APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 16-1928

James J. Thole; Sherry Smith, individually and on behalf of all others similarly situated

Plaintiffs-Appellants

v.

U.S. Bank, National Association, individually and as successor in interest to FAF Advisors, Inc.; U.S. Bancorp

Defendants-Appellees

Nuveen Asset Management, LLC, as successor in interest to FAF Advisors, Inc.

Defendant

AARP; AARP Foundation; R. Alexander Acosta, Secretary of the United States Department of Labor

Amici on Behalf of Appellant(s)

Chamber of Commerce of the United States of America

Amicus on Behalf of Appellee(s)

Appeal from United States District Court for the District of Minnesota – Minneapolis

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Submitted: May 11, 2017
Filed: October 12, 2017

Before SMITH, Chief Judge, COLLOTON and KELLY, Circuit Judges.

Smith, Chief Judge.

Named plaintiffs James Thole and Sherry Smith (collectively, "plaintiffs")[1] brought a putative class action against U.S. Bank, N.A. ("U.S. Bank"); U.S. Bancorp; and multiple U.S. Bancorp directors (collectively, "defendants"),[2] challenging the defendants' management of a defined benefit pension plan ("Plan" or "U.S. Bank Pension Plan") from September 30, 2007, to December 31, 2010. The plaintiffs alleged that the defendants violated Sections 404, 405, and 406 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1104-06, by breaching their fiduciary obligations and causing the Plan to engage in prohibited transactions with a U.S. Bank subsidiary, FAF Advisors, Inc. (FAF).

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[1]The district court dismissed named plaintiffs Adetayo Adedipe and Marlene Jackson per the parties' stipulation.

[2]The district court dismissed defendant Nuveen Asset Management LLC ("Nuveen") on its motion.

The plaintiffs' complaint asserts that these alleged ERISA violations caused significant losses to the Plan's assets in 2008 and resulted in the Plan being underfunded in 2008. The plaintiffs sought to recover Plan losses, disgorgement of profits, injunctive relief, and other remedial relief pursuant to ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2), and ERISA Section 409, 29 U.S.C. § 1109. They also sought equitable relief pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3).

In response, the defendants moved to dismiss the plaintiffs' consolidated amended complaint with prejudice under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Specifically, they argued that the plaintiffs lacked standing to bring the suit, the ERISA claims were time-barred or had been released, and the pleading otherwise failed to state a claim on which relief could be granted. Relevant to the present appeal, the district court[3] concluded that the plaintiffs' claim challenging the Plan's strategy of investing 100 percent of its assets in equities was barred by ERISA's six-year statute of repose. The court, however, permitted the plaintiffs to proceed with their claim that the defendants engaged in a prohibited transaction by investing the Plan's assets in mutual funds that FAF managed.

During the litigation, the factual backdrop of the case changed. In 2014, the Plan became overfunded; in other words, there was more money in the Plan than was needed to meet its obligations. The defendants, alleging that the plaintiffs had not suffered any financial loss upon

[3]The Honorable Joan N. Erickson, United States District Judge for the District of Minnesota.

which to base a damages claim, moved to dismiss the remainder of the action for lack of standing pursuant to Rule 12(b)(1). Although the district court concluded that standing was the wrong doctrine to apply, it granted the motion to dismiss for lack of Article III jurisdiction based on the doctrine of mootness. The court concluded that because the Plan is now overfunded, the plaintiffs lack a concrete interest in any monetary relief that the court might award to the Plan if the plaintiffs prevailed on the merits.[4] The court later denied the plaintiffs' motion for attorneys' fees, determining that the plaintiffs had achieved no success on the merits. The court concluded that the plaintiffs failed to show that the litigation had acted as a catalyst for any contributions that U.S. Bancorp made to the Plan resulting in its overfunded status.

On appeal, the plaintiffs argue that the district court erred by (1) dismissing the case as moot; (2) dismissing the Equities Strategy claim on statute-of-limitations and pleading grounds; and (3) denying their motion for attorneys' fees and costs. We affirm.

I. *Background*[5]

A. *Overview of the U.S. Bank Pension Plan—A Defined Benefit Plan*

The plaintiffs, both retirees of U.S. Bank, are participants in the U.S. Bank Pension Plan. U.S. Bancorp is the

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[4]As far as the record discloses, the Plan remains overfunded.

[5]We "accept[] as true all factual allegations in the complaint and draw[] all reasonable inferences in favor of the nonmoving party." *Wieland v. U.S. Dep't of Health & Human Servs.,* 793 F.3d 949, 953 (8th Cir. 2015).

Plan's sponsor, while U.S. Bank (a wholly-owned subsidiary of U.S. Bancorp) is the Plan's trustee. Pursuant to the Plan document, the Compensation Committee and Investment Committee had authority to manage the Plan's assets. The Compensation Committee was composed of U.S. Bancorp directors and officers. The Compensation Committee designated FAF as the Investment Manager with full discretionary investment authority over the Plan's assets. During the relevant time period, U.S. Bank was the parent of FAF.[6]

The Plan is a defined benefit plan regulated under ERISA. *See* 29 U.S.C. §§ 1002(2)(A), 1002(35), 1003. "A defined benefit plan . . . consists of a general pool of assets rather than individual dedicated accounts. Such a plan, 'as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment.'" *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999) (quoting *Comm'r v. Keystone Consol. Indus.*, Inc., 508 U.S. 152, 154 (1993)). According to the plaintiffs, the Plan's purpose "is to provide a monthly retirement income based on a U.S. Bancorp employee's pay and years of service." In 2009, "Smith elected to receive her Plan benefits in the form of a single life annuity in the amount of $42.26 per month, and received a payment of the portion of her benefit accrued under a predecessor plan . . . in the amount of $7,588.65." In 2011, "Thole elected to receive his Plan benefits in the form of a Estate Protection 50% Joint and Survivor Annuity in the amount of $2,198.38 per month." Under § 2.1.26 of the Plan, Smith and Thole are entitled to receive their respective benefits for the rest of their

[6]Nuveen acquired FAF from U.S. Bank in November 2010.

lives. Thus far, the plaintiffs have received all payments under the Plan to which they are entitled.

U.S. Bancorp and its subsidiaries make all Plan contributions. *See Hughes*, 525 U.S. at 439 ("The asset pool may be funded by employer or employee contributions, or a combination of both." (citing 29 U.S.C. § 1054(c))). Plan "members have a right to a certain defined level of benefits, known as 'accrued benefits.'" *Id.* at 440. "Accrued benefit" for purposes of a defined benefit plan means "the individual's accrued benefit determined under the plan . . . expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A).

A measurement called the Funding Target Attainment Percentage (FTAP) determines whether a plan is on track to meet its benefit obligations to participants. The FTAP is used to determine whether the plan sponsor must make a contribution to the Plan in a particular year. *See* 29 U.S.C. § 1083(a), (d). A plan's assets are less than its liabilities if its FTAP is under 100 percent; if this occurs, then the plan sponsor must make a contribution. By contrast, if the FTAP is over 100 percent—i.e., the plan's assets are greater than the liabilities—the plan sponsor is not required to make a contribution. *See* 26 U.S.C. § 430(c).

Under the Plan (like all defined benefit plans), "the employer typically bears the entire investment risk and—short of the consequences of plan termination—must cover any underfunding as the result of a shortfall that may occur from the plan's investments." *Hughes*, 525 U.S. at 439. But "if the defined benefit plan is overfunded, the employer may reduce or suspend his contributions." *Id.* at 440. The defined benefit plan's structure "reflects

the risk borne by the employer." *Id.* "Given the employer's obligation to make up any shortfall, no plan member has a claim to any particular asset that composes a part of the plan's general pool." *Id.*

In summary, "[i]n a defined benefit plan, if plan assets are depleted but the remaining pool of assets is more than adequate to pay all accrued or accumulated benefits, then any loss is to plan surplus." *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 906 (8th Cir. 2002). "Plan beneficiaries have no claim or entitlement to its surplus. If the Plan is overfunded, [the employer] may reduce or suspend its contributions." *Id.* Conversely, "[i]f the Plan's surplus disappears, it is [the employer]'s obligation to make up any underfunding with additional contributions. If the Plan terminates with a surplus, the surplus may be distributed to [the employer]." *Id.* "[T]he reality is that a relatively modest loss to Plan surplus is a loss only to . . . the Plan's sponsor." *Id.*

B. *Complaint*

In 2014, the plaintiffs filed the consolidated amended complaint[7] setting forth a putative class action against the defendants, challenging their management of the Plan from September 30, 2007, to December 31, 2010. According to the plaintiffs, the defendants violated ERISA Sections 404, 405, and 406, 29 U.S.C. §§ 1104–06.

