UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

John Meiners, on behalf of a class of all persons similarly situated, and on behalf of the Wells Fargo & Company 401(k) Plan,

Plaintiffs,

v.

Wells Fargo & Company; Human Resources Committee of the Wells Fargo Board of Directors; Wells Fargo Employee Benefits Review Committee; Hope Hardison; Justin Thornton; Patricia Callahan; Michael Heid; Timothy Sloan; Lloyd Dean; John Chen; Susan Engel; Donald James; and Stephen Sanger,

Defendants.

Case No. 16-cv-03981 (DSD/FLN)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

I. INTRODUCTION

To save for retirement, employees of Defendant Wells Fargo & Company may contribute to the company's 401(k) Plan. Plan participants can choose how to invest their contributions (and the company's "match") among the 27 investment options that the Plan's fiduciaries currently make available to them.

Plaintiff John Meiners alleges that certain of these investment options, known as "target date funds," were imprudent investment options, but he fails to allege any plausible facts sufficient to state a claim. Although he complains that these funds are managed by an affiliate of Wells Fargo, both Congress and the U.S. Department of Labor approve of the "common" practice of offering such "affiliated" funds in 401(k) plans—precluding any plausible inference of wrongdoing on this basis.

The other "facts" that Meiners alleges are simply attempts to compare "apples to oranges" and to judge the prudence of the Plan's target date fund investments with the benefit of 20/20 hindsight. As the Eighth Circuit just recently observed in *Tussey v. ABB, Inc.*, such attacks are "mistaken" and cannot plausibly state a claim for breach of fiduciary duty. No. 15-2792, 2017 U.S. App. LEXIS 4225, at *18 n.8 (8th Cir. Mar. 9, 2017) ("*Tussey II*"). Meiners' Complaint should be dismissed.

II. BACKGROUND

A. The Plan and Its Investment Lineup.

Wells Fargo & Company sponsors a 401(k) plan for its employees (the "Plan"). (Compl. ¶ 10.) The Plan is what is known as a "defined contribution plan,"[1] meaning that it allows eligible employees to contribute a portion of their earnings into individual accounts to save for retirement. (*Id.*) They can then allocate those contributions among an array of investment options. (Holland Decl. Ex. 1 at 15-22 ("2013 SPD").) Wells Fargo also contributes to its employees' retirement savings by matching a portion of their contributions—contributing, for example, $1.1 billion to the Plan in 2015.[2]

Throughout the class period, the Plan offered participants over 25 options in which to invest.[3] This investment lineup spans the risk-return spectrum—ranging from potentially higher-returning equity options (like the "Emerging Markets Equity Fund") to

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[1] *See LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255-56 (2008).

[2] *See* Bullard Decl. Ex. A at 2 line 2a(a)(1)(A); *see also* 2015 Form 5500 Schedule H p. 2, line 2a(a)(1)(A), *available at* https://www.efast.dol.gov/portal/app/disseminate?execution=e1s1# (EIN – 410449260; Pin – 002).

[3] *See* Compl. ¶ 19; 2013 SPD at 15-22; Holland Decl. Ex. 2, at 14-20 ("2012 SPD"); Ex. 3, at 15-20 ("2012 SPD").

lower-risk funds (like the "100% Treasury Money Market Fund.") (2013 SPD at 15-22.) The lineup includes six low-cost index funds, with fees ranging from 2 to 9 basis points.[4] As required by ERISA, participants receive disclosures, such as a Summary Plan Description ("SPD"), that explain these investment options, their fees, and their historical performance. (*See, e.g.*, 2012 SPD at 14-20, 39-42.) Participants then choose how to allocate their contributions among the various funds. (2013 SPD at 15.)

The Plan's investment options are managed by several investment managers, including State Street Global Advisors, Pacific Investment Management Company, and Lazard Asset Management. (2013 SPD at 19-22.) Some of the investment options are managed by corporate affiliates of Wells Fargo, such as Wells Fargo Funds Management, LLC. (*Id.* at 18.) This arrangement is expressly permitted by U.S. Department of Labor ("DOL") regulations authorizing financial institutions like Wells Fargo to offer mutual funds managed by affiliates in their 401(k) plans.[5] The SPDs fully disclose the corporate affiliation of the Plan's various investment options. (*See, e.g.*, *id.* at 15-22.)

B. Plaintiff Meiners Invested in the Dow Jones Target 2025 Fund.

Plaintiff John Meiners, a former Wells Fargo employee, is a participant in the Plan. (Compl. ¶ 9.) Throughout the class period, he invested a portion of his retirement account in the Wells Fargo Dow Jones Target 2025 Fund (the "2025 Fund"), one of a

[4] *See* 2012 SPD at 42; 2011 SPD at 42. One basis point is 0.01%.

[5] *See* DOL, Prohibited Transaction Exemption 77-3 ("PTE 77-3"), 42 Fed. Reg. 18,734 (Mar. 31, 1977); ERISA § 408(b)(8), 29 U.S.C. § 1108(b)(2); *see also infra* at 11.

series of "Dow Jones Target Date Funds" that he now alleges were imprudent investment options for the Plan. (*See* Holland Decl. Ex. 5, at 2-4; Compl. ¶¶ 52-68.)

The Dow Jones Target Date Funds are a type of investment called "target date" or "lifecycle" funds. (Compl. ¶ 20.) These funds are "designed to provide a single investment choice" that follows investors for their entire life. (2013 SPD at 18.) The Dow Jones Target Date Funds are comprised of a series of twelve distinct index funds.[6] (Compl. ¶¶ 19-20.) Each fund has its own investment strategy that is based upon a "planned year of retirement" for its investors, allowing investors to choose the fund that most closely matches their expected retirement date. (SPD at 18.) To accomplish this objective, each fund "automatically shift[s] the asset mix of stocks, bonds, and cash equivalents in [its] portfolio" as it approaches its "targeted retirement date." (Compl. ¶ 20.) This automatic reallocation strategy makes target date funds "simple, long-term investment vehicles for individuals with particular target retirement dates in mind."[7]

Specifically, the Complaint alleges that the twelve Dow Jones Target Date Funds offered to Plan participants range from the Dow Jones Target Today Fund to the Dow Jones Target 2060 Fund. (Compl. ¶¶ 19-20.) When a particular fund's intended investors are further from their expected date of retirement, that fund invests a greater

[6] "An index fund is a mutual fund that seeks to match the performance of the market as a whole by holding the stocks that compose a broad-based index such as the S&P 500." *Knopick v. UBS Fin. Servs.*, 121 F. Supp. 3d 444, 458 n.15 (E.D. Pa. 2015) (quotation omitted).

