APPENDIX

APPENDIX

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 18-2781

Francesca Allen, individually and on behalf of all others similarly situated and on behalf of the Wells Fargo & Company 401(k) Plan; John Sterling Ross, and all other individuals similarly situated; Mary Lou Shank
Plaintiffs – Appellants

v.

Wells Fargo & Company; Wells Fargo Bank NA; Wells Fargo Director of Human Resources; Wells Fargo Director of Compensation and Benefits; Wells Fargo Employee Benefits Review Committee; Lloyd H. Dean; Susan E. Engel; Donald M. James; Stephen W. Sanger; John Does, 1-30; John G. Stumpf; Hope A. Hardison; Justin C. Thornton; Greatbane Trust Company; John Does; Richard Roes; Hope Hardison; Timothy J. Sloan; David A. Hoyt; Michael J. Heid; Frank Codel; Justin C. Thornton; John Shrewsberry; Kevin Oden; Patricia Callahan; Stanhope Kelly; Dawn Martin Harp; Suzanne Ramos; James Steiner; George Wick; Martin Davis; Thomas Wolfe
Defendants – Appellees

Appeal from United States District Court
for the District of Minnesota

Submitted: April 15, 2020
Filed: July 27, 2020

Before: SHEPHERD, GRASZ, and KOBES, Circuit Judges.

SHEPHERD, Circuit Judge.

Appellants Francesca Allen, John Sterling Ross, and Mary Lou Shank appeal the district court[1] order dismissing their second amended complaint brought pursuant to sections 409 and 502 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1109 and 1132, against Appellees Wells Fargo & Company (Wells Fargo) and fiduciaries of Wells Fargo's 401(k) plan. Having jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

I.

We recite the facts as alleged in the second amended complaint, viewing them in the light most favorable to Appellants. Davenport v. Farmers Ins. Grp., 378 F.3d 839, 841 (8th Cir. 2004).

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[1] The Honorable Patrick J. Schiltz, United States District Judge for the District of Minnesota.

A.

Wells Fargo sponsors a 401(k) plan (the Plan) that allows its employees to save for retirement by investing a portion of their compensation in one or more investment funds. The Plan is a "defined contribution" benefit plan and is tax qualified under the Internal Revenue Code as both an employee stock ownership plan (ESOP) and a 401(k)-qualified cash or deferred arrangement. Eligible employees participate in the Plan by contributing a percentage of their compensation to the Plan, and Wells Fargo matches employee contributions up to a specified percentage.

Plan participants may invest their contributions in any of the investment funds offered by the Plan. Among those investment fund options are the Wells Fargo ESOP Fund and the Wells Fargo Non-ESOP Fund (together, the Wells Fargo Stock Funds), both of which invest primarily in Wells Fargo stock. In addition, all employer matching contributions are automatically invested in the Wells Fargo Stock Funds. Accordingly, at any given time, a large portion of the Plan's assets is invested in Wells Fargo stock.

B.

This appeal arises out of the unauthorized-accounts scandal at Wells Fargo. As early as 2004, Wells Fargo, at its senior management's direction, engaged in a practice of imposing unreasonably high sales quotas on its branch employees and then threatening those employees with termination if they failed to meet those unrealistic quotas. Through this aggressive sales program, Wells Fargo pressured and induced thousands of its employees to engage in widespread unlawful and unethical sales practices, including using confidential, personal financial information of Wells Fargo customers to open over 3.5

million unauthorized customer bank accounts and credit cards.

The Wells Fargo fraud was not disclosed to the public until September 8, 2016, when federal banking regulators announced that Wells Fargo had been fined $185 million. The initial public disclosure of the fraud caused the market value of Wells Fargo's stock to drop drastically—with Wells Fargo losing more than $18 billion in market capitalization between the close of market on September 7, 2016 and September 15, 2016—and Plan participants consequently suffered significant losses.

Following the public disclosure of the fraud, Appellants—former and current employees of Wells Fargo and participants in the Plan—brought an action on behalf of themselves, the Plan, and all persons who were participants of the Plan "at any time between January 1, 2014 through September 15, 2016 . . . and whose Plan accounts suffered losses . . . through investments in Wells Fargo" Stock Funds. In their first amended complaint, Appellants brought claims of breach of the duty of prudence and breach of the duty of loyalty pursuant to sections 409 and 502 of ERISA, as well as derivative claims of co-fiduciary liability and breach of the duty to monitor fiduciaries. Specifically, they alleged Appellees knew as early as 2005 that Wells Fargo's incentive structure was inducing the company's employees to engage in widespread and ongoing unethical and unlawful sales practices, and that such practices were artificially inflating the market value of Wells Fargo's stock. Appellants also alleged that Appellees knew as early as 2013 that a government regulator was investigating Wells Fargo's possible misconduct and, thus, Appellees knew or should have known that public disclosure of the fraud was inevitable. Appellants alleged that, by failing to take corrective measures to protect the Plan participants, such as publicly disclosing Wells Fargo's unethical sales practices prior to September 2016, freezing investment in the Wells Fargo Stock Funds, or purchasing a hedging product, Appellees breached their duties of prudence and loyalty under ERISA.

The district court granted Appellees' motion to dismiss the first amended complaint. The court found that Appellants' allegations with respect to their claim of breach of the duty of prudence did not satisfy the pleading requirements under Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014), because Appellants failed to plausibly allege that a prudent fiduciary in Appellees' position could not have concluded that Appellants' proposed alternative actions would do more harm than good to the Wells Fargo Stock Funds. Thus, the court dismissed that claim with prejudice. The court also found that Appellants had not pled a freestanding claim of breach of the duty of loyalty and dismissed that claim without prejudice.

Appellants then filed a second amended complaint, alleging that Appellees breached their duty of loyalty by failing to disclose the unethical sales practices, freeze investment in the Wells Fargo Stock Funds, or avoid conflicts of interest.[2] Appellees moved to dismiss, arguing that the court should apply the Dudenhoeffer pleading standard not only to the claim of breach of the duty of prudence, but also to the claim of breach of the duty of loyalty. They argued that, under that standard, the court should dismiss Appellants' claim of breach of the duty of loyalty for the same reasons it dismissed their claim of

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[2] Appellants also re-plead their claim of breach of the duty of prudence and their derivative claims.

breach of the duty of prudence. Further, they argued that, even if the Dudenhoeffer pleading standard does not apply to the claim of breach of the duty of loyalty, the court should nonetheless dismiss that claim.

The district court granted the motion to dismiss the second amended complaint, finding that, although Dudenhoeffer does not apply to a claim of breach of the duty of loyalty, Appellants' allegations are nonetheless insufficient to plausibly plead that Appellees breached their duty of loyalty. Further, the court found that, because Appellants fail to plausibly allege that Appellees breached their fiduciary duties under ERISA, their derivative claims also fail. This appeal follows.

II.

Appellants challenge the district court's grant of Appellees' motion to dismiss the second amended complaint pursuant to Fed. R. Civ. P. 12(b)(6). Specifically, they argue that the district court erred in finding that Appellants fail to plausibly allege claims of breach of the duty of prudence and of breach of the duty of loyalty under ERISA. We review de novo a district court's grant of a motion to dismiss for failure to state a claim, assuming all factual allegations as true and construing all reasonable inferences in the light most favorable to Appellants, the nonmoving party. Usenko v. MEMC LLC, 926 F.3d 468, 472 (8th Cir. 2019).

A.

ERISA imposes a duty of prudence on plan fiduciaries, including ESOP fiduciaries, which requires that they manage their plans with "care, skill, prudence, and diligence[.]" 29 U.S.C. § 1104(a)(1)(B); see Dudenhoeffer, 573 U.S. at 411-12. But when ESOP fiduciaries are alleged to have inside information that a stock is overpriced, they confront a unique conflict between securities laws and their duty of prudence. See Amgen Inc. v. Harris, 136 S. Ct. 758, 759 (2016) (per curiam). Thus, the Supreme Court has established a demanding pleading standard for situations in which inside information forms the basis of an imprudence claim:

> To state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.

Dudenhoeffer, 573 U.S. at 428. Three considerations "inform the requisite analysis." Id. First, in deciding whether a complaint states a claim, courts must bear in mind that ERISA's duty of prudence cannot require the ESOP fiduciary to perform an action that would violate securities laws. Id. Second, "courts should consider the extent to which an ERISA-based obligation. . . could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws." Id. at 429.

> Third, lower courts faced with such claims should also consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position *could not* have concluded that [the alternative action]. . . would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund.

Id. at 429-30 (emphasis added). In Amgen, the Supreme Court reaffirmed that a complaint must "'plausibly allege[]' that a prudent fiduciary in the same position 'could not have concluded' that the alternative action 'would do more harm than good.'" 136 S. Ct. at 760 (quoting Dudenhoeffer, 573 U.S. at 429-30) (finding the Ninth Circuit failed to properly evaluate complaint because it failed to assess whether complaint plausibly alleged that a prudent fiduciary in same position could not have concluded that alternative action would do more harm than good). Determining whether a plaintiff has met this pleading standard is a fact-based inquiry that "focuses on the information available to the fiduciary at the time of the relevant investment decision." Usenko, 926 F.3d at 473.

On appeal, Appellants limit their argument to two proposed alternative actions: public disclosure of the unethical sales practices, and freezing purchases in the Wells Fargo Stock Funds. Because Appellees could not have implemented a purchase freeze without also disclosing Wells Fargo's unethical sales practices, we focus our analysis on the public-disclosure alternative. See Saumer v. Cliffs Natural Res. Inc., 853 F.3d 855, 864-65 (6th Cir. 2017) (noting that implementing a purchase freeze without explanation might be even worse than just disclosing the negative information because it signals to the market that something may be deeply wrong inside the company without giving the market enough information to gauge the stock's true value).

Most circuit courts to consider an imprudence claim based on inside information post-Dudenhoeffer have rejected the argument that public disclosure of negative information is a plausible alternative, finding that a prudent fiduciary could readily conclude that disclosure would do more harm than good "by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." Singh v. RadioShack Corp., 882 F.3d 137, 149 (5th Cir. 2018) (per curiam) (quoting Dudenhoeffer, 573 U.S. at 430); see Saumer, 853 F.3d at 864 (finding that the "fiduciaries could have concluded that divulging inside information . . . would have collapsed Cliffs's stock price, hurting participants already invested in the ESOP"); Whitley v. BP, P.L.C., 838 F.3d 523, 529 (5th Cir. 2016) (finding "that a prudent fiduciary could very easily conclude that [disclosure of such information] *would* do more harm than good").

Appellants argue that the present case is distinguishable, however, because they allege Appellees knew or should have known that public disclosure of the fraud was inevitable and that, based on general economic principles, the longer the fraud is concealed, the greater the harm to the company's reputation and stock price. In Martone v. Robb, the Fifth Circuit considered allegations and arguments similar to those presented by Appellants. 902 F.3d 519 (5th Cir. 2018). Specifically, the Martone plaintiff argued that a prudent fiduciary in the defendants' position could not conclude that earlier disclosure of the fraud would do more harm than good because it is a "widely-known and generally-applicable" economic principle that "the longer the fraud persists, the harsher the correction tends to be, usually because a prolonged fraud necessarily means that long-term damage is also done to a fraudster's reputation for trustworthiness." Id. at 526-27 (internal quotation marks omitted). In rejecting this argument, the Fifth Circuit reasoned that if such a principle were as widely known and generally applicable as the plaintiff suggested, then it would apply in virtually every fraud case. But, the court explained, such a principle cannot apply in virtually every fraud case because, in Whitley, the Fifth Circuit had already found that a prudent fiduciary could easily conclude that taking an action that might expose fraudulent conduct would do more harm than good. Id.; see Whitley, 838 F.3d at 529. Accordingly, the court found that the plaintiff failed to plausibly allege that a prudent fiduciary in the defendants' position could not conclude that earlier disclosure of negative information would do more harm than good to the fund.

Similarly, in Laffen v. Hewlett-Packard Co., the Ninth Circuit rejected the plaintiff's proposed alternative action of early disclosure of fraud, finding that a prudent fiduciary in the same circumstances as the defendant could conclude that earlier disclosure, as opposed to later disclosure following a full investigation, would do more harm than good. 721 F. App'x 642, 644 (9th Cir. 2018) (per curiam) ("Laffen's proposed alternative faults Defendants-Appellees for first investigating the whistleblower's allegations before taking action, but a prudent fiduciary must first investigate problems before acting.").

The sole instance in which a circuit court has found that a plaintiff plausibly alleged that a prudent fiduciary in the defendant's position could not conclude that earlier disclosure of fraud would do more harm than good is Jander v. Retirement Plans Committee of IBM, 910 F.3d 620 (2d Cir. 2018), vacated and remanded, 140 S. Ct. 592, reinstated, 962 F.3d 85 (2d Cir. 2020). In fact, Jander is the only case in which a circuit court has found the Dudenhoeffer pleading standard to be satisfied. In Jander, the Second Circuit found persuasive the plaintiff's allegation that "the eventual disclosure of a prolonged fraud causes reputational damage that increases the longer the fraud goes on," noting that the plaintiff had "cit[ed] economic analyses that show that reputational harm is a common result of fraud and grows the longer the fraud is concealed[.]" Id. at 629 (internal quotation marks omitted). The court also found particularly important the plaintiff's allegation that the defendant knew that disclosure was inevitable because IBM was likely to sell the business and would be unable to hide its overvaluation from the public at that point. Id. The court determined that when the stock drop is inevitable, "it is far more plausible that a prudent fiduciary would prefer to limit the effects of the stock's artificial inflation on the ESOP's beneficiaries through prompt disclosure." Id. at 630.

Turning to the present case, we find that Appellants have failed to plausibly allege that a prudent fiduciary in Appellees' position could not have concluded that earlier disclosure would do more harm than good. Like the Fifth Circuit in Martone, we find Appellants' allegation based on general economic principles—that the longer a fraud is concealed, the greater the harm to the company's reputation and stock price—is too generic to meet the requisite pleading standard. See Martone, 902 F.3d at 526-27. But even considering these general economic principles "as part of the overall picture," as the Second Circuit did in Jander, we reach the same conclusion. See Jander, 910 F.3d at 630. We find particularly important Appellants' allegation that Appellees knew that government regulators were conducting an investigation into Wells Fargo's sales practices since at least 2013 and up until the disclosure in 2016. We find that a prudent fiduciary—even one who knows disclosure is inevitable and that earlier disclosure may ameliorate some harm to the company's stock price and reputation—could readily conclude that it would do more harm than good to disclose information about Wells Fargo's sales practices prior to the completion of the government's investigation. See Laffen, 721 F. App'x at 644. Relatedly, a prudent fiduciary could conclude that "an unusually-timed disclosure[,]" such as one made by a plan fiduciary prior to the conclusion of an investigation, "risks 'spooking the market,' creating the potential for an outsized stock drop." Martone, 902 F.3d at 527. We conclude that, "[a]lthough earlier disclosure *may* have ameliorated some harm to the Fund, that course of action was not so clearly beneficial that a prudent fiduciary could not conclude that it would be more likely to harm the fund than to help it." Graham v. Fearon, 721 F. App'x 429, 437 (6th Cir. 2018).

Accordingly, we find that the district court did not err in finding that Appellants have failed to plausibly plead that a prudent fiduciary could not have concluded that Appellants' proposed alternative actions would do more harm than good. Thus, Appellants have failed to state a claim of breach of the duty of prudence.

B.

ERISA also imposes a duty of loyalty on plan fiduciaries. 29 U.S.C. § 1104(a)(1) ("[F]iduciary shall discharge his duties with respect to a plan solely in the interest of the participants[.]"). Because the Dudenhoeffer standard is limited to imprudence claims, Twombly[3] and Iqbal[4] provide the proper pleading standard for disloyalty claims: Appellants must allege sufficient facts to give rise to a plausible inference that Appellees breached their duty.[5]

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

[4] Ashcroft v. Iqbal, 555 U.S. 1030 (2008).

[5] Appellees argue that the Dudenhoeffer standard should apply to the disloyalty claim because such a claim boils down to failure to disclose inside information. The Supreme Court clearly limited the Dudenhoeffer standard to imprudence claims. However, we agree with the district court that the concerns that the Supreme Court cited in relation to imprudence claims apply with equal force to disloyalty

Appellants first argue that Appellees breached their duty of loyalty by failing to disclose to Plan participants material information about Wells Fargo's unethical and unlawful sales practices. As support, Appellants cite a number of Eighth Circuit cases for the proposition that the duty of loyalty requires a fiduciary to disclose material information about the company to plan participants where such information could adversely affect a plan participant's interests. However, each of those cases involved information about the plan, not non-public information about the company. See, e.g., Shea v. Esensten, 107 F.3d 625, 628-29 (8th Cir. 1997) (holding fiduciary had a duty to disclose health maintenance organization's financial incentive scheme that discouraged treating doctors from providing essential health care referrals for conditions covered under the plan benefit structure); Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 598 (8th Cir. 2009) (holding fiduciary had duty to disclose "complete and accurate material information about the Plan funds and the process by which they were selected").

Moreover, other circuit courts have held that the duty of loyalty does not require disclosure of non-public information about the company that might impact the plan participants. See, e.g., Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1284 (11th Cir. 2012) (affirming dismissal of claim of breach of duty of loyalty because "ERISA does not explicitly impose a duty to provide participants with

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claims. Dudenhoeffer, 573 U.S. at 423 (deeming legitimate the "potential for conflict . . . because ESOP fiduciaries often are company insiders and because suits against insider fiduciaries frequently allege . . . that the fiduciaries were imprudent in failing to act on inside information they had about the value of the employer's stock"). Accordingly, we find the district court did not err in rigorously applying Twombly and Iqbal to the disloyalty claim.

nonpublic information affecting the value of the company's stock"). As the Eleventh Circuit explained, there is good reason for the distinction between plan information and non-public information that may affect stock value: if there were an affirmative duty to disclose non-public information that would impact the stock, such a duty "would improperly transform fiduciaries into investment advisors." Id. at 1285 (citing In re Citigroup ERISA Litig., 662 F.3d 128, 143 (2d Cir. 2011), abrogated by Dudenhoeffer, 573 U.S. at 409). Moreover, such an affirmative duty would circumvent the Dudenhoeffer standard and render it worthless; there would be no reason to analyze whether a prudent fiduciary could have concluded that disclosure of non-public information would do more harm than good.

Second, Appellants argue that Appellees breached their duty of loyalty due to conflicts of interest. Specifically, Appellants allege that Appellees chose not to disclose the unethical sales practices so as to not jeopardize their own high-ranking positions. But, beyond this conclusory allegation, Appellants fail to allege any specific facts from which a court can infer that Appellees were motivated by disloyal reasons in choosing not to disclose information. Moreover, ERISA permits "[p]ersons who serve as fiduciaries [to] also act in other capacities, even capacities that conflict with the individual's fiduciary duties." Trs. of the Graphic Commc'ns Int'l Union Upper Midwest Local 1M Health & Welfare Plan v. Bjorkedal, 516 F.3d 719, 732 (8th Cir. 2008). Thus, the fact that some fiduciaries also hold high-ranking positions in the company is insufficient to create a plausible inference that Appellees failed to act loyally due to conflicts of interest. See In re Bank of Am. Corp. Sec., Derivative, & ERISA Litig., 756 F. Supp. 2d 330, 355 (S.D.N.Y. 2010) ("[T]he purported conflict would exist for all corporate insiders, who are charged with managing the affairs of the corporation; it would deprive the plans of services of the most knowledgeable individuals."); cf. Singh, 882 F.3d at 150 (finding that "Plaintiffs fail to point to any fact suggesting a conflict of interest other than Defendants' stock ownership" and thus "the complaint fails to allege facts that would give rise to a plausible inference that Defendants' concern about the stock price was self-serving").

Appellants also argue that they have stated a disloyalty claim based on conflicts of interest because they allege that Appellees sold their own Wells Fargo shares at an inflated price. However, as Appellees note, corporate officers and directors sell their stock periodically. See Pugh v. Tribune Co., 521 F.3d 686, 695 (7th Cir. 2008) (noting that "executives sell stock all the time"). We find that the fact that Appellees sold their Wells Fargo shares at an inflated price, without more, is insufficient to give rise to a plausible inference that Appellees breached their duty of loyalty. See Singh, 882 F.3d at 150 ("We decline to adopt a rule that would make stock ownership, without more, synonymous with a plausible claim of fiduciary disloyalty."); cf. Coulter v. Morgan Stanley & Co. Inc., 753 F.3d 361, 368 (2d Cir. 2014) (per curiam) ("[A] conflict of interest claim cannot be based solely on the fact than an ERISA fiduciary's compensation was linked to the company's stock." (internal quotation marks omitted)).

We are persuaded by Appellees' argument that Appellants' disloyalty claim "merely recasts the imprudence claim" so as to circumvent the demanding Dudenhoeffer standard. As Appellees note, Appellants' disloyalty claim and imprudence claim are based on the same alleged acts: failing to disclose the unethical sales practices, and failing to freeze purchases in the Wells

Fargo Funds. "Surely the [Supreme] Court did not lay down the detailed requirements for pleading a breach of the duty of prudence if all that was required was to label the insufficient allegations as a breach of the duty of loyalty." In re Pilgrim's Pride Stock Inv. Plan ERISA Litig., No. 2:08-cv-472-JRG-RSP, 2016 WL 8814356, at *4 (E.D. Tex. Aug. 19, 2016).

Accordingly, we find that the district court did not err in holding that Appellants have failed to sufficiently plead a claim of breach of the duty of loyalty. Because the district court properly dismissed Appellants' claims of breach of fiduciary duties, the district court also properly dismissed Appellants' derivative claims of co-fiduciary liability and breach of the duty to monitor. See Brown v. Medtronic, Inc., 628 F.3d 451, 461 (8th Cir. 2010) (holding that "neither of [the derivative] claims can survive without a sufficiently pled theory of an underlying breach").

III.

For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Case No. 16-CV-3405 (PJS/BRT)

IN RE: WELLS FARGO ERISA
401(k) LITIGATION

ORDER

Adam J. Levitt, Amy E. Keller, and Daniel R. Ferri, DICELLO LEVITT & CASEY LLC; Robert K. Shelquist and Rebecca A. Peterson, LOCKRIDGE GRINDAL NAUEN P.L.L.P.; Greg G. Gutzler, Richard M. Elias, and Tamara M. Spicer, ELIAS GUTZLER SPICER LLC; W. Daniel "Dee" Miles, III, and Claire E. Burns, BEASLEY ALLEN CROW METHVIN PORTIS & MILES, P.C.; Samuel E. Bonderoff, Jacob H. Zamansky, Edward H. Glenn, and Justin Sauerwald, ZAMANSKY LLC; Michael B. Ershowsky, LEVI & KORSINSKY LLP; Carolyn G. Anderson, June P. Hoidal, and Devon Holstad, ZIMMERMAN REED LLP; and Douglas J. Nill, DOUGLAS J. NILL, PLLC, for plaintiffs.

