No. 17-2397

United States Court of Appeals for the Eighth Circuit

JOHN MEINERS, on behalf of all others similarly situated and on behalf of the Wells Fargo & Company 401(k) Plan,

Plaintiff-Appellant,

v.

WELLS FARGO & COMPANY; HUMAN RESOURCES COMMITTEE OF THE WELLS FARGO BOARD OF DIRECTORS; WELLS FARGO EMPLOYEE BENEFITS REVIEW COMMITTEE; HOPE HARDISON; JUSTIN THORNTON; HOWARD ATKINS; PATRICIA CALLAHAN; MICHAEL HEID; TIMOTHY SLOAN; JOHN STUMPF; LLOYD DEAN; JOHN CHEN; SUSAN ENGEL; DONALD JAMES**; and** STEPHEN SANGER**,**

Defendants-Appellees

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT COURT FORTHE DISTRICT OF MINNESOTA

NO. 0:16-CV-03981-DSD-FLN

Motion for Leave to File Brief of *Amici Curiae* American Benefits Council, The ERISA Industry Committee and Chamber of Commerce of the United States of America In Support of Appellees/Affirmance

Alston & Bird LLP
PATRICK C. DICARLO
1201 West Peachtree Street
Atlanta, GA 30309
Telephone: (404) 881-7000
Fax: (404) 881-7777
pat.dicarlo@alston.com

Counsel for amici Curiae

LEGAL02/37638010v3

CERTIFICATE OF INTERESTED PARTIES

The American Benefits Council, the Chamber of Commerce of the United States of America and the ERISA Industry Committee, and are non-profit, tax-exempt organizations incorporated in the District of Columbia. They have no parent corporations, and no publicly held corporation owns more than 10% of their stock or membership interests.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, the American Benefits Council (the "Council"), the Chamber of Commerce of the United States of America (the "Chamber") and The ERISA Industry Committee ("ERIC") respectfully request leave of the Court to file the accompanying brief of *amici curiae* in support of Defendants-Appellees and urging affirmance of the District Court's order dismissing Plaintiffs-Appellants' Complaint.

The Council is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 430 members are primarily large, multi-state employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor

or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored programs.

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of three million businesses and professional organizations of every size, in every economic sector, and from every region of the country. Many of the Chamber's members maintain, administer, or provide services to employee-benefits programs governed by ERISA.

ERIC is a nonprofit organization representing the Nation's largest employers that maintain health care, retirement, disability, and other employee benefit plans covered by ERISA. ERIC is the only national association that advocates for large employers on health, retirement, and compensation public policies at the federal, state, and local levels. Its members are leaders in every sector of the economy. As the voice of large employer plan sponsors on public policies impacting their ability to provide benefits to millions of active workers, retired persons, and their families nationwide, ERIC frequently participates as amicus curiae in cases that have the potential for far-reaching effects on employee benefit plan design or administration.

The Council, the Chamber and ERIC often participate as *amicus curiae* in cases with the potential to significantly affect the design and administration of

employee benefit plans under ERISA. Many of their members offer their employees the opportunity to invest in 401(k) plans similar to the plan at issue here. Both the companies that design those plans and the fiduciaries who administer them have significant interests in the standard by which their actions are reviewed.

This case is of great significance for employers and retirement plan sponsors because it has the potential to define the standards governing the types of allegations necessary to move forward with a lawsuit challenging the investment options plan fiduciaries choose to make available to 401(k) participants. As a practical matter, the legal standard may have an enormous impact on how investment professionals go about choosing plan investment options. Accordingly, *amici* seek leave to file this brief to aid this Court in its understanding of the ERISA issues presented in this appeal, and the deleterious impact of allowing class actions challenging the prudence of 401(k) plan investment options to proceed on only the allegations that there were two cheaper funds available in the market and/or that propriety investment options were offered as choices to participants.

Appellate Case: 17-2397 Page: 4 Date Filed: 10/27/2017 Entry ID: 4594441

Accordingly, *Amici* seek leave to file the brief of *Amici Curiae* attached hereto.

This 27th day of October, 2017.