[7] DOL & SEC, Public Hearing on Target Date Funds and Other Similar Investment Options (June 18, 2009) (transcript), *available at* https://www.sec.gov/spotlight/targetdatefunds/targetdatefunds061809.pdf.

percentage of its assets in higher-risk/higher-reward investments like equities. (*Id.* ¶ 20.) As investors near retirement and their tolerance for risk decreases, the funds "automatically shift this asset allocation toward a more conservative stance," investing a greater percentage of assets in lower-risk investments like bonds. (2013 SPD at 18.) *See Tussey II*, 2017 U.S. App. LEXIS 4225, at *4 (explaining that target date funds "dynamically change their mix of investments to become more conservative as" the "expected retirement[] approaches").

For example, in 2016, the assets mixes of the 2015 Fund, Meiners' 2025 Fund, and the 2055 Fund[8] were as follows:

Asset Allocation in 2016[9]			
Fund	Equity (%)	Bonds (%)	Cash Equivalent (%)
2015 Fund	26	70	4
2025 Fund	49	47	4
2055 Fund	90	6	4

Consistent with the strategy referenced above, the 2015 and 2025 Funds—whose participants are expected to be closer to retirement, and thus are more risk adverse—invest more conservatively. The 2055 Fund, in contrast, invests more heavily in equities.

[8] The Court may consider this information, which is drawn from a publically-available prospectus, filed with the SEC, and embraced by the Complaint. *See In re Xcel Energy, Inc., Sec. Der. & ERISA Litig.*, 312 F. Supp. 2d 1165, 1178 n.5 (D. Minn. 2004) (agreeing court may consider "publicly filed" plan documents "necessary" to claims on a motion to dismiss); *see, e.g.*, *Hecker v. Deere & Co.*, 556 F.3d 575, 582-83 (7th Cir. 2009) (proper to consider prospectus); *Renfro v. Unisys Corp.*, No. 07–2098, 2010 U.S. Dist. LEXIS 41563, at *7 n.2 (E.D. Pa. April 26, 2010) (same). (*See* Compl. ¶¶ 28, 31.)

[9] *See* Holland Decl. Ex. 6, at 77 ("2016 Dow Jones Prospectus"). The other Dow Jones Target Date Funds likewise shift their asset allocation away from equities and toward bonds as the projected date of retirement nears. For example, the 2035 Fund's asset allocation in 2016 was 74% equities, 22% bonds, and 4% cash equivalents. *Id.*

Although there are other "target date" funds available on the market, they do not follow the same investment strategy.[10] In fact, the DOL has observed that "target date funds, even if they share the same target date . . . may have very different investment strategies and risks." DOL & SEC Investor Bulletin at 1. For example, the Plan's Dow Jones Target Date Funds utilize a proprietary investment strategy "developed by S&P Dow Jones Indices, LLC." (Compl. ¶ 21.) In contrast, the target date funds offered by Fidelity and Vanguard—the only two other target date fund families mentioned in the Complaint—follow their own in-house investment strategies. (*See id.* ¶¶ 27-32.)[11] As a result, the respective funds allocate assets differently. For example, the 2025 Fidelity and Vanguard target date funds' indexes allocate significantly more assets to higher-risk equity investments than the Dow Jones 2025 Fund's index:

Asset Allocation in 2016[12]			
2025 Fund	Equity (%)	Bonds (%)	Cash Equivalent (%)
Wells Fargo	49	47	4
Fidelity	65	29	4
Vanguard	67	33	0

[10] *See* DOL & SEC, Investor Bulletin: Target Date Retirement Funds (May 6, 2010), *available at* https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/TDFInvestorBulletin.pdf (hereinafter, "DOL & SEC Investor Bulletin").

[11] *See* Bullard Decl. Ex. B at 2-3 ("2016 Fidelity Prospectus") (describing funds' investment strategy); Ex. C at 6-7 ("2016 Vanguard Prospectus") (describing funds' investment strategy).

[12] *See* 2016 Dow Jones Prospectus at 77; 2016 Fidelity Prospectus at 4; 2016 Vanguard Prospectus at 3-4. Similarly, in 2012, Meiners' 2025 Fund allocated 57% of its assets to equities, whereas the Fidelity and Vanguard 2025 funds allocated 61% and 73% to equites, respectively. (*See* Bullard Decl. Ex. D at 9; Ex. E at 3; Ex. F at 3 ("2012 Vanguard Prospectus").)

Naturally, funds that take on greater risk by allocating more assets to equities may earn higher returns in a market in which equities enjoy strong performance. However, as the DOL cautions, funds with greater allocations in equities—such as the Vanguard and Fidelity funds—"can be more volatile and carry greater investment risk." DOL, Target Date Retirement Funds-Tips for ERISA Fiduciaries (Feb. 2013), *available at* https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/fsTDF.pdf. Thus, in a down equities market, investors might, in hindsight, have preferred to have followed a more conservative strategy. *See infra* at 16-18.

C. Meiners' Complaint.

Meiners has sued on behalf of a putative class of past and present Plan participants who invested in the 2025 Fund, as well as the eleven other Dow Jones Target Date Funds in which he did not invest. (Compl. ¶ 43.) Meiners alleges that employees who served on Wells Fargo's internal committee charged with administering the Plan (the "Committee Defendants")[13] made available to participants the Dow Jones Target Date Funds not because they preferred their more conservative asset-allocation strategy, but

[13] The Committee Defendants named in the Complaint are Patricia Callahan, Michael Heid, and Timothy Sloan (Defendants John Stumpf and Howard Atkins have been dismissed). (*See* Compl. ¶ 15; Order (Dkt. 34).)

The Complaint also names two Wells Fargo employees, Hope Hardison and Justin Thornton, who served as "Plan Administrators," (Compl. ¶¶ 12-13.) but who, as disclosed to Meiners' counsel, did not serve on the Committee. Wells Fargo Board members Lloyd Dean, John Chen, Susan Engel, Donald James, and Stephen Sanger, as well as Wells Fargo & Company, are also named. (*Id.* ¶¶ 11, 17.) Collectively these Defendants will be referred to as the "Non-Committee Individual Defendants."

because they wanted to generate revenue for the Wells Fargo affiliate that manages those funds. (*See id.* ¶¶ 52-58.)

In support of this claim, Meiners does not allege a single fact about the process by which the Committee Defendants decided to retain[14] the Dow Jones Target Date Funds. (*See* Compl. ¶¶ 19-41.) Instead, he asks the Court to *infer* that the Committee Defendants acted carelessly and disloyally because a Wells Fargo affiliate manages the Dow Jones Target Date Funds, and because those funds allegedly "underperformed" "cheaper" funds during the putative class period. (*See, e.g.*, *id.* ¶ 57.) For the reasons discussed below, however, no plausible inference of imprudence or disloyalty can be drawn from Meiners' allegations.

