No. 16-1928

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JAMES THOLE, ET AL.,
Plaintiffs-Appellants,

v.

U.S. BANK, NATIONAL ASSOCIATION, ET AL.,
Defendants-Appellees

On Appeal from the United States District Court for the District of Minnesota (No. 13-cv-2687 (JNE/JJK))

BRIEF OF APPELLEES

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SUMMARY OF THE CASE

The District Court properly ruled that Plaintiffs lacked "injury in fact" necessary for subject matter jurisdiction under Article III. Plaintiffs have received all benefits due them under their defined benefit plan that Defendant U.S. Bancorp sponsors. Because the Plan's assets exceed its liabilities, it is considered to be "overfunded." Two Eighth Circuit decisions, *Harley* and *McCullough*, hold that participants in "overfunded" defined benefit plans lack standing to sue the Plan's fiduciaries for losses to the Plan. This is because their benefits are "fully protected," especially where, as here, the financial wherewithal of the Plan's sponsor is undisputed. The Supreme Court's recent *Spokeo* decision confirms that *Harley*, *McCullough*, and the District Court's decision here are correct. Further, the District Court properly found that the Plan became overfunded for reasons independent of this litigation, and properly dismissed the case as moot.

Alternatively, the District Court's dismissal can be affirmed because the Complaint failed to state a claim. Among other things, Plaintiffs' claim that Defendants should have changed the Plan's investment strategy in anticipation of the 2008 financial crisis fails to state a claim. The Supreme Court's intervening decision in *Tibble* does not change this result.

Defendants agree that 20 minutes for oral argument is appropriate.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1A, Appellee U.S. Bank National Association states that it is a wholly-owned subsidiary of U.S. Bancorp, a publicly held Delaware corporation. Appellee U.S. Bancorp is traded on the New York Stock Exchange under the symbol "USB." No publicly held corporation owns ten percent or more of the stock of U.S. Bancorp.

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ISSUES PRESENTED

1. Whether the District Court properly dismissed Plaintiffs' claims under this Circuit's precedents in *Harley* and *McCullough* for lack of Article III jurisdiction when the defined benefit plan in which Plaintiffs are participants is "overfunded," and when, in any event, Plaintiffs presented no evidence that their benefits were ever at risk.

Apposite authorities: U.S. Const., art. III; *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002); *McCullough v. AEGEON USA, Inc.*, 585 F.3d 1082 (8th Cir. 2009).

2. Whether the District Court properly dismissed the case as moot when the injury Plaintiffs claimed (i.e., the risk to their benefits from the Plan's underfunding) no longer remained.

Apposite authorities: U.S. Const., art. III; *Perelman v. Perelman*, 793 F.3d 368 (3d Cir. 2015); *Ark. Right to Life State Political Action Comm. v. Butler*, 146 F.3d 558 (8th Cir. 1998).

3. Whether, in the absence of any injury to Plaintiffs personally, this Court has Article III jurisdiction, through Plaintiffs' "personal statutory interest" or an "equitable" interest in their defined benefit plan's assets.

Apposite authorities: *Harley*, 284 F.3d 901; *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016); *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992).

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4. Whether the District Court correctly held that Plaintiffs' claims that the Plan imprudently invested in equities were barred by ERISA's six-year statute of repose when that strategy was adopted more than six years prior to the filing of the Complaint, and Plaintiffs' argument that Appellees breached their duty to monitor within the repose period was based on allegations that Appellees should have anticipated the 2007-08 financial crisis.

Apposite authorities: *Pension Benefit Guar. Corp ex. rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt., Inc.*, 712 F.3d 705 (2d Cir. 2013); 29 U.S.C. § 1113(1)(A).

5. Whether the Plaintiffs stated a prohibited transaction claim under ERISA § 406(b)(1), prohibiting the intentional misuse of plan assets, when they failed to plausibly allege that the U.S. Bank Defendants used plan assets to benefit themselves at the expense of the Plan.

Apposite authorities: *Reich v. Compton*, 57 F.3d 270 (3d Cir. 1995); 29 U.S.C. § 1106(b)(1).

6. Whether the District Court erred in refusing to grant Plaintiffs' request for attorneys' fees when they achieved no success on the merits.

Apposite authorities: *Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. 242 (2010).

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STATEMENT OF THE CASE

I. THE INDIVIDUAL PLAINTIFFS RECEIVE BENEFITS UNDER A PENSION PLAN SPONSORED BY U.S. BANK.

Appellants James Thole and Sherry Smith ("Plaintiffs") are participants in the U.S. Bank Pension Plan (the "Plan"). App-40–41 ¶¶ 25, 27. They are both retired. Def-App-28 ¶¶ 6, 7. The Plan in which Plaintiffs participate is what is known as a "defined benefit plan."

Like many defined benefit plans, the Plan pays Thole, Smith, and every other participant a set monthly payment based on a formula that takes into account their respective salaries and years of service.[1] Under the Plan, Thole has received a monthly retirement benefit of $2,198.38 since his retirement in 2011, and Smith has received a monthly benefit of $42.26 since her retirement in 2010. Def-App-28 ¶¶ 6, 7.

Both Smith and Thole are entitled under the Plan to continue to receive their respective benefits for the rest of their lives. *See* Def-App-34 § 2.1.26. Neither has alleged that the Plan has missed any payments to them so far, and neither has hinted at any actual risk that they (or any other Plan participant) will not receive Plan benefits in the future. App-122. In fact, as discussed below, the Plan's assets

[1] *See* Def-App-32 § 2.1.1; Def-App-35–36 § 5.2; Def-App-43 § 5.2 (participants entitled to set amount regardless of Plan's investment returns).

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are currently more than sufficient to pay expected future benefit obligations. *See infra* p. 8.

The Plan is sponsored and funded by the corporate parent of Plaintiffs' (former) employer, U.S. Bancorp. App-45–46 ¶¶ 53–56. To fund benefits for Plan participants, U.S. Bancorp contributes money to a trust and appointed fiduciaries to manage and invest the Plan's assets.[2] Together, these employer contributions and returns on Plan investments are then used to pay benefits to Plan participants.[3] If investment losses, interest rate fluctuations, or unanticipated changes to the participants' life expectancy, retirement age, or other demographic factors result in Plan assets being insufficient to pay future benefits, U.S. Bancorp is required under the Plan and ERISA to make up any shortfall.[4] U.S. Bancorp's current assets—over $86 billion—would cover the Plan's liabilities dozens of times over.[5]

In these respects, the Plan is different from 401(k) and other "defined contribution" plans in which the Plan's investment returns affects participants' individual benefits. *Hughes*, 525 U.S. at 439. Participants make no personal

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[2] *See generally* ERISA § 303(a) (29 U.S.C. § 1083(a)); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-41 (1999).

[3] *See* Def-App-33 § 2.1.22; Def-App-38 § 10.2; *Hughes*, 525 U.S. at 439.

[4] *See* Def-App-38 § 10.2; *Hurlic v. S. Cal. Gas Co.*, 539 F.3d 1024, 1029 (9th Cir. 2008).

[5] *See* U.S. Bancorp 2014 Annual Report at 60 ($86.9 billion in liquid assets), *available at* https://www.usbank.com/en/annual_report/investor/resources/doc/USBank_AR14.pdf.

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contributions to the Plan. App-46 ¶ 56. Rather, any risk of loss to the Plan falls completely and squarely on the shoulders of the Plan's sponsor, U.S. Bancorp. The Plan does not allow Plaintiffs or any other participant to receive more or less than their defined benefit according to the Plan's formula.[6] Upon termination of the Plan, and after all participants' benefits are paid, any surplus would revert to U.S. Bancorp.[7]

II. THE VALUE OF THE PLAN'S ASSETS DECREASES DURING THE 2008 FINANCIAL CRISIS.

In 2008, the Plan lost 27% of its value because, according to Plaintiffs, it failed to reallocate its equities investments to "cash, treasury bills, and/or bonds" before the financial crisis hit. App-77 ¶ 204.[8] They assert the Plan's strategy of investing 100% of its assets in equities (the "Equities Strategy") had until this point yielded hundreds of millions in "excess income" for the Plan and leaving it "significantly overfunded." App-55 ¶ 102. But Plaintiffs allege that increased market volatility in late 2007 and early 2008 should have alerted the Plan

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[6] *See supra* note 1; *Hughes*, 525 U.S. at 439-40.

[7] *See Harley*, 284 F.3d at 905–06.

[8] Specifically, Plaintiffs allege that the Plan lost $748 million of its total assets of $2.8 billion due to its imprudent investment strategy. App-69–70 ¶ 168. As Amicus AARP notes, losses of this magnitude in 2008 were not unusual. AARP Br. 17 (funding of 100 largest corporate plans went from 108.6% to 79.1%).

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fiduciaries[9] to change course and divest an unspecified percentage of its equity investments before the Plan lost value. App-68 ¶ 163.

Of the Plan's equity holdings, approximately 40% were in mutual funds managed by a U.S. Bancorp affiliate, FAF Advisors, Inc. (the "FAF Mutual Funds"). App-34–35 ¶ 6. A Department of Labor regulation called Prohibited Transaction Exemption 77-3 ("PTE 77-3") expressly permits such investments,[10] and the Complaint does not allege that the Plan violated that regulation or lost any money as a result of these investments.[11]

In 2010, FAF's mutual fund business was sold to Nuveen Asset Management, LLC, App-51 ¶ 83, and the Complaint alleges no investments in mutual funds managed by affiliates since then. *Id.*; *see also* App-186 n.6. Also, by 2011 the Plan had "meaningfully" modified its investment strategy to include debt/fixed income and real estate investments as well as equities. App-62–63 ¶ 145. The Complaint alleges no fiduciary violations since then.

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[9] The Plan's fiduciaries included outside board members on U.S. Bancorp's Board of Directors, including members of the Board's Compensation Committee that was charged with overseeing the Plan's investments. App-43–44.

[10] *See* 42 Fed. Reg. 18,734 (April 8, 1977).

[11] App-82–107 ¶¶ 228–327.

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III. THE PLAN IS "OVERFUNDED."

Under ERISA, a measurement called the Funding Target Attainment Percentage, or "FTAP," determines whether a plan is on track to meet its benefit obligations to participants. App-172–73. FTAP is a ratio that compares the actuarial value of the Plan's assets to the actuarial value of its present and future liabilities, and is primarily used to determine whether the plan sponsor must make a contribution to the Plan in a given year. *See* ERISA § 303(a), (d) (29 U.S.C. § 1083(a), (d)).[12] If a plan's FTAP is under 100%—*i.e.*, the plan's assets are less than its liabilities—then the plan sponsor must make a contribution. App-172. If the FTAP is over 100%—*i.e.*, the plan's assets are greater than the liabilities—it is not required do so. *Id.*[13]

Courts and commentators frequently refer to plans with funding levels that are above or below 100% as respectively being "overfunded" or "underfunded."[14] Notably, ERISA does not forbid—and in fact anticipates—that a plan may be

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[12] Thus, if a plan has $15 billion in assets and $20 billion in liabilities, its FTAP is 75%; if it has $10 billion in assets and $10 billion in liabilities, its FTAP is 100%.