Russell L. Hirschhorn, Howard Shapiro, and Lindsey Chopin, PROSKAUER ROSE LLP; and Kirsten E. Schubert and Stephen P. Lucke, DORSEY & WHITNEY LLP, for defendants.

Plaintiffs Francesca Allen, John Sterling Ross, and Mary Lou Shank are current and former employees of Wells Fargo & Company ("Wells Fargo"). All of them held Wells Fargo stock in their 401(k) accounts. In September 2016, the price of that stock dropped sharply—and plaintiffs suffered significant losses—after Wells Fargo and the United States government announced that thousands of Wells Fargo employees had engaged in grossly unethical sales practices.

Plaintiffs then brought this lawsuit under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., against Wells Fargo and corporate insiders who served as fiduciaries of their 401(k) plan. Plaintiffs alleged that defendants violated two distinct duties under ERISA—the duty of prudence and the duty of loyalty—by failing to disclose Wells Fargo's unethical sales practices prior to September 2016. According to plaintiffs, if defendants had disclosed this information earlier, the value of the Wells Fargo stock in their 401(k) accounts would not have dropped as much as it did.

Defendants moved to dismiss plaintiffs' amended complaint. ECF No. 113. Defendants argued that plaintiffs' prudence claim should be dismissed because plaintiffs had not plausibly alleged—as *Fifth Third Bancorp v. Dudenhoeffer* requires—"that a prudent fiduciary in the defendant's position could not have concluded that [earlier disclosure of Wells Fargo's sales practices] . . . would do more harm than good to the fund

. . . ." 134 S. Ct. 2459, 2473 (2014). The Court agreed and dismissed the prudence claim. *In re Wells Fargo ERISA 401(k) Litig.*, No. 16-CV-3405 (PJS/BRT), 2017 WL 4220439 (D. Minn. Sept. 21, 2017).

Defendants also argued that plaintiffs had not pleaded "a freestanding claim for breach of the duty of loyalty." ECF No. 155 at 15. The Court agreed that the amended complaint did not clearly separate the prudence claim from the loyalty claim. *In re Wells Fargo*, 2017 WL 4220439, at *7. The Court therefore dismissed plaintiffs' loyalty claim but gave plaintiffs leave to replead that claim more clearly in a second amended complaint. *Id.*

Plaintiffs responded by filing a second amended complaint and reasserting their loyalty claim. Defendants have now moved to dismiss that complaint. Defendants argue that the *Dudenhoeffer* pleading standard should be applied not only to prudence claims, but to loyalty claims—and that, under that standard, plaintiffs' loyalty claim should be dismissed for the same reasons that their prudence claim was dismissed. Defendants also argue that, even if the *Dudenhoeffer* pleading standard is not applied to plaintiffs' loyalty claim, that claim should nevertheless be dismissed.

I. APPLICATION OF *DUDENHOEFFER* TO LOYALTY CLAIMS

Defendants first argue that, even though *Dudenhoeffer* described only what was necessary to plead viable prudence claims, its pleading standard should also be applied to loyalty claims. *See Dudenhoeffer*, 134 S. Ct. at 2464 ("We limit our review to the duty- of-prudence claims."). To fully understand defendants' argument—and why the Court ultimately rejects it—some background is necessary.

Prior to 1995, the federal courts were burdened with a substantial number of abusive securities-fraud actions. The filing of a securities-fraud action seemed to follow on the heels of every substantial drop in the price of the stock of a publicly traded company. Congress eventually concluded that "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent' had become rampant." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (quoting H.R. Conf. Rep. No. 104-369, at 31 (1995)).

To curb these perceived abuses, Congress passed the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. 104-67, 109 Stat. 737. Among the PSLRA's features was the imposition of heightened pleading standards on certain securities- fraud actions. *See Dabit*, 547 U.S. at 81-82. As the Ninth Circuit explained, "Congress sought to reduce the volume of abusive federal securities litigation by erecting procedural barriers . . . . such as heightened pleading standards." *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 977-78 (9th Cir. 1999).

In the wake of the enactment of the PSLRA, the plaintiffs' bar came up with a strategy to evade the heightened pleading standards. That strategy involves "tak[ing] what is essentially a securities-fraud action and plead[ing] it as an ERISA action." *Wright v. Medtronic, Inc.,* No. 09-CV-0443 (PJS/AJB), 2010 WL 1027808, at *1 (D. Minn. Mar. 17, 2010). "Plaintiffs' attorneys are able to evade the PSLRA in this manner—as well as take advantage of the strict duties imposed on fiduciaries by ERISA—by suing not on behalf of those who purchased the stock of a company as members of the investing public, but instead on behalf of those who purchased the stock of a company as participants in a defined-contribution plan sponsored by that company." *Id.* The centerpiece of these ERISA stock-drop cases is typically a claim that the fiduciaries of a 401(k) plan breached their duty of prudence by directing the plan to buy or hold shares of a company's stock, when they knew or should have known that the stock was overpriced.

As these ERISA stock-drop cases proliferated, federal courts began to have a number of concerns, including the concern that companies would be deterred from offering employee stock ownership plans ("ESOPs"). *Dudenhoeffer*, 134 S. Ct. at 2470. The Supreme Court described this concern as follows:

> ESOP plans instruct their fiduciaries to invest in company stock, and [29 U.S.C.] § 1104(a)(1)(D) requires fiduciaries to follow plan documents so long as they do not conflict with ERISA. Thus, in many cases an ESOP fiduciary who fears that continuing to invest in company stock may be imprudent finds himself between a rock and a hard place: If he keeps investing and the stock goes down he may be sued for acting imprudently in violation of § 1104(a)(1)(B), but if he stops investing and the stock goes up he may be sued for disobeying the plan documents in violation of § 1104(a)(1)(D).

Id.

To address this concern, many courts held that ESOP fiduciaries who were sued under ERISA enjoyed a "presumption of prudence." This presumption was "generally defined as a requirement that the plaintiff make a showing that would not be required in an ordinary duty-of-prudence case, such as that the employer was on the brink of collapse." *Id.* at 2463.

In *Dudenhoeffer*, the Supreme Court eliminated the presumption of prudence, holding that "the law does not create a special presumption favoring ESOP fiduciaries." *Id.* at 2467. Rather, the Supreme Court said, "the same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries . . . ." *Id.* The Supreme Court acknowledged the concern that "the threat of costly duty-of-prudence lawsuits will deter companies from offering ESOPs to their employees, contrary to the stated intent of Congress." *Id.* at 2470. But, the Supreme Court said, "we do not believe that the presumption at issue here is an appropriate way to weed out meritless lawsuits . . . ." *Id.*

According to the Supreme Court, a far better "mechanism for weeding out meritless claims" is for defendants to move to dismiss those claims under Federal Rule of Civil Procedure 12(b)(6), and for district courts to rigorously apply the standards of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See Dudenhoeffer*, 134 S. Ct. at 2471. In particular, districts courts must closely examine a complaint that asserts a prudence claim against an ESOP fiduciary to ensure that the complaint pleads "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

The Supreme Court wrapped up its *Dudenhoeffer* opinion by setting forth various "considerations" intended to guide lower courts in "apply[ing] the pleading standard as discussed in *Twombly* and *Iqbal* . . . ." *Dudenhoeffer*, 134 S. Ct. at 2471. In insider- information cases such as this one—that is, cases in which "a complaint faults fiduciaries for failing to decide, on the basis of the inside information, to refrain from making additional stock purchases or for failing to disclose that information to the public so that the stock would no longer be overvalued," *id.* at 2473—the Supreme Court identified "three points [to] inform the requisite analysis," *id.* at 2472. The third of those points was the following:

> Third, lower courts faced with such claims should . . . consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases—which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment—or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund.

Id. at 2473.

In its earlier order in this case, this Court characterized this more-harm-than-good standard as "very tough" and explained why "plaintiffs will only rarely be able to plausibly allege that a prudent fiduciary 'could not' have concluded that a later disclosure of negative inside information would have less of an impact on the stock's price than an earlier disclosure." *In re Wells Fargo*, 2017 WL 4220439, at *2 (quoting *Dudenhoeffer*, 134 S. Ct. at 2473 (emphasis added)). After examining plaintiffs' amended complaint, the Court concluded that "[p]laintiffs have failed to plead specific facts to make plausible their allegation that, under the circumstances of this particular case, a prudent fiduciary 'could not have concluded' that a later disclosure would result in a smaller loss to the Fund than an earlier disclosure." *Id.* at *7 (quoting *Dudenhoeffer*, 134 S. Ct. at 2473). For that reason, the Court dismissed plaintiffs' prudence claim.

That brings us to plaintiffs' loyalty claim. Defendants concede that *Dudenhoeffer* was explicitly limited to prudence claims. But, say defendants, just about any prudence claim can easily be recast as a loyalty claim. That is particularly true in insider- information cases. By definition, these are cases in which the defendant was a corporate insider who served as the fiduciary of an ESOP plan, the defendant received negative inside information about the company, and the plaintiff alleges that the defendant breached the duty of prudence by not disclosing or otherwise acting upon that inside information. In that context, defendants argue, turning a prudence claim into a loyalty claim requires nothing more than adding the allegation that, in failing to disclose or otherwise act upon the inside information, the defendant was motivated by a desire to protect his position as a corporate insider.

To this point, the Court agrees with defendants. And the Court also agrees with defendants that—given how easy it is for a plaintiff to convert a prudence claim into a loyalty claim in an insider-information case—the Supreme Court would have as much concern about these loyalty claims as it had about the prudence claims in *Dudenhoeffer*. After all, these loyalty claims place ESOP fiduciaries "between a rock and a hard place" in the same manner as the prudence claims discussed in *Dudenhoeffer*. 134 S. Ct. at 2470. And thus, these loyalty claims will deter companies from offering ESOP plans unless district courts apply a "mechanism for weeding out meritless claims." *Id.* at 2471.

Here, however, is where this Court and defendants part ways: Defendants argue that this Court should apply the same "mechanism" for weeding out meritless loyalty claims that *Dudenhoeffer* said should be applied for weeding out meritless prudence claims. In particular, defendants point to the Supreme Court's admonition that, in inside-information cases, "lower courts . . . should . . . consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases . . . or publicly disclosing negative information would do more harm than good to the fund . . . ." *Id.* at 2473. Defendants urge that this more-harm-than-good standard should be applied to *both* prudence *and* loyalty claims. Given that the Court has already held that plaintiffs' prudence claim does not meet the standard, defendants argue, the Court must dismiss plaintiffs' loyalty claim for the same reason.

The problem with defendants' argument is that it wrenches the more-harm-than-good standard out of context. The Supreme Court was very clear in *Dudenhoeffer* about how district courts should weed out meritless prudence claims: by rigorously applying the *Iqbal/Twombly* plausibility standard. And this Court is confident that, if faced with the question, the Supreme Court would hold that district courts should weed out meritless loyalty claims in the same way: by rigorously applying the *Iqbal/Twombly* plausibility standard. But a judge who is applying the *Iqbal/Twombly* standard to a *loyalty* claim must necessarily ask different questions than a judge who is applying the *Iqbal/Twombly* standard to a *prudence* claim, for the simple reason that the elements of the two claims are not the same.

The duty of prudence requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). This is an objective standard; the subjective intentions of the fiduciary are irrelevant. *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009). Thus, a plaintiff who brings a prudence claim must plead and prove that a hypothetical prudent person would not have acted as the fiduciary did under the same circumstances. *See Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917-918 & n.3 (8th Cir. 1994) (stating that it was "improper[]" for the district court to "appl[y] a subjective test to the trustees' conduct").

By contrast, the duty of loyalty requires fiduciaries to act "for the exclusive *purpose* of . . . providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1)(A)(i) (emphasis added). This is a subjective standard; what matters is *why* the defendant acted as he did. *See A.F. v. Providence Health Plan*, 173 F. Supp. 3d 1061, 1073 (D. Or. 2016) (noting that the duty of loyalty "looks to the fiduciary's subjective motivation in determining whether the fiduciary is in compliance with the rule"). Thus, a plaintiff who brings a loyalty claim does not have to plead or prove anything about what a hypothetical prudent person would have done under the same circumstances; instead, the plaintiff must plead and prove that the defendant acted to further his own interests rather than the interests of the fund.

To illustrate: Suppose that two corporate officers serve as fiduciaries of an ERISA plan that exclusively holds their company's stock. Both fiduciaries receive inside information that one of the company's key products is defective and will likely have to be recalled. Both fiduciaries also know that when this information is ultimately disclosed, the price of the company's stock will plummet. Both fiduciaries decide to delay the disclosure of the defect to the public. The first fiduciary delays disclosure because he sincerely believes that a later disclosure will result in less of an impact on the price of the company's stock—and thus less of an impact on plan participants—because the company will be able to pair the announcement of the defect with an announcement of a specific plan to remedy the problem. The second fiduciary delays disclosure because he is scheduled to receive a bonus of 100,000 shares of company stock at the end of the year, and he does not want the price of the company's stock to drop until he gets and sells those shares.

In this hypothetical, a plaintiff bringing a prudence claim against the two fiduciaries would have to plead and prove that a prudent person would not have delayed disclosure of the defect. If the plaintiff did so, both fiduciaries could be found to have breached the duty of prudence; if the plaintiff failed to do so, neither fiduciary could be found to have breached the duty of prudence. The good intentions of the first fiduciary—and the bad intentions of the second fiduciary—would be irrelevant.

By contrast, a plaintiff bringing a loyalty claim against the two fiduciaries would have to plead and prove that the reason that a particular fiduciary delayed disclosure of the defect was to further his own interests, rather than the interests of the fund participants. Because the first fiduciary acted in subjective good faith, he could not be found to have breached the duty of loyalty. But because the second fiduciary did not act in subjective good faith, he could be found to have breached the duty of loyalty. *See Tussey v. ABB, Inc.*, 850 F.3d 951, 958 (8th Cir. 2017) ("A fiduciary can abuse its discretion and breach its duties by acting on improper motives, even if one acting for the right reasons might have ended up in the same place.").[1]

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[1]At oral argument, defendants agreed with this description of the contrasting nature of prudence and loyalty claims. *See* ECF No. 209 at 3-6. In their brief, however, defendants cite *In re Target Corp.*

It makes sense, then, that a judge who is applying the *Iqbal/Twombly* plausibility standard to a prudence claim would ask "whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases . . . or publicly disclosing negative information would do more harm than good to the fund . . . ." *Dudenhoeffer*, 134 S. Ct. at 2473. At the heart of any prudence claim is the question of what "a *prudent* fiduciary in the defendant's position" could have done. But it makes no sense for a judge who is applying the *Iqbal/Twombly* plausibility standard to a *loyalty* claim to ask what "a prudent fiduciary in the defendant's position" could have done. That is irrelevant to a loyalty claim—which, again, turns not on whether the fiduciary acted prudently, but on whether the fiduciary acted "for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1)(A)(i). Hence, when defendants demand that this Court apply the more-harm-than-good standard to plaintiffs' loyalty claim, defendants are demanding that

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Securities Litigation, 275 F. Supp. 3d 1063, 1089 (D. Minn. 2017), to argue that the duty of loyalty standard is objective. ECF No. 198 at 21 n.9. But when the Court reads *In re Target* in context, the Court believes that the order was simply making the point that a fiduciary's decision should not be deemed disloyal just because it turns out to be a poor decision in hindsight. *In re Target*, 275 F. Supp. 3d at 1089. To the extent that *In re Target* suggests something more—specifically, that whether a defendant has breached the duty of loyalty is evaluated under an objective standard—the Court respectfully disagrees, for the reasons described above. The only authority cited by *In re Target* in support of its statement that the duty of loyalty standard "is objective" is *Braden*. But *Braden* does not say that the duty of loyalty is objective; instead, *Braden* says that ERISA's "*prudent* person standard is an objective standard." *See Braden*, 588 F.3d at 595 (citation omitted and emphasis added)."

plaintiffs be required to *plead* something that they are not required to *prove*. The law imposes no such requirement.

In sum, the Court finds that the concerns that *Dudenhoeffer* expressed about prudence claims apply with equal force to loyalty claims, and therefore that judges must be as concerned about weeding out meritless loyalty claims as they are about weeding out meritless prudence claims. The Court also finds that the "mechanism for weeding out meritless claims" described in *Dudenhoeffer*—a rigorous application of the *Iqbal/Twombly* plausibility standard—should be applied to both loyalty and prudence claims. *Dudenhoeffer*, 134 S. Ct. at 2471. This means identifying the elements that the plaintiff must prove to recover on the particular claim and ensuring that, with respect to each of those elements, that the complaint pleads "enough facts" so that it "state[s] a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

II. APPLICATION OF *IQBAL* AND *TWOMBLY* TO PLAINTIFFS' LOYALTY CLAIM

Applying the *Iqbal/Twombly* standard to plaintiffs' loyalty claim, the Court finds that the claim is not plausible, and thus the Court dismisses it.

To begin, the second amended complaint alleges that the individual defendants breached their duty of loyalty by "fail[ing] to avoid conflicts of interest." ECF No. 186 ¶ 315. It further alleges that defendants were "Wells Fargo officers, employees, and Board members" who "were incentivized to avoid doing or saying anything that would harm the image or reputation of Wells Fargo . . . because doing so would be reasonably likely to damage their relationships within Wells Fargo and on the Board, and thus harm their own careers or their places on the Board." *Id.* ¶ 317. But "the mere fact that a fiduciary had an adverse interest does not by itself state a claim for relief." *Morrison v. MoneyGram Int'l, Inc.*, 607 F. Supp. 2d 1033, 1058 (D. Minn. 2009). Specifically, ERISA does not prohibit corporate officers from also serving as fiduciaries of ESOPs. On the contrary, "[p]ersons who serve as fiduciaries may also act in other capacities, even capacities that conflict with the individual's fiduciary duties. What ERISA requires is that the fiduciary with two hats wear only one [hat] at a time, and wear the fiduciary hat when making fiduciary decisions." *Trustees of the Graphic Commc'ns Int'l Union Upper Midwest Local 1M Health & Welfare Plan v. Bjorkedal,* 516 F.3d 719, 732 (8th Cir. 2008) (citation and internal punctuation omitted).

Plaintiffs concede that a fiduciary may serve as an officer or employee of a company without violating ERISA, but they claim that defendants went beyond serving dual roles and breached their duty of loyalty by "failing to disclose" "material information" about ongoing misconduct at Wells Fargo. ECF No. 186 ¶¶ 321-22. But this allegation still falls short of the mark. This Court has previously held (following the lead of many other courts) that ERISA should not be read to impose "an affirmative duty on a corporate insider who acts as a fiduciary of a defined-contribution plan to disclose to plan participants nonpublic (i.e., 'inside') information about the corporation that might affect the value of the corporation's stock." *Wright v. Medtronic, Inc.,* No. 09-CV-0443 (PJS/AJB), 2011 WL 31501, at *7 (D. Minn. Jan. 5, 2011). Rather, "ERISA and the securities laws should be confined to their respective spheres." *Id.* "ERISA defines when a fiduciary must disclose plan- and benefit-specific information that is of interest to plan participants but not to investors generally," and "the securities laws define when general financial and corporate information must be provided to the investing public—including, but obviously not limited to, plan participants." *Id.*

In this case, plaintiffs do not claim that defendants misled them about "plan- and benefit-specific information," such as the terms of Wells Fargo's 401(k) plan. *Cf. Braden*, 588 F.3d at 598-600 (8th Cir. 2009) (upholding a nondisclosure claim alleging that fiduciaries failed to disclose material information about plan fund fees and kickback payments). Instead, plaintiffs claim that defendants failed to disclose inside corporate information "that might affect the value of the corporation's stock"—information that would be of interest to every member of the investing public. *Wright*, 2011 WL 31501, at *7. As the Court held in *Wright*, defendants have no duty under ERISA to disclose that information; any such duty would arise under the securities laws, and, if defendants have acted wrongly, they can be held accountable under those laws. *Id.* Therefore, to the extent that plaintiffs' loyalty claim relies solely on defendants' nondisclosure of inside information about Wells Fargo's present and future financial condition, plaintiffs' loyalty claim must be dismissed.

A few paragraphs in the second amended complaint could be read as alleging that defendants breached their duty of loyalty not merely by failing to disclose inside corporate information, but also by making affirmative misrepresentations to the general public. *See, e.g.,* ECF No. 186 ¶¶ 146, 170-73, 322. And certainly, a fiduciary "may not affirmatively miscommunicate or mislead plan participants about material matters regarding their ERISA plan when discussing a plan." *Kalda v. Sioux Valley Physician Partners, Inc.*, 481 F.3d 639, 644 (8th Cir. 2007) (citation and internal quotation marks omitted).

But this does not save plaintiffs' loyalty claim from dismissal for several reasons.

First, the Court is not sure whether plaintiffs actually mean to pursue an affirmative-misrepresentation claim. In their brief, plaintiffs argue only that defendants breached their duty of loyalty "[t]hrough their silence and inaction." ECF No. 202 at 23.

Second, if plaintiffs intended to plead an affirmative-misrepresentation claim, then they have abandoned it. Defendants' opening brief argued that any allegation in the second amended complaint that defendants had "acted disloyally by making misrepresentations" was insufficient to state a claim for relief. ECF No. 198 at 23-24. Plaintiffs said nothing in response to that specific argument. In fact, plaintiffs' response brief uses a form of the word "misrepresent" only twice—once in a string cite for the proposition that "courts have upheld conflict of interest claims," and once in a string cite for the proposition that "Eighth Circuit precedent recognizes the ability, and even the obligation, of fiduciaries to disclose material facts to ERISA beneficiaries." ECF No. 202 at 21-24.

Third, although a few paragraphs in the second amended complaint could be read as alleging that defendants made affirmative misrepresentations, nothing in the complaint could be read as alleging that defendants made such misrepresentations *in their fiduciary capacity*. Public filings or communications that are "made in a company's corporate capacity—and not in its capacity as an ERISA fiduciary—. . . do not, without more, constitute fiduciary communications." *Morrison*, 607 F. Supp. 2d at 1054. The second amended complaint alleges that defendants misled the general public in a media interview, *see* ECF No. 186 ¶ 146; in Financial Industry Regulatory Authority ("FINRA") forms, *id.* ¶ 170-71; and in a press release, *see id.* ¶¶ 172-73. None of these are plausibly alleged to have been fiduciary communications.

