sale, exchange, or lease of property between the Plan

and a "party-in-interest." The TD Collective Trusts are investment alternatives, not subsidiaries or affiliates of Wells Fargo, and thus are not themselves parties-in-interest as defined in ERISA section 3(14). *See* DOL Advisory Opinion 2003-15A (opining that a collective trust is not a party-in-interest under section 3(14)); *see Reich*, 57 F.3d at 276–77 (stating that only those parties enumerated in the section 3(14) "comprehensive list" are parties-in-interest); *Hans*, 2011 WL 7179644, at *6–7 (rejecting plaintiffs' argument that defendant was a party-in-interest because it would "in effect add an additional category" to "a long and carefully crafted definition").

Becker's investment in the TD Collective Trusts is exempt from the prohibited transaction rules. Even if Becker could somehow plead the elements of one or more prohibited transaction claims, it would not matter because the documents embraced by the Complaint firmly establish that all of her claims fall within a prohibited transaction exemption. ERISA section 408(b)(8) provides a broad exemption for plan investments in a bank or trust company's proprietary collective trusts. For the exemption to apply, certain conditions must be satisfied; namely, the "transaction is a sale or purchase of an interest in the fund," the bank or trust company receives "not more than reasonable compensation," and such transaction is "expressly permitted by the [plan]." 29 U.S.C. § 1108(b)(8). *See* U.S. Dep't of Labor Opinion Letter No. 96-15A (E.R.I.S.A.), 1996 WL 453859, at *3 (Aug. 7, 1996) (stating that section 408(b)(8) provides relief from Section 406(a) and (b) transactions); *Dupree*, 2007 WL 2263892, at *41 (same).

Of these conditions, Becker concedes that the first one is satisfied (¶¶ 194–95); and the third one is satisfied because the Plan clearly permits investment in collective trusts. (Holland Ex. A at § 8.1(b).) That leaves the second condition, regarding the reasonableness of the compensation paid. Because Wells Fargo and its affiliates received *no* compensation from the Plan or Becker, this condition is indisputably satisfied as well.

Although the availability of an exemption is often viewed as an affirmative defense that cannot be adjudicated on a motion to dismiss, courts routinely apply the exemption when it is clear from the pleadings that its elements are satisfied. *See*, *e.g.*, *Hecker*, 556 F.3d at 588–90 (applying affirmative defense on a motion to dismiss where the pleadings demonstrated it applied); *Patterson*, 2019 WL 4934834, at *16 (same); *Capital Grp. Cos.*, 2018 WL 748104, at *5 (same); *Leber*, 2010 WL 935442, at *10 (same). These rulings rest on the well-established principle that a complaint must allege conduct that is plausibly actionable under the relevant statute and must go beyond creating "a sheer possibility that defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678; *see Cervantes*, 2019 WL 5067202, at *14 (dismissing claims under sections 406(a) and (b) because plaintiff only pled conclusory allegations).[10]

[10] The circumstances here are readily distinguishable from those in *Braden* where the exemption to the prohibited transaction rules upon which the defendants relied were not established by the pleadings. 588 F.3d at 600–01. In *Braden*, the Court permitted plaintiff's claim to proceed because the plaintiff affirmatively alleged that he had no visibility into "revenue sharing payments" and alleged that such payments "far exceeded the value of services actually performed." *Id.* at 599–01, 601 n.9.

III. BECKER'S CLAIMS CONCERNING THE OTHER INVESTMENTS TARGETED IN THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM FOR RELIEF.

As discussed, Becker does not allege that she suffered any plan-wide injury, or any injury with respect to any of the funds targeted in the Complaint except the TD Collective Trusts and, having terminated her interest in the Plan, she has no concrete interest in its future administration. *See* Point I, *supra.* If not dismissed for lack of standing, Becker's claims related to the other investments should be dismissed for the same reasons as her claims relating to the TD Collective Trusts.

A. Becker Fails To State A Viable Claim of Imprudence Concerning The Money Market Fund, Causeway Fund and Emerging Growth Fund.

Becker contends that the Causeway Fund, Money Market Fund, and Emerging Growth Fund were allegedly more expensive and underperformed relative to other funds preferred by Becker and, as a result, the Benefits Committee breached its fiduciary duty to monitor these funds. (Background §§ B.2, D.) These allegations do not amount to a plausible basis for a claim because she does not identify suitable comparators against which to evaluate the fees or performance of the challenged funds; and, in any event, the alleged differences are so small that they do not give rise to an inference of a flawed decision-making process or otherwise imprudent conduct.

