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)

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

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PRELIMINARY STATEMENT

Plaintiff Yvonne Becker's Opposition Brief confirms that her claims are dependent on factual assertions that are demonstrably false. She contends, for example, that: (i) Defendants offered the TD Collective Trusts to "seed" them for future investment by others, when in fact they were offered exclusively to the Plan; (ii) Defendants offered Wells Fargo-affiliated funds to enrich Wells Fargo, when in fact for most of them, Wells Fargo paid the fees (if any) to affiliates; and (iii) the affiliated funds overcharged and underperformed relative to other funds, when in fact the net fees and performance were favorable.

Even if credited, these allegations would not satisfy the requirement to plead allegations from which the Court could infer a flawed decision-making process. Indeed, Becker flatly ignores the pleading standard. But there is no reason to even consider whether her allegations satisfy it when they are directly refuted by documents embraced by the Complaint. Contrary to Becker's contentions, the Court is expected to consider these documents and remove allegations that are demonstrably false.

As discussed below, stripped of those false allegations, the Complaint must be dismissed.

I. THE COURT SHOULD CONSIDER ALL DOCUMENTS EMBRACED BY THE COMPLAINT.

Becker contends that the Court should accept the Complaint's allegations at face value and ignore the documented facts embraced by the Complaint demonstrating they are false. This is a transparent pretext designed to enable Becker to proceed to discovery with claims that cannot satisfy the pleading requirements—one that the Court should not countenance.

In adjudicating a motion to dismiss, a court should consider documents "embraced by the pleadings." *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018); *see Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 484 n.3 (8th Cir. 2020). These documents "trump[] the allegations" in the complaint that are directly contradicted by them. *Elkharwily v. Mayo Holding Co.*, 955 F. Supp. 2d 988, 996 (D. Minn. 2013), *aff'd*, 823 F.3d 462 (8th Cir. 2016); *see Zean v. Fairview Health Servs.*, 858 F.3d 520, 526–27 (8th Cir. 2017) (dismissing based on documents that contradicted plaintiff's allegation) (collecting cases). Considering these documents on a motion to dismiss "[p]revent[s] plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting references to documents upon which their claims are based." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018).

Documents "embraced by the Complaint" include documents whose contents are referenced in the complaint or are "integral to the claim[s]" alleged. *Zean*, 858 F.3d at 526; *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (documents upon which a claim rests "are necessarily embraced by the pleadings"). Here, they

include the Plan documents (Holland Exs. A-B, D-E), which Becker concedes are properly considered here (Dkt. 112 at 14); and disclosures that contain the same types of fee and performance data on which Becker purports to rely, including mutual fund prospectuses filed with the SEC, participant fee disclosures, collective fund disclosures, and fact sheets (Hooley Exs. A-S). As Becker acknowledges, these documents are made available to Plan participants, 29 C.F.R. § 2550.404a-5, to inform them about the funds' fees and performance (Compl. ¶ 93, *see also* Compl. ¶¶ 116, 122, 129) and are undoubtedly what she relied on in drafting her Complaint.

They also are the types of documents that courts in this Circuit (and elsewhere) routinely consider on a motion to dismiss. *See, e.g.*, *Davis*, 960 F.3d at 484 n.3 (fee disclosure statements, mutual fund prospectuses and fact sheets, separate account disclosure); *Meiners*, 898 F.3d at 823 (mutual fund prospectuses); *Nelsen v. Principal Glob. Invs. Tr. Co.*, 362 F. Supp. 3d 627, 630 n.1 (S.D. Iowa 2019) (collective trust disclosure); *Larson v. Allina Health Sys.*, 350 F. Supp. 3d 780, 790 (D. Minn. 2018) (mutual fund prospectus); *Schultz v. Edward D. Jones & Co., L.P.*, 2018 WL 1508906, at *2 n.5, *3 (E.D. Mo. Mar. 27, 2018) (plan documents, Morningstar reports); *Krueger v. Ameriprise Fin., Inc.*, 2012 WL 5873825, at *2, 7 (D. Minn. Nov. 20, 2012) (plan, SPD, mutual fund prospectus); *Gipson v. Wells Fargo & Co.*, 2009 WL 702004, at *4 (D. Minn. Mar. 13, 2009) (plan, SPD); *Van Natta v. Sara Lee Corp.*, 439 F. Supp. 2d 911, 921 n.3 (N.D. Iowa 2006) (plan); *Terraza v. Safeway Inc.*, 241 F. Supp. 3d 1057, 1066–67 (N.D. Cal. 2017) (plan, SPD, participant fee disclosures).

As discussed below, once the Complaint is evaluated in light of these properly considered documents, Becker's claims cannot withstand dismissal.