/s/ Patrick C. DiCarlo
Patrick C. DiCarlo
Alston & Bird, LLP
1201 West Peachtree Street
Atlanta, GA 30309
Telephone: (404) 881-7000

No. 17-2397

United States Court of Appeals for the Eighth Circuit

JOHN MEINERS, on behalf of all others similarly situated and on behalf of the Wells Fargo & Company 401(k) Plan,

Plaintiff-Appellant,

v.

WELLS FARGO & COMPANY; HUMAN RESOURCES COMMITTEE OF THE WELLS FARGO BOARD OF DIRECTORS; WELLS FARGO EMPLOYEE BENEFITS REVIEW COMMITTEE; HOPE HARDISON; JUSTIN THORNTON; HOWARD ATKINS; PATRICIA CALLAHAN; MICHAEL HEID; TIMOTHY SLOAN; JOHN STUMPF; LLOYD DEAN; JOHN CHEN; SUSAN ENGEL; DONALD JAMES**; and** STEPHEN SANGER**,**

Defendants-Appellees

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT COURT FORTHE DISTRICT OF MINNESOTA

NO. 0:16-CV-03981-DSD-FLN

Brief of *Amici Curiae* American Benefits Council, The ERISA Industry Committee and Chamber of Commerce of the United States of America In Support of Appellees/Affirmance

Alston & Bird LLP
PATRICK C. DICARLO
1201 West Peachtree Street
Atlanta, GA 30309
Telephone: (404) 881-7000
Fax: (404) 881-7777
pat.dicarlo@alston.com

Counsel for amici Curiae

Appellate Case: 17-2397 Page: 6 Date Filed: 10/27/2017 Entry ID: 4594441

TABLE OF CONTENTS

I. INTEREST OF *AMICI CURIAE* 1

II. ARUGMENT 4

A. Identifying two possible alternatives to an affiliated fund is insufficient to state a claim. 4

1. Plaintiff's performance and fee arguments. 4

2. The affiliated nature of the funds at issue. 9

B. The funds' status as the default options is irrelevant. 11

III. Conclusion 13

TABLE OF AUTHORITIES

Page(s)

Cases

Amron v. Morgan Stanley Inv. Advisors, Inc.,
464 F.3d 338 (2d Cir. 2006) 5, 7

Braden v. Wal-Mart Stores, Inc.,
588 F.3d 585 (8th Cir. 2009) 5, 6, 7

Cunningham v. Cornell Univ.,
No. 16-cv-6525 (PKC), 2017 WL 4358769 (S.D.N.Y. Sept. 29, 2017) 8

DeBruyne v. Equitable Life Assurance Soc'y,
920 F.2d 457 (7th Cir. 1990) 5

Fifth Third Bancorp v. Dudenhoeffer,
134 S.Ct. 2459, 189 L.Ed.2d 457 (2014) 4

Hecker v. Deere & Co.,
556 F.3d 575 (7th Cir. 2009) 5, 7, 8

Sacerdote v. New York Univ.,
No. 16-cv-6284 (KBF), 2017 WL 3701482 (S.D.N.Y. Aug. 25, 2017) 8

Tussey v. ABB, Inc.,
746 F.3d 327 (8th Cir. 2014) 5, 10, 11

Tussey v. ABB, Inc.,
850 F.3d 951 (8th Cir. 2017) 7, 10

Statutes

Employee Retirement Income Security Act of 1974 2

ERISA 1, 2, 5

Other Authorities

29 C.F.R. § 2550.404c-5 12

29 C.F.R. § 2550.404c-5(e)(3)(1)....................12

29 C.F.R. § 2550.404c-5(e)(4)....................13

Notice of Proposed Rulemaking, Participant Directed Individual Account Plans, 56 Fed.Reg. 10724 (Mar. 13, 1991)....................9

Rule 12(b)(6)....................2, 4

Rule 29(a)(4)(E)....................1

Appellate Case: 17-2397 Page: 9 Date Filed: 10/27/2017 Entry ID: 4594441

I. INTEREST OF *AMICI CURIAE*

Amici curiae are the American Benefits Council (the "Council"), the Chamber of Commerce of the United States of America (the "Chamber") and The ERISA Industry committee ("ERIC") and the American Benefits Council (the "Council").[1] The Council is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 430 members are primarily large, multi-state employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored programs.