The plaintiffs alleged that by 2007, FAF had invested the entire Plan portfolio in equities—direct stock holdings or through mutual funds that FAF managed ("Equities Strategy"). According to the plaintiffs, well-accepted principles of diversification provide that a retirement

[7]The plaintiffs filed their original complaint in 2013.

portfolio should be invested in multiple asset classes rather than in a single class. They alleged that diversification among the asset classes reduces the risk of large losses and uncertainty because different asset classes historically do not move up or down at the same time. The plaintiffs maintained that because the Plan was significantly overfunded by 2007, it did not need to pursue such a high-risk/high-reward investment strategy to meet its pension obligations. The plaintiffs alleged that the defendants stood to benefit from the Equities Strategy; specifically, they claimed that U.S. Bancorp and its Board members benefitted from the Equities Strategy because it allowed U.S. Bancorp to increase its operating income and avoid minimum employer contributions to the Plan. And they alleged that the Equities Strategy benefitted the individual defendants holding stock options, which were exercised and sold at a higher price because U.S. Bancorp's reported income (and resulting stock price) was increased by the excess pension income.

Because the defendants put all the Plan's assets in a single higher-risk asset class, the plaintiffs alleged, in 2008, the Plan suffered a loss of $1.1 billion. They alleged that the Plan lost significantly more money in 2008 than it would have if the defendants had properly diversified it. The $1.1 billion loss reduced the funding status of the Plan—it went from being significantly overfunded in 2007 to being 84 percent underfunded in 2008.

The plaintiffs claimed that the defendants failed to monitor the investment of Plan assets and terminate the Equities Strategy. This failure, according to the plaintiffs, (1) violated the defendants' fiduciary duty of prudence under ERISA because it exposed the Plan to un-

necessary risk; (2) violated their fiduciary duty to diversify plan assets under ERISA because investing an entire retirement portfolio in a single asset class is non-diversified on its face; and (3) violated their fiduciary duty of loyalty under ERISA because the Equities Strategy benefitted the defendants to the detriment of the Plan and its participants.

The plaintiffs also alleged several violations of ERISA based on the purported conflicts of interest associated with the Plan's assets being heavily invested in U.S. Bancorp's own mutual funds ("FAF Funds"). By 2007, FAF had invested over 40 percent of the Plan's assets in the FAF Funds despite their costing more than similar alternative funds. By investing the Plan's assets in U.S. Bancorp's own propriety mutual funds, the plaintiffs alleged, FAF and U.S. Bancorp received management fees from the Plan, increased the total assets under management to $1.25 billion, and were able to attract more investors. The plaintiffs claim that, as a result, the Plan paid too much in management fees for the FAF Funds.

Allegedly, these ERISA violations caused significant losses to the Plan's assets in 2008 and resulted in the Plan's underfunded status in 2008 through the commencement of this suit in 2013. The plaintiffs sought to recover Plan losses, disgorgement of profits, injunctive relief, and other remedial relief pursuant to ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2), and ERISA Section 409, 29 U.S.C. § 1109. They also sought equitable relief pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3).

C. *Dismissal Orders*

The defendants moved to dismiss the complaint on various grounds, including that the plaintiffs lacked Article III standing, that their ERISA claims were time-barred, and that their pleading failed to state a claim on which relief could be granted. On November 21, 2014, the district court denied the motion to dismiss in part and granted it in part.[8] First, the district court determined that the plaintiffs had statutory and Article III standing to pursue all their claims. *Adedipe v. U.S. Bank, Nat'l Ass'n (Adedipe I)*, 62 F. Supp. 3d 879, 887–96 (D. Minn. 2014). In determining that the plaintiffs had Article III standing, the district court noted that the plaintiffs did "not allege that their benefit levels have actually decreased as a result of the Defendants' alleged misconduct," *id.* at 891; therefore, they had "no 'claim to any particular asset that composes a part of the [P]lan's general asset pool,'" *id.* at 890 (quoting *Hughes*, 525 U.S. at 440). But the plaintiffs did allege that the defendants' conduct caused the Plan to become underfunded in 2008, and the Plan remained in that status through the lawsuit's commencement. *Id.* at 891.

Based on the Plan's underfunded status, the plaintiffs alleged that they were "injured by the increased risk of default that arose when the Plan's liabilities exceeded its assets as a result of the significant losses caused by the Defendants' ERISA violations." *Id.* at 894. The court agreed. It found relevant "ERISA's minimum funding

[8]The district court granted summary judgment to the defendants on the plaintiffs' securities-lending claims and dismissed the claim that investing in FAF funds violated the Plan document. The plaintiffs do not challenge these rulings on appeal.

standards." *Id.* Measured by these standards, the court stated, "the Plan lacked a surplus large enough to absorb the losses at issue." *Id.* at 895. "In other words, Plaintiffs' injury in fact was that Defendants' actions caused an 'alleged increased risk of default' and 'the concomitant increase in the risk that the participants will not receive the level of benefits they have been promised due to the Plan being inadequately funded at termination.'" *Adedipe v. U.S. Bank, Nat'l Ass'n (Adedipe II)*, No. CV 13-2687 (JNE/JJK), 2015 WL 11217175, at *3 (D. Minn. Dec. 29, 2015) (quoting *Adedipe I*, 62 F. Supp. 3d at 891). The court also determined that the plaintiffs adequately alleged that the defendants' ERISA violations caused the increased risk of default and that the relief that the plaintiffs sought ("the restoration to the Plan of the assets that were allegedly lost as a result of the Defendants' misconduct") would "remedy the underfunding that is at the root of their injury." *Id.* (quoting *Adedipe I*, 62 F. Supp. 3d at 896).

After concluding that the plaintiffs had standing, the court dismissed the Equities Strategy claims on statute-of-limitations grounds, concluding that because the Plan had become invested entirely in equities securities more than six years before the commencement of the suit, the claims were time-barred under 29 U.S.C. § 1113(1)(A). *Adedipe I*, 62 F. Supp. 3d at 898–99. The court further determined that the complaint did not plausibly allege a "significant" change in circumstances that would "trigger an obligation for fiduciaries to investigate whether altering an investment strategy previously decided upon would [be] in the best interests of the plan." *Id.* at 899. Finally, the court denied the defendants' motion to dis-

miss the plaintiffs' FAF Funds claims based on the alleged conflicts of interest and prohibited transactions. *Id.* at 900–02.

Thereafter, the defendants moved to dismiss the action for lack of standing, renewing an argument raised in the previous motion to dismiss. *Adedipe II*, 2015 WL 11217175, at *1. The defendants based their motion "on the factual development that the Plan is now overfunded." *Id.* at *3. The district court concluded thatstanding was the wrong doctrine to apply given the procedural posture of the case; instead, the applicable doctrine was mootness. *Id.* The court identified the plaintiffs' injury in fact as "the increased risk of Plan default, or, put another way, the increased risk that Plan beneficiaries will not receive the level of benefits they have been promised." *Id.* at *4. The court concluded that because the Plan is now overfunded, the plaintiffs no longer have a concrete interest in the monetary and equitable relief sought to remedy that alleged injury. *Id.* at *5. The court dismissed the entire case as moot.

Shortly thereafter, the plaintiffs moved for attorneys' fees and costs pursuant to ERISA Section 502(g), 29 U.S.C. § 1132(g)(1). The plaintiffs argued that the defendants' voluntary contribution of millions of dollars to the Plan after the commencement of the lawsuit constituted some success on the merits because the contribution was motivated by the litigation. The defendants responded "that in 2014 they again made excess contributions in order to reduce the Plan's insurance premiums." *Adedipe v. U.S. Bank, Nat'l Ass'n (Adedipe III)*, No. CV 13-2687 (JNE/JJK), 2016 WL 7131574, at *3 (D. Minn. Mar. 18, 2016). The district court denied the plaintiffs' motion, finding "no evidence that Defendants' 2014 contribution

is an 'outcome' of the litigation, as opposed to an independent decision that nonetheless affected the viability of Plaintiffs' case." *Id.* at *4.

II. *Discussion*

On appeal, the plaintiffs argue that the district court erred by (1) dismissing the case as moot based on the Plan's overfunded status; (2) dismissing the Equities Strategy claim on statute-of-limitations and pleading grounds; and (3) denying their motion for attorneys' fees and costs.

A. *Dismissal of ERISA Claims Based on Plan's Overfunded Status*

The plaintiffs argue that the district court erroneously conflated the doctrine of mootness with the doctrine of standing in holding that the Plan's overfunded status mooted their case. The plaintiffs contend that *Harley* and its progeny provide that whether a Plan is underfunded is a factual issue relevant only to the injury-in-fact element of Article III standing. This issue, the plaintiffs contend, is determined at the commencement of the lawsuit. Because the plaintiffs showed that the Plan was underfunded at the commencement of the suit, they maintain, they have satisfied the Article III standing requirement and are not required to establish that standing again. And, according to the plaintiffs, their case is not moot because they are capable of receiving the various forms of relief sought in the complaint and authorized by ERISA; that is, their lawsuit can remedy the Plan's and their own injuries.

"We review de novo a district court's grant of a motion to dismiss for lack of jurisdiction." *Doe v. Nixon*, 716 F.3d 1041, 1051 (8th Cir. 2013). "We may affirm 'for any reason

supported by the record, even if different from the reasons given by the district court.'" *Robbins v. Becker*, 794 F.3d 988, 992 (8th Cir. 2015) (quoting *Bishop v. Glazier*, 723 F.3d 957, 961 (8th Cir. 2013)).