III. ARGUMENT

A. Standard for Pleading an ERISA Breach of Fiduciary Duty Claim.

A plaintiff's complaint must offer "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To be "plausible," a complaint must contain "factual allegations [that] are sufficient to support the reasonable inference that the defendant is liable for the misconduct alleged." *García-Catalán v. United States*, 734 F.3d 100, 103 (1st Cir. 2013) (quotation omitted).

[14] Meiners does not allege any facts suggesting that the Committee breached its fiduciary duty when it first selected these funds. Nor could he, since these funds were offered to Plan participants over six years prior to the filing of this Complaint, and thus such claims would be barred by ERISA's six year statute of repose, ERISA § 413. (*See* Holland Decl. Ex. 4 at 17 ("2010 SPD").) Instead, Meiners' claims focus on the failure to remove the funds from the Plan's investment lineup. (*See, e.g.*, Compl. ¶ 57.)

In *Fifth Third Bancorp v. Dudenhoeffer*, the Supreme Court outlined the court's task in separating the "plausible sheep" from the "meritless goats" in a breach of fiduciary duty action under ERISA. 134 S. Ct. 2459, 2470-71 (2014). According to the Court, that task requires "careful, context-sensitive scrutiny" of a plaintiff's allegations based on the "circumstances . . . prevailing" at the time the fiduciary acted. *Id.* (quoting 29 U.S.C. § 1104(a)(1)(B)). Thus, the "appropriate inquiry" in these cases focuses on what the fiduciary knew about the investment in light of its objectives at the time in question—not what is now known with the advantage of hindsight. *Id.*; *see also Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917-18 (8th Cir. 1994) (explaining that ERISA's fiduciary standard "is not concerned with results," but "focuses on the fiduciary's conduct preceding the challenged decision").

Accordingly, to state a fiduciary breach claim, a plaintiff must allege facts "plausibly" suggesting that the fiduciaries' "decision making process was flawed." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009).[15] Because ERISA's fiduciary standard "focus[es] on a fiduciary's conduct in arriving at an investment decision, not on its results," *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996), a plaintiff cannot state a claim by alleging from "the vantage point of hindsight," that fiduciaries could have selected and maintained better-performing and cheaper funds.

[15] *See also Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 716 (2d Cir. 2013) ("*PBGC*") (holding that the fiduciary standard focuses on "whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment").

In re Citigroup ERISA Litig., 662 F.3d 128, 140 (2d Cir. 2011).[16] Finally, given the challenges in making investments, courts review fiduciaries' discretionary determinations "deferentially." *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006) (ERISA does not seat fiduciaries on the "razor's edge").

B. Meiners' Complaint Fails to State a Plausible ERISA Breach of Fiduciary Duty Claim.

Meiners' Complaint alleges nothing at all about the process by which the Committee investigated and evaluated the prudence of the Dow Jones Target Date Funds as Plan investments options. Instead, he asks this Court to infer from circumstantial facts that the Committee's decision-making process was flawed. To support this conclusion, Meiners complains that the Dow Jones Target Date Funds were affiliated with Wells Fargo. He further alleges that a target date fund family offered by Vanguard (out of many other available funds) generated, in retrospect, higher returns at a lower cost. Such allegations do not, however, plausibly suggest that the Committee Defendants engaged in a flawed process in breach of their fiduciary duties. Among other things, Congress and the DOL expressly authorize the "common practice" of offering affiliated funds in a 401(k) plan. Pointing out that a cheaper, higher-risk strategy would have, in retrospect, delivered higher returns is nothing more than an improper hindsight attack.

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[16] *See also DeBruyne v. Equitable Life Assurance Soc.*, 920 F.2d 457, 465 (7th Cir. 1990) (explaining that ERISA's "fiduciary duty of care . . . requires prudence, not prescience.") (internal quotations omitted); *Bd. of Trs. of the Operating Eng'rs Pension Tr. v. JPMorgan Chase Bank*, No. 09-cv-9333, 2012 U.S. Dist. LEXIS 56853, at *11 (S.D.N.Y. Apr. 20, 2012) (similar).

1. The inclusion of affiliated funds in a broad menu of investment options does not plausibly suggest a flawed fiduciary process.

The fact that the Dow Jones Target Date Funds are managed by an affiliate of Wells Fargo cannot in itself suggest a flawed fiduciary process.

Congress and the DOL expressly authorize the "common" use of affiliated investment products by a pension plan.[17] ERISA authorizes, for example, banks and insurers to offer their proprietary investment products in their plans. *See* ERISA § 408(b)(5), (8), 29 U.S.C. § 1108(b)(5), (8). And since 1977, the DOL has allowed plans sponsored by mutual fund advisors (or their affiliates) to offer those affiliated funds as investment options. *See* PTE 77-3, 42 Fed. Reg. 18,734. Meiners does not allege, nor could he, that the Plan's investment in the Dow Jones Target Date Funds runs afoul of these regulations. *See Krueger v. Ameriprise Fin., Inc.*, No. 11-cv-02781, 2012 U.S. Dist. LEXIS 166191, at *43 (D. Minn. Nov. 20, 2012) (recognizing that DOL "regulations permit[] [financial services companies] to select affiliated investment options for" their plans); *Dupree v. Prudential Ins. Co. of Am.*, No. 99-8337, 2007 U.S. Dist. LEXIS 57857, at *144-46 (S.D. Fla. Aug. 7, 2007) (same).

Given this statutory and regulatory framework, courts recognize that the common practice of offering affiliated funds in 401(k) plans does not, by itself, suggest fiduciary misconduct. For example, in *Dupree*, the court rejected a fiduciary challenge to an

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[17] *See* H.R. Conf. Rep. No. 93-1280 (Aug. 12, 1974) (noting it is "common practice" for financial service companies to offer their products in their plans); Participant Directed Individual Account Plans, 56 Fed. Reg. 10,724, 10,730 (Mar. 13, 1991) (noting it is "normal" practice for a company whose business is financial management to use affiliate's services).

insurance company's inclusion of affiliated investment products in its pension plan. 2007 U.S. Dist. LEXIS 57857, at *143-46. The court concluded that the defendants' conformity with "a practice—the very result Congress [and the DOL] intended to approve by enacting the[se] exemptions—does not give rise to an inference of" fiduciary breach. *Id.* at *144-45. The same is true here. The Plan's inclusion of affiliated funds among a diverse array of other funds managed by unaffiliated entities, including State Street Global Advisors, PIMCO, and Lazard Asset Management,[18] does not raise an inference of a fiduciary breach. *See N.J. Carpenters Health Fund v. Royal Bank of Scot. Grp.*, 709 F.3d 109, 121 (2d Cir. 2013) (cautioning that facts "merely consistent with" misconduct are insufficient to state a claim).[19]

Of course, the DOL's regulation does not give fiduciaries of plans sponsored by financial institutions *carte blanche* to invest in funds managed by affiliates. Like all investments, these funds, too, must pass fiduciary muster. *See Krueger*, 2012 U.S. Dist. LEXIS 166191, at *43. But the DOL's regulation does preclude Meiners from plausibly

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[18] The Complaint acknowledges that, apart from the Dow Jones Target Date Funds, only four of the Plan's "26 to 27 investment options" were managed by Wells Fargo affiliates. (Compl. ¶ 19.)