1. Claims Relating to The Money Market Fund.

The documents embraced by the Complaint unequivocally establish that Becker's allegations pertaining to the retention of the Money Market Fund do not infer an imprudent decision-making process. The Complaint alleges that the expense ratio for the

Money Market Fund was 20 bps, which it contends was excessive because similarly-sized plans allegedly paid 14 bps on average for these types of funds (¶ 126); and because two other funds had lower expense ratios: Federated Investors (10 bps) and Fidelity's Money Market Treasury Portfolio (12 bps) (¶¶ 127–28). But, after accounting for the Plan's fee waiver, the expense ratio never exceeded 12 bps (Hooley Ex. C at 9, Ex. D at 6), which is less than what the Complaint alleges to be the average, and is equal to one of Becker's alleged comparable funds.

Becker's allegations of underperformance (¶ 124) fail for similar reasons. After properly accounting for the Plan's fee waiver, the Money Market Fund *outperformed* its benchmark for the 10-year period preceding November 1, 2019. (Hooley Ex. D at 2, 6.)[11] It also *outperformed* one of Becker's preferred alternatives when accounting for the Plan's fee waiver, the Fidelity Money Market Treasury Fund, in the 1, 3, 5, and 10 year periods preceding November 30, 2020. (*Compare* Hooley Ex. O at 1 *with* Declaration of Tulio D. Chirinos ("Chirinos") Ex. A at 1.) Becker's other preferred investment, the Federated Investor Fund (¶ 127), is a separate account which provides no plausible comparison. *See, e.g.*, *Salesforce.com*, 2020 WL 5893405, at *2 n. 4–5 (explaining why it is inappropriate to compare different investment vehicles). In any event, after accounting for the Plan fee waiver, the Money Market Fund outperformed the Federated

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[11] In 2019, the expense waiver available exclusively to the Plan was 0.13% (or 13 bps) (Hooley Ex. D at 6), and when added to the Money Market Fund's 10-year return of 0.42% (*id.* at 2), its return was 0.55%, while its benchmark's return was 0.52% over the same period (*id.*).

Investor Fund for the ten years preceding November 30, 2020, and equaled it over the five years preceding November 30, 2020. (*Compare* Hooley Ex. O at 1 *with* Chirinos Ex. B at 1.)

2. Claims Relating To The Causeway Fund and Emerging Growth Fund.

As a threshold matter, Becker cannot state a viable claim with respect to the Causeway Fund and Emerging Growth Fund because they are subfunds of Plan investment alternatives, and Becker does not allege that there was anything imprudent about the parent funds in which participants were directly invested: the International Equity Fund and Small Cap Fund, respectively. Nor could she, since the International Equity Fund has outperformed its benchmark since its inception (Hooley Ex. P), and the Small Cap Fund has consistently outperformed its benchmark (Hooley Ex. Q at 1). *See Meiners*, 898 F.3d at 823 n.5 ("The total fee, not the internal, post-collection distribution of the fee that is the material figure for assessing the reasonableness of a fee."); *Hecker*, 556 F.3d at 586 (same); *Sacerdote v. New York Univ.,* No. 16-cv-6284, 2017 WL 3701482, at *11 (S.D.N.Y. Aug. 25, 2017) (dismissing fee-layering claim because plaintiffs did not allege that the inclusion of investments led to higher fees overall); *see also In re Disney ERISA Litig.*, No. 16-cv-2251, 2016 WL 8192945, at *4 (C.D. Cal. Nov. 14, 2016) (concluding that it was not "reasonable or appropriate" to require plan fiduciaries to monitor every holding maintained by every mutual fund within the plan).

Even when the allegations pertaining to the two subfunds are considered independently of their parent funds, the documents embraced by the Complaint establish

that they could not possibly support an inference of an imprudent decision-making process. Becker's allegation that the Causeway Fund was included in the Plan "to seed and prop [it] up" (¶ 101) makes no sense because Causeway Capital Management LLC, the investment manager of the Causeway Fund, has no affiliation with Wells Fargo or any of its affiliates (Holland Ex. B at 21; Hooley Ex. L at 3). Her effort to establish that the Causeway Fund charged excessive fees and underperformed by comparing it to the Causeway International Separate Account (¶ 113) is inappropriate because the two funds are different investment vehicles with different fee structures (*see* p.26, *supra*). In any event, according to the Complaint, the separate account is less than 3 bps cheaper than the Causeway Fund (¶ 113) and barely outperformed the Causeway Fund over unspecified one- and five-year periods (¶ 116)—differences so small that they cannot give rise to an inference of imprudence (*see* pp.16–17, *supra*).

