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)

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

For over six years, a cornerstone of the Wells Fargo & Company 401(k) Plan (the "Plan") has been a suite of Wells Fargo's[1] own proprietary retirement funds, which at all times were more than 2.5 times more expensive than comparable funds and consistently underperformed them. Motivated by self-interest, Wells Fargo funneled billions of dollars of participants' retirement savings into the funds by, among other things, defaulting participants into them, thereby leveraging participants' investments – which were over a quarter of the funds' total assets – as seed money for the funds. Wells Fargo allowed these investments to remain in the Plan, failing to consider or correct the conflict of interests, the imprudent investments, or the flawed Plan design that funneled billions of dollars of retirement savings into these funds.

Courts, including the Eighth Circuit and this Court, have repeatedly held that similar allegations of self-dealing are sufficient to state a claim for breach of fiduciary duty under ERISA. Indeed, under almost identical facts, this Court denied a similar motion brought by Wells Fargo on a claim that asserted similar allegations of self-dealing concerning a different set of proprietary funds in the Plan. *See Gipson v. Wells Fargo & Co.*, No. 08-cv-4546, 2009 WL 702004 (D. Minn. Mar. 12, 2009). After denying Wells Fargo's motion to dismiss, the Court subsequently certified the 401(k) Plan class, and approved a settlement for $17.5 million. *See Figas v. Wells Fargo & Co.,* No. 08-cv-4546 (D. Minn. Aug. 9, 2011) (Doc. 294) (attached as Exhibit A).

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[1] Defendants are collectively referred to herein as "Wells Fargo" or "Defendants."

Brushing aside *Gipson* and similar cases, Wells Fargo mischaracterizes Plaintiff's allegations as merely faulting Wells Fargo for choosing affiliated funds that, in hindsight, underperformed other funds. But Plaintiff alleges something much different. Plaintiff alleges that Wells Fargo put its self-interest ahead of Plan participants by funneling retirement savings into its own funds that for six years—quarter over quarter, year over year—were over 2.5 times more expensive and underperformed comparable funds. Courts, including this Court and the Eighth Circuit, have repeatedly held that such allegations are sufficient to withstand a motion to dismiss.

For these reasons, Plaintiff respectfully requests that Wells Fargo's motion to dismiss be denied.

BACKGROUND

I. Nature of the Action

Plaintiff John Meiners brings this action as a representative of the Plan, asserting breach of fiduciary duty and related claims against Defendants for engaging in a process of self-dealing and imprudent investing by funneling billions of dollars of the participants' retirement savings into Wells Fargo's proprietary target date funds. Plaintiff asserts breach of fiduciary duty claims against individual members of the Wells Fargo Employee Benefit Review Committee ("Benefit Committee")—a named fiduciary under the Plan, which is comprised of Wells Fargo & Company's senior executives, and is responsible for choosing and periodically reviewing and monitoring the Plan's

investment options. (Compl. ¶¶ 14, 52-58).[2] Plaintiff further asserts breach of co-fiduciary duty claims against the Human Resources Committee of the Wells Fargo Board of Directors ("HR Committee"), which was, for most of the class period, also a named fiduciary of the Plan with the authority to appoint Benefit Committee members and to amend the Plan. *Id.* at ¶¶ 17, 59-63.[3] Plaintiff also asserts breach of co-fiduciary duties against Director of Human Resources Hope Hardison and Director of Compensation and Benefits Justin Thornton, who are also named fiduciaries under the Plan, with the authority to control and manage the operation and administration of the Plan. *Id.* at ¶ 12-13, 59-63. Finally, Plaintiff alleges a claim against Wells Fargo & Company—the Plan sponsor—for knowingly participating in the breaches of fiduciary duties of the fiduciary Defendants. *Id.* at ¶ 11, 64-68.

II. The Plan Investments and the Wells Fargo TDFs

The Plan is a defined-contribution plan, also known as a 401(k) plan, which is a type of employee retirement plan in which employees invest a percentage of their earnings on a pre-tax basis. Compl. ¶ 10. With over 350,000 participants, the Plan is one of the largest retirement plans in the country. *Id.*

[2] The Benefit Committee Defendants include Defendants Patricia Callahan, Timothy Sloan, and Michael Heid. Wells Fargo has recently identified additional members of the Benefit Committee during the relevant class period, and Plaintiff anticipates adding them to the Complaint in the near future.

[3] The HR Committee Defendants are Defendants Lloyd Dean, John Chen, Susan Engel, Donald James, and Stephen Sanger.

At all relevant times, the Plan offered a limited menu of 26 to 27 investment options, approximately 16 of which were proprietary funds managed by Wells Fargo & Company or its subsidiaries. *Id.* ¶ 19. Twelve of the Wells Fargo funds are the funds at issue here—a family of funds called Wells Fargo Dow Jones Target Date Funds ("Wells Fargo TDFs") managed by a wholly-owned Wells Fargo subsidiary. *Id.*

Target date funds, also known as lifecycle funds, are mutual funds that are typically used to plan for retirement or other long-term savings goals. *Id.* at ¶ 20. Target date funds automatically shift the asset mix of stocks, bonds, and cash equivalents in the fund portfolio based on the targeted retirement date. *Id.* The suite of Wells Fargo TDFs is based on target retirement dates spanning from 2010 to 2060 in five year increments, in addition to a fund with a target date of current day. *Id.*

The Wells Fargo TDFs employ what is known as a passive index-based strategy. *Id.* at ¶ 21. The stated objective of the funds is to approximate the holdings and weightings of the Dow Jones Target Date indices for each corresponding target year. *Id.* The Dow Jones Target Date indices provide benchmarks for target date funds, and are comprised of subindices representing three major asset classes—stocks, bonds, and cash. *Id.*

The Wells Fargo TDFs approximate the holdings and weightings of the Dow Jones Target Date indices by investing exclusively in three proprietary Wells Fargo index funds: (1) the Wells Fargo Diversified Stock Portfolio, (2) the Wells Fargo Diversified Fixed Income Portfolio, and (3) the Wells Fargo Short Term Investment Portfolio. *Id.* at ¶ 22. These Wells Fargo index funds (called the "master portfolios") attempt to

approximate the equity, bond, and cash subindices of the Dow Jones Target Date indices. *Id.*