[13] 26 U.S.C. § 430(c); ERISA § 303(a), (g)-(h); *Hughes*, 525 U.S. at 439-40; *see generally* G. Neff McGhie III, Defined Benefit Answer Book § 13:9 (5th ed. 2013).

[14] *E.g.*, *Hughes*, 525 U.S. at 439; *Harley*, 284 F.3d at 904-06.

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"underfunded" at any particular point in time,[15] and does not limit or restrict benefits to participants unless plan funding levels fall below 80%—something that did not occur with respect to the Plan.[16]

As Plaintiffs acknowledge, since 2014 the Plan has been "overfunded" under ERISA. Specifically, the latest funding information available reflects that effective January 1, 2015, the Plan was 115.30% funded on an FTAP basis, an increase from January 1, 2014 when it was 105.18% funded.[17] Although the Plan was slightly underfunded under this measure (95.27%) in 2013 when this lawsuit commenced, the actuarial value of the Plan's assets in relation to its actuarial liabilities has since 2014 been more than sufficient to meet expected present and future obligations to Thole, Smith, and other plan participants. In fact, funding levels were higher in 2014 than they were on the eve of the 2008 financial crisis, when Plaintiffs themselves describe the Plan (when it had an FTAP of 101.24%) as having been "significantly overfunded." App-57 ¶ 109; Def-App-142, Line 14.[18]

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[15] In fact, in 2010, according to the Pension Benefit Guarantee Corporation ("PBGC"), 79% of single-employer defined benefit plans in the United States were "underfunded, and the average funding ratio for such plans in that year was 81% (and 80% in 2009). Def-App-57–58.

[16] *See* 26 U.S.C. § 436(c), (d)(3); App-129; *see also* Def-App-32 § 2.1.1; Def-App-35–36 § 5.2; *Hughes*, 525 U.S. at 439-40.

[17] *See* Def-App-129 ¶ 11; Def-App-132.

[18] The "84% underfunded" figure Plaintiffs reference is to FTAP. Pls.' Br. 8. Under a related measure, known as the Adjusted Funding Target Attainment

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IV. THE DISTRICT COURT DISMISSES THE PLAINTIFFS' CLAIMS

This case was filed in September 2013. The final amended complaint (the "Complaint") alleged two claims relevant to this appeal. First, it alleged that in violation of ERISA § 404(a) (29 U.S.C. § 1104(a)), the U.S. Bank Defendants breached their fiduciary duties under ERISA of loyalty, prudence, and diversification by failing to end the Equities Strategy before the 2008 financial crisis hit (the "Equities Strategy Claim"). Second, it alleged that by investing the Plan's assets in the FAF Funds, Defendants engaged in a prohibited transaction in violation of ERISA § 406(b) (29 U.S.C. § 1106(b)) (the "Affiliated Funds Claim").

Through two separate orders, the District Court dismissed both of these claims.

First, in its November 21, 2014 Order, the Court dismissed most of Plaintiffs' complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). App-110–56. Because the Equities Strategy was adopted nearly ten years prior to the filing of the Complaint, the Court ruled that Plaintiffs'

Percentage ("AFTAP"), the Plan was 114.96% funded at that time. Def-App-164 (citing Def-App-146). AFTAP is related to FTAP, except that it also includes "credits" that are essentially prepayments (akin to advance payments on a mortgage), and it is used to determine whether a plan is "at risk." Def-App-127 ¶ 6; App-129; 26 U.S.C. § 436; *see also Palmason v. Weyerhaeuser Co.*, 2013 WL 4511361, at *8–9 (W.D. Wash. Aug. 23, 2013). Contrary to Plaintiffs' statement that after 2008 "the Plan continued to be underfunded by all relevant measures until 2014," the Plan's AFTAP remained above 100% until 2011. Def-App-164.

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claim challenging that strategy was barred by ERISA's six-year statute of repose, and Plaintiffs had failed to sufficiently allege any fiduciary monitoring violations within the repose period. App-133–40. The Court also dismissed other claims, but allowed a portion of the Affiliated Funds Claim to go forward because the relevant DOL regulation allowing such investment was an affirmative defense. App-144.

Later, on December 29, 2015, the Court dismissed the remainder of the lawsuit as moot under Federal Rule of Civil Procedure 12(b)(1). App-169–86. In its previous order, the District Court concluded that the Plaintiffs had Article III standing to bring this case because the Plan was at the time the case commenced "underfunded," but by now, the Plan was indisputably "overfunded." Following this Circuit's prior rulings in *Harley* and *McCullough*, the Court dismissed the remaining claims because Plaintiffs no longer had any concrete interest in the requested relief.

The District Court also denied Plaintiffs' motion for attorneys' fees, finding that Plaintiffs had achieved no success on the merits and that there was no factual basis for their claim that this litigation had acted as a catalyst for any contributions that U.S. Bancorp made to the Plan. App-209–18.

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SUMMARY OF ARGUMENT

The District Court properly dismissed all of Plaintiffs' ERISA claims.

First, the District Court properly ruled that it no longer had Article III jurisdiction over the Plaintiffs' claims. As this Court previously held in *Harley* and *McCullough*, participants do not have standing to sue for alleged losses to overfunded defined benefit plans because they are not personally affected by any losses that overfunded plans experience. Thus, when the Plan became 105% overfunded during this litigation, any alleged "risk" to Plaintiffs' benefits no longer existed. Nor, did Plaintiffs submit any evidence of any "imminent" risk to their benefits on account of a future Plan default or otherwise.

Second, dismissal was appropriate even though the Plan became overfunded during the litigation. Article III requires the Plaintiffs retain the personal interest that allowed them to sue throughout the entire litigation, and they did not do so.

Third, without injury to them personally, Plaintiffs cannot establish "injury in fact" by virtue of a supposed "personal statutory right to have their pension assets managed" in accordance with ERISA, or through their "equitable interest" in the Plan's assets. The Supreme Court's recent *Spokeo* decision confirms this.

Fourth, Plaintiffs stated no claim for relief. Plaintiffs' Equities Strategy was established well before ERISA's six-year statute of repose, and Plaintiffs did not plausibly allege that the U.S. Bank Defendants should have divested in anticipation

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of the financial crisis within the statute's six-year period. Nor did Plaintiffs plausibly allege that the Defendants intentionally benefitted themselves at the expense of the Plan sufficient to state their Affiliated Funds claim.

Finally, Plaintiffs are not entitled to attorneys' fees. They achieved no success and this lawsuit had nothing to do with the Plan's overfunded status.

ARGUMENT

I. STANDARD OF REVIEW

Although the District Court's first order dismissing the case for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), should be reviewed de novo, *see Drobnak v. Andersen Corp.*, 561 F.3d 778, 783 (8th Cir. 2009), its other orders are subject to a more deferential standard of review.

The Court's second order dismissing the case as moot was based on factual challenge to the Court's jurisdiction under Rule 12(b)(1) (not the pleadings), and is therefore reviewed under a more deferential standard. *See Osborn v. United States*, 918 F.2d 724, 728–30 (8th Cir. 1990).[19] Although the District Court's legal determinations on this motion are reviewed de novo, its factual findings are reviewed for clear error. *Id.*

[19] *See also Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 915 (8th Cir. 2015).

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Similarly, the Plaintiffs' appeal of the order denying their motion for attorneys' fees is reviewed for abuse of discretion. *See Quigley v. Winter*, 598 F.3d 938, 956 (8th Cir. 2010); *Deckard v. Interstate Bakeries Corp.*, 704 F.3d 528 (8th Cir. 2013).

II. THE DISTRICT COURT DID NOT HAVE ARTICLE III JURISDICTION BECAUSE PLAINTIFFS LACKED A "CONCRETE AND PARTICULARIZED" INJURY.

A. <u>Plaintiffs Must Have an "Injury in Fact" Under Article III of the United States Constitution.</u>

To satisfy Article III's mandatory jurisdictional requirements, a party must demonstrate (a) an injury in fact that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical;" (b) a causal connection between the injury and the conduct complained of and (c) the harm must be redressable by the requested relief. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). This requires Plaintiffs to show that they "personally" have suffered a "real" injury to themselves that "actually exists." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549-50 (2016); *see also Lujan*, 504 U.S. at 563 (plaintiff must be "directly affected").

Just as important, "Article III standing must exist throughout the litigation." *Arkansas Right to Life*, 146 F.3d at 560. Thus, it is "of no consequence that the controversy was live at earlier stages in this case; it must be live when [the court] decide[s] the issues." *South Dakota v. Hazen*, 914 F.2d 147, 150 (8th Cir. 1990).

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B. <u>Plaintiffs Lack Injury in Fact Because the Plan Is "Overfunded."</u>

In *Harley* and *McCullough*, the Eighth Circuit concluded that participants in overfunded pension plans have not suffered an "injury in fact" sufficient to challenge any losses to their plan. Rather, because the plan sponsor must fund all benefits paid by the plan, any loss to the plan's surplus assets is really "a loss only to" the sponsoring employer. *Harley*, 284 F.3d at 906. Absent a meaningful risk of plan default, "any money that could be awarded would simply add to the Plan's now-existing surplus, in which Plaintiffs" have no personal interest. App-178.

Here, there is no dispute that the Plan is significantly overfunded. And Plaintiffs presented no evidence below (and indeed do not even argue on appeal) that their monthly benefits of $2,198.38 and $42.26 faced any risk of any kind in the future, let alone any risk that is "imminent."

1. Plaintiffs' Claims Fail under *Harley* and *McCullough*.

The Eighth Circuit has twice now held that participants in defined benefit plans that are "overfunded" under ERISA do not experience an "injury in fact" when the plan suffers a loss. *Harley*, 284 F.3d at 908; *McCullough*, 585 F.3d at 1087.