[19] Although courts in some cases allow claims to proceed based upon a plan's investments in affiliated funds, those cases are distinguishable. For example, in some cases, all of the plan's funds were affiliated with the sponsor. *See, e.g.*, *Wildman v. Am. Century Servs., LLC*, No. 4:16-CV-00737-DGK, 2017 U.S. Dist. LEXIS 31700, at *16-19 (W.D. Mo. Feb. 27, 2017). In other cases, the affiliated funds were brand new and "unproven" or replaced existing comparable funds that had superior performance records. *See, e.g.*, *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 15-1614, 2016 U.S. Dist. LEXIS 104244, at *5 (C.D. Cal. Aug. 5, 2016). In still other cases, the fiduciary allegedly chose a particular affiliated fund, when an identical, cheaper version of the same fund was available. *See, e.g.*, *Gipson v. Wells Fargo & Co.*, No. 08-4546, 2009 U.S. Dist. LEXIS 20740, at *12-13 (D. Minn. Mar. 12, 2009).

alleging that the affiliated nature of the Plan's target date fund investment, in and of itself, suggests a flawed process; otherwise, litigants could file suit based on nothing more than a plan's adherence to a practice that the DOL expressly allows, rendering the regulation's protections hollow. *Cf. In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 580 (S.D.N.Y. 2011) ("[I]f company stock ownership or compensation through company stock alone presented conflict of interests, ERISA's statutory scheme allowing company officers and directors, who are often stock holders and are compensated with stock, to serve as fiduciaries would be contradictory.").

Accordingly, Meiners cannot, as a matter of law, raise a plausible inference of a flawed fiduciary process simply because the Dow Jones Target Date Funds are managed by an affiliate, especially when those funds are offered within a mix of other unaffiliated funds. *See Dupree*, 2007 U.S. Dist. LEXIS 57857, at *144-46.

2. The hindsight allegation that another fund performed "better" does not plausibly suggest a flawed fiduciary process.

Meiners also cannot create an inference of a fiduciary breach by alleging that, during the class period, the Dow Jones Target Date Funds "underperformed" another series of target date funds offered by Vanguard.[20] (*See* Compl. ¶¶ 30-32.) Such "20/20 hindsight musings" based on the performance of a single fund family do not suggest that retaining the Dow Jones Target Date Funds was improper, especially without any

[20] Although Meiners alleges in conclusory fashion that Fidelity target date funds also outperformed the Dow Jones Target Date Funds, the Complaint alleges no facts to support this conclusion. (*See* Compl. ¶¶ 26-27.)

plausible allegation that the Vanguard funds are "comparable" for purposes of judging "performance." *Kanawi v. Bechtel Corp.*, 590 F. Supp. 2d 1213, 1230 (N.D. Cal. 2008).

As noted, the "ultimate outcome of an investment is not" evidence of "imprudence" or a fiduciary breach. *DeBruyne*, 920 F.2d at 465. Rather, the touchstone of ERISA's fiduciary standard is process, not result. *Roth*, 16 F.3d at 917-18.[21] For this reason, the Eighth Circuit and all other courts refuse to infer fiduciary wrongdoing simply from "hindsight" allegations about "investment options' subsequent performance." *Tussey v. ABB, Inc.*, 746 F.3d 327, 338 (8th Cir. 2014) (vacating judgment). Indeed, the Eighth Circuit just recently reaffirmed the principle that "looking back at the funds' earnings after the fact [is not] a valid way to determine whether choosing [one fund over another] was prudent." *Tussey II*, 2017 U.S. App. LEXIS 4225, at *10 n.4 (8th Cir. Mar. 9, 2017).[22] Thus, Meiners' allegation that the Dow Jones Target Date Funds "underperformed" does not suggest a flawed fiduciary process.

Further, even if a fund's "underperformance" could in some circumstances suggest a flawed fiduciary process, Meiners has not plausibly alleged here that the Dow Jones Target Date Funds actually "underperformed" in any meaningful way. Meiners does not compare the returns of the Dow Jones Target Date Funds to a benchmark or some other

[21] *See also PBGC*, 712 F.3d at 716 ("We judge a fiduciary's actions based upon information available to the fiduciary at the time of each investment decision and not from the vantage point of hindsight." (quotation and alteration omitted)); *Laboy v. Bd. of Trs. of Bldg. Serv. 32 BJ SRSP Fund*, 513 F. App'x 78, 79-81 (2d Cir. 2013) (same).

[22] *See also, e.g.*, *White v. Chevron Corp.*, No. 16-cv-0793-PJH, 2016 U.S. Dist. LEXIS 115875, at *55 (N.D. Cal. Aug. 29, 2016) (refusing to credit hindsight allegations of underperformance); *Kanawi*, 590 F. Supp. 2d at 1230 (same).

objective measure of performance. *Cf. Krueger*, 2012 U.S. Dist. LEXIS 166191, at *8 (assessing allegation that "funds underperformed their benchmarks each year" for years).[23] Nor does he offer a plausible basis for measuring the performance of the twelve target date funds—each of which has its own investment objective—on the basis of a manufactured "weighted average return" composite that the Complaint never defines or explains.[24] (*See* Compl. ¶ 31.) Instead, Meiners' "underperformance" allegation rests entirely on the claim that the Dow Jones Target Date Funds had lower returns than did a series of target date funds offered by Vanguard. (*Id.*)

Nothing in the Complaint or in the law, however, suggests that comparing the returns of the Dow Jones Target Date Funds to the returns of one other target date fund series plausibly demonstrates that the Dow Jones Funds "underperformed." In fact, the Eighth Circuit in *Tussey II* just observed that such a "view" is "mistaken." 2017 U.S. App. LEXIS 4225, at *18 n.8. There, the court rejected the assertion that a fund that "earned more [than the Plan's fund] over the relevant time frame 'should' have been offered to participants, or even that it performed 'better' in a meaningful sense." *Id.* As

[23] Meiners' conclusory allegations that analysts gave Vanguard their "highest ratings" but gave the Dow Jones Target Date Funds "neutral or, in several cases, negative ratings" are undifferentiated with respect to the funds in the target date series and do not describe what these "highest ratings" were for or how they were determined, adding nothing to the "careful, context-sensitive inquiry" required by *Dudenhoeffer*, 134 S. Ct. at 2470. (*See* Compl. ¶ 32.) *See, e.g.*, *White*, 2016 U.S. Dist. LEXIS 115875, at *49-57 (refusing to credit allegations about Morningstar return data).

