UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

SERGIO NAVARRO, THERESA GAMAGE, DAYLE BULLA, and JANE KINSELLA, on their own behalf, on behalf of all others similarly situated, and on behalf of the Wells Fargo & Company Health Plan and its component plans, Plaintiffs, v. WELLS FARGO & COMPANY, MICHAEL BRANCA, MARK HICKMAN, DREW WINELAND, DAVID GALLOREESE, BEI LING, and DOES 1-20, Defendants.	No. 0:24-cv-03043-LMP-DTS

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT WELLS FARGO & COMPANY'S MOTION TO DISMISS THE CLASS ACTION COMPLAINT

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PRELIMINARY STATEMENT

Plaintiffs' Opposition Brief confirms that they cannot satisfy Article III's standing requirements because they have failed to allege a personal injury that is plausibly connected to a viable claim. They *claim to have suffered personal injury* in the form of higher monthly premiums for healthcare coverage and greater out-of-pocket costs for certain prescription drugs, but they fail to plausibly connect that alleged harm to their *claim that the Plan allegedly overpaid* for prescription drugs and fees charged by its pharmacy benefits manager ("PBM"). Insofar as Plaintiffs also may be alleging personal injury attributable to their claim that they overpaid for specific prescription drugs, they fail to distinguish the authorities establishing that these charges are Plan design decisions that are not subject to challenge as fiduciary breaches.

Plaintiffs' Opposition Brief also confirms that they have not stated a viable claim for breach of fiduciary duty because they have failed to allege that comparable plans are incurring lower costs for comparable prescription drug programs, and no inference of a fiduciary breach can be drawn from their allegations regarding the costs of certain components of the program. Plaintiffs' isolated allegations of procedural imprudence associated with the PBM agreement cannot cure these deficiencies. Plaintiffs' bare-boned prohibited transaction claim similarly fails to state a claim.

For either or both reasons, the Complaint should be dismissed.

I. PLAINTIFFS FAIL TO SATISFY ARTICLE III'S STANDING REQUIREMENTS.

Plaintiffs do not dispute that, to satisfy Article III's standing requirements, they must plausibly allege that they suffered personal harm that is attributable to their claims and redressable by the relief sought. Nor do they dispute that they have not been deprived of any benefits due to them under the Plan. Instead, Plaintiffs purport to satisfy Article III's standing requirements by contending that, as a result of Wells Fargo's alleged failure to control the Plan's costs, they suffered monetary harm in the form of increased monthly premiums and greater out-of-pocket costs for certain prescription drugs. (ECF No. 38 at 9.) But Plaintiffs fail to distinguish the numerous cases finding such a link too tenuous to establish standing. Insofar as Plaintiffs may also be asserting that they were directly harmed by the allegedly excessive costs they paid for prescription drugs, they fail to distinguish the case law establishing that these charges are a matter of plan design that are not subject to challenge as breaches of fiduciary duty.

A. Plaintiffs' Allegations of Increased Contributions Attributable to the Plan's Costs for the PBM Agreement Are Implausible.

Wells Fargo previously cited numerous cases dismissing, for want of Article III standing, claims seeking recovery of allegedly excessive plan costs upon finding that the complaint failed to (i) plausibly link the plan's excessive costs to individual participant harm, and/or (ii) establish that the participants' individual losses would be redressable by recovery to the plan. Plaintiffs' efforts to distinguish these authorities—whether based on their alleged facts or the relief available—fail.

1. Plaintiffs Fail To Distinguish Wells Fargo's Authorities Based on Their Underlying Allegations.

Plaintiffs seek to distinguish factually the cases cited by Wells Fargo in support of its motion, but these efforts all fall short. For example, in *Knudsen v. MetLife Group, Inc.*, the Third Circuit held that plaintiffs lacked standing to sue the plan sponsor over the company's retention of PBM rebates because they failed to show "that the purported violative conduct was the but-for-cause of their injury-in-fact, namely, an increase in their out-of-pocket costs above what they would have been." 117 F.4th 570, 582 (3d Cir. 2024). Significantly, as in this case, the plaintiffs alleged participant premiums were set at a fixed percentage of the plan's projected costs and thus were directly linked to the plan's overall costs. But the court held that this did not amount to "well-pleaded allegations that drug rebates (or even the total value of plan assets) are, under the Plan documents, used to calculate Plan participants' out-of-pocket costs and that the effect of these inputs would decrease costs." *Id.*; *see also Winsor v. Sequoia Benefits & Ins. Servs., LLC*, 62 F.4th 517, 524-25 (9th Cir. 2023) (rejecting allegation that employer historically set the same employee contribution rates as sufficient to establish an injury-in-fact because employer retained discretion to set such rates).