In *Harley*, the Eighth Circuit dismissed for lack of standing a similar claim under ERISA § 502(a)(2) by a participant who challenged his defined benefit plan's investments in allegedly imprudent securities. 284 F.3d at 906. This Court

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noted that participants in a defined benefit plan have a right to receive a set monthly payment only at retirement, and have no "claim or entitlement to" any surplus assets the plan might have over and above those needed to pay benefits. *Id.*[20] Because the plan at issue in *Harley* was an "ongoing [p]lan," with a "financially sound settlor responsible for making up any future underfunding," that would not "terminate in the foreseeable future," any loss in the case was "a loss only to . . . the Plan's sponsor." *Id.* at 906-08. "Article III," the Court observed, "counsel[s] against permitting participants . . . who have suffered no injury in fact from suing to enforce ERISA fiduciary duties." *Id.* at 907-08. Further, this Court also concluded that, as a "prudential" matter, participants in an overfunded defined benefit plan are not within the "zone of interests" Congress intended to be "protected" by ERISA § 502(a)(2). *Id*. at 907.

This decision was reaffirmed in *McCullough*, where the Eighth Circuit held that Article III "does not permit a participant in a defined-benefit plan to bring suit claiming liability . . . for alleged breaches of fiduciary duties when the plan is overfunded." 585 F.3d at 1084–85. This included claims for injunctive relief. *Id.*

Every circuit to have addressed the issue has followed these decisions. *See Perelman*, 793 F.3d at 375; *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013);

[20] *See also LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008).

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Lee v. Verizon Communs., Inc., 623 Fed. App'x. 132, 148, (5th Cir. 2015), *cert. granted, judgment vacated sub nom. Pundt v. Verizon Commc'ns, Inc.*, 136 S. Ct. 2448 (2016).[21] Plaintiffs cannot cite a single case allowing a claim on behalf of an overfunded defined benefit plan to go forward.

Under *Harley* and *McCullough*, the District Court properly held that after the Plan became overfunded, Plaintiffs did not suffer any "injury in fact." The District Court found—and Plaintiffs do not dispute—that the Plan became "overfunded" under FTAP, the formula that Congress authorized for determining the Plan's funding level.[22] Under this methodology, the Plan's funding level was, 105.18%, effective January 1, 2014, and 115.30%, effective January 1, 2015, and meant that the Plan's assets were more than sufficient to pay its liabilities, including Thole's and Smith's monthly benefits Def-App-128–29 ¶¶ 8, 11. As a

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[21] *See also Glanton ex. rel ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1124-25 (9th Cir. 2006); *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 608 (6th Cir. 2007).

[22] Plaintiffs no longer claim that a valuation method other than the FTAP ratio provides the "relevant valuation method" for determining whether the Plan is "overfunded" and in fact, that measure has gained acceptance in determining Article III standing. App-126; App-177 (*citing Perelman*, 793 F.3d at 375; *Harley*, 284 F.3d at 908; *Cress v. Wilson*, 2008 WL 5397580, at *8-11 (S.D.N.Y. Dec. 29, 2008) (noting that ERISA's minimum funding standards provide "the exclusive way" to determine whether a funding delinquency exists)). Nor do Plaintiffs dispute that it is the current statutory scheme mandated by Congress, including the "actual assumptions and methods" known as MAP-21, which first applied to the Plan in 2013, that are relevant. *See* App-177–78; Def-App-164; *see also Perelman*, 793 F.3d at 375.

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result, Plaintiffs "no longer ha[d] a concrete interest in any monetary relief that might be awarded to the Plan if they prevailed on the merits." App-178. Rather, "any money that could be awarded [as a result of the lawsuit] would simply add to the Plan's now-existing surplus, in which [Plaintiffs] have no legal interest." *Id.* (*citing Hughes Aircraft*, 525 U.S. at 440; *Harley*, 284 F.3d at 906). No award "could provide [Plaintiffs] any effectual relief." App-179. And, although the Plan could become underfunded at some point in the future, "the causal connection between the new increased risk of default" and the alleged fiduciary breaches "would be tenuous at best." *Id.*

2. There Is no Evidence that Plaintiffs Suffered a "Concrete and Particularized" Injury in Fact.

Harley and *McCullough* mandate dismissal of Plaintiffs' claims. But even putting those precedents aside, the District Court's decision should still be affirmed. There was no evidence below that the Plaintiffs faced any risk to their benefits or other injury to themselves, as is required to establish Article III jurisdiction.

Acknowledging they did not themselves lose any benefits, Plaintiffs instead claimed "injury in fact" based upon the "increased risk" that the Plan might default

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at some future, unidentified time.[23] To claim an injury in fact based upon such a future risk, however, that risk must be "imminent" or "certainly impending." *Clapper v. Amnesty Int'l U.S.*, 133 S. Ct. 1138, 1147 (2013); *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1031, 1033 (8th Cir. 2014) ("If there is no 'actual' harm, then there must at least be 'imminent' harm.").[24] Mere "allegations of possible future injury," including the possibility that challenged conduct creates a "risk" of injury at some point in the future is not sufficient to show an "injury in fact." *Lyons*, 461 U.S. at 102; *O'Shea v. Littleton*, 414 U.S. 488, 495-97 (1974); *Shain v. Veneman*, 376 F.3d 815, 818 (8th Cir. 2004).[25] Or as the recent *Spokeo* decision confirmed, a risk of future harm must be both "imminent" as well as a "material" risk to the plaintiff. 136 S. Ct. at 1548, 1550.

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[23] Pls.' Br. 34; *LaRue*, 552 U.S. at 255 ("Misconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan.").

[24] *See*, *Lyons*, 461 U.S. at 102 (holding a plaintiff must demonstrate that he or she is "immediately in danger of sustaining some directly injury as [a] result" of the challenged conduct); *McConnell v Federal Election Com'n*, 540 U.S. 93, 114 (2003); *Va. State Corp. Com'n v. F.E.R.C.*, 468 F.3d 845, 848-849 (D.C. Cir. 2006); *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1297-98 (D.C. Cir. 2007) ("increased risk" is not a "concrete, particularized, and actual injury for standing purposes"; rather, "the mere increased risk of some event occurring is utterly abstract").

[25] *Whitmore*, 495 U.S. at 158; *see also Lujan*, 504 U.S. at 565 n.2, 567 n.3; *DaimlerChrysler Corp. v. Cuno*, 547 U.S 332, 345 (2006); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979).

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As noted, the U.S. Bank Defendants' mootness motion was raised as a factual challenge under Fed. R. Civ. P. 12(b)(1).[26] As a result, it was necessary that the record "establish[] jurisdiction . . . by a preponderance of the evidence." *Iowa League of Cities v. EPA*, 711 F.3d 844, 870 (8th Cir. 2013); *Nuclear Info. & Res. Serv. v. NRC*, 457 F.3d 941, 954 (9th Cir. 2006) (dismissing under a Rule 12(b)(1) challenge to a regulation because the "declarations" did not establish "at least reasonable probability of a threat to a concrete interest").[27] Plaintiffs needed to establish this continuing Article III jurisdiction "with the manner and degree of evidence required at the successive stage of the litigation." *Lujan*, 504 U.S. at 561.

All of the evidence in the record on Defendants' Rule 12(b)(1) motion demonstrated that the Plaintiffs faced no risk to their benefits. It is undisputed that the "actuarial value of the [P]lan's assets in relation to its actuarial liabilities"[28] is currently more than is necessary to pay its future liabilities—including Plaintiffs' respective $2,198.38 and $42.26 per month benefits. *See supra* p. 8. Further, and as the District Court observed, it was "undisputed" that U.S. Bancorp had more than sufficient assets to make up any shortfall that might theoretically develop to Plaintiffs' benefits. App-123–24; *supra* note 5 ($86.9 billion in liquid assets). The

[26] *Osborn*, 918 F.2d at 729.

[27] *See also Va. State Corp. Comm'n*, 468 F.3d at 848.

[28] *Harley*, 284 F.3d at 908.

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Plaintiffs offer no responsive evidence of any kind suggesting that their benefits were at risk—let alone any evidence that any risk was "material," "imminent" or "certainly impending." Thus, the District Court properly found that Plaintiffs "neither alleged . . . nor offered any evidence to suggest" that U.S. Bancorp would be unable to fund the benefits at issue. App-124; *see Alphin*, 704 F.3d at 338 ("[T]he risk that Appellants' pension benefits will [] be adversely affected as a result of the present alleged ERISA violations is too speculative to give rise to Article III standing.").

III. *HARLEY* AND *MCCULLOUGH* APPLY WHEN A PLAN BECOMES OVERFUNDED DURING LITIGATION.

Harley and *McCullough* are no less applicable because the Plan became overfunded *during* rather than *before* the litigation. Rather Supreme Court precedent makes it clear that Plaintiff must face an injury in fact throughout the entire litigation. Plaintiffs' suggestion that such injury need not exist once standing is initially established is inconsistent with this precedent and multiple other decisions. Pls.' Br. 17, 19.

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A. **Plaintiffs' Injury in Fact Must Continue Throughout the Litigation.**

As the Supreme Court has explained, mootness—the doctrine the District Court applied[29]—is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997). A plaintiff therefore must "throughout the litigation . . . have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).[30] Or as the Seventh Circuit has said, "[i]f at any point the plaintiff would not have standing to bring suit at that

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[29] Contrary to Plaintiffs' suggestion that the District Court misunderstood the distinction between standing and mootness, and that they were unfairly required to "re-establish standing," the Court clearly concluded that the U.S. Bank Defendants' motion should be judged under mootness principles, and applied the very test that Plaintiffs reference. App-174–75. The fact that the tests are similar may simply be due to the fact that the two doctrines are, as Plaintiffs acknowledge, "intertwined." Pls.' Br. 12.

[30] *See also Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016) ("The need to satisfy these three requirements persists throughout the life of the lawsuit."); *Camreta v. Greene*, 563 U.S. 692, 701 (2011) ("To ensure a case remains 'fit for federal-court adjudication,' the parties must have the necessary stake not only at the outset of litigation, but throughout its course."); *United States v. Streich*, 617 F. App'x 749, 750 (9th Cir. 2015); *Ramirez v. Sanchez Ramos*, 438 F.3d 92, 10 (1st Cir. 2006).

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time, the case has become moot." *Milwaukee Police Ass'n v. Bd. of Fire & Police Comm'rs*, 708 F.3d 921, 929 (7th Cir. 2013).[31]

Therefore, just as Plaintiffs could not have *initiated* this case under *Harley* and *McCullough* if the Plan had been overfunded, they can no longer *continue* it once the Plan became overfunded. *Spencer*, 523 U.S. at 7; *Milwaukee Police Ass'n*, 708 F.3d at 929; *see also Rhodes v. Judiscak*, 676 F.3d 931, 933 (10th Cir. 2012). The same reasons why the Eighth Circuit denied standing in *Harley* apply equally when a plan becomes overfunded during litigation—any loss to the Plan's assets has no effect on Plaintiffs, absent evidence of a risk to their benefits, which they did not even try to establish here. *See supra* pp. 17–20.

