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)

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

I. INTRODUCTION

Tellingly, Meiners does not even acknowledge the Supreme Court's recent decision in *Fifth Third Bancorp v. Dudenhoeffer*, requiring courts to undertake a "careful, context-sensitive scrutiny of a complaint's allegations" to determine whether they state an ERISA fiduciary-breach claim. 134 S. Ct. 2459, 1270 (2014). Nor does he allege facts plausibly suggesting that the Dow Jones Funds charged excessive fees or had subpar performance. Although Meiners criticizes the Wells Fargo Defendants for offering funds managed by an affiliate and designating those funds as the Plan's default option, those actions are entirely legal and—without any plausible allegations that the Dow Jones Funds are in any way deficient—do not constitute "self-dealing."

This is not, as Meiners suggests, a case in which the Wells Fargo Defendants seek dismissal because it is *possible* that a legal justification exists for conduct he has plausibly alleged to be illegal. Rather, his allegations themselves do not plausibly suggest illegality in the first instance. All Meiners alleges is that Defendants engaged in conduct authorized by ERISA and DOL regulations, and that the funds at issue did not have the highest returns at the lowest cost. If such allegations are sufficient to state a claim, then virtually ***any*** affiliated 401(k) investment option that does not have the highest returns and lowest cost would be vulnerable to ERISA class action litigation and its attendant burdens. That result is contrary to the Supreme Court's mandate requiring a "careful, context-sensitive scrutiny" of claims alleging ERISA fiduciary misconduct.

II. ARGUMENT

A. Conclusory Allegations of "Self-Dealing" Do Not State a Claim.

Meiners' Opposition Brief ("Opp'n") tries to establish the plausibility of his Complaint by repeatedly stating that the Wells Fargo Defendants engaged in "self-dealing" by retaining the Dow Jones Funds. (*See* Opp'n 1, 15, 19.) But those allegations are quintessential legal conclusions that are "not entitled to the assumption of truth" and do not move the plausibility needle. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *see also, e.g.*, *In re Honda of Am. Mfg.*, 661 F. Supp. 2d 861, 869 (S.D. Ohio 2009) (rejecting "conclusory allegation of 'undisclosed self-dealing'"); *White v. Chevron Corp.*, 2016 U.S. Dist. LEXIS 115875, at *10-14 (N.D. Cal. Aug. 29, 2016) (dismissing "self-dealing" ERISA claim as implausible).

Rather, under the Eighth Circuit's decision in *Braden v. Wal-Mart Stores, Inc.*, Meiners must allege "factual content" that plausibly supports his "self-dealing" allegations. 588 F.3d 585, 594 (8th Cir. 2009); *see also Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 719 (2d Cir. 2013) (facts must be "suggestive of" wrongdoing). This requires that Meiners plead facts that are more than "merely consistent" with illegality; a legal conclusion like self-dealing "is not plausible if the facts he points to are precisely the result one would expect from lawful conduct in which the defendant is known to have engaged." *Braden*, 588 F.3d at 597. *See also Dudenhoeffer*, 34 S. Ct. at 2470.

Indeed, in all the cases cited by Meiners, the plaintiffs alleged facts—not present here—inconsistent with the proper and prudent administration of a 401(k) plan. The cases Meiners most heavily relies on, *Braden*, *Krueger*, and *Gipson*, each involved allegations that the plan fiduciaries, out of a desire to generate investment management fees for their benefit, chose a higher-priced share class of affiliated funds, when the identical funds were available in a lower-priced share class.[1] For example, in *Braden*, the Eighth Circuit held that the plaintiff stated a claim because, in order to reduce the company's cost in administering the plan, the Wal-Mart fiduciaries selected "retail" class mutual funds, when a cheaper "institutional" class of the same fund was available. 588 F.3d at 595. In contrast to those concrete allegations implying wrongdoing, Meiners does

[1] *See Braden*, 588 F.3d at 590; *Krueger v. Ameriprise Fin., Inc.*, 2012 U.S. Dist. LEXIS 166191, at *29-30 (D. Minn. Nov. 20, 2012); *Gipson v. Wells Fargo & Co.*, 2009 U.S. Dist. LEXIS 20740, at *12-13 (D. Minn. Mar. 12, 2009).

not dispute that the Dow Jones Funds share classes were the cheapest versions of the funds available. *See also Gipson*, 2009 U.S. Dist. LEXIS 20740, at *12-13 (reflecting allegations of higher priced share classes).

