No. 17-2397

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN MEINERS, ON BEHALF OF A CLASS OF ALL PERSONS SIMILARLY SITUATED, AND ON BEHALF OF THE WELLS FARGO & COMPANY 401(K) PLAN,

Plaintiff-Appellant,

v.

WELLS FARGO & COMPANY, ET AL.,

Defendants-Appellees.

On Appeal From The United States District Court
For The District of Minnesota
Case No. 16-cv-03981 (DSD/FLN)
Hon. David S. Doty, District Judge

BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org. SIFMA and its members have an ongoing interest in ERISA litigation, and SIFMA regularly files amicus curiae briefs in ERISA cases like this one, which raise issues of concern to plan sponsors. *See, e.g., Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015); *Fifth Third Bancorp. v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *Tussey v. ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014); *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011).

INTRODUCTION AND SUMMARY OF ARGUMENT

Wells Fargo sponsors a 401(k) "defined contribution plan" for its employees (the "Plan"), which allows eligible employees to save for retirement by contributing a portion of their earnings into individual plan accounts, and then to allocate those contributions among the plan's available investment options. Wells Fargo's Plan offers participants a number of investment options in which they may invest their retirement contributions, which are selected by the Plan's Employee Benefits Review Committee (the "Benefits Committee"). The Plan has long offered participants access to a family of target-date funds (the "Dow Jones TDFs") that are managed by a Wells Fargo affiliate. P-App 23-24, ¶ 19. The Complaint alleges that the Benefits Committee breached its duties of prudence and loyalty under ERISA by failing to remove the Dow Jones TDFs from the Plan.

While the Complaint is entirely without merit, SIFMA's brief focuses on the Complaint's failure to plausibly plead that the Plan's inclusion of affiliated funds as investment options available to participants breached ERISA's duty of loyalty. Plan sponsors throughout the financial services industry have been plagued by lawsuits making similar allegations. SIFMA has a strong interest in ensuring that plan sponsors in the financial services industry are not discouraged from offering the same investment options to their employees as part of their in-house retirement plans that they are in the business of making available to the general public

through the open market. Not only is this common practice lawful, but courts and the Department of Labor have repeatedly recognized that it would be strange indeed for plan sponsors in the financial services industry not to allow their employees to invest their retirements in the very investment products that they proudly work to optimize for other investors every day, and with which they are most intimately familiar.

Plaintiff John Meiners asks this Court to infer that the Benefits Committee breached ERISA's duty of loyalty by failing to remove the Dow Jones TDFs from the Plan, and by making them the Plan's default investment option. But Meiners does not plead any facts that, accepted as true, would constitute actually disloyal conduct. Instead, he merely pleads that the Benefits Committee engaged in the perfectly lawful conduct of using affiliated funds, notes the unremarkable fact that the particular funds selected were not the very cheapest or (in hindsight) the highest-yielding funds on the market, slaps on a conclusory and unsupported allegation that the decision to use the funds was motivated by a desire to make money for Wells Fargo, and asks the court to *infer* a loyalty breach on that basis.

The district court correctly held that more is required to state a plausible fiduciary breach claim under ERISA. *Meiners v. Wells Fargo & Co.*, No. CV 16-3981(DSD/FLN), 2017 WL 2303968 (D. Minn. May 25, 2017). Meiners completely ignores the Supreme Court's seminal decision in *Fifth Third Bancorp*

v. Dudenhoeffer, 134 S. Ct. 2459 (2014), in which the Supreme Court instructed lower courts that motions to dismiss are an "important mechanism for weeding out meritless" ERISA fiduciary breach claims, and directed them to apply "careful, context-sensitive scrutiny" when analyzing the plausibility of such allegations. *Id.* at 2470-71. If plaintiffs are permitted to get past a motion to dismiss—and thus to put financial services plan sponsors through expensive and disruptive discovery—with such superficial allegations of lawful conduct, then as a practical matter financial services plan sponsors will rapidly conclude that it has become financially prohibitive to offer employees access to affiliated funds, and the practice will be discontinued.

