**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)

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE CLASS ACTION COMPLAINT

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I. INTRODUCTION

This case is simple. The Wells Fargo executives who controlled Wells Fargo's 401(k) Plan ("Wells Fargo Plan" or "Plan") used their employees' retirement savings to seed newly-created Wells Fargo funds, which paid millions of dollars in fees to Wells Fargo. In doing so, Defendants breached their fiduciary duties under the Employee Retirement Income Security Act ("ERISA") — the highest duties known to law.

Plaintiff Yvonne Becker ("Plaintiff" or "Ms. Becker") alleges that Defendants violated ERISA by: (1) using the Plan's substantial assets to seed newly-launched Wells Fargo funds (which had zero performance history) to make them more marketable to outside investors; (2) continuing to invest in Wells Fargo's proprietary funds despite the fact that each of them underperformed Defendants' own chosen benchmarks; and (3) investing the Plan in Wells Fargo funds even though they had fees that are higher than similar (in some cases nearly identical) non-proprietary funds and much higher than the average fees paid by other large plans for similar investments. As a result, Ms. Becker brought this action against Defendants for violating their fiduciary duties of loyalty and prudence, and for violating ERISA's prohibited transaction rules.

Defendants' Motion to Dismiss the Class Action Complaint ("Motion" or "Mot."), ECF Nos. 97 & 99, attempts to contradict Plaintiff's careful and specific allegations with snippets from cherry-picked documents. This is improper at the motion to dismiss stage. When Plaintiff's allegations are accepted as true (as they must be), applicable Eighth Circuit authority makes clear that her Complaint states plausible claims that Defendants violated ERISA. Defendants' Motion should be denied in full.

II. FACTUAL AND LEGAL BACKGROUND

A. Factual Allegations

The Wells Fargo 401(k) Plan is an ERISA-governed plan that allows employees to save for retirement by deferring part of their compensation into the Plan. Complaint ¶ 62 ("Compl."), ECF No. 1. Once employees have deferred their compensation into the Plan, they may choose how to invest those retirement savings. They are limited, however, to choosing among investment options selected for the Plan by Wells Fargo's Employee Benefit Review Committee, which is the Named Fiduciary with the authority to manage the assets of the Plan under 29 U.S.C. § 1102(a). Compl. ¶¶ 24, 27, 63. The Employee Benefit Review Committee and its members are referred to collectively as the "Fiduciary Defendants."

The value of each participant's individual account in the Plan depends on the amount of contributions made by the participant, plus the investment gains earned on those contributions, minus all fees and expenses. Compl. ¶ 64. Fees and expenses vary significantly among the investment vehicles available on the market, and higher fees and/or expenses diminish participants' retirement savings. *Id*. Similarly, if the funds in the Plan perform poorly compared to alternative comparable funds, then the participants' retirement savings are eroded. *Id*. The Fiduciary Defendants were or are high-level Wells Fargo executives whose compensation and promotion levels increased when they acted to increase revenue for Wells Fargo by, among other things, directing substantial assets into Wells Fargo affiliated funds—resulting in increased fee revenue to Wells Fargo. *Id.* ¶ 205. Additionally, the commercial viability of Wells Fargo's funds improved with increased assets under management. *Id.* The Wells Fargo Plan, which is one of the largest defined-contribution plans in the country, hosts a massive asset base that could provide substantial assets under management of newly-launched Wells Fargo funds. *Id*. ¶¶ 66, 77, 85, 101, 108.

The Plan had about $40 billion in assets as of year-end 2018 (*id*. ¶¶ 65-66) and the Plan's most recent annual report discloses that the Plan holds over $47 billion in retirement assets as of year-end 2019.[1] Due to the enormous size of the Plan, the Fiduciary Defendants wield extensive bargaining power in the market for retirement funds and should have been able to obtain superior investment products at extraordinarily low cost. Compl. ¶ 66

Instead, the Fiduciary Defendants selected and retained 17 Wells Fargo proprietary funds (the "Wells Fargo Fund(s)"), many of which underperformed the benchmark that Defendants themselves selected as the "appropriate broad-based securities market index" for each Wells Fargo Fund for multiple years during the class period. Compl. ¶¶ 93-96, 116-18, 124-25, 146-47 (referring to ERISA's benchmark disclosure requirement in 29 C.F.R. § 2550.404a-5(d)(1)(iii)). Specifically, between 2016 and 2019 the Wells Fargo/State Street Target Date Collective Trusts ("TD Collective Trusts")[2] underperformed by 2% (Compl. ¶¶ 93-96), the Wells Fargo/Causeway International Value Fund ("Causeway Fund") underperformed by 3.3% (*id*. ¶¶ 116-18), the Wells Fargo 100%

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[1] Exhibit A to Declaration of Michelle C. Yau ("Yau Ex.") in Support of Plaintiffs' Opposition to Defendants' Motion, 2019 Form 5500 for Wells Fargo Plan at Schedule H page 2 ("Net Assets").

[2] For ease of the reader, this brief uses the same abbreviations for fund names as Defendants' Motion.

Treasury Money Market Fund ("Money Market Fund") underperformed by 1% (*id*. ¶¶ 124-25, 129); and the Wells Fargo Emerging Growth Fund ("Emerging Growth Fund") underperformed by 1.1%. *Id*. ¶¶ 146-47; *see also* Table 1 *infra*, page 16.

In addition, the Wells Fargo Funds underperformed similar and cheaper non-affiliated funds that were available to the Plan. For example, the Causeway Fund not only underperformed the benchmark Defendants chose to evaluate the fund's performance, it also did worse than a materially identical fund offered by Causeway directly—the Causeway International Separate Account. Compl. ¶¶ 116-17. That fund charges roughly half the fees of the Causeway Fund: the Plan pays 55.6 basis points[3] ("bps") in fees for the Causeway Fund, while the Causeway International Separate Account costs just 32 bps. *Id*. ¶¶ 109-14.

The TD Collective Trusts and Causeway Fund were newly-launched funds added to the Plan despite having no performance history or track record to demonstrate that they were appropriate Plan investments. *Id*. ¶¶ 83-86, 104-06. Relatedly, the Plan's assets served as seed money for the TD Collective Trusts and Causeway Fund, which had no other investors at the time the Fiduciary Defendants selected them for the Plan. *Id*. ¶¶ 87-88, 107-08.

Finally, Plaintiff alleges that the Plan paid fees or expenses to Wells Fargo affiliates from the Plan's retirement assets that were invested in Wells Fargo Funds. Compl. ¶¶ 152-56. Specifically, the Plan paid Wells Fargo 90 bps for the Emerging Growth Fund and 20

[3] Basis points ("bps") are commonly used to disclose investment fees as a percentage of the investment's asset base. For example, 1.0 bps equals 0.01% and 90 bps equals 0.90%.

bps for the Money Market Fund. Compl. ¶¶ 155-56. The Plan paid Wells Fargo 55.6 bps for the Causeway Fund, 16.4 bps for the Wells Fargo/Federated Total Return Bond Fund ("Total Return Bond Fund"), and 19.8 bps for the Wells Fargo Stable Value Fund ("Stable Value Fund").[4] Compl. ¶¶ 153-54. The Complaint explains that Wells Fargo's trust documents, which govern the Plan's investments in Wells Fargo sponsored collective trusts, state that Wells Fargo Bank "may charge a reasonable fee for its management and administration of the [collective trusts] and withdraw the amount thereof from the [collective trusts]" (*id.* ¶ 159), and that Wells Fargo Bank invests some of the Wells Fargo collective trust into two other Wells Fargo funds which pay additional fees to Wells Fargo (*id.* ¶¶ 158, 160-61).

B. <u>Legal Standard for a Rule 12(b)(6) Motion</u>

Under Federal Rule of Civil Procedure 8(a)'s notice pleading standard, a complaint must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). In other words, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiff is not required to allege specific facts, and need only "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555). No heightened pleading

[4] Defendants assert that all fees paid to Wells Fargo in connection with the Plan's investment in the Causeway Fund, Total Return Bond Fund, and Stable Value Fund were paid by Wells Fargo and not Plan participants. However, as detailed below, Defendants' extrinsic documents undermine these factual assertions. *See* Section III.B.4, *infra*.

standard applies to ERISA claims. *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 674 (7th Cir. 2016) (citing *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014)). And the Eighth Circuit urges that courts, when evaluating ERISA claims in the context of a motion to dismiss, "must be attendant to ERISA's remedial purpose and evident intent to prevent through private civil litigation 'misuse and mismanagement of plan assets.'" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8, 142 n.9 (1985)).

A claim for relief is "plausible" if its factual content allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Braden*, 588 F.3d at 595 (quoting *Iqbal*, 556 U.S. at 678). While the plausibility standard requires a plaintiff's complaint to show that success on the merits is more than a "sheer possibility," the standard is not a "probability requirement." *Id*. at 594 (citation omitted).