In further contrast, the complaints in *Braden* and *Krueger* alleged facts—not conclusions—from which a flawed fiduciary process could be inferred. For example, unlike Meiners' complaint, the complaint in *Braden* included detailed allegations that the challenged funds consistently "underperformed the market indices they were designed to track." 588 F.3d at 596. Where Meiners simply compares the challenged funds' performance to one alternative, the *Krueger* court confronted a detailed set of concrete facts that, considered all together, plausibly suggested that "self-dealing" may have occurred: that the affiliated funds were new and untested; that they consistently and substantially underperformed their own benchmarks; and that the fees charged by the affiliated funds substantially exceeded the market at large. 2012 U.S. Dist. LEXIS 166191, at *8-14, 28-30. As set forth below, Meiners' Complaint alleges no such facts, which mandates the dismissal of his claim.

B. Meiners' Factual Allegations Are Merely the Expected Results of Lawful Conduct.

All of the facts that Meiners alleges "are precisely" what one would "expect from lawful conduct in which" the Wells Fargo Defendants "engaged." *Braden*, 588 F.3d at 597. Such "lawful conduct" includes offering affiliated funds and designating those funds as the Plan's default investment. Adding conclusory accusations of "self-dealing" and "funneling" says nothing. To credit those conclusory allegations in determining the

sufficiency of the Complaint would circumvent the "careful, context-sensitive scrutiny of a complaint's allegations" called for by *Dudenhoeffer*, 134 S. Ct. at 2470.

1. The use of affiliated funds does not imply self-dealing.

Meiners now acknowledges that he cannot allege a flawed fiduciary process simply because the Plan offered affiliated funds. (*See* Opp'n 19-20.) Nor does he dispute *Dupree*'s holding that the use of affiliated funds—allowed by DOL regulations—"does not give rise to an inference of" fiduciary breach, especially given that such use is "universal among plans of the financial services industry."[2] (*Id.*)

Meiners argues that the DOL regulations do not relieve fiduciaries of their duty to prudently select funds, but that misses the point. The Wells Fargo Defendants have never said the regulations allow them to select affiliated funds that are otherwise imprudent. But it likewise, offering affiliated funds is "lawful conduct," approved of by DOL regulations, that "one would expect" from a 401(k) plan sponsored by an employer that manages mutual funds. *Braden*, 588 F.3d at 597; *see also In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 580 (S.D.N.Y. 2011) (rejecting claim, as implausible, that fiduciary breached duty by engaging in conduct allowed by ERISA); *Krueger*, 2012 U.S. Dist. LEXIS 166191, at *41 (noting the "normal business practice for a company whose business is financial management" to include affiliated funds) (citing 56 Fed. Reg. 10724 (March 13, 1991)).

[2] *Dupree v. Prudential Ins. Co. of Am.*, 2007 U.S. Dist. LEXIS 57857, at *144-46 (S.D. Fla. Aug. 7, 2007).

Although Meiners cites cases such as *Wildman* and *Urakhchin*, in which courts inferred self-dealing from the use of affiliated funds, those cases are readily distinguishable. Not only did they involve concrete allegations that the selection of affiliated funds led to "outrageously high" fees as measured against objective benchmarks, but they also involved plans that offered ***only*** affiliated funds.[3] There are no such allegations here, and Meiners cannot dispute that the Plan includes a diverse mix of unaffiliated funds.[4] (*See* Defs. Mem. of Law ("Mem.") 2-3, 12.)