Contrary to Plaintiffs' assertion, the fact that their Complaint alleges that "employee contributions *would* be lower," rather than that they "*may* have" reduced participant costs, as was alleged in *Knudsen* (ECF No. 38 at 12 (emphasis added)), does not make their allegations any less speculative (ECF No. 30 at 14 n.6). If anything, Plaintiffs' allegations of harm here are even more speculative because publicly available

filings show that the percentage of Plan costs charged to participants has *not* remained constant—between 2016 and 2023, the proportionate share of employee contributions varied between 25.00% and 28.59% of total contributions.[1] Given that total contributions to the Plan exceeded $2.5 billion at all relevant times, each 1% variance is a difference of at least $25 million. But even if the historic proportions remained constant, this would not support a claim because the Plan expressly reserved to Wells Fargo the discretion to require participants to fund all expected expenses and to use participant contributions to pay for any Plan expenses. (ECF No. 30 at 4.)

Plaintiffs have likewise failed to distinguish *Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450 (3d Cir. 2003), which held that the plaintiff failed to plead an injury-in-fact where her allegations rested on the premise that had her employer not overpaid the HMO, the employer "would have passed these savings on to its employees . . . ." *Id.* at 457. Plaintiffs contend that Wells Fargo mischaracterized the *Horvath* complaint as alleging breaches that "caused the employer, *and thus participants*, to overpay for care." (ECF No. 38 at 11.) But Plaintiffs are wrong. The opinion stated that the plaintiff sought "restitution and/or disgorgement of the amount *she and other members of the putative class allegedly overpaid* as a result of" Keystone's alleged fiduciary breaches. *Horvath*, 333 F.3d at 453 (emphasis added). *Horvath* clearly supports a finding that Plaintiffs lack standing.

[1] Excerpts of the 2018-2022 Form 5500s were previously filed. (ECF No. 32.01-05.) Those Form 5500s and the 2016-2017 and 2023 Form 5500s are available at https://www.efast.dol.gov/5500Search/.

Similarly unavailing is Plaintiffs' effort to distinguish *Fox v. McCormick*, 20 F. Supp. 3d 133 (D.D.C. 2013). Plaintiffs note that the *Fox* plaintiffs "did not argue that the defendant's alleged misconduct increased their contributions." (ECF No. 38 at 12.) But that is simply a function of the claims in that case; namely, that the trustees' timely pursuit of delinquent contributions would have increased the plan's benefit accrual rate, and ultimately plaintiffs' pensions. *Fox*, 20 F. Supp. 3d at 138. The court held this claim was too speculative to confer standing because the accrual rate was a "matter of [t]rustee discretion and is neither automatic nor guaranteed." *Id.* at 142. Similarly, here, Wells Fargo retained discretion to determine the participant cost-sharing arrangement.

Conversely, the primary case cited by Plaintiffs in which the standing requirements were satisfied involved a well-defined nexus between the harms suffered by the plan and by the participants. In *Slack v. International Union of Operating Engineers*, the plaintiffs explicitly alleged that the governing labor agreement "forced [participants] to make up" the shortfall of assets attributable to uncollected employer contributions "with their own higher out-of-pocket payments." 83 F. Supp. 3d 890, 907 (N.D. Cal. 2015); *see also Slack v. Int'l Union of Operating Eng'rs*, Case No. 13-cv-5001 (N.D. Cal. 2015), ECF No. 179 ¶¶ 102 n.5, 104, 116. By contrast, here, nothing in the Plan requires participants to pay more if the Plan incurs higher costs.

2. Plaintiffs Fail To Distinguish Wells Fargo's Authorities Based on the Identity of the Defendants or the Nature of Available Relief.

Plaintiffs alternatively seek to distinguish some, but not all, of the cases cited by Wells Fargo, contending that because: (i) the relief they are seeking runs to the Trust, it

must inure to the participants' benefit; and (ii) Wells Fargo is not an "independent actor" but a Plan fiduciary, the Court can direct the distribution of relief to participants and prohibit Wells Fargo from offsetting that relief with future adjustments to contribution requirements. (ECF No. 38 at 22.) These arguments, which apply to only some of the cases cited,[2] do nothing to cure Plaintiffs' failure to demonstrate an injury-in-fact, and, even as to redressability, they are unpersuasive for three reasons. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (ruling plaintiff must allege facts demonstrating "each element" of standing at pleading stage).