[24] Meiners does not allege or explain, for example, why the performance of the 2055 Fund should be aggregated with the performance of his own fund, the 2025 Fund, or why the returns of twelve separate funds can be aggregated. (*See* Compl. ¶ 31.)

the court explained, "some investments are simply meant to pay off less than others, in return for lower risks, different exposures, or countless other considerations." *Id.*

Here, Meiners' allegation of "underperformance" is premised on the same "mistaken" view that *Tussey II* rejected—that the Vanguard funds delivered "better" returns over the relevant time frame—notwithstanding the different investment strategies that the respective funds employ. (*See* Compl. ¶ 30.) *See Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009) (recognizing that a claim of improper behavior is not plausible if there is an "alternative explanation" for the facts alleged). As noted, the Vanguard funds' index allocates more assets to higher-risk equity investments, while the Dow Jones Target Date Funds' index allocates more assets to lower-risk investments like bonds. *Cf.* U.S. Dep't of Labor, Advisory Opn. 88-16(A) (1988) (requiring that returns be judged "in comparison to risk"). This difference is aptly illustrated by Meiners' own fund, the 2025 Fund, which puts over half its assets in lower-risk bonds and cash, while the Vanguard 2025 fund has only a third of its assets in such investments:

Asset Allocation in 2016[25]			
2025 Fund Index:	Equity (%)	Bonds (%)	Cash Equivalents (%)
Dow Jones	49	47	4
Vanguard	67	33	0

[25] *See* 2016 Dow Jones Prospectus at 77; 2016 Vanguard Prospectus at 4. Most of the Dow Jones Target Date Funds also have more conservative allocations than Vanguard and Fidelity counterparts. For example, in 2016, the Dow Jones 2015 Fund invested 26% in equities—the Vanguard and Fidelity 2015 funds invested 49% and 53% in equities, respectively; the Dow Jones 2035 Fund invested 74% in equities—the Vanguard and Fidelity 2035 funds invested 82% and 89% in equities, respectively. (2016 Dow Jones Prospectus at 77; 2016 Vanguard Prospectus at 4; 2016 Fidelity Prospectus at 4.)

Although Meiners complains that he would have enjoyed higher returns had the Committee Defendants replaced the more conservative Dow Jones Target Date Funds with the more aggressive Vanguard funds (*see* Compl. ¶ 31), that does not mean that the Vanguard funds "should" have been selected, particularly in light of the fact that the funds in the Plan track the Dow Jones Indexes and the Vanguard funds pursue a different strategy. As *Tussey II* makes clear, funds "designed for different purposes [] choose their investments differently, so there is no reason to expect them to make similar returns over any given span of time." 2017 U.S. App. LEXIS 4225, at *18; *see also* DOL & SEC Investor Bulletin at 1 (explaining that different target date funds on the market have "very different investment strategies and risks").[26]

Risk works both ways: While higher risk in the form of a greater exposure to equities can (and in this case allegedly did) result in higher returns, it can also result (and has resulted)[27] in lower returns and even losses. The Complaint does not, however, allege that it was wrong for the Committee to choose funds that followed the Dow Jones' more conservative asset-allocation strategy. Thus, Meiners cannot plausibly claim that the

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[26] Further, Meiners does not even attempt to account for differences between the Dow Jones Target Date Funds' and Vanguard funds' strategy for investing within equity and bond asset classes. (*See* Compl. ¶¶ 30-32.) (*Compare* 2016 Dow Jones Prospectus at 78-79, *with* 2016 Vanguard Prospectus at 6-7 (weighting investments within equity class and within bond class differently).)

[27] In fact, the Complaint acknowledges that, during the class period, the Dow Jones Target Date Funds outperformed the Vanguard funds in the five years prior to 2012. (*See* Compl. ¶ 31 (alleging that the Dow Jones Funds earned 1.87% from 2008 to 2012, while the Vanguard funds earned 1.47%).) Meiners' own statistics include returns during the 2008 financial crisis, where the Dow Jones 2025 Fund beat the 2025 Vanguard fund by 3.35%. (*Compare* 2016 Dow Jones Prospectus at 29, *with* 2012 Vanguard Prospectus at 2.)

Dow Jones Target Date Funds "should" have been replaced because the Vanguard funds offered "better" returns. *See Tussey II*, 2017 U.S. App. LEXIS 4225, at *18 n.8 (recognizing that "some investments are simply meant to pay off less than others in return for lower risks"); *see also Jenkins v. Yager*, 444 F.3d 916, 925-26 (7th Cir. 2006) (explaining that, despite "years of low performance," the decision to select "long-term, conservative, reliable investments that would do well during market fluctuations" was not "unreasonable or imprudent").[28]

For these reasons, the fact that the Vanguard funds generated higher returns than the Dow Jones Target Date Funds does not raise a plausible inference that retention of the Dow Jones Target Date Funds was the result of a flawed fiduciary process. If it did, then all but the mutual fund with the highest returns among other allegedly "comparable" funds would be vulnerable to ERISA class actions.

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[28] Cases where courts have cited past performance as a factor in allowing fiduciary claims to go forward are distinguishable. In many of those cases, the fiduciaries allegedly chose a higher-priced version of the same investment option in order to generate investment management fees. *See, e.g.*, *Braden*, 588 F.3d at 590; *Krueger*, 2012 U.S. Dist. LEXIS 166191, at *13; *Gipson*, 2009 U.S. Dist. LEXIS 20740, at *12-13. In others, the fiduciaries allegedly chose affiliated funds over comparable funds that had better historical returns as measured by objective benchmarks. *See, e.g.*, *Krueger*, 2012 U.S. Dist. LEXIS 166191, at *8. Further, in *Gipson* the plaintiff based her claims on returns of affiliated funds that were lower than allegedly "comparable" funds, *Gipson* Amended Complaint (Dkt. 38, No. No. 08-CV-4546), whereas here the funds are demonstrably not "comparable." *Compare supra* at 6 (Dow Jones 2025 Fund invested less than half in equities, while over two thirds of assets in 2025 Vanguard fund invested in equities), *with* Dep't of Labor, Advisory Opn. 88-16(A) (1988) (requiring that returns be judged "in comparison to risk").