II. BECKER'S CLAIMS RELATED TO THE TD COLLECTIVE TRUSTS SHOULD BE DISMISSED.

As previously discussed, Becker cannot proceed with claims related to funds in which she did not invest, especially if she has no plausible claim with respect to her own investments in the TD Collective Trusts. The starting point for the Court's analysis is thus Becker's claims related to the TD Collective Trusts. These claims are all premised on allegations that are demonstrably false. Without them, Becker has no plausible claims for relief because she cannot "show that a prudent fiduciary in like circumstances would have acted differently." *Meiners*, 898 F.3d at 822.

A. Becker's Fiduciary-Breach Claims Should Be Dismissed.

In support of her claim of imprudence and disloyalty, Becker contends that the TD Collective Trusts were untested investments that were offered in the Plan as a means of "seeding" to increase their marketability to outside investors; and charged excessive fees and underperformed relative to their benchmarks. These contentions cannot be reconciled with the documents embraced by the Complaint.

First, Wells Fargo could not have used the Plan to "seed" the TD Collective Trusts because they were "exclusively designed" for the Plan. (Hooley Ex. A at 1.)[1]

[1] Becker cannot create a factual issue as to whether the funds were limited to the Plan by referencing boilerplate text that generally identifies who may invest in Wells Fargo funds. When read in context, it cannot reasonably be construed to suggest that they were marketed to the public. (*Compare* Hooley Ex. A at 1 *with* Hooley Exs. B at 1, E at 1, G at 2, H at 2, J at 4, K at 2, L at 4; M at 5.)

Second, Becker's assertion that the TD Collective Trusts lacked a track record overlooks the fact that the Plan had been invested in a substantially similar mutual fund version of these funds and a substantially similar version of the funds had been tested with other investors for years. (Dkt. 99 at 6–7.) In any event, there is nothing inherently imprudent about a decision to include a new fund in a plan. *See Patterson v. Morgan Stanley*, 2019 WL 4934834, at *14 (S.D.N.Y. Oct. 7, 2019) (rejecting allegation that it was imprudent to include an "untested" target date fund); DOL Advisory Opinion 2003-15A (recognizing that Verizon could *create* a collective investment vehicle for its plan). Otherwise, a plan could never invest in a separate account, like the Stable Value Fund, that is specially created for a plan. Even Becker does not challenge the Stable Value Fund on that basis.[2]

Third, Becker's excessive fees and underperformance allegations are similarly based on demonstrably false assertions.[3] Virtually all of the funds outperformed their benchmarks from inception through 2018. (Dkt. 99 at 17–18.) The illusion of an extended period of underperformance is created by Becker's reference to performance from inception through 2019, but when read in conjunction with the data for inception through 2018, this merely shows one year of underperformance. (*Compare* Hooley Ex. N at 1–2 *with* Ex. D at 1–2.) It is well-established that such a short period of

[2] Unlike here, in *Gipson*, 2009 WL 702004, and *Krueger*, 2012 WL 5873825 (Dkt. 112 at 20), plaintiffs alleged that defendants included affiliated mutual funds that were open to investment by others in their plans as a means to seed the investments.

[3] Becker offers nothing to substantiate her conclusory allegation that another unidentified fund was "nearly 20% cheaper." (Dkt. 99 at 15–16.)

underperformance is insufficient to give rise to an inference of imprudence. (Dkt. 99 at 16–17.)

Lastly, Becker cannot salvage her disloyalty claim by asserting that a "partial fee waiver is not an absolute shield to claim of disloyalty" (Dkt. 112 at 29), because the Plan did not pay *any* fees to Wells Fargo affiliates (Dkt. 99 at 8).

B. Becker's Prohibited Transaction Claims Should Be Dismissed.

Becker does not dispute that, in the absence of any fees paid by the Plan, her claims related to the TD Collective Trusts under ERISA §§ 406(a)(1)(D), 406(b)(1) and 406(b)(3) must be dismissed. She instead attempts to manufacture a dispute as to whether the Plan pays fees related to these funds. Becker concedes that the disclosure states that Wells Fargo does not charge a fee, but also contends that it states that certain expenses "will be in addition to the fees and expenses charged by Wells Fargo." (Dkt. 112 at 32.) Read in context, it is clear that the quoted statement unambiguously refers to expenses paid to *unaffiliated* third-parties. (Hooley Ex. A at 8.)[4]

Becker's remaining claim under ERISA § 406(a)(1)(A) contending that the Plan transacted with a party-in-interest because it "purchased property" from Wells Fargo Bank, N.A. fares no better. The Plan's investment was indisputably with the TD Collective Trusts, which are not parties-in-interest. (Dkt. 99 at 22–23.)