The underlying strategy of the Wells Fargo TDFs, which is to approximate indices developed by others, is a passive investment strategy. *Id.* at ¶ 23. Funds with passive strategies generally charge less than funds with active strategies, where, rather than relying on an index, the managers use significant amounts of discretion and analysis to select investments and to try to beat the markets. *Id.*

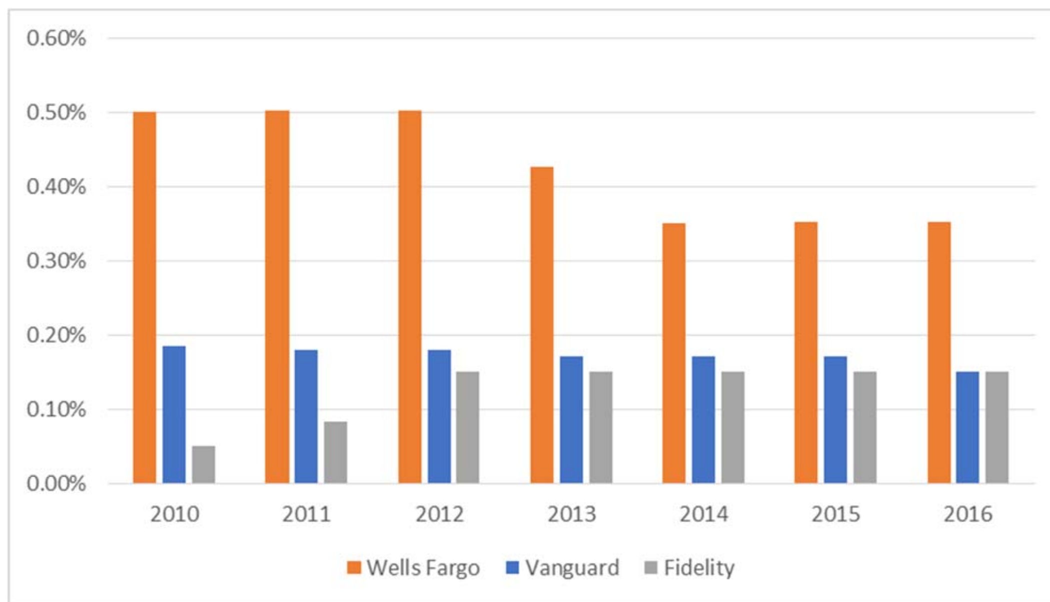
The expenses associated with the Wells Fargo TDFs include a management fee component and an administrative fee component. *Id.* at ¶ 24. There is also a charge related to the management fee underlying the Wells Fargo index funds comprising the Wells Fargo TDFs. *Id.* Therefore, Wells Fargo charges two layers of fees for the Wells Fargo TDFs—one for the services for the target date fund, and one of the services associated with the underlying index funds. *Id.*

III. Defendants Funneled Plan Assets into the Costly Wells Fargo TDFs Despite Cheaper, Better-Performing Alternatives

During the entire class period, the Benefit Committee, with the full knowledge and participation of the other Defendants, selected Wells Fargo TDFs for the plan and failed to eliminate them despite cheaper and better performing alternatives. *Id.* at ¶ 25-26. The comparable alternatives include, for example, the Vanguard Target Retirement Funds ("Vanguard Funds") managed by Vanguard Group, Inc., and the Fidelity Freedom Index Funds ("Fidelity Funds") managed by Fidelity Investments. *Id.* at ¶ 27. Like the Wells Fargo TDFs, these funds are target date retirement index funds which employ a passive

management strategy based on indexes. *Id.* For the entire class period, the net expense ratios of the Wells Fargo TDFs were at least 2.5 times more than the net expense ratios of the Vanguard and Fidelity Funds for comparable share classes. *Id.*

The following is a comparison of the annual expense rations of the funds during the class period:



Id. at ¶ 28.

The disparity in cost is due in part to the fact that the Vanguard and Fidelity Funds, unlike the Wells Fargo TDFs, do not double charge for management fees. *Id.* at 29. That is, Vanguard and Fidelity charged no fees for managing the target date funds themselves, charging fees only for managing the index funds underlying the target date funds. *Id.*

Not only were alternative funds far cheaper than the Wells Fargo TDFs, they also consistently outperformed them. *Id.* at 30. For example, as of June 30, 2011, a total of approximately $3.2 billion of Plan assets was invested in the Wells Fargo TDFs, and, as

of June 30, 2016, the weighted average annual return of those investments was 5.44 percent. *Id.* Had the Benefit Committee eliminated the conflict of interests and instead selected the Vanguard Funds, the weighted average return over the same period would have been 7.02 percent. *Id.* This amounts to a difference of 10.21 percent in total returns over that five-year period, or $323 million. *Id.*

The underperformance of the Wells Fargo TDFs is not just apparent in hindsight. To the contrary, the underperformance was apparent year after year during the class period. *Id.* at 31. For example, from 2011 to present, the weighted average returns of the Wells Fargo TDFs consistently underperformed the same weighted average returns of the Vanguard Funds on a one-, three-, and five-year trailing basis as follows:

Weighted Average Returns as of 6/30/2011

	1 Year	3 year	5 year
Vanguard	23.64	6.71	3.72
Wells Fargo	20.76	6.48	2.52

Weighted Average Returns as of 6/30/2012

	1 Year	3 year	5 year
Vanguard	1.22	12.41	1.47
Wells Fargo	0.31	11.12	1.87

Weighted Average Returns as of 6/30/2013

	1 Year	3 year	5 year
Vanguard	12.92	12.21	4.55
Wells Fargo	9.69	9.95	4.10

Weighted Average Returns as of 6/30/2014

	1 Year	3 year	5 year
Vanguard	18.61	10.68	13.85
Wells Fargo	15.93	8.35	12.06

Weighted Average Returns as of 6/30/2015

	1 Year	3 year	5 year
Vanguard	3.08	11.72	11.69
Wells Fargo	0.91	9.17	9.52

Weighted Average Returns as of 6/30/2016

	1 Year	3 year	5 year
Vanguard	0.15	7.08	7.05
Wells Fargo	1.20	5.92	5.44

Id. at ¶ 31.