3. The existence of two "cheaper" alternative funds does not plausibly suggest a flawed fiduciary process.

Meiners' allegation that the Vanguard and Fidelity target date funds are "cheaper" than the Dow Jones Target Date Funds also fails to raise a plausible inference of fiduciary wrongdoing. (*See* Compl. ¶¶ 26-29.) Significantly, Meiners does not allege that the Dow Jones Target Date Funds' fees during the class period were "excessive," "unreasonable," or even "high" as compared to the fees charged by target date funds generally. (*See id.*)

Instead, Meiners attempts to raise an inference of imprudence by pointing out that target date funds offered by just two other financial institutions cost less than the Dow Jones Target Date Funds. (Compl. ¶ 28.) But courts have consistently rejected attempts to imply fiduciary wrongdoing from the fact that there was some alternative option on the market that charged lower fees. As the Seventh Circuit observed in *Hecker*, the mere fact that plan fiduciaries could have found another, even cheaper option "is beside the point; nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund." 556 F.3d at 586; *see also White*, 2016 U.S. Dist. LEXIS 115875, at *37 ("It is inappropriate to compare distinct investment vehicles solely by cost."). Similarly, the DOL cautions that an investment fund "offering the lowest cost services is not necessarily the best choice for your plan."[29]

[29] DOL, Emp. Benefits Sec. Admin., 401(k) Plan Fee Disclosure Form, https://www.dol.gov/ebsa/pdf/401kfefm.pdf; *see also* 29 C.F.R. § 2550.404a-5(d)(1)(iv)(A)(4) (noting "that fees and expenses are only one of several factors that participants and beneficiaries should consider when making investment decisions").

Indeed, Meiners' allegation that the Committee Defendants should have invested in cheaper funds implicitly assumes that all the funds offer the same services. (*See* Compl. ¶ 27.) But the facts incorporated within the pleadings do not support that assumption. In addition to employing the subadvisory services of State Street Global Advisors and Global Index Advisors, the Dow Jones Target Date Funds rely on—and pay for—proprietary investment information from S&P Dow Jones Indices, LLC. (*See* 2016 Dow Jones Prospectus at 84, 99.) Nothing in the Complaint, however, suggests whether the Fidelity and Vanguard target date funds use the same or similar services. (*See* Compl. ¶¶ 26-29.) Thus, the Complaint does not offer an "apples to apples" comparison, measuring the funds' fees "against the services rendered." *See Laboy*, 513 F. App'x at 80 n.4 (quotation omitted); *cf. Tussey II*, 2017 U.S. App. LEXIS 4225, at *18 (commenting on the limited value of "apples-to-oranges" comparisons).

For this reason, courts routinely reject efforts like Meiners' to sustain complaints on grounds that cheaper funds (particularly those offered by Vanguard) were available. *See Kalish v. Franklin Advisers, Inc.*, 742 F. Supp. 1222, 1231 (S.D.N.Y. 1990) (noting "there are . . . significant differences in structure, peculiar to the Vanguard family of funds, which lessen the value of the comparison").[30] Rather, what is required is a plausible allegation that the fees were "excessive" as compared to the services provided,

[30] *See also Amron v. Morgan Stanley Inv. Advisors Inc.*, 464 F.3d 338, 345 (2d Cir. 2006) ("That a mutual fund has an expense ratio higher than Vanguard, a firm known for its emphasis on keeping costs low, raises little suspicion."); *Reso Artisan Int'l Fund v. Artisan Partners*, No. 11-CV-873-JPS, 2011 U.S. Dist. LEXIS 133526, at *23-24 (E.D. Wis. Nov. 18, 2011) (calling comparisons to Vanguard "of little value")

see, e.g., *Braden*, 588 F.3d at 590 (allegation of "excessive" fees); *Krueger*, 2012 U.S. Dist. LEXIS 166191, at *9 (same), or that "far lower cost funds with the *identical* managers, investment styles, and stocks were available." *Karolyn v. Novant Health, Inc.*, 131 F. Supp. 3d 470, 474 (M.D.N.C. 2015) (emphasis added). No such allegations, however, can be found in this Complaint. (*See* Comp. ¶¶ 26-29.)

Meiners cannot save his deficient fee allegation through his unsubstantiated claim that the Dow Jones Target Date Funds "double charge" for their services. (*See* Compl. ¶¶ 3, 24.) To the contrary, Meiners' own Complaint acknowledges that the funds do not "double charge." The Complaint asserts that the Dow Jones Target Date Funds do not themselves invest in specific stocks or bonds. (*Id.* ¶ 22.) Rather, each fund invests a (different) percentage of its assets in three separate "underlying" funds: an equities index fund, a bond index fund, and a cash-equivalent fund. (*Id.* ¶ 24.)[31] The advisors for each of these funds (the Dow Jones Target Date Fund itself and the three underlying funds) charge a separate fee. The fees paid to the "underlying" funds are disclosed in the prospectus, and the fee that Meiners acknowledges the Dow Jones Target Date Funds charge includes the fees from the "underlying" funds. (*See* 2016 Dow Jones Prospectus at 25, 73-83; Compl. ¶ 28.) Thus, the fees charged by the fund manager for the Dow Jones Target Date Funds are for services such as allocating assets to the underlying

[31] *See also* 2016 Dow Jones Prospectus at 73-84. This "fund of funds" arrangement is common in the industry. *See* Jacob Hale Russell, *The Separation of Intelligence and Control: Retirement Savings and the Limits of Soft Paternalism*, 6 WM. & MARY BUS. L. REV. 35, 54 ("Most [target date funds] are 'funds of funds,' which simply hold other funds run by the same mutual fund family and charge an additional fee.").

funds. These fees are separate and distinct from the fees charged by each of the underlying funds for managing the equity, bond, and cash-equivalent holdings. Meiners' own allegations therefore demonstrate that participants do not pay twice for the same service.[32]

Meiners' allegation that participants pay "for the services for the target date fund" and separately "for the services associated with the underlying index funds" is, therefore, nothing more than a complaint that the fees are "too high" and in no way alleges "double charging." (*See* Compl. ¶ 24.) For the same reasons that the Complaint fails to allege that the overall fee charged by the Dow Jones Target Date funds signaled imprudence, it does not improve that allegation by adding that that fee is broken down into separate components.[33] *See Hecker*, 556 F.3d at 586 (explaining that what matters is the "total fee, not the internal" structure of the fee); *see also* DOL, A Look at 401(k) Plan Fees 1-2 (Aug. 2013) ("If a target date fund invests in other mutual funds (often called a 'fund-of-funds'), fees may be charged by both the target date fund and the other funds.").

Accordingly, the mere fact that there were two cheaper funds out of the many target date funds available raises no inference of wrongdoing.