This case involves ERISA's civil enforcement provision. We first address 29 U.S.C. § 1132(a)(2). Section 1132(a)(2) provides that a plan participant or beneficiary may bring a civil action "for appropriate relief under section 1109 of this title." 29 U.S.C. § 1132(a)(2). Section 1109, in turn, provides:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.
>
> (b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

29 U.S.C. § 1109.

"In *Harley*, this court concluded that § 1132(a)(2) does not permit a participant in a defined-benefit plan to bring suit claiming liability under § 1109 for alleged breaches of fiduciary duties when the plan is overfunded."

McCullough v. AEGON USA Inc., 585 F.3d 1082, 1084 (8th Cir. 2009) (citing *Harley*, 284 F.3d at 905–07). The *Harley* plaintiffs alleged that the plan fiduciaries of the defined benefit plan in which they participated breached their fiduciary duties by (1) inadequately investigating and monitoring a $20 million investment in a hedge fund that resulted in a total loss of the investment, and (2) permitting the plan to enter into a prohibited transaction under 29 U.S.C. § 1106(b)(1) by paying a $1.17 million fee to the hedge fund's investment advisor. *Harley*, 284 F.3d at 903–04, 908.

On appeal, we affirmed the district court's grant of summary judgment dismissing the plaintiffs' failure-to-investigate and monitor claims. *Id.* at 907. Our "focus [was] on whether plaintiffs ha[d] standing to bring an action under § 1132(a)(2) to seek relief under § 1109 for this particular breach of duty, given the unique features of a defined benefit plan." *Id.* at 905–06. We held that § 1132(a)(2) did not authorize the plaintiffs to bring suit because "the Plan's surplus was sufficiently large that the . . . investment loss did not cause actual injury to plaintiffs' interests in the Plan." *Id.* at 907. We explained that "a contrary construction [of § 1132(a)(2)] *would raise* serious Article III case or controversy concerns" given that "the limits on judicial power imposed by Article III counsel against permitting participants or beneficiaries who have suffered *no* injury in fact from suing to enforce ERISA fiduciary duties on behalf of the Plan." *Id.* at 906 (first and second emphases added).

But "[t]he statutory holding of *Harley* did not rest solely on constitutional avoidance." *McCullough*, 585 F.3d at 1087. Another critical consideration for the court

was ERISA's primary purpose—"the protection of individual pension rights." *Harley*, 284 F.3d at 907 (quoting H.R. Rep. No. 93-533, at 1 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4639). We reasoned that the plan participants' and beneficiaries' individual pension rights were fully protected; in fact, their "rights would if anything be adversely affected by subjecting the Plan and its fiduciaries to costly litigation brought by parties who have suffered no injury from a relatively modest but allegedly imprudent investment." *Id.*[9] "[T]he purposes underlying ERISA's imposition of strict fiduciary duties," we reasoned, "are not furthered by granting plaintiffs standing to pursue these claims." *Id.* "In addition to the Article III constitutional limitations," we also noted that "prudential principles bear on the question of standing. One of those principles is to require that 'plaintiff's complaint fall within the zone of interests to be protected or regulated by the statute . . . in question.'" *Id.* (ellipsis in original) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982)).

In *Harley*, we determined "that a breach of a fiduciary duty causes no harm to a participant when the plan is overfunded, and that allowing costly litigation would run counter to ERISA's purpose of protecting individual pension rights. That logic applies whether an action alleges a single breach or a series of breaches." *McCullough*, 585 F.3d at 1087. Additionally, even though *Harley* "ad-

[9] "Although the court did not identify the precise text of § 1132(a)(2) that it was construing, we presume the court determined that the suit would not be one 'for appropriate relief' under the circumstances." *McCullough*, 585 F.3d at 1084–85.

dressed only claims for monetary relief," "[g]iven *Harley's* holding that a participant suffers no injury as long as the plan is substantially overfunded . . . we [have found] no basis to construe § 1132(a)(2) to authorize an action against fiduciaries of an overfunded plan for injunctive relief, but not for the monetary relief sought in *Harley*." *Id.*

"*Harley* was decided on *statutory* grounds," not on Article III standing. *Id.* at 1085 (emphasis added). We acknowledge that some references in *Harley* to standing may have caused some confusion for both the parties and the district court. "The Supreme Court has recently commented that it has observed confusion about the concept of standing and has suggested that the use of that term in conjunction with anything other than the 'irreducible constitutional minimum of standing' provided by Article III should be disfavored." *Tovar v. Essentia Health*, 857 F.3d 771, 774 (8th Cir. 2017) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014)). We have acknowledged the confusion that the "the term 'statutory standing'" causes; nonetheless, "its purpose is clear: a plaintiff who seeks relief for violation of a statute must 'fall[] within the class of plaintiffs whom Congress has authorized to sue' under that statute." *Id.* (alteration in original) (quoting *Lexmark*, 134 S. Ct. at 1387). "Determining whether this requirement is satisfied is 'a straightforward question of statutory interpretation.'" *Id.* (quoting *Lexmark*, 134 S. Ct. at 1388).

In summary, a careful reading of *Harley* shows that the issue it addressed was whether the plaintiffs in that case fell within the class of plaintiffs whom Congress has authorized under § 1132(a)(2) to bring suit claiming liability under § 1109 for alleged breaches of fiduciary duties

given that the plan was overfunded. *McCullough*, 585 F.3d at 1084 (citing *Harley*, 284 F.3d at 905–07). That issue was resolved on statutory grounds, not Article III grounds, such as standing or mootness. *Harley* holds (and *McCullough* affirms) that when a plan is overfunded, a participant in a defined benefit plan no longer falls within the class of plaintiffs authorized under § 1132(a)(2) to bring suit claiming liability under § 1109 for alleged breaches of fiduciary duties. Here, the Plan is overfunded; therefore, *Harley* is applicable, and the plaintiffs no longer fall within the class of plaintiffs authorized to bring suit. Therefore, although the district court dismissed the case on mootness, the dismissal (as far as it concerns relief under § 1132(a)(2)) was nonetheless proper, as we may affirm the dismissal for any reason supported by the record. See *Robbins*, 794 F.3d at 992.[10]

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[10]The plaintiffs also argue that if we hold that *Harley* and its progeny require that the Plan be underfunded at the commencement of the lawsuit and at every moment throughout the litigation, we must reconsider Harley in light of the Supreme Court's recent standing decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."). As we have explained, however, "*Harley* was decided on statutory grounds," not on Article III standing. *McCullough*, 585 F.3d at 1085. Furthermore, "[t]he statutory holding of *Harley* did not rest solely on constitutional avoidance" but also on "advanc[ing] ERISA's primary purpose of protecting individual pension rights." *Id.* at 1087.

We did not address whether "a plan participant may seek injunctive relief under § 1132(a)(3)" in either *Harley* or *McCullough*. *McCullough*, 585 F.3d at 1087. "[C]ases from other circuits [have] conclud[ed] that a plan participant may seek injunctive relief under § 1132(a)(3) [against fiduciaries of an overfunded plan]." *Id.* (citing *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 607–10 (6th Cir. 2007); *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 455–56 (3d Cir. 2003)).

Section 1132(a)(3) provides that a plan participant or beneficiary may bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3). Section "1132(a)(3) is a 'catch-all' provision that 'act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that [§ 1132] does not elsewhere adequately remedy.'" *Soehnlen v. Fleet Owners Ins. Fund*, 844 F.3d 576, 583 (6th Cir. 2016) (alterations in original) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996)). Here, in addition to relief under § 1132(a)(2), the plaintiffs sought "any injunctive relief that the Court deems appropriate" pursuant to § 1132(a)(3). The Sixth Circuit recently rejected plan participants' argument that "they need not show individual injury to obtain injunctive relief for a breach of fiduciary duty" pursuant to § 1132(a)(3). *Soehnlen*, 844 F.3d at 584. In doing so, the Sixth Circuit examined its prior opinion in *Loren* and then observed:

> We recognize that misconduct by the administrators of a benefit plan can create an injury if "it creates or enhances a risk of default by the entire

> plan." *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 255, 128 S. Ct. 1020, 169 L. Ed. 2d 847 (2008). *But Plaintiffs make no showing of actual or imminent injury to the Plan itself*. Plaintiffs concede this point by pleading that the actions of the fiduciaries expose the Plan to *prospective* liability in the amount of $15,000,000. To the extent that Plaintiffs argue that the risk of an enforcement action is itself sufficient to constitute an injury, we find in the absence of any evidence that penalties have been levied, paid, or even contemplated that "these risk-based theories of standing [are] unpersuasive, not least because they rest on a highly speculative foundation lacking any discernible limiting principle." *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013). We therefore affirm the district court's finding that Plaintiffs[] lack standing to bring this claim.

Id. at 585 (first emphasis added) (first alteration in original).

While *Soehnlen* is phrased in terms of Article III standing, the Sixth Circuit's recognition that the plaintiffs must "make [a] showing of *actual or imminent injury* to the Plan itself," *id.* (emphasis added), under § 1132(a)(3) is similar to our holding in *Harley* that § 1132(a)(2) does not authorize plaintiffs to bring suit when "the Plan's surplus [is] sufficiently large that the . . . investment loss did not cause *actual injury* to plaintiffs' interests in the Plan," *Harley*, 284 F.3d at 907 (emphasis added).