Lower costs and better performance has earned the Vanguard Funds, during the entire class period, the highest ratings from leading third-party analysts such as Morningstar and Lipper, while during the same period, the Wells Fargo TDFs have been consistently downgraded to neutral or, in several cases, negative ratings. *Id.* at ¶ 32.

IV. Defendants Defaulted Participants Into the Wells Fargo TDFs

Not only did the Benefit Committee select the costlier and worse-performing Wells Fargo TDFs, Defendants implemented a system designed to maximize the amount of Plan assets invested in the funds. *Id.* at ¶ 33. One component of the system was designating the Wells Fargo TDFs as the default funds into which participants' contributions were invested. *Id.* at ¶ 34. Thus, for those participants who enrolled in the

Plan without selecting an investment option (a relatively common occurrence), their contributions were automatically invested into the Wells TDF that matched their estimated retirement year based on age. *Id.* The assets defaulted into the Wells Fargo TDFs included employee pre-tax salary contributions, monies rolled over into the Plan from other retirement accounts, and repayments of any loans taken against a participant's account. *Id.*

In addition to defaulting participants into the Wells Fargo TDFs, the Plan offered an "Easy Enroll" and "Quick Enroll" feature, which was prominently offered in the summary plan documents provided to the Plan participants throughout the class period. *Id.* at ¶ 35. Under the current Easy Enroll feature, participants may, with the check of a box, automatically commit six percent of their pre-tax salary to the Wells Fargo TDF that matches their estimated retirement year based on age, with automatic one percent increases each year thereafter until their contribution reaches 12 percent. *Id.*

V. Defendants Used Plan Assets to "Seed" Their Proprietary Wells Fargo TDFs

This system of funneling members into the Wells Fargo TDFs has helped put over $3 billion in Plan assets into the Wells Fargo TDFs, which has been an important source of seed money for the funds. Indeed, investments from Plan participants constitute approximately 28 percent of the total assets in the Wells Fargo TDFs. *Id.* at ¶ 36. Further, an additional 29 percent of the assets in the Wells Fargo TDFs come from other Wells Fargo-directed activity, including third-party 401(k) plans where Wells Fargo serves as a third-party administrator. Thus, Wells Fargo-directed activity accounts for approximately 59 percent of the assets in the Wells Fargo TDFs. *Id.*

VI. Defendants Failed to Properly Monitor the Plan

During the entire class period, the Benefit Committee was required by Wells Fargo's internal policies to periodically monitor the Plan investments to ensure, among other things, that they were prudent and not tainted by a conflict of interests. *Id.* at ¶ 37. Wells Fargo's internal policies required that these reviews occur at least quarterly. *Id.*

The Benefit Committee knew or should have known that (1) the Wells Fargo TDFs were selected based on a conflict of interests, (2) the Plan was designed to funnel participant money into the Wells Fargo TDFs, and (3) there were substantially cheaper and better-performing comparable funds available. *Id.* at ¶ 38. Despite this actual or constructive knowledge, the Benefit Committee failed to remove the Wells Fargo TDFs from the Plan, allowing the conflict of interests to persist to the substantial detriment of the Plan participants. *Id.*

Thus, the Benefit Committee, driven by its desire to generate fees for Wells Fargo and seed the poor-performing Wells Fargo TDFs, engaged in a deeply flawed monitoring process and failed in its monitoring duties. *Id.* at ¶ 39. The flaws in the process included:

- Failing to consider Defendants' conflict of interests;
- Failing to put the interests of the Plan participants above those of Defendants in making investment decisions;
- Failing to consider comparable funds that were cheaper and better-performing than the Wells Fargo TDFs; and
- Failing to consider the flawed design that funneled Plan assets into the imprudent Wells Fargo TDFs.

Id.

Wells Fargo & Company and the other Defendants were fully aware of, and participated in, the flawed Plan design and monitoring process. *Id.* at ¶ 40. Indeed, Wells Fargo & Company's senior executives, including those sitting on the Benefit Committee, directed the committee to put Wells Fargo's interests ahead of the Plan by selecting and failing to eliminate the Wells Fargo TDFs when superior alternative funds existed, and failed to correct the flawed Plan structure that funneled Plan assets into the Wells Fargo funds. *Id.* The HR Committee and other fiduciary Defendants, including Hardison and Thornton, also knowingly participated in the breaches by, among other things, failing to remove members of the Benefit Committee who it knew were putting Wells Fargo's interests before those of the Plan participants, and failing to correct the flawed Plan design that funneled plan assets into the Wells Fargo TDFs. *Id.*

ARGUMENT

I. Standard for Pleading an ERISA Breach of Fiduciary Claim

A complaint must contain "a short and plan statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Under this standard, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Braden v. Wal-Mart Stores, Inc.,* 588 F.3d 585, 594 (8th Cir. 2009) (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)) (internal quotations omitted). The "court must take the plaintiff's factual allegations as true" and "inferences are to be drawn in favor of" the plaintiff. *Braden,* 588 F.3d at 594-95. While a plaintiff must show that success on the merits is more than a "sheer possibility," it "is not a probability requirement." *Id.* at 594. Importantly, the "complaint 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.

Further, in ERISA cases, when considering the Rule 8 pleading standards, courts "must be attendant to ERISA's remedial purpose and evident intent to prevent through private civil litigation misuse and mismanagement of plan assets." *Id.* at 597 (citing *Massachusetts Mut. Life Ins. Co. v. Russell*, 105 S. Ct. 3085, 3089 n. 8, 3090 n. 9 (1985)) (internal quotations omitted). Congress "intended that private individuals would play an important role in enforcing ERISA's fiduciary duties—duties which have been described as the highest known to law." *Braden*, 680 F.2d at 598 (citations omitted). In "giving effect to this intent, [courts] must be cognizant of the practical context of ERISA litigation. No matter how clever or diligent, ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." *Id.*

Thus, "while a plaintiff must offer sufficient factual allegations to show that he or she is not merely engaged in a fishing expedition or strike suit, [courts] must also take account of their limited access to crucial information." *Id.* If "plaintiffs cannot state a claim without pleading facts which tend systematically to be in in the sole possession of defendants, the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer." *Id.* These "considerations counsel careful and holistic evaluation of an ERISA complaint's factual allegations before concluding that they do not support a plausible inference that the plaintiff is entitled to relief." *Id.*

Under these pleading principles, there is no requirement that a plaintiff "describe directly the ways in which [the defendants] breached their fiduciary duty." *Id.* at 595 (reversing the trial court for its "mistaken assumption" that plaintiffs needed to make specific allegations about the fiduciaries' conduct). Rather, "it is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior, so long as the facts pled give the defendant fair notice of what the claim is and the grounds upon which it rests . . . and allow the court to draw the reasonable inference that the plaintiff is entitled to relief." *Id.* (citing *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1959 (2007) and *Iqbal,* 129 S. Ct. at 1949) (internal quotations omitted).