The Third Circuit in *Perelman* similarly dismissed a case where, like here, the plan went from being approximately 96% funded under FTAP when the litigation commenced to 104% funded under FTAP during the litigation. 793 F.3d at 374–75.[32] *Compare supra* p. 8 (Plan's FTAP increased from 95% in 2013 to

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[31] There are two ways in which Article III's injury in fact requirement for standing differs from mootness, but as discussed below, neither apply here. *Lucero v. Bureau of Collection Recovery*, 639 F.3d 1239, 1242-43 (10th Cir. 2011).

[32] *See* Def-App-173, Line 14 (excerpt from appellate record in *Perelman* showing FTAP of 96.06% as of January 2010); *Perelman*, 793 F.3d at 374–75 (noting $13.6 million in assets and $13.0 million in liabilities under FTAP); *see also Perelman v. Perelman*, 919 F. Supp. 2d 512, 520 (E.D. Pa. 2013) (noting an FTAP of 95.27% as of January 2011).

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105% in 2014). Citing Judge Ericksen's initial ruling that defined benefit plan participants in overfunded defined benefit plans lack injury in fact, the Third Circuit affirmed the district court's dismissal. It reasoned that because the plan was "appropriately funded" under the "valuation method approved by Congress," the plaintiff lacked the requisite "injury in fact" because any claim that "the Plan is nonetheless at risk of default is entirely speculative." *Id.*

Contrary to Plaintiffs' arguments, nothing in this Court's follow-up decision to the original *Harley* decision, *Harley v. Zoesch*, 413 F.3d 866, 871-72 (8th Cir. 2005) ("*Harley II*"), alters the requirement that Plaintiffs must experience an injury in fact that continues throughout the litigation. Although *Harley II* stated that "standing is determined" based on the facts "at the lawsuit's commencement," the context was to explain why a plaintiff who *lacked* constitutional standing at the beginning of a lawsuit could not retroactively obtain it through subsequent events. *Id.*[33] It did not disturb the requirement that the Plaintiffs' injury in fact present at the start must remain throughout the litigation.

[33] *Park v. Forest Serv. of U.S.*, 205 F.3d 1034, 1037 (8th Cir. 2000) (holding that standing is evaluated at the time the complaint is filed only because plaintiff argued subsequent events gave her standing).

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B. <u>Once the Plan Became Overfunded, the District Court Could No Longer Provide "Effectual Relief" to the Plaintiffs.</u>

Once a plaintiff no longer suffers any "injury in fact," and the Court can no longer provide "effectual relief" to the plaintiff, dismissal is mandatory. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012). Thus because the Plan by now is overfunded, and all the conduct Plaintiffs complained about ended years before the litigation, the District Court could no longer provide any relief ***to them***. Dismissal for mootness was proper.

Hoping to elide this standard, Plaintiffs suggest *Knox* holds that dismissal is appropriate only when "it is impossible for a court to grant any effectual relief whatever," Pls.' Br. 18, but they ignore the rest of the sentence in *Knox* stating that the "effectual relief" must benefit "the prevailing party." *Knox*, 132 S. Ct. at 2287 ("A case becomes moot only when it is impossible for a court to grant any effectual relief whatever *to the prevailing party*." (emphasis added)). Read completely and correctly, *Knox* merely reiterates that the "injury in fact" test for mootness and standing are indistinguishable, and does not allow a case to continue after the plaintiff's personal injury is gone. *Compare id.* (requiring that plaintiff have a "concrete interest, however small" in the litigation to avoid mootness), *with Spokeo*, 136 S. Ct. at 1552 (requiring plaintiff to have a "concrete interest" in the case to have standing); *see also* Wright & Miller, Fed. Prac. & Procedure §3533.1 (the mootness doctrine requires "that the interests originally sufficient to confer

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standing persist throughout the suit").[34] Plaintiffs' suggestion that a case is not moot if a court can grant any relief whatsoever, untethered to Plaintiffs' personal interest, is thus inconsistent with *Knox*.

Under the proper standard, dismissal on mootness grounds was proper. When the Plan became overfunded, the District Court could no longer provide "effectual relief" to Plaintiffs. As in *Harley*, they no longer had a "concrete interest" in seeking damages—as that relief would only further fund the already-overfunded Plan. *See supra* pp. 8, 10.

That Plaintiffs also seek a damage award in the form of "disgorgement" adds nothing. Both *McCullough* and *Perelman* dismissed claims for disgorgement of profits when the plan at issue was overfunded. *See McCullough*, 585 F.3d at 1083; *Perelman*, 793 F.3d at 375. And the result is no different simply because Plaintiffs also sue under ERISA § 502(a)(3) because, in addition to that claim being procedurally improper, *see infra* pp. 43–45, the law is clear that any profits disgorged would have to be returned to the Plan. *Mass. Mut. Life. Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985) (noting that any relief for breach of fiduciary

[34] *See Singleton v. Wulff*, 428 U.S. 106, 112 (1976) (describing constitutional standing inquiry as "whether the plaintiff-respondents allege 'injury in fact,' that is, a sufficiently ***concrete interest*** in the outcome of their suit to make it a case or controversy subject to a federal court's Art. III jurisdiction" (emphasis added)); *Kaplan v. Cty. of Sullivan*, 74 F.3d 398, 399–400 (2d Cir. 1996) (quoting *Singleton*); *In re Kurtzman*, 194 F.3d 54, 58 (2d Cir. 1999); *Spencer*, 523 U.S. at 7; *Milwaukee Police Ass'n*, 708 F.3d at 929.

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duty must "benefit [] the plan as a whole"); *LaRue*, 552 U.S. at 254.[35] As such, Plaintiffs have no "personal stake" in any "disgorgement."

Likewise, none of the injunctive relief that Plaintiffs requested would be "effectual" as to them because, as *McCullough* recognized, they do not have a cognizable interest under Article III in obtaining equitable relief. *See McCullough*, 587 F.3d at 1087 (extending *Harley* to claims for injunctive relief). And in any event, as the District Court found, the practices Plaintiffs seek to enjoin—the Equities Strategy and the Plan's investment in the Affiliated Funds—were abandoned more than two years before this case was filed, and five years before the District Court made its decision. *See* App-33 ¶ 2; App-37 ¶ 15, App-62–63 ¶ 145, App-75 ¶ 196. The District Court's finding on this Rule 12(b)(1) motion that there was no reason to believe that the challenged practices would resume was not clearly erroneous. *See Osborn*, 918 F.2d at 730. Finally, under *McCullough*, absent injury to themselves, Plaintiffs also cannot demand that the Court remove the Plan's fiduciaries. *See McCullough*, 585 F.3d at 1083 (noting that the plaintiff sought the removal of fiduciaries).[36]

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[35] *See also* ERISA § 409(a) (29 U.S.C. § 1109(a)) (recognizing that losses and profits from breach of fiduciary duty must go to the Plan); *Edmonson v. Lincoln Nat'l Life Ins., Co.*, 725 F.3d 406, 418 (3d Cir. 2013).

[36] Plaintiffs' request for attorneys' fees, of course, "cannot save the case from mootness." *Hechenberger v. W. Ele. Co.*, 742 F.2d 453, 455 n.5 (8th Cir. 1984).

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Without an "injury in fact" that the Court could remedy through "effectual relief" to them personally, Plaintiffs cannot, as they claim, "seek to remedy the Plan's injuries," or to "represent interests other than their own," such as putative class members. Pls.' Br. 21, 23. Although *Braden* holds that a plaintiff with standing can potentially represent the interest of other class members, it still requires them to actually suffer an "injury in fact." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 593 (8th Cir. 2009); *see also Spokeo*, 136 S. Ct. at 1547 n.6 (noting that class representatives "must allege and show that they personally have been injured."); *Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994) ("[I]f the claims of the named plaintiffs become moot prior to class certification, the entire action becomes moot.").

Finally, although Plaintiffs cite cases such as *Laidlaw* as suggesting that the U.S. Bank Defendants have a "heavy burden" to show mootness, that "heavy" burden applies only to the "voluntary cessation" exception—which, as explained in the next section, Plaintiffs cannot invoke. *See Laidlaw*, 528 U.S. at 190–91 (noting "heavy burden" of showing mootness when defendant voluntarily ceased challenged conduct).[37] In any event, even if the U.S. Bank Defendants bear the burden of production, it is uncontested that the Plan became overfunded in 2014,

[37] *See also* Wright and Miller, Federal Practice and Procedure § 3533.1 (noting "heavy burden" of persuasion applies only "as a result of voluntary discontinuance").

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depriving Plaintiffs of whatever "concrete and particularized" interest they ever had in any of their claims, precluding this Court from awarding "any effectual relief whatever" to them.

As such, Plaintiffs' claims were moot and properly dismissed.

C. The Voluntary Cessation Exception to the Mootness Doctrine Does Not Apply.

Plaintiffs cannot avoid *Harley* and *McCullough* by relying on the voluntary cessation doctrine.[38] That exception to the mootness doctrine applies only if the defendant voluntarily abandons an illegal practice in response to a lawsuit seeking to enjoin that practice. In such circumstances, there is a risk that Defendants are engaged in "gamesmanship"—and that the challenged conduct would restart after the litigation ends. *Laidlaw*, 528 U.S. at 190-91. By its nature, the voluntary cessation doctrine "applies, indeed it only makes sense, in the context of a claim seeking some prospective relief." *Goldenberg v. Indel*, 2012 WL 2466567, at *4 (D.N.J. June 27, 2012). The doctrine thus does not and cannot apply to claims for damages. *Id.*; *see also Pakovich v. Verizon LTD Plan*, 653 F.3d 488, 492 (7th Cir. 2011).

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[38] *Laidlaw*, 528 U.S. at 190-91; *Lucero*, 639 F.3d at 1242-43; *Strickland v. Alexander*, 772 F.3d 876, 887 (11th Cir. 2014). Plaintiffs do not assert that the other exception—capable of repetition yet evading review—applies.

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The District Court properly found that the evidence in the record conclusively demonstrated that the two challenged practices—the Equities Strategy and the Affiliated Funds investment—"cannot reasonably be expected to start up again." App-185.[39] As the Plaintiffs have acknowledged, the challenged Equities Strategy was abandoned in 2010 when the Plan "meaningfully beg[a]n to diversify into asset classes other than equities." App-62 ¶ 145. Similarly, Plaintiffs themselves allege that FAF's mutual fund business was sold in 2010 which eliminated any chance that the Plan would invest in "affiliated" mutual funds in the future. *Id.*[40]

For these reasons, the District Court correctly found that it was "absolutely clear" that the challenged investment practices cannot be reasonably expected to recur, and that Plaintiffs' concerns about potential future misconduct were "too conjectural . . . to present an actual controversy." App-186. Contrary to Plaintiffs' argument that the District Court should have insisted that the U.S. Bank Defendants promise never to engage in the challenged conduct again, it was

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[39] The District Court also found that in so far as Defendants' voluntary contributions to the Plan caused the "overfunding," such contributions were not motivated to moot this litigation. *See infra* p. 55.