Finally, when considering a Rule 12(b)(6) motion, the court must accept the allegations as true, draw all inferences in plaintiff's favor and construe the complaint in the light most favorable to the plaintiff. *Braden*, 588 F.3d at 594; *Iqbal*, 556 U.S. at 678. Dismissal is not warranted in the event a fiduciary identifies potential "lawful reasons why the defendants chose the investment options they did," as it is "not the plaintiff's responsibility to rebut these possibilities in his complaint." *Krueger v. Ameriprise Fin., Inc.*, No. 11-cv-02781 (SRN/JSM), 2012 WL 5873825, at *10 (D. Minn. Nov. 20, 2012); *see also Braden*, 588 F.3d at 596 (reversing dismissal because "Rule 8 does not require a plaintiff to plead facts tending to rebut all possible lawful explanations for a defendant's conduct.").

C. History and Purpose of ERISA

ERISA is "a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines*, 463 U.S. 85, 90 (1983). ERISA imposes strict fiduciary standards that are derived from the common law of trusts, including the twin duties of loyalty and prudence. *Varity Corp. v. Howe*, 516 U.S. 489, 497, 506 (1996). The Eighth Circuit has described ERISA's fiduciary duties as "the highest known to the law." *Braden*, 588 F.3d at 598 (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982)); *see also Tibble v. Edison Int'l*, 843 F.3d 1187, 1197 (9th Cir. 2016).

Specifically, the duty of loyalty requires that fiduciaries act "solely in the interest of the participants" and "for the exclusive purpose" of providing benefits and defraying reasonable plan expenses. 29 U.S.C. § 1104(a)(1)(A).[5] The duty of prudence requires fiduciaries to discharge their responsibilities "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use. 29 U.S.C. § 1104(a)(1)(B). These exacting standards were adopted because "the crucible of congressional concern was misuse and mismanagement of plan assets … [and] ERISA was designed to prevent these abuses in the future." *Russell*, 473 U.S. at 140 n.8 (further explaining that pension plans are often "abused by those responsible for their management who manipulate them for their own purposes or make poor investments with them.") (citations omitted).

[5] For ease of the reader, this brief will cite to ERISA's provisions in the U.S. Code.

ERISA's prohibited transactions provisions, located at 29 U.S.C. § 1106, provide further protection to plan participants by "categorically barring certain transactions deemed 'likely to injure the pension plan.'" *Braden*, 588 F.3d at 600 (quoting *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc*., 530 U.S. 238, 241-42 (2000)). Courts have held that "a violation of § [1106] is a per se violation" and "[l]ack of harm to the plan or the good faith ... are not relevant, and certainly not controlling[.]" *See Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 434, 439 (6th Cir. 2002); *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984); *see also Braden*, 588 F.3d at 602 ("prohibited transactions [under § 1106(a)(1)] involve self-dealing [and the] settled law is that in such situations the burden of proof is always on the party to the self-dealing transaction to justify its fairness") (quotation omitted).

While Congress provided certain limited exemptions to ERISA's prohibited transaction rules, the burden to establish each condition of an exemption lies with the Fiduciary Defendants. 29 U.S.C. § 1108; *Braden*, 588 F.3d at 601 ("statutory exemptions established by § 1108 are defenses" which defendants must prove) (citing *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996)). And significantly, even if a prohibited transaction qualifies for an exemption, the fiduciary decision to engage in the transaction must still comport with ERISA's prudence and loyalty standards. 42 Fed. Reg. at 18734; *see also Patelco Credit Union v. Sahni*, 262 F.3d 897, 910 (9th Cir. 2001) (concluding that exemption "applies only to [29 U.S.C. § 1106(a)] transactions . . .[and not to] a breach of the general duty of loyalty (in violation of 29 U.S.C. § 1104(a)(1)(A)).").

III. ARGUMENT

Plaintiff first explains that she has Article III standing to seek relief for the losses not only to her investments, but to all investments in the Plan—because she may bring a cause of action under ERISA that "sweeps more broadly" than just her individual injury. Next, Ms. Becker demonstrates that her factual allegations in the Complaint assert plausible claims for relief for Defendants' violations of ERISA's fiduciary requirements and prohibited transaction provisions. Defendants' arguments to the contrary rely on their submitted extrinsic documents, which, as explained *infra*, cannot be considered with their Motion.

A. Plaintiff Has Article III Standing to Seek Relief on Behalf of the Plan as a Whole.

Defendants agree that Ms. Becker has Article III standing to restore the monetary losses her retirement account suffered due to Defendants' mismanagement of her retirement plan.[6] However, Defendants seek to narrow Plaintiff's relief, which is necessarily sought for the entire Plan, to losses suffered by the funds in which her retirement account is invested. This argument has been rejected by the Eighth Circuit in *Braden* and is inconsistent with the Supreme Court's decision in *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020). In *Braden*, the Eighth Circuit explained that "constitutional

[6] Loss of monetary benefits is sufficient to satisfy Article III's injury-in-fact requirement. *See Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1619 (2020). Plaintiff alleges that her retirement account suffered losses due to Defendants' fiduciary breaches and that those losses will be redressed by this action. Compl. ¶¶ 180-90, Prayer for Relief. Defendants do not contest that Plaintiff satisfies these components of Article III standing with respect to her investments in the TD Collective Trusts. *Cf.* Mot. at 10-12.

standing is only a threshold inquiry, and 'so long as [Article III] is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others.'" 588 F.3d at 592 (quotation omitted). Indeed, *Braden* made clear that an ERISA plaintiff "may be able to assert causes of action which are based on conduct that harmed him, but which sweep more broadly than the injury he personally suffered." *Id.* (citations omitted).

Here, Ms. Becker's allegations establish not only her concrete stake in this litigation for purposes of Article III standing, but also her ability to pursue broader relief for the mismanagement of the Plan as a whole. Like the *Braden* plaintiff, she alleges that she invested in the TD Collective Trusts during the class period (Compl. ¶¶ 12-16) and that she lost money due to Defendants' mismanagement of the Plan which affected her investments (*id*. ¶¶ 78-97, 180-90). *See Braden*, 588 F.3d at 590. She also alleges, like the plaintiff in *Braden*, that Defendants' fiduciary violations are broad-sweeping in nature and caused losses to other Plan investments in which she did not invest (*id*. ¶¶ 98-148, 180-90). These losses are all based on Defendants' disloyal conduct of adding proprietary, untested, underperforming funds to the Plan over suitable alternatives. *Id*. ¶¶ 3, 67-73. Finally, Plaintiff seeks, and is authorized to obtain, broad remedial relief for the losses suffered by the plan as a whole under 29 U.S.C. § 1132(a)(2) and § 1109, which allow her to recover "any losses to the plan resulting from" Defendants' fiduciary violations. *Id*. ¶¶ 185-88; *Russell*, 473 U.S. at 142, n.9 (claims under § 1132(a)(2) are necessarily "brought in a representative capacity on behalf of the plan as a whole."); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 261 (2008) (Thomas, J., concurring) ("On their face, §§

[1109(a)] and [1132(a)(2)] permit recovery of *all* plan losses caused by a fiduciary breach.") (emphasis in original).

The weight of authority follows *Braden*'s holding, permitting an ERISA plaintiff to seek relief related to fund options other than the ones in which she invests. *Parmer v. Land O'Lakes, Inc.*, No. 20-1253 (DSD/HB), 2021 WL 464382, at *3-4 (D. Minn. Feb. 9, 2021) (citing *Braden* and finding that Plaintiff had constitutional standing for ERISA claims regarding all retirement plan options, despite investing in only three); *Boley v. Universal Health Servs., Inc.*, No. 20-2644, 2020 WL 6381395, at *4-5 (E.D. Pa. Oct. 30, 2020) (ERISA plaintiffs had standing under *Thole*, although invested in only some of the funds challenged); *Rohan v. Saint Luke's Health Sys., Inc.*, No. 4:20-cv-00179-SRB, 2020 WL 8410451, at *3-4 (W.D. Mo. June 22, 2020) (ERISA plaintiff had standing to pursue claims for funds she did not invest in).

The Supreme Court's recent decision in *Thole* supports Plaintiff's Article III standing here and does not conflict with *Braden*. *Contra* Mot. at 12. Ms. Becker, a participant in a defined-contribution plan,[7] is precisely the type of ERISA plaintiff that has constitutional standing under *Thole* because she alleges that mismanagement of her 401(k) plan caused losses to her ***individual*** account. Compl. ¶¶ 15-16, 97; *Thole*, 140 S. Ct. at 1616 (distinguishing between standing for participants in the at-issue defined-benefit

[7] A defined-contribution plan provides "an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account[.]" 29 U.S.C. § 1002(34). In contrast, a defined-benefit plan does not hold its assets in individual accounts; rather, participants receive a fixed level of benefits and the plan takes on the risk associated with investment of the plan's assets. 29 U.S.C. § 1002(35).

pension plan versus participants in a 401(k) plan). Specifically, *Thole* recognized that a 401(k) plan participant alleging loss to her retirement account has a justiciable claim under Article III and has representational standing to pursue § 1132(a)(2) claims on behalf of the entire plan. *Id.* at 1620.

In sum, because Ms. Becker undisputedly suffered Article III injury due to the Wells Fargo funds in which she invested, she may pursue ERISA claims on behalf of the Plan including claims concerning funds in which she did not directly invest.