II. The Complaint Adequately Alleges that the Wells Fargo Benefit Committee Breached Its ERISA Fiduciary Duties

ERISA regulates plans providing employees with fringe benefits, and is designed to promote the interests of employees and their beneficiaries in such plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). Congress "enacted ERISA to regulate comprehensively certain employee benefit plans and to protect the interest of participants in these plans by establishing standards of conduct, responsibility, and obligations for fiduciaries." *Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc.*, 413 F.3d 897, 906-07 (8th Cir. 2005) (citations and internal quotations omitted).

ERISA imposes upon fiduciaries twin duties of loyalty and prudence, requiring them to, among other things, (1) act "solely in the interest of [plan] participants and their beneficiaries" for the "exclusive purpose" of providing benefits and defraying reasonable administrative expenses, and (2) carry out their duties with the appropriate "care, skill,

prudence, and diligence." 29 U.S.C. § 1104(a)(1); *Braden*, 588 F.3d at 595. These fiduciary duties have "been described as the highest known to law." *Braden*, 680 F.2d at 598.

The duty of loyalty requires fiduciaries to act with an "eye single" to the interests of plan participants. *Pegram v. Herdrich*, 120 S. Ct. 2143, 2157 (2000). Perhaps "the most fundamental duty of a [fiduciary] is that he must display... complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons." *Id.* at 2152 (quotations and citations omitted). A corporate officer serving as a fiduciary must "wear only one hat at a time, and wear the fiduciary hat when making fiduciary decisions." *Id.* Further, fiduciaries must "avoid placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees of a pension plan." *Krueger v. Ameriprise Fin., Inc.*, No. 11-CV-02781, 2012 WL 5873825, at * 8 (D. Minn. Nov. 20, 2012) (citing *Donovan v. Biewirth*, 680 F.2d 263, 271 (2d Cir. 1982)).

The duty of prudence requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1). The prudent person standard "is an objective standard . . . that focuses on the fiduciary's conduct preceding the challenged decision." *Roth v. Sawyer-Cleater Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994). Thus,

in evaluating whether a fiduciary has acted prudently, courts focus on the process by which it makes its decisions rather than the results of those decisions. *Id.* at 917-18.

An ERISA fiduciary also "has a continuing duty to monitor trust investments and remove imprudent ones." *Tibble v. Edison Int'l.*, 135 S. Ct. 1823, 1828 (2015). This "continuing duty exists separate and apart from the [fiduciary's] duty to exercise prudence in selecting investments at the outset." *Id.* A plaintiff "may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." *Id.* at 1828-29.

A. Courts Have Uniformly Held That the Type of Self-Dealing Allegations Asserted by Plaintiff Are Sufficient to State a Claim Under ERISA

Applying the law outlined above, courts, including this Court, have routinely held that allegations that fiduciaries put their interests ahead of those of the plan participants by selecting their own funds over cheaper, better-performing alternatives are sufficient to state a claim for breach of ERISA fiduciary duties.

For example, in *Gipson,* a case strikingly similar to this one, this Court held that allegations that Wells Fargo breached its ERISA fiduciary duties by investing plan assets into its own mutual funds were sufficient to state a claim. 2009 WL 702004, at * 5-6. There, the plaintiffs alleged that the plan breached its fiduciary duties by (1) investing in a class of Wells Fargo shares with higher administrative fees when cheaper share classes were available, (2) failing to switch the investments to similar funds offered by Vanguard, which were allegedly better performing than the Wells Fargo funds, and (3) using the plan assets as "seed money" for the Wells Fargo funds, allowing the funds to

survive and attract other investors. *Id.* at *5. In denying Wells Fargo's motion to dismiss, the court held that the allegations, including the allegations that Wells Fargo should have switched to the Vanguard funds, stated a plausible claim for relief: "Plaintiffs claim that the Committee should have invested in other funds that outperformed the Wells Fargo funds. This is plainly sufficient to withstand a motion to dismiss." *Id.*

Similarly, in *Krueger*, this Court held that allegations that a fiduciary selected its own investment products for a plan when cheaper, better alternatives were available were sufficient to withstand a motion to dismiss. 2012 WL 5873825, at *11-15. There, the plaintiffs alleged that the defendants breached their fiduciary duties by investing in, among other things, target date funds managed by defendants' subsidiary, which funds were less established and more expensive than alternative funds, such as Vanguard. *Id.* at *2-3. The funds were more expensive due, in part, to the fact that they, unlike Vanguard and other alternatives, charged two layers of fees for managing the target date funds and the underlying mutual funds into which the target funds invested. *Id.* at 3. The Court held that such allegations were sufficient to state a claim: "Plaintiffs have plausibly argued . . . that Defendants breached their fiduciary duties when they invested in affiliated funds that charged fees that were excessive relative to those available from comparable mutual funds, from other share classes, or from alternative investments such as separate managed accounts." *Id.* at *15.