Fourth, the second amended complaint does not allege that plaintiffs chose to continue holding Wells Fargo stock in their 401(k) account *because* of any affirmative misrepresentation made by defendants. At best, the second amended complaint only makes the general and conclusory allegation that plaintiffs "lost a significant portion of their retirement investments" "[a]s a direct and proximate result of Individual Defendants' fiduciary duty breaches." *Id.* ¶ 323. This allegation does not make plausible any allegation of reliance. As this Court has previously noted, "for plaintiffs to recover for defendants' alleged misrepresentations to Plan participants, they must show that a loss 'result[ed] from' the misrepresentations." *Wright*, 2011 WL 31501, at *4 (quoting 29 U.S.C. § 1109(a)). It is difficult to see "how a loss could have 'result[ed] from' a misrepresentation made to a Plan participant unless that participant read and relied on the misrepresentation." *Id.*

Fifth, and finally, the Court is skeptical that the alleged misrepresentations identified in the second amended complaint are actionable. For example, plaintiffs allege that Wells Fargo falsely represented that it had taken "deadly seriously" the accusation that its employees had pushed unwanted products on customers. ECF No. 186 ¶ 146. This representation seems to be more of an (unprovably false) statement of opinion rather than a (provably false) statement of fact.

In short, plaintiffs allege that defendants acted disloyally by failing to avoid conflicts of interest, by failing to disclose inside corporate information to plan participants, and (perhaps) by affirmatively misleading the general public. For the reasons explained above, these allegations are insufficient to make plausible the claim that defendants breached their duty of loyalty under ERISA. Therefore, plaintiffs' loyalty claim is dismissed.

III. OTHER CLAIMS

In Count II of their second amended complaint, plaintiffs replead their previously-dismissed prudence claim solely for the purpose of preserving it for appeal. The Court again dismisses this claim for the reasons stated in its previous order. *See In re Wells Fargo*, 2017 WL 4220439, at *3-7.

Counts III and IV of the second amended complaint are entirely derivative of Counts I and II in that they allege that if one or more defendants breached the duty of loyalty or prudence, other defendants should also be held liable for that breach. Given that the Court has held that plaintiffs have failed to plausibly allege that any of the defendants breached their fiduciary duties under ERISA, Counts III and IV also fail.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. Defendants' motion to dismiss plaintiffs' second amended complaint [ECF No. 196] is GRANTED.
2. Plaintiffs' second amended complaint [ECF No. 186] is DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 19, 2018

s/Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Case No. 16-CV-3405 (PJS/BRT)

IN RE: WELLS FARGO ERISA
401(k) LITIGATION

ORDER

Adam J. Levitt, Daniel R. Ferri, and Amy E. Keller, DICELLO LEVITT & CASEY LLC; Robert K. Shelquist and Rebecca A. Peterson, LOCKRIDGE GRINDAL NAUEN P.L.L.P.; Richard M. Elias, Greg G. Gutzler, and Tamara M. Spicer, ELIAS GUTZLER SPICER LLC; Lori G. Feldman and Michael B. Ershowsky, LEVI & KORSINSKY LLP; W. Daniel "Dee" Miles, III, Rebecca D. Gilliland, and Claire E. Burns, BEASLEY ALLEN CROW METHVIN PORTIS & MILES, P.C.; Samuel E. Bonderoff, Jacob H. Zamansky, Edward H. Glenn Jr., and Justin Sauerwald, ZAMANSKY LLC; Carolyn G. Anderson and June P. Hoidal, ZIMMERMAN REED LLP; and Douglas J. Nill, DOUGLAS J. NILL, PLLC, for plaintiffs.

Russell L. Hirschhorn, Joseph E. Clark, Howard Shapiro, and Lindsey H. Chopin, PROSKAUER ROSE LLP; and Kirsten E. Schubert and Stephen P. Lucke, DORSEY & WHITNEY LLP, for defendants.

This lawsuit—brought under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq.—is one of many actions in which "plaintiffs' attorneys have taken what is essentially a securities fraud action and pleaded it as an ERISA action in order to avoid the demanding pleading requirements of the Private Securities Litigation Reform Act of 1995 ('PSLRA'), Pub. L. 104–67, 109 Stat. 737." *Wright v. Medtronic, Inc.*, No. 09-CV-0443 (PJS/AJB), 2010 WL 1027808, at *1 (D. Minn. Mar. 17, 2010). "Plaintiffs' attorneys are able to evade the PSLRA in this manner—as well as take advantage of the strict duties imposed on fiduciaries by ERISA—by suing not on behalf of those who purchased the stock of a company as members of the investing public, but instead on behalf of those who purchased the stock of a company as participants in a defined-contribution plan sponsored by that company." *Id.*

In this lawsuit, the company at issue is defendant Wells Fargo & Company ("Wells Fargo"), and the plaintiffs at issue are current and former employees of Wells Fargo who held the company's stock in their 401(k) accounts. The price of Wells Fargo stock dropped sharply—and plaintiffs consequently suffered significant losses—after Wells Fargo and the United States government announced in September 2016 that thousands of Wells Fargo employees had engaged in unethical sales practices, including opening deposit accounts and issuing credit cards without the knowledge or consent of customers.

Plaintiffs allege that the fiduciaries of Wells Fargo's 401(k) plan were corporate insiders who knew about the improper sales practices long before the public announcement. Plaintiffs now sue those fiduciaries, arguing that they violated their duty of prudence under ERISA by not disclosing the improper sales practices prior to September 2016. According to plaintiffs, if the fiduciaries had disclosed that inside information earlier, the value of the Wells Fargo stock in plaintiffs' 401(k) accounts would not have dropped as much as it did following the September 2016 announcement.

The Supreme Court considered a similar claim in *Fifth Third Bancorp. v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). In *Dudenhoeffer*, the defendants argued that "the threat of costly duty-of-prudence lawsuits will deter companies from offering ESOPs to their employees." *Id.* at 2470. ("ESOPs" is an abbreviation for "employee stock ownership plans.") In response, the Supreme Court emphasized that Fed. R. Civ. P. 12(b)(6)—as interpreted in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)—provides an "important mechanism for weeding out meritless claims." *Dudenhoeffer*, 134 S. Ct. at 2471. The Supreme Court then instructed district courts handling lawsuits challenging the failure of ERISA fiduciaries to disclose inside information to determine "whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that . . . publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." *Id.* at 2473.

This is a very tough standard. Trying to predict the impact of *anything* on the price of a company's stock—like trying to predict the impact of an athlete's injury on an upcoming game or the impact of a politician's gaffe on an upcoming election—is a highly speculative endeavor. An ERISA fiduciary who is trying to figure out whether earlier disclosure of negative inside information would have more or less of an impact on a stock's price than later disclosure of that negative information is trying to predict the future on the basis of information that is incomplete, imperfect, and fluid. In light of the inherently uncertain nature of this task, plaintiffs will only rarely be able to plausibly allege that a prudent fiduciary "*could not*" have concluded that a later disclosure of negative inside information would have less of an impact on the stock's price than an earlier disclosure. *Id.* (emphasis added).

This is not that rare case. Plaintiffs have not plausibly alleged that defendants could not have concluded that an earlier disclosure of the unethical sales practices would have done more harm than good. The Court therefore dismisses plaintiffs' amended complaint.

I. BACKGROUND

Wells Fargo sponsors a 401(k) plan ("the Plan") for its employees. ECF No. 54 ¶ 55. Eligible employees may contribute their own money to their individual 401(k) accounts. *Id.* ¶ 58. If they do, Wells Fargo matches their contributions, dollar-for-dollar, up to a certain amount. *Id.* ¶ 61; ECF No. 116-1 § 5.1(a).

Two of the Plan's investment funds—the Wells Fargo Non-ESOP Fund and the Wells Fargo ESOP Fund—"consist primarily of shares of Company Stock." ECF No. 116-1 § 8.1(a)-(b). Wells Fargo's matching contributions are also "invested automatically in Wells Fargo stock." ECF No. 54 ¶ 62. At any given time, then, a large portion of the Plan's assets is invested in Wells Fargo stock. *See id.* ¶ 60 (estimating that "approximately 34% of the 401(k) Plan Assets . . . were invested in Wells Fargo common stock" in 2016). Wells Fargo employees are not required to keep their 401(k) money invested in Wells Fargo stock. They may transfer their money into "any other Investment Fund" maintained by the Plan, including funds that do not invest in Wells Fargo stock. ECF No. 116-1 § 8.6(a).

The amended complaint alleges that Wells Fargo has been engaging in widespread unethical sales practices since at least 2005. *See* ECF No. 54 ¶¶ 88-103, 112, 163. For example, Wells Fargo opened more than 1.5 million deposit accounts for customers without their authorization. *Id.* ¶¶ 92, 102. Wells Fargo also submitted over 500,000 credit-card applications for customers without their permission. *Id.* ¶¶ 93, 102. Because of these improper sales practices, "federal banking regulators announced [in September 2016] that Wells Fargo had been fined $185 million." *Id.* ¶ 169. That was the first public disclosure of the unethical sales practices, and the market value of Wells Fargo's stock fell in response to the disclosure. *Id.* ¶¶ 175, 186, 199.

Plaintiffs allege that the Plan's fiduciaries—who were also corporate insiders— "were aware of systemic criminal and unethical conduct at the Company since as early as 2005," yet they failed to disclose this fraud to the public. *Id.* ¶ 163. Plaintiffs claim that earlier disclosure would have mitigated the impact on Wells Fargo's stock price that would inevitably result from the disclosure of Wells Fargo's fraud. *See id.* ¶ 208 ("Defendants . . . knew that . . . the longer the fraud is permitted to fester, and the longer the fraud is concealed, the greater the inflation and the greater the ultimate damage upon revelation—which is *precisely* what happened here."); *id.* ¶ 220 ("[T]he lengthy cover-up made the situation far worse for Plan Participants."). Plaintiffs also allege that the Plan's fiduciaries acted imprudently by failing to take other corrective measures to protect participants, such as "implementing processes to stop the known fraud"; temporarily freezing stock purchases and sales to prevent Plan participants from purchasing more Wells Fargo stock at inflated prices; "[d]iscontinuing the automatic investment" of matching contributions in Wells Fargo stock; or purchasing a hedging product. *Id.* ¶ 229.

II. ANALYSIS

Plaintiffs allege that defendants violated their duties of prudence and loyalty under ERISA. *See* 29 U.S.C. § 1104(a)(1)(A)-(B). The Court will address each of these duties in turn.

A. Duty of Prudence

ERISA requires plan fiduciaries to manage their plans prudently. 29 U.S.C. § 1104(a)(1)(B). ERISA generally allows fiduciaries to invest plan assets "in the stock of the company that employs the plan participants." *Dudenhoeffer*, 134 S. Ct. at 2463, 2465-66; *see also* 29 U.S.C. § 1104(a)(2) (exempting employee stock ownership plans from ERISA's diversification requirement). But in some situations, it may be imprudent for a fiduciary to allow plan participants to invest in overpriced stock.

As a general matter, plan fiduciaries may "prudently rely on the market price" of a publicly-traded stock as "the best estimate of" its value. *Dudenhoeffer*, 134 S. Ct. at 2471 (citation omitted). In other words, the duty of prudence does not require plan fiduciaries to "outsmart a presumptively efficient market." *Id.* at 2472 (citation omitted). Therefore, "allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances." *Id.* at 2471.

One such "special circumstance" occurs when a fiduciary has inside information that a publicly-traded stock is overpriced. *See id.* at 2472. In this situation, a fiduciary cannot rely on the stock's market price, because the fiduciary knows that the market price is inflated. But fiduciaries nevertheless face "unique challenges" when they are accused of imprudently "fail[ing] to act on inside information they had about the value of the employer's stock." *Amgen Inc. v. Harris*, 136 S. Ct. 758, 759 (2016) (latter quote from *Dudenhoeffer*, 134 S. Ct. at 2469). One obvious challenge is that it is illegal for anyone, including the fiduciary of an ERISA plan, to trade on the basis of inside information. ERISA's duty of prudence does not "require an ESOP fiduciary to perform an action—such as divesting the fund's holdings of the employer's stock on the basis of inside information—that would violate the securities laws." *Dudenhoeffer*, 134 S. Ct. at 2472.

Given the difficult situation facing an ERISA fiduciary, the Supreme Court in *Dudenhoeffer* established a demanding pleading standard for "a claim for breach of the duty of prudence on the basis of inside information." *Id.* To withstand a motion to dismiss such a claim, "a plaintiff must plausibly allege [1] an alternative action that the defendant could have taken [2] that would have been consistent with the securities laws and [3] that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." *Id.* Here, plaintiffs' amended complaint meets only two of these three requirements.

1. An Alternative Action

The amended complaint identifies five alternative actions that the Plan's fiduciaries could have taken to protect the Plan's assets. According to the amended complaint, the Plan's fiduciaries could have (1) implemented processes to stop the fraud; (2) disclosed the fraud to Plan participants, the government, and the public; (3) frozen "further stock purchases (and sales)" to "prevent[] Plan Participants from purchasing billions of dollars of Wells Fargo stock at fraudulently-inflated values"; (4) stopped matching employer contributions in Wells Fargo stock; and (5) purchased a "hedging product" to offset the anticipated losses that the Plan would incur when Wells Fargo's unethical sales practices came to light. ECF No. 54 ¶ 229.

The implementation of any of these alternatives would have required disclosure, however. Obviously, the disclosure alternative would have required disclosure, but the fiduciaries could not have implemented any of the other alternatives without also disclosing the unethical sales practices. Thus, if the fiduciaries did not violate their duty of prudence when they failed to disclose, they also did not violate their duty of prudence by failing to take the other steps. Plaintiffs admitted as much at oral argument. *See* ECF No. 161 at 74 (conceding that the other alternatives are "entirely derivative of a disclosure action," so if plaintiffs "haven't adequately pled a disclosure claim," the other alternatives "fall with it").[1]

[1] In fact, removing a fund as an investment option "without explanation might be even worse" than straight-up disclosure. *Saumer v. Cliffs Nat. Res. Inc.*, 853 F.3d 855, 864 (6th Cir. 2017). Removing a fund as an investment option without explanation "signals that something may be deeply wrong inside [the] company" without giving the market enough "information to gauge the stock's true

The Court will therefore focus on the disclosure alternative.

2. Consistent with the Securities Laws

Defendants argue that early disclosure would have been inconsistent with the securities laws, because, they say, the securities laws do not *require* them to "immediately" disclose "all information that might conceivably affect" Wells Fargo's stock price. ECF No. 115 at 18 (quoting *In re Bos. Sci. Corp. Sec. Litig.*, 686 F.3d 21, 27 (1st Cir. 2012)). But defendants do not argue that early disclosure would have *violated* any "provision of the securities laws." ECF No. 161 at 100. This is not surprising, as one of the main goals of the securities laws is to curb fraud and insider trading. Thus, an early disclosure of Wells Fargo's unethical sales practices would have been consistent with both the letter and the spirit of the securities laws.

3. More Harm Than Good

The problem for plaintiffs is the third *Dudenhoeffer* requirement—viz., the requirement that they plausibly allege that "a prudent fiduciary in the defendant's position could not have concluded that . . . publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." *Dudenhoeffer*, 134 S. Ct. at 2473.

This is a "fact-sensitive inquiry." *Harris v. Amgen, Inc.*, 788 F.3d 916, 926 (9th Cir. 2014) (Kozinski, J., dissenting from denial of rehearing en banc). The fiduciary's decision should not be "evaluated from the 'vantage point of hindsight.'" *In re Target Corp. Sec.*

value." *Harris v. Amgen, Inc.*, 788 F.3d 916, 925-26 (9th Cir. 2014) (Kozinski, J., dissenting from denial of rehearing en banc)

Litig., No. 16-CV-1315 (JNE/BRT), 2017 WL 3267708, at *19 (D. Minn. July 31, 2017) (quoting *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994)). And a prudent fiduciary may—indeed, must—consider numerous factors in determining whether disclosure would cause a fund more harm than good.

For example, just how serious is the alleged fraud? *See Smith v. Delta Air Lines Inc.*, 619 F. App'x 874, 876 (11th Cir. 2015) (dismissing a complaint that did not allege that "the fiduciaries had material inside information about [the company's] financial condition"). How much would disclosure affect the company's stock price in the short run? How about in the long run? *See Harris*, 788 F.3d at 926. How many shares of company stock does the Plan currently own? How many additional shares will Plan participants purchase if disclosure is delayed for a month? Or a year? *See In re Pilgrim's Pride Stock Inv. Plan ERISA Litig.*, No. 2:08-CV-472-JRG-RSP, 2016 WL 8814356, at *3, *report and recommendation adopted*, ECF No. 203 (E.D. Tex. Oct. 4, 2016) (rejecting the plaintiffs' argument that earlier disclosure would have been better for the fund partly because "[t]he million-plus shares already in the Plan dwarf the small number that would have been added in any given month by contributions to the Plan").

Then there are factors that relate to the *timing* and *form* of any disclosure. *See Harris*, 788 F.3d at 926 (noting that a "badly timed withdrawal could cause the stock value to drop below its efficient-market level"). How confident is the fiduciary that he or she has all relevant information, so that a single complete and accurate disclosure can be made? Should the fiduciary wait to get more information before disclosing the fraud so as to avoid a piecemeal "releas[e of] a disparate array of half-truths and incomplete data to the market"? *Id.* at 927.

Should the fiduciary wait until the company's fraud can be disclosed simultaneously with some remedial action, such as a settlement with the SEC, the resignation of the company's CEO, or the rollout of a new company initiative to win back its customers' trust? Being able to pair an announcement of fraud with an announcement of remedial action may cushion the bad news and thus mitigate the drop in the stock price. Also, would it be more beneficial to disclose the fraud through normal channels rather than through the fiduciaries of a 401(k) plan? *See Graham v. Fearon*, No. 1:16 CV 2366, 2017 WL 1113358, at *5 (N.D. Ohio Mar. 24, 2017) (observing that "an 'unusual' disclosure outside the securities laws' normal reporting regime could 'spook' the market, causing a more significant drop in price than if the disclosure were made through the customary procedures" (quoting *In re BP P.L.C. Sec. Litig.*, No. 4:10- CV-4214, 2017 WL 914995, at *5 (S.D. Tex. Mar. 8, 2017))).

This list of considerations is not exhaustive, of course. But it is sufficient to make the point that an earlier disclosure is not always better than a later disclosure. A dozen fiduciaries in the same position could weigh the same factors and reach a dozen different (but equally prudent) conclusions about whether, when, how, and by whom negative inside information should be disclosed.

Perhaps for that reason, most post-*Dudenhoeffer* cases have come down on the side of the defendants.[2]

[2] Two notable exceptions are *Murray v. Invacare Corp.*, 125 F. Supp. 3d 660, 667-69 (N.D. Ohio 2015) and *Ramirez v. J.C. Penney Corp.*, No. 6:14-CV-601-MHS-KNM, 2015 WL 5766498, at *4-5 (E.D.

For example, in *Loeza v. John Does 1-10*, 659 F. App'x 44 (2d Cir. 2016), a group of JPMorgan employees argued that the fiduciaries of JPMorgan's 401(k) plan acted imprudently by failing to disclose fraud to the public. There, as here, the plaintiffs claimed that earlier disclosure "would not have caused the Fund more harm than good because 'the longer a fraud goes on, the more painful the [stock price] correction would be, as experienced finance executives . . . reasonably should have known.'" *Id.* at 45-46 (citation omitted). The Second Circuit, however, held that these allegations were "wholly conclusory and . . . insufficient" to meet *Dudenhoeffer*'s pleading standard. *Id.* at 46.

Similarly, in *Saumer v. Cliffs Natural Resources Inc.*, 853 F.3d 855 (6th Cir. 2017), the plaintiffs claimed that plan fiduciaries should have divulged inside information about the company "so that the market would correct downward and the fiduciary would cease buying [the employer's] stock at an inflated price." *Id.* at 863. But disclosing this information "would have collapsed [the employer's] stock price, hurting participants already invested in the" fund. *Id.* at 864. Therefore, the Sixth Circuit rejected the "plaintiffs' nonpublic-information claims." *Id.* at 865. Similarly, in *Whitley v. BP, P.L.C.*, 838 F.3d 523 (5th Cir. 2016), the Fifth Circuit held that a prudent fiduciary "could very easily conclude" that early disclosure of BP's past safety

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Tex. Sept. 29, 2015). But *Murray* relied heavily on a Ninth Circuit decision that was later reversed by the United States Supreme Court in *Amgen Inc. v. Harris*, 136 S. Ct. 758, 759-60 (2016). And *Ramirez* likewise predated *Amgen*. *See Graham v. Fearon*, No. 1:16 CV 2366, 2017 WL 1113358, at *4 & n.5 (N.D. Ohio Mar. 24, 2017); *In re BP P.L.C. Sec. Litig.*, No. 4:10-CV-4214, 2017 WL 914995, at *3 & n.7 (S.D. Tex. Mar. 8, 2017).

breaches "*would* do more harm than good" to the plan. *Id.* at 529.

Courts have even dismissed breach-of-prudence claims when plaintiffs have made quite specific allegations about the likely impact of disclosure on the plan. For example, in *Forte v. U.S. Pension Committee*, No. 15-CV-4936 (PKC), 2016 WL 5922653 (S.D.N.Y. Sept. 30, 2016), the plaintiff alleged that "purchasers, who were harmed, outnumbered the sellers, who benefitted, by more than two to one." *Id.* at *5. That specificity did not satisfy the district court, which dismissed the plaintiff's claim on standing grounds but faulted the plaintiff for failing to "plead any facts to support his broad contention that 'in virtually every fraud case, the longer the fraud persists, the harsher the [price] correction tends to be.'" *Id.* at *10 (citation omitted). Similarly, in *Graham*, the plaintiffs alleged that disclosure "near the very beginning of" the fraud would have avoided "almost all of the artificial inflation of [the employer's] stock price that occurred" while harming "virtually no Plan participants." *Graham*, 2017 WL 1113358, at *5. And in *BP*, the plaintiffs offered expert analysis stating that an earlier disclosure "would likely have resulted in" a mere 3 to 5% drop in the stock price, instead of the nearly 50% drop that later occurred after the April 2010 Deepwater Horizon explosion. *BP*, 2017 WL 914995, at *4-5 (citation omitted). Yet in both *Graham* and *BP*, the courts dismissed the plaintiffs' prudence claims because the plaintiffs had failed to plausibly allege that a prudent fiduciary *could not* have concluded that disclosure would have caused the plan more harm than good.

Plaintiffs argue that their case is different because it involves fraud that was ongoing at the time that defendants failed to disclose. Ongoing fraud is certainly one factor that a prudent fiduciary might consider in deciding whether early disclosure would better protect the plan's assets; after all, disclosing the fraud will usually end the fraud, and less fraud will usually mean less damage to the company. But ongoing fraud is not a talisman that will always satisfy *Dudenhoeffer*'s pleading standard. Rather, it is simply another "factor[] [that] Defendants might have considered when deciding whether to make" an earlier disclosure. *In re JPMorgan Chase & Co. ERISA Litig.*, No. 12-CV-4027 (GBD), 2016 WL 110521, at *4 (S.D.N.Y. Jan. 8, 2016), *aff'd sub. nom. Loeza v. John Does 1-10*, 659 F. App'x 44 (2d Cir. 2016). Here, the alleged presence of ongoing fraud does not save plaintiffs' prudence claim for at least two reasons:

First, other courts have rejected similar ongoing-fraud claims. In *Martone v. Whole Foods Market, Inc.*, No. 1:15-CV-877 RP, 2016 WL 5416543 (W.D. Tex. Sept. 28, 2016), for example, the plaintiffs alleged that Whole Foods' grocery stores "systematically overcharg[ed] customers for pre-packaged foods." *Id.* at *1. This fraud went on for years. *Id.* And like plaintiffs here, the plaintiffs in *Whole Foods* alleged that the negative impact of Whole Foods' fraud "w[ould] only get worse the longer the fraud goes on." *Id.* at *8. Even so, the court dismissed the plaintiffs' claims, reasoning that "a prudent fiduciary could very easily conclude that [corrective] actions would do more harm than good." *Id.* (quoting *Whitley*, 838 F.3d at 529).