B. Plaintiff Plausibly Alleges ERISA Claims for Fiduciary Breach and Prohibited Transactions.

Under Eighth Circuit law, Ms. Becker's factual allegations are more than sufficient to allow this action to proceed. Plaintiff's allegations—that Defendants used their employees' retirement savings to seed newly created Wells Fargo Funds, which had no track record to demonstrate they were appropriate for the Plan; that the Wells Fargo Funds underperformed Defendants' chosen benchmarks over 4-6 years; and that the Wells Fargo Funds were more expensive than similar (and sometimes identical) alternative funds—state plausible claims for fiduciary breach. Section III.B.2-3, *infra*. Plaintiff also properly plead prohibited transaction claims, and Defendants' extrinsic documents (which should not be considered) do not show otherwise. Section III.B.4, *infra*. Lastly, the Complaint plausibly alleges that Wells Fargo knowingly participated in the breach of fiduciary duties. Section III.B.5, *infra*.

While Defendants wrongly assert that the Complaint "bears no resemblance to complaints that have withstood motions to dismiss," the weight of authority sustaining complaints in similar ERISA cases demonstrates precisely the opposite: that the allegations in Ms. Becker's complaint are more than sufficient to plausibly state fiduciary breach and prohibited transaction claims. Section III.B.2-4, *infra*. Accordingly, Defendants' Motion should be denied in full.

1. Defendants' Reliance on Extrinsic Documents to Contradict the Complaint's Factual Allegations is Improper.

Defendants submitted 30 exhibits (totaling over 250 pages) to rebut the factual allegations in the Complaint. Defendants' reliance on these extrinsic materials is inappropriate at the pleading stage. Those documents are not embraced by the Complaint and Defendants offer them to contradict the Complaint's factual allegations, which is improper given that the Court must accept all allegations as true on a motion to dismiss.

Generally, when ruling on a Rule 12(b)(6) motion, the Court may not look beyond the four corners of the complaint. *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). While this rule has limited exceptions, in all circumstances extrinsic materials *cannot* be considered on a motion to dismiss if they are used to contradict the complaint's allegations. *Morin v. Essentia Health*, No. 16-4397, 2017 WL 4876281, at *1 (D. Minn. Oct. 27, 2017) (declining to consider extrinsic documents that were submitted "apparently in an effort to undermine Plaintiffs' allegations."); *see also State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1107 (8th Cir. 1999). The Court may only consider extrinsic "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012) (quotation omitted).

Moreover, Defendants' own authority indicates that the extrinsic documents (save one) are not embraced by the Complaint because they are not referenced in it. *Elkharwily v. Mayo Holding Co.*, 955 F. Supp. 2d 988, 992 (D. Minn. 2013) (finding that medical report referenced in the complaint is embraced by the complaint). Here, the only extrinsic document referenced in the Complaint is the Plan document (Holland Ex. A, ECF No. 100-2), which Plaintiff agrees may generally be considered at the pleading stage. Compl. ¶ 218. Here, however, Defendants provide an excerpt of the Plan document, which offers incomplete (and biased) information. *See, e.g.*, *Arriaga v. Orgil Int'l Greenhouse Corp.*, No. 07-cv-0217-LAB (NLS), 2007 WL 2904055, at *2 (S.D. Cal. Oct. 2, 2007) ("incomplete and contested documentary evidence is not competent when offered as proof of matters asserted").

Defendants' other twenty-nine (29) extrinsic documents, Hooley Exs. A – S (ECF Nos. 101-2-101-20), Chirinos Exs. A – F (ECF Nos. 102-2-102-7) and Holland Exs. B – E (ECF Nos. 100-3-100-6), are ***not*** referenced in the Complaint; they are summaries of various facts far outside the four corners of the Complaint. Furthermore, Defendants rely on these documents for the truth of the factual statements therein, which at best, creates disputed factual issues that cannot be resolved at the pleading stage. *Hickory Springs Mfg. Co. v. R & D Plastics of Hickory, Ltd.*, No. 5:14-cv-00093-RLV, 2015 WL 4430219, at *3 n.3 (W.D.N.C. July 20, 2015) ("'[C]herry-picked portions of' [documents attached to a motion to dismiss] are necessarily subject to 'reasonable dispute'") (quotation omitted).

The reason Defendants may not use extrinsic materials to contradict Plaintiff's factual allegations is obvious: a proper Rule 12(b)(6) motion challenges the sufficiency of the pleading. Defendants improperly seek to contradict Plaintiff's factual allegations even though those allegations must be assumed to be true on a Rule 12(b)(6) motion. 5B Charles A. Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 1357 (3d ed.) ("A proposition that is at the heart of the application of the Rule 12(b)(6) motion, and one that is of universal acceptance . . . is that for purposes of the motion to dismiss . . . the [complaint's] allegations are taken as true."). Accordingly, the Court should decline to consider the extrinsic documents attached to the Motion.

2. Plaintiff Plausibly Alleges Violations of the Duty of Prudence.

Under Eighth Circuit law, Plaintiff has alleged facts sufficient to establish an inference of imprudence. *See* Section II.A, *supra*; 29 U.S.C. § 1104(a)(1)(B). Indeed, based on virtually identical allegations involving the same Plan, this Court rejected a motion to dismiss in *Gipson v. Wells Fargo*, No. 08-4546 (PAM/FLN), 2009 WL 702004, at *5 (D. Minn. Mar. 13, 2009). In *Gipson*, the complaint alleged that Wells Fargo 401(k) Plan's assets were used as "'seed money' for the Wells Fargo funds. . . to attract other investors," and that the fees and "performance of the Wells Fargo funds was sub-par" compared to similar funds. 2009 WL 702004, at *5. Similarly here, the Complaint alleges that (1) the challenged Wells Fargo Funds underperformed appropriate benchmarks; (2) Defendants used the Plan's assets to seed newly-launched Wells Fargo Funds that lacked a performance history necessary to evaluate them; and (3) the Wells Fargo Funds charged greater fees than similar (or substantially identical) non-proprietary funds. These allegations are more than sufficient to plausibly state a claim for breach of the duty of prudence. *See Meiners v.*

Wells Fargo & Co., 898 F.3d 820, 822 (8th Cir. 2018) (citing *Braden*, 588 F.3d at 595–96); *Krueger*, 2012 WL 5873825, at *10.

a. *Plaintiff alleges that the Wells Fargo Funds underperformed "meaningful benchmarks," consistent with Meiners and Braden.*

The Eighth Circuit in *Meiners* held that fiduciary breach claims based on excessive fees or underperformance "must provide a sound basis for comparison—a meaningful benchmark." 898 F.3d at 822. Ms. Becker meets this standard, as the Complaint alleges that the Wells Fargo Funds underperformed ***the very benchmarks Wells Fargo itself selected*** as comparisons for the Funds.[8]

Table 1:

Wells Fargo Fund	**Wells Fargo Selected Benchmark**	**Period**	**Amount Underperformed**	**Compl. ¶**
TD Collective Trusts	Morningstar Lifetime Conservative Indexes	2016 - 2019	$105 million	¶¶ 93-96
Causeway Fund	MSCI EAFE Index	2015 - 2019	$60 million	¶¶ 116-18
	Causeway Sep Acct (identical)	2015 - 2019	$5 million	¶¶ 111-14, 117-18
Money Market Fund	FTSE 3-mo treasury bill index	2014 - 2019	$5 million	¶¶ 124-25, 129
Emerging Growth Fund	Russell 2000 Growth Index	2014 - 2019	$1.8 million	¶¶ 146-47

[8] For the TD Collective Trusts, Causeway and Money Market Funds, the benchmark identified in the Complaint is the same benchmark Defendants reported to participants as the "appropriate broad-based securities market index" pursuant to 29 C.F.R.§ 2550.404a-5(d)(1)(3). And Wells Fargo discloses the benchmark for the Emerging Growth Fund (Russell 2000 Growth Index) to investors in its prospectus. *U.S. Equity Funds Prospectus* (March 9, 2021), https://www.wellsfargoassetmanagement.com/assets/edocs/regulatory/prospectus/us-equity-inst-oct-pro.pdf.

Under *Meiners*' holding—that imprudence may be inferred when the plaintiff alleges underperformance of a fund compared to a meaningful benchmark—Plaintiff plausibly states a breach of ERISA's duty of prudence. 898 F.3d at 822 (explaining that the critical difference between the *Meiners* and *Braden* pleadings is that the underperformance allegations in the *Meiners* complaint were ***not*** based on "meaningful" benchmarks). Here, Defendants do not contend that the benchmarks identified in the Complaint are ***not*** meaningful benchmarks; nor could they, given that Defendants themselves chose and reported the very same benchmarks to Plan participants pursuant to their fiduciary disclosure obligations. *See* note 8 *supra*. As such, the Complaint here does not and could not suffer from the defects identified in *Meiners*. 898 F.3d at 822; *contra* Mot. at 1 (asserting, without analysis, that the Complaint "resembles" the dismissed complaint in *Meiners*).