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of three million businesses and professional organizations of every size, in every economic sector, and from every region of the country. Many of the Chamber's

---

[1] Pursuant to Rule 29(a)(4)(E), *amici* affirm that no party or counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

members maintain, administer, or provide services to employee-benefits programs governed by ERISA.

ERIC is a nonprofit organization representing the Nation's largest employers that maintain health care, retirement, disability, and other employee benefit plans covered by ERISA. ERIC is the only national association that advocates for large employers on health, retirement, and compensation public policies at the federal, state, and local levels. Its members are leaders in every sector of the economy. As the voice of large employer plan sponsors on public policies impacting their ability to provide benefits to millions of active workers, retired persons, and their families nationwide, ERIC frequently participates as amicus curiae in cases that have the potential for far-reaching effects on employee benefit plan design or administration.

The Council, the Chamber and ERIC often participate as *amicus curiae* in cases with the potential to significantly affect the design and administration of employee benefit plans under the Employee Retirement Income Security Act of 1974, as amended, ("ERISA"). Many of *amici's* members offer their employees the opportunity to invest in 401(k) plans similar to the plan at issue here, the Wells Fargo & Company 401(k) Plan (the "Plan"). Both the companies that design those plans and the fiduciaries who administer them have significant interests in the standard by which their actions are reviewed.

Appellate Case: 17-2397 Page: 11 Date Filed: 10/27/2017 Entry ID: 4594441

Amici are concerned that if the conclusory and sparse allegations in the Complaint at issue are sufficient to state a claim under Rule 12(b)(6), the result will be an avalanche of new suits supported only by bare allegations that a cheaper investment option was available and/or that simply offering affiliated funds is a fiduciary breach. Such a result would have a number of adverse public policy consequences impacting the *amici's* members and the participants and beneficiaries of the retirement plans they sponsor and/or service. If merely having an affiliated fund is sufficient to state a claim, financial services companies may be forced, as a practical matter, to use products offered by competitors just to avoid the appearance of a conflict, irrespective of whether those other products are superior investments. A finding that identifying two cheaper funds (one of which performed better) alone states an imprudence claim would upend established law that fiduciaries can, and should, consider factors other than price, and would create a race towards the cheapest funds, irrespective of other considerations, which may have substantial adverse results for retirement savers in the next bear market.

Amici believe the interests of retirement plan participants are best served by allowing retirement plan fiduciaries broad discretion to act within their own area of expertise. Judicial review is an important safeguard, but should be limited to situations in which a plaintiff is able to plead facts, not just conclusions, that if proven would demonstrate imprudence and/or disloyalty without speculation or the

use of hindsight. The District Court's opinion here properly focused on the lack of factual detail in Plaintiff's allegations to support claims of fiduciary breach. *Amici's* members have an interest in advocating for the affirmance of such an order.

II. ARGUMENT

Plaintiff argues that he has stated a claim upon which relief can be granted by alleging only that: (1) Wells Fargo offered proprietary target date funds to participants when there were two cheaper, and one better performing, funds available; and (2) that the target date funds were designated as the Plan's default alternative to "seed" such funds for the benefit of Wells Fargo. (*See* Plaintiff/Appellant's Brief, p. 1.) As discussed more fully below, these threadbare allegations are not sufficient to plausibly state a claim for relief. *See Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459, 2471, 189 L.Ed.2d 457 (2014) (Rule 12(b)(6) "requires careful judicial consideration of whether the complaint states a claim that the defendant has acted imprudently.").