[40] Further, the voluntary cessation doctrine only applies when the defendants' change in conduct is specifically "because of the litigation," *Pub. Utils. Comm'n v. FERC*, 100 F.3d 1451, 1460 (9th Cir. 1996), which, considering that the challenged practices were abandoned years before Plaintiffs' lawsuit, is not the case here.

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sufficient that the conduct Plaintiffs oppose ended on its own. *See Adams v. Bowater Inc.*, 313 F.3d 611, 615 (1st Cir. 2002) ("Mootness turns primarily on future threats, not upon penance."). Plaintiffs did not "offer[] anything but speculation that the alleged misconduct will resume." App-186.

D. Alternatively, Plaintiffs Lacked Standing to Initiate this Case.

Even if the mootness doctrine does not support dismissal, the judgment should be affirmed because Plaintiffs did not have Article III jurisdiction at the outset of the case.[41] Rather, Plaintiffs' conclusory allegations that U.S. Bank Defendants' alleged breaches "significantly increase[ed] the risk of default of the Plan"[42] fell far short of *Twombly* pleading standards, especially when the Court considers the "undisputed" financial wherewithal of the Plan's sponsor.[43]

Although *Harley* and *McCullough* both involved "overfunded" defined benefit plans, nothing in these decisions suggests that participants in "underfunded" defined benefit plans necessarily have standing. Rather, prospective plaintiffs must make *Twombly*-sufficient allegations of an "injury in fact." *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 934-35, 934 n.5 (8th

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[41] This Court can affirm the District Court's judgment on any basis supported by the record. *MSK EyEs Ltd. v. Wells Fargo Bank, Nat. Ass'n*, 546 F.3d 533, 539 (8th Cir. 2008).

[42] App-69 ¶ 167.

[43] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

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Cir. 2012). In this context, a Plaintiff must plead facts demonstrating that the alleged fiduciary breaches created an "impending" or "imminent" risk that the Plan would default. *See Clapper*, 133 S. Ct. at 1147; *supra* at pp. 17–20. For this reason, defined benefit plan participants may just as well lack standing to sue fiduciaries in underfunded plans, especially when the plan is close to fully funded,[44] or when the financial wherewithal of the plan's sponsor is not in question.[45]

Although, as the District Court observed, Plaintiffs alleged a significant diminution in the Plan's value during 2008, they alleged no facts plausibly suggesting that the Plan was even remotely in danger of default apart from alleging that this loss "significantly increas[ed] the risk of default of the Plan." App-67 ¶ 167. But this is exactly the sort of "formulaic" recitation of an applicable legal standard barred by *Twombly*—particularly where, as here, the Plan was nearly fully

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[44] *Weyerhaueser*, 2013 WL 451361 at *9 (no standing where plan was 98.5% funded); *Fletcher v. Convergex Grp., LLC*, 2016 WL 690889 (S.D.N.Y. Feb. 17, 2016) (dismissing claims where the plan was 53% underfunded); *New Orleans ILA Pensioners Ass'n v. Bd. of Trs. of New Orleans Emp'rs Int'l Longshoreman's Ass'n AFL-CIO Pension Fund*, 2008 WL 215654 at *3 (E.D. La. Jan 24, 2008).

[45] *Lee*, 623 F. App'x at 148 (holding that the Plaintiffs failed to demonstrate Article III standing even though the defined benefit plan was 66% funded because of the financial strength of the sponsor).

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funded[46] and U.S. Bancorp's financial strength to cover any shortfall is undisputed.[47] Thus, the facts alleged in the Complaint do not plausibly allege any cognizable risk to Plaintiffs' benefits. [48]

IV. UNDER *SPOKEO*, PLAINTIFFS MUST SHOW A PERSONAL HARM TO ESTABLISH ARTICLE III JURISDICTION.

Unable to point to a personal "injury in fact" because of the Plan's "risk of default," Plaintiffs instead argue that none is needed because they have alleged violations of their "personal statutory right to have their pension assets managed" in compliance with ERISA, and that losses to the Plan harmed their "equitable interest" in its assets. Pls.' Br. 32. The Supreme Court's recent *Spokeo* decision (along with numerous others), however, confirms that Plaintiffs must be "actually affected" by and have a "personal stake" in the challenged conduct that affects them in an "individualized way," which they do not have.

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[46] Although Plaintiffs alleged that the plan's FTAP ratio was only 80%, the 5500 effective in 2013—the year the case was filed—disclosed that the Plan's FTAP was 95.27%—nearly fully funded. Def-App-162, Line 14; U.S. Bank Defs.' Am. Mem. L. Supp. Mot. Dismiss 17 n.46, ECF No. 106 (explaining Plaintiffs' error); *see also Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987) (indicating facts in a complaint can be disregarded if they conflict with the documents they rely upon).

[47] App-123–24; *supra* note 5.

[48] Further, the obligation of the Pension Benefit Guaranty Corporation to fully insure Plaintiffs' respective benefits underscores that they experienced no injury in fact as a result of the Plan's losses in 2008. *Alphin*, 704 F.3d at 338 (taking into account PBGC funding in standing dispute); *cf.* App-126.

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A. **A Violation of a "Personal Statutory Right" Is Not An Injury In Fact Under *Spokeo*.**

Absent a "personal stake" in this litigation,[49] Plaintiffs cannot argue that they have Article III standing to raise claims simply because they have alleged a violation of ERISA.

Courts have long held that, absent harm to them, a plaintiff does not have standing simply by alleging a bare violation of a statute. *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing"); *Lujan* 504 U.S. at 572. And *Harley* (along with *McCullough*) confirmed that Article III precludes participants "who have suffered no injury in fact from suing to enforce ERISA fiduciary duties." 284 F.3d at 906.[50] Rather, the Plaintiffs had to be "directly affected" by the challenged conduct. *Lujan*, 504 U.S. at 563.[51]

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[49] *Raines v. Byrd*, 521 U.S. 811, 819 (1997).

[50] *Glanton* 465 F.3d at 1125; *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) ("While plan fiduciaries have a statutory duty to comply with ERISA under §1104(a)(1)(D), Kendall must allege some injury or deprivation of a specific right that arose from a violation of that duty in order to meet the injury-in-fact requirement."); *Loren*, 505 F.3d at 608–09 (same); *Weyerhaeuser*, 2013 WL 4511361, at *3-4.

[51] *See also, e.g.*, *Shain v. Veneman*, 376 F.3d 815, 818 (8th Cir. 2004); *Nuclear Info. & Res. Serv. v. NRC*, 457 F.3d 941, 954 (9th Cir. 2006).

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The recent *Spokeo* decision does nothing to change, but in fact reaffirms, these holdings. A plaintiff's injury must be "actual or imminent not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548. Only a "risk of real harm" can "satisfy the requirement of concreteness," which must also be "particularized." *See Lujan*, 504 U.S. at n.1 (holding an injury "must affect the plaintiff in a personal and individual way"). Thus, Article III jurisdiction "requires a concrete injury" to the plaintiff "even in the context of a statutory violation." *Id*. at 1549 (holding plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right" to sue). Accordingly, even if Congress has authorized a cause of action, a plaintiff seeking to protect the sorts of rights the statute protects cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."[52] *Id*. at 1549.[53]

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[52] Courts interpreting *Spokeo* have uniformly come to this conclusion. *E.g.*, *Hancock v. Urban Outfitters, Inc.*, 2016 WL 3996710, at *3 (D.C. Cir. July 26, 2016); *Sartin v. EKF Diagnostics, Inc.*, 2016 WL 3598297, at *3 (E.D. La. July 5, 2016).

[53] For example, in *Spokeo*, although the Fair Credit Reporting Act gives an individual the right to sue over inaccurate credit reporting, "not all inaccuracies cause harm or present any material risk of harm" to the individual. "It is difficult to imagine," the Court suggested, "how the dissemination of an incorrect zip code, without more, could work any concrete harm that would create an 'injury in fact.'" *Spokeo*, 136 S. Ct. at 1550.

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Spokeo leaves no room for Plaintiffs' argument that their "personal statutory right to have their pension assets managed prudently, loyally and in a diversified manner," Pls.' Br. 32, in itself constitutes an "injury in fact" sufficient for the Court to exercise jurisdiction. As noted above, because no award of damages, injunctive relief, or disgorgement will benefit them personally, the conduct they allege did not "material[ly]" affect the Plaintiffs "in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. The mere fact that Congress created a right to sue under ERISA does not eliminate this constitutional requirement, any more than it did with respect to environmental laws in *Lujan* or the Fair Credit Reporting Act in *Spokeo*. Plaintiffs cannot meet Article III's injury in fact requirement by claiming a "personal statutory right" to have the Plan managed in accordance with ERISA.

B. **Plaintiffs Have No "Injury in Fact" Based Upon their "Intangible," "Equitable" Interest in the Plan's Assets.**

Nor can Plaintiffs meet Article III's "injury in fact" requirement by claiming that the losses that the *Plan* experienced affected their "equitable interest" in the Plan's assets. Absent a "personal injury" to themselves, such an "abstract" interest in the Plan's performance is not sufficient under *Spokeo*, "even in the context of a statutory violation." *Spokeo*, 136 S. Ct. at 1548. Calling an ERISA violation an injury to an "equitable interest" under "trust law" principles does not give Plaintiffs a "personal stake," as Article III requires, nor, absent actual injury,

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would any loss to the Plan's benefits affect the Plaintiffs in a "personal and individual way." *Lujan*, 504 U.S. at 561; *see also Whitmore v. Arkansas*, 495 U.S. 149, 155 (1984) (noting that an alleged injury must "distinct[ly] and palpabl[y]" affect the plaintiff).

Even before *Spokeo*, courts uniformly ruled that defined benefit plan participants could not, absent injury to themselves, sue to protect their "equitable interest" in the plan's assets. Both *McCullough* and *Harley*, for example, rejected any argument that such an interest gives courts subject matter jurisdiction to hear generalized grievances concerning the administration of ERISA retirement plans. *McCullough*, 585 F.3d at 1085; *Harley*, 284 F.3d at 906. Similarly, the Third Circuit in *Perelman*, rejected a similar claim that a plaintiff "need not prove an individual injury insofar as he seeks monetary equitable remedies in a 'derivative' or 'representative' capacity." 793 F.3d at 375–76; *see also Alphin*, 704 F.3d at 336 (rejecting claim that "trust law principles extend to the ERISA context to confer Article III standing" on participants).