In an attempt to sidestep this conclusion, Defendants contend that courts "routinely dismiss[] fiduciary breach claims premised on modest or temporary periods of underperformance." Mot. at 16. The only Eighth Circuit decision Defendants cite is *Davis*, which dismissed the ERISA prudence claims because it found the Vanguard comparator funds identified in the complaint were not meaningful benchmarks. *Davis v. Washington Univ. in St. Louis*, 960 F.3d 478, 484-86 (8th Cir. 2020) (citing *Meiners*, 898 F.3d at 822). By contrast, here the Complaint alleges that each Wells Fargo Fund underperformed compared to Defendants' own selected benchmarks. Accordingly, Plaintiff Becker's underperformance allegations support the inference of imprudence under both *Davis* and *Meiners*.

Additionally, while *Davis* notes that a plan fiduciary is not required to pick the "best performing fund," it did not hold, as Defendants contend, that modest or temporary periods of underperformance of a fund compared to its own self-identified performance benchmark are condoned by ERISA. *Id.* at 486. Here, unlike in *Meiners* or *Davis*, Ms. Becker does not merely allege underperformance based on one or two other funds. She also explains that the challenged Wells Fargo funds underperformed Defendants' own hand-selected benchmarks for periods of four to six years. *See* Table 1, *supra*, page 16 (providing periods of underperformance). This hardly qualifies as "modest or temporary" underperformance (*contra* Mot. at 16) and multi-year periods of underperformance are plainly sufficient to state a claim of imprudence. *See, e.g.*, *Braden*, 588 F.3d at 596 (imprudence plausibly alleged where the challenged funds underperformed their benchmarks for years); *Gipson*, 2009 WL 702004, at *5-6 (sustaining imprudence claims against fiduciaries of Wells Fargo plan because the Wells Fargo funds underperformed comparable funds for years); *Krueger*, 2012 WL 5873825, at *10 (similar).

Finally, Defendants' attempt to create factual disputes to undermine the Complaint's allegations (Mot. at 17-18)[9] is improper at the pleading stage. *Gipson*, 2009 WL 702004, at *5-6 (sustaining claims of imprudence against Wells Fargo fiduciaries notwithstanding

[9] Even if the extrinsic material is considered, it supports (rather than refutes) Plaintiff's allegations. For instance, while Defendants assert that the TD Collective Trusts outperformed their benchmarks as of 2018 (Hooley Ex. N, ECF No. 101-15), the 2019 performance information, which ***subsumes*** the 2018 information, confirms that the TD Collective Trusts ***underperformed*** their benchmarks from 2016 to 2019, consistent with the Complaint's allegations. *See* Hooley Ex. D, ECF No. 101-5; *contra* Mot. at 17-18. The same document also shows the Money Market Fund underperformed its benchmark on a 1, 3 and 5-year basis. *Id.*; *contra* Mot. at 26-27.

submitted extrinsic documents that purported to show that the funds performed well); *see also Nelsen v. Principal Glob. Invs. Tr. Co.*, 362 F. Supp. 3d 627, 641 (S.D. Iowa 2019) (rejecting arguments that "ask the Court to weigh the facts, a task that is not permitted when considering a motion to dismiss").

b. *Defendants used Plan assets to seed newly-launched Wells Fargo Funds that had no performance history.*

The Complaint alleges that Defendants used billions of dollars of the Plan's assets to seed newly-launched Wells Fargo Collective Trusts. These actions violate Defendants' duty of loyalty (discussed below) ***and*** duty of prudence because to invest billions of dollars of retirement assets in untested funds violates prevailing fiduciary norms. As the Department of Labor ("DOL") explained in its guidance concerning target date funds, when "selecting a TDF you [the fiduciary] should consider prospectus information, such as information about performance (investment returns) and investment fees and expenses." U.S. DOL Fact Sheet "Target Date Retirement Funds - Tips for ERISA Plan Fiduciaries."[10] Here, however, the Fiduciary Defendants necessarily failed to consider the performance history of the TD Collective Trusts because there was ***no*** performance history to consider when they were chosen for the Plan. Compl. ¶¶ 83-92. The same is true for the Causeway Fund. *Id*. ¶ 106.

Not surprisingly, courts routinely hold that, where an ERISA plaintiff alleges that fiduciary defendants choose new and untested funds for a plan, those allegations are

[10] *Target Date Retirement Funds-Tips for ERISA Plan Fiduciaries* (February 2013), *available at* https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/target-date-retirement-funds.pdf.

sufficient to infer imprudence. *See, e.g.*, *Krueger*, 2012 WL 5873825, at *11 (sustaining fiduciary breach claims for choosing "novel" funds "instead of more established and better performing alternatives"); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. SACV 15-1614-JLS-JCGX, 2016 WL 4507117, at *2 (C.D. Cal. Aug. 5, 2016) ("[n]ew funds are generally imprudent selections for a retirement plan because they are untested and carry expensive start-up costs"); *Pledger v. Reliance Tr. Co.*, 240 F. Supp. 3d 1314, 1326–27 (N.D. Ga. 2017) (sustaining fiduciary breach claims where defendants invested the plan in target date funds "which ***had been created two days before*** Reliance included them in the Plan.") (emphasis added). These allegations standing alone are likely sufficient to infer imprudence.

Defendants respond to these damning factual allegations by attempting to create disputed issues of fact. Mot. at 6, 14-15. This is inappropriate at the motion to dismiss stage. *See* Section III.B.1, *supra*. Plaintiff's allegations that Defendants seeded several new Wells Fargo Funds with the Plan's assets to make them more marketable to outside investors—when taken as true—are sufficient to infer imprudence. *See, e.g., Gipson*, 2009 WL 702004, at *5-6 (allegations that Wells Fargo plan fiduciaries used plan assets to "seed" Wells Fargo funds supported inference of imprudence and holding that the resolution of factual disputes "must await further record development."); *Krueger*, 2012 WL 5873825, at *10 (similar). Even if the disputed issues of fact were considered at the pleading stage, because the Court must draw all inferences in Plaintiff's favor, Defendants' Motion should still be denied. *E.g., Davis*, 960 F.3d at 483-84 (holding that the district court erred by dismissing fiduciary breach claims because it did not draw all inferences in plaintiffs' favor).

Further, Defendants' extrinsic documents do not show that the TD Collective Trusts were created "exclusively" for the Plan and would not accept other investors.[11] *See* note 13, *infra*. And, whatever Defendants' motivation was for investing the Plan in the newly-formed TD Collective Trusts, the fact that they had no track record or performance history, which are necessary to determine whether the funds are appropriate for the Plan, is indicative of imprudence. Compl. ¶¶ 83-85; 29 C.F.R. § 2550.404a-1(b)(1)(i), (b)(2)(i) (prudence requires the consideration of relevant facts and circumstances, including the returns associated with that investment compared to alternative investments with similar risks).

c. *Defendants' selection of Wells Fargo Funds that are more expensive than similar or identical funds is indicative of imprudence.*

Plaintiff alleges that the Fiduciary Defendants invested Plan assets in the Wells Fargo Funds which charged higher fees than similar (sometimes materially identical) funds. *See* Compl. ¶¶ 90, 111-14, 142-45, 126-28. These allegations, taken as true, plausibly state claims for imprudence. *Gipson*, 2009 WL 702004, at *5; *Davis*, 960 F.3d at 483-84; *Braden*, 588 F.3d at 596.

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[11] Likewise, Defendants' extrinsic documents (which are improper) do not show that the TD Collective Trusts were "substantially similar" to the previous Wells Fargo Dow Jones Funds. *Contra* Mot. at 15. In fact, Hooley Exhibit C, ECF No. 101-4, shows that Defendants used a different benchmark for the TD Collective Trusts versus the Wells Fargo Dow Jones Funds.

For instance, the Complaint explains that the Causeway Fund—a fund managed by Wells Fargo but sub-advised by Causeway—is almost twice as expensive (24 bps greater) than a nearly identical Causeway fund which was invested in by other plans that were smaller in size. *Compare* Compl. ¶¶ 110-14, *with Braden*, 588 F.3d at 595 n.5 (fee differential of 25 bps between fund in plan versus other substantially identical funds supported claim of fiduciary breach); *Davis*, 960 F.3d at 483 (reversing dismissal of ERISA complaint that alleged that plan was invested in higher cost shares of substantially identical investments). While Defendants concede that "ERISA plaintiffs may state a claim by alleging that 'the *same* fund' the fiduciaries offered was available at a lower price" (Mot. at 14), they argue that Plaintiff's comparison of the Causeway Fund "to the Causeway International Separate Account (¶ 113) is inappropriate because the two funds are different investment vehicles with different fee structures." Mot. at 28. To the contrary, there is no legitimate reason to pay more for a Wells Fargo affiliated fund than a fund that is materially identical, yet cheaper. *See Nelsen*, 362 F. Supp. 3d at 633 (denying motion to dismiss where plaintiff alleged 401(k) plan was invested in "Principal-affiliated mutual funds as investments within the Principal CITs despite the availability of lower-cost, but otherwise identical, annuity separate accounts managed by Principal."); *Davis*, 960 F.3d at 483 (reversing dismissal of complaint against plan fiduciaries where complaint alleged fiduciaries invested the plan in higher cost shares of substantially identical investments).