A. Identifying two possible alternatives to an affiliated fund is insufficient to state a claim.

1. Plaintiff's performance and fee arguments.

The allegations that the funds at issue were more expensive than two other funds Plaintiff identifies (and performed worse than one) does not come close to stating a claim. Significantly, Plaintiff does not allege that the fees charged exceed

market averages for similar services, or even that they are unreasonable in relation to the services provided. Rather, Plaintiff asserts only that there are two funds that charge lower fees that could have been selected. Identifying just two cheaper funds does not state a plausible claim because there is no obligation to choose the cheapest investment options available. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 n. 7 (8th Cir. 2009) (the "bare allegation that cheaper alternative investments exist in the marketplace" does not raise an inference of fiduciary breach); *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) ("nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund ….") *Amron v. Morgan Stanley Inv. Advisors, Inc.*, 464 F.3d 338, 345 (2d Cir. 2006) ("That a mutual fund has an expense ratio higher than Vanguard, a firm known for its emphasis on keeping costs low, raises little suspicion ….").

Equally unavailing is Plaintiff's assertion that the Wells Fargo target date funds performed worse (in hindsight) than some of the funds he alleges should have been chosen. First, it is well established that prudence is not to be judged with the benefit of hindsight. *Tussey v. ABB, Inc.*, 746 F.3d 327, 338 (8th Cir. 2014); *see also DeBruyne v. Equitable Life Assurance Soc'y*, 920 F.2d 457, 465 (7th Cir. 1990) ("The fiduciary duty of care … requires prudence, not prescience."). As the District Court properly noted: "The rate of return for the

Wells Faro and Vanguard funds are only relevant insofar as they suggest that Wells Fargo's decision making process was flawed." (Add-5.) Yet, Plaintiff makes no allegations regarding that process other than to criticize the results.

More fundamentally, the two funds identified by Plaintiff are simply not similar to the funds he challenges. The funds Plaintiff says should have been included track different indexes and have far different allocations to stocks versus bonds. (D-App 338, 349, 359 and Add-6.) As the District Court noted, the two comparator funds proffered by Plaintiff have a significantly higher percentage of assets invested in stocks versus bonds. (Add-6.) Because there are greater potential rewards, but also potentially greater losses, associated with investments in stock, it is not surprising that a fund with a higher exposure to stocks outperformed another fund more heavily invested in bonds during a period of time in which we now know that the stock market did quite well. Further, Plaintiff does not even allege that the Wells Fargo target date funds failed to meet their benchmark. The fact that two different funds (that track different indexes) had differing results raises no inference of misconduct.

It is precisely because the funds at issue and the funds identified by Plaintiffs are so different, that this case is clearly distinguishable from *Braden*. In *Braden*, the court dealt not with comparing two different investment funds, but rather two different share classes of the *same* funds. *Braden*, 588 F.3d at 595 ("each of the

ten funds included in the Plan offers only retail class shares, which charge significantly higher fees than institutional shares for the same return on investment.") Comparing two different share classes of the same fund is vastly different than comparing two totally different funds that follow different strategies.

There are a variety of differences between various funds (e.g., management experience, credit worthiness, customer service, performance history, etc.) that could reasonably justify a difference in cost. *Tussey v. ABB, Inc.*, 850 F.3d 951, 960 (8th Cir. 2017) ("funds … designed for different purposes … choose their investments differently, so there is no reason to expect them to make similar returns over any given span of time."). Thus, a Plaintiff challenging an investment choice must plead something more than just that one fund is more expensive than the other. *Braden*, 588 F.3d at 596 n. 7; *Hecker*, 556 F.3d at 586; *Amron*, 464 F.3d at 345.

Nor does it help Plaintiff to assert that the fee structure for the comparison funds is an aggregate fee, whereas the target date funds charge a fee at the target date fund level and at the underlying investment fund level. The facts pled do not in any way establish that the fees the Wells Fargo target date funds charge are duplicative. The target date funds allocate a particular participant's investment among a set of underlying funds, and periodically reallocate the participants' investment in such funds, and, of course, the underlying funds themselves invest in