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[32] Although the court in *Pledger v. Reliance Trust Co.* briefly referenced an "additional" layer of fees that the target date funds at issue charged, this was in the context of claims that the fiduciaries selected affiliated funds that were new, untested, charged the most expensive fee available for that set of funds, and allegedly resulted in inappropriate revenue sharing. No. 1:15-CV-4444-MHC, 2017 U.S. Dist. LEXIS 39745, at *18-23 (N.D. Ga. Mar. 7, 2017).

[33] *See also* 2016 Dow Jones Prospectus at 73 (noting that the "services provided and fees charged" by the underlying funds are "in addition to and not duplicative" of the fees and expenses charged by the Dow Jones Target Date Funds themselves).

4. Meiners' remaining criticisms about the Dow Jones Target Date Funds do not plausibly suggest a flawed fiduciary process.

Having failed to allege a breach of fiduciary duty based upon the Dow Jones Target Date Funds' performance and fees, Meiners offers additional critiques, but they do not imply a flawed fiduciary process either.

First, Meiners cannot state a claim simply because the Dow Jones Target Date Funds are the Plan's "default" investment option for participants who do not make an investment election. (*See* Compl. ¶ 34.) Congress has explicitly authorized 401(k) plans to include "default" investment options for participants who fail to make an investment election. 29 U.S.C. 1104(c)(5). And, the DOL has concluded that target date funds are ideal default investment options because they serve the twin goals of "long-term appreciation and capital preservation."[34] It should come as no surprise, then, that "96 percent of plans with an automatic enrollment policy used target date funds" as their default investment option,[35] or that the Plan would do the same.[36] Given the existence of such a "concrete, obvious alternative explanation" for why the Dow Jones Target Date Funds might serve as default options, Meiners' conclusory assertions that they are

[34] Default Investment Alternatives Under Participant Directed Individual Account Plans, 72 Fed. Reg. 60,453, 60,461 (Oct. 24, 2007); *see also* 29 C.F.R. § 2550.404c-5(e)(4) (2015) (listing target date funds, traditional balanced funds, and managed accounts); DOL & SEC Investor Bulletin at 1 (noting that target date "funds are designed to make investing for retirement more convenient").

[35] S. Special Comm. on Aging, 111th Cong., Target Date Retirement Funds: Lack of Clarity Among Structures and Fees Raises Concerns 13 (2009), *available at* https://www.gpo.gov/fdsys/pkg/CPRT-111SPRT53067/html/CPRT-111SPRT53067.htm.

[36] Nor, for the same reasons, would the fact that Participants could choose these funds through a "Quick Enroll" process suggest wrongdoing. (*See* Compl. ¶ 35.)

maintained for an improper purpose is not plausible. *Braden*, 588 F.3d at 597; *see also Iqbal*, 556 U.S. at 682 (recognizing that a claim of improper behavior is not plausible if there are "alternative explanations" for the facts alleged).

Second, Meiners' claim that the Plan holds a quarter of the assets in the Dow Jones Target Date Funds fails to plausibly suggest that the Committee Defendants were "seeding" these funds. (*See* Compl. ¶ 36.) Many of these funds have been in existence since the 1990s,[37] which precludes any argument that the Committee Defendants were trying to "seed" new funds.[38] *Cf. Gipson*, 2009 U.S. Dist. LEXIS 20740, at *15 (considering "seeding" allegations in the context of new funds). Nor does the fact that the Plan's participants who (like the Funds' other investors) selected the Dow Jones Target Date Funds suggest any shortcoming. Meiners himself suggests that the Wells Fargo Plan is one of the largest in the country (*see* Compl. ¶ 10), further diminishing his conclusory allegation that its percentage of ownership can only be explained by fiduciary malintent. *See Iqbal*, 556 U.S. at 682 (recognizing that the plausibility of allegations is undermined by "alternative explanations").

5. The Complaint, read as a whole, does not plausibly suggest a flawed fiduciary process.

Meiners' Complaint should be dismissed because it alleges no facts indicating a flawed fiduciary process, and it alleges no facts from which a flawed process can be

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[37] *See* Bullard Decl. Ex. D at 8.

[38] Meiners' Complaint, therefore, is not like others that have survived dismissal motions due to allegations that fiduciaries populated plans with "new" and "untested" funds with no proven track record. *See, e.g.*, *Urakhchin*, 2016 U.S. Dist. LEXIS 104244, at *5 (assessing allegation that plan fiduciaries used plan to "seed" new funds).

inferred. Nor can any inference of wrongdoing somehow be inferred by considering the fees, performance, affiliated status of the Dow Jones Target Date Funds, and the other factors Meiners cites in combination.

While it is of course true that complaints "should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible," *Braden*, 588 F.3d at 594, the allegations in Meiners' Complaint, when read as a whole, allege nothing more than the fact that an affiliated fund had lower returns than did another, cheaper fund that was pursuing a demonstrably more aggressive investment strategy. If that was all that was necessary to plead a cause of action in an affiliated fund case, then virtually any time an affiliated fund were alleged to have come in "second," it would be subject to suit and the attendant costs and burdens associated with federal litigation. Opening the doors of the courthouse so wide would be inconsistent with the "careful, context-sensitive scrutiny" that the Supreme Court requires in judging the sufficiency of ERISA fiduciary claims. *See Dudenhoeffer*, 134 S. Ct. at 2470-71 (explaining that "careful judicial consideration" of ERISA claims is necessary to safeguard Congress' intention "not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering . . . benefit plans in the first place") (quotation omitted); *see also PBGC*, 712 F.3d at 718 ("[T]he prospect of discovery in a suit claiming breach of fiduciary duty is ominous.").

C. Meiners Fails to Allege a Breach of Co-Fiduciary Duty Claim.

Further, Meiners' claim that the Non-Committee Individual Defendants (*see supra* at n.13) violated their "co-fiduciary duties" under ERISA § 405 fails as well. (Compl. ¶¶ 59-63.)

First, Meiners' co-fiduciary claim fails because, for the reasons explained above, he has failed to allege an underlying breach of fiduciary duty. Without such a breach, this derivative claim based upon the non-Committee members' failure to prevent the primary breach of fiduciary duty cannot proceed. *See Brown v. Medtronic, Inc.*, 628 F.3d 451, 461 (8th Cir. 2010) (affirming dismissal of derivative co-fiduciary claim, which cannot "survive without a sufficiently pled theory of an underlying breach").