Under both § 1132(a)(2) and (a)(3), the plaintiffs must show actual injury—to the plaintiffs' interest in the Plan under (a)(2) and to the Plan itself under (a)(3)—to fall

within the class of plaintiffs whom Congress has authorized to sue under the statute. Given that the Plan is overfunded, there is no "actual or imminent injury to the Plan itself" that caused injury to the plaintiffs' interests in the Plan. *Soehnlen*, 844 F.3d at 585. For that reason, as in *Harley* and *McCullough*, the plaintiffs' suit is not one for appropriate relief, and we hold that dismissal of the plaintiffs' claims for relief under § 1132(a)(3) was also proper.[11]

B. *Attorneys' Fees and Costs*

The plaintiffs next argue that if we affirm the district court's dismissal of their claims based on the Plan's overfunded status, then they are entitled to fees pursuant to ERISA Section 502(g)(1), which permits "the court in its discretion [to] allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). We review for an abuse of discretion a district court's denial of an award for attorneys' fees and costs. *McDowell v. Price*, 731 F.3d 775, 783–84 (8th Cir. 2013). But, as a threshold matter, "a fees claimant must show 'some degree of success on the merits' before a court may award attorney's fees under § 1132(g)(1)." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 255 (2010) (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983)). This standard is not satisfied "by achieving 'trivial success on the merits' or a 'purely procedural victor[y].'" *Id.* (alteration in original) (quoting *Ruckelshaus*, 463 U.S. at 688 n.9). But the standard is satisfied "if the court can fairly call the outcome of the litigation some success on the merits without

[11] Because we conclude that all of the plaintiffs' claims were properly dismissed based on the Plan's overfunded status, we need not address whether the district court erred in dismissing the Equities Strategy claim on statute-of-limitations and pleading grounds.

conducting a 'lengthy inquir[y] into the question whether a particular party's success was 'substantial' or occurred on a 'central issue.'" *Id.* (alteration in original) (quoting *Ruckelshaus*, 463 U.S. at 688 n.9).

Before the district court, the plaintiffs argued that they had achieved some success on the merits because after they filed suit, the defendants, in 2014, made $311 million in voluntary excess contributions to the Plan. *Adedipe III*, 2016 WL 7131574, at *4. According to the plaintiffs, "their litigation served as a catalyst for Defendants' $311 million contribution." *Id.* The district court found this a flawed argument because no evidence existed that the defendants' 2014 contribution was "an 'outcome' of the litigation, as opposed to an independent decision that nonetheless affected the viability of Plaintiffs' case." *Id.* According to the defendants, they made the 2014 contribution "to reduce the Plan's insurance premiums." *Id.* at *3. The district court found the defendants' explanation for this excess contribution "to be supported by the record" and recounted the record evidence as follows:

> In 2012, Defendants voluntarily made a $35 million contribution. Hansen Decl. ¶ 6, Dkt. No. 264; *see also* Dkt. No. 108–1, Ex. E at 2–1 (showing September 11, 2012 contribution of $35 million). As explained in a sworn declaration by U.S. Bancorp's Senior Vice President of Benefits Design, David Hansen, the contribution was made in order to reduce the expensive variable insurance premiums the Plan would otherwise have been required to pay for Plan Year 2011. Hansen Decl. ¶ 6. In 2013, before Plaintiffs filed suit, Defendants made $163 million of the total of $290 million in voluntary excess contributions that year, again

> to reduce premiums, as well as for other reasons unrelated to the litigation. *Id.* ¶¶ 7–8. Defendants explain that in 2014 they again made excess contributions in order to reduce the Plan's insurance premiums. *Id.* ¶ 9. They note that the excess contributions in 2013 and 2014 brought the Plan's "PBGC ratio," which is used to calculate the required insurance premiums, almost exactly to the ratio that would minimize premium costs, thus corroborating this explanation for Defendants' decisions to make the contributions. *Id.* ¶¶ 8–9.

Id. (footnote omitted). According to the court, the plaintiffs offered no evidence beyond mere speculation that the "litigation caused the contributions to the Plan." *Id.*

Additionally, the district court noted that "no court order spurred Defendants' actions, nor did [the district] [c]ourt ever state that it was likely to grant summary judgment to Plaintiffs." *Id.* at *4; *cf. Hardt*, 560 U.S. at 256 (holding that plaintiff, whose claim for benefits was denied by insurer, achieved some success on the merits of her ERISA claim when, although the plaintiff "failed to win summary judgment on her benefits claim, the [d]istrict [c]ourt nevertheless found 'compelling evidence'" that supported her case and stated that it was inclined to grant her summary judgment but first ordered the insurer to reconsider her claim and the insurer, during its "court-ordered review," awarded the plaintiff the claimed benefits). In fact, the "case was still in the pleadings stage when the [c]ourt dismissed it." *Adedipe III*, 2016 WL 7131574, at *4.

"Courts within the Eighth Circuit and elsewhere have found that an award of attorney's fees in an ERISA case

may be proper when a plaintiff's suit operated as a catalyst to bring about a voluntary change in the defendant's conduct." *Greater St. Louis Constr. Laborers Welfare Fund v. X–L Contracting, Inc.*, No. 4:14-CV-946-SPM, 2016 WL 6432768, at *11 (E.D. Mo. Oct. 31, 2016) (citing *Boyle v. Int'l Bhd. of Teamsters Local 863 Welfare Fund*, 579 F. App'x 72, 77–78 (3d Cir. 2014) (determining that the plaintiffs had achieved some success on the merits and could receive an award of attorneys' fees under the catalyst theory where the defendants voluntarily reinstated the plaintiffs' benefits but did so only after the plaintiffs filed suit); *Broadbent v. Citigroup Long Term Disability Plan*, No. CIV 13–4081–LLP, 2015 WL 1189565, at *4–5 (D.S.D. Mar. 16, 2015) (determining that the plaintiff had achieved some degree of success on the merits where the lawsuit "served as a catalyst to cause [the defendant] to provide her with substantially all of the relief she sought in her complaint"); *Greenwald v. Liberty Life Assurance Co.*, No. 4:12–CV–3034, 2013 WL 3716416, at *3 (D. Neb. July 12, 2013) (determining that a plaintiff can obtain fees under ERISA pursuant to the catalyst theory even though the litigation did not result in a favorable judgment, if "the pressure of the lawsuit was a material contributing factor in bringing about extrajudicial relief," and explaining that "an award of attorney fees under § 1132(g) does not require the fee claimant to achieve prevailing party status" and that "ERISA is remedial legislation, and should be interpreted to advance Congress' goals of protecting employee rights and securing effective access to federal courts" (internal quotation marks omitted)).

Here, the record supports the district court's conclusion that the plaintiffs failed to produce evidence that

their lawsuit was a material contributing factor in the defendants' making the 2014 contribution resulting in the Plan's overfunded status and any relief that the plaintiffs sought in their complaint. Accordingly, we hold that the district court did not abuse its discretion in denying the plaintiffs' motion for attorneys' fees and costs.

III. *Conclusion*

Accordingly, we affirm the judgment of the district court.

KELLY, Circuit Judge, concurring in part and dissenting in part.

I agree with the court's conclusion that—under Harley and McCullough—the plaintiffs lack authorization to sue under 29 U.S.C. § 1132(a)(2). However, I respectfully dissent from the court's holding that the plaintiffs lack authority to bring their claims for injunctive relief under 29 U.S.C. § 1132(a)(3). As relevant, § 1132(a)(3) authorizes civil actions "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of [29 U.S.C. §§ 1104–1106], or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce [§§ 1104–1106]." In light of this unambiguous statutory text and in the absence of any dispute that the plaintiffs are participants in and beneficiaries of the Plan, I believe that the plaintiffs' complaint—which seeks to enjoin the defendants from breaching their fiduciary duties under §§ 1104–1106 in relation to their management

of the Plan—falls within "the zone of interests to be protected or regulated" by ERISA. See Harley, 284 F.3d at 907 (quoting Valley Forge, 454 U.S. at 475).

I also believe that—accepting as true all factual allegations in the plaintiffs' complaint and drawing all reasonable inferences in their favor, as we must—the plaintiffs have shown an actual or imminent injury. Cf. Soehnlen, 844 F.3d at 585 (concluding plaintiffs who made "no showing of actual or imminent injury to the Plan itself" lacked standing). More specifically, the plaintiffs allege that the defendants invested the entirety of the Plan's assets in high-risk/high-reward equities, in violation of their fiduciary duties under §§ 1104–1106, and that as a result, the Plan suffered a loss of $1.1 billion, causing the Plan to fall from being significantly overfunded in 2007 to being 84 percent underfunded in 2008. See Harley, 284 F.3d at 905 (recognizing that investment losses were cognizable losses to the ERISA plan because they reduced the pool of plan assets). The relief sought is not monetary, but injunctive, and the injury alleged is not speculative. Moreover, the complaint alleges that at least some of the defendants continue to serve as Plan fiduciaries and remain positioned to resume their alleged ERISA violations. Cf. Soehnlen, 844 F.3d at 585 (finding risk of a potential enforcement action too speculative to satisfy requirement of actual or imminent injury "in the absence of any evidence that penalties had been levied, paid, or even contemplated"). Finally, I do not believe that Harley or McCullough controls our decision in this case as to whether plaintiffs have authority under § 1132(a)(3) to sue for injunctive relief. See McCullough, 585 F.3d at 1087 (applying Harley as controlling circuit precedent on the plaintiff's claim for injunctive relief under

§ 1132(a)(2), and specifically noting that the plaintiff had not relied on § 1132(a)(3)).