At oral argument, plaintiffs tried to distinguish *Whole Foods* by arguing that the fraud in that case was not as bad as the fraud here. *See* ECF No. 161 at 47-49. Specifically, plaintiffs claimed that the fraud in *Whole Foods* did not go to the "core of the company's business," while the fraud here went to the core of Wells Fargo's "reputation" for putting its "customer[s] first." *Id.* at 49. The Court disagrees. A grocery store's systematic overcharging of its customers is as serious a matter as a bank's overly aggressive cross selling.

Second, and more importantly, a fiduciary's prudence or imprudence must be assessed in light of the "*totality* of the circumstances." *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 368 (4th Cir. 2014) (emphasis added; hyphens removed); *see also Dudenhoeffer*, 134 S. Ct. at 2471 (describing this inquiry as "necessarily . . . context specific"). The presence of ongoing fraud may weigh in favor of earlier disclosure. But other factors may weigh in favor of later disclosure. In this case, for example, a large percentage of the Plan's assets was already invested in Wells Fargo stock. A prudent fiduciary might have concluded that, although delaying disclosure would result in a relatively small number of shares of overpriced Wells Fargo stock being added to the Plan, delaying disclosure would nevertheless benefit the Plan because it would allow the company to make a more complete and accurate disclosure, to pair a disclosure with an announcement of remedial measures, and to disclose through regular corporate channels rather than through 401(k) fiduciaries—all of which would help to mitigate the impact of disclosure on the price of Wells Fargo stock. *See Harris*, 788 F.3d at 926-27; *Graham*, 2017 WL 1113358, at *5.

In short, plaintiffs' prudence claim largely rests on their conclusory assertion that early disclosure of corporate misconduct is *always* better for a plan than later disclosure. That assertion is simply not true, as multiple courts have recognized. Plaintiffs have failed to plead specific facts to make plausible their allegation that, under the circumstances of this particular case, a prudent fiduciary "could not have concluded" that a later disclosure would result in a smaller loss to the Fund than an earlier disclosure. *Dudenhoeffer*, 134 S. Ct. at 2473. Plaintiffs' prudence claim must therefore be dismissed.

B. Duty of Loyalty

An ERISA fiduciary is required not only to act with prudence, but also to act with loyalty—that is, "solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . . providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(1)(A)(i). In their briefs and then at oral argument, plaintiffs insisted that they pleaded a breach-of-the-duty-of-loyalty claim that was independent from their breach-of-the-duty-of-prudence claim. In other words, plaintiffs argued that even if their prudence claim were to be dismissed under *Dudenhoeffer*, they should be permitted to proceed with their loyalty claim.

In fact, though, the amended complaint does not clearly separate these two claims—that is, it does not clearly explain how, say, defendants' failure to make an earlier disclosure of the unethical sales practices could violate their duty of loyalty even if it did not violate their duty of prudence. The Court will therefore dismiss plaintiffs' loyalty claim with leave to replead the claim in a second amended complaint. If plaintiffs replead their loyalty claim, they should specify exactly who breached his or her duty of loyalty, exactly when, and exactly how. After that, defendants may move to dismiss the claim. The Court can then decide whether *Dudenhoeffer*'s pleading requirements apply to a loyalty claim that is predicated on the same facts as a (dismissed) prudence claim.

C. Fiduciary Status

Defendants argue that Wells Fargo, the Plan administrators, and the Human Resources Committee were not ERISA fiduciaries. Nothing seems to turn on this argument as a practical matter. In any event, the Court need not reach this question as to plaintiffs' prudence claim because that claim is being dismissed under *Dudenhoeffer*. If plaintiffs replead their loyalty claim, defendants may reassert this argument in moving to dismiss that claim.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. Defendants' motion to dismiss plaintiffs' amended complaint [ECF No. 113] is GRANTED.
2. Plaintiffs' amended complaint is DISMISSED WITH PREJUDICE, except that plaintiffs' claim that defendants breached their duty of loyalty under ERISA is DISMISSED WITHOUT PREJUDICE.
3. Plaintiffs may file a second amended complaint by Friday, October 27, 2017, in which they may replead their loyalty claim.

Dated: September 21, 2017

s/Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Case No. 0:16-cv-03405 (PJS/BRT)

IN RE: WELLS FARGO
ERISA 401(K) LITIGATION

SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

Dated: October 27, 2017

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IX. REQUEST FOR RELIEF 99

Plaintiffs, Francesca Allen, John Sterling Ross, and Mary Lou Shank (collectively, "Plaintiffs"), individually and on behalf of all other similarly-situated participants in, and beneficiaries of, Wells Fargo & Company's 401(k) Plan (the "Class"), by their undersigned counsel, bring this Second Amended Consolidated Class Action Complaint against the defendants listed herein (collectively "Defendants," as defined below), for their violations of Sections 409 and 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1109 and 1132, alleging as follows:

I. NATURE OF THE ACTION

"We found that Wells Fargo's business model imposed unrealistic sales quotas that, among other things, incentivized employees to engage in highly aggressive sales practices, creating the conditions for unlawful activity…."

Michael N. Feuer,
Los Angeles City Attorney
September 20, 2016

"Failing to notify these customers about these sham accounts, this isn't cross-selling, this is fraud."

Senator Pat Toomey (R-PA)
September 20, 2016

"When the Independent Directors of the Board authorized this investigation, the purpose was to examine the root causes of sales practice abuses and to assess how issues of corporate structure and culture as well as individual actions contributed to the injuries inflicted upon Wells Fargo's customers and the extraordinary damage to Wells Fargo's brand and reputation, not merely to determine compensation or disciplinary action."

April 10, 2017 Independent Directors of the Board of Wells Fargo & Company Sales Practices Investigation Report

1. Plaintiffs – Wells Fargo & Company ("Wells Fargo" or the "Company") "team members" and participants in Wells Fargo's 401(k) Plan (the "Plan") – bring this action concerning the Plan's investments in Wells Fargo stock individually, as representatives of the Plan and on behalf of a class of all Plan participants and beneficiaries (collectively "Participants") for whose individual accounts the Plan invested in funds that invested primarily in Wells Fargo stock from January 1, 2014 through September 15, 2016 (the "Class Period").

2. Wells Fargo recently stated that it is "committed to helping [its] clients achieve their investment goals through advice that is regularly reviewed and aligned to their objectives and risk tolerance." As described herein, Wells Fargo and its Plan fiduciaries failed to show the same commitment to Plan Participants.

3. As is now well known, Wells Fargo was plagued for years by a fraud epidemic, in which its low-level employees were incentivized and pressured to open millions of unauthorized accounts in the names of unsuspecting Wells Fargo customers. Revelation of the fraud undermined critical components of Wells Fargo's business model and key drivers of its stock price – cross-selling and a reputation for truthfulness and integrity.

4. Initially, when the fraud was revealed in September 2016, Wells Fargo admitted to the opening of approximately 2 million unauthorized accounts. In August 2017, however, Wells Fargo revealed that it had, in fact, opened at least 3.5 million unauthorized accounts.

5. Defendants, which include high-level Wells Fargo executives and Board members, knew about the epidemic for years, but failed to take any steps to stem the fraud and, indeed, facilitated and fostered further fraud by not disclosing it to the public.

6. Defendants breached their duties of loyalty to Plan Participants by failing to avoid conflicts of interests which prevented them from taking any corrective actions, including removing Wells Fargo stock as an investment option, that would have prevented Plan participants from purchasing inflated stock; and also by improperly withholding from Plan Participants material, non-public information about the long-running fraud epidemic.

7. Defendants did not act for the exclusive purpose of benefiting the Plan. Rather, they acted for their own benefit by not daring to disrupt the status quo (which was a culture of greed), to protect their own careers. Defendants' choice to maintain their own positions and enhance their own financial interests by leaving Plan Participants in the dark and continually investing Plan Assets in stock that they knew to be artificially inflated is the epitome of disloyalty.

8. Even after Defendants knew that Wells Fargo's stock price was destined to drop upon the eventual public disclosure, and would only drop more significantly the longer the ongoing fraud epidemic was allowed to continue, Defendants failed to take any actions to protect Plan Participants from purchasing artificially-inflated Wells Fargo stock.

9. Thus, Defendants violated their ERISA fiduciary duties to the Plan Participants, causing hundreds of millions of dollars, if not more, in losses to the Plan.

II. JURISDICTION AND VENUE

10. Plaintiffs bring this action pursuant to 29 U.S.C. § 1132(a)(2) and (3), which provide that participants in an employee retirement plan may pursue a civil action on behalf of the plan to remedy breaches of fiduciary duties and other prohibited conduct, and to obtain monetary and appropriate equitable relief as set forth in 29 U.S.C. §§ 1109 and 1132.

11. This case presents a federal question under ERISA, and, therefore, this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1).

12. Venue is proper pursuant to 29 U.S.C. § 1132(e)(2) and 28 U.S.C. § 1391(b) and, based on information and belief, because this is the district where the Plan is administered and where breaches of fiduciary duties giving rise to this action occurred.

III. PARTIES

Plaintiffs

13. Francesca Allen is a Plan Participant, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), who purchased and held, through the end of the Class Period, Wells Fargo shares in her retirement investment portfolio during the Class Period. From at least 2013 through the present, Ms. Allen's 401(k) Plan assets have included the Wells Fargo employee stock ownership plan ("ESOP") and Non-ESOP Funds.

14. John Sterling Ross is a Plan Participant, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), who purchased and held, through the end of the Class Period, Wells Fargo shares in his retirement investment portfolio during the Class Period. From at least 2013 through the

present, Mr. Ross's 401(k) Plan assets have included the Wells Fargo ESOP and Non-ESOP Funds.

15. Mary Lou Shank is a Plan Participant, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), who purchased and held Wells Fargo shares in her retirement investment portfolio during the Class Period. From at least 2013 through the present, Ms. Shank's 401(k) Plan assets have included the Wells Fargo ESOP Fund.

Defendants

16. ERISA requires every plan to provide for one or more named fiduciaries who will have "authority to control and manage the operation and administration of the plan." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

17. ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under § 402(a)(1), 29 U.S.C. § 1102(a)(1), but also any other persons who, in fact, perform fiduciary functions. Therefore, a person is a fiduciary to the extent: "(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

18. Each of the named Defendants was a fiduciary during the Class Period as defined by ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A) – either as a named fiduciary or de facto fiduciary – with respect to the Plan, and owed fiduciary duties to the Plan and its Participants under ERISA.

A. Wells Fargo & Company

19. With $1.5 trillion in assets, Wells Fargo is one of the nation's largest financial services companies. Wells Fargo is the Plan "sponsor" within the meaning of 29 U.S.C. § 1002(16)(B), is a participating employer in the Plan, and provides funding for the Plan.

20. On information and belief, through its selection, management and supervision of the Human Resources Committee, the Employee Benefits Review Committee ("EBRC"), the Director of Human Resources, and the Director of Compensation and Benefits, Wells Fargo exercises discretionary authority or discretionary control concerning management of the Plan, as well as discretionary authority and responsibility with respect to the administration of the Plan. Therefore, the Company is a fiduciary under 29 U.S.C. § 1002(21)(A).

B. Director of Human Resources and Director of Compensation and Benefits

21. The Plan Administrators, the Wells Fargo Director of Human Resources, Hope Hardison, and the Wells Fargo Director of Compensation and Benefits, Justin Thornton, are "Named Fiduciar[ies]" under the Plan. Plan § 2.29.[1] The Plan Administrators are empowered "[t]o adopt and enforce such rules and regulations and prescribe the use of such forms as may be necessary to carry out the provisions of the Plan," Plan § 12.3(a), and they have "sole authority … to make any determinations required in the administration of the Plan." Plan § 12.1. As the Plan Administrators, they have full discretionary authority to administer and interpret

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[1] Unless otherwise noted, all citations to the "Plan" refer to the Wells Fargo & Company 401(k) Plan, as Amended and Restated January 1, 2015

the Plan and, therefore, are fiduciaries pursuant to 29 U.S.C. § 1002(21)(A).

C. Wells Fargo Employee Benefits Review Committee (EBRC)

22. Per the Wells Fargo Summary Plan Description, the investment options offered within the 401(k) Plan are monitored and reviewed periodically by the EBRC, which has "authority to control or manage the assets of the Plan." Plan § 2.29. Therefore, the EBRC and its members are fiduciaries under 29 U.S.C. § 1002(21)(A).

23. The Trust Agreement further states that the EBRC "shall direct the Trustee as to matters involving the investment of the Trust Fund," Trust Agreement § 1.4, and "shall manage and control the Plan assets held in the Trust Fund, and the Trustee shall be subject to the directions of the [EBRC] or an Investment Manager, if applicable, at all times regarding the investments of the Trust Fund and other matters herein." Trust Agreement § 3.1(a).

24. The EBRC members were all senior executives with vested interests in maintaining the corrupt status quo and inflating the Company's cross-selling metrics. They also had an interest in not blowing the whistle on their colleagues and peers for fear of retribution (as evidenced by Wells Fargo's systemic firing of other whistleblowers).

25. No publicly available plan documents limit, circumscribe, or otherwise negate the ERBC's duties and responsibilities under trust law or ERISA mandates.

26. No publicly available document contains any ERBC discussions regarding making the Plan match in cash, and not Wells Fargo stock, regardless of whether a Wells Fargo stock option was available as part of the plan.

27. Defendant John Shrewsberry is a Senior Executive Vice President and Wells Fargo's Chief Financial Officer. He is responsible for the Company's financial management functions, including accounting and control, financial planning and analysis, line of business finance functions, asset-liability management, treasury, tax management, investor relations, and the company's investment portfolios. He serves on the Wells Fargo Operating, Management, and Market Risk Committees and was a member of the EBRC from at least January 1, 2010 through May 14, 2014.

28. Defendant Kevin Oden is an executive vice president and head of Operational Risk and Compliance within Corporate Risk at Wells Fargo. Oden manages second-line risk activities across information security, financial crimes risk, model risk, operational risk, regulatory compliance risk, and technology risk, and he also serves on the Wells Fargo Management Committee. Oden reports to Michael Loughlin, Senior Executive Vice President and Chief Risk Officer. Prior to his current position, Oden was the Chief Market & Institutional Risk Officer, where his responsibilities included managing market risk oversight, market risk regulatory capital calculation, model risk management, counterparty credit and issuer risk as well as country risk. Prior to that, Oden was the head of Market Risk for Wells Fargo Securities. He has been a member of the EBRC from at least December 8, 2014 through the present.

29. Defendant Patricia Callahan is a recently retired senior executive officer of Wells Fargo. From 2011-2015, she held the prominent role of Chief Administrative Officer where she oversaw the company's brand, communications, reputation management and stakeholder engagement efforts. She also served on Wells

Fargo's Corporate Responsibility Committee. She was a member of the EBRC from at least January 1, 1999 through August 31, 2015.

30. Defendant Stanhope Kelly was a top executive of Wells Fargo, serving as Wells Fargo's lead regional president for the Carolinas, covering retail, small business and business banking operations until his retirement in 2014. He served on the EBRC from at least March 1, 2009 through June 30, 2014. Carrie Tolstedt, one of the ringleaders and primary beneficiaries of the Wells Fargo fake account scandal, was in close contact with Kelly, commenting on his retirement: "When I think about the definition of a great community banker, I think about Stan Kelly."

31. Defendant Dawn Martin Harp is a member of the Wells Fargo Management Committee and serves as the head of Wells Fargo Dealer Services. She is responsible for the strategy, growth, and profitability of Indirect Auto Finance and Commercial Services. Harp served on the EBRC from at least March 1, 2016 to the present.

32. Defendant Suzanne Ramos is a member of Wells Fargo's Management Committee. She serves as Executive Vice President, Wells Fargo's National Affluent Sales Leader. She has served in that position since January 2013. Prior to that, Ramos served as Executive Vice President, Border Region President. She has been a member of the EBRC since at least December 1, 2010.

33. Defendant James Steiner is the president of Abbot Downing, a Wells Fargo brand that caters to ultra-high net worth clients. Steiner has been a member of the EBRC from at least July 1, 2011 to the present. He served

on Wells Fargo's Management Committee during the Class Period.

34. Defendant George Wick is the head of Principal Investments for Wells Fargo Securities and reports to Shrewsberry. He has been a member of the EBRC from at least March 15, 2015 to the present. He served on Wells Fargo's Management Committee during the Class Period.

35. Defendant Martin Davis served as the head of enterprise technology services, executive vice president and chief technology officer for Wells Fargo until his departure in mid-2015. He was a member of the EBRC from at least March 1, 2009 through December 10, 2014.

36. Defendant Thomas Wolfe was head of the Consumer Credit Solutions Group at Wells Fargo. The Consumer Credit Solutions Group was a part of the Consumer Lending Group. Wolfe retired on October 31, 2015. He was a member of the EBRC from at least March 1, 2012-August 31, 2014.

37. Based on (a) their roles within the Company; (b) their participation in various committees with other executives; and (c) their position on the EBRC, all EBRC members knew, or should have known about: the importance of cross-selling metrics to the Company's share price; the importance of Wells Fargo's reputation; the systemic fraud being committed and concealed; and the resulting impact on Wells Fargo's stock price from the continued concealment and failure to correct the fraudulent practices.

D. Human Resources Committee of the Board

38. From at least January 1, 2010 through January 1, 2015, the Human Resources Committee of the Board ("HRC") was a "Named Fiduciary" under the Plan. Wells

Fargo & Company 401(k) Plan, as Amended and Restated January 1, 2010, at § 2.26.

39. Throughout the Class Period, the HRC had the express authority to amend the Plan at any time. Plan § 13.1.

40. Accordingly, the HRC had, and has, discretionary authority with respect to the management and administration of the Plan.

41. According to answers provided by Wells Fargo to the Senate Committee for Banking, Housing, and Urban Affairs ("Senate Banking Committee") in November 2016, as top management of Wells Fargo became aware of fraudulent practices in the Community Banking segment of the Company, they informed the HRC that they were "monitoring sales integrity in Community Banking."

42. The HRC members during the Class Period were Lloyd H. Dean, John S. Chen, Susan E. Engel, Donald M. James, and Stephen W. Sanger.

43. According to the HRC Charter, the HRC's purpose is to assist the Board "in fulfilling its responsibilities relating to the overall compensation strategy for the Company and the compensation of the Company's executive officers."

44. Significantly, the HRC is tasked with overseeing "the implementation of risk-balancing and risk management methodologies for incentive compensation plans and programs for senior executives and those identified employees in a position to expose the Company to material risk."

45. The HRC Charter further states, in pertinent part, that:

- The HRC shall establish, in consultation with senior management, the overall strategy for the Company with respect to incentive compensation and shall oversee the Company's incentive compensation practices to help ensure that they are consistent with the safety and soundness of the Company and do not encourage excessive risk-taking;

  and

- The HRC shall make recommendations to the Board with respect to the Company's incentive compensation and equity-based plans that are subject to Board approval, discharge any responsibilities assigned to the HRC by any of these plans, and periodically review the Company's stock ownership retention guidelines for participants in the Company's Long-Term Incentive Compensation Plan.

46. Wells Fargo's 2016 Annual Proxy further reiterates the HRC's primary responsibilities in both establishing the Company's incentive compensation policies and monitoring any risk exposure created from such policies, including:

- Discharging the Board's responsibilities relating to the Company's overall compensation strategy and the compensation of its executive officers;
- Overseeing the Company's incentive compensation practices so that they are consistent with the safety and soundness of the Company and do not encourage excessive risk-taking, and reviewing and

approving benefit and compensation plans and arrangements applicable to executive officers of the Company;

- Evaluating the CEO's performance and approving and recommending the CEO's compensation to the Board for ratification and approval, and approving compensation for other executive officers and any other officers or employees as the HRC determines appropriate; and
- Having the sole authority to retain or obtain the advice of and terminate any compensation consultant, independent legal counsel or other advisor to the HRC, and evaluating the independence of its advisors in accordance with NYSE rules.

47. Based on (a) their roles on the Board, (b) the scope of misconduct discussed below, and (c) senior management informing them of the scandal and the underlying mechanics, the HRC had actual knowledge of: the importance of cross-selling metrics to the Company's share price; the importance of Wells Fargo's reputation; the systemic fraud being committed and concealed; and the resulting impact on Wells Fargo's stock price from the continued concealment and failure to correct the fraudulent practices.

48. Each Defendant identified above as a Plan fiduciary is also subject to co-fiduciary liability under 29 U.S.C. § 1105(a)(1)-(3) because she, he, or it enabled other fiduciaries to commit breaches of fiduciary duties, failed to comply with 29 U.S.C. § 1104(a)(1) in the administration of its duties, and/or failed to remedy other fiduciaries' breaches of their duties, despite having knowledge of the breaches.

IV. DEFENDANTS' FIDUCIARY DUTIES

49. ERISA imposes strict fiduciary duties upon plan fiduciaries, none of which were eliminated, circumscribed, or otherwise limited by the Plan documents. ERISA § 404(a), 29 U.S.C. § 1104(a), states, in relevant part, that:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and … for the exclusive purpose of providing benefit to participants and their beneficiaries; and defraying reasonable expenses of administering the plan; with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims; by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and Title IV.

50. An ERISA fiduciary's duties are derived from the common law of trusts, and include the following, none of which were eliminated, circumscribed, or otherwise limited by the Plan documents.

51. *The Duty of Loyalty*: ERISA imposes on a plan fiduciary the duty of loyalty – that is, the duty to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and … for the exclusive *purpose* of … providing benefits to participants

and their beneficiaries…." ERISA § 404(a)(1)(A), 29 U.S.C. § 11404(a)(1)(A) (emphasis added).

52. The duty of loyalty requires fiduciaries to deal fairly and honestly with plan members. In particular, fiduciaries must not mislead plan members, and must disclose material information that could adversely affect a plan member's interests in the plan.

53. The duty of loyalty entails a duty to avoid conflicts of interest and to resolve them promptly when they occur. A fiduciary must always administer a plan with an eye toward the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or of the plan sponsor. This inquiry and the governing standard is necessarily subjective.