Although *Spokeo* recognized that, as prior cases had noted, "history," the "judgment of Congress," and "tradition[]" can help determine whether injury to an "intangible" interest (such as in the environment, or one's reputation) can be an "injury in fact," it still required that the plaintiff in a particular case show that such injury "concrete[ly]" and "personal[y]" affected them. 136 S. Ct at 1549. In fact,

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Spokeo held that mere allegations that the defendant published incorrect personal information about the plaintiffs in violation of the Fair Credit Reporting Act was not enough, and that the plaintiffs still needed to show on remand that this violation "resulted in [] harm" to them personally. *See id.* at 1550; *Lujan*, 504 U.S. at 578 (dismissing case when the Plaintiff was not "actually affected" by the harm to the "intangible" environmental interest). Thus, although "intangible" interests may exist as a result of Congressional recognition, history, or tradition, plaintiffs must, in order to demonstrate an injury to those intangible interests sufficient to meet the requirements of Article III, still be "actually," "personally," and "individually" affected by the challenged conduct. Claiming harm, as Plaintiffs do here, by virtue of an "equitable" interest in the Plan's assets without showing actual harm to themselves—does not meet that Article III requirement.

Nor, in any event, does "tradition" as reflected in the common law of trusts support Plaintiffs' claim that harm to a trust's corpus that does not personally affect them is nevertheless actionable. In addition to disregarding the foregoing authorities rejecting standing on the basis of a beneficiary's derivative or "equitable" interest in the trust, the Restatement of Trusts says otherwise,[54] as does the case law. *See Morse v. Bank One*, 2005 WL 3541037, at *9 (E.D. La. Nov. 1,

[54] Restatement (Third) of Trusts § 214, cmt. b (A suit to enforce a private trust ordinarily . . . may be maintained by any beneficiary whose rights are or may be adversely affected by the matter(s) at issue.).

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2005) (trust beneficiary lacked standing to challenge alleged mismanagement of trust assets that did not affect her rights).[55] Indeed, several circuit courts, including *McCullough*, have rejected the notion that the "history" or "tradition" supports ERISA plan participants having representational standing absent injury to themselves. *See Alphin*, 704 F.3d at 335-36 (no "history" would support representational standing in ERISA context); *McCullough*, 585 F.3d at 1086; *Glanton*, 465 F.3d at 1125–26 n.2.

Similarly, *Scanlan v. Eisenberg*, 669 F.3d 838 (7th Cir. 2012), does not support Plaintiffs' theory. Unlike Plaintiffs, who have no cognizable interest in the Plan's assets, *see Hughes*, 525 U.S. at 440, the plaintiff in *Scanlan* did. Further, the court noted specifically that the plaintiff was potentially "eligible to receive all of the Trust's corpus," and thus held she had a "personal stake in the outcome." *Id*. at 846. Contrary to Plaintiffs' argument, *Scanlan* made clear that its decision

[55] *Glanton*, 465 F.3d at 1125 n.2 (citing Restatement (Second) of Trusts § 214 cmt. b); *Skinner v. Union Planters Nat'l Bank of Memphis*, 448 F. Supp. 726, 730 (W.D. Tenn. 1978) (same); *Wisener v. Burns*, 44 S.W.3d 289, 294-95 (Ark. 2001); *Reed v. Del. Trust Co.*, 1996 WL 255903, at *1 (Del. Ch. May 7, 1996) ("In other words, the beneficiary may sue only insofar as his or her interest is affected.") (internal citations omitted); *Weyerhaeuser*, 2013 WL 4511361, at *3-4 (same).

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would not "lead to any beneficiary having standing whether or not its specific interest is affected," but rather turned on the specific facts of the case. *Id*. at 847.[56]

To the extent, however, that *Scanlan* and other common law trust authorities supported Plaintiffs' "equitable interest" theory, they are inconsistent with and cannot upset this Circuit's rulings in *Harley* and *McCullough*.[57] Further, *Scanlan* did not arise under ERISA, and although the "law of trusts often will inform" a Court's interpretation of ERISA, it is "only a starting point, after which courts must go on to ask whether . . . the language of [ERISA], its structure, or its purpose require departing from common-law trust" law. *Varity Corp v. Howe*, 516 U.S. 489, 497 (1996). Because ERISA—unlike trusts at common law—has "complex minimum funding" requirements that require ongoing Plan contributions to ensure the payment of benefits, trust law principles are not "informative" in this setting. *See Hughes*, 525 U.S. at 440 ("[N]o plan member has a claim to any particular

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[56] The other cases Plaintiffs cite do not support their position either. *See also Pender v. Bank of Am.*, 788 F.3d 354, 367 (4th Cir. 2015) (finding 401(k) plan participant had standing to recover profits a fiduciary made by inappropriately using plan assets when any recovery would directly increase the plaintiffs' 401(k) account balances); *Kendall*, 561 F.3d at 121 (recognizing under Second Circuit law that a party must suffer a direct injury in order to sue for violation of ERISA).

[57] *See United States v. Provost*, 969 F.2d 617, 622 (8th Cir. 1992) (noting authority from another circuit cannot be used by one panel to overturn decision by an earlier panel).

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asset that composes a part of the plan's general asset pool."); *LaRue*, 552 U.S. at 255; *Varity*, 516 U.S. at 497.

Nor can Plaintiffs infer from the post-*Spokeo* remand of *Pundt v. Verizon Commc'ns, Inc.*, 136 S. Ct. 2448 (2016), that the Supreme Court has implicitly loosened the injury in fact requirements in contravention of *Harley* and *McCullough*. A remand order does not, of course, create an inference that the case was wrongly decided. *See Kenemore v. Roy*, 690 F.3d 639, 641 (5th Cir. 2012). And, in any event, unlike here, the plan at issue in *Pundt* was allegedly less than 80% funded, which under ERISA, could affect a participants' receipt of benefits. *Lee*, 623 F. App'x at 148; *see* App-128–29 (noting that plans that fall below 80% funding are subject to benefits restrictions).

In any event, regardless of the reach of *Spokeo* and *Lee*, Plaintiffs' claims do not for the reasons above "fall within the zone of interests to be protected or regulated by" ERISA that would be necessary for prudential standing as well. *Harley*, 262 F.3d at 907 (*quoting Valley Forge*, 454 U.S. at 475); *see also McCullough*, 585 F.3d at 1087. Allowing claims by participants in overfunded defined benefit plans would thus not advance ERISA's goal of "protecting individual pension rights" but instead would instead discourage their sponsorship and continuation. *McCullough*, 585 F.3d at 1087.

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Accordingly, *Spokeo* cannot be read as changing the law or otherwise supporting Plaintiffs' argument that Article III jurisdiction exists on account of their "personal statutory" or "equitable" interest in the Plan's assets.[58]

C. **Congress Did Not Intend to and Could Not Expand Article III Jurisdiction through ERISA.**

Contrary to amicus AARP's general policy argument, affirming the District Court would in no way interfere with Congress' purpose in passing ERISA, nor would it leave participants whose benefits are actually at risk without protection.

AARP's suggestion that plan participants should be able to sue for plan losses based solely on statutory violations is in effect a call to overrule *Lujan*, *Spokeo*, and other Supreme Court cases requiring a plaintiff to be "actually affected" by such violation in order can bring suit. Although it focuses its argument on how or why Congress might have intended this result, vague references to ERISA's "purpose" cannot, as *Harley* recognized, eviscerate Article III's "case or controversy" requirement.[59]

[58] *See Bock v. Pressler & Pressler, LLP*, 2016 WL 4011150, at *1 (3d Cir. N.J. July 27, 2016) ("[T]he Supreme Court did not change the rule for establishing standing in *Spokeo* . . . "); *Mey v. Got Warranty, Inc.*, 2016 WL 3645195, at *3 (N.D.W.V. June 30, 2016).

[59] *Harley*, 284 F.3d at 906 ("Although a statute may broaden the class of redressable injuries, the Supreme Court has never held that Congress may do away with the Article III requirement of concrete injury."); *see also Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979).

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In any event, there is no evidence that Congress intended plan participants to be able to sue without injury to themselves. It is a well-accepted rule of statutory interpretation that "broad statutory grants" such as ERISA's civil enforcement mechanism are "construed in a manner consistent with constitutional limitations, including the Article III limitation that only those who suffer the actual injury have standing to sue." *See* Roberts, *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1227 (1993); *see also Clark v. Martinez*, 543 U.S. 371, 381 (2005) ("[When] choosing between competing plausible interpretations of a statutory text, [a court should] rest[] on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.").

Further, there is no basis for amicus's concern that following Article III's "case or controversy" requirements would leave ERISA's fiduciary rules unenforced. As *Harley* recognized, breaching fiduciaries would still be accountable to federal regulators charged with enforcing ERISA's provisions, 284 F.3d at 908 n.5, as well as to other fiduciaries. *See* ERISA § 502(a)(2) (allowing fiduciaries to sue to enforce fiduciary breaches); *Harley*, 284 F.3d at 904. Further, affirming the District Court's decision would not mean that participants in any defined benefit plans would be unable to sue for breaches of fiduciary duty—they would merely need to establish a cognizable constitutional injury, as all plaintiffs entering federal court must do.

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This outcome is, as the Supreme Court observed in *Spokeo*, necessary "to remain faithful to [the] tripartite structure" in the Constitution. 136 S. Ct. at 1547. By limiting the exercise of "judicial power" to resolving disputes raised by plan participants who have a personal stake and are "actually affected" by the alleged fiduciary breaches, the Constitution leaves to the political branches the task of addressing more generalized grievances about, for example, the need for minimum standards concerning investment policy that would be of broader application. *Id.*; Roberts, *supra* at 1229–30.

In fact, allowing ERISA fiduciary claims to be raised on behalf of participants who have not been injured would more likely undermine ERISA's goal of encouraging employers to offer defined benefit pension plan benefits to employees.[60] Unencumbered by the requirement that a fiduciary violation "directly affect[]" their benefits, *Lujan*, 504 U.S. at 563, participants and their lawyers could retrospectively challenge any number of investment decisions (even those, according to AARP, that made money), which would inevitably "subject[] the Plan and its fiduciaries to 'costly litigation.'" *McCullough*, 585 F.3d at 1087.[61] Indeed,

[60] *See* 29 U.S.C. § 1001b(c)(2) (ERISA policy is "to encourage the maintenance and growth of single-employer defined benefit pension plans).