For these reasons, I believe that the plaintiffs are authorized to sue for injunctive relief under § 1132(a)(3). I would therefore affirm the district court's dismissal of the plaintiffs' claims under § 1132(a)(2), reverse the dismissal of their claims for injunctive relief under § 1132(a)(3), and remand this matter to the district court for further proceedings, including reconsideration of the issue of attorney's fees and costs upon final resolution of the case.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 13-cv-02687

Adetayo Adedipe, James J. Thole, Marlene Jackson, and Sherry Smith, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

U.S. Bank, National Association, et al.,

Defendants.

ORDER
Filed: December 29, 2015

Michelle C. Yau and Mary J. Bortscheller, Cohen Milstein Sellers & Toll PLLC, and June Pineda Hoidal, Zimmerman Reed PLLP, appeared for the Plaintiffs.

Stephen P. Lucke, Thomas P. Swigert and Andrew J. Holly, Dorsey & Whitney LLP, appeared for the Defendants.

Named plaintiffs James Thole and Sherry Smith ("Plaintiffs"), in a putative class action, sued defendants

U.S. Bank, N.A. (the "Bank"), U.S. Bancorp (the Bank's parent company), and multiple individual U.S. Bancorp directors (collectively, "Directors") (all together, "Defendants"), challenging the Defendants' management of a defined benefit pension plan (the "Plan") from September 30, 2007 to December 31 , 2010.[1] The case involves the intricacies of the Employee Retirement Income Security Act of 1974 ("ERISA"). Plaintiffs allege that Defendants violated ERISA Sections 404, 405, and 406, 29 U.S.C. §§ 1104-106, by breaching their fiduciary obligations and causing the Plan to engage in prohibited transactions with a Bank subsidiary, FAF Advisors. These ERISA violations allegedly caused significant losses to the Plan's assets in 2008, resulting in the Plan's underfunded status in 2008 through 2012. *See, e.g.*, Consol. Am. Compl. ("CAC") ¶¶ 167, 170-71, Dkt. No. 92. Plaintiffs seek to recover Plan losses, disgorgement of profits, injunctive relief, and/or other remedial relief pursuant to ERISA Sections 502(a)(2) and 409 (29 U.S.C. § 1109), and also seek equitable relief pursuant to ERISA Sections 502(a)(3). CAC ¶¶ 328-30. "[T]he relief requested in this action is for the benefit of the Plan . . . . " *Id.* ¶ 53.

Defendants filed a motion to dismiss the action for lack of standing ("Motion"), Dkt. No. 210, renewing one of the arguments they had advanced on an earlier motion to dismiss ("2014 Motion"), Dkt. No. 102. The Court granted in part and denied in part Defendants' 2014 Motion. Order, Dkt. No. 146. Of particular relevance, the Court rejected

[1]The Court dismissed named plaintiffs Adedipe and Jackson per the parties' stipulation and dismissed defendant Nuveen Asset Management LLC on its motion. Dkt. Nos. 146, 209.

Defendants' standing arguments based on the record before it, finding that Plaintiffs adequately allege injury, causation, and redressability to support the determination that they had standing when they filed their complaint in September 2013. *Id.* at 11-23. Defendants' "factual attack" was insufficient to undermine that conclusion. *See id.* at 14-15. A year later, Defendants argue that new facts and recent persuasive case law now compel dismissal. The Court finds that Defendants have incorrectly framed the question as a standing inquiry, but for the reasons below, the Court grants Defendants' motion to dismiss for lack of Article III jurisdiction, on the grounds that the action is moot.

Background

In the CAC, Plaintiffs alleged three categories of wrongdoing: (1) the Bank's adoption of a risky strategy of investing Plan assets exclusively in equities and its continued pursuit of that strategy in the face of a deteriorating stock market ("100% Equities Strategy" allegations); (2) the Bank's investment of Plan assets in the Bank subsidiary FAF Advisors ("Affiliated Funds" allegations); and (3) FAF Advisors' actions with regard to a Securities Lending Portfolio ("Securities Lending Program" allegations). *See* Order 4-5. The Court dismissed the 100% Equities Strategy allegations and granted summary judgment for Defendants on the Securities Lending Program

claims, but held that the Affiliated Funds allegations survived in part. *Id.* at 30-31, 34-35, 46.[2] These claims all concern Defendants' alleged mismanagement of the Plan primarily in 2007 to 2008, which allegedly caused significant losses to the Plan and resulted in its fall from overfunded status in 2007 to underfunded status in 2008 and every year through the commencement of the lawsuit. *See* Order 18-19. Plaintiffs allege that the mismanagement continued through 2010. *E.g.*, CAC ¶ 2.

Some context on ERISA may be helpful at this point. Rather than repeat itself, the Court draws from its previous description of the statutory scheme:

> Congress enacted ERISA in 1974 for the "primary purpose" of "protect[ing] individual pension rights." *Harley v. Minnesota Min. and Mfg. Co.* [(*Harley 1*)], 284 F.3d 901, 907 (8th Cir. 2002) (quoting H.R. Rep. No. 93-533 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4639)). To that end, ERISA "regulat[es] the structure and operation of retirement plans." *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994). Among the retirement plans that ERISA regulates are "defined benefit plans" like the Plan. *See* 29 U.S.C. §§ 1002(35), 1002(2)(A), 1003. A defined benefit plan "consists of a general pool of assets"—which "may be funded by employer or employee contributions, or a combination of both"—out of which "a fixed periodic payment" is made

[2] In their briefing on the current Motion, both parties referenced a dispute over the scope of the remaining Affiliated Funds claims; neither party squarely presented that dispute for resolution, and the Court need not resolve it in order to decide the jurisdictional question.

> to a participant upon her retirement. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999) (internal quotation and citation omitted). Owing to the structure of this type of retirement plan, "[n]o [participant] has a claim to any particular asset that composes a part of the plan's general asset pool." *Id.* at 440. Participants in such plans do, however, have "a right to a certain defined level of benefits, known as 'accrued benefits.'" *Id.*
>
> . . .
>
> ERISA requires that the plan be funded in a manner that provides sufficient assets to meet its liabilities, 29 U.S.C. Ch. 18, Subch. I, Subt. B, Pt. 3, and that the plan maintain insurance against underfunding at termination through the Pension Benefit Guaranty Corporation [("PBGC")], 29 U.S.C. Ch. 18, Subch. III.

Order 7-8. The Plan sponsor "typically bears the entire investment risk" and "must cover any underfunding as the result of a shortfall that may occur from the plan's investments." *Harley I*, 284 F.3d at 905 (quoting *Hughes Aircraft*, 525 U.S. at 439). There is an overarching purpose to ERISA' s requirements:

> All of these requirements are means to the end of "guarantee[ing] that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984) (quotation and citation omitted). *See also* 29 U.S.C. § 1001(b)-(c) (declaration that policy of ERISA is

> to "protect . . . the interests of participants in employee benefit plans and their beneficiaries" by "establishing standards of conduct, responsibility, and obligation for fiduciaries," "by requiring [plans] to meet minimum standards of funding," and "by requiring plan termination insurance"); *Lockheed Corp. v. Spink*, 517 U.S. 882, 887-88 (1996) (discussing "key measures" of ERISA that are designed "[t]o increase the chances that employers will be able to honor their benefits commitments—that is, to guard against the possibility of bankrupt pension funds").

Order 8-9.

Whether an ERISA-regulated defined benefit plan is underfunded or overfunded is measured annually pursuant to the statutory scheme. A plan's "funding target attainment percentage" or "FTAP" is "'the ratio (expressed as a percentage)' of 'the value of plan assets for the plan year (as reduced [by certain prefunding and carryover balances])' to 'the present value of all benefits accrued or earned under the plan as of the beginning of the plan year.'" *Id.* at 19 (citing 29 U.S.C. § 1083(d)(l)-(2)). Under ERISA's pension funding provisions, with respect to any defined benefit plan "in which the value of plan assets" is less than "the present value of all benefits accrued or earned under the plan as of the beginning of the year," ERISA obligates the employer to make the "minimum required contributions" necessary to amortize that shortfall over the ensuing seven years. *Id.* at 20 (citing 29 U.S.C. §§ 1082-83). In other words, an employer must make minimum funding contributions if the plan's FTAP is less than 100%, meaning that the plan is underfunded. *Id.* at 21 n.6.