First, the fact that relief would flow to the Trust does not ensure that it will be used to reduce participants' contributions, since Wells Fargo retains discretion to use Plan funds to pay for *any* Plan expenses. (ECF No. 30 at 4.) Under similar circumstances, several courts have found plaintiffs' redressability theories too tenuous to establish standing. *See Knudsen v. MetLife Grp., Inc.*, 2023 WL 4580406, at *5 (D.N.J. July 18, 2023) ("Even if Plaintiffs were to succeed in their ERISA claims and any disgorged funds are deposited back into the Plan, whether each participant's costs would be reduced or distributions would be paid out, remains conjecture."), *aff'd*, 117 F.4th 570 (3d Cir. 2024); *Gonzalez de Fuente v. Preferred Home Care of N.Y. LLC*, 2020 WL 5994957, at *3 (E.D.N.Y Oct. 9, 2020) ("[E]ven if the plaintiffs were successful . . . their benefits

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[2] In *Knudsen*, the claims were brought against the plan fiduciary rather than an independent actor, and the relief demanded would have flowed to the trust. 117 F.4th at 574.

would not change; any disgorged funds would be deposited back into the Plan's trust."), *aff'd*, 858 F. App'x 432 (2d Cir. 2021).

Second, the argument that the redressability requirement can be satisfied here because Wells Fargo allegedly is the Plan fiduciary, rather than an "independent actor," is misplaced. Plaintiffs presume the Court would not only direct Wells Fargo to restore funds to the Plan, but also prevent Wells Fargo from recovering the cost of such relief by controlling its future plan design decisions regarding the allocation of costs between Wells Fargo and the participants. But it would be improper for the Court, in the guise of equitable relief, to disrupt the Plan's design. *See US Airways, Inc. v. McCutchen*, 569 U.S. 88, 100 (2013) (rejecting application of equitable doctrines that would override plan terms).

Finally, Plaintiffs' reliance on the fact that they seek various other forms of equitable relief also is misplaced for the reasons previously stated with respect to their demand for injunctive relief. (ECF No. 30 at 19-20.) Such relief will not inure to the benefit of former participants, like Plaintiffs.[3]

B. Plaintiffs' Allegations of Increased Drug Costs Cannot Satisfy Article III's Standing Requirements Because They Challenge Plan Design Decisions.

Plaintiffs' Opposition Brief does not dispute that decisions as to participant out-of-pocket costs for prescription drugs are settlor, rather than fiduciary, decisions. Yet, when

[3] Neither of the Eighth Circuit decisions cited by Plaintiffs even mentions prospective injunctive relief, and their district court decisions addressed issues relating to statutory standing or class certification. (ECF No. 38 at 23-24.)

arguing that they have standing based on allegations of increased prescription drug costs, Plaintiffs fail to clarify whether this claim (like their claim of increased premiums) is premised on the theory that increased costs to the Plan result in increased prescription drug costs to participants. If Plaintiffs' claim is based on this same theory of indirect harm, it fails for the reasons stated in the previous section. On the other hand, if Plaintiffs are purporting to claim injury based on Wells Fargo's decision to enter into a contract with ESI that permits allegedly excessive prices to them for particular drugs, they fail to explain why this claim amounts to a fiduciary breach, as opposed to an unwarranted challenge to a plan design decision. (ECF No. 30 at 15-17.)[4]

II. PLAINTIFFS' BREACH OF FIDUCIARY DUTY CLAIMS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

Plaintiffs try to sustain their excessive fee claim primarily through alleged comparisons of component parts of the Plan's prescription drug program, such as the cost of certain categories of prescription drugs or the administrative fees charged to the Plan. (ECF No. 38 at 30-36.)[5] But they have failed to distinguish the case law establishing that

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[4] Plaintiffs' contention that the distinction between fiduciary and plan design decisions is not appropriately resolved on a motion to dismiss (ECF No. 38 at 13) is unavailing because courts are required to consider all arguments that call into question their jurisdiction, even if the arguments overlap with the merits. *See Sisney v. Kaemingk*, 15 F.4th 1181, 1195 n.4 (8th Cir. 2021). In any event, the argument is of no consequence, since this Court can readily dismiss Plaintiffs' claim based on excessive drug costs pursuant to Rule 12(b)(6) (ECF No. 30 at 22-25) and dismiss the remaining claims for lack of standing.