And unlike *Meiners*, here the Complaint explains that the strategy of the cheaper non-affiliated Causeway fund matches nearly word-for-word that of the challenged Causeway Fund sponsored by Wells Fargo. Compl. ¶ 110. Indeed, that the investment strategies of the two funds are identical is confirmed by Defendants' extrinsic materials. Hooley Ex. L., ECF No. 101-13 at 3. In *Gipson*, this Court sustained fiduciary breach claims based on similar allegations that the fiduciaries of the Wells Fargo Plan invested the Plan's assets in more expensive funds which were materially identical to cheaper funds. *See* 2009 WL 702004, at *5. Notably, in reaching that holding, this Court rejected Wells Fargo's argument that a fee waiver brought the Plan's fees below the fees paid by the cheaper share class. *Id.*

Defendants also wrongly assert that the difference in fees between the Causeway Fund and the almost identical Causeway separate account is less than 3 bps and thus too small to support an inference of imprudence. Mot. at 28. This conclusion appears to be predicated on incorrect math: the fee differential between the two funds is not less than 3 bps, it is 24 bps because the Causeway Fund charges 55.6 bps (or 0.556%) and the separate account charges just 32 bps (or 0.32%). Compl. ¶¶ 111-14.

Defendants also fail to meaningfully address Plaintiff's allegations that the Plan pays 90 bps for its holdings in the Emerging Growth Fund, which is 300% higher than the average fees paid by large plans investing in domestic equity funds. Compl. ¶ 143. Instead, Defendants attempt to distract focus on these exorbitant fees by asserting that the fees are not as bad as they look because the Plan purportedly receives a partial rebate of 15 bps for this fund. Mot. at 28. While this is an improper factual dispute, even assuming that the Plan paid only 75 bps to Wells Fargo (based on the asserted 15 bps waiver), the Plan would still pay Wells Fargo a fee that is ***209% greater*** (36 bps more) than the average fees paid for the same type of fund. Compl. ¶ 143; *see Braden*, 588 F.3d at 595-96.

Ultimately, whether the Plan paid Wells Fargo 90 bps or 75 bps for the Emerging Growth Fund, that fee is substantially more expensive than comparable alternatives managed by Vanguard (which charges 34 bps), Triton (which charges 66 bps), and T. Rowe Price (which charges 66 bps). Compl. ¶¶ 144-45. Defendants strangely assert that the Plan's investment in the Causeway Fund charges a lower fee than the Triton fund. Mot. at 28-29 (citing Chirinos Ex. E, ECF No. 102-6). Again, Defendants' reliance on extrinsic materials to create factual disputes is inappropriate at the pleading stage. Regardless, their factual conclusions are plainly erroneous as the document which they offer in support actually ***confirms*** the Complaint's allegation that the Triton fund is 24 bps cheaper than the Emerging Growth Fund the Plan invested in (and would be 9 bps cheaper even with the rebate for the Emerging Growth Fund). *Compare* Compl. ¶¶ 143-45 *with* Chirinos Ex. E, ECF No. 102-6 (showing Triton fund's cheapest share class is 66 bps, 24 bps lower than the Emerging Growth Fund).

Finally, the Fiduciary Defendants cannot dodge responsibility for their decisions to choose Wells Fargo sub-funds as investment options for the Plan. Defendants' argument that an ERISA participant cannot claim imprudence concerning a "subfund" of an investment option in the Plan (Mot. at 27) is contrary to the Complaint's allegations. Compl. ¶ 100 (alleging that the Fiduciary Defendants "are responsible for selecting the sub-funds that comprise the International Fund and thus were responsible for selecting the [Causeway] Fund") and ¶ 133 (the Fiduciary Defendants "are responsible for selecting the sub-funds that comprise the Small Cap Fund and thus were responsible for selecting the [Emerging] Growth Fund as a Plan investment.").

Additionally, courts have sustained claims against plan fiduciaries for failing to select and monitor all funds in a plan—including sub-funds—based on the requisite considerations of the fund's costs, performance and risk-profile compared to alternative investment options. For example, in *Nelsen*, the court found that allegations that Principal fiduciaries invested their employees' 401(k) assets in funds that contained expensive and untested Principal sub-funds were sufficient to plausibly allege imprudence. 362 F. Supp. 3d at 633.

In short, Plaintiff's allegations that the Wells Fargo Funds were more expensive than similar, and sometimes identical funds, are sufficient to state a plausible claim for imprudence.[12] *See Braden*, 588 F.3d at 596; *Gipson*, 2009 WL 702004, at *5; *Davis*, 960 F.3d at 483-86.

3. <u>Plaintiff Plausibly Alleges Violations of the Duty of Loyalty.</u>

ERISA's duty of loyalty requires that plan fiduciaries "must display ... complete loyalty to the interests of the" plan participants whose retirement assets they manage, and plan fiduciaries "must exclude all selfish interest and all consideration of the interests of third persons." *Krueger*, 2012 WL 5873825, at *8 (quoting *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000)); *see also* Bogert's Trusts and Trustees § 255 (2d ed. 2009) (same); Section II.C, *supra*; 29 U.S.C. § 1104(a)(1)(A). Additionally, Circuit courts have recognized that "[w]here it might be possible to question the fiduciaries' loyalty, they are obliged at a

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[12] The Complaint also alleges the TD Collective Trusts are 20% more expensive than similar target date funds available directly from State Street, who is the sub-advisor of the TD Collective Trusts (Compl. ¶ 90) and that the Money Market Fund is 6 bps more expensive than the average fee paid by large plans for a similar fund (*id*. ¶¶ 126-28).

minimum to engage in an intensive and scrupulous independent investigation of their options to insure that they act in the best interests of the plan beneficiaries." *Leigh*, 727 F.2d at 125-26 (citation omitted); *see also Howard*, 100 F.3d at 1489 (same); *Bierwirth*, 680 F.2d at 271 (same); *Grindstaff v. Green*, 133 F.3d 416, 430 (6th Cir. 1998) (same).

Here, the Complaint contains myriad allegations that Defendants' fiduciary process for selecting Wells Fargo Funds for the Plan "failed to satisfy threshold procedural norms needed for a non-conflicted fiduciary to satisfy their duties of loyalty." Compl. ¶¶ 76; 78-147. Indeed, Plaintiff's loyalty claims are supported by approximately seventy paragraphs of facts establishing that Defendants "selected and retained Wells Fargo products over materially identical, yet cheaper, non-proprietary alternatives; selected Wells Fargo products that had no performance history" and "failed to remove proprietary funds despite sustained underperformance." Compl. ¶ 76; *see also* Compl. ¶¶ 78-147. Allegations like these are more than sufficient to state plausible claims for fiduciary breach. *See Krueger*, 2012 WL 5873825, at *10-11 (denying motion to dismiss complaint that alleged the Ameriprise defendants "chose investment options with poor or non-existent performance histories" and "continued to choose novel or poorly performing affiliated fund[s]" for the plan "instead of more established and better performing alternatives.").

Defendants ignore Plaintiff's detailed allegations and instead wrongly contend that Plaintiff's breach of loyalty claims turn on "the mere fact that some of the offered investments are proprietary in nature." Mot. at 18. Not so. For example, Plaintiff alleges that Defendants used $5 billion of the Plan's assets to seed the newly-launched TD Collective Trusts "[u]pon their creation in 2016. . . even though the funds had no prior performance history or track record which could demonstrate that they were appropriate funds for the Plan." Compl. ¶ 83. Likewise, the Plan invested in the Causeway Fund almost immediately after it was created in September 2014. *Id.* ¶ 104. Defendants do not dispute that these Wells Fargo Funds were added to the Plan upon their creation. Mot. at 14-15, 28. Yet they offer a counter explanation for why they selected Wells Fargo funds without any track record or performance history in attempt to rebut Plaintiff's allegations. Mot. at 2 (asserting that the reason the Plan was the first investor in the TD Collective Trusts is that the funds were "designed exclusively for the Wells Fargo Plan" and "could not possibly have been a source of future investment by third parties.") Again, Defendants are free to raise disputed issues of fact on summary judgment, but may not do so in a Rule 12(b)(6) motion. *Nixon*, 164 F.3d at 1107 (extrinsic materials which contradict the complaint's allegations cannot be considered on a motion to dismiss). However, even if the Court reviewed Defendants' extrinsic materials, it would find that the TD Collective Trusts were made available and advertised to a wide range of eligible investors that could not (by definition) be Wells Fargo.[13]

The Complaint further alleges that, after adding the newly-launched Wells Fargo Funds to the Plan, Defendants ignored their underperformance for years. Compl. ¶¶ 76, 91-92, 95-97, 116-18, 121-29, 134, 146-47. Courts routinely sustain ERISA claims for breach

[13] The very fund disclosures on which Defendants rely do ***not*** indicate evidence that the TD Collective Trusts were created "exclusively" for the Wells Fargo Plan. *Contra* Mot. at 6. Rather, they indicate that the TD Collective Trusts were available to a wide range of eligible investors, like governmental plans, 403(b) plans, plans organized in Puerto Rico, other collective trust funds, separate accounts maintained by insurance companies, and custodial accounts. Hooley Exs. A and B, ECF Nos. 101-2 & 101-3.

of loyalty based on far less-specific allegations. *See Urakhchin*, 2016 WL 4507117, at *6 (sustaining breach of loyalty claims where defendants retained proprietary funds "despite their excessive fees and poor performance."); *Terraza v. Safeway, Inc.*, 241 F. Supp. 3d 1057, 1075-81 (N.D. Cal. 2017) (same).