Second, Meiners has failed to plausibly allege, as he must, that any of the Non-Committee Individual Defendants actually had "knowledge" of the Committee Defendants breach of fiduciary duty, and failed to take curative action. *See* ERISA § 405(a)(3), 29 U.S.C § 1105(a)(3).[39] Meiners does not allege why the outside directors and "Plan Administrators," Hope Hardison and Justin Thornton, should have known that the Dow Jones Target Date Funds were somehow deficient. (*See* Compl. ¶¶ 59-63.) He does not allege why, for example, the outside directors knew or had reason to know the relative cost and performance of the Fidelity and Vanguard funds, or any other facts and circumstances that he contends suggest imprudence. (*See id.*) All Meiners offers is

[39] ERISA § 405 makes an existing fiduciary liable if he or she (1) "participates knowingly" in another party's breach of fiduciary duty; (2) by failing to perform a fiduciary duty, allows another party to breach its fiduciary duties; or (3) has knowledge of a breach by another fiduciary, and fails to take steps to remedy that breach.

conclusory statements that these individuals "knowingly participated" in the Committee's alleged breaches of fiduciary duties, which fails because it does nothing more than "simply parrot" the text of ERISA § 405's co-fiduciary rules. *See, e.g.*, *In re Sprint Corp. ERISA Litig.*, 388 F. Supp. 2d 1207, 1230-31 (D. Kan. 2004) (dismissing co-fiduciary claims where the complaint contained "no factual allegations at all, but instead simply parrot[s] the language of the co-fiduciary liability statute").

D. Meiners Fails to Allege Claims against Wells Fargo & Company.

Meiners has alleged that Defendant Wells Fargo & Company was not a Plan fiduciary, and in Count III, seeks to hold it liable under the only provision of ERISA that allows relief against non-fiduciaries—Section 502(a)(3). (Compl. ¶¶ 64-68.) *See Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 251 (2000) (recognizing that ERISA's remedies against non-fiduciaries are limited to relief under ERISA § 502(a)(3)). Along with all of Meiners' other claims, however, this claim fails as well.

First, like the co-fiduciary claim, Meiners' § 502(a)(3) claim is derivative in nature and fails absent an underlying breach claim. *See, e.g.*, *In re Pfizer Inc. ERISA Litig.*, No. 04-cv-10071, 2013 U.S. Dist. LEXIS 45868, *34 (S.D.N.Y. March 29, 2013) (dismissing claims for "knowing participation" against non-fiduciaries under ERISA § 502(a)(3) because Plaintiffs failed to plead a primary breach of fiduciary duty).

Further, Count III against Wells Fargo should be dismissed because it does not state a claim to recover "appropriate equitable relief," as required under ERISA § 502(a)(3). Because relief under this section is limited to that which is "*equitable*," the United States Supreme Court has expressly ruled that plaintiffs cannot obtain, under this

section, damages or other relief sounding at law. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214 (2002) (emphasis added). Rather, plaintiffs may seek only relief traditionally available at equity—that is, an order requiring a non-fiduciary "to restore to the[m] particular funds or property in the defendant's possession." *Id.*[40] This requires that any amounts that plaintiffs seek must "be traced [from ERISA plan assets] to a particular fund held by a defendant." *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Gerber Life Ins. Co.*, 771 F.3d 150, 155 (2d Cir. 2014).

Here, Meiners has failed to plead any facts satisfying this standard for relief under § 502(a)(3). Although the Complaint alleges that Wells Fargo (through its affiliates) "earned millions in fees" from the assets of the Dow Jones Target Date Funds, ERISA explicitly provides that the assets of a mutual fund are not plan assets. *See* ERISA § 401(b)(1). Thus, Meiners has failed to allege that Wells Fargo & Company has in its possession Plan assets that should be restored to the Plan. (*See* Compl. ¶ 67.) Absent such an allegation, Meiners' claim against Wells Fargo & Company should be dismissed. *See, e.g.*, *Pledger*, 2017 U.S. Dist. LEXIS 39745, at *46-48 (dismissing § 502(a)(3) "knowing participation" claim against non-fiduciary for failure to allege "identifiable res" from which "ill-gotten proceeds or profits" could be returned); *Urakhchin*, 2016 U.S. Dist. LEXIS 104244, at *23-27 (same); *Moreno v. Deutsche Bank Ams. Holding Corp.*, 2016 U.S. Dist. LEXIS 142601, at *24-26 (S.D.N.Y. Oct. 13, 2016) (same).

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[40] *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (holding that ERISA does not permit a cause of action against nonfiduciaries for the recovery of damages); *see also Peabody v. Davis*, 636 F.3d 368, 373 (7th Cir. 2011); *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 103 (2d Cir. 2005).

IV. CONCLUSION

Meiners' Complaint fails to meet the "careful, context-sensitive scrutiny" that *Dudenhoeffer* requires in class actions alleging fiduciary violations under ERISA. Defendants respectfully request the Court dismiss the Complaint.

Dated: March 22, 2017

DORSEY & WHITNEY LLP

By s/Stephen P. Lucke

Stephen P. Lucke (#154210)
lucke.steve@dorsey.com
Andrew Holly (#308171)
holly.andrew@dorsey.com
Nicholas J. Bullard (#0397400)
bullard.nick@dorsey.com
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600

and

PROSKAUER ROSE LLP
Deidre Grossman (admitted *pro hac vice*)
dagrossman@proskauer.com
Eleven Times Square
New York, NY 10036-8299
Telephone: (212) 969-3814

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

John Meiners, on behalf of a class of all persons similarly situated, and on behalf of the Wells Fargo & Company 401(k) Plan,

Plaintiffs,

v.

Wells Fargo & Company; Human Resources Committee of the Wells Fargo Board of Directors; Wells Fargo Employee Benefits Review Committee; Hope Hardison; Justin Thornton; Patricia Callahan; Michael Heid; Timothy Sloan; Lloyd Dean; John Chen; Susan Engel; Donald James; and Stephen Sanger,

Defendants.

Case No. 16-cv-03981 (DSD/FLN)

CERTIFICATE OF COMPLAINCE WITH LOCAL RULE 7.1

I, Stephen P. Lucke, certify that Defendants' Memorandum of Law in Support of their Motion to Dismiss complies with the limits in Local Rule 7.1(f) and type-size limit of Local Rule 7.1(h). I further certify that, in the preparation of the Memorandum, I used Microsoft Word version 2010, 13-point font, Times New Roman typeface, and that this word processing program has been applied to include all text, including headings, footnotes, and quotations in the word count. I further certify that the above-reference Memorandum contains 8,228 words.

Dated: March 22, 2017

DORSEY & WHITNEY LLP

By s/Stephen P. Lucke
Stephen P. Lucke (#154210)
lucke.steve@dorsey.com
Andrew Holly (#308171)
holly.andrew@dorsey.com
Nicholas J. Bullard (#0397400)
bullard.nick@dorsey.com
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600

and

PROSKAUER ROSE LLP
Deidre Grossman (admitted *pro hac vice*)
dagrossman@proskauer.com
Eleven Times Square
New York, NY 10036-8299
Telephone: (212) 969-3814

Attorneys for Defendants