[5] Plaintiffs half-heartedly argue that they need not plead such comparisons at all (ECF No. 38 at 30, 32), but Eighth Circuit law is unequivocal on this issue (ECF No. 30 at 2, 21-22).

the proper comparison is to other prescription drug programs in their entirety. (ECF No. 30 at 21-23) (citing *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278-80 (8th Cir. 2022)); *Gonzalez v. Northwell Health, Inc.*, 632 F. Supp. 3d 148, 166-67 (E.D.N.Y. 2022); *Miller v. Packaging Corp. of Am., Inc.*, 2023 WL 2705818, at *5-6 (W.D. Mich. Mar. 30, 2023).[6]

The closest Plaintiffs come to a comparator for the prescription drug program as a whole is the PepsiCo plan. (ECF No. 38 at 34.) But their conclusory assertion that PepsiCo's prescription drug program is cheaper than the Plan's is based on a comparison of the prices allegedly paid by the PepsiCo plan for 38 drugs. The Complaint contains no allegations as to the quantity of those drugs (or any other drugs) purchased by either plan, or as to PepsiCo's plan design, plan services, premiums, scope of coverage, total out-of-pocket costs, or total overall drug costs. Without this information, there is no basis to infer that PepsiCo paid less for a comparable drug program, let alone infer any fiduciary breach.

Apart from being legally insufficient, Plaintiffs' piecemeal comparisons fail for want of meaningful comparators. Their alternative effort to sustain a claim based on isolated allegations of procedural imprudence is insufficient as well. Whether evaluated

[6] Plaintiffs' reliance on *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 423 (4th Cir. 2007) (ECF No. 38 at 34-35) is misplaced. There, the court concluded that each individual investment option on a 401(k) plan menu must be prudently monitored. The apt analogy here would be a requirement that the Plan's fiduciaries prudently monitor the costs of the prescription drug program independently of the costs of other benefit programs offered by the Plan. It does not support a finding of liability based on aspects of the prescription drug program if the program in its entirety is priced reasonably.

individually or as a whole, none of Plaintiffs' allegations nudges their claims to plausibility. After all, "zero plus zero still equals zero." *Clark v. Matthews Int'l Corp.*, 639 F.3d 391, 400 (8th Cir. 2011) (Colloton, J. dissenting).

A. Plaintiffs Have Not Identified Meaningful Benchmarks for Plan Prescription Drug Costs.

To support their contention that the Plan's costs for prescription drugs are excessive, Plaintiffs identify: 260 prescription drugs with prices that allegedly exceeded prices derived from NADAC data (ECF No. 38 at 30-32); and 10 prescription drugs with prices that allegedly exceeded prices at retail pharmacies for uninsured customers.

As previously explained, NADAC is a weekly average of what certain pharmacies pay for certain drugs. (ECF No. 30 at 7 & n.4.) Even if, as Plaintiffs now contend, it could be characterized as a "benchmark," it is not a "*meaningful* benchmark" because Plaintiffs have made no allegations of a similar plan paying in accordance with NADAC. (*Id.* at 24-25.) Furthermore, the fact that a pharmacy may charge an uninsured consumer less than what Accredo charges the Plan for a handful of drugs is by no means an indication that the Plan is overpaying for the drugs relative to what similar plans pay; or, more importantly, that similar plans pay less for prescription drugs in the aggregate. (*Id.* at 25-26.)

Plaintiffs also contend, on information and belief, that the Plan paid higher prices for 31 prescription drugs through ESI than other plans paid for the same drugs. (ECF No. 38 at 33.) As previously explained, and as Plaintiffs have acknowledged, these other

PBMs are pass-through PBMs, which operate on materially different business models (ECF No. 30 at 23) and are thus not comparable.

B. Plaintiffs Have Not Identified Meaningful Benchmarks Related to Administrative Fees.

Plaintiffs advance two arguments for why their allegations of excessive administrative fees render their breach of fiduciary duty claims plausible: first, five other plans allegedly paid lower per capita fees to ESI (ECF No. 38 at 37-39); and second, the Plan's per capita administrative fees increased during a period in which Plaintiffs assume that the services provided remained the same (*id.* at 36-37). The first argument is based on unsupported allegations that the other plans received comparable services. Contrary to Plaintiffs' contention, the mere fact that some of the service codes reported in the plans' Form 5500s overlap with the Plan's service codes is insufficient, as it does not establish that the "services purchased were sufficiently similar to render the comparisons valid." *Barrett v. O'Reilly Auto., Inc.*, 112 F.4th 1135, 1140 (8th Cir. 2024) (quoting *Mator v. Wesco Distrib., Inc.*, 102 F.4th 172, 188 (3d Cir. 2024)). The second argument is unavailing because the mere increase in costs alone does not support an inference that the Plan paid more for the same services as similar plans. *See Matousek*, 51 F.4th at 278 (dismissing claim alleging defendants permitted recordkeeping expenses to "spiral out of control" because "[e]ven if the fees here look high, we cannot infer imprudence unless similarly sized plans spend less on the same services").[7]

[7] Plaintiffs' reliance on out-of-circuit cases (ECF No. 38 at 37) in support of the contrary conclusion is misplaced, since the reasoning of each decision is at odds with the Eighth Circuit's pleading standard.