In deciding the standing question that Defendants raised in their 2014 Motion, the Court analyzed whether the Plaintiffs had carried their burden of showing the three elements of Article III standing: (1) that they have personally suffered an "injury in fact" (2) that is "fairly traceable to the challenged action of the defendant" and (3) that is "likely [to] be redressed by a favorable decision." *Id.* at 11-12 (quoting *Braden v. Wal-Mart Stores*, 588 F.3d 585, 591 (8th Cir. 2009)). The Court found that Plaintiffs "do not allege that their benefit levels have actually decreased as a result of the Defendants' alleged misconduct," *id.* at 13, and that as a matter of law they "have no 'claim to any particular asset that composes a part of the [P]lan's general asset pool,'" *id.* (quoting *Hughes Aircraft,* 525 U.S. at 440). Plaintiffs, however, allege that Defendants' conduct caused the Plan to become underfunded in 2008 and remain underfunded through the commencement of the lawsuit. *Id.* at 18-19. The Court found that these allegations, which Defendants' evidence did not overcome, adequately allege an injury in fact: that as measured by ERISA's minimum funding requirements, "the Plan lacked a surplus large enough to absorb the losses at issue." *Id.* at 21. In other words, Plaintiffs' injury in fact was that Defendants' actions caused an "alleged increased risk of default" and "the concomitant increase in the risk that the participants will not receive the level of benefits they have been promised due to the Plan being inadequately funded at termination." *Id.* at 14 (discussing *LaRue v. De Wolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008)).

The Court also found that Plaintiffs adequately allege that the increased risk of default was caused by the De-

fendants' ERISA violations, and that Defendants' asserted facts failed to rebut the allegations. *Id.* at 22-23. Finally, the Court found that the relief Plaintiffs seek—"in particular, the restoration to the Plan of the assets that were allegedly lost as a result of the Defendants' misconduct"—would "remedy the underfunding that is at the root of their injury." *Id.* at 23. The Court concluded that Plaintiffs had made a sufficient showing of constitutional standing. *Id.*

Applicable Standards

Defendants again move the Court to dismiss this action for lack of standing, relying on the factual development that the Plan is now overfunded. Plaintiffs counter that standing is the wrong doctrine to apply in this procedural posture, and that the proper question is whether the case has become moot. Plaintiffs are correct. Standing is assessed as of the time a lawsuit is commenced. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.5 (1992); *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 869 (8th Cir. 2013); *Harley v. Zoesch (Harley II)*, 413 F.3d 866, 872 (8th Cir. 2005). In contrast, mootness is the doctrine that applies when, after a plaintiff with standing files a case presenting a ripe question or controversy, circumstances change such that there is no longer an Article III case or controversy for the court to decide. *E.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000) (contrasting "initial standing to bring suit" with "postcommencement mootness"); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 72 (1997) (holding that "changed circumstances" post-filing "mooted the case stated in her complaint"); *Park v. Forest Serv. of*

United States, 205 F.3d 1034, 1037-38 (8th Cir. 2000).[3] Many decisions describe mootness as "the doctrine of standing set in a time frame," so confusing the two "is understandable." *Laidlaw*, 528 U.S. at 189. Nonetheless, the mootness inquiry, not standing, applies to Defendants' argument that the case should be dismissed because the Plan became overfunded in 2014.

"A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Ayyoubi v. Holder*, 712 F.3d 387, 391 (8th Cir. 2013) (quoting *Already, LLC v. Nike,* 133 S. Ct. 721, 726 (2013). It becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (internal quotation marks omitted) (quoting *Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)); *Deerbrook Pavilion, LLC v. Shalala*, 235 F.3d 1100, 1103 (8th Cir. 2000). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox*, 132 S. Ct. at 2287 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984)).

Moreover, where the defendant initiates the intervening event or events that might moot a case, the defendant

[3] Defendants primarily rely on a Third Circuit decision involving similar ERISA claims, *Perelman v. Perelman*, 793 F.3d 368 (3d Cir. 2015), to argue that the standing doctrine applies where a plan that was underfunded when a lawsuit was commenced becomes overfunded during the course of litigation. The *Perelman* opinion, however, did not analyze or even note when the plan at issue became overfunded, and therefore is not good authority for the application of the standing doctrine to the facts of this case.

bears a difficult burden under what is called the "voluntary cessation" exception to mootness. *Already*, 133 S. Ct. at 727. A defendant "claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (quoting *Laidlaw*, 528 U.S. at 190).

Where, as here, Defendants mount a "factual attack" on the court's subject matter jurisdiction by drawing on materials outside the CAC, Plaintiffs do not receive "the benefit of 12(b)(6) safeguards." *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990).

Mootness Analysis

The Court begins its analysis of whether an Article III case or controversy continues to exist by applying the general principles of mootness, then considers whether Defendants bear the "formidable burden" imposed by the voluntary cessation doctrine. Under both analyses, the Court concludes that it no longer has Article III jurisdiction over Plaintiffs' claims.

A. Concrete Interest

Whether Plaintiffs continue to have a "concrete interest, however small, in the outcome of the litigation," *Knox*, 132 S. Ct. at 2287, turns on whether they still have an interest in the relief they seek in order to remedy the injury caused by Defendants' alleged misconduct. As discussed above, Plaintiffs' injury in fact is the increased risk of Plan default, or, put another way, the increased risk

that Plan beneficiaries will not receive the level of benefits they have been promised.[4] Plaintiffs have no legal interest in any particular asset in the Plan, nor do they have a legal interest in any Plan surplus. *Hughes Aircraft*, 525 U.S. at 440; *see also LaRue*, 552 U.S. at 255.

1. The Plan Is Overfunded

Under Eighth Circuit precedent, Plaintiffs, as participants in a defined benefit plan, do not suffer harm for purposes of Article III standing analysis where the plan maintains a surplus under relevant ERISA valuation methods at the time the complaint is filed. *McCullough v. AEGON USA Inc.*, 585 F.3d 1082, 1084 (8th Cir. 2009); *Harley II*, 413 F.3d at 869; Order 16-17. The key question in this case is whether the Court retains Article III jurisdiction now that the Plan has become overfunded. Here, as alleged, the Plan became underfunded in 2008 and remained underfunded through the time when Plaintiffs brought suit.

Defendants, however, have presented evidence sufficient to show that the Plan is now overfunded. The Plan had an FTAP of 105.18% for Plan Year 2014 and an even higher FTAP of 115.30% for Plan Year 2015. Ellison Ltr. Exs. A, B, Dkt. No. 228. FTAP and ERISA's minimum funding requirements are "relevant measures" for assessing whether a plan has a surplus for purposes of Article III jurisdictional analysis. Order 20-21; *see also Perelman*, 793 F.3d at 375 ("[T]he controlling yardstick

[4]Plaintiffs do not allege that any Plan beneficiary has suffered a decrease in benefits. Order 13. Defendants offer uncontested evidence that the Plan has to date paid every named Plaintiff all benefits to which he or she was entitled. Smith Decl. ¶¶ 2-11, Dkt. No. 212.

here is provided by the finely tuned framework established by Congress."); *Harley I*, 284 F.3d at 908 (assessing the plan's surplus by the statutory measures for required contributions). Further, and as the Court previously found, Plaintiffs have not alleged or offered any evidence to suggest that "U.S. Bancorp is incapable of meeting the minimum funding obligations or paying the PBGC [insurance] premiums that ERISA imposes for the purpose of bolstering the financial soundness of underfunded defined benefit plans." Order 15. The financial strength of a plan sponsor is relevant to determining if there is any increased risk of plan default once a plan is overfunded. *Harley I*, 284 F.3d at 907; *see also* Order 17 (noting that "the financial health of the plan sponsor" is not "irrelevant").

Plaintiffs contest the conclusion that the Plan is now overfunded. First, they argue in several footnotes that FTAP is not the only relevant measure for whether the Plan has surplus and that the Plan is underfunded by the following measures: "the FTAP funding ratio without adjusted interest rates, which is 80% for plan year 2014," and "the financial reporting funding ratio, which is 60% as of December 31, 2014" (citing figures in U.S. Bancorp's 2014 Annual Report). *E.g.*, Pls.' Opp. 10 n.10. Plaintiffs do not explain why the Court should find these measures to be relevant under the ERISA scheme. The current statutory scheme mandates the use of adjusted interest rates for assessing minimum funding requirements. Highway & Transp. Funding Act of 2014 (HAFTA), Pub. L. No. 113-159, § 2003(b)(l), 128 Stat. 1849 (2014) (modifying the MAP-21 rates in ERISA Section 303(h)(2), 29 U.S.C. § 1083(h)(2)); Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. No. 112-141, § 40211(b)(l), 126

Stat. 405 (2012) (amending 29 U.S.C. § 1083(h)(2), which dictates actuarial assumptions and methods). Plaintiffs' proposed use of unadjusted interest rates is thus not a relevant measure for determining minimum funding requirements under ERISA. *See* Order 20 (rejecting Defendants' proposed AFTAP measurement by the same reasoning). Similarly, the ratio drawn from figures in the annual report is not a relevant measure because it too diverges from ERISA's specified methods for calculating minimum funding requirements. *Harley II*, 413 F.3d at 872. In addition, Plaintiffs question the accuracy of the FTAP figures Defendants provided and request additional jurisdictional discovery on their accuracy, but do not provide any compelling reasons to doubt the accuracy of the figures, which were prepared by a third-party actuary. Indeed, the Form 5500 that Defendants submitted to establish that the Plan's FTAP for Plan Year 2014 exceeded 100% is the same form that Plaintiffs rely on to allege that in previous years, the Plan was underfunded; it is unclear why the form and calculations should be discounted when Defendants cite them but not when Plaintiffs do. *See* CAC ¶ 20. Plaintiffs' arguments against the conclusion that the Plan is now overfunded are thus unsuccessful.