Defendants also attempt to dodge Plaintiff's well-pled allegations by wrongly asserting that Congress and the DOL have condoned the practice of financial institutions offering proprietary investment products to their employees through their 401(k) plans. Mot. at 18-19 ("[I]t would be contrary to normal business practice for a bank to invest its plan assets in another bank.") (citing H.R. Conf. Rep No. 93-1280, Aug. 12, 1974). However, this quotation actually refers to plans making bank ***deposits*** with affiliated banks. *See* H.R. Conf. Rep. No. 93-1280, reprinted in 1974 U.S.C.C.A.N. 5038, 5093 ("In certain cases the prohibited transaction rules . . . do not prevent a bank . . . which is a plan fiduciary from investing all or part of the plan's assets in ***deposits*** with the bank, etc., if the deposits bear a reasonable interest rate.") (emphasis added).

By contrast, the relevant section of the legislative history discussing the "[e]xemption for certain pooled investment funds" does not remotely indicate that including a bank's own affiliated funds in the bank's 401(k) plan is condoned by ERISA. *Id.* at 5096. Rather, it states that while "in certain circumstances" ERISA may allow "the purchase and sale of interests in a pooled fund maintained by a bank, etc., which is a plan fiduciary. . . ***it generally is inappropriate for the bank, etc., to make the decisions with respect to investment in a pooled fund because of a potential conflict of interest***." *Id.* at 5096 (emphasis added). Further, the mere availability of prohibited transaction exemptions does not affect the plausibility of Plaintiff's claim for breach of Defendants' duty of loyalty. *See, e.g.*, DOL Advisory Opinion 1998-06A ("[I]f the decision is motivated by the intent to generate seed money that facilitates the marketing of the mutual fund, then the plan fiduciary would be liable for any loss resulting from such breach of fiduciary responsibility[.]"). The relevant inquiry is "whether fiduciaries with divided loyalties make an intensive and scrupulous investigation of the plan's investment options." *Leigh*, 727 F.2d at 127; *see also Schaefer v. Arkansas Med. Soc.*, 853 F.2d 1487, 1492 (8th Cir. 1988).

Finally, Defendants' attempt to muddy the waters concerning how much the Plan paid Wells Fargo as fees for the Wells Fargo Funds is of little relevance on a Rule 12(b)(6) motion, where the Court is required to draw all inferences in Plaintiff's favor. *Contra* Mot. at 19. Further, even if one assumes that Wells Fargo did rebate the Plan some (but not all) of the fees Wells Fargo was paid from its employees' retirement assets, a partial fee waiver is not an absolute shield to claims of disloyalty based on allegations that Defendants invested the Plan's assets in newly-launched and poorly performing Wells Fargo Funds. *See Tussey v. ABB, Inc.*, 850 F.3d 951, 957 (8th Cir. 2017) ("The fact the ABB fiduciaries apparently did not. . . seize every opportunity to send Fidelity more of the participants' money, does little to undermine the district court's finding [of the breach of loyalty]."). Ultimately, the development of a full factual record is necessary to determine if any fee offsets are available to Defendants. *Gipson*, 2009 WL 702004, at *6 (resolution of factual disputes "must await further record development.")

4. Plaintiff Has Plausibly Pled that Defendants Engaged in Transactions Prohibited Under ERISA.

Defendants concede that ERISA's prohibited transaction provisions categorically bar certain transactions deemed "likely to injure the [...] plan." Mot. at 19-20 (citing *Harris Tr.*, 530 U.S. at 241–42). These transactions are *per se* "prohibited" and are enumerated at 29 U.S.C. § 1106.[14]

Here, Ms. Becker plausibly alleges three types of prohibited transactions. Compl. ¶¶ 149-51. ***First***, Plaintiff alleges that the Fiduciary Defendants violated § 1106(a)(1)(A) by causing the Plan to purchase property in Wells Fargo affiliated funds from Wells Fargo and Wells Fargo Bank, which are both ERISA parties-in-interest. *Id*. ¶¶ 152, 192-95. This Court found similar allegations were sufficient to plausibly allege prohibited transaction claims for the purchase of affiliated funds in *Krueger*, 2012 WL 5873825, at *15-16, and *Gipson*, 2009 WL 702004, at *4-5.

Second, Plaintiff alleges that the Fiduciary Defendants, Wells Fargo Bank, and Galliard Management ("Galliard") violated § 1106(a)(1)(D) by causing the transfer of Plan assets to Wells Fargo Bank and its affiliates through fees associated with the Wells Fargo Funds. *Id*. ¶¶ 153-56 (describing the specific fees the Plan paid to Wells Fargo), ¶¶ 159-69 (describing how Wells Fargo and its affiliates have discretion to invest in funds or instruments that pay fees to Wells Fargo), ¶¶ 197, 229 (describing the transfers of Plan assets to Wells Fargo and its affiliates in the form of fees). This Court found similar

[14] Plaintiff notes that *Meiners* did not address the pleading standards for prohibited transaction claims because *Meiners* alleged only fiduciary breach claims. 898 F.3d at 821 (identifying claims asserted in the *Meiners* complaint).

allegations were sufficient to plausibly allege prohibited transaction claims under both § 1106(a) and (b) in *Krueger*, 2012 WL 5873825, at *16, and *Gipson*, 2009 WL 702004, at *4. *See also Braden*, 588 F.3d at 600-02 (remanding dismissal of § 1106(a) party-in-interest claims).

Third, Plaintiff plausibly alleges violations of §§ 1106(b)(1) and 1106(b)(3) against the Fiduciary Defendants, Wells Fargo Bank, and Galliard for seeding Wells Fargo's newly-launched funds and directing revenue to Wells Fargo from the Plan's assets through fees. Compl. ¶¶ 77, 87, 107-08, 203-08; *see Krueger*, 2012 WL 5873825, at *16 (sustaining § 1106(b) claims based on allegations that investment in Ameriprise funds "allowed Ameriprise to benefit both financially, through fees paid by the options to Ameriprise, and commercially, by increasing the assets under management"); *Gipson*, 2009 WL 702004, at *4 (same as to Wells Fargo).

a. *Defendants' assertion of extrinsic facts is improper and unavailing.*

Defendants' bid to dismiss Plaintiff's prohibited transaction claims through disputed factual assertions (*see* Mot. at 21) fails for two independent reasons. First, as discussed *supra* Section III.B.1, Defendants may not use extrinsic documents to contradict the Complaint's well-plead allegations. Further, Defendants rely on cases, unlike here, where the complaint lacked factual allegations to support its prohibited transaction claims. Mot. at 21-22. Defendants may not replace Ms. Becker's detailed and fulsome factual allegations—which are sufficient to state a claim for relief—with their extrinsic documents. 5B Charles A. Wright & Arthur R. Miller § 1357 (3d ed.).

Second, even if the Court were to consider Defendants' extrinsic documents, they do ***not*** demonstrate that the Plan paid Wells Fargo no fees. *Contra* Mot. at 21. For example, while the fund disclosure for the TD Collective Trusts states that "Wells Fargo does not charge a trustee fee to the Funds," the same document also states that the "Underlying Fund expenses will be in addition to the fees and expenses charged by Wells Fargo to the [TD Collective Trusts]." Hooley Ex. B, ECF No. 101-3 at 7. In other words, the very document upon which Defendants rely to establish that Wells Fargo did not take fees from the TD Collective Trusts indicates that Wells Fargo ***did*** collect "fees and expenses" from the Plan's assets held in those funds. The remainder of Defendants' extrinsic documents also undermine their factual contention that Wells Fargo receives no fees from the Plan's investments in Wells Fargo Funds. *See* Hooley Ex. J, ECF No. 101-11 at 12 ("These Underlying Fund Expenses will be in addition to the fees and expenses charged by Wells Fargo to the [Stable Return Fund]"); Ex. K, ECF No. 101-12 at 5 (same, for the Blackrock Short-Term Investment Fund); Ex. M, ECF No. 101-14 at 11 (same, for the Total Return Bond Fund); Ex. L, ECF No. 101-13 at 9 (Wells Fargo charges trustee fee to certain classes of the [Causeway Fund]). Defendants' assertion that Wells Fargo (and not the Plan) pays the investment management fees associated with the Stable Value Fund is undermined by the Plan's governmental filings—upon which Plaintiff's allegations are based—stating that those fees are paid with Plan assets.[15]

[15] Compl. ¶ 166; *see also* Yau Ex. B at "Notes to Financial Statements," at page 15 (2017 Form 5500 with Plan's financial statements disclosing plan paid expenses including "investment management fees in 2017 and 2016 were $204,079 and $296,479").