Becker's allegations concerning the Emerging Growth Fund fare no better. First, contrary to Becker's allegation that the Emerging Growth Fund charged 90 bps (¶ 143), the fees associated with the Emerging Growth Fund were in fact only 75 bps in light of a 15 bps fee waiver available to the Plan, and the Plan offers the least expensive institutional share class. (Holland Ex. E at 46; Hooley Ex. R at 8.) Once this correction is taken into account, it is clear that the Emerging Growth Fund significantly outperformed its benchmark over the five-and-ten year period, as well as the S&P 600 Small Cap Growth Index that Becker purports to use as a benchmark—without any explanation why it is a meaningful benchmark—at all relevant times. (*Compare* Hooley

Ex. R at 8 *with* Chirinos Ex. C at 2.) It also significantly outperformed the three funds that Becker alleges—without explanation—are comparable funds. (*Compare* Hooley Ex. S at 1 *with* Chirinos Ex. D at 1, Ex. E at 1, Ex. F at 1.) In addition, the Emerging Growth Fund's expense ratio is less than one of them (Chirinos Ex. E) and is only 8 bps more than another one (Chirinos Ex. D).

Becker also alleges that the Plan imprudently "sacrificed economies of scale" by offering the Emerging Growth Fund because it duplicated another subfund of the Small Cap Fund. (¶¶ 135, 138.) But this allegation cannot give rise to an inference of imprudence because Becker has not pled any facts showing that the two funds had identical investment styles; and, even if they did, there is nothing imprudent about using multiple subfunds with the same investment style to complement one another. *See Larson v. Allina Health Sys.*, 350 F. Supp. 3d 780, 802 (D. Minn. 2018) ("A Plan that offers duplicative funds does not hurt plan participants, 'but instead provides them opportunities to choose the investments that they prefer.'") (citation omitted).

B. Becker Fails To State A Claim For Breach Of the Duty Of Loyalty Related To The Money Market Fund, Causeway Fund and Emerging Growth Fund.

Becker's claim for breach of the duty of loyalty, as it relates to the Causeway Fund should be dismissed for the same reasons stated above with respect to the TD Collective Trusts; namely, it is premised on an erroneous assumption that Plan participants pay a fee to a Wells Fargo affiliate in connection with this fund. *See* Point II.C, *supra*. Although the two mutual funds (the Money Market Fund and Emerging Growth Fund) do pay fees to a Wells Fargo affiliate, this fact cannot support her claim because the documents

embraced by the Complaint clearly dispel any inference of disloyalty: the fees related to the Money Market Fund have always been at or below the industry average pled by Becker, as well as Becker's preferred investments; and the Plan is in the lowest cost share class of the Emerging Growth Fund and the fees are significantly lower than Becker alleges in the Complaint. *See* Point III.A.2, *supra*.

C. Becker Fails To State A Viable Prohibited Transaction Claim Concerning The Causeway Fund, Total Return Bond Fund, Stable Value Fund, Stable Return Fund, BlackRock STIF, Money Market Fund, and Emerging Growth Fund.

Like her prohibited transaction claims relating to the TD Collective Trusts, Becker's prohibited transaction claims relating to the other investments targeted in the Complaint fail to state a claim for relief.

Becker's prohibited transaction claims related to the collective trusts[12] and Stable Value Fund should be dismissed for the same reasons as for the TD Collective Trusts. First, there is no transaction relating to the transfer or use of plan assets *for the benefit of* Wells Fargo or its affiliates, for purposes of stating a claim under ERISA sections 406(a)(1)(D), 406(b)(1) and 406(b)(3), because Wells Fargo pays any fees to its affiliates related to them. *See* Point II.D, *supra*. Second, Becker's claims under ERISA sections 406(a)(1)(D) and 406(b)(1) fail for the additional reason that Defendants had no subjective intent to benefit themselves. *See* Point II.D, *supra*. Third, Becker's claim under ERISA section 406(a)(1)(A) fails because there was no transaction "with" a party

[12] The collective trusts include the Causeway Fund, Total Return Bond Fund, Stable Return Fund, and BlackRock STIF. (¶¶ 102, 158, 160.)

in interest because the investments are not themselves parties in interest. *See* Point II.D, *supra*. Fourth, all of the collective trusts challenged in the Complaint are exempt from prohibited transaction rules under ERISA section 408(b)(8). *See* Point II.D, *supra*.