2. Consequences of the Plan's Overfunded Status

Because the Plan is overfunded, Plaintiffs no longer have a concrete interest in any monetary relief that might be awarded to the Plan if they prevailed on the merits. *Knox*, 132 S. Ct. at 2287; *Hughes Aircraft*, 525 U.S. at 440. Plaintiffs seek the restoration of losses to the Plan caused by Defendants' alleged violations of ERISA Section 405; the disgorgement of any profits, ill-gotten gains, or fees

Defendants obtained through the use of Plan assets in violation of ERISA Sections 404 and 406; and legal fees and costs. Pls.' Opp. 15-16; CAC §X ¶¶ B, C, F, H. But any money that could be awarded would simply add to the Plan's now-existing surplus, in which Plaintiffs have no legal interest. *Hughes Aircraft*, 525 U.S. at 440; *Harley I*, 284 F.3d at 906; Order 13; *see also Perelman*, 793 F.3d at 375; *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013). Because they would have no interest in it, such monetary relief would not provide these individual plaintiffs any effectual relief. Moreover, to the extent that the Plan becomes underfunded again in the future, raising anew concerns about the security of Plan participants' future stream of benefits, the causal connection between the new increased risk of default and the Defendants' alleged violations in 2007 through 2010 would be tenuous at best.

Plaintiffs also seek equitable and injunctive relief and a declaration that Defendants breached their fiduciary duties. Pls.' Opp. 15-16; CAC §X ¶¶ A, D, E, G. For example, they seek an injunction preventing Plan fiduciaries from pursuing in the future the 100% Equities Strategy—which Plaintiffs allege was abandoned in late 2010 or 2011, CAC ¶¶ 145-46—and "preventing disloyal decision-making," and an order appointing a new Plan manager or requiring Defendants to diversify Plan assets. Plaintiffs seek this equitable and injunctive relief pursuant to ERISA Sections 409, 502(a)(2) and 502(a)(3). CAC ¶¶ 19, 329-33. This relief, like the requested monetary relief, aims to remedy Defendants' alleged violations of ERISA Sections 404, 405, and 406. But their requests for injunctive and other equitable relief under Sections 502(a)(2) and 409 to remedy the same alleged violations do not suffice to create an Article III injury where the Plaintiffs

lack an interest in monetary relief. *McCullough*, 585 F.3d at 1085, 1087. The remaining question is whether Plaintiffs maintain a concrete interest in the case through their requests for equitable relief pursuant to Section 502(a)(3), including for disgorgement and the imposition of a constructive trust. The Eighth Circuit has not directly addressed this question. *See id.* at 1087. It has, however, addressed the question of when Section 502(a)(3) relief is available to an ERISA plan participant plaintiff. The Eighth Circuit has held that where a plaintiff would be "provided adequate relief by her right to bring a claim" under one of the other 502(a) subsections, "equitable relief would not be appropriate" and therefore would not be available under Section 502(a)(3). *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)). In this case, Plaintiffs seek equitable or remedial relief under Section 502(a)(2), including equitable or remedial relief under Section 409 to remedy breaches of fiduciary duty. CAC ¶ 329. They seek the same type of relief under Section 502(a)(3), also to remedy breaches of fiduciary duty under Sections 404, 405, and 406. CAC ¶¶ 328, 330. Because the relief available under Section 502(a)(2) would be adequate, the same type of relief under Section 502(a)(3) would not be "appropriate." *Wald*, 83 F.3d at 1006. Therefore, Plaintiffs' request for relief under Section 502(a)(3) cannot preserve a concrete interest in this case.

Finally, Plaintiffs' requests for fees and costs cannot, by themselves, "save the case from mootness." *Hechenberger v. W Elec. Co., Inc.*, 742 F.2d 453, 455 n.5 (8th Cir. 1984); *see also Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990) ("This interest in attorney's fees is,

of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim . . . .").

Plaintiffs rely on *Pender v. Bank of America Corp.*, 788 F.3d 354 (4th Cir. 2015), and *Lupiani v. Wal-Mart Stores, Inc.*, 435 F.3d 842, 847 (8th Cir. 2006), to argue that their requests for relief keep this case live. Pls.' Opp. 17-18. Because those cases did not turn on plaintiffs' rights with regard to defined benefit plans, they are unpersuasive. *See Pender*, 788 F.3d at 358 (stating that plaintiffs had had separate accounts under a defined contribution plan before the defendants allegedly wrongfully induced them to transfer their account balances to a different plan); *Lupiani*, 435 F.3d at 844 (referring to defined contribution plans, *e.g.*, 401(k) pension plan). Those plaintiffs' interests in their separate accounts under a defined contribution plan are fundamentally different than Plaintiffs' interests with regard to the Plan, a defined benefit plan. *See LaRue*, 552 U.S. at 255; *Hughes Aircraft*, 525 U.S. at 439-40.

The Court is mindful that a mootness analysis should not become an evaluation of the merits, and that a claim "cannot be dismissed as so implausible that it is insufficient to preserve jurisdiction." *Chafin v. Chafin*, 133 S. Ct. 1017, 1024 (2013). That is not the case here. Rather, as a matter of law in the intricate scheme governing defined benefit plans under ERISA, now that the Plan is overfunded, Plaintiffs do not have a concrete interest in the monetary damages they seek, and their other requests for relief do not work independently to keep the controversy live. This conclusion is consistent with ERISA's purposes. Allowing participants in an overfunded plan to pursue their claims "would not advance

ERISA's primary purpose of protecting individual pension rights, because the pension rights of such plaintiffs are fully protected, and would if anything be adversely affected by subjecting"—or continuing to subject—"the Plan and its fiduciaries to costly litigation." *McCullough*, 585 F.3d at 1087 (internal quotation marks omitted) (quoting *Harley I*, 284 F.3d at 907).

3. Plaintiffs' Alternative Arguments

In another attempt to overcome the significance of the Plan's overfunded status, Plaintiffs argue that regardless of Plan funding levels, they continue to have an Article III concrete interest because Defendants' alleged breaches of their fiduciary duties to the Plan constitute an invasion of a legally protected interest under ERISA. They rely primarily on *Hammer v. Sam's East, Inc.*, 754 F.3d 492, 498 (8th Cir. 2014), in which the Eighth Circuit stated that "the actual-injury requirement [for Article III standing] may be satisfied *solely* by the invasion of a legal right that Congress *created*." That statement does not extend as far as Plaintiffs wish. Statutory standing and constitutional standing are not necessarily coterminous; even if a plaintiff satisfies every statutory element, if she did not suffer an injury in fact, she does not have Article III standing. *E.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) ("Statutory broadening of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.") (internal brackets omitted). *Hammer* does not alter this bedrock principle. *Hammer*

involved the question of whether plaintiffs had alleged injury in fact sufficient to establish Article III standing for their claims under the Fair and Accurate Credit Transactions Act, which provides for statutory damages if a company prints a person's credit card number on his or her receipt. 754 F.3d at 496, 498-99. In holding that the plaintiffs had standing, the Eighth Circuit stressed that they had alleged "actual, individualized" harm because "it was their own receipts" that contained numbers printed illegally. *Id.* at 499. Plaintiffs in this case have not alleged such an "actual, individualized" harm, because no one asserts that the Plan has failed to pay any of his or her benefits. Rather, they assert a more general increased risk of Plan default. The other cases on which Plaintiffs rely are likewise distinguishable. *Charvat v. Mutual First Federal Credit Union*, 725 F.3d 819, 824 (8th Cir. 2013) (plaintiff personally did not receive required notice and was charged a fee); *Oti Kaga, Inc. v. S. Dakota Housing Devel. Authority*, 342 F.3d 871, 878 (8th Cir. 2003) (plaintiff suffered increased costs and lost opportunities).[5]

Lastly, Plaintiffs assert that their claims are not moot because, even if the Plan is overfunded, they separately have standing to bring the fiduciary duty claims under common law trust principles. They contend that ERISA codifies the common law of trusts; that at common law, trust beneficiaries suffer an injury in fact when trustees

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[5] *Charvat* and *Hammer* are further distinguishable because they involved claims for statutory damages. 725 F.3d at 823 ("Our Court, as well, has held that plaintiffs need not show actual damages, beyond a statutory violation, in order to recover statutory damages."); 754 F.3d at 500 ("We reject Sam's Club's invitation to foreclose statutory damages in the absence of actual damages when the language of the FCRA liability provision dictates otherwise.").

breach their fiduciary duties; and that trust law precedent should be "well nigh conclusive" on Article III questions. Pls.' Opp. 28-31 (quoting *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 285 (2008)). Although much of ERISA reflects its roots in the common law of trusts, "trust law does not tell the entire story," and courts must "bear[] in mind the special nature and purpose of employee benefit plans." *Varity*, 516 U.S. at 497. Eighth Circuit precedent specific to ERISA defined benefit plans defeats Plaintiffs' argument. In *Harley I*, although the Eighth Circuit recognized that "the law of trusts is the starting point in interpreting and applying ERISA's fiduciary duties," it dismissed the claims for lack of standing where the plan was overfunded. 284 F.3d at 907. Then, after *Sprint* was decided, the Eighth Circuit in *McCullough* again considered the question of Article III standing in connection with an overfunded plan, and held that *Sprint* did not alter the *Harley I* rule. 585 F.3d at 1086-87. Plaintiffs cannot overcome the precedential weight of *Harley I* and *McCullough* in the ERISA context. *Accord David*, 704 F.3d at 338 (rejecting similar argument); *Lee v. Verizon Commc'ns, Inc.*, No. 14-10553, 2015 WL 4880972, at *13 (5th Cir. Aug. 17, 2015) ("[O]ur sister circuits . . . have held that fiduciary misconduct, standing alone without allegations of impact on individual benefits, is too removed to establish the requisite injury.") (collecting cases).