C. Plaintiffs Fail To Plead Plausible Allegations of An Imprudent Process.

Having failed to build a case based on suitable comparators, Plaintiffs cannot resuscitate their Complaint with isolated, unsupported allegations of an imprudent process. Plaintiffs' first contention, that Wells Fargo failed to conduct a request for proposal ("RFP"), is refuted by their own admission to the contrary. (ECF No. 38 at 6, 35.) There is, in any event, "no legal authority [that] require[s] competitive bidding," *Fritton v. Taylor Corp.*, 2023 WL 5348834, *4 (D. Minn. Aug. 21, 2023), nor is there any support for inferring a breach of fiduciary duty from a failure to conduct an RFP. *See, e.g.*, *Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136, 1148, 1156 (10th Cir. 2023); *Albert v. Oshkosh Corp.*, 47 F.4th 570, 579 (7th Cir. 2022). Furthermore, Plaintiffs' speculation that conducting an RFP "would have saved millions of dollars" (ECF No. 1 ¶ 106) is implausible given that they have failed to identify a comparable PBM that offered the same services for less. *See White v. Chevron Corp.*, 2016 WL 4502808, at *14 (N.D. Cal. Aug. 29, 2016) ("[P]laintiffs do not even allege that a competitive bid would have benefitted the Plan or the Plan participants, because they do not allege any facts from which one could infer that the same services were available for less on the market.").

Plaintiffs' second contention—that Wells Fargo mismanaged the Plan by steering participants to obtain specialty prescription drugs from Accredo, ESI's affiliated online pharmacy (ECF No. 38 at 39-40)—is nothing more than a recharacterized claim about a component of the prescription drug program, which, for the reasons stated, does not give rise to an inference of imprudence.

Plaintiffs' final contention—that Wells Fargo allegedly retained a conflicted consultant (*id.* at 6)—should be rejected as a conclusory, particularly since it relies on a statement in a consultant's SEC filing that has no specific connection to Wells Fargo or its contract with ESI, and states that the consultant receives commissions as part of a lawful industry practice. *See* https://www.sec.gov/Archives/edgar/data/315293/000162828023004087/aon-20221231.htm.[8]

III. PLAINTIFFS' PROHIBITED TRANSACTION CLAIMS SHOULD BE DISMISSED.

As previously discussed (ECF No. 30 at 30-31), several circuit courts have dismissed threadbare claims for violations of ERISA's prohibited transaction rules where, as here, plaintiffs have failed to plead either: (i) the presence of self-dealing or conflicts of interest; or (ii) that the fees charged were unreasonable. In response, Plaintiffs have done nothing more than remind the court of the Eighth Circuit's ruling in *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009). But the circumstances presented in *Braden* more than 15 years ago were very different. There, the plaintiff alleged a secret kickback scheme between a pension plan and Merrill Lynch (a party in interest) whereby mutual fund providers paid Merrill Lynch a share of their fees "in exchange for inclusion of their funds in the [p]lan," and plan fiduciaries agreed to keep those payments confidential. *Id.* at 590. Whether or not these allegations are viewed as allegations of self-

[8] Plaintiffs abandoned their implausible allegation that the Plan's prescription drug costs impacted their wages (ECF No. 30 at 29). *See, e.g.*, *Hopper v. BMO Harris Bank, N.A.*, 2023 WL 4936160, at *3 (D. Minn. Aug. 2, 2023).

dealing or conflicts of interest (as Plaintiffs contend), there are no allegations here that are remotely similar.

In any event, the U.S. Supreme Court is expected to rule this term on the pleading standard applicable to prohibited transaction claims like the ones asserted here. *See Cunningham v. Cornell Univ.*, No. 23-1007 (U.S.). In the interim, there is no utility in allowing the prohibited transaction claims to proceed to discovery if the fiduciary breach claims are dismissed.

CONCLUSION

For the reasons stated herein and in Wells Fargo's moving brief, the Complaint should be dismissed without leave to replead against all named Defendants.

Dated: December 2, 2024

Respectfully submitted,

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