individual stocks and bonds. (*See* Compl. ¶ 3 ("charging fees for both (1) managing the target date funds themselves, and (2) managing the index funds underlying the target date funds.").) Thus, there are fees associated with the fund investment function, and fees associated with the target date allocation function. A particular fund may choose to bundle those fees, or express them separately, but the fees are charged for different functions and the bottom line is whether the total fee is reasonable. *Hecker*, 556 F.3d at 586 ("The total fee, not the internal, post-collection distribution of the fee, is the critical figure …."); *Cunningham v. Cornell Univ.*, No. 16-cv-6525 (PKC), 2017 WL 4358769, at *6 (S.D.N.Y. Sept. 29, 2017) ("Simply alleging that the Plans included investment options with unnecessary 'layers' of fees does not plausibly allege that the overall fee was unreasonable . . ."); *Sacerdote v. New York Univ.*, No. 16-cv-6284 (KBF), 2017 WL 3701482, at *11 (S.D.N.Y. Aug. 25, 2017) ("plaintiffs' allegations regarding unnecessary and excessive fee layers are insufficient . . . plaintiffs have not alleged that the inclusion of investment products with these fees led to higher fees overall. Without such an allegation, it is not clear that plaintiffs have plausibly alleged that the overall fee structure was unreasonable.").

The Court can save for another day issues raised by allegations that fees are unreasonable in comparison to the market or in comparison to the value of services provided or that a particular fund failed to meet its benchmark. Plaintiff does not

Appellate Case: 17-2397 Page: 17 Date Filed: 10/27/2017 Entry ID: 4594441

make those types of allegations. Rather, Plaintiff has simply identified two alternative target date funds (albeit with different strategies) that charge less. Such allegations, without more, are insufficient to state a plausible claim for fiduciary breach. Thus, an appropriate ruling in this case may be a fairly narrow one. Whatever factual detail is necessary to state a plausible claim for imprudent investment selections, the sparse allegations in the present Complaint does not come close.

2. The affiliated nature of the funds at issue.

The fact that the target date funds are offered by a Wells Fargo affiliate does not, without further factual allegations, raise a plausible inference of fiduciary breach. Most financial services companies offer their own investment products to their employees through 401(k) plans. There is nothing illegal about doing so. Indeed, it is such a common practice that the Department of Labor (the "DOL") long ago established an exemption from the normal prohibited transaction rules to cover this practice. *See* Prohibited Transaction Exemption ("PTE") 77-3 (providing prohibited transaction relief where open-ended mutual funds are provided through employee benefit plans covering employees of the mutual fund company or its affiliates). As the DOL has recognized, it would be "contrary to normal business practice for a company whose business is financial management to seek financial management services from a competitor." Notice of Proposed

Rulemaking, Participant Directed Individual Account Plans, 56 Fed.Reg. 10724 (Mar. 13, 1991).

Plaintiff does not allege facts that, if proven, would show the selection of proprietary funds, along with the many non-proprietary funds, was imprudent or disloyal. The District Court noted that a "fiduciary's choice of affiliated funds is relevant in showing that the fiduciary may have acted in its financial self-interest," but such an allegation standing alone is insufficient. (Add-9.) Plaintiff has not alleged that the affiliated funds missed their benchmark, performed worse than relevant peers over a period of time, experienced management difficulties or had other specific problems that made them unsuitable investments. Simply pleading that the affiliated funds were more expensive than two other potential options, and did not perform as well in the recent bull market as one fund with a higher exposure to stocks (and that tracked a different index) is not sufficient to raise a plausible inference of fiduciary breach.

Plaintiff argues that selecting a proprietary fund itself suggests an improper motivation, and cites this Court's opinion in *Tussey* for the proposition that acting on improper motives may constitute a breach even if one acting for the right reasons might have ended up in the same place. *Tussey v. ABB, Inc.*, 850 F.3d 951, 958 (8th Cir. 2017). However, the facts alleged here are not similar to the facts at issue in *Tussey*. In that case, this Court addressed a situation where:

> Fidelity provided additional administrative services to ABB [the sponsor] unrelated to the Plan, including processing ABB's payroll and acting as recordkeeper for ABB's defined benefit plans and health and welfare plans. Fidelity incurred losses from these additional services, but made substantial profits from the Plan.

Tussey v. ABB, Inc. 746 F.3d 327, 331 (8th Cir. 2014). Further, "Fidelity advised ABB that Fidelity provided services for ABB's health and welfare plans at below market cost and did not charge for administering other ABB plans." *Id.* Here, there are no allegations that Wells Fargo was using assets from the Plan to subsidize corporate expenses or other benefit plans. Rather, the allegations are simply that an affiliated fund was selected and cheaper unaffiliated funds (that tracked different indexes) were available. These allegations are not sufficient to state a claim for fiduciary breach.