Likewise, Plaintiff alleges that the Stable Value Fund is invested in other Wells Fargo affiliated funds, which cause the Plan to pay more fees to Wells Fargo in addition to those deducted from the Stable Value Fund's assets. Compl. ¶ 166. This allegation is supported by the extrinsic documents upon which Defendants rely. Hooley Ex. I, ECF No. 101-10 at 2-3, 10 (disclosing that Stable Value Fund may invest in "Underlying Funds" that may charge additional investment management fees, contract fees and administrative expenses in addition to the fees for the Stable Value Fund itself).[16] Defendants' extrinsic documents, at most, create factual disputes unsuitable for resolution on a motion to dismiss.

Finally, Defendants wrongly contend that the fact that Wells Fargo Bank generated and kept float income from the Plan assets held in the Wells Fargo Funds cannot support a prohibited transaction claim. Mot. at 31 n.13 (citing *Tussey*, 746 F.3d 327 for the proposition that float income is not a plan asset). But *Tussey*'s holding was premised on the plaintiffs' failure to provide evidence that the plan had any property rights in the float income; the court did not hold that float income could not be a plan asset under any circumstances. Discovery is warranted to determine if the float income here are Plan assets.

b. *Defendants' assortment of alternative arguments all fail.*

The Motion contains several additional, and often confusing, arguments disputing the prohibited transaction claims. None of them undermine Plaintiff's plausible factual

[16] The Plan's financial statements disclose that the Stable Value Fund also invests in Wells Fargo Stable Return Fund G and the Wells Fargo/BlackRock Short Term Investment Fund S. Yau Ex. B at "Notes to Financial Statements," at page 11.

allegations establishing violations of §§ 1106(a) and (b), and any defenses Defendants rely on are not appropriately considered on a motion to dismiss.

(1) Subjective intent is not an element of a prohibited transaction claim.

Plaintiff is not required to plead "subjective intent" to plausibly state prohibited transaction claims. *See* 29 U.S.C. § 1106; *contra* Mot. at 22, 30. Courts have uniformly held that "a violation of § [1106] is a per se violation." *Chao*, 285 F.3d at 441 n.12; *see also Patelco*, 262 F.3d at 911 (holding § 1106(b) "creates a per se ERISA violation; even in the absence of bad faith, or in the presence of a fair and reasonable transaction") (citation omitted). Similarly, the Eighth Circuit does not require ERISA plaintiffs to plead subjective intent to benefit a party-in-interest. *See Braden*, 588 F.3d at 600-01 (allegations that a party-in-interest received kickbacks constituted a plausible claim for prohibited transaction under §§ 1106(a)(1)(C) and (D), without allegations of intent to benefit a party-in-interest).[17] Finally, DOL regulations make clear that if the Fiduciary Defendants exercised their discretion to invest in affiliated funds that caused the Plan to pay fees to Wells Fargo, they violated § 1106(b)(1), regardless of whether they acted with subjective intent to benefit themselves or Wells Fargo. 29 C.F.R. § 2550.408b-2(e) ("[A] fiduciary may not use the authority, control, or responsibility which makes such person a fiduciary to cause a plan to pay an additional fee to such fiduciary (or to a person in which such fiduciary has an interest).").

[17] Regardless, Plaintiff has sufficiently pled that the Fiduciary Defendants made Plan-related decisions with the intent to benefit themselves. Compl. ¶¶ 205, 207.

(2) The prohibited transactions alleged are between the Plan and Wells Fargo and its affiliates, which are unquestionably parties-in-interest.

Defendants' argument that the Wells Fargo Funds in which the Plan invests are not parties-in-interest within the meaning of 29 U.S.C. § 1002(3)(14), Mot. at 22-23, 30-32, is premised on a misconstruction of the Complaint's allegations. Plaintiff alleges that the Plan purchased property (interests in Wells Fargo Funds) from Wells Fargo and Wells Fargo Bank, which hold legal title to the Wells Fargo Funds[18] and both of which are indisputably parties-in-interest. Compl. ¶¶ 193-94; 29 U.S.C. § 1002(14)(C) (employer of employees in the Plan, such as Wells Fargo, is party-in-interest); 29 U.S.C. § 1002(14)(A) (fiduciary of the plan, such as Wells Fargo Bank, is party-in-interest). These allegations sufficiently state a claim for a prohibited transaction under § 1106(a)(1)(A) as to all the Wells Fargo Funds. *See Krueger*, 2012 WL 5873825, at *16 (sustaining prohibited transaction claim based on allegation that plan invested in affiliated funds); *Gipson*, 2009 WL 702004, at *4-5 (same).

Similarly, Defendants' contention that investment in a mutual fund (such as the Money Market Fund or the Emerging Growth Fund) does not convert a mutual fund's assets into plan assets (Mot. at 32) again misconstrues the alleged transaction. Plaintiff challenges the Fiduciary Defendants' decision to invest the Plan's assets in Wells Fargo sponsored mutual funds, thus transferring the Plan's assets directly or indirectly to Wells Fargo as fees. In other words, Plaintiff does not assert claims concerning the management of the Wells Fargo mutual funds themselves; rather, she challenges the Plan fiduciaries'

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[18] Wells Fargo holds legal title to the Money Market Fund and Emerging Growth Fund assets, and Wells Fargo Bank holds legal title to the collective trust assets. Compl. ¶ 193.

decision to purchase interest in the Wells Fargo mutual funds with the Plan's assets. Multiple courts have concluded that allegations almost identical to Plaintiff's state cognizable claims under § 1106(b)(1) and (b)(3). *See, e.g.*, *Baird v. Blackrock Institutional Tr. Co., N.A.*, 403 F. Supp. 3d 765, 783 (N.D. Cal. 2019) (sustaining § 1106(b) claims based on similar allegations); *Feinberg v. T. Rowe Price Grp., Inc.*, No. MJG-17-0427, 2018 WL 3970470, at *10 (D. Md. Aug. 20, 2018); *Krueger*, 2012 WL 5873825, at *10 (same). Accordingly, the Complaint plausibly states prohibited transaction claims with respect to the Money Market Fund and Emerging Growth Fund under § 1106(b)(1) and (b)(3), and Defendants' Motion should be rejected.

(3) Defendants do not meet the conditions of the exemptions upon which they rely, § 1108(b)(8) and PTE 77-3.

Finally, Defendants wrongly contend that they are not liable for Plaintiff's prohibited transaction claims because they have established all conditions of two prohibited transaction exemptions: (i) for the Wells Fargo collective trust funds, the statutory exemption at 29 U.S.C. § 1108(b)(8); and (ii) for the Wells Fargo mutual funds, the prohibited transaction exemption ("PTE") 77-3. The Eighth Circuit and this Court have previously rejected similar arguments, holding that even if such exemptions are applicable, they are affirmative defenses that Plaintiff need not plead around and which may not be adjudicated at the pleading stage. *Braden*, 588 F.3d at 601 n.10; *Krueger*, 2012 WL 5873825, at *16-17; *Allen*, 835 F.3d at 676. Specifically, *Braden* held that ERISA's prohibited transaction exemptions are affirmative defenses that cannot be resolved on a motion to dismiss. *Braden*, 588 F.3d at 601-02. As such, Defendants' Motion must be denied; they are free to pursue their affirmative defenses based on a full factual record. *Contra* Mot. at 23-24, 30-31.

Moreover, even if this Court were to evaluate whether the exemptions Defendants rely on are available to them based on the Complaint's factual allegations, it must conclude that they are not.

With respect to § 1108(b)(8),[19] Defendants' own documents confirm that the prohibited purchase of Wells Fargo affiliated funds is not "expressly permitted by the [plan]" as required by condition (C) of § 1108(b)(8). While Defendants offer a snippet of the Plan Document (the instrument governing the Plan), to assert otherwise, review of the full Plan Document shows that it ***does not*** permit the Plan to invest in Wells Fargo Funds that would be prohibited transactions under ERISA. *See* Yau Ex. C § 12.9 ("[a] fiduciary with respect to the Plan shall not cause the Plan to engage in any prohibited transaction within the meaning of ERISA."). Here, because Plaintiff alleges that the Plan's investment in Wells Fargo collective trust funds violates ERISA's prohibited transaction provisions, those investments are ***not*** "expressly permitted" by the Plan Document as required by condition (C) of § 1108(b)(8). Additionally, Plaintiff's allegations are sufficient to establish that condition (B) of § 1108(b)(8) is not met because she pleads that the Plan pays much higher fees to invest in the Wells Fargo collective trusts than similar—and sometimes

[19] The exemption available under 29 U.S.C. § 1108(b)(8) applies to transactions between a plan and a collective trust maintained by a party-in-interest, only if: "(A) the transaction is a sale or purchase of an interest in the fund; (B) the bank, trust company, or insurance company receives not more than reasonable compensation, and; (C) such transaction is expressly permitted by the instrument under which the plan is maintained . . ." 29 U.S.C. § 1108(b)(8).

substantially identical—funds. *See, e.g.*, Compl. ¶¶ 90, 111-14; *Braden*, 588 F.3d at 600-01.