The Eighth Circuit has upheld similar allegations of self-dealing by plan fiduciaries. In *Braden*, for example, the Eight Circuit reversed the trial court's dismissal

of ERISA fiduciary claims where the plaintiffs alleged that the plan fiduciaries failed to consider, among other things, (1) the trustee's interest in receiving portions of revenues from the funds it selected for the plan, (2) excessive administration fees charged by the funds, and (3) lower cost alternatives. 588 F.3d at 589, 598-99. The court held that it was not necessary that the plaintiff allege a specific flaw in the selection process, as such could be inferred from the facts alleged:

> Taken as true, and considered as a whole, the complaint's allegations can be understood to assert that the Plan includes a relatively limited menu of funds which were selected by Wal-Mart executives despite ready availability of better options. The complaint alleges, moreover, that these options were chosen to benefit the trustee at the expense of the participants. If these allegations are substantiated, the process by which [defendants] selected and managed the funds in the Plan would have been tainted by failure of effort, competence, or loyalty. Thus the allegations state a claim for breach of fiduciary duty.

Id. at 596.

Other courts are in accord. In *Wildman v. Am. Century Servs. LLC,* for example, the court denied a similar motion based on allegations that, among other things, the plan was motivated by self-interest in failing to consider lower-cost funds and retaining underperforming funds. No. 4:16-cv-00737, 2017 WL 839795, at *5-8 (W.D. Mo. February 17, 2017). Further, in *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, the court denied a motion to dismiss based on allegations nearly identical to those here: "Defendants allegedly breached their fiduciary duties because they selected Allianz-affiliated investment options to benefit the Allianz family, they failed to monitor the high fees and expenses imposed on Plan participants, they failed to investigate lower-cost options with comparable performances, *and* they retained the high-cost investment

options to the direct detriment of Plan participants. . . . Together, these allegations sufficiently state a claim for breach of fiduciary duties." No. 15-1614, 2016 WL 4507117, at *7 (C.D. Cal. Aug. 5, 2016). Similarly, in *Leber v. Citigroup, Inc.*, the court denied a motion to dismiss a complaint based on similar allegations, holding that "Plaintiffs make specific factual allegations that eight affiliated funds selected by the committee defendants charged higher fees than those charged by comparable Vanguard funds—in some instances fees that were more than 200 percent higher than those comparable funds—and accordingly, they nudge those claims across the line from merely conceivable to plausible." No. 07-CV-9329, 2010 WL 935442, at *13 (S.D.N.Y. March 16, 2010).

In light of *Gipson*, *Krueger, Braden* and the other authority cited above, Plaintiff has plausibly alleged that the Benefit Committee breached its fiduciary duties of loyalty and prudence to the Plan participants. Like those cases, Plaintiff has alleged that the Benefit Committee engaged in a deeply flawed monitoring process, failing to consider, among other things, (1) Wells Fargo's conflict of interest, (2) that the Wells Fargo TDFs were significantly more expensive than comparable funds, (3) that the funds consistently underperformed comparable funds, and (4) that Wells Fargo was using the retirement savings of its participants to seed the Wells Fargo TDFs. Further, here there are the additional allegations that the Benefit Committee failed to consider the flawed design of the 401(k) Plan, which maximized participant investments into the Wells Fargo TDFs by defaulting them into the funds and offering the "quick enrollment" and "easy enrollment" functions, which encouraged participants, with a check of a box, to commit their entire

contributions to the Wells Fargo TDFs. Compl. ¶¶ 33-36. Under these facts, Plaintiff has pled a plausible claim for breach of fiduciary duties.

B. Wells Fargo Misconstrues the Complaint by Attempting to Compartmentalize Plaintiff's Allegations of Self-Dealing

Rather than address these allegations in their totality, Wells Fargo attempts to silo Plaintiff's allegations, arguing that each allegation in isolation is insufficient to demonstrate a flawed process. But the Eighth Circuit has denounced such tactics, holding that "the complaint 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.

As explained above, Plaintiff's complaint asserts multiple allegations of self-dealing on the part of Wells Fargo. Each of these allegations provide strong evidence that Defendants, including the Benefit Committee, breached their fiduciary duties to Plan participants—and, taken as a whole, the allegations are more than sufficient to state a claim under ERISA.

1. Wells Fargo Funneled Plan Assets Into Its Own, Proprietary Funds Despite Cheaper and Better Performing Alternatives

In its motion, Wells Fargo contends that the selection of its own fund, "in itself," does not plausibly suggest a flawed fiduciary process. Defendants' Brief, p. 11 (citing PTE 77-3, 42 Fed. Reg. 18,734). In support of this argument Well Fargo cites Department of Labor regulations allowing a 401(k) plan to select affiliated investment funds. This argument misses the mark: Plaintiff does not contend that the Benefit Committee is liable just because it selected affiliated funds; rather Plaintiff alleges that the fiduciaries breached their duties in putting their own self-interest ahead of those of the

Plan participants by retaining the funds and funneling participant investments into them when cheaper, better alternatives were available.

Indeed, this Court rejected this same argument in *Krueger,* holding that DOL regulations do not excuse fiduciaries from their fiduciary obligations: "While the Department of Labor regulations permitted the Defendants to select affiliated investment options for the Plan, the Defendant still has a fiduciary duty to act with an 'eye single' towards the participants in the Plan, which Plaintiffs plausibly allege the Defendants failed to do." 2012 WL 5873825, at *15; *see also Wildman*, 2017 WL 839795, at *6 (rejecting the same argument: "PTE 77-3 is specific to prohibited transaction claims under 29 U.S.C. § 1106. It does not relieve a fiduciary from its duties of loyalty and prudence to a plan. 29 U.S.C. 1108(a). . . . Therefore, PTE 77-3 is inapplicable as to the duties under § 1108 subject to this claim.").

Wells Fargo further argues that the fact that it offers non-affiliated funds defeats an inference of a fiduciary breach. Courts, however, have squarely rejected this argument. In *Wildman*, for example, the court held that "under ERISA, each investment alternative offered by a plan must be judged individually. . . . Therefore, the existence of [non-affiliated options] is *irrelevant* to determining whether Defendants used a disloyal or imprudent process to select other investment options." 2017 WL 839795, at *7 (citing *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 423 (4th Cir. 2007)) (internal quotations omitted) (emphasis added). Here, the Wells Fargo TDFs constituted nearly half of the options in the 401(k) Plan, and served as an important class of retirement funds for participants, giving them the enticing option to invest in a fund that is designed to change

asset allocation as retirement nears. The Benefit Committee breached its fiduciary duties by failing to consider comparable, cheaper, and better performing target date funds. The fact that other funds were available in the plan is irrelevant.