Even Meiners recognizes that he must offer *something* more than merely pleading the use of affiliated funds to survive a motion to dismiss. Opening Br. at 42-43. But he asks this Court to hold that ERISA plaintiffs should be permitted to pass the plausibility bar merely by pleading *additional* instances of lawful conduct that on their face give rise to no plausible inference of disloyalty. Meiners' proposed standard for pleading "something more" would be no standard at all—it would be the exact same free plaintiffs' pass to extensive discovery and endless litigation, with the exact same effect of forcing financial services plan sponsors to stop offering in-house plan participants access to affiliated funds. This Court should affirm the district court's dismissal of the complaint, and make clear that

when plaintiffs in ERISA fiduciary breach cases merely pair allegations of lawful conduct with conclusory allegations of self-interested motivation, dismissal is the right result.

ARGUMENT

ERISA imposes statutory duties of prudence and loyalty. *Tussey v. ABB, Inc.*, 746 F.3d 327, 335 (8th Cir. 2014); 29 U.S.C. § 1104(a). The duty of loyalty prohibits ERISA fiduciaries from placing their own interests ahead of those of plan participants. *Vander Luitgaren v. Sun Life Assurance Co. of Can.*, 765 F.3d 59, 65 (1st Cir. 2014). Meiners contends that the Benefits Committee "engaged in self-dealing that benefited Wells Fargo at the expense of Plan participants" by offering participants the opportunity to invest their retirement contributions in TDFs affiliated with Wells Fargo, and by further designating those TDFs as the plan's default investment option for participants who do not make an individualized investment election. Opening Br. at 26.

The Complaint makes the conclusory assertion that the Benefits Committee made these two decisions out of a self-interested and disloyal "desire to generate fees for Wells Fargo and to support the poor-performing Wells Fargo TDFs … ." Opening Br. at 13 (citing Compl. ¶ 39). As Meiners acknowledges, however, Opening Br. at 25, 32, the Complaint does not plead any facts that, accepted as true, would directly establish this alleged disloyal motivation. Instead, Meiners asks this Court to *infer* disloyal motivation based on certain characteristics of the Dow Jones TDFs: their affiliated status, their fees and fee structure, their performance outcomes, and the size of the Plan's overall investment. *Id*. at 25-26,

32-33. These unremarkable characteristics do not support an inference of disloyalty.

While ERISA plaintiffs may support claims with *reasonable* inferences of fiduciary misconduct, "[a] reasonable inference is one which may be drawn from the evidence without resort to speculation." *Tussey*, 746 F.3d at 339 (quoting *Sip-Top, Inc. v. Ekco Grp., Inc.*, 86 F.3d 827, 830 (8th Cir. 1996)) (internal quotation marks omitted). A "sheer possibility" is not enough to create a reasonable inference. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). Moreover, "[a]n inference pressed by the plaintiff is not plausible if the facts he points to are precisely the result one would expect from lawful conduct in which the defendant is known to have engaged." *Id*. at 597. Meiners' Complaint fails because the supposedly supporting facts on which it relies are *precisely what one would reasonably expect to see* in a plan sponsored by a financial services company that lawfully offered plan participants access to affiliated TDFs. No two plans are exactly alike, of course, and precise figures on fees, performance outcomes, and total asset holdings will vary from fund to fund and from plan to plan. But a plaintiff cannot render conclusory claims of disloyalty plausible merely by pleading facts that are the reasonably expected result of lawful conduct, and the district court's decision dismissing the Complaint should be affirmed.

I. NO INFERENCE OF DISLOYALTY CAN BE DERIVED FROM A PLAN'S LAWFUL USE OF AFFILIATED FUNDS

The Complaint seeks to cast as somehow sinister the Benefit Committee's decision to offer Wells Fargo employees the opportunity to invest a portion of their retirement savings in TDFs that are affiliated with Wells Fargo. In fact, however, not even a hint of disloyalty can reasonably be inferred from a plan's decision to offer affiliated funds. The use of affiliated funds is indisputably and expressly lawful under ERISA; it is ubiquitous in the financial services industry; and it has been found to provide meaningful benefits to plan participants.

ERISA and implementing regulations promulgated by the Department of Labor ("DOL") expressly approve the use of affiliated investment products in a financial service company's retirement plan, so long as certain safeguards are met. *See* ERISA § 408(b)(5), (8), 29 U.S.C. § 1108(b)(5), (8); PTE 77-3, 42 Fed. Reg. 18,734 (Apr. 8, 1977). Those safeguards generally require that participants in the financial service company's plan be treated the same as all other investors, *see id*., and nowhere in the Complaint is it alleged that the Dow Jones TDFs ever failed to satisfy the applicable requirements. No inference of disloyalty can be derived from the Benefits Committee's decision to allow the Plan to continue to engage in such expressly authorized and lawful conduct. *Braden*, 588 F.3d at 597.