[61] As demonstrated by multitude of cases recently filed by 401(k) plan participants (whose benefits are "directly affected" by the plan's investment returns), the prospect of increased litigation by defined benefit plan participants is not merely theoretical. *See* Jacklyn Wille, "Uptick in Fee Litigation Reshaping

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Plaintiffs below sough $31 million in attorney's fees despite having obtained no benefit for the Plan.[62] Such costs to plans would have no corresponding benefit to participants. As this Court has observed, participants in overfunded defined benefit plans are already "fully protected," and, in fact, "would if anything be adversely affected" by an expanded litigation platform that would be another disincentive for the sponsorship and continuation of defined benefit plans already in decline. *McCullough*, 585 F.3d at 1087; *see also Harley*, 284 F.3d at 907.[63]

V. ARTICLE III APPLIES TO CLAIMS UNDER ERISA § 502(a)(3).

Having failed to show that this Court has Article III jurisdiction to decide their claim "on behalf of the Plan" under ERISA § 502(a)(2), Plaintiffs cannot create jurisdiction by bringing a claim under ERISA§ 502(a)(3) (29 U.S.C. §1132(a)(3)).

401(k) Industry," *Bloomberg* BNA, June 9, 2016, available at http://www.bna.com/uptick-fee-litigation-n57982073839/.

[62] *See* Pls.' Mem. L. Supp. Mot. Attorney's Fees & Expenses 7, ECF No. 252

[63]The percentage of workers participating in defined benefit plans decreased nearly 50% between 1980 and 2008, and as the Social Security Administration has observed, the financial and regulatory pressures on employers to replace defined benefit plans that they fully fund with defined contribution plans that employees typically fund are growing. Butrica et al., *The Disappearing Defined Benefit Pension and Its Potential Impact on the Retirement Incomes of Baby Boomers*, Social Security Bulletin, Vol. 69, No. 3, 2009, available at https://www.ssa.gov/policy/docs/ssb/v69n3/v69n3p1.html.

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First, there is no reason to treat Article III principles differently under ERISA § 502(a)(3) than under ERISA § 502(a)(2). Regardless of the section of ERISA under which Plaintiffs proceed, they are only entitled to receive a "fixed periodic payment" from the Plan. *See Hughes*, 525 U.S. at 439 (noting Plaintiffs have no right to any plan assets sums above and beyond their benefits). Thus, any relief obtained must be returned to the Plan to fund benefit payments. *See Russell*, 473 U.S. at 140; *LaRue*, 552 U.S. at 254 (recognizing that recovery for breach of fiduciary duty must go to the Plan); ERISA § 409.[64] Nor do they have a personal interest in the injunctive relief they are seeking. *See supra* pp. 25–26. None of the cases cited by Plaintiffs provide otherwise. *Edmonson*, 725 F.3d at 418 (holding plaintiffs must have a personal right to disgorgement damages for Article III); *Pender*, 788 F.3d at 367.

Second, as the District Court recognized, Plaintiffs' claim for "equitable" relief under the "catch-all" provision of ERISA's civil enforcement scheme is limited to relief that is "appropriate." ERISA §502(a)(3). The Eighth Circuit has held that relief under this section is not "appropriate" where a plaintiff can be "provided adequate relief by her right to bring a claim" under another provision of

[64] Even if these sums could be held in "constructive trust' outside the Plan, they would still be used to fund benefits—a remedy that (as discussed above) Plaintiffs have no personal interest in obtaining.

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ERISA § 502(a).[65] Here, of course, as the District Court recognized, ERISA § 502(a)(2) provides for all the relief they seek, including damages, disgorgement of profits, and injunctive relief.[66] Plaintiffs' "catch-all" claim was properly dismissed.

VI. PLAINTIFFS' COMPLAINT FAILED TO STATE A CLAIM FOR RELIEF.

Even if the District Court had subject matter jurisdiction over Plaintiffs' claims, it properly dismissed the Equities Claim as barred by ERISA's six-year statute of repose and for failure to state a claim for relief under *Twombly*. Further, Plaintiffs' Affiliated Funds Claim also failed to state a claim for relief as well.

A. <u>The District Court Properly Dismissed The Equities Strategy Claim.</u>

Plaintiffs challenge the "determination" of the U.S. Bank Defendants to "allocat[e] 100% of [the Plan's] assets to equity investments." App-57 ¶ 109. Plaintiffs allege that Defendants' failure after 2004 to change course from this investment strategy left the Plan overexposed to equities when the 2008 financial crisis hit, causing a loss in value of the Plan's assets.

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[65] *Wald v. Sw. Bell Corp. Customcare Med. Plan*, 83 F.3d 1002, 1006 (8th Cir. 1996) (discussing *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996)).

[66] *See* ERISA § 409(a) (29 U.S.C. § 1109(a)) (establishing that a participant may obtain damages, disgorgement of profits, and injunctive relief to cure a breach of fiduciary duty).

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ERISA requires that breach of fiduciary duty claims must be brought within "six years after the date of the last action that constituted a part of the breach or violation." ERISA § 413(1)(A) (29 U.S.C. § 1113(1)(A)). Plaintiffs do not dispute that any claim based upon the adoption of the Equities Strategy would plainly be barred, but instead claim that the U.S. Bank Defendants failed to "monitor and reevaluate" based upon events that occurred during the six-year statutory period. Contrary to Plaintiffs' arguments, however, the District Court squarely and correctly ruled Plaintiffs failed to allege a plausible monitoring claim within this period.

Specifically, to plead that fiduciary violations occurred within ERISA's six-year statute of repose, Plaintiffs alleged that the Plan's investment fiduciaries failed to respond to "increased volatility in the equities market" as the 2007-08 financial crisis was unfolding. They allege that, had the fiduciaries noticed this, they would have ended the Equities Strategy. *See* App-37 ¶ 13. As the District Court recognized, however, courts have routinely and uniformly rejected such arguments, reasoning that such a duty would require fiduciaries to essentially "time the market" by predicting short-term swings in stock prices. *E.g.*, *Morgan Stanley*,

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712 F.3d at 733 (rejecting claims that "warning signs" of the 2007-08 financial crisis should have caused a fiduciary to abandon at-risk investments).[67]

To avoid dismissal, Plaintiffs wrongly argue that the district court "ignored" their monitoring claim, which they contend was endorsed by the Supreme Court's subsequently issued decision in *Tibble*. But, in fact, in its Order denying Plaintiffs' post-*Tibble* request for attorneys' fees, the District Court specifically found that it had considered, and denied, Plaintiffs' equities strategy claim consistent with the rule in *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015). *See* App-211 n.3; *see also* Def-App-124.

Although Plaintiffs now claim that the Equities Strategy always was and always would be imprudent, they never advanced before the District Court a plausible basis for this assertion. To the contrary, the Complaint expressly acknowledged that the Equities Strategy had for several years generated "significant amounts of pension income" that resulted in the Plan's becoming "significantly overfunded." App-55 ¶ 102. Apart from a conclusory characterization of the strategy as "imprudent," "aggressive," "unreasonable," or

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[67] *See also White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 991-92 (7th Cir. 2013); *Tussey v. ABB, Inc.*, 746 F.3d 327, 746 F.3d at 338 (rejecting analysis reflecting an improper hindsight bias); *In re Citigroup ERISA Litig.*, 662 F.3d 128, 141 (2d Cir. 2011); *Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190, 1199, 1204-05 (10th Cir. 2013); *Fulton Cnty. Emps. Ret. Sys. v. MGIC Inv. Corp.*, 675 F.3d 1047, 1050 (7th Cir. 2012); *Rinehart v. Akers*, 722 F.3d 137, 150 (2d Cir. 2013).

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"excessively risky," Plaintiffs did not plausibly allege why such a (publically disclosed) investment strategy would be inappropriate given the "Plan'[s] investment horizon and the financial viability of U.S. Bancorp." App-55 ¶ 103; *see Morgan Stanley*, 712 F.3d at 719 (allegations must give rise to a "reasonable inference" as to why plan investments "so plainly risky"). Rather, their allegations were that U.S. Bank failed to recognize the "warning signs" of the 2007-08 financial crisis,[68] and they cannot fault the District Court for not ruling on a claim that they did not plausibly allege in their Complaint.[69] *Callantine v. Staff Builders, Inc.*, 271 F.3d 1124, 1130 (8th Cir. 2001).[70]

[68] App-34–35 ¶ 6 ("Defendants failed to review the investment allocation despite multiple indicators of a deepening financial and economic crisis including a sharp increase in the volatility of the equities market and increased correlation among all stocks which exposed the Plan to an unnecessary risk of loss, and which should have caused the Committee Defendants to reevaluate the 100% Equities Strategy."); App-53–54 ¶ 96 (alleging that defendants did not adequately review investments "despite the severe increase in volatility in the equities market and the significant increase in correlation among all stocks during the first half of 2008"); *see also, e.g.*, App-32–109 ¶¶ 2, 7, 101, 111, 130, 142, 150-65, 168, 202-04, 241-42, 291, 321 and 325.

[69] *See also* App-139 ("An examination of the [Complaint] reveals that the only facts the Plaintiffs offer to support [misconduct within the repose period] are that volatility and correlation increased in the equities market in late 2007 and 2008.").

[70] Plaintiffs cannot argue that reversal is warranted on the basis of facts that they did not allege in their complaint. Although Plaintiffs indicated they intended to file an amended complaint that would address supposed new law resulting from *Tibble*, they never did so. Having failed to do so, they cannot now rely on facts outside of the operative complaint to state a claim. *See Jones v. United States*, 727

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Nor, in any event, could Plaintiffs have made such a claim that the Equities Strategy violated ERISA's diversification rules without alleging more than a bare allegation that the investments were not diversified. *E.g.*, *Morgan Stanley*, 712 F.3d at 733. There is no dispute that the Plan owned equities of literally hundreds of companies spread across all industries in the American economy. Def-App-60–123. Nor do Plaintiffs question the appropriateness of any particular equity, or allege why such a concentrated position in equities is inappropriate in light of the "Plan'[s] investment horizon and the financial viability of [U.S. Bancorp]." App-55 ¶ 103. A bare allegation of non-diversity, without more, is insufficient to state a claim. *See also Metzler v. Graham*, 112 F.3d 207, 210 (5th Cir. 1997) (no diversification violation when investing more than 60% of portfolio on single parcel of realty); *Lanka v. O'Higgins*, 810 F. Supp. 379, 387-90 (N.D.N.Y. 1992) (no diversification violation when concentrating investments in several blue-chip stocks).

Finally, Plaintiffs offered only the barest, implausible, allegations that the U.S. Bank Defendants' failure to change this strategy during the 2007-08 financial crisis was motivated by a disloyal intent. App-55 ¶ 108. Nor would such a theory make any sense, as the Plaintiffs' allegation that the U.S. Bank Defendants adopted

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F.3d 844, 846 (8th Cir. 2013) (indicating that plaintiffs cannot rely on facts outside of the complaint to state a claim).