2. The Wells Fargo TDFs Were 2.5 Times More Expensive Than Comparable Funds

Wells Fargo contends that it cannot be liable for choosing funds that were over 2.5 times more expensive than comparable funds because it has no obligation to scour the market for the cheapest possible fund. Defendants' Brief, at p. 19.[4] In support of this assertion, Wells Fargo cites *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009), a non-self-dealing case where the plaintiffs alleged that all of the 2,500 mutual funds selected for a plan had excessive expense ratios. This Court, however, has cautioned that *Hecker* "was tethered closely" to its own facts and was "not intended to give the 'green light' to recklessness or imprudence in the selection of investments." *Krueger*, 2012 WL 6873825, at * 12 (citing *Hecker*, 569 F.3d at 71).

Indeed, courts have rejected Wells Fargo's very argument, where, as here, a plaintiff alleges that plan fiduciaries failed to consider cheaper alternatives in comparison to their more expensive affiliated funds: "Plaintiffs are not complaining that Defendants

[4] Wells Fargo argues that Plaintiff has not alleged that the fees associated with the Wells Fargo TDFs were "excessive," "unreasonable," or "high." To be clear, Plaintiff alleges that the fees associated with the Wells Fargo TDFs, which were over 2.5 times more than comparable alternatives because, were excessive. Unlike the alternatives, they were comprised of two layers of fees, were excessive, unreasonable, and high as compared to the alternative funds. Those characterizations are obvious from the well-pled facts of the Complaint.

failed to find the lowest cost funds, rather, they allege that Defendants acted in their own self-interest by following a process that failed to consider lower-cost funds in favor of higher-cost [affiliated] funds. These specific allegations regarding the excessive fees support an inference that the Plan's fiduciaries' process was deficient." *Wildman,* 2017 WL 839795, at *7; *see also Braden*, 588 F.3d at 595 n. 6 (rejecting *Hecker* where, as here, it was alleged that the plan offered a "limited menu" of funds); *Krueger,* 2012 WL 6873825, at *13 (holding under similar facts that the defendants' reliance on *Hecker* was "misplaced"). Further, in *Braden*, the Eighth Circuit held that "it was not [plaintiff's] responsibility to rebut" alternative explanations as to why the defendants chose the higher cost funds, such as higher returns, lower financial risk, or more services offered, because "Rule 8 does not require a plaintiff to plead facts tending to rebut all possible lawful explanations for a defendant's conduct." *Braden*, 588 F.3d at 596.

Wells Fargo also takes issue with Plaintiff's claim that the Wells Fargo TDFs double charge for their services, labeling the allegation as "unsubstantiated." Defendants' Brief, p. 21. This is incorrect. Defendants *admit* that the Wells Fargo TDFs charge *two* separate fees—one for the services associated with the Wells Fargo TDFs, and one for managing the Wells Fargo index funds underlying the Wells Fargo TDFs. Defendants' Brief, pp. 21-22. Vanguard, Fidelity, and other comparable index-based target funds, on the other hand, do *not* charge two separate fees. Compl. ¶ 29. Indeed, they charge *no* fee for managing the target date fund itself. *Id.* This is the reason why the Wells Fargo fees are so much more expensive than those of comparable funds,

making the fees excessive compared to the comparable funds. *Id.* Wells Fargo fails to address this undeniable fact.

Wells Fargo argues that the Complaint alleges insufficient information about the services rendered by the Wells Fargo TDFs versus comparable funds, such as Vanguard and Fidelity, for an "apples to apples" comparison of the fees charged. Defendants' Brief, at pp. 20-21. But such detailed allegations are not required at the pleading stage. *Gipson*, 2009 WL 702004, at *5 (rejecting the defendants' argument that the plaintiffs "ha[d] not been specific enough in the allegations relating to the Vanguard funds" as "requir[ing] too much on a motion to dismiss."). The well-pled facts sufficiently establish that the Wells Fargo TDFs, like the Vanguard, Fidelity, and other funds, are target date funds that employ the same passive, index-based strategy. Compl. ¶ 27. The reason for the disparity in costs is not due to a difference in nuanced services rendered; rather it is because of the Wells Fargo TDFs charged two layers of fees, while the other funds did not. Compl. ¶ 29. This Court has accepted at the pleadings stage such comparisons before. *See Krueger,* 2012 WL 5873825, at *3, 10-11 (comparing defendants' target date funds, which charged two layers of fees, with the target date funds of Vanguard, Fidelity, and T. Rowe Price, which did not); *see also Gipson,* 2009 WL 5873825, at * 5-6 (denying motion to dismiss based, in part, on comparison to Vanguard); *Leber,* 2010 WL 935442, at *13 (denying motion to dismiss where, as here, plaintiff alleged that affiliated funds were more than 200 percent higher than comparable Vanguard funds).

Ignoring this law, Wells Fargo resorts to non-ERISA cases, arguing that comparisons to Vanguard should be rejected. Defendants Brief, at p. 20 (citing *Kalish v. Franklin Advisers, Inc.*, 742 F. Supp. 1222, 1231 (S.D.N.Y. 1990); *Amron v. Morgan Stanley Inv. Advisors, Inc.*, 464 F.3d 338, 345 (2nd Cir. 2006)). But the authority upon which Wells Fargo relies is inapposite, as those cases addressed claims brought under the Investment Company Act of 1940, which requires that the plaintiff establish that the funds at issue charged fees that were "so disproportionately large that [they] bear no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining." *See Amron,* 464 F.3d at 340, 344; *Kalish*, 744 F. Supp. at 1223, 1227. Plaintiff is making no such allegations here, nor is he required to. Instead, Plaintiff argues that the Benefit Committee breached its ERISA fiduciary duties—the highest duties known to law—by failing to consider cheaper, better alternatives to its affiliated funds. Under the case law of this circuit and elsewhere comparisons to comparable funds such as Vanguard are appropriate.