2. Meiners fails to plausibly allege a "funneling" of Plan assets to "seed" the Dow Jones Funds.

Nor does Meiners move the plausibility needle by his conclusory assertion that the Wells Fargo Defendants concocted a "system" to "funnel" Plan assets into the Dow Jones Funds by designating them as default investment options. (Opp'n 24-25.) As explained in Defendants' Opening Brief, Congress and the DOL have identified target date funds as appropriate default options, and 96% of similar plans have followed that advice. (Mem. 23-24.) Thus, just as offering the Dow Jones Funds as investment options is "lawful conduct," so too, is designating them as the Plan's default option.

This "concrete, obvious alternative explanation" for why the Dow Jones Funds were the Plan's default investment renders implausible the allegation that their use was part of some plot to "funnel" Plan assets. *Braden*, 588 F.3d at 597. Likewise, Meiners'

[3] *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2016 U.S. Dist. LEXIS 104244, at *1-6 (C.D. Cal. Aug. 5, 2016); *Wildman v. American Century Services*, 2017 U.S. Dist. LEXIS 31700, at *3-5 (W.D. Mo. Feb. 27, 2017).

[4] Even Meiners' suggestion that "nearly half" the Plans' funds are affiliated is an exaggeration, as it counts the suite of Dow Jones Funds as twelve funds. (*See* Opp'n 20.)

assertion that this "funneling" was done to "seed" funds that had been in existence since 1996[5] also falls flat. (Opp'n 25-26.) Although Meiners asserts that the Plan's contributions comprise a quarter of the investments in the Dow Jones Funds (Opp'n 26), that fact is entirely consistent with his other allegation that the Plan "is one of the largest in the country." (Compl. ¶ 10.) Rather than raise an inference of self-dealing, the Complaint alleges nothing more than what "one would expect" in the administration of a large plan sponsored by a financial services company. Under *Braden*, that is not enough. 588 F.3d at 597.

3. Meiners' allegations regarding performance and cost raise no plausible inference of "self-dealing."

As demonstrated in *Braden*, *Krueger*, and the other cases cited in the Opposition Brief, Meiners must allege something more than the Dow Jones Funds' affiliation and use as the default option—he must allege facts inconsistent with proper and prudent plan administration. Meiners claims that his "something more" is his allegation that the Dow Jones Funds were not as cheap as two funds, and that they "underperformed" one of those funds. (*See* Opp'n 1.) But a "careful, context-sensitive scrutiny" of the pleadings shows that these allegations do not pass muster.

[5] *See infra* at 8-9 (use of publically-available prospectuses appropriate). Also, *Gipson* does not, as Meiners suggests, support the proposition that "seeding" applies to established funds; in fact, it presupposes that the concept applies to new funds. *Gipson*, 2009 U.S. Dist. LEXIS 20740, at *16 (declining to dismiss claims as time barred due to factual dispute about funds' inception date).

a. The returns of a single, alternative fund with a different investment strategy does not plausibly suggest self-dealing.

Although Meiners continues to claim the Dow Jones Funds "underperformed," he does not dispute that his Complaint compares the funds to just one other fund family (Vanguard).[6] (Opp'n 26-28.) Nor does he dispute that his comparison is flawed if based on an "apples-to-oranges" comparison. (*Id.*) Instead, he argues that he should not be burdened with addressing inconvenient facts about the two fund families' different investment strategies because those facts are "extrinsic" to the pleadings. (*Id.*)

Meiners is wrong. It is well established that, in deciding a motion to dismiss, a court may consider information "embraced by" the complaint. *Enervations, Inc. v. 3M*, 380 F.3d 1066, 1068 (8th Cir. 2004).[7] Here, Meiners' Complaint cites return data from the funds' prospectuses, and thereby "embraces" those documents. (Compl. ¶ 31.) Moreover, the prospectuses are "SEC filings of public record," and thus may be considered on a motion to dismiss. *In re Patterson Cos.*, 479 F. Supp. 2d 1014, 1026 (D. Minn. 2007). And perhaps most critically, Meiners does not even attempt to dispute the