54. In 2013, right at the beginning of the Class Period in this case, Wells Fargo itself issued a publication entitled "Your Role as a Fiduciary." https://www08.wellsfargomedia.com/assets/pdf/commercial/retirement-employee-benefits/perspectives/role-as-a-fiduciary.pdf. In this publication, Wells Fargo posed the question: "What are my basic fiduciary responsibilities?" Wells Fargo then answered the question in two separately numbered paragraphs regarding the duty of loyalty and the duty of prudence – "Abide by the exclusive benefit rule" and, separately, "Act prudently."

55. In 2016, Wells Fargo also issued a publication entitled, "A look at the good, the bad, and the ugly of an Employee Stock Ownership Plan." In that publication, Wells Fargo stated:

- "Employer stock in the plan places an intense spotlight on plan fiduciaries."

- "The employer and the trustee have a fiduciary responsibility to guard the interests of plan participants."
- "The employer and the trustees should consult with legal counsel to make sure they understand where their duty to the employer stops and their fiduciary duty to the ESOP and its participants begins."
- "Fiduciary responsibilities must be taken seriously. Consider a plan that invests primarily in the stock of a single company — the assets of the plan are not diversified. Furthermore, the directors and officers of that company have decision-making powers over the plan, and often serve as plan trustees."
- "The employer and plan trustees are fiduciaries, and a fiduciary must always act in the best interest of the plan participants. The risks are obvious and the liability is real."

56. *The Duty of Prudence*: ERISA also imposes on a plan fiduciary the duty of prudence – that is, the duty "to discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and … with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man, acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims…." ERISA § 404(a)(1)(B), 29 U.S.C. § 11404(a)(1)(B). This, by its very terms, is an inherently objective analysis.

57. The duties of loyalty and prudence are independent duties, each with different responsibilities

and each subject to different standards and inquiries. A fiduciary must comply with each of these independent duties under ERISA.

58. The duty of loyalty is separate and distinct from the duty of prudence because it looks at an entirely different question than the duty of prudence does – namely, the duty of loyalty looks at whether the subjective intent of the fiduciaries was to act for the exclusive purpose of benefiting ERISA beneficiaries. In contrast, the duty of prudence simply asks the objective question – were the fiduciaries' actions reasonable?

59. *The Duty to Investigate and Monitor Investment Alternatives*: The duties of loyalty and prudence also encompass a duty to conduct an independent investigation into, and to continuously monitor, the merits of the investment alternatives in a plan, including employer securities, to ensure that each investment is a suitable option for that plan.

60. *The Duty to Monitor Appointed Fiduciaries*: Fiduciaries who have the responsibility to appoint other fiduciaries have the further duty to monitor those fiduciaries. The duty to monitor entails both giving information to and reviewing the actions of the appointed fiduciaries. The monitoring fiduciaries must ensure that the appointed fiduciaries:

(a) possess the needed credentials and experience, or use qualified advisors and service providers to fulfill their duties;

(b) are knowledgeable about the operations of the plan, the goals of the plan, and plan participants' behavior;

(c) are provided with adequate financial resources to do their jobs;

(d) have adequate information to do their jobs of overseeing the plan investments with respect to company stock;

(e) have access to outside, impartial advisors when needed;

(f) maintain adequate records of the information on which they base their decisions and analysis with respect to the plan's investment options; and

(g) report regularly to the monitoring fiduciaries.

The monitoring fiduciaries must then review, understand, and approve the conduct of the hands-on fiduciaries with whom they are charged with monitoring.

61. *The Duty to Disregard Plan Documents, if Required:* A fiduciary cannot avoid its fiduciary responsibilities by relying solely on the language of plan documents. While the basic structure of a plan may be specified, within limits, by the plan sponsor, the fiduciary cannot blindly follow the plan document if doing so leads to an imprudent result. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D)

62. *Co-Fiduciary Liability:* A fiduciary is liable, not only for fiduciary breaches within the sphere of his own responsibility, but also as a co-fiduciary in certain circumstances.

63. Indeed, ERISA § 405(a), 29 U.S.C. § 1105(a), states, in relevant part, that:

> In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with

respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; or

(2) if, by his failure to comply with section 404(a)(1) in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

64. *Non-Fiduciary Liability*: Under ERISA, non-fiduciaries who knowingly participate in a fiduciary breach may themselves be liable under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

V. THE PLAN

65. The Plan was established in 1953 and was restated multiple times, including in 2010 and 2015.

66. The Plan is a "defined contribution" benefit plan that is sponsored by Wells Fargo and available to eligible employees of Wells Fargo and its subsidiaries. All contributions to the Plan are held in the 401(k) Plan Trust.

67. The Plan is tax qualified under the Internal Revenue Code as both an employee stock ownership plan and as a 401(k)-qualified cash or deferred arrangement.

68. At all relevant times to this Complaint, the Plan was a "defined contribution" or "individual account" plan within the meaning of ERISA Section 3(34), 29 U.S.C. § 1002(34), in that the Plan provided for individual

accounts for each Participant and for benefits based solely upon the amount contributed to the Participant's account, and any income, expenses, gains, and losses, and any forfeitures of accounts of other Participants which could be allocated to such Participant's accounts. As such, the Plan is subject to ERISA.

69. An eligible employee can make salary deferral contributions to the Plan. Salary deferral contributions to the Plan are made from certified compensation earned during the entire pay period containing the date in which the employee salary deferral election is effective.

70. The Plan has more than 350,000 Participants and contains total assets of approximately $35 billion.

71. On information and belief, as of 2016, approximately 34% of the 401(k) Plan Assets, totaling approximately $11 billion out of the total $35 billion, were invested in Wells Fargo common stock.

72. Participants are eligible to receive employer matching and employer discretionary profit sharing contributions.

73. All matching contributions of the Plan are invested automatically in Wells Fargo stock.

Wells Fargo ESOP Fund

74. Participant contributions to the Plan's ESOP Fund are invested primarily in Wells Fargo common stock and such participation is available exclusively to Plan Participants.

75. Dividends on the ESOP may be distributed or passed through to Participants who are invested in the ESOP Fund.

Wells Fargo Non-ESOP Fund

76. Participant contributions to the Plan's Non-ESOP Fund are invested primarily in Wells Fargo common stock and such participation is available exclusively to Participants.

77. Due to certain Internal Revenue Code regulations, dividends declared or paid on Participants' account balances in the Non-ESOP Fund are reinvested within the Fund.

VI. FACTUAL ALLEGATIONS

A. Wells Fargo Touted its Reputation for Trust and Integrity.

78. Trust and reputation are at the cornerstone of the financial industry. Any breach of those principles will have harsh consequences for a malefactor's company stock price.

79. Wells Fargo has consistently emphasized the importance of trust, loyalty, and integrity to its business model in its external communications.

80. Indeed, protecting its reputation is one of Wells Fargo's seven risk management principles. According to a presentation at Wells Fargo's 2014 Investor Day by Wells Fargo's Chief Risk Officer, Mike Loughlin, "reputation is paramount" and Wells Fargo "strive[s] to minimize activities that could damage the franchise."

81. Wells Fargo has put its reputation for trust and loyalty at the forefront of its public communications, including the following examples:

a. On its website: "From the Gold Rush to the early 20th Century, through prosperity, depression and war, Wells Fargo earned a reputation of trust due to its attention and loyalty to customers."

b. In its Vision and Values (removed from their website just recently): "Corporate America is littered with the debris of companies that crafted lofty values on paper but, when put to the test, failed to live by them. We believe in values lived, not phrases memorized…. **We strive to be recognized by our stakeholders as setting the standard among the world's great companies for integrity and principled performance**. This is more than just doing the right thing. We also have to do it in the right way. **Honesty, trust, and integrity are essential for meeting the highest standards of corporate governance…. We will not engage in activities or business practices that could cause damage to our reputation**…." (emphasis added).

c. In its Code of Ethics: "Integrity is not a commodity. It's the most rare and precious of personal attributes. It is the core of a person's – and a company's – reputation…. At Wells Fargo, holding ourselves to the highest standards of ethical behavior is nothing new … it's been the cornerstone of our culture since 1852!"

d. In its Corporate Social Responsibility Report: "For 160 years, our customers have trusted us with their financial assets. To honor that trust, we hold ourselves to the highest ethical standards. We regularly monitor and refine our business practices and risk management structure to ensure there are appropriate controls in place to reduce risks to our customers and communities and ensure all team members are performing honestly and with integrity."

e. In its Corporate Governance Guidelines: "One of the Board's key responsibilities is **to ensure that the Company, through its management, maintains high ethical standards and effective policies and practices designed to protect the Company's reputation, assets and business**." (emphasis added).

f. In its Annual Reports: "Today, I sum up Wells Fargo's culture with this word: 'Relationships.' It captures the passion we all share for serving our key stakeholders — customers, communities, investors, and team members. **To earn their trust, we strive to do the right thing and act under the highest ethical standards were honesty, trust, and integrity matter**." (2-14 Report; emphasis added).

82. Wells Fargo's public campaign emphasizing its reputation for trust and loyalty was effective. Indeed, Wells Fargo's stock has received a higher price-to-book multiple compared to other big banks because of this reputation.

B. Cross-Selling Was Critical to Wells Fargo's Business Model.

83. Attempting to capitalize on its reputation for trust and loyalty, Wells Fargo engaged in an aggressive marketing practice known as "cross-selling" – the sale of multiple banking products to the same customer.

84. Cross-selling was central to Wells Fargo's business model and share price. The goal of Wells Fargo's high-pressure cross-selling strategy was to show steady quarterly growth in the opening of customer accounts and, most importantly, drive up the Company's share price. The multiple accounts held by many Wells Fargo customers signaled to Wall Street that the Company maintained deep relationships with its customers, meaning the Company would continue making money from them.

85. As stated in the Sales Practices Investigation Report issued by the Board ("Board Report"), the Community Bank's sales model, of which cross-selling was an integral part, "emphasized sales volume and relied heavily on consistent year-over-year growth."

86. Any apparent increase in customer accounts gained through cross-selling was particularly important to Wells Fargo, since it could be viewed as a testament to its purportedly client-centric approach and heritage. In other words, it enhanced the perception that Wells Fargo was so good to its customers that those customers were deepening their connection to Wells Fargo by opening new accounts and adding new services at a record pace.

87. Wells Fargo promoted cross-selling so aggressively that Former Chairman and CEO Richard Kovacevich created a target for each customer called the "Gr-eight initiative," meaning *eight add-on products per household*.

88. In Wells Fargo's Vision and Values Statement, cross-selling was described as "our most important strategy."

89. Cross-selling was so central to the Company's bottom line and financial metrics that Wells Fargo

management mentioned it 108 times at a two-day investor conference in 2010.

90. Wells Fargo's senior management knew of, encouraged, and closely monitored the cross-selling program. They regularly received updated cross-selling data and discussed the push for cross-selling with investors and securities analysts.

91. Wells Fargo's Annual Reports are filled with examples of the Company touting its cross-selling strategies and the corresponding impact on its financial results, including:

2010 Annual Report

- "Selling more products to our customers – 'cross-selling' – is very important to our business model and key to our ability to grow revenue and earnings."

2011 Annual Report

- "Because we conduct most of our businesses under the 'Wells Fargo' brand, negative public opinion about one business could affect our other businesses and also could negatively affect our 'cross-sell' strategy."

2012 Annual Report

- "Cross-sell of our products is an important part of our strategy to achieve our vision to satisfy all our customers' financial needs. Our retail bank household cross-sell was 6.05 products per household in fourth quarter 2012, up from 5.93 a year ago. We believe there is more opportunity for cross-sell as we continue to earn more business from our customers. Our goal is eight products per customer, which is approximately half of our estimate of potential demand for an average U.S. household. In fourth quarter 2012, one of every four of our retail banking households had eight or more of our products."

<u>2013 Annual Report</u>

- Our cross-sell strategy, diversified business model and the breadth of our geographic reach facilitates growth in both strong and weak economic cycles. We can grow by expanding the number of products our current customers have with us, gain new customers in our extended markets, and increase market share in many businesses."

<u>2014 Annual Report</u>

- "Our ability to grow primary customers is important to our results because these customers have more interactions with us, have higher cross-sell and are more than twice as profitable as non-primary customers."

<u>2015 Annual Report</u>

- "An outcome of offering customers the products and services they need, want and value is that we earn more opportunities to serve them, or what we call cross-sell. Cross-sell is the result of serving our customers well, understanding their financial needs and goals over their lifetimes, and ensuring we innovate our products, services and channels so that we earn more of their business and help them succeed financially. Our approach to cross-sell is needs-based as some customers will benefit from more products, and some may need fewer."

92. In addition to statements in its financial disclosures, Wells Fargo made many other public statements touting its alleged cross-selling success.

93. During quarterly earnings calls and investor presentations, Wells Fargo's CEO and other officials consistently cited the Company's alleged cross-selling achievements as the key driver of its revenues and share value. Following such calls and the release of Wells Fargo's financial disclosures, third-party analysts would routinely give favorable value assessments of Wells Fargo stock based on the Company's claims regarding cross-selling.

94. For example, on May 19, 2014, the day before Wells Fargo's Analyst Day, anticipating the Company's routine of emphasizing cross-selling, the Motley Fool released an article entitled, "1 Reason Wells Fargo & Co Will Remain the Biggest and Best Bank," stating:

> Cross-selling is one of the most cost-effective ways for a bank to add to its deposit base, loan portfolio, and other businesses. According to a recent report by Fiserv, it costs banks 8-10 times more to gain a new customer than it does to sell a new product to an existing customer. The more products each customer has with a bank, the longer the bank retains those customers. Customer retention is one of the keys to stability in banks, and cross-selling is the best way to do it.

95. And during the May 20, 2014 Analyst Day, as was customary, Wells Fargo proudly trumpeted its cross-selling efforts and the financial results the Company had achieved due to the effectiveness of its cross-selling strategy. Chief Financial Officer John Shrewsberry summarized it this way: "Our relationship focus and cross-

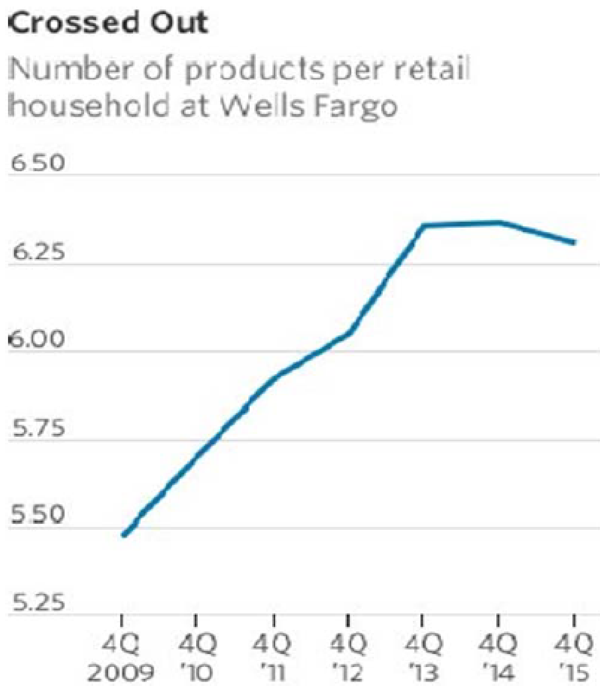
sell capability is hopefully legendary at this point. It has been our vision for decades. We've stuck to it."

96. The very next day, UBS issued a report focusing on the Company's cross-selling:

> **Management is focused on growth and execution of cross-selling strategy**
>
> [Wells Fargo]'s investor day highlighted a growth strategy – the presentations mention growth 116 times versus 39 mentions of costs. The strategy for growth is unchanged and focuses on cross-selling across all products and client segments with particular attention paid to cards, wealth management (where pre-tax margin target was increased from 22% to 25%) and corporate banking.

97. The reported cross-sell metrics, discussed extensively by Wells Fargo and external analysts, strongly distinguished Wells Fargo from its competitors, adding significantly to Wells Fargo's share price.

98. From 2009 to 2015, Wells Fargo reported a steep incline in cross-sell success. Compared to the industry average of three products per retail customer, Wells Fargo reported approximately twice that amount, as shown in the following chart published by The Wall Street Journal:



99. The positive trend in the cross-sell results that Wells Fargo touted in its Annual Reports, investor presentations, and other public statements, coincides with the positively-trending Company stock price throughout the Class Period. Based on Wells Fargo's fraudulent cross-selling metrics, the marketplace investors rewarded the Company's stock price, which, from mid-2010 to September 7, 2016, *increased 111%* – from approximately $24 to $50.56 per share.

C. The Truth: Wells Fargo's Cross-Selling Metrics were a Façade, Masking a Rampant Fake Accounts Scam.

100. As is now known, far from being the trusted and loyal bank it represented itself to be in external

communications, Wells Fargo, through its senior management's direction, imposed an extremely aggressive sales program on its branch employees and encouraged its branch employees to engage in widespread unlawful and unethical behavior, including creating millions of fake accounts to meet unrealistic and heavy-handed goals.

101. In particular, in an effort to boost revenues and inflate its stock price dating back to at least 2010 (and, apparently, much earlier), Wells Fargo's management imposed on its branch offices daily quotas to achieve cross-sell goals.

102. For example, if a customer had a checking account, Wells Fargo employees were pressured to engage in abusive sales practices to sign that customer up for a savings account, a credit card and a debit card, online banking services, and many other products, regardless of whether the customer needed or wanted such products.

103. As recently discovered, Wells Fargo management consistently coerced and threatened employees to meet these unreasonable quotas and to engage in fraudulent practices.

104. A common tactic involved creating a false deposit account by moving a small amount of money from the customer's existing Wells Fargo account to open a new one without customer authorization. In this scenario, the Wells Fargo internal systems would give the employee credit toward her sales goals for opening a new account, and the accounts would often, in turn, generate fees for Wells Fargo.

105. Another common tactic involved applying for credit card accounts without customer authorization. When customers later complained about receiving cards they did not request, they were advised to simply destroy

the unrequested and unauthorized cards. At other times, Wells Fargo employees would advise customers who did not want credit cards that they would be sent a credit card anyway, and instruct them to simply tear up the credit card when they received it. But destroying the unauthorized cards did not close the account, reimburse unauthorized fees, or repair the effect on a customer's credit profile. Indeed, customers' credit reports were often negatively affected and customers were sometimes forced to purchase costly identity theft protection services to protect against further fraudulent activity. Among other tactics, Wells Fargo employees targeted individuals holding Mexican Consular cards because the lack of a Social Security number made it easier to open numerous fraudulent accounts.

106. Another practice was known as "pinning," in which a Wells Fargo banker obtained a customer's debit card number and set the PIN (often to 0000) without customer authorization. Pinning allowed a Wells Fargo banker to enroll a customer in online banking, for which the employee received a sales credit. In order to bypass computer prompts requiring customer contact information, bankers would impersonate the customer online and input false generic email addresses, such as noname@wellsfargo.com to ensure that the transaction was completed and that the customer was not alerted to the activity.

107. Another practice, known as "bundling," involved Wells Fargo sales personnel telling customers that the account they legitimately sought to open could be obtained only with the purchase of additional accounts or products, when the desired product was actually available on its own. Employees were coached by managers to lie to customers by telling them that each checking account

automatically comes with a savings account, credit card, or other products.

108. Yet another practice, known at Wells Fargo as "sandbagging," involved a banker delaying the opening of a new account or processing a sale (without knowledge of the account holder) until a time that was most beneficial to Wells Fargo or the employee, such as when a new sales reporting period commenced. New Year's Day was an especially common date to open "sandbagged" accounts because of the Company's "Jump into January" sales program. This program required bankers to meet even more aggressive sales goals than usual, which encouraged bankers to hold onto, or not process, new accounts or other requests until January 1. When customers inquired why an account had not been opened promptly, they were given false explanations, such as a "technical problem" or an oversight that would be corrected eventually. Sandbagging allowed Wells Fargo management to report inflated first quarter sales.

109. Management pressured Wells Fargo employees into engaging in a variety of other fraudulent tactics as well. They would misrepresent to potential customers that they would incur a monthly fee on their checking account unless they opened a savings account, when this was not the case. Wells Fargo employees would also misrepresent that additional accounts did not have monthly fees when, in fact, they did. Wells Fargo would then withdraw money from customers' authorized accounts to pay the fees assessed by Wells Fargo on unauthorized accounts opened in the customers' names. In some cases, Wells Fargo referred unauthorized, and thus unfunded, accounts to collection agencies because the accounts had negative balances.

110. There is also evidence that Wells Fargo employees were routinely opening unauthorized accounts for customers who they thought would not notice, such as elderly clients or those who did not speak English as their first language.

111. As one former Wells Fargo employee from California recently confessed, employees would open as many as ten unauthorized accounts in the names of undocumented workers. As fees on those accounts remained unpaid, Wells Fargo would charge off the accounts, and the workers would start getting calls from collection agencies.

112. In one poignant example demonstrating the depth and financial entanglement of the fraud, a Wells Fargo customer specifically rejected a request for overdraft protection. However, ignoring the customer's specific rejection, the Wells Fargo branch authorized overdraft protection and, to further the scam, opened an unauthorized credit card for that customer and linked the overdraft charges to the credit card. After several months, the credit card company was pursuing the customer for payment. The customer, however, had no knowledge of the credit card, no knowledge that overdraft protection was opened in violation of orders, and no knowledge that the overdraft charges were being slipped onto the credit card.

113. As in this example, in most cases, the fake accounts went unnoticed by the customers.

114. After news of the scandal and the resulting $185 million regulatory fine broke on September 8, 2016, numerous Wells Fargo employees confirmed that the Company's unethical and unlawful sales practices were widespread and dated back to at least 2004.

115. Initially, in September 2016, Wells Fargo announced that its employees opened at least 1.5 million deposit accounts and submitted applications for at least 500,000 credit-card accounts without customer authorization to do so during the period of 2011-2015.

116. Wells Fargo knew, however, that the problem went far beyond these 2 million fake accounts announced in September 2016. As Tim Sloan stated in October 2016, the scandal "could get a little bit worse before it gets better."

117. In August 2017, Wells Fargo announced that, after completing a more comprehensive review, its employees had opened at least 3.5 million unauthorized accounts from 2009 through September 2016.

D. Wells Fargo Senior Management Structured, Implemented, and Rewarded the Systemic Fraud.

118. Wells Fargo senior management set sales goals and designed an incentive system based on the sales goals, with knowledge of the systemic fraud, thereby encouraging and promoting that now-uncovered fraud.

119. As stated in the Board Report, sales goals were set by bank leadership, pushed down to regions, and ultimately pushed to retail bank branches. At each level, employees were measured on how they performed relative to the bank's aggressive sales goals. Employees were ranked against one another on their performance relative to goals, and their incentive compensation and promotional opportunities were determined relative to those goals.

120. Senior management and the Board, including each of the Defendants, had a vested interest in protecting and maintaining the system, and concealing the rampant

abuse that their system had elicited. The cross-selling system and successes under the system were integral to their livelihoods.