To the contrary, DOL and the courts have recognized that participants in financial service companies' retirement plans *benefit* from access to affiliated

funds. Following a six-day bench trial adjudicating a challenge to the Prudential retirement plan's use of affiliated investment products, the District Court for the Southern District of Florida found that advantages to using affiliated funds include personal familiarity with affiliated investment managers, fostering confidence in their abilities and responsiveness. *Dupree v. Prudential Ins. Co.,* No. 99-cv-8337, 2007 WL 2263892, at *10 (D. Fla. Aug. 7, 2007). Similarly, DOL explained in proposing PTE 77-3 that it was responding in part to concerns that barring financial services companies' plans from using affiliated funds "would create a situation in which a plan covering employees of a firm specializing in investment management could not invest in the very investment vehicle managed by that firm, thus creating problems of employee morale." 41 Fed. Reg. 54,080, 54,081 (Dec. 10, 1976).

For these and other related reasons, the practice of using affiliated funds is virtually "universal among plans of the financial services industry." *Dupree,* 2007 WL 2263892, at *46. A study invoked by the court in *Dupree* found "that nearly half of the surveyed plans in the financial services industry had substantially all of their assets managed internally and most of the rest had significant internal management." *Id*. at *13. Nor is such widespread use of affiliated funds by plans in the financial services sector a recent development. Congress found when ERISA was enacted that such use of affiliated funds was already "common

practice," *see* H.R. Conf. Rep. No. 93-1280 (Aug. 12, 1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5094, and when DOL proposed PTE 77-3 just a few years later, it explained that it was doing so in part in response to concerns that without an express exemption many financial services sector plans that had long used affiliated funds "might be compelled to liquidate their existing investments . . . creat[ing] special expenses for in-house plans and their participants and beneficiaries . . . ." 41 Fed. Reg. at 54,081.

Yet the concern that plans might feel compelled to liquidate affiliated investment options is precisely the result that will likely obtain if courts begin to infer breaches of the duty of loyalty based on nothing more than the use of the statutory and regulatory affiliated fund exemptions. No such inference is warranted. To be sure, some plaintiffs—unlike Meiners—may be in a position to plead facts that, accepted as true, would plausibly establish that the conditions of the applicable exemptions were not satisfied. This Court should make clear, however, that absent such allegations, a financial service industry plan's mere inclusion of affiliated funds as an investment alternative should be deemed lawful conduct that gives rise to no hint of suspicion of disloyalty.[1]

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[1] SIFMA does not read the Complaint as alleging that the plan's use of affiliated funds in full compliance with the terms of the exemptions was also imprudent. To the extent the Complaint is so read, however, that argument would fail for all of the same reasons explained herein.

II. A PLAINTIFF CANNOT MANUFACTURE AN INFERENCE OF DISLOYALTY BY PLEADING ADDITIONAL INSTANCES OF LAWFUL AND REASONABLY EXPECTED CONDUCT

Starting from the baseline principle that there is nothing suspect about a plan benefits committee's decision to offer participants the opportunity to invest in affiliated funds, it follows that a plaintiff cannot state a plausible disloyalty claim merely by pleading "additional facts" that, individually and collectively, amount to nothing more than "the result one would expect from [such] lawful conduct." *Braden*, 588 F.3d at 595. Yet such additional facts are all that Meiners offers. None of the facts that he pleads—the fact that the Benefits Committee made the Dow Jones TDFs the Plan's default investment option; the fact that the Plan's investment in the Dow Jones TDFs constituted 28% of those funds' total assets; the fact that the Dow Jones TDFs were not the cheapest TDFs available on the market; or the fact that in hindsight it can be said that one other family of TDFs outyielded the Dow Jones TDFs—give rise to a reasonable inference of disloyalty, whether they are viewed collectively or in isolation. To the contrary, those facts are nothing more than the reasonably expected and readily explainable result of the Benefit Committee's entirely lawful decision to offer plan participants access to affiliated TDFs.