Finally, as Plaintiff explains *supra* (Section III.B.1), Defendants' attempt to create disputed issues of fact using extrinsic documents is improper on a Rule 12(b)(6) motion. Defendants are free to attempt to carry their burden of showing all conditions of the relevant exemptions are met after the development of a full factual record. However, their affirmative defenses and the factual questions related to them may not be resolved through a motion to dismiss, where the Complaint's factual allegations are accepted as true. *Contra* Mot. at 23-24, 30-31.

Similarly, the Complaint (and the extrinsic documents) do not demonstrate that PTE 77-3 applies to exempt the Plan's investment in the Money Market Fund and Emerging Growth Fund. *Contra* Mot. at 32-33. As Defendants' Motion notes, for a transaction to satisfy PTE 77-3, the transacting parties must show that all other dealings between the plan and the affiliated fund are "on a basis no less favorable to the plan than such dealings are with other shareholders." 42 Fed. Reg. 18,734, 18,734-35 (1977); *see also* Mot. at 33. Nothing in the Complaint speaks to the nature of all other dealings between other investors in the Money Market Fund and Emerging Growth Fund, much less establishes that no other mutual fund investors are getting a better deal than the Wells Fargo Plan. While Defendants seek to introduce extrinsic materials purportedly demonstrating that the Plan receives an expense waiver for the Money Market Fund and the Emerging Growth Fund, those documents contain nothing about the dealings between Wells Fargo and other investors in the Money Market Fund and the Emerging Growth Fund. Even applying a summary judgment analysis, Defendants unquestionably have failed to carry their burden to show they meet all conditions of PTE 77-3. *Feinberg v. T. Rowe Price Grp.*, No. JKB-17-427, 2021 WL 488631, at *10-11 (D. Md. Feb. 10, 2021).

On these grounds, the Court should reject Defendants' Motion with respect to Plaintiff's claim that Defendants engaged in prohibited transactions regarding the Wells Fargo Funds under sections 1106(a)(1)(A), (a)(1)(D), (b)(1) and (b)(3).

5. <u>Plaintiff Plausibly Alleges Wells Fargo Knowingly Participated in ERISA Violations by Other Fiduciaries.</u>

ERISA permits a participant to obtain "appropriate equitable relief" from a nonfiduciary party-in-interest who knowingly participates in a fiduciary violation. *Harris Tr.*, 530 U.S. at 250; 29 U.S.C. § 1132(a)(3). Consistent with *Harris Trust*, Ms. Becker alleges that Wells Fargo is a party-in-interest within the meaning of 29 U.S.C. § 1002(14)(C) and that the Plan's assets "were repeatedly transferred to Wells Fargo & Co. as fees or compensation for the Wells Fargo affiliated funds in the Plan" in violation of 29 U.S.C. § 1106(a)(1)(D). Compl. ¶¶ 227, 229.

Wells Fargo can be liable as a nonfiduciary so long as it participated in the prohibited transaction with actual or constructive knowledge of the "circumstances that rendered the transaction unlawful." *Harris Tr.*, 530 U.S. at 251. Here, the Complaint alleges sufficient facts establishing Wells Fargo's actual or constructive knowledge. Far from a "conclusory allegation that Wells Fargo 'knew or should have known' of the alleged violations," Mot. at 34 (citing Compl. ¶¶ 231–33), Ms. Becker references DOL filings in which Wells Fargo disclosed that the Plan engages in "party-in-interest" transactions with respect to the Wells Fargo Funds. Compl. ¶ 233.

Second, Ms. Becker has stated an equitable claim for disgorgement of the fees paid by the Plan to Wells Fargo because she alleges entitlement to particular funds in Wells Fargo's possession. Defendants correctly note that claims under § 1132(a)(3) may only seek relief traditionally available at equity, but their argument demonstrates that Plaintiff's claims are equitable in nature. Defendants rely on *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002) to support their argument that Plaintiff improperly seeks legal relief. Mot. at 34. But the Supreme Court has since explained that "the restitution sought in *Great–West* was legal—not equitable—because the specific funds to which the fiduciaries 'claim[ed] an entitlement ... [we]re not in [the defendants'] possession.'" *Montanile v. Bd. of Trs. of Nat. Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 143 (2016) (quoting *Great-West*, 534 U.S. at 214). By contrast, here, Plaintiff claims entitlement to the fees Wells Fargo illegally collected from the Plan—funds that have always been within Wells Fargo's possession. Compl. ¶¶ 235-37.

Defendants' citation to *Central States, Southeast & Southwest Areas Health & Welfare Fund v. Gerber Life Insurance Co.*, 771 F.3d 150 (2d Cir. 2014) fares no better. *Central States* concerned a dispute between two insurers about which of them was responsible for their joint insured's claim. Central States paid the insured's claim and sought reimbursement from Gerber, who refused to pay, so Central States sued under § 1132(a)(3) for restitution. *Id.* at 152. The Second Circuit held that because Central States "simply assert[ed] a claim against Gerber's general assets" rather than a claim to particular funds, the claim was legal, not equitable. *Id.* at 155. In contrast, Plaintiff seeks the ***return*** of fees that Wells Fargo improperly accepted from the Plan as part of a prohibited transaction, not recovery from Wells Fargo's general assets.

Defendants suggest that Plaintiff must, before conducting any discovery, articulate the precise transfer history of the fees paid by the Plan and identify the account containing the fees.[20] They cite no authority for this conclusion because it is not the law. At the pleading stage, plaintiffs are not required to ***trace*** the path of the funds, but merely to allege that the path of the funds ***is traceable***. *See Zavala v. Kruse-Western, Inc.*, 398 F. Supp. 3d 731, 742 n.3 (E.D. Cal. 2019) (while plaintiff must allege defendants possess the funds, those allegations need not be pled with specificity). Ms. Becker alleges that the impermissible fees remain in the Wells Fargo account that originally received such fees. Compl. ¶ 235. Alternatively, Plaintiff contends that, in the event that Wells Fargo deposited the fees in a commingled account, that account has at all times maintained a balance over the value of the illegal transfers (what is known as the "lowest intermediate balance" theory).[21] *Id*. ¶ 236. Finally, Plaintiff plausibly alleges that Wells Fargo maintains detailed

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[20] For example, Defendants state that "any monetary recovery sought by Becker *must* 'be traced [from ERISA plan assets] to a particular fund held by a defendant.'" Mot. at 34-35 (quoting *Central States*, 771 F.3d at 155) (emphasis added). But Defendants' citation from *Central States* is misleading, because that case actually holds that a claim is equitable if the claimant sought restitution that "*could* be traced to a particular fund held by a defendant." 771 F.3d at 155 (emphasis added).

[21] Courts apply the "lowest intermediate balance" theory of tracing in a variety of contexts. *See Meyer v. Norwest Bank Iowa, Nat. Ass'n*, 112 F.3d 946, 950-51 (8th Cir. 1997) (collecting cases). The theory, which evolved from equitable principles of trusts, is available to plaintiffs stating a claim under § 1132(a)(3). *See Zavala*, 398 F. Supp. 3d at

financial and accounting records that, after discovery, will allow her to trace the transfer of fees from the Plan to Wells Fargo. *Id*. ¶ 237. Courts have explicitly recognized that these allegations state a claim for equitable relief under § 1132(a)(3). "[A] complaint may allege 'the existence of a general account in which the ill-gotten funds... were commingled, such that the product of those funds would be traceable.'" *Zavala*, 398 F. Supp. 3d at 741 (quotation omitted). In addition, "a plaintiff may allege that defendants' account balance remained above the surcharge amounts for purposes of the 'lowest intermediate balance' theory." *Id.*

Defendants' other cited cases also do not support their argument. *Pledger*, which dismissed a § 1132(a)(3) claim, is distinguishable because the plaintiffs failed to allege that they could identify the location of the ill-gotten funds. 240 F. Supp. 3d at 1336. By contrast, Plaintiff explicitly alleges that here. Compl. ¶ 237. In *Urakhchin*, the plaintiffs failed to allege that they could trace the funds from the transaction at all—they only raised the argument in their opposition to a motion to dismiss, which is not the case here. 2016 WL 4507117, at *8. Finally, *Moreno v. Deutsche Bank Americas Holding Corp.* is inapposite because there the plaintiffs relied on an "accounting for profits" exception. No. 15 Civ 9936 (LGS), 2016 WL 5957307, at *9 (S.D.N.Y. Oct. 13, 2016).

In sum, Plaintiff has adequately alleged Wells Fargo's knowing participation in the § 1106 violations asserted against the Fiduciary Defendants.

741; *In re R & T Roofing Structures & Commercial Framing, Inc.*, 887 F.2d 981, 987 (9th Cir. 1989).

IV. CONCLUSION

In light of the foregoing, Plaintiff respectfully requests that Defendants' Motion to Dismiss Plaintiff's Class Action Complaint be denied in total.

Dated: March 10, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed via CM/ECF on March 10, 2021, which effectuates service upon all counsel of record.

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