121. This conflict loomed large as Defendants learned of the rampant fraud, mass firings, retaliation against whistleblowers, fraudulently-inflated cross-selling reports in financial disclosures, regulatory investigations, and dire consequences for the Company's stock price.

122. Setting unreasonably high sales quotas and threatening employees with termination if they failed to meet these quotas, Wells Fargo management encouraged, condoned, rewarded, and profited from thousands of its employees stealing the confidential personal financial information of Wells Fargo's own customers and then exploiting that protected information to open over 3.5 million unauthorized bank accounts and credit cards in their names.

123. Indeed, Wells Fargo realized that its sales goals were unattainable. It commonly referred to them as "50/50 plans," because there was an expectation that only half the regions would be able to meet them.

124. Wells Fargo's sales quotas were generally unattainable simply because not enough customers interact with their banks on a daily basis, nor do they want or need that many products, particularly from a single provider.

125. Thus, thousands of Wells Fargo employees faced a Hobson's choice: fail to meet Wells Fargo management's unethical and unlawful demands and risk losing their jobs, or succumb to the overwhelming pressure to meet their quotas by any means possible. In order to keep their jobs and support their families, many employees resorted to opening accounts without customer consent, using inaccurate or misleading information about

potential accounts to induce customers to open them, and engaging in other high-pressure sales tactics to coerce customers into opening additional accounts.

126. As Shrewsberry admitted after the scam was revealed, the quotas and demands Wells Fargo management imposed on branch office employees were so unreasonable that many employees, at risk of being fired otherwise, were compelled to "game" the system, stating that the problem stemmed from "people trying to meet their minimum goals to hang onto their job."

127. Only after getting caught, fined and publicly rebuked has Wells Fargo management feigned contrition to the marketplace. Wells Fargo CEO and Chairman Stumpf (who knew of the fraud as early as 2007, but did nothing) testified before the Senate Banking Committee in September 2016:

> I want to apologize to all Wells Fargo customers. I want to apologize for violating the trust our customers have invested in Wells Fargo. And I want to apologize for not doing more sooner to address the causes of this unacceptable activity. That said, I accept full responsibility for all unethical sales practices in our retail banking business…. We should have done more sooner to eliminate unethical conduct and unintended incentives for that conduct to occur.

128. Stumpf "retired" a few days later.

129. The man who replaced Stumpf as Wells Fargo CEO, Defendant Tim Sloan, acknowledged in a speech to Wells Fargo employees that the Company did not respond to the problems in its branches soon enough and that Wells Fargo's upper management inappropriately dodged responsibility for the bad behavior and wrongly placed blame on branch employees. He further admitted to a loss

of trust in the Company: "To regain the trust we have lost, we must continue to be transparent with all our stakeholders and go beyond what has been asked of us by our regulators."

130. Sloan further stated in March 2017: "We made some significant mistakes. We had an issue as it relates to our incentive compensation plan. We should have dealt with it soon. We should have dealt with it faster. We had to own up for that. We let our stakeholders down. It's affected the reputation. We've got to rebuild that trust, and that's my primary responsibility now. . . . I wouldn't call us a victim, because again, what happened at Wells Fargo was our responsibility."

E. The Plan Fiduciaries Knew About the Fraud, Yet Concealed It For Their Own Benefit.

131. Since at least 2005, Wells Fargo senior management, including Plan fiduciaries, knew that the Company's incentive structure was inducing some employees to secretly sign up customers for unauthorized and unwanted accounts and other banking products to generate record, albeit fabricated, cross-selling metrics and concomitant share price growth.

132. In 2005, the Human Resources Department directly received specific information regarding fraudulent accounts, forged customer signatures, and unsolicited credit cards.

133. The volume of reported allegations of employee involvement in sales practice-related misconduct steadily increased from 288 in the second quarter of 2007 to 1,469 in the fourth quarter of 2013. The number of terminations or resignations relating to sales practice misconduct increased from 61 terminations or resignations in the second quarter of 2007 to 447 in the fourth quarter of 2013.

134. Defendant Hardison was aware of the scandal and its implications for Wells Fargo. Indeed, Hardison had actual knowledge of: the importance of cross-selling metrics and Wells Fargo's reputation to the Company's share price; the systemic fraud being committed and concealed; and the resulting impact on Wells Fargo's stock price from the continued failure to correct the fraudulent practices and the Company's concealment thereof.

135. In her position leading the Human Resources Department since 2010, Hardison led "a team that develops and implements people strategies to support Wells Fargo's business objectives, as well as the management of compensation and benefits." Indeed, thousands of employees were fired and disciplined during her tenure because of fraudulent sales practices.

136. Hardison was certainly made aware of the repeated instances of Wells Fargo employees stealing a customers' identities, opening unauthorized accounts, and violating multiple banking laws. Indeed, the Human Resources Department that Hardison headed was directly informed, as early as 2005, about Wells Fargo's cross-selling problems.

137. Hardison was also aware of whistleblowers raising alarm bells regarding the systemic fraud. Hardison knew that Wells Fargo employees were elevating concerns about abusive sales practices and unlawful conduct, among other things, to Wells Fargo senior management.

138. As alleged in numerous, recently-filed, anti-retaliation lawsuits, multiple whistleblowers came forward during the Class Period to executives in Defendant Hardison's department – Human Resources – to complain about pressure to hit Wells Fargo cross-

selling targets and the illicit conduct that making those targets engendered. For their honesty, Wells Fargo fired these would-be whistleblowers.

139. For example, according to an article in *The New York Times*, one Wells Fargo employee was fired just three days after calling the Company's so-called "ethics hotline," and subsequently ended up living in his truck. According to CNN Money, a single mother was fired soon after submitting a similar whistleblowing report – and was then accused by Wells Fargo of falsifying documents. Such complaints were known, or should have been known, by Defendant Hardison, Wells Fargo's Director of Human Resources.

140. The Board Report confirms Hardison's knowledge of the fraud epidemic within Wells Fargo. It states that "Hardison was aware of sales practice issues throughout her tenure as HR Director" and that she understood these issues to be "pervasive" after the Los Angeles/Orange County investigation in late 2013.

141. Knowledge of the systemic fraud extended well beyond the Human Resources department. Indeed, Wells Fargo's corporate management and Board members were all well aware of the systemic fraud throughout the Class Period.

142. On September 20, 2016, Wells Fargo's former CEO, John Stumpf, testified before the Senate Banking Committee that he learned of the ongoing fraud in 2013. He further testified that the knowledge that there was an ongoing fraud issue that had yet to be solved "got to the corporate level in 2013 because progress was not being made, and the board level in 2014…."

143. As revealed in the Board Report, Stump specifically asked in November 2013 for the number of terminations associated with sales integrity violations. He

was informed that 1% of employees had been terminated for such violations. As the Board Report recognizes, this number only reflects employees caught engaging in sales practice misconduct.

144. Likewise, the Board Report states that Sloan's "knowledge of sales practice issues . . . increased after publication of the *Los Angeles Times* article . . . in December 2013."

145. Defendant Shrewsberry, Wells Fargo's CFO, was also intimately familiar with the cross-selling scandal. Shrewsberry was carefully monitoring the cross-selling scandal and had elevated it to one of the most dire problems at the Company years before the scandal became public in September 2016.

146. In an April 14, 2015 Reuters interview, Shrewsberry said that Wells Fargo was aware that some employees had pushed unwanted and unneeded products on customers, stating: "We have to be cautious and make sure we're not creating incentives for people to sell products and provide services that are not in the best interest of the customer. **We take that deadly seriously, and we have for a long time**." (emphasis added). This statement was false and misleading. Shrewsberry knew that Wells Fargo was, in fact, creating such incentives and was sitting on a powder keg of regulatory and legal problems. It was also misleading because Wells Fargo did *not* take this issue "deadly seriously." In reality, Shrewsberry and other Plan fiduciaries were carefully concealing that: they fostered the perverse incentive system; the incentive system and employee misconduct had spun wildly out of control; and Wells Fargo was on the verge of devastating regulatory actions, crushing legal actions, and public blowback. Shrewsberry's carefully-

worded statement was yet another step in the Wells Fargo concealment campaign.

147. The incentive structure, referenced by Shrewsberry, was squarely within the charter of the HRC, which included various Risk Committee members who had been apprised by senior management of the cross-selling fraud being perpetrated across Wells Fargo.

148. Shrewsberry also said: "Wells Fargo looks into allegations of inappropriate cross-selling pressure and wants to set up the right incentives for workers" and further stated that: "While sales quotas are part of a 'scorecard' for bankers in Wells Fargo branches, it is not the only measurement used to evaluate performance."

149. Shrewsberry, one of Wells Fargo's top executives, is integrally involved in all aspects of company strategy and serves on the EBRC. With his prominent position as the CFO and a lead member on the Wells Fargo Operating, Management, and Market Risk Committees, he had a fiduciary obligation to remain abreast of, and inform others, of risk to the company, including inappropriate behavior by employees under the guise of cross-selling. Indeed, under the Sarbanes-Oxley Act of 2002 ("SOX"), Shrewsberry was required to personally certify – and did personally certify – that the Company had adequate financial and operational controls. Thus, Shrewsberry would have been, or should have been, apprised of all aspects of the cross-selling scandal.

150. Shrewsberry, among his other committee positions, served alongside Chief Administrative Officer and Human Resources Director Hope Hardison, Chief Risk Officer Michael Loughlin, General Counsel James Strother, Chief Auditor David Julian, new CEO Tim Sloan, and former CEO John Stumpf, on Wells Fargo's Operating Committee. Each of these executives was

aware of the cross-selling scandal and its importance to the Company's stock price.

151. On or around September 13, 2016, Plan fiduciary Shrewsberry acknowledged the materiality of the misconduct, the scope and breadth of which had been concealed from the public, including Plan Participants: "The pattern of behavior that we've seen here is something that needs to stop. It is not acceptable to do things that are designed to increase either individual or firm bottom lines by deceiving customers or passing along charges that are either invisible or they don't know about."

152. At the same conference where Shrewsberry, speaking on behalf of the Company, stated that the unacceptable conduct needed to stop, he further stated that Wells Fargo would develop a new compensation model for employees that gives "incentives for people to behave in a manner that's consistent with our principles."

153. Shrewsberry also spoke on behalf of the Company when he said: "The people who we're talking about here weren't the high performers. It was really more at the lower end of the performance scale, where people apparently were making bad choices to hang on in their job."

154. Defendant Oden also served on the EBRC with Shrewsberry. Oden is and was a member of the corporate risk leadership team, where he reported to Loughlin, the Chief Risk Officer and a Management Committee member along with Shrewsberry. Oden's responsibilities include managing regulatory compliance risk, which would have required knowledge about the regulatory investigations (discussed below) of the extensive fraud within Wells Fargo. Oden was, therefore, privy to details

of the Wells Fargo fraud and the impending regulatory fines.

155. Defendant Callahan was another EBRC member who was immersed in the details of the cross-selling scandal (until she retired just before the scam was publicly revealed). Callahan served on the Corporate Responsibility Committee, which Stumpf testified was notified of the ongoing cross-selling scandal in 2014. Because Callahan oversaw the Company's reputation management, she understood the severe implications that the scandal would have on Wells Fargo's reputation and, therefore, its stock price.

156. According to the Board Report, Defendant Callahan "had substantial influence at Wells Fargo. . . . Stumpf characterized her as a confidante and trusted advisor. Callahan also worked extensively with the Board, including, at various times, as the primary contact in management for the HRC and the Corporate Responsibility Committee."

157. Defendants Callahan and Hardison were members of the Enterprise Risk Management Committee, the "management committee through which significant risks were reported, evaluated and escalated to the Board by senior members of management." The ERMC met approximately monthly and "provided the Board quarterly assessments of the largest risks facing Wells Fargo." The ERMC was specifically informed in April 2014 that there were approximately 1,000 employees terminated for sales violation in 2013.

158. Defendants Callahan and Hardison were also members of the Team Member Misconduct Executive Committee ("TMMEC"), which received reports on various forms of misconduct by employees, including sales integrity violations. Reports included the number of sales

integrity allegations and cases. Michael Bacon (head of Corporate Security, which includes Internal Investigations) characterized sales integrity violations as a matter of concern to the TMMEC.

159. According to the Board Report, "Hardison and Callahan were very concerned about the number of people being fired by the Community Bank. Hardison in particular was concerned that the Community Bank was blindly firing people and not looking for a root cause of the problem, while Callahan was also concerned about the reputational risk arising from the firings."

160. As further stated in the Board Report, in April 2014, Hardison was "vocal in expressing her dissatisfaction with the efforts made by the Community Bank to understand and fix the problems, noting that it appeared that they had not really done anything." And "Callahan's sense was that the Community Bank was not doing enough fast enough to address the sales practice issues, but she did not push the pace of its efforts."

161. Defendant Thornton was also directly aware of the cross-selling scandal. Thornton served on the Management Committee along with Defendants Shrewsberry and Oden, among others. Further, while the Company was firing thousands of employees for fraudulent misconduct, and firing whistleblowers for reporting on the misconduct, Thornton had front-line responsibility for those issues since he was responsible for their benefits and severances.

162. Further, based on Thornton's role at the Company, he had actual knowledge of: (a) the importance of cross-selling metrics and Wells Fargo's reputation to the Company's share price; (b) the systemic fraud being committed and concealed; and (c) the resulting impact on Wells Fargo's stock price from the continued failure to

correct the fraudulent practices and the Company's concealment thereof.

163. Additionally, with respect to the board, Stumpf testified that "in 2014 various committees of the board were made aware of [the ongoing fraud scandal] – the risk committee, the audit and examination, the corporate responsibility." Likewise, as stated in the Board Report, "[i]n February 2014, following publication of newspaper articles critical of Wells Fargo's practices in Los Angeles, and continuously thereafter, management identified sales practices as a 'noteworthy risk' to the Board and Risk Committee."

164. And Wells Fargo further admitted in its sworn responses to the U.S. Senate that the Risk Committee was apprised by management of "noteworthy risk issues, which included, among other risks, sales conduct and practice issues affecting customers and management's efforts to address those risks."

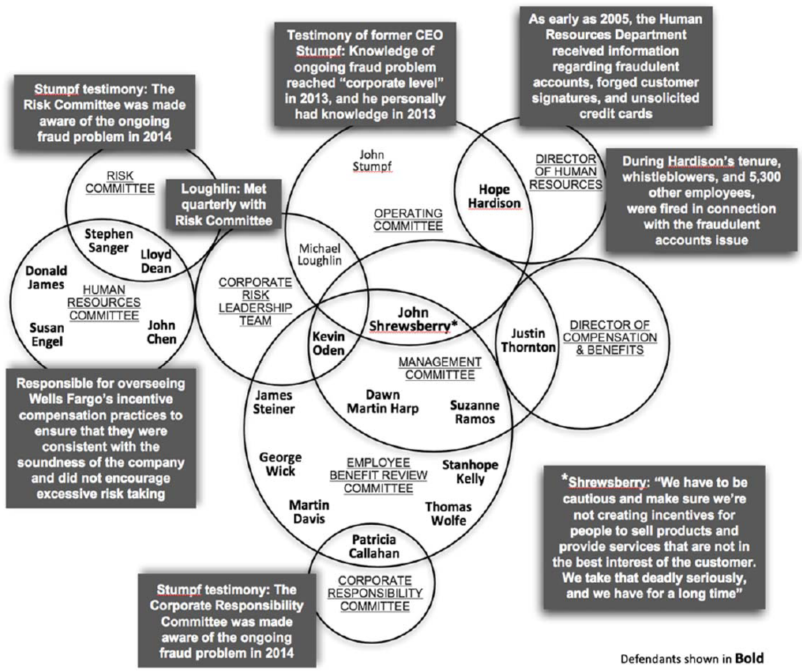
165. Pursuant to the Risk Committee Charter, the Risk Committee met at least quarterly before and during the Class Period. The Risk Committee met with Wells Fargo's Chief Risk Officer, who is charged with communicating any significant risk issues to the Risk Committee. Michael Loughlin is Wells Fargo's Chief Risk Officer. Beneath him, on his Corporate Risk Leadership Team during the Class Period, were Claudia Russ Anderson and Kevin Moss, who were responsible for monitoring risk within, respectively, Wells Fargo's community banking and consumer lending lines of business.

166. As stated in the Board Report, Loughlin became "more concerned about sales practices in October 2013," and in January 2014 he included sales practices in a Significant Enterprise Risks memorandum to the Board.

167. The Risk Committee includes, among other Directors, Dean and Sanger, who are also members of the HRC. Because the HRC's charter requires it to oversee "the implementation of risk-balancing and risk management methodologies for incentive compensation plans and programs for senior executives and those identified employees in a position to expose the Company to material risk," the systemic fraud being caused by the onerous Wells Fargo incentive system would have been (or should have been) at the very top of their threat list.

168. Further, Wells Fargo admitted in sworn answers provided to the Senate in November 2016 that management informed the HRC that it was "monitoring sales integrity in Community Banking."

169. Below is a diagram showing the interconnectedness of the Defendant fiduciaries, and how not a single one was isolated from knowledge of the rampant fraud:



170. With full knowledge of the ongoing fraud, Wells Fargo management – which included Plan fiduciaries like Hardison – took numerous steps to actively conceal the cross-selling fraud by knowingly and intentionally filing misleading, inaccurate, and incomplete Financial Industry Regulatory Authority ("FINRA") forms regarding employees fired for cross-selling fraud.

171. According to a November 2, 2016 letter written by three United States Senators to new-CEO Tim Sloan, Wells Fargo deliberately misled FINRA about the reasons for employees' dismissals: "It would appear that Wells Fargo concealed key information from regulators

that may have revealed the bank's misdeeds long before the September 2016 settlement [with regulators]."

172. Wells Fargo's active concealment of its scheme as it related to regulator investigations went well beyond its FINRA lies, however. For example, in July 2016, the same time that the OCC sent a Supervisory Letter to the Company, Wells Fargo announced that Tolstedt would be "retiring," never mentioning the massive fraud perpetrated by her division, and failing to disclose pending investigations into the rampant misconduct by regulators.

173. The Wells Fargo press release concerning Tolstedt's "retirement" evidences the Company's concealment campaign. Although Wells Fargo's senior management and Plan fiduciaries knew that Tolstedt's Community Banking division had engaged in rampant fraud against customers for many years, the Company's official press release in July 2016 contained a statement by Stumpf extolling Tolstedt's role at Wells Fargo as a "champion" for customers: "A trusted colleague and dear friend, Carrie Tolstedt has been one of our most valuable Wells Fargo leaders, a standard-bearer of our culture, a champion for our customers, and a role model for responsible, principled and inclusive leadership."

174. And Tolstedt is not the only senior executive to furtively "retire" under the impending doom of the scam. On information and belief, there are other senior executives who have been allowed to "resign" or "retire" on amicable terms (with no disclosure of wrongdoing) rather than be fired for their knowledge of, and role in, the illegal fraud.

175. Still other Wells Fargo senior executives were privately disciplined, removed, or replaced without the Company revealing to Plan Participants or the public that

those actions were connected, in any manner, to the fraudulent misconduct or regulatory investigations.

176. For example, Claudia Russ Anderson, the Company's risk officer charged with helping to police the division that created millions of fake accounts, took a six-month unpaid "leave of absence" (announced to employees back in June 2016), and was later replaced in her position. Anderson was a member of the corporate risk team, along with Defendant Oden, and a member of the EBRC. Anderson's boss was Michael Loughlin, the Chief Risk Officer, who reported to Defendants Dean and Sanger, in their roles as members of the Risk Committee, as well as Wells Fargo management. Further, Loughlin was a member of the Operating Committee with Defendants Hardison and Shrewsberry.

177. Despite knowledge of the crushing consequences of the rampant fraud continuing and inevitably being discovered, Defendants concealed the conduct until the proverbial gun was pointed at their head. But why did they choose, month after month, and year after year, to not stop the fraud and to not tell the truth? Why did they choose to let the Plan invest billions of their retirement dollars into the company stock that the Defendants knew was artificially inflated by reason of the false cross-selling metrics? Because the Defendants wanted to protect themselves. They wanted to keep their lofty positions and that required that they continue to "play ball," just like Enron executives and their hopelessly conflicted auditors, Arthur Andersen.

178. Indeed, as former bank regulator William Black (now a law professor at University of Missouri-Kansas City), stated, "[t]he only folks who win when fraud is allowed to fester are the elite bank officers running the fraud," and that "[i]t would be far better for the bank, as

well as for the investors in the bank, for these frauds to come out as quickly as possible, so they end as quickly as possible."[2]

179. The subjective motivation of Defendants was clearly to protect themselves in the corporate ladder, and not to help the vast swaths of workers simply trying to provide for their families. Indeed, the contemporaneous meeting minutes of the EBRC reflect no analysis or any stated concerns about Plan Participants' interests arising from the artificial stock inflation resulting from the fake accounts scheme.

180. The April 2011 Harvard Business Review published a piece called "Ethical Breakdowns," chronicling the powerful and deleterious impact of conflicts of interest. It discussed well-known cases like the Ford Pinto and Barry Bonds. As is appropriate here, the authors wrote: "It does little good to simply note that conflicts of interest exist in an organization. A decade of research shows that awareness of them doesn't necessarily reduce their untoward impact on decision making. Nor will integrity alone prevent them from spurring unethical behavior, because honest people can suffer from motivated blindness. Executives should be mindful that conflicts of interest are often not readily visible and should work to remove them from the organization entirely, looking particularly at existing incentive systems."[3]

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[2] https://www.thestreet.com/story/14357634/1/trump-rollback-of-cfpb-arbitration-rulecould-hurt-investors.html (last visited Oct. 26, 2017).

[3] https://hbr.org/2011/04/ethical-breakdowns (last visited Oct. 26, 2017).

181. In fact, there is not a shred of evidence that the Defendants ever even considered trying to protect Plan Participants. Documents produced to date show that Defendants never engaged in any analysis or thought as to whether Plan Participants would be best served by continuing to funnel money into Wells Fargo stock.

F. The OCC Investigation

182. In addition to knowledge of the rampant fraud, termination of thousands of employees for engaging in the same conduct for the same reasons, and awareness of the devastating impact soon to befall the stock (while simultaneously protecting themselves), Wells Fargo senior executives, including Plan fiduciaries, were acutely aware of ongoing regulatory investigations related to the fraudulent misconduct.

183. In February 2013, the Office of the Comptroller of the Currency ("OCC") issued a Supervisory Letter which required Wells Fargo to develop an operational risk compliance program to address widespread problems in its business practices. In defiance of the admonitions, particularly coupled with ample evidence from prior internal complaints, the Company continued down the path of fraud, inaction, and concealment.

184. Following the receipt of additional complaints by consumers and bank employees alleging improper sales practices, OCC examiners initiated meetings with Wells Fargo senior executives to further evaluate Wells Fargo's business practices, including cross-selling.

185. In early 2014, the OCC directed Wells Fargo to address its weaknesses in compliance and to establish a comprehensive compliance risk management program related to unfair and deceptive practices, including its cross-selling sales practices. Again, the Company took

insufficient measures to address the problems, and the fraud, inaction, and concealment continued.