3. Defendants Maximized Participation in Their Proprietary Funds By Defaulting Participants Into the Wells Fargo TDFs

In its motion, Wells Fargo does not dispute that it defaulted participants into the proprietary Wells Fargo TDFs. Nor does Wells Fargo contest the fact that the Plan offered an "Easy Enroll" and "Quick Enroll" feature, which was prominently offered in the summary plan documents provided to the Plan participants throughout the class period. Nevertheless, Wells Fargo asserts that Plaintiff "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." Defendants' Brief, at 23.

Once again, Wells Fargo misconstrues Plaintiff's allegations. The complaint does not claim that Defendants breached their fiduciary duties "simply because" Plan participants were offered a default investment option in the form of a target date fund. Rather, Plaintiff alleges that Wells Fargo defaulted Plan participants into its *own*, *proprietary* Wells Fargo TDFs, which helped put over $3 billion of Plan assets into Wells Fargo's own, proprietary funds. This practice, and its effect, is strong evidence of Wells Fargo's financial motive in continuing to funnel Plan assets into the funds, despite cheaper, better-performing alternatives.

4. Defendants Used Participants' Retirement Money to 'Seed' Their Proprietary Wells Fargo TDFs

Well Fargo acknowledges that allegations of using participants' retirement savings to seed affiliated funds have survived motions to dismiss. Defendant's Brief, at p. 24 (citing *Gipson,* 2009 WL702004, at *15; and, *Urakhchin*, 2016 U.S. Dist. LEXIS 104244, at *5). Nevertheless, Wells Fargo argues that the age of some of its funds somehow justifies dismissal here, apparently because "seeding" allegations only apply to new funds. This is incorrect.

First, in support of this argument, Wells Fargo improperly attempts to introduce extrinsic evidence, and, for this reason alone the argument fails. *See e.g.*, *BJC Health System v. Columbia Cas. Co.*, 348 F.3d 685, 688 (8th Cir. 2003) (documents submitted in support of motion to dismiss that "were provided 'in opposition to the pleading'" and

were not undisputed constituted "matters outside the pleading"); *Gipson*, 2009 WL 702004, at *2 ("[o]n a motion to dismiss, the Court generally may not consider matters outside the pleadings.") (*citing Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999)).

Second, and more importantly, Wells Fargo misses the point. Whether characterized as seeding, maintaining, or growing the funds, the fact remains that the Plan assets constitute over 25 percent of the total assets in the Wells Fargo TDFs. Without those assets, Wells Fargo's market share in the target date funds would drop precipitously. Compl. ¶ 36. This, of course, would negatively impact the funds and Wells Fargo. This heavy concentration of Plan assets in the Wells Fargo TDFs is additional strong evidence of Wells Fargo's financial motive in retaining the funds—year after year—despite cheaper, better-performing alternatives.

5. This Is Not a Case of "Hindsight"; Defendants—Motivated by Self-Interest—Failed to Properly Monitor the Plan

Wells Fargo further asserts that Plaintiff is merely asking the court to second-guess the Wells Fargo TDF investments because they underperformed comparable funds. Defendant's Brief, at p. 14. Relying heavily on *Tussey v. ABB, Inc.,* — F. 3d —, 2017 WL 929202 (8th Cir. Mar. 9, 2017), Wells Fargo characterizes Plaintiff's claim as "hindsight allegations" about the subsequent performance of investment options. *Id.*

This is incorrect. Here, Plaintiff is not alleging that the Benefit Committee breached its fiduciary duties merely because the Wells Fargo TDFs underperformed comparable funds. Rather, Plaintiff alleges that the fiduciaries were motivated by and

acted out of their own self-interest to maximize Wells Fargo's fees and grow the Wells Fargo TDFs. This is evidenced by, among other things, the fact that the Benefit Committee retained the Wells Fargo TDFs quarter after quarter, year after year, despite consistently costing more than and underperforming comparable funds throughout the entire period. Compl. ¶¶ 30-32. These allegations are sufficient to survive a motion to dismiss.

Defendants' reliance on *Tussey v. ABB, Inc.,* — F. 3d —, 2017 WL 929202 (8th Cir. Mar. 9, 2017) is misplaced. Indeed, *Tussey* supports Plaintiff's position, not Wells Fargo's. In *Tussey*, the Eighth Circuit affirmed the trial court's finding, after a bench trial, that the defendants breached their fiduciary duties of loyalty by swapping Vanguard target date funds with a fund affiliated with the plan administrator. 2017 WL 929202, at *2-4. After the benefit of discovery, the plaintiffs introduced evidence that the plan fiduciaries were motivated by their own financial interest in making the switch and the district court held that this evidence established a breach of fiduciary duty. *Id.* Affirming, the Eighth Circuit rejected defendants' arguments that they were being second-guessed with the benefit of hindsight, holding that the evidence of self-interest "tended to suggest the [] fiduciaries did what they did not because they thought it was best for the plans, but because they wanted to get a better deal for themselves…. A fiduciary can abuse its discretion and breach its duties by acting on improper motives, even if one acting for the right reasons might have ended up in the same place." *Id.*

Finally, throughout its brief, Wells Fargo attempts to introduce extrinsic evidence to try to distinguish the Wells Fargo TDFs from other funds, focusing on, among other

things, what it claims are differences in the asset allocation between one of the 12 Wells Fargo TDFs and comparable Vanguard and Fidelity funds. *See, e.g.,* Defendants' Brief at p. 6. This evidence is not properly considered on a motion to dismiss (*BJC Health System*, 348 F.3d at 688; *Gipson*, 2009 WL 702004, at *2), and, in any event, does nothing to change the fact that the comparable funds, like the Wells Fargo TDFs, are also target date funds that employ a passive index-based strategy. Arguments over the finer points of the funds, such as nuanced differences between the asset allocations, cannot be resolved at the pleadings stage.

For these reasons, when viewed "as a whole," and "not parsed piece by piece to determine whether each allegation, in isolation, is plausible" (*Braden,* 588 F.3d at 594), the Complaint has plausibly alleged that the Benefit Committee breached its fiduciary duties. Therefore, Defendants' motion to dismiss Count I should be denied.