[6] Meiners' repeated use of the plural— "underperforming comparable *funds*"—is misleading, given that he makes no specific allegations about the performance of any funds but the Vanguard funds—and for those, he uses a made-up "weighted-average" measurement. (Compl. ¶ 31; Mem. 15.) Nor does his Complaint allege that the Vanguard funds outperformed the Dow Jones Funds "quarter after quarter," as he provides only aggregate, yearly data. (Compl. ¶ 31.)

[7] *See also, e.g., In re Xcel Energy, Inc., Sec. Der. & ERISA Litig.*, 312 F. Supp. 2d 1165, 1178 n.5 (D. Minn. 2004).

accuracy of these public filings.[8] Thus, Meiners cannot avoid the information incorporated in documents that his own Complaint embraces.

As explained in the Wells Fargo Defendants' Opening Brief, there are obvious differences in the investment strategies between the Dow Jones and Vanguard funds, and they cannot be dismissed as "finer points" or "nuanced differences in asset allocations" that "need not be addressed at the pleadings stage." (Opp'n 28.) As noted, Meiners' own fund, the 2025 Fund, invested less than half of its assets in equities, while the Vanguard 2025 Fund invested over two thirds of its assets in equities. (Mem. 16.) Logic would say that the returns of the two funds would not be expected to be the same, but if logic was not enough, the Eighth Circuit has now driven the point home in *Tussey v. ABB, Inc.*, explaining that 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 (8th Cir. Mar. 9, 2017).

Meiners does not, and cannot, dispute that the Vanguard funds pursue a more aggressive, equity-heavy investment strategy, whereas the Dow Jones Funds allocate more assets to conservative, fixed-income investments.[9] (*See* Mem. 13-18.) Nor does he claim that it was improper, in any way, for the Wells Fargo Defendants to opt for a more

[8] *See also BJC Health Sys. v. Columbia Cas. Co.*, 348 F.3d 685, 687-89 (8th Cir. 2003) (refusing to consider extrinsic documents because they were in dispute, which is not true here); *Gipson*, 2009 U.S. Dist. LEXIS 20740, at *3-4.

[9] Although the Dow Jones and Vanguard funds are both passively managed and fall into the category of "target date funds," that is an insufficient basis for comparison because, as the DOL and SEC have explained, target date funds "have very different investment strategies and risks." (*See* Mem. 6.)

conservative investment strategy. *Cf. Barchock v. CVS Health Corp.*, 2017 U.S. Dist. LEXIS 59084, at *25 (D.R.I. Jan. 31, 2017) (refusing to infer fiduciary wrongdoing from selection of more conservative fund). His argument, therefore, that the Vanguard funds' higher returns plausibly suggest that the Dow Jones Funds "underperformed" is "mistaken," *Tussey*, 2017 U.S. App. LEXIS 4225, at *18 n.8, and raises no inference of "self-dealing."[10]

Absent a "meaningful" comparison to other funds or an objective benchmark,[11] Meiners' allegations that the Dow Jones Funds were "poor-performing" cannot survive a "careful, context-sensitive scrutiny." *See Tussey*, 2017 U.S. App. LEXIS 4225, at *18 n.8 (higher returns do not equate to "better" performance "in a meaningful sense"). In fact, Meiners' own authority, *Leber v. Citigroup, Inc.*, supports dismissal because there, as here, "lower performance" allegations failed because the plaintiff did not "provide any basis for evaluating or comparing that performance." 2010 U.S. Dist. LEXIS 25097, at *39 (S.D.N.Y. Mar. 16, 2010).