186. OCC examiners met with Wells Fargo management throughout 2014 in furtherance of their examination of Wells Fargo's corporate governance practices, which included an assessment of Wells Fargo's cross-selling and sales practices.

187. From at least 2014 and onwards, Wells Fargo senior executives and Plan fiduciaries, most notably, but not limited to, Defendants Hardison, Shrewsberry and Oden, knew the OCC was examining the Company's practices. Nonetheless, the Company continued to foster the cross-selling fraud, continued concealing it, and did nothing to protect the Plan from the impending peril.

188. The OCC's ongoing review of Wells Fargo's corporate governance and compliance practices, including those relating to cross-selling, continued into 2015. This included continued meetings with Wells Fargo's management. In March 2015, the OCC completed a multi-year assessment of Wells Fargo's compliance management systems, and identified the need for Wells Fargo to improve its risk management and corporate governance relating to operational and compliance risk.

189. In February 2015, the OCC conducted an examination of Wells Fargo's Community Bank Operational Risk Management, which included evaluating the Community Bank division's sales practices oversight. In April 2015, the OCC issued a Supervisory Letter requiring Wells Fargo to address the corporate governance of sales practices within its Community Bank division.

190. Three months later, in June 2015, the OCC issued another Supervisory Letter to the Company, citing an "inappropriate tone at the top," and addressing Wells

Fargo's lack of adequate control and oversight structure in light of: (a) Wells Fargo's emphasis on product sales and cross-selling; (b) Wells Fargo's lack of an enterprise-wide sales practices oversight program; (c) Wells Fargo's lack of an effective enterprise-wide customer complaint process; and (d) the lack of a formalized governance process to oversee sales practices.

191. The June 2015 Supervisory Letter further instructed Wells Fargo to take specific remedial actions, such as to reevaluate its compensation and sales incentive plans, and to independently assess and improve it sales oversight processes. The OCC further instructed Wells Fargo to remediate any consumer harm that resulted from the sales practices at issue. Wells Fargo failed to comply with any of these directives.

192. Additionally, the June 2015 Supervisory Letter ordered Wells Fargo to retain an independent consultant to review its sales practices and to assess consumer harm. The consultants that Wells Fargo retained issued their findings in October 2015, February 2016, and May 2016.

193. In July 2015, the OCC issued a Notice of Deficiency to Wells Fargo that cited Wells Fargo's failures to comply with the OCC's safety and soundness expectations.

194. On July 16, 2016, the OCC issued a Report of Examination, in which the OCC found and concluded that Wells Fargo failed to address the previous corrective directives, that Wells Fargo's sales practices were unethical and harmed customers, and that Wells Fargo management had not promptly responded to these issues. In addition, the OCC issued a letter to Wells Fargo, stating that Wells Fargo had engaged in unsafe and unsound banking practices.

195. The Board Report admits that regulatory scrutiny was recognized within the Company. It stated: "In May 2015 . . . [r]egulatory scrutiny increased as well. From May 2015 until settlements were announced in September 2016, the Board's and Risk Committee's meetings addressed sales practice issues, responding to regulatory concerns and remediating customer harm."

196. As further stated in the Board Report, "[t]hroughout the spring and summer [of 2016], management advised the Board of ongoing settlement discussions with the Los Angeles City Attorney, the CFPB, and the OCC."

197. Wells Fargo senior executives, including Plan fiduciaries, thus intentionally flouted regulator directives and investigations, and, instead, concealed the misconduct in order to increase Wells Fargo's profits and maximize personal gains.

198. The public was unaware that Wells Fargo was under OCC investigation and scrutiny over its cross-selling sales practices. Wells Fargo did not disclose the material information regarding the internal complaints, nor the OCC's regulatory letters, actions, and findings.

199. Wells Fargo's campaign of concealment included affirmative acts to mislead and conceal the Company's widespread campaign of deceit and customer abuse. Wells Fargo also intentionally withheld material information from the public – including Plan Participants – about pending regulatory investigations. In sum, Defendants were aware of systemic criminal and unethical conduct at the Company since as early as 2005, through internal and external reports and regulatory investigations, yet Defendants actively concealed the scope and extent of the problem from the public (including Plan Participants), failed to protect Plan assets, and

significantly increased the inevitable harm to Plan Participants caused by years of additional misconduct and concealment.

G. Senior Management and Plan Fiduciaries Enriched Themselves While Perpetuating and Concealing the Fraud, Demonstrating That They Did Not Make Their Fiduciary Decisions With the Exclusive Purpose of Benefiting the Plan.

200. While concealing the systemic misconduct, and taking no actions to protect Plan Participants, Defendants took affirmative actions to benefit themselves from the systemic criminal conduct and the active concealment of that conduct by senior Wells Fargo executives. In so doing, Defendants violated their duty of loyalty because their state of mind and consequent actions were not motivated for the exclusive purpose of the Plan; rather, they were motivated to benefit themselves.

201. Indeed, Defendants were trading their own artificially-inflated Wells Fargo shares for vast personal benefit, while they allowed Plan Participants to continue buying shares of Wells Fargo stock at prices artificially inflated by the Company's concealment of the ongoing fraud.

202. Defendant Shrewsberry disposed of over 240,000 shares of Wells Fargo stock at inflated market prices during the Class Period.

203. Defendant Hardison disposed of over 70,000 shares of Wells Fargo stock at inflated market prices during the Class Period.

204. Defendant Sanger disposed of over 10,000 shares of Wells Fargo stock at inflated market prices during the Class Period.

205. Defendant Engel disposed of over 10,000 shares of Wells Fargo stock at inflated market prices during the Class Period, including selling almost 2,000 shares of artificially inflated Wells Fargo stock on the open market.

206. Defendant Dean disposed of over 10,000 shares of Wells Fargo stock at inflated market prices during the Class Period, including selling over 2,000 shares of artificially inflated Wells Fargo stock on the open market.

207. Defendant Chen disposed of over 2,000 shares of Wells Fargo stock at inflated market prices during the Class Period.

208. During the period in which Defendants had actual or constructive knowledge of Wells Fargo's widespread criminal activity relating to its cross-selling fraud, they reaped the benefits of the inflated stock price and related bonuses, resulting in exorbitant compensation and profits.

H. The Inevitable Revelation of the Fraud Destroyed Wells Fargo's Reputation and Its Stock Price.

209. While Wells Fargo management withheld material information and rewarded themselves, Company investors (with the 401(k) Plan being one of the largest), paid a heavy price for the Company's misconduct, mismanagement, and, perhaps most notably, deliberate deception.

210. While Wells Fargo's bad conduct was common knowledge to its senior leadership for many years, the public revelation of that conduct in September 2016 took the marketplace and Plan Participants by surprise due to Defendants' campaign of concealment.

211. On September 8, 2016, federal banking regulators announced that Wells Fargo had been fined

$185 million for a host of illegal banking practices related to the cross-selling scandal. The settlement included penalties of $100 million assessed by the Consumer Finance Protection Bureau ("CFPB") (the largest penalty in the history of that agency), $35 million by the OCC, and $50 million by the City of Los Angeles (the largest such penalty in the history of the City Attorney's office). The OCC simultaneously issued a cease and desist order outlining the Company's unsafe and unsound practices.

212. Specifically, in the Consent Order, the OCC made several findings, including that the Company's "incentive compensation program and plans within the Community Bank Group were not properly aligned with local branch traffic, staff turnover, or customer demand, and they fostered the unsafe or unsound sales practices … and pressured Bank employees to sell Bank products not authorized by the customer."

213. Significantly, the OCC rejected any notion that Wells Fargo's illegal behavior was somehow isolated in scope or duration, concluding instead that "the Bank engaged in reckless unsafe or unsound banking practices that were part of a pattern of misconduct." The OCC required full restitution to the Bank's customers.

214. The CFPB's Consent Order similarly found, among other things, that Wells Fargo's "employees opened hundreds of thousands of unauthorized deposit accounts and applied for tens of thousands of credit cards without consumers' knowledge or consent."

215. In the news conference announcing the penalties, regulators said that Wells Fargo employees opened roughly 1.5 million bank accounts and applied for 565,000 credit cards that may not have been authorized by customers in the 2011-2015 timeframe.

216. The regulators stated that these practices reflected serious flaws in the internal culture and oversight at Wells Fargo. As Richard Cordray, director of the CFPB, explained, "The gravity and breadth of the fraud that occurred at Wells Fargo cannot be pushed aside as the stray misconduct of just a few bad apples. The stunning nature and scale of these practices reflects instead the consequences of a diseased orchard."

217. The fallout from the scandal was immediate and devastating to Wells Fargo's reputation, its market value, and Plan assets. And, as information continued to leak out to the marketplace regarding the Company's misconduct, Wells Fargo's stock price continued to be detrimentally affected as a direct result thereof.

218. Lawmakers throughout the government promptly delivered stinging criticisms of the Company, with Senator Elizabeth Warren at the forefront, describing Wells Fargo's behavior as a "staggering fraud." Treasury Secretary Jack Lew commented: "The pattern of behavior that we've seen here is something that needs to stop. It is not acceptable to do things that are designed to increase either an individual or firm's bottom line by deceiving customers or passing on charges that are either invisible or they don't know about." Comptroller of the Currency Thomas Curry echoed these sentiments, stating: "These practices … undermine the fundamental trust that goes to the heart of the bank-customer relationship. They are unacceptable and have no place in the federal banking system."

219. On September 20, 2016, the Senate Banking Committee held a hearing on the matter (the "Senate Hearing"), and Committee members from both parties lambasted Stumpf and the Company. Below are just a few of the statements the Senators directed to Stumpf:

- *Senator Elizabeth Warren*: "You squeezed your employees to the breaking point so you could cheat customers and drive up the value of your stock. And when it all blew up, you kept your job, your multi-million dollar bonuses, and went on TV and blamed thousands of $12-an-hour employees trying to meet cross-sell quotas. You should resign. You should be criminally investigated by the Department of Justice and Securities and Exchange Commission."
- *Senator Pat Toomey*: "Wells Fargo wasn't cross-selling. Failing to notify these customers about these sham accounts, this isn't cross-selling, this is fraud."
- *Senator Toomey*: "You state unequivocally that there are no orchestrated effort or scheme [sic], as some have called it, by the company. But when thousands of people conduct the same kind of fraudulent activity, it's a stretch to believe that every one of them independently conjured up this idea of how they would commit this fraud."
- *Senator Warren*: "You keep saying, 'The board, the board,' as if they're strangers you met in a dark alley…. You are not passive here. If you have nothing to do, then what are you doing serving as chairman of the board? If you have no opinion on the most massive fraud to hit this bank since the beginning of time, how do you get to continue getting a check as chairman of the board?"

220. After the hearing, the harsh criticism continued. Ed Mierzwinski, consumer program director at the U.S. Public Interest Research Group, said Stumpf's apology was not enough to contain the scandal. "I think the CEO of Wells Fargo failed to disprove that it was a massive fraud," said Mierzwinski, who attended the hearing. "No senator believed him."

221. On September 29, 2016, the U.S. House of Representatives Financial Services Committee held a hearing (the "House Hearing") on the matter, during which Representative Brad Sherman criticized Stumpf for his position that the non-disclosed information relating to the broad and systematic fraud scheme "was not material." Examples of Sherman's admonitions include (emphasis added):

- "This sham was not an attempt to steal a few million dollars in fees from your customers, although that's important, because you could say that a few million dollars wasn't material. What was material was the price of your stock. You opened two million phony accounts and then went and told … and it had to be material because you were bragging about it to the people investing in your stock – that you had higher penetration rates, more accounts per customer, that the number of banking customers that had credit cards had grown from the mid-20% up to 42%, so it had to be material. You were talking about it. ***The peak firings, according to your own documents, was in 2013, so you knew you had a problem then***."

- "Why didn't you tell shareholders our penetration rates are phony, our new accounts are phony accounts, and when we tell you we're deepening our relationship with our customers, we're doing so by putting them through the wringer. What internal audit system did you have that assured you that you didn't have a material problem?"
- "Mr. Stumpf, you were bragging … you were firing, according to your own documents, the highest number of people in 2013, but bragging about your penetration rates, the number of accounts opening, in 2014, so you knew it was material to shareholders and you knew it was a phony number that you had fired people for falsifying."
- "You fired 5,300 people. You took 5,300 good Americans and turned them into felons, with a system that you created, benefited from, ***and drove your stock price up by bragging about your levels of new accounts***."

222. On November 18, 2016, Senator Sherrod Brown of the Senate Banking Committee harshly criticized Wells Fargo for providing unsatisfactory written responses to questions that the Committee submitted to it. Senator Brown questioned how "Wells Fargo can restore the trust of its customers if it continues to ignore or dodge basic questions about the causes and consequences of the fraud that it permitted for years."

223. Further, on November 18, 2016, the OCC announced that it was restricting the Company from offering departing executives "golden parachute"

payouts, and that the Company must get the OCC's permission before it changes its business plans, hires or fires senior executives, or revamps its Board of Directors.

224. Since the scandal was revealed to the public in September 2016, many additional investigations have been launched at both the federal and state level, certain of which may result in criminal indictments and further damage to the Wells Fargo and its shareholders.

225. Federal prosecutors in U.S. Attorney's Offices in New York, California, and North Carolina have opened investigations into Wells Fargo's sales practices.

226. The State of California has also opened a criminal investigation on allegations of identity theft.

227. And on November 2, 2016, Wells Fargo confirmed that the SEC is investigating it for its fraudulent sales practices, along with a myriad of other state, local, and federal government agencies.

228. The rampant misconduct and management's campaign of concealment resulted in fines of $185 million, an approximate 12% drop in the Company's stock (a loss of approximately $22 billion in market capitalization), numerous stock downgrades, and significant lost business (*e.g.*, New York City, the State of California, the State of Illinois, the Commonwealth of Massachusetts, and the State of Ohio).

229. More recently, after Wells Fargo announced, in August 2017, that the total number of unauthorized accounts was at least 3.5 million, the Senate Banking Committee held yet another hearing to address Wells Fargo's misconduct. Senator Warren called for Mr. Sloan's firing, and Senator Schatz suggested the revocation of the Company's charter. Mr. Sloan admitted

that "The bank's leaders acted too slowly and too incrementally. That was unacceptable."

230. Wells Fargo's systemic fraud, and prolonged concealment of it from the marketplace, has devastated its reputation among its customers, the financial services industry, government representatives and regulators, and the public at large, thereby devastating its share price:

a. The Wall Street Journal reported on September 9, 2016: "A $185 million fine is small change for Wells Fargo & Co., which had profit last year of almost $23 billion. But the reputational blow from claims of 'widespread illegal' sales practices could prove costly…. But in the case of Wells Fargo, banking specialists, analysts and investors say the damage may be just starting. 'This scandal, easy to understand and not nearly as complex as mortgage-backed securities, seriously undermines Wells Fargo's Main Street image,' wrote Ian Katz, director at research firm Capital Alpha Partners LLC. Those allegations could hurt the bank's ability to attract new customers, could prompt current customers to look for another bank and affect the amount of products and services Wells Fargo is able to sell to new or existing customers, said Allen Tischler, a senior vice president at Moody's who focuses on U.S. banks."

b. "The regulators' findings are consequential for a bank such as Wells Fargo, which historically has had strong customer satisfaction scores and a reputation for sound risk management," Moody's analyst Allen Tischler wrote. "We do expect some immediate damage to Wells Fargo's reputation from this embarrassing episode."

c. In its most recent quarterly earnings report, Wells Fargo reported: (i) double-digit percentage drops in bank account openings; (ii) declines in bank branch traffic; (iii) new account openings had taken a nosedive – customers opened 25 percent fewer checking accounts and applied for 20 percent fewer credit cards in September compared with a year ago; (iv) a gauge of customer loyalty – which asks customers whether they would recommend Wells Fargo to family and friends — was also down in September. Wells Fargo executives acknowledged that customers may have shunned the bank as the result of the scandal.

d. On December 16, 2016, Wells Fargo reported that (i) new consumer checking-account openings continued to fall in November, down 41% from the previous November; and (ii) new credit card applications fell 45% from the previous November.

e. According to a recent survey, fourteen percent (14%) of Wells Fargo customers have decided to leave the bank, with another thirty percent (30%) considering other alternatives, including walking out the door.

f. On June 20, 2017, *Barron*'s ranked Wells Fargo as the least respected company in the United States (of "the 100 largest components of the Standard & Poor's 500 (based on the index's composition as of April 19)"). *Barron*'s stated that "Wells Fargo suffered a quick and severe loss of investor respect in the past year, and would up plunging to last place . . . The bank was faulted for numerous lapses, including opening millions of fictitious or unauthorized customer accounts. Further reputational harm came from the wide spread view that management was too slow in owning up to and fixing the problems. Wells, which ranked No. 7 as recently as 2015, got 54 Don't Respect votes, the most by far of any company on this year's list."

231. Indeed, Wells Fargo's misconduct and years of concealment will continue to have long-lasting detrimental effects. This is especially harmful to Wells Fargo because banking, and particularly retail banking, is an industry built on customer trust and the integrity of the bank – the very things Wells Fargo repeatedly promoted and emphasized while it engaged in its above-described trust and integrity-killing scheme.

232. As explained above, Wells Fargo has taken great pains to try to set itself apart from its competitors with a reputation based on integrity and honesty. Thus, the negative effect when that reputation is destroyed is that much greater.

233. Investor Place, an investing and financial news site, summarized it as follows:

> The scale of the deception was so vast that it was immediately clear that the company's incentive system bears a large part of the blame. With their jobs on the line, lower-level WFC employees did what it took to make their numbers. That's not an excuse in any way for their behavior, but the blame ultimately lies with Wells Fargo. Eliminating sales goals helps ensure that the bank doesn't have another such scandal. It's also important for optics. WFC needs to be seen moving swiftly and decisively to address the problem. **But it doesn't help Wells Fargo stock. It certainly does nothing for WFC's once-sterling reputation as the 'cleanest' of the big banks. In fact, Wells Fargo will never get its name back in quite the same way.**

(Emphasis added).

234. Reputational damage leads to the public's loss of confidence in a bank and negatively affects the bank's consumer sales and ultimately its revenue and profits as it is likely that both current customers and prospective customers will refrain from doing business with a bank that they cannot trust.

235. In addition to the above facts, on September 29, 2016, California's State Treasurer announced that, due to the actions of Wells Fargo described herein, it would suspend its business relationship with Wells Fargo for one year. This is estimated to cost Wells Fargo over $700 million, not to mention the inevitable ripple effects of such a public rebuke.

236. Likewise, on October 3, 2016, Illinois's State Treasurer announced that Illinois would suspend most business with Wells Fargo for one year, amounting to approximately $30 billion in transactions.

237. Ohio, Massachusetts, Pennsylvania, and others followed suit.

238. The key principles of good corporate governance are transparency, integrity, responsibility, and fairness. Until Wells Fargo can once again prove to the public that it possesses good corporate governance and integrity, its reputation will continue to be harmed and market confidence in the Company will remain low.

239. The damages to Wells Fargo's cross-selling platform are immense. The metrics they touted, and the consequent praise bestowed upon them by analysts and the investor marketplace, were fraudulent, calling into question Wells Fargo's number one competitive advantage. And because Wells Fargo fostered and concealed the fraud for so long, it had to entirely abandon any type of incentive system for legitimate and beneficial cross-selling.

240. Moody's issued a report stating that revelations that bank employees had opened the accounts are "highly disturbing" and that the "deficiencies" uncovered by the CFPB and other government investigators show that the bank's "vaunted cross-selling capabilities were inflated."

241. Wells Fargo's wrongful conduct directly caused a substantial drop in Wells Fargo's stock price. For example, between the close of the market on September 7, 2016, the day before Wells Fargo's fines and the partial extent of the scandal were first disclosed, and September 15, 2016, Wells Fargo's stock price declined from $49.77 per share to $46.15 per share, representing a loss of more than $18 billion in market capitalization and resulting in losses to the Plan of *$1 billion*. The Wells Fargo price drop stands in stark contrast to the S&P 500 index, which, during that same time frame, increased 8.7%.

242. And immediately after news of the fraud went public, J.P. Morgan downgraded Wells Fargo stock, with analyst Vivek Juneja warning that the Company has suffered a "material reputational hit" and that "mounting public scrutiny" of the unauthorized account openings "will result in additional investigations."

243. Similarly, on October 4, 2016, Raymond James downgraded Wells Fargo stock, stating that it has a "cloudy outlook on Wells Fargo as the company undergoes additional investigations, lawsuits and fines in connection to the misconduct."

244. And on October 4, 2016, Fitch downgraded its outlook on Wells Fargo from stable to negative, warning that Wells Fargo may lose its AA credit rating for the first time in two decades because of damage to its reputation and profits from the scandal.

245. Standard & Poor's likewise downgraded Wells Fargo from stable to negative, "saying risks for the magnitude of the reputational damage have increased in the wake of the unauthorized accounts scandal and the potential for ongoing legal and regulatory investigations."

246. On October 12, 2016, Zacks Equity Research stated, as a reason to sell, that "Wells Fargo is likely to face further troubles following the recent $190-million settlement tied with opening of millions of unauthorized accounts." Specifically, Zacks noted: "'Cross-selling,' which has been the company's key strength in recent years, drew regulators' attention as they found thousands of employees of the bank unlawfully enrolled consumers in products and services without their knowledge or consent in order to receive incentives for meeting sales targets." Zacks further noted that Wells Fargo "faces suspension of business relations with states including

Illinois and California and cities such as Chicago and Seattle."

I. Defendants Violated Their Fiduciary Duties to the Plan.

247. Defendants breached their fiduciary duties owed to the Plan and Plan Participants, including the fiduciary duties set forth in ERISA § 404, 29 U.S.C. § 1104, and Department of Labor Regulations, 29 C.F.R. § 2550. As a result of these breaches, Defendants are liable to the Plan for all losses resulting from each such fiduciary duty breach.

248. Defendants' failure to act prudently, loyally, and competently has resulted in losses to the Plan and its Participants because of the significant drop in the Company's stock price immediately upon the news of the scandal, causing not less than hundreds of millions of dollars in Plan losses.

249. Because Defendants knew or should have known the precise nature of the fraud, and the impact it would have on Wells Fargo's cross-selling program and reputation when the scheme was inevitably discovered, Defendants also knew that: (a) the value of Wells Fargo stock was artificially inflated; and (b) the value of Wells Fargo stock would be materially and detrimentally affected once this non-public and nondisclosed fraud was disclosed following the Company's prolonged cover-up; and (c) the longer the fraud is permitted to fester, and the longer the fraud is concealed, the greater the inflation and the greater the ultimate damage upon revelation – which is precisely what happened here.

250. A prudent and loyal fiduciary would have recognized that the inevitable disclosure of the broad and systemic fraudulent scheme, after the prolonged time period for which it was concealed, would severely and

detrimentally affect the Plan's investment of employees' retirement savings in Wells Fargo stock and would inevitably result in significant losses.