A. A Plan's Designation Of Target Date Funds As A Default Investment Option Is Lawful And Encouraged by the Department of Labor

Meiners asks this Court to treat the Benefits Committee's designation of the Dow Jones TDFs as the Plan's default investment option, and its further decision to offer "Easy Enroll" procedures for the purpose of encouraging employees to increase their retirement savings, as indications of disloyalty. Opening Br. at 11-12, *citing* Compl. ¶¶ 33-35, App-29. Nothing could be further from the truth. Congress and the Department of Labor have long encouraged plans to adopt default investment options and "quick enroll" procedures as useful mechanisms to help participants maximize retirement savings. Moreover, TDFs are widely recognized—and specifically endorsed by DOL—as exemplary default investment options. The Benefits Committee's designation of the Plan's chosen family of TDFs as its default investment option, and its further offering of "Easy Enroll" procedures, do not give rise to a reasonable inference of disloyalty, but rather are precisely the kind of conduct one would reasonably expect from prudent and loyal fiduciaries appropriately seeking to advance the interests of plan participants.

In 2006, Congress added a new statutory provision to ERISA as part of the Pension Protection Act ("PPA") specifically authorizing plan fiduciaries to designate "default" investment options for participants who fail to make an investment election. 29 U.S.C. § 1104(c)(5); Pension Protection Act of 2006, PL

109-280, 120 Stat. 780 (Aug. 17, 2006). In 2007, DOL published a regulation implementing the new PPA provision designed to steer plan fiduciaries to use certain types of investments as their plan's default investment option. *See* 29 C.F.R. § 2550.404c-5. The regulation deems the favored investment types—which include "life-cycle" or "targeted-retirement-date" funds— "qualified default investment alternatives," or "QDIAs," which when selected entitle the plan fiduciaries to certain fiduciary safe harbors. *See id*.

TDFs have since been widely adopted by plans as default investment options. In 2009, the Senate Special Committee on Aging published a study noting that "[a]vailable data indicate that plans with automatic enrollment policies are overwhelmingly adopting target date funds as their default investment." S. Special Comm. on Aging, 111th Cong., *Target Date Retirement Funds: Lack of Clarity Among Structures and Fees Raises Concerns* 12 (2009) (available at https://www.aging.senate.gov/imo/media/doc/letters/targetdatecommitteeprint.pdf). The report referenced data indicating that between 87 and 96 percent of plans with automatic enrollment were using target date funds as their default investment option as of 2009, up from between 42 and 57 percent in 2005. *Id.* 12-13.

The Benefits Committee's decision to make the Plan's TDFs its default investment option thus does not suggest a disloyal pursuit of self-interest, but rather is precisely the kind of decision that Congress and DOL intended. Once the

Benefits Committee made the perfectly lawful decision to include affiliated TDFs in the Plan, it naturally followed that those TDFs were a likely candidate to be designated the Plan's default investment option. This reasonably expected and readily explainable result is in no way suggestive of disloyal and self-interested conduct.

The same is true of the Benefit Committee's decision to adopt an "Easy Enroll" procedure for the plan. One of DOL's two primary objectives in promulgating the QDIA regulation was to ensure that "automatic enrollment provisions will become more common, boosting participation." 72 Fed. Reg. 60,452, 60,466 (Oct. 24, 2007). "Approximately 30 percent of eligible workers do not participate in their employer's 401(k)-type plan," but "[s]tudies suggest that automatic enrollment plans could reduce this rate to less than 15 percent, significantly increasing retirement savings." Department of Labor, Automatic Enrollment 401(K) Plans for Small Businesses 1 (available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/automatic-enrollment-401k-plans-for-small-businesses.pdf). The Benefit Committee's adoption of this encouraged and beneficial practice shows that the Committee was paying attention to recent developments in best practices and taking proactive action to safeguard the interests of plan participants. It does not remotely give rise to any inference of disloyalty.

B. The Fact That The Plan's Investment In The Dow Jones TDFs Constituted 28% Of Total Assets Is Not Suggestive Of Seeding

The Complaint's allegation that "investments from Plan participants constitute approximately 28 percent of the total assets" in the Dow Jones TDFs, Opening Br. at 12 (citing Compl. ¶ 36), adds nothing to Meiners' efforts to stitch together an inference of disloyalty. The Complaint's own figures show that nearly three-quarters of the assets in the Dow Jones TDFs belong to other investors, indicating that numerous third parties have deemed the Dow Jones TDFs an appropriate place to invest billions of dollars of their own retirement money, without having any conceivable motivation to "bolster" the funds or any ability to earn fees on the investments. This pleaded concession greatly undermines virtually all of the Complaint's prudence and loyalty allegations, because it establishes that numerous other fiduciaries and third-party investors who are presumably both prudent and loyal chose to include the Dow Jones TDFs in their plans as well.