[10] *Gipson* is not to the contrary, for in that case (decided before *Dudenhoeffer* and *Tussey*), it could not be determined at the pleading stage that the proffered "comparator" funds were in fact not comparable. (*See* Mem. 18 n.28.) Here, it is clear.

[11] Notably, Meiners does not address the absence of allegations comparing the returns of the Dow Jones Funds to a composite index or other objective measure of performance. (*See* Mem. 14-15.) Nor does he respond to Defendants' argument that the Morningstar and Lipper ratings and commentary that he relies upon are vague and devoid of context, as compared to, for example, the specific and concrete allegations that passed muster in *Krueger*, 2012 U.S. Dist. LEXIS 166191, at *8 (funds underperformed their own benchmarks for years and were in bottom 2% of defined contribution plans in MyPlanIQ web-based application).

b. The existence of two cheaper funds does not plausibly suggest self-dealing.

Because "[n]othing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund," a plaintiff cannot allege "self-dealing" simply because there is a cheaper investment option on the market. *Braden*, 588 F.3d at 596 n.7 (quotation omitted). Yet, that is precisely what Meiners is trying to do by comparing the fees of the Dow Jones Funds with the fees of just two other fund families (Vanguard and Fidelity). (*See* Mem. 19-20.)

Comparing fees of just two funds, while ignoring the fees of the many other target date funds on the market at large, is, of course, alleging facts out of context. This is, quite literally, the opposite of pleading facts so that the Court can conduct the "context-sensitive" inquiry required by *Dudenhoeffer*. *See also Iqbal*, 556 U.S. at 679 (assessing plausibility is a "context-specific task"). There are indisputably dozens of target date fund families on the market,[12] and thus any assertion that the fees of the Dow Jones Funds are "excessive," "unreasonable," or even "high" cannot be made in isolation. Notably, in sustaining the claim in *Krueger* that fees of affiliated Ameriprise funds were unreasonable, Judge Nelson relied on allegations that those fees were "higher than the median" for 38 other target date funds. 2012 U.S. Dist. LEXIS 166191, at *10-14; *see also Wildman*, 2017 U.S. Dist. LEXIS 31700, at *4 (allegations of average costs).

[12] A U.S. Senate report published just before the class period (cited in Defendants' Opening Brief) identified at least 48 target date fund families. (*See* Mem. 23 n.35.)

Meiners' fees allegations fail for additional reasons. Not only does Meiners exaggerate the fees charged by the Dow Jones Funds,[13] but his Complaint does not even allege that the funds' fees were "excessive,"—a failure Meiners cannot fix through his briefing. *See Thomas v. United Steelworkers Local 1938*, 743 F.3d 1134, 1140 (8th Cir. 2014). And, contrary to his argument, fees on a rule 12 motion must be considered "relative to the services rendered." *Young v. GM Inv. Mgmt. Corp.*, 325 F. App'x 31, 33-34 (2d Cir. 2009) (quotation omitted). Further, ERISA cases (as well as 1940 Investment Act cases) have observed that Vanguard's unique structure makes it an inappropriate comparator for determining whether fees are excessive. *See, e.g.*, *Brotherston v. Putnam Invs., LLC*, 2017 U.S. Dist. LEXIS 48223, at *18 (D. Mass. Mar. 30, 2017) (ERISA fiduciary-breach case rejecting a "flawed . . . apples to oranges" comparison to Vanguard fees).

Finally, although Meiners gratuitously accuses the Dow Jones Funds of "double charg[ing]" for services (Opp'n 6), he later acknowledges that what he means is that the funds charge different fees for different services. (Opp'n 22.) He does not allege that those fees for separate services are duplicative. Nor does he address the fact the layered fees are the norm among target date funds.[14] Although it may be true that Vanguard and

[13] As evidenced in SPDs distributed to participants, the fees charged by the Plan's Dow Jones Funds were never 50 basis points, as Meiners alleges (Opp'n 6); they were always in the mid to low 30s. (*See* Holland Decl. Ex. 2 at 42 n.3, Ex. 3 at 43 n. 1 (reflecting 15 basis-point fee reduction for Plan).)