The Stable Value Fund (¶ 154) also is exempt from prohibited transaction claims. Section 408(b)(2) provides a broad statutory exemption for contracting for services necessary for the establishment or operation of a plan, if "no more than reasonable compensation is paid." 29 U.S.C. § 1108(b)(2)(A); *see Scott v. Aon Hewitt Fin., Advisors, LLC*, No. 17-cv-679, 2018 WL 1384300, at *10–13 (N.D. Ill. Mar. 19, 2018) (applying section 408(b)(2) to investment management and plan services contract and dismissing prohibited transaction claim); *Leber*, 2010 WL 935442, at *11 (same); *Skin Pathology Assocs., Inc. v. Morgan Stanley & Co*., 27 F. Supp. 3d 371, 374–78 (S.D.N.Y. 2014) (dismissing claim under section 406(a) based on section 408(b)(2)); *see also Harley v. Minn. Mining and Mfg. Co.*, 284 F.3d 901, 908–09 (8th Cir. 2002) (acknowledging that section 408(b)(2) applies to claims under section 406(b)(1)); *Dupree*, 2007 WL 2263892, at *7, 39–40 (applying section 408(b)(2) to accounts that were organized as separate accounts). Because Wells Fargo paid the fees (if any) charged by the Wells Fargo affiliate related to the Stable Value Fund—and Plan participants did not—there is no question that this condition is satisfied.[13]

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[13] Becker's conclusory assertion that Wells Fargo Bank, N.A. impermissibly generated "float income" from un-invested cash held in the subfunds which it kept for itself does not alter this conclusion. (¶¶ 167–69, 160.) Float income is not an asset of the Plan, and thus it cannot support a prohibited transaction claim that is predicated on the use of plan assets. *See In re Fid. ERISA Float Litig.*, 829 F.3d 55, 58-64 (1st Cir. 2016) (citing

Becker's prohibited transaction claims related to the two mutual funds also should be dismissed for similar reasons. The only funds that generated a fee payable to a Wells Fargo affiliate were the two mutual funds—the Money Market Fund and Emerging Growth Fund. Becker's prohibited transaction claims related to these funds nevertheless fail for multiple reasons. First, Becker's claims under ERISA sections 406(a)(1)(D), 406(b)(1) and 406(b)(3) fail because of the absence of the requisite "plan assets." *See* Point II.D, *supra*. ERISA provides that the mutual funds' assets, which are used to pay the funds' management fees are not considered assets of a plan: "In the case of a plan which invests in any security issued by [a mutual fund], the assets of such plan shall be deemed to include such security but shall not, solely by reason of such investment, be deemed to include any assets of such [mutual fund]." 29 U.S.C. § 1101(b)(1); *see Wildman v. Am. Century Servs.,* LLC, No. 16-cv-737, 2018 WL 2326627, at *6-7 (W.D. Mo. May 22, 2018) (holding that the fees paid from mutual funds are not plan assets); *see generally Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 338–39 (2010).

Second, there is no violation of ERISA section 406(a)(1)(A) because the mutual funds are not parties in interest. *See* Point II.D, *supra*.

Finally, affiliated mutual funds are protected by Prohibited Transaction Exemption ("PTE") 77-3, 42 Fed. Reg. 18,734, 18,734–35 (1977), which allows a financial services

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Tussey v. ABB, Inc., 746 F.3d 327 (8th Cir. 2014)).

company to offer its retirement plan participants the opportunity to invest in affiliated mutual funds provided that

> [F]irst, the plan must pay no "investment management, investment advisory or similar fee" to the mutual fund, although the mutual fund itself may pay such fees to its managers; second, the plan must not pay "a redemption fee" when selling its shares; third, the plan must not pay a sales commission in connection with the sale or acquisition; and fourth, all other dealings between the plan and the affiliated fund must be "on a basis no less favorable to the plan than such dealings are with other shareholders."