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the equities strategy to boost the Plan's return rate simply did not plausibly allege disloyalty.

B. <u>Plaintiffs' Affiliated Funds Claim Fails to State a Claim for Relief.</u>

Plaintiffs' claim that the U.S. Bank Defendants engaged in a prohibited transaction by investing the Plan's assets in mutual funds managed by an affiliate, also fails because the Plaintiffs did not, as required, allege any facts suggesting that the U.S. Bank Defendants inappropriately used the Plan assets "in [their] own interests."[71]

To state a claim under ERISA § 406(b)(1), it is not enough that plan assets were invested in a manner that was mutually beneficial to both the plan and the plan's sponsor (or fiduciary)—rather a plaintiff must allege that the fiduciary invested plan assets to benefit themselves, to the detriment of the Plan. *Siskind v. Sperry Ret. Program, Unisys*, 47 F.3d 498, 506 (2d Cir. 1995) (holding it is not a breach of fiduciary duty to act "in the interest of both the plan's participants and the employer").[72] The plaintiff must plead facts plausibly alleging that a fiduciary

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[71] The District Court did not reach this issue.

[72] *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982), *cert. denied* 459 U.S. 1069 (1982); *Leber v. Citigroup, Inc.*, 2010 WL 935442, at *10-14 (S.D.N.Y. Mar. 16, 2010); *Metzler*, 112 F.3d at 213; *see also In re Huntington Bancshares, Inc., ERISA Litig.*, 620 F. Supp. 2d 842, 849 n.6 (S.D. Ohio 2009) (noting that ERISA does not prohibit an investment strategy that is mutually beneficial to both the sponsor and the plan).

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engaged in a transaction with a "subjective intent to benefit" that fiduciary, at the Plan's expense. *Reich*, 57 F.3d at 279.[73]

Plaintiffs' allegations failed to meet this standard. Certainly, such intent cannot be inferred from the fact that the Plan invested in affiliated funds. As noted, both ERISA and the DOL specifically recognize the "common practice" of a Plan's investment in affiliated investment products, such as the Affiliated Funds,[74] and the DOL has adopted regulations (which Plaintiffs do not allege have been violated) that permit such investments.[75] Further, the Complaint does not allege that investments in the FAF funds performed any worse than their peers, or otherwise caused the Plan any losses. In fact, the only purported "deficiency" in the FAF Funds alleged by the Complaint is that they were not the "lowest cost"

[73] *Hans v. Tharaldson*, 2011 WL 7179644, at *7-8 (D.N.D. Oct. 31, 2011); *Dupree v. Prudential Ins. Co. of Am.*, 2007 WL 2263892, at *39 (S.D. Fla. Aug. 7, 2007); *Saxton v. Cent. Pa. Teamsters Pension Fund*, 2003 WL 22952101, at *20-21 (E.D. Pa. 2003); *Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 860-61 (6th Cir. 2000); *Reich v. Constr. Laborers Local No. 1140*, 908 F. Supp. 697, 706 (D. Neb. 1995). Although separate sections of ERISA, this subjective intent requirement applies to both claims under ERISA §§ 406(a)(1)(D) and 406(b)(1). *See Alves v. Harvard Pilgrim Health Care Inc.*, 204 F. Supp. 2d 198, 214 (D. Mass. 2002).

[74] *See* H.R. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5096 (emphasis added)); *see also* ERISA § 408(b)(8).

[75] *See Mehling v. New York Life Ins. Co.*, 163 F. Supp. 2d 502, 510–11 (E.D. Pa. 2001) (describing exemption).

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investments (App-97 ¶ 292), which courts hold is not sufficient.[76] In short, Plaintiffs' conclusory allegation that the U.S. Bank Defendants invested in the affiliated funds to generate fees at the expense of the Plan—and nothing more—did not meet *Twombly* standards.[77]

VII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES.

The District Court did not abuse its discretion in refusing to grant Plaintiffs request for attorneys' fees. *See supra* p. 12 (noting abuse of discretion standard); *see also* ERISA § 502(g) (allowing the district court "in its discretion" to award "reasonable" attorneys' fees).

To obtain fees under ERISA § 502(g), Plaintiffs must show they achieved "some success on the merits." *Hardt*, 560 U.S. at 254. This requires more than a merely "trivial" or a "purely procedural victory." *Id.* at 255. Instead, the court must be able to fairly call the outcome of the litigation some success on the merits

[76] *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009); *Braden*, 588 F.3d at 596, n. 7; *Morgan Stanley*, 712 F.3d at 718. This is especially true where, as here, Plaintiffs do not take into account the fact that FAF charged no fee for managing that portion of the over 55% of the Plan's portfolio that was not invested in FAF mutual funds. *See* Def-App-6 ¶ 4.

[77] Although Plaintiffs did not allege below that the investment in the Affiliated Funds violated ERISA § 404(a)(1) and (2)'s duties of loyalty and prudence, their failure to allege any facts suggesting that the FAF Mutual Funds were imprudent or inappropriate for the Plan would have precluded those claims as well. *Dupree*, 2007 WL 2263892, at * 39.

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without having to conduct a "lengthy inquir[y] into the question whether a particular party's success was 'substantial' or occurred on a 'central issue.'"[78] *Id.*

In support of their fee petition, which below was for $31 million under a "common trust" argument, but now has been limited to their alternative lodestar argument, Plaintiffs assert the "catalyst theory," meaning that the litigation was the catalyst that caused a benefit to their clients. In a detailed written order, the District Court properly exercised its discretion and rejected this argument.

As the District Court discussed in its Order, the Court dismissed Plaintiffs' complaint early in the case, before substantive discovery. App-217–18. The U.S. Bank Defendants, not the Plaintiffs, were primarily successful on the first motion to dismiss which eliminated the Equities Strategy claim, the securities lending claim, and a portion of the affiliated funds claim.[79] *Id.* The District Court did not

[78] While this circuit has identified five factors for a court to consider in exercising its discretion, "[b]ecause these five factors bear no obvious relation to §1132(g)(1)'s text or to our fee-shifting jurisprudence, they are not required for channeling a court's discretion when awarding fees under this section." *Hardt*, 560 U.S. at 254-55.

[79] Although this claim was subject to the prohibited transaction exemption, PTE 77-3, District Court ruled it was an affirmative defense that could not be adjudicated on a motion to dismiss. Following the Court's ruling, Defendants immediately provided notice that they intended to move promptly for summary judgment based on their compliance with the exemption, submitting evidence of compliance. *See* U.S. Bank Defs.' Mem. Supp. Mot. Protective Order 1–2, 6–16, ECF No. 171.

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suggest at any time that Plaintiffs might prevail. It does not take a "lengthy" or "substantial" inquiry to conclude that Plaintiffs achieved no success.

Nor did the litigation serve as a catalyst for the Plan to become overfunded, as Plaintiffs claim. As the District Court found, "there is no evidence in the record to support Plaintiffs' speculation about Defendants' motives for making large contributions to the Plan," or any evidence showing contributions were "an outcome of the litigation as opposed to an independent decision that nevertheless affected the viability of Plaintiffs' case." *See* App-217. The only evidence in the record on this issue, two sworn declarations from David Hansen (U.S. Bancorp's Senior Vice President, Compensation and Benefits Design), shows conclusively that the litigation had no impact whatsoever on plan funding. Def-App-129 ¶ 11; Def-App-188–90 ¶¶ 6–9. Rather, the contributions that U.S. Bancorp made in excess of the minimum required was to avoid additional insurance premiums the Plan would have had to pay to the PBCG. *Id.*

In addition to ignoring Defendants' evidence (and failing to offer any evidence of their own), Plaintiffs misstate the record by implying that U.S. Bancorp's $414 million contribution to the Plan on July 15, 2015, was made to

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moot the litigation.[80] What Plaintiffs fail to mention is that the Plan became overfunded in 2014—at least *a year before* this $414 million contribution, when the Plan's FTAP ratio became 105.18% retroactive to January 1, 2014. Def-App-162, Line 18; Def-App-171, Line 14. In fact, contrary to Plaintiffs' claim that the District Court held that U.S. Bancorp's voluntary contributions "cured any injuries suffered by Plaintiffs," the District Court was clear that it did not find "that Plaintiffs received from Defendants the relief Plaintiffs had requested," Pls.' Br. 53, and indeed, that it did not "endorse" the "causative effect" Plaintiffs suggested. App-212–13. Similarly, Plaintiffs' statement that U.S. Bancorp did not make voluntary contributions in excess of the minimum required until after the litigation commenced is inaccurate, for as the District Court found, U.S. Bank made nearly $200 million in contributions in the two years preceding the litigation.[81]

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[80] Plaintiffs failed to make this argument to the District Court, and therefore it has been waived. *Callantine*, 271 F.3d at 1130; *see generally*, Pls.' Mem. L. Supp. Mot. Attorney's Fees & Expenses, ECF No. 252.

[81] On August 14, 2013, a month before the lawsuit commenced, U.S. Bancorp made a $119.41 million contribution to the Plan, which brought the total contributions in excess of minimum contributions to $163 million for Plan Year 2012. Def-App-188 ¶ 7. Before that, the Bank made $35 million in excess of minimum contributions in September 2012, also to avoid PBGC variable premiums. Def-App-188 ¶ 6 With respect to their observation that no contributions were made to the Plan for nearly a decade before that, Plaintiffs overlook the fact that no such payments were necessary (even when FTAP was under 100%) because of previous credits—or prepayments made to the Plan. Def-App-188 ¶ 5.

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Because the District Court dismissed all of Plaintiffs' claims, because the record is devoid of any evidence that that litigation was "the catalyst" for the plan's funding, and because Plaintiffs otherwise have no standing to assert their claims, the District Court did not abuse its discretion by denying Plaintiffs their request for attorney's fees under ERISA § 502(g)(1).

CONCLUSION

For the reasons discussed above, the decision of the District Court should be affirmed.

Dated: September 12, 2016

Respectfully submitted,

s/ Andrew J. Holly

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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this brief complies with the applicable type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B). The brief contains 18,837 words, from the Issues Presented through the Conclusion, as determined by the word-count feature of Microsoft Office Word 2010 in 14-point, proportionally spaced Times New Roman font. The undersigned also certifies that the brief filed with the Court and served on all parties have been determined to be virus-free in compliance with Eighth Circuit Rule 28A(h).

Dated: September 12, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2016, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system on counsel for Appellants-Plaintiffs.

Dated: September 12, 2016

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