B. Voluntary Cessation Doctrine

Plaintiffs further argue that even if the case is moot, Defendants cannot meet their "formidable burden" under the voluntary cessation exception to mootness. *Already*, 133 S. Ct. at 727. The exception applies when the defendant stops its offending conduct during the course

of litigation and then moves to dismiss the case as moot, and reflects courts' concern that a defendant could "engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Id.* To prevent this gamesmanship, the defendant must show "that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (quoting *Laidlaw*, 528 U.S. at 190). There must be more than a "speculative contingenc[y]" or "speculative possibility" that the unlawful activity will recur. *McCarthy v. Ozark Sch. Dist.*, 359 F.3d 1029, 1036-37 (8th Cir. 2004); *Deakins v. Monaghan*, 484 U.S. 193, 200 n.4 (1988). Concerns about future misconduct that are "too conjectural or hypothetical to present an actual controversy" will not suffice. *Ayyoubi v. Holder*, 712 F.3d 387, 391 (8th Cir. 2013). The voluntary cessation doctrine "does not allow a plaintiff 'to rely on theories of Article III injury that would fail to establish standing in the first place.'" *Id.* at 392 (quoting *Already*, 133 S. Ct. at 730). If the Court is satisfied by the defendant's showing, the case is moot. *Already*, 133 S. Ct. at 729.

The doctrine appears to apply not just when a defendant stops its conduct, but also when he takes affirmative steps to remedy the alleged wrong and claims that those steps have mooted the case. *See Knox*, 132 S. Ct. at 2287 (applying the doctrine where, after nonunion employees filed suit to challenge a fee increase, the union sent out a notice offering a full refund to all class members, but resting its holding that the case was not moot on other grounds); *Indigo LR LLC v. Advanced Ins. Brokerage of Am., Inc.*, 717 F.3d 630, 634-35 (8th Cir. 2013) (citing the doctrine and finding that a suit for the reimbursement of

funds was moot where a third party, not the defendant, had reimbursed the only out-of-pocket amounts of which the plaintiff offered proof).

In this case, Plaintiffs argue that if the Plan is found to be overfunded, its overfunded status resulted from Defendants' affirmative payments of amounts far greater than the minimum contributions required under ERISA for the past two years, and suggest that Defendants made these excess payments so they could move to dismiss the case as moot. Pls.' Opp. 20-21. As Defendants point out, there is no evidence in the record to support Plaintiffs' speculation about Defendants' motives for making large contributions to the Plan.

Nonetheless, assuming that the voluntary cessation doctrine does apply because Defendants' payments (whatever their motivation) have caused the Plan to become overfunded, Defendants have met their burden. Taking into consideration the CAC's allegations and the facts offered by both parties on Defendants' Motion, the Court "is satisfied that it is 'absolutely clear' that the allegedly unlawful activity cannot be reasonably expected to recur." *Already*, 133 S. Ct. at 729. Plaintiffs allege that Defendants unlawfully pursued the risky 100% Equities Strategy, which caused the Plan to suffer huge losses in 2008 and which the Defendants abandoned in 2011 when the Plan "meaningfully beg[a]n to diversify into asset classes other than equities." CAC ¶¶ 145-46; Order 22-23. They do not allege, nor have they offered any evidence to suggest, that Defendants have re-adopted a 100% Equities Strategy for the Plan since 2011. Plaintiffs also allege that Defendants improperly appointed the Bank subsidiary FAF Advisors as the Plan manager in 2007 and that

FAF Advisors improperly invested Plan funds in the subsidiary's own equities-backed mutual funds from 2007 to 2011. Order 5, 31-32; *e.g.*, CAC ¶¶ 143, 146. They allege that after the Bank sold FAF Advisors in 2010, Defendants "ceased to use parties in interest to manage a significant portion of the Plan's assets." CAC ¶ 198. In addition, Plaintiffs allege ERISA violations based on the Plan's participation in FAF Advisors' Securities Lending Portfolio from 2005 to 2010, again causing Plan losses in 2008. Order 5-6; CAC ¶ 174. Thus, Plaintiffs allege that Defendants' misconduct ended by 2011 at the latest and do not allege any continuing misconduct. Nor have Plaintiffs offered anything but speculation that the alleged misconduct will resume.[6] Their concerns about Defendants' potential future misconduct are "too conjectural or hypothetical to present an actual controversy" and cannot save the case from mootness now that the Plan is overfunded. *Ayyoubi*, 712 F.3d at 391. "A speculative possibility is not

[6]The one concrete example Plaintiffs cited in opposing this Motion was a red herring. At oral argument, they pointed to a line in the Plan's 2014 Form 5500 showing its continued investment in a First American Funds, Inc. fund, the "Prime Obligation Fund Cl Z," and argued that this line showed that Defendants' misconduct persisted to this day. *See* Ellison Ltr. Ex. A 26. Plaintiffs' allegations, however, concerned FAF Advisors' equities-backed mutual funds, which the cited fund is not. The pertinence of this distinction is evidenced by the fact that the Plan has invested in the Prime Obligation Fund Cl Z since at least 2007, see Dkt. No. 108-1, Ex. I 41, yet Plaintiffs did not allege that the investment in this fund, unlike others, was problematic, see CAC ¶ 139. This one example illustrates the absence of facts or specific allegations that could bring Plaintiffs' concerns out of the realm of the hypothetical. It is not Plaintiffs' burden to prove that the voluntary cessation doctrine prevents dismissal for mootness, but the Court is aware of nothing in the record showing more than a "speculative possibility" that Defendants' unlawful activity will recur.

a basis for retaining jurisdiction over a moot case." *McCarthy*, 359 F.3d at 1036.

Conclusion

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Defendants' Motion to Dismiss for Lack of Standing Under Rule 12(b)(1) [Dkt. No. 210] is GRANTED.
2. The action is DISMISSED AS MOOT.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 29, 2015

s/ Joan N. Erickson
JOAN N. ERICKSON
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Case Number: 13-cv-2687

Adetayo Adedipe, James J. Thole, Marlene Jackson, and Sherry Smith, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

U.S. Bank, National Association, individually and as successor in interest to FAF ADVISORS, INC., U.S. BANCORP, NUVEEN ASSET MANAGEMENT, LLC, as successor in interest to FAF ADVISORS, INC., RICHARD K. DAVIS, DOUGLAS M. BAKER, JR., Y. MARC BELTON, PETER H. COORS, JOEL W. JOHNSON, OLIVIA F. KIRTLEY, O'DELL M. OWENS, CRAIG D. SCHNUCK, ARTHUR D. COLLINS, JR., VICTORIA BUYNISKI GLUCKMAN, JERRY W. LEVIN, DAVID B. O'MALEY, PATRICK T. STOKES, RICHARD G. REITEN, WARREN R. STALEY, and JOHN and JANE DOE 1-20,

Defendants.

JUDGMENT IN A CIVIL CASE

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. Defendants' Motion to Dismiss for Lack of Standing Under Rule 12(b)(1) [Dkt. No. 210] is GRANTED.
2. The action is DISMISSED AS MOOT.

December 29, 2015
Date

RICHARD D. SLETTEN, CLERK

s/Thomas S. Schappa
(By) Thomas S. Schappa, Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16-1928

James J. Thole and Sherry Smith, individually and on behalf of all others similarly situated

Appellants

v.

U.S. Bank, National Association, individually and as successor in interest to FAF Advisors, Inc. and U.S. Bancorp

Appellees

Nuveen Asset Management, LLC, as successor in interest to FAF Advisors, Inc.

Richard K. Davis, et al.

Appellees

AARP, et al.

Amici on Behalf of Appellant(s)

Chamber of Commerce of the United States of America

Amicus on Behalf of Appellee(s)

Appeal from U.S. District Court for the District of Minnesota – Minneapolis
(0:13-cv-02687-JNE)

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

Judge Kelly and Judge Stras would grant the petition for rehearing *en banc*. Judge Benton did not participate.

February 22, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX E

1. 29 U.S.C. 1109(a) provides:

Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

2. 29 U.S.C. 1132(a) provides in pertinent part:

Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

* * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * * * *

3. Article III, Section 2 of the United States Constitution provides:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made * * * *"