[4] The general statement in the Declaration of Trust, which is applicable to *all* collective trusts, that Wells Fargo "may charge a reasonable fee" (Dkt. 112 at 5) does nothing to undermine the TD Collective Trusts' specific disclosure that states Wells Fargo does not charge a fee.

Becker's effort to resist application of the exemption under ERISA § 408(b)(8) is likewise disingenuous. The Plan's statement that it will not engage in prohibited transactions does not preclude reliance on an exemption whose purpose is to render the transaction not prohibited.

III. BECKER'S CLAIMS RELATED TO THE OTHER CHALLENGED INVESTMENTS SHOULD BE DISMISSED.

Given Becker's failure to state a plausible claim related to the TD Collective Trusts, she indisputably lacks standing to assert claims related to funds in which she did not invest. Furthermore, her claims related to these funds are similarly premised on demonstrably false assertions which, once removed, leave her without a viable claim.

A. Becker Lacks Standing To Assert Claims Related To Funds In Which She Did Not Invest.

As previously discussed, Becker cannot proceed with her claims related to funds in which she did not invest—especially if she has not stated a claim with respect to the TD Collective Trusts—because she has not been harmed. Becker does not dispute that she did not invest in any of the other challenged funds and, as a former participant, cannot seek relief going forward, including for "mismanagement of the Plan as a whole" (Dkt. 112 at 10).[5] Absent any harm to herself, she cannot seek relief "on behalf of the

[5] Becker cherry-picked for attack only 3 of the Plan investment alternatives, as well as a couple of subfunds. As so limited, the Complaint can hardly be characterized as one challenging Plan-wide mismanagement. For this reason, Becker's reliance on *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009) and the other cited cases is misplaced. (Dkt. 99 at 11–12.)

Plan." That is the fundamental holding of *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020), which makes clear that there is no "ERISA exception to Article III standing."

B. Becker's Fiduciary-Breach Claims Should Be Dismissed.

Becker's fiduciary-breach allegations relate to only one investment alternative, the Money Market Fund, and two subfunds, the Causeway Fund and Emerging Growth Fund. Becker's basis for pursuing these claims rests on demonstrably false premises.

First, as already discussed and not disputed, Becker's allegations related to the Money Market Fund are false once the Plan's fee waiver is taken into account. (Dkt. 99 at 25–26.)

Second, Becker's claim relating to the two subfunds is misplaced because, unlike in her one cited case, she has not asserted a claim for imprudence as to their parent funds. *Cf. Nelsen*, 362 F. Supp. 3d at 638–39 (challenging fund and its subfund). In any event, Becker provides no meaningful response to the independent grounds for dismissal related to the Causeway Fund (Dkt. 99 at 27–28) and Emerging Growth Fund (*id.* at 28–29).[6] Thus, there is no basis to conclude that she has alleged conduct giving rise to an inference of a breach.

[6] Becker's comparison to the ICI Study (Dkt. 112 at 23) is misplaced because that study provides an average of fees charged by different types of funds. *See Parmer v. Land O'Lakes, Inc.*, 2021 WL 464382, at *5 (D. Minn. Feb. 9, 2021); *Davis v. Salesforce.com, Inc.*, 2020 WL 5893405, at *3 (N.D. Cal. Oct. 5, 2020).

C. Becker's Prohibited Transaction Claims Should Be Dismissed.

Becker's prohibited transaction claims related to the collective trusts in which she did not invest should be dismissed for the same reasons stated above. *See* Point II.B, *supra*.

Similarly, Becker's assertion that the Plan pays fees to the Stable Value Fund (Dkt. 112 at 32 n.15) is misplaced because the disclosure clearly states that the fees paid by the Plan are to *unaffiliated* third-party sub-advisors (Hooley Ex. I at 3, 10).[7]

There also is no basis for concluding that PTE 77-3 does not apply to the two mutual funds. The Plan offers the cheapest available version and once the Plan's fee waiver is properly accounted for, the net fees are less than for any other investor. The requirement that the Plan be treated at least as favorably as other investors is thus fully satisfied. (Dkt. 112 at 32–33.)

IV. BECKER'S KNOWING PARTICIPATION CLAIM SHOULD BE DISMISSED.

Becker concedes that, in the absence of a plausible prohibited transaction claim, her claim for "knowing participation" falls away. Independently, her conclusory assertions that Wells Fargo knew of the alleged prohibited transactions are plainly insufficient. (Dkt. 99 at 34–35.)

[7] Becker nowhere disputes the application of ERISA § 408(b)(2) to the Stable Value Fund. (Dkt. 99 at 31.)

CONCLUSION

The Court should grant Defendants' Motion to Dismiss and dismiss the Complaint with prejudice.

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Respectfully submitted,

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