Meiners seeks to avoid the devastating implications of his 28% of total assets admission by further pleading that "an additional 29 percent of the assets in the [Dow Jones] TDFs come from other Wells Fargo-directed activity, including third-party 401(k) plans where Wells Fargo serves as a third-party administrator." Compl. ¶ 36. This effort is unavailing. To begin, third-party administrators do not select investment options for the 401(k) plans they service, *see, e.g., Hecker v.*

Deere & Co., 556 F.3d 575, 583 (7th Cir. 2009) (third party trustee of retirement plans at issue did not have discretion to select funds for defendant employer's plans), so the conclusory allegation that an additional 29% of the assets invested in the TDFs are the result of "Wells Fargo-directed activity" is internally contradictory and inherently implausible. Moreover, even if was assumed to be true that other Wells Fargo entities did "direct" additional third-party assets into the Dow Jones TDFs, that fact would not cast any aspersions on the Benefits Committee's independent decision to keep the Plan invested in the Dow Jones TDFs. To the contrary, if other business entities not involved with the Plan also decided to use the Dow Jones TDFs, that strongly suggests that the market as a whole regarded those TDFs as a reasonably prudent investment option.

Finally, while the Complaint alleges that the Plan's investment in the Dow Jones TDFs "has been an important source of seed money for the funds," this spare allegation is insufficient to establish seeding or any other kind of loyalty breach. The Complaint recognizes that "[w]ith over 350,000 participants and approximately $35 billion in assets, the Plan is one of the largest retirement plans in the country." Compl. ¶ 10. A $3 billion total investment in the Dow Jones TDFs, *see* Compl. ¶ 36, constituting 28% of the funds' total assets, *see id.*, is thus nothing more than the reasonably expected result of the Benefit Committee's lawful decision to include those TDFs in the plan. The Complaint does not plead a

single supporting fact that, accepted as true, would plausibly suggest that the Benefits Committee acted out of an alternative, improper motivation to "seed" the funds.

C. The Complaint's Allegations Concerning Fees And Performance Are Reasonably Expected And Readily Explainable

The Complaint's allegations concerning the allegedly excessive fees charged by the Dow Jones TDFs, and their alleged underperformance, primarily assert breaches of the duty of prudence, and are thoroughly debunked by Defendants' Opposition Brief. To the extent Meiners seeks to use those allegations to bolster his claims of disloyalty, however, the effort fails for the same reason as all the rest: the selection of a family of TDFs that is not the very cheapest available in the market, and that in hindsight is known to have yielded less than one other family of TDFs, is the reasonably expected and readily explainable result of the Benefits Committee's lawful decision to offer participants access to affiliated TDFs.

It is well-established that "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund." *Hecker*, 556 F.3d at 586. Only one fund (or a small group of similarly priced funds) can be the "cheapest" in its investment category, and thus it is highly *unlikely* that any given fund that a plan fiduciary selects for inclusion in the plan will turn out to be the cheapest, the second cheapest, or even the third cheapest available—regardless of its affiliated status. The Complaint's allegation that two cheaper families of TDFs

were available on the market is thus precisely what one would expect, and does not give rise to a reasonable inference that the Benefits Committee acted disloyally in choosing affiliated TDFs that happened to charge higher fees.

The Complaint's allegation that the Dow Jones TDFs "double charge" their fees (*see, e.g.*, Compl. ¶¶ 3, 24) similarly seeks to cast as sinister a practice that is lawful and unremarkable. As the Complaint itself acknowledges, the Dow Jones TDFs do not themselves invest in individual stocks or bonds, but rather are "funds of funds" that invest primarily in other funds, each of which charges its own fee. (*Id.* ¶¶ 22, 24.) The challenged fees thus are not "double charges" for the same service, but rather are separate fees for separate services. As numerous courts have recognized, what ultimately matters to a plan and its participants is not how a fund's fee is divided, but rather what the total fee is and whether it was disclosed. *See Hecker*, 556 F.3d at 586 (finding the "total fee, not the internal, post-collection distribution of the fee" to be the "critical figure" for an investor); *Spano v. The Boeing Co.*, 125 F. Supp. 3d 848, 863 (S.D. Ill. 2014) ("[E]ven if Participants were not clearly apprised of the revenue sharing fee component, every participant was made aware of the total fees they paid."); *Abbott v. Lockheed Martin Corp.*, No. 06-CV-0701-MJR, 2009 WL 839099, at *4 (S.D. Ill. Mar. 31, 2009) (same). Here, there is no allegation that the Dow Jones TDFs failed to disclose their total fees, and as previously explained, the Complaint's bare assertion that two other funds