B. The funds' status as the default options is irrelevant.

It does not help Plaintiff's argument that the challenged funds were designated as the Plan's Qualified Default Investment Alternative ("QDIA") for participants who failed to make their own investment elections. First, the fiduciary requirement is that the funds made available to participants must be prudent investment choices. As discussed above, Plaintiff has not pled facts sufficient to show that the target date funds were imprudent options. Nor are there any facts pled that would indicate that, although prudent options generally, the target date funds were somehow imprudent as a default investment alternative.

The DOL has promulgated a specific regulation governing QDIAs. 29 C.F.R. § 2550.404c-5. The regulation contains a number of detailed requirements in order for a default option to be considered "qualified." Nowhere among this detail is there any requirement that the default alternative be non-affiliated. To the contrary, the regulation specifically provides that the QDIA can be managed by the plan sponsor. 29 C.F.R. § 2550.404c-5(e)(3)(1). Just as there is no authority that affiliated funds cannot be included in a 401(k) plan investment option lineup, there is no authority that such funds cannot be used as a plan's QDIA.

Plaintiff adds the conclusory allegation that the target date funds were selected as the default in order to "seed" those funds. The allegations in the Complaint are sparse to non-existent as to what Plaintiff means by this. Plaintiff does not allege that the funds are new, or that a large entity like Wells Fargo needed seed capital. Plaintiff does allege that Plan assets constituted more than a quarter of the assets of the funds. (Compl. ¶ 4.) Given the allegations that the Plan is one of the largest in the country (Compl. ¶ 10), it is not surprising that a plan that size would be a significant component of any target date fund family in which it invests. Plaintiff's allegation, moreover, also means that approximately 75% of the funds' invested capital came from unaffiliated investors who invested their money because they thought it was the best option available.

The DOL has specifically approved the use of target date funds as a "qualified" default investment alternative. 29 C.F.R. § 2550.404c-5(e)(4). As discussed above, no facts have been pled to show that the Wells Fargo target date funds were an imprudent investment. Thus, Plaintiff's allegations do not show that designating such funds as the default option was a fiduciary breach.

III. Conclusion

Simply alleging that affiliated funds were selected when two different cheaper funds were available (and one performed better), and that the affiliated funds were the plan's default investment, are insufficient to state a claim upon which relief can be granted. Viewed individually or in the aggregate, Plaintiff's allegations fail to state a plausible claim. Permitting a case to proceed on such sparse allegations would open a floodgate of new, meritless litigation. The District Court's order dismissing the Complaint should be affirmed.

This 27th day of October, 2017.

/s/ Patrick C. DiCarlo
Patrick C. DiCarlo
Alston & Bird, LLP
1201 West Peachtree Street
Atlanta, GA 30309
Telephone: (404) 881-7000

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2017, an electronic copy of the Motion for Leave to File Brief of *Amici Curiae* American Benefits Council, The ERISA Industry Committee and Chamber of Commerce of the United States of America in Support of Appellees/Affirmance was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. The undersigned also certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: October 27, 2017

Respectfully submitted,

/s/ Patrick C. DiCarlo
Patrick C. DiCarlo
Alston & Bird LLP
1201 West Peachtree Street
Atlanta, GA 30309
Telephone: (404) 881-7000
Fax: (404) 881-7777
pat.dicarlo@alston.com

Appellate Case: 17-2397 Page: 23 Date Filed: 10/27/2017 Entry ID: 4594441

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 3,381 words excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Respectfully submitted,

/s/ Patrick C. DiCarlo

Patrick C. DiCarlo
Alston & Bird LLP
1201 West Peachtree Street
Atlanta, GA 30309
Telephone: (404) 881-7000
Fax: (404) 881-7777
pat.dicarlo@alston.com

LEGAL02/37638010v3

Appellate Case: 17-2397 Page: 24 Date Filed: 10/27/2017 Entry ID: 4594441