Leber, 2010 WL 935442, at *10 (citation omitted). These conditions were indisputably satisfied. The Complaint nowhere alleges that the Plan pays *any* fees, redemption fees, or sales commissions, and the documents embraced by the Complaint expressly state that there are no such fees. (Hooley Ex. D at 7.) Furthermore, Becker has not plausibly alleged that the dealings between the Plan and the investment company or the investment adviser or any affiliated person thereof were on a basis less favorable to the plan than others. As discussed, as a result of the fee waivers the Plan enjoys, *see* Point III.A, *supra*, the Money Market Fund and Emerging Growth Fund charged participants an expense ratio that was considerably *lower* than the expense ratio for non-plan investors in these same funds. *See Patterson*, 2019 WL 4934834, at *16–17 (concluding that because defendant charged plan and non-plan participants under the same fee structure that the "dealings between Defendants and the Plan were 'on a basis no less favorable to the plan than such dealings [were] with other shareholders'").

IV. BECKER FAILS TO STATE A CLAIM AGAINST WELLS FARGO FOR KNOWING PARTICIPATION IN A PROHIBITED TRANSACTION.

In the absence of any viable claim for violation of ERISA's prohibited transaction rules, Becker's claim against Wells Fargo for knowingly participating in a prohibited transaction in violation of section 406(a) of ERISA (Count V) fails as well. *See Meiners*, 2017 WL 2303968, at *4 (dismissing "knowing participation" claim because plaintiffs failed to plead an underlying breach of fiduciary duty claim), *aff'd*, 898 F.3d 820.

Independently, this claim fails for two reasons. First, Becker has not plausibly pled that Wells Fargo had actual or constructive knowledge of the prohibited transactions. *See Harris Tr. & Sav. Bank*, 530 U.S. at 251. Becker's conclusory allegation that Wells Fargo "knew or should have known" of the alleged violations (¶¶ 231–33) is plainly insufficient. *York v. Wellmark, Inc.*, No. 16-cv-627, 2017 WL 11261026, at *14–15 (S.D. Iowa Sept. 6, 2017) (dismissing claim that asserted only vague and conclusory statements that non-fiduciaries knowingly participated), *aff'd*, 965 F.3d 633 (8th Cir. 2020); *see Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 15-cv-1614, 2016 WL 4507117, at *7–8 (C.D. Cal. Aug. 5, 2016) (same).

Second, Becker has not pled a claim to recover "appropriate equitable relief," as required under ERISA section 502(a)(3). Becker may seek only relief traditionally available at equity—that is, an order requiring a non-fiduciary "to restore to the[m] particular funds or property in the defendant's possession." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214 (2002) (emphasis added). This requires that any monetary recovery sought by Becker must "be traced [from ERISA plan assets] to a

particular fund held by a defendant." *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Gerber Life Ins. Co.*, 771 F.3d 150, 155 (2d Cir. 2014); *see Pledger v. Reliance Tr. Co.*, 240 F. Supp. 3d 1314, 1336 (N.D. Ga. 2017) (dismissing knowing participation claim for failure to allege identifiable *res* from which ill-gotten proceeds could be returned); *Urakhchin*, 2016 WL 4507117, at *8 (same); *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 15-cv-9936, 2016 WL 5957307, at *8–9 (S.D.N.Y. Oct. 13, 2016) (same). Becker has not identified any res from which any "ill-gotten profit and/or assets" (¶ 239) could be returned. Her conclusory allegations that "based on information currently available, the ill-gotten funds remained in" a Wells Fargo account; and a Wells Fargo account has retained more money than the alleged illegal transfers (¶¶ 235–36) are plainly insufficient.

CONCLUSION

For all of the foregoing reasons, the Court should grant Defendants' Motion to Dismiss and dismiss the Complaint with prejudice.

Dated: February 4, 2021

Respectfully submitted,
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Yvonne Becker, Plaintiff, vs. Wells Fargo & Co.; Employee Benefit Review Committee; Human Resources Committee of the Board of Directors of Wells Fargo & Co.; Ronald L. Sargent; Wayne M. Hewett; Donald M. James; Maria R. Morris; Wells Fargo Bank, National; and Galliard Capital Management, Defendants.	Case No. 0:20-cv-02016 (DWF/BRT)

CERTIFICATE OF COMPLIANCE

I, the undersigned, certify that Defendants' Motion to Dismiss Plaintiff's Class Action Complaint complies with Local Rule 7.1(f) and 7.1(h). I further certify that, in preparation of this document, I used the word-count function of Microsoft Word 2016 and that this function was applied specifically to include all text, including headings, footnotes, and quotations, and exclude all other portions of the document. I further certify that this document contains the following number of words: 9,632.

Dated: February 4, 2021

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