available on the market charged cheaper total fees does not give rise to any reasonable inference of a loyalty breach.

The Complaint's hindsight assertion that the Dow Jones TDFs "underperformed" one other family of TDFs during the class period fares no better. *See, e.g.,* Compl. ¶ 31, 57. The Complaint does not allege (and could not plausibly allege) that the relative future performance of the Dow Jones and Vanguard TDFs was knowable at the time the Benefits Committee decided to retain the Dow Jones TDFs. The two funds are different investment products that pursue different investment strategies, and would be expected to perform differently in different markets.[2] *See* Opposition Br. at 29-31. The Complaint's entire performance-based allegation thus impermissibly depends upon both hindsight perspective and an "apples to oranges" comparison, and should be disregarded as without merit. *See Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994) (noting that ERISA's "prudent person standard is not concerned with results; rather, it is a test of how the fiduciary acted viewed from the perspective of the time of the [challenged] decision rather than from the vantage point of hindsight") (internal

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[2] The differences between the funds also makes it impossible to compare their fees on an apples-to-apples basis. *See, e.g., White v. Chevron Corp.*, No. 16-CV-0793-PJH, 2016 WL 4502808, at *12 (N.D. Cal. Aug. 29, 2016) ("It is inappropriate to compare distinct investment vehicles solely by cost, since their essential features differ so significantly.").

quotation marks omitted); *Tussey*, 746 F.3d at 338 ("While it is easy to pick an investment option in retrospect … selecting an investment beforehand is difficult."); *Hecker,* 556 F.3d at 586.

The relative performance of the two funds also does not give rise to a reasonable inference of disloyalty. At the time a plan fiduciary selects an investment option for inclusion in a plan, it is highly *unlikely* that the fund will turn out to be the best-performing in its category—regardless of its affiliated status. The fact that, as it turns out, at least one other family of TDFs outperformed the Dow Jones TDFs is thus precisely what one would expect, and does not give rise to a reasonable inference of disloyalty. Indeed, it is hard to see how such an allegation supports an inference of disloyalty at all, since the financial interest of Wells Fargo and its affiliates in managing a fund that charges asset-based fees is to maximize the fund's returns within the parameters of its investment mandate, and thereby maximize its applicable fees. The fact that the Dow Jones TDFs adhered to their more conservative mandate and consequently earned less reward in the rising financial markets of 2011-2016, *see* Opposition Br. at 26-30, is what one would expect of a prudent and loyal fiduciary, rather than an unscrupulous and disloyal one. The funds' relative performance certainly is not suggestive of any disloyalty on the part of the Benefits Committee.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below. The Complaint fails to state a plausible claim that the Benefits Committee breached ERISA's duty of loyalty because its decision to retain affiliated TDFs was entirely lawful, and none of the additional facts pleaded in the Complaint—whether viewed individually or collectively—give rise to a reasonable inference of disloyalty. To the contrary, the additional facts that Meiners has pleaded amount to nothing more than the reasonably expected and readily explainable result of the Benefits Committee's lawful decision to offer plan participants the opportunity to invest in affiliated TDFs in the first place.

Respectfully submitted,

/s/ Gregory F. Jacob

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Dated: October 27, 2017

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the attached brief complies with the type-volume limitations in Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because this brief contains 4,598 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Undersigned counsel further certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

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ANTI-VIRUS CERTIFICATION

Undersigned counsel hereby certifies that the attached brief complies with Rule 28A(h) of the Eight Circuit Rules of Appellate Procedure and has been scanned for computer viruses and is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2017, an electronic copy of the Brief for the Securities Industry and Financial Markets Association as Amicus Curiae in Support of Defendants-Appellees and 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.

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