[14] *See* Mem. 22 (citing DOL authority explaining that layered fees are common).

Fidelity do not separate their fees into two layers,[15] he does not explain why not doing so makes a difference. And most important, he does not attempt to address the Wells Fargo Defendants' cases holding that what matters is the "total fee," not its "internal" structure. *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009).

4. Considering all of Meiners' allegations "together" adds nothing.

Meiners cites *Braden* for the proposition that his Complaint must be viewed as a whole, but the Wells Fargo Defendants' Opening Brief explained why his allegations are not plausible in whole or in part. (Mem. 24-25.) None of the facts he alleges raise an inference of "self-dealing," and aggregating these facts does nothing to improve the plausibility of his claim of a flawed fiduciary process. *See Advanced Tech. Corp. v. Instron, Inc.*, 925 F. Supp. 2d 170, 182 (D. Mass. 2013) (noting that "lengthy" and "numerous allegations . . . do not add up to a plausible" claim); *Barchock*, 2017 U.S. Dist. LEXIS 59084, at *6 (dismissing ERISA claim "loaded to the scuppers with factual allegations"). Whether considered individually or together, Meiners' allegations "are precisely" what "one would expect" from the Wells Fargo Defendants' "lawful conduct," and thus, under *Braden*, are insufficient to state a claim. 588 F.3d at 597.

[15] Contrary to Meiners' assertion, although *Krueger* noted that the plaintiff had alleged there were two levels of fees in the Ameriprise target date funds, it did not rely on that fact in denying the motion to dismiss. Rather, the court relied on plaintiffs' allegations that the fiduciaries failed to select the lowest share class of the funds in question and that the fees were objectively more expensive than the market at large. *Krueger*, 2012 U.S. Dist. LEXIS 166191, at *28-30.

C. Meiners' Opposition Fails to Support his Co-Fiduciary and Section 502(a)(3) Claims.

The Opposition does nothing to support Meiners' co-fiduciary duty claims or his Section 502(a)(3) claim against Wells Fargo & Company.

First, Meiners does not deny that his co-fiduciary and Section 502(a)(3) claims fail without an underlying fiduciary-breach claim. (Mem. 26-27.)

Second, Meiners does not even dispute that his co-fiduciary claims merely parrots the text of ERISA § 405's co-fiduciary rules. Instead, he claims it is sufficient that his Complaint "tracks the statutory language," citing an assortment of pre-*Twombly* and pre-*Iqbal* cases. (Opp'n 29-30.) That reasoning, however, ignores the holding of *Twombly* and *Iqbal* that "recitals of the elements of a cause of action . . . do not suffice." *Iqbal*, 556 U.S. at 678.

Third, one of the main cases upon which Meiners relies, *Urakhchin*, explains the defect in his Section 502(a)(3) claim against Wells Fargo & Company: Meiners "fail[s] to allege that any of the money sought to be disgorged can be traced to particular funds or property in [Wells Fargo's] possession." 2016 U.S. Dist. LEXIS 104244, at *23-27. *Urakhchin* also shuts the door on Meiners' argument that there is an exception to the tracing requirement for equitable accounting sought against nonfiduciaries. *Id.* at *26 ("Given that this third claim is alleged against nonfiduciary defendants, the 'limited exception' to the traceability requirement does not apply here."). Meiners' Section 502(a)(3) claim should be dismissed, as well.

III. CONCLUSION

The Wells Fargo Defendants respectfully request that the Court dismiss Meiners' Complaint with prejudice

Dated: April 21, 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
Russell Hirschhorn (admitted *pro hac vice*)
rhirschhorn@proskauer.com
Eleven Times Square
New York, NY 10036-8299
Telephone: (212) 969-3814

Attorneys for Defendants