III. Plaintiff Has Alleged a Plausible Co-Fiduciary Claim

Defendants contend that Plaintiff has not adequately alleged a plausible claim for breach of co-fiduciary duty under ERISA § 405. Defendants' Brief, pp. 26-27. In particular, Defendants assert that Plaintiff's co-fiduciary claim is deficient because the underlying breach of fiduciary duty claim is flawed, and because Plaintiff has purportedly failed to allege 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." *Id*. Defendants are incorrect.

First, for the reasons set forth above, Plaintiff has sufficiently alleged an underlying breach of fiduciary duty. (*See infra*, pp. 15-28.) Second, Plaintiff has, in fact,

adequately alleged a claim for breach of co-fiduciary duty. The Complaint alleges that Defendant Hope Hardison, Wells Fargo's Director of Human Resources and a named fiduciary under the Plan, had "the authority to control or manage the operation and administration of the Plan." Compl. ¶ 12. Similarly, the Complaint alleges Defendant Justin Thornton, Wells Fargo's Director of Compensation and Benefits and a named fiduciary under the Plan, also had "the authority to control or manage the operation and administration of the Plan." Compl. ¶ 12. And, the Complaint alleges that the members of the Human Resources Committee were named fiduciaries under the Plan, "with the authority to appoint individuals to serve on the Benefit Committee and the authority to amend the Plan." Compl. ¶ 17. The Complaint further alleges that these co-fiduciaries acted "with full knowledge and participation," and that they "knew or should have known that the Wells Fargo TDFs were substantially more expensive and worse performing than comparable funds." Compl. ¶¶ 25-26 (see also, Compl. ¶¶ 59-63 [alleging, in part, that co-fiduciaries "knowingly participated in the Benefit Committee's breaches of fiduciary duty and failed to take steps to remedy such breaches."]).

These allegations of knowledge and participation in the underlying conduct are sufficient to state a claim for breach of co-fiduciary duty. *See e.g.*, *In re Polaroid Litig.*, 362 F.Supp.2d 461, 479-80 (S.D.N.Y. 2005) (rejecting *In re Sprint Corp. ERISA Litig.*, 388 F. Supp. 2d 1207 (D. Kan. 2004), and stating: "Defendants argue that the Complaint does not sufficiently allege knowledge of co-fiduciary actions. However, the Complaint closely tracks the statutory language, which is sufficient."); *In re Honeywell Int'l ERISA Litig.*, No. 03-cv-1214, 2004 WL 3245931, **14-15 (D. NJ 2004) (sustaining co-

fiduciary claim: "Here, by alleging their participation in the alleged breaches, Plaintiffs have also alleged facts from which it can be inferred at least that all the Defendants knew of the alleged breaches and failed to make reasonable efforts to remedy them."); *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 833 (S.D. Ohio 2004) (finding allegations of breach of co-fiduciary duty sufficient where such allegations track language of statute); *Kling v. Fidelity Management Trust Co.*, 323 F. Supp. 2d 132, 144 (D. Mass. 2004) (breach of co-fiduciary duty claim adequately alleged where the "SAC alleges that the[] defendants failed to remedy breaches of the co-fiduciaries 'with knowledge of such breaches' . . ., and that their failure to adequately monitor the appointed fiduciaries enabled those fiduciaries to breach their duties.").

Accordingly, Plaintiff has adequately alleged a claim for breach of co-fiduciary duty, and Defendants' motion to dismiss Count II should be denied.

IV. Plaintiff Has Alleged a Plausible Claim Against Wells Fargo & Company

Defendants are incorrect that Count III against Wells Fargo does not state a claim for equitable relief under ERISA § 502(a)(3). Plaintiffs seek an equitable accounting and disgorgement of profits from Wells Fargo & Company, an alleged knowing participant in fiduciary breaches. *See Harris Trust and Sav. Bank v. Salomon Smith Barney*, 530 U.S. 238, 250 (2000) (holding that trustees or beneficiaries may maintain an action for disgorgement of a knowing participant's profits derived from a fiduciary breach); Rest. 3d Restitution and Unjust Enrichment § 43, com. g ("one who actively participates in another's breach of fiduciary duty will be liable to disgorge the profits realized thereby)." Disgorgement of profits is a classic form of equitable relief "because it serves the purpose

of preventing undue profit, not compensating the plaintiff." *Calhoon v. Trans World Airlines*, 400 F.3d 593, 597 (8th Cir. 2005); *Parke v. First Reliance Standard Life Ins.*, 368 F.3d 999, 1006, n. 6 (8th Cir. 2004) ("Disgorgement of profits results from a court's determination that an accounting for profits is an appropriate equitable remedy.") *citing* 1 Dan B. Dobbs, Law of Remedies § 4.3(5), at 610 (2d ed. 1993).

Contrary to Defendants' argument, it is not necessary to trace plan assets into the hands of the knowing participant in order to obtain disgorgement of profits. While accounting for profits is a form of restitution, "accounting for profits is a limited exception to the requirement that equitable restitution seek to restore particular funds or property to the plaintiff." *Calhoon, quoting Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214 n.2 (2002). "Such a remedy involves no claim to particular assets and no requirement of tracing . . ." Rest.3d, Restitution and Unjust Enrichment, § 51, com. b. [A]ccounting [for profits] does not seek any particular *res* or fund of money; the defendant will be forced to yield up profits, but the defendant can pay from any monies he might have, not some special account." 1 Dobbs, Law of Remedies § 4.3(1) (2d ed. 1993).[5]

Plaintiff has, therefore, adequately stated a claim for equitable relief against Wells Fargo & Co., and Defendants' motion to dismiss Count III should be denied.

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[5] The cases cited by Defendants either did not state a claim for disgorgement of profits (*Moreno v. Deutsche Bank Ams. Holding Corp.*, 2016 U.S. Dist. LEXIS 14260, at *24-26 (S.D.N.Y. Oct. 13, 2016)), contained no analysis (*Pledger*, 2017 U.S. Dist. LEXIS 39745, at *46-48), or relied on pre-*Harris Trust dicta* (*Urakhchin*, 2016 U.S. Dist. LEXIS 104244, at *23-27) (relying on *dicta* in *Reich v. Continental Casualty Co.*, 33 F.3d 754, 756 (7th Cir. 1994)).

CONCLUSION

For the foregoing reasons, Defendants motion should be denied.

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