251. And most importantly, no prudent and loyal fiduciary could have concluded that failing to stop the fraud and continuing to cover up the scandal – amidst government investigations and knowing that the truth would inevitably be revealed – was a proper (or legal) course of conduct. Indeed, common sense tells us this, as confirmed by the Motley Fool's summary on September 27, 2016 concerning the Wells Fargo scandal: "Sometimes the cover-up is worse than the crime."

252. Rather than honor their fiduciary obligations to the Plan, Defendants chose to protect Company executives, and their own positions, at the expense of the Plan Participants. Executives were lauded and rewarded with millions of dollars of bonuses and stock options based on cross-selling "successes," motivating Defendants to do nothing that would reveal the fraudulent practices or indicate their materiality, in essence, kicking the proverbial can down the road.

253. Plan Participants invested in Wells Fargo stock, on the other hand, did not have full knowledge of the wide-reaching fraudulent scheme or of Wells Fargo's regulatory problems. Unlike Defendants, Plan Participants did not know that more than 5,000 employees had been fired as part of the scheme or that millions of unauthorized accounts had been opened on behalf of unsuspecting customers over a period of several years. They did not know of the existence or reach of numerous regulatory investigations. They did not know that Wells Fargo executives were "retiring" as a result of the rampant misconduct or that large regulatory fines were imminent. They did not know that Wells Fargo's

concealed fraud was distorting the Company's financial results and artificially inflating its stock price. And they did not know that when their retirement assets were invested in Wells Fargo stock, they were overpaying and would inevitably suffer losses when the Company's ill-fated campaign of concealment was exposed, and when the Company would be forced to stop its fraudulent practices.

254. Accordingly, any Plan Participants who purchased Wells Fargo stock during the Class Period did so at artificially-inflated prices. Additionally, any Plan Participant who purchased or held Wells Fargo stock during the Class Period suffered investment losses, and also lost out on gains experienced in alternative investments under the Plan.

255. As fiduciaries, Defendants were obligated to consider whether the nonpublic information to which they were privy regarding the breadth and systemic extent of the fraud would be material to investors and, specifically, Plan Participants. And it was, indisputably, material.

256. At the very least, Defendants should have *evaluated* the non-disclosed information in light of the total mix of information. Had Defendants done so, they would have readily determined that the information would be material to the market, shareholders, and Plan Participants. There is more than a substantial likelihood that a reasonable investor would have viewed this broad and systemic fraud as having significantly altered the total mix of information available. In fact, the market reaction to the disclosure, following the sustained nature of the fraud and the corresponding coverup, definitively proves this point.

257. But Defendants never even attempted to engage in such an analysis, further proving that their interests

and motives were *not* to benefit Plan Participants, but, rather, to conceal the fraud to benefit themselves.

258. Indeed, Defendants never initiated any investigation, analysis, or inquiry regarding the impact of the concealed and ongoing wrongdoing on the Plan because they weren't even considering the Plan's interests.

259. Defendants' repeated decision to continue pouring employees' money into the Plan was not predicated on a subjective intent to benefit the Plan; it was done solely with the intent of preserving Defendants' own place in the Company hierarchy and to keep their own personal financial engines humming. This conflict of interest led to concealment and that led to substantial Plan losses, to the detriment of Plaintiffs and the other Class members. And it all stemmed from Defendants' greed. That is classic disloyalty under ERISA or otherwise.

260. A materiality analysis requires both a quantitative analysis and a qualitative analysis which turns on what a reasonable investor would find important in making an investment decision, including the potential impact of corporate activities upon the company's reputation and share value.

261. The omitted information about Wells Fargo's broad and systemic fraud was material because, among other reasons: (a) the omission masked the fact that Wells Fargo's touted cross-selling successes were both a sham and unsustainable; (b) such an omission masked changes in earnings or sales trends; (c) the omission concerns the Banking and Retail Services divisions, each of which plays a significant role in operations and profitability; (d) the omission related directly to Wells Fargo's reputation, specifically its position of trust with its own customers;

and (e) the omissions involve the concealment of unlawful transactions.

262. Accordingly, the undisclosed fraud not only inflated Wells Fargo stock price but likely also violated the federal securities laws. In addition, the lengthy cover-up made the situation far worse for Plan Participants.

263. At its most fundamental level, Defendants had an obligation at least to consider the interests of the Plan and put those interests first. They did not do so. An examination of Defendants' documents, however, reveals that not a single analysis or inquiry was made into the interests of the Plan in the face of the Company's devastating ongoing harm. That fact alone establishes a violation of the duty of loyalty. Defendants could not have been acting for the Plan if they never even considered the Plan's interests (as their "exclusive purpose"), as is required by ERISA.

264. The reasonable and easily foreseeable results of Wells Fargo's nondisclosure of the broad and systemic fraud were material, including: (a) large regulatory fines; (b) shareholder lawsuits; (c) consumer lawsuits; (d) civil fines; (e) loss of stock value; (f) the adverse effect on Wells Fargo's reputation; (g) dismantling of the legitimate aspects of the cross-selling program; and (h) and Wells Fargo's employees' losses resulting from the Plan's continued investment in Wells Fargo stock.

265. Any tension between the securities law and Defendants' fiduciary obligations is one of their own making. Fiduciaries without disclosure obligations under the federal securities laws, as well as those with such obligations, have it within their power to prevent harmful investments by Plan Participants. Fiduciaries without disclosure obligations should act to protect Plan Participants as soon as they know or should know that

material information for which disclosure is required under securities laws is not being released to the public. Fiduciaries with securities law disclosure obligations should act to protect the Plan Participants under ERISA as soon as the federal securities laws require disclosure.

266. The fact that certain fiduciary Defendants decided not to act at an early stage does not mean that ERISA fiduciary duties do not apply thereafter. Rather, it means quite the opposite. It means that they are continuing to violate their fiduciary duties by not acting.

J. Duty of Prudence: No Prudent Fiduciary Could Have Concluded That Alternative Actions For The Plan Would Have Caused More Harm Than Good; Defendants' Failure to Consider and Implement Alternative Actions Damaged The Plan.

267. Under the specific facts of this case, no prudent fiduciary could have concluded that alternative actions for the Plan would have caused more harm than good.

268. To comply with their duty of prudence, Defendants were required to take alternative actions for the Plan because the underlying fraud, and concealment thereof, went to the very heart of Wells Fargo's two key drivers of share value – cross-selling and a reputation for truthfulness and loyalty. Wells Fargo repeatedly touted these key aspects of their business model and share value, and analysts and the investing public relied on these aspects to drive up share value for years.

269. And because the nature of the fraud and related investigations was such that it was inevitable that the existence and facts of the scheme were ultimately going to be unearthed and disclosed, taking alternative action was mandatory to protect the Plan.

270. Among the alternative actions available to Defendants, which no prudent fiduciary would have deemed to cause more harm than good to the Plan, were the following to fulfill their ERISA duties of prudence:

a. <u>Adequately implementing processes to stop the known fraud and to mitigate the adverse consequences of the known fraud, including but not limited to, an earlier, comprehensive, and genuine investigation into the known wrongdoing; the protection of whistleblowers; and the implementation of compliance requirements and reporting measures as required and suggested by regulators.</u> As is evidenced by the actions and statements of Wells Fargo after the scandal was revealed on September 8, 2016, Wells Fargo had the ability to implement practical solutions to prevent the fraudulent practices. During a November 3, 2016 investor conference, Wells Fargo announced, through CEO Tim Sloan and retail banking head Mary Mack, "that Wells Fargo is moving quickly to put in place new rules for its workers that will prevent the sort of culture that lead to the scandal…." The alternative action of developing processes to stop the known fraud (such as revising the incentive structure, which they have now abolished entirely) would necessarily have benefitted the Plan. Solely by way of example, other measures that could have been undertaken include: (i) introducing risk management guidelines regarding the sale and cross-sale of services, and more importantly, the Bank's central values, ethos and compliance-based performance requirements; reviewing and testing regulatory compliance and risk management by the Board of Directors and management (including those responsible for Wells Fargo's 401(k) Plan) and held such individuals responsible and accountable; seeking forfeiture from Board members and/or management and employees for any personal investment gains, compensation and/or benefit packages obtained during and as a result of the illegal and unethical activities within the Community Banking division; (ii) conducting risk assessment analyses, workshops and training at all levels of the organization; and/or (iii) appointing an independent monitor to oversee the actions of the Board, management and 401(k) plan fiduciaries to mitigate the harm caused to customers, employees and investors (including the plaintiffs in this action) and ensure that the Bank's regulatory compliance and risk management are effective and lead to sound sales practices by the Company. Had Wells Fargo adequately implemented processes to stop the known fraud, it would have, at least, reduced the ultimate amount of fraudulent activity and demonstrated its dedication to integrity. This would necessarily have benefitted the Plan because, upon the eventual revelation of the fraud, there would have been, at least, less of a negative impact on Wells Fargo's reputation and on Wells ability to continue engaging in acceptable sales practices that it has now had to curtail.

b. <u>Undertaking truthful and complete public disclosure earlier, by Board members and managers to the public, including participants</u>

in, and beneficiaries of, Wells Fargo's 401(k) Plan, and to government regulators including, but not limited to, the OCC, CFPB, SEC, FDIC, and DOL, in order to protect customers and investors, especially Plan Participants, against the *known* fraud. This alternative action would also have been necessarily more beneficial to the Plan than what the Plan fiduciaries actually did, which was to permit the fraud to fester and then to actively conceal the scandal for years. By making an early and truthful disclosure, the benefits would have been multi-fold: (1) the fraud would have been reduced significantly in scope because the disclosure was a strong signal that employee fraud was being taken seriously and it was not tolerated, (2) investors would have thereby received some assurance that the Company was taking the issue seriously and taking actions to remedy it, and (3) the Company's reputation for integrity would have been far less damaged as opposed to the active concealment and disingenuous posturing after the fact (including Stumpf's ill-fated and scripted positioning during the Senate Hearing). It would have also given Plan Participants a fair opportunity to make informed decisions about the investment of their monies under the Plan. Further, by making an earlier disclosure, it would have led to the stock no longer being artificially inflated in the market, and would have significantly reduced the amount of artificially-inflated stock purchased by the Plan Participants. In sum, no prudent fiduciary could have deemed an earlier truthful and accurate disclosure would have caused more harm than good when the problem was going to be unearthed eventually, particularly in light of extensive regulatory investigations and increasing pressure due to the pattern of firing thousands of employees, including whistleblowers. Like a Ponzi scheme, the end was coming; rather than reducing the losses much earlier, Wells Fargo Plan fiduciaries let the scheme go until everyone lost everything;

c. <u>Freezing further stock purchases (and sales) by the 401(k) Plan earlier, when the extent of the fraud, its inevitable effect on the Company's reputation, and the increased harm that would occur from continued concealment became clear</u>. The rationale for this alternative action, which would have necessarily benefitted the Plan, is similar to the above. By freezing further stock purchases and sales, Plan fiduciaries would have prevented Plan Participants from purchasing billions of dollars of Wells Fargo stock at fraudulently-inflated values;

d. <u>Discontinuing the automatic investment under the Plan of the employer contributions into Wells Fargo stock</u>. The fact that the Company defaulted employer matching contributions into Wells Fargo stock is particularly problematic because 34% of the Plan was invested in Wells Fargo stock and, as the Company knows, since it is one of the largest third-party administrators for 401(k) plans, and as found by the Pension Research Council at The Wharton School, University of Pennsylvania, "most 401(k) plan participants are characterized by profound inertia."[4] This alternative action could not possibly have caused damage to the Plan. Rather, it would have provided the benefit of diversification and decreased the amount of Wells Fargo common stock purchased at fraudulently-inflated values;

e. <u>Purchasing a hedging product</u>. Defendants could have used their authority as fiduciaries to divert some of the Plan's funds into a low-cost hedging product that would behave in a countercyclical fashion vis-à-vis Wells Fargo stock. Products such as the ESOP Protection Trust, designed by StockShield, LLC, are structured as irrevocable trusts which pool funds together from a group of financially healthy and diverse companies for a fixed period of time. Applicants are thoroughly screened and vetted for the benefit and protection of other participating companies. The trust is managed by an independent third party. During a fixed time period, the pooled funds are invested in safely and securely, typically in U.S. Treasury securities. At the conclusion of the fixed period, the trust restores

[4] Pension Research Council, The Wharton School, University of Pennsylvania Olivia S. Mitchell, Gary R. Mottola, Stephen P. Utkus, and Takeshi Yamaguchi, The Inattentive Participant: Portfolio Trading Behavior in 401(k) Plans: "Most workers in defined contribution retirement plans are inattentive portfolio managers: only a few engage in any trading at all, and only a tiny minority trades actively. Using a rich new dataset on 1.2 million workers in over 1,500 plans, we find that **most 401(k) plan participants are characterized by profound inertia**. Almost all participants (80%) initiate no trades, and an additional 10% makes only a single trade, in a two-year period." (Emphasis added)

> losses caused by declines in price of company stock. Typical products offering this protection only require annual cash deposits of 1-2%. However, if the trust is not required to restore any losses to participating companies, refunds of over half of the amount of the annual contributions are typically issued to participants. This can bring the cost of participation down to 0.10% per year. Second, should the participant's stock appreciate in value during the fixed period, the participant retains all of the benefit of that appreciation, and all of the benefit of any dividends paid. No fiduciary would deem this alternative action to do more harm than good because it provides the Plan, and other investors, with the benefits of protecting against the inevitable fallout from the scandal. If Plan fiduciaries pursued a hedging strategy, the effect of the artificial share inflation would have been significantly less, thereby benefitting Plan Participants instead of harming them under the path Wells Fargo actually took.

271. Despite having these corrective options – and other options – available to the Company, Defendants failed to take *any* of these actions to protect Plan Participants.

272. No prudent fiduciary could deem that no corrective action – particularly considering Wells Fargo's systematic concealment and simultaneous self-dealing – would be better than performing one or more of the above alternative actions. Indeed, the radical drop in Wells Fargo's stock price following disclosure of the prolonged Company misconduct and cover-up proves this point.

273. Where a known, ongoing fraud exists – and, therefore, a disclosure (or possibly a corrective disclosure) is separately required by the securities laws – a plan fiduciary's overarching objective must be to stop the fraud and prevent the plan from continuing to purchase artificially-inflated stock while the fraud continues. This is particularly true in this case when the concealed fraud related to Wells Fargo's own professed key drivers of stock value – cross-selling and its reputation.

274. Because Wells Fargo had an obligation under the securities laws to disclose the material information relating to the fraud, a prudent and loyal fiduciary could not have concluded that taking alternative corrective actions would have caused more harm than good to Plan assets. And even if Wells Fargo did not have an obligation under the securities laws to disclose the material information, no prudent and loyal fiduciary could have concluded that taking other alternative actions would cause more harm than good to Plan assets. In failing to do so, Wells Fargo severely damaged its reputation, which the marketplace values, particularly in the banking field. As stated in the 2016 Journal of International Banking Law and Regulation in an article entitled *Fraudsters at the Gate: How Corporate Leaders Confront and Defeat Institutional Fraud*: "Banks and banking rely on trust. Trust can take years, if not decades, to establish, but can be lost in an instant." And as the Charlotte Observer stated: "The allegations have marred the reputation of Wells Fargo, the third-largest U.S. bank by assets and the nation's biggest home lender."

275. Tim Sloan, new CEO of Wells Fargo, echoed this principle and confirmed Wells Fargo's corrupt culture and the impact it had on the Company: "There are things that need to be fixed within our culture. There are weaknesses

within it that must change. If my top priority as CEO is to restore the trust we've lost, then I also need to make it safe to talk about the problems that got us here – no matter where they began, no matter where the responsibility lies."

276. Defendants knew – or should have known – that disclosure of the fraud was going to happen one way or another. The federal securities laws required disclosure. Wells Fargo was being investigated by multiple regulatory agencies; the fruits of those investigations were eventually going to become public and thus reveal the truth about the Company's misconduct – indeed, that is *exactly* what ended up happening. Whistleblowers were coming forward; sooner or later one of them was going to get the ear of the government or the media. Thus, the question was not *whether* they could prevent a stock drop due to Wells Fargo's fraud, but *when* that drop would occur, and how severe it would be. Defendants should have recognized that the sooner they acted, the less severe the drop, and, therefore, the less harm to the Plan and to Plan Participants.

277. If Defendants had undertaken a corrective public disclosure at any time prior to the news of the scandal breaking on September 8, 2016, then every Plan Participant who purchased Wells Fargo stock between that point and September 8, 2016 would not have purchased Wells Fargo stock at an artificially inflated price caused by concealment of the scandalous fraud.

278. Further, any reasonably prudent fiduciary would have foreseen that delaying any corrective action, including the disclosure of the broad and systemic fraud, would exacerbate the negative impact on Company stock value that would occur upon revelation of the fraud, and would have acted prudently by taking one or more of the

alternative actions described above in order to adhere to their ERSIA fiduciary duties. This principle was poignantly echoed by Stumpf during his Senate testimony: "We should have done more sooner."

279. If Defendants had taken steps to eliminate the fraud in combination with corrective public disclosure near the very beginning of Wells Fargo's herein-described fraudulent conduct, almost all of the artificial inflation of Wells Fargo's stock price that occurred could have been avoided, and virtually no Plan Participants would have been harmed. But as the fraud went on, Plan Participants unknowingly continued making purchases at artificially high prices, and thus the harm to Plan Participants steadily increased. As two experts framed the issue:

> If the fraud occurs on one day at the beginning of the class period so that the gap between the value line and the price line appears immediately, the bias will be small because only investors who purchased the securities in the first few days of the class period are affected by the error. However, if the fraud consists of a series of omissions and misrepresentations so that the gap between the price line and the value line widens slowly, ***the inflation will be overstated for a much larger group of purchasers***.

Bradford Cornell and R. Gregory Morgan, *Using Finance Theory to Measure Damages in Fraud on the Market Cases,* 37 UCLA L. Rev. 883, 911 (1990) (emphasis added).

280. Defendants knew that the longer fraud persists, particularly when it relates to a company in an industry in which trust is paramount and the company touts its reputation for trust, and when senior executives are knowingly concealing it while self-dealing, the harsher the

correction, and the slower the price recovery, will more likely be when the fraud is finally revealed.

281. When a public company like Wells Fargo prolongs a fraud, the price correction when the truth emerges is that much harsher, because not only does the price have to be reduced by the amount of artificial inflation, but it is reduced by the damage to the company's overall reputation for trustworthiness as well. Some experts estimate that reputational damage can account for as much as 60% of the price drop that occurs when a fraud is revealed. This figure, moreover, increases over time. So, the earlier a fraud is corrected, the less reputational damage a company is likely to suffer.

282. This reputational damage is not merely theoretical. Economists and finance experts have conducted numerous empirical studies on the matter, and concluded that "the reputational penalty" a company suffers because it perpetrates a prolonged fraud is significantly greater than any regulatory fines or other penalties that may occur—in fact, the reputational penalty is "7.5 times the sum of all penalties imposed through the legal and regulatory system." Jonathan M. Karpoff, D. Scott Lee, and Gerald S. Martin, *The Cost to Firms of Cooking the Books*, Journal of Financial and Quantitative Analysis, Vol. 43, No. 3 (Sept. 2008). Moreover, "[*f]or each dollar that a firm misleadingly inflates its market value, on average, it loses this dollar when its misconduct is revealed, plus an additional $3.08 …* ***[of which] $2.71 is due to lost reputation***." *See id.* (emphasis added). And this reputational damage, unsurprisingly, increases the longer the fraud goes on. *Id.*

283. Rather than protecting the Plan, Defendants continued to offer and to allow investment of the Plan's assets in Company stock, even as Wells Fargo continued

to conceal the scandal and perpetrate the systemic fraud scheme. Defendants' breaches, and consequent damage to the Plan, were exacerbated by the fact that Defendants continued defaulting matching contributions into the Wells Fargo common stock, which resulted in a massive concentration of assets in the stock. As of 2016, approximately 34% of Plan assets (a staggering $11 billion) of Plan Participants' retirement assets had been invested in Wells Fargo stock.

284. The Plan was devastated by Defendants' breach. Upon information and belief, over the course of the Class Period, the Plan was a net purchaser of Wells Fargo stock by a margin of at least $1.5 billion, showing that far more Plan Participants were damaged than could have possibly benefited from serendipitously selling during the inflation window.

285. Given that the ongoing fraud was going to inevitably be unearthed (and it was), undertaking alternative action – such as the above-listed exemplars – would not have done more harm to the Plan than good. Rather, taking such alternative action would have protected the Plan and avoided the large Plan losses that resulted from the continuation of the broad and systemic fraud scheme and the delayed disclosure of the non-public material information regarding the scheme.

286. No publicly available document shows that Defendants considered dropping Wells Fargo stock as a 401(k) investment option.

287. No publicly available document shows that Defendants considered eliminating Wells Fargo stock as the 401(k) match.

288. No publicly available document shows that Defendants discussed selling Wells Fargo stock held in the 401(k) plan and converting the proceeds to cash.

289. No publicly available document shows that Defendants discussed stopping Wells Fargo stock purchases on a temporary basis in the 401(k) plan.

290. No publicly available document shows that the Defendants made any decision regarding what to do with the Wells Fargo stock match in light of the cross-selling issues. Doing nothing is not the same as making a decision to not make changes. It is a breach of fiduciary and trust principles to not make a decision in light of information indicating the duties of loyalty and prudence have been implicated and may be breached.

291. In light of the lack of discussion regarding the 401(k) plan and the cross-selling issues, there is no record from which to discern any alternative action Defendants may have taken, much less whether any of those items never discussed may cause more harm than good to Plan Participants.

292. ERISA, the plan documents, and trust principles all mandate disclosure, discussions, and decisions be made by trustees or fiduciaries when there is an appearance of disloyalty or conflict of interest.

293. ERISA, the plan documents, and trust principles all create a burden on the trustee or fiduciary to rebut the appearance of disloyalty or a conflict of interest, even if, after disclosure, there is no actual showing of disloyalty or conflict of interest.

294. Under the circumstances alleged herein, in order to prevent greater harm caused by delayed corrective actions and disclosure, Plan fiduciaries needed to make inquiries and take prudent alternative actions to avoid continued fraud and continued investment in artificially-inflated Company stock that would inevitably fall. Defendants failed to do that and the Plan and Plan Participants were damaged thereby.

295. Had Defendants fulfilled their fiduciary duties of prudence under ERISA and chosen to implement alternative action(s), such as those listed above, they would have protected the Plan from unreasonable and predictable losses exacerbated by years of additional fraud and concealment. Such actions would have certainly done more good than harm to the Plan and Plan Participants.

VI. CLASS ACTION ALLEGATIONS

296. Plaintiffs bring this action individually and on behalf of all others similarly situated as a class action pursuant to the provisions of Rules 23(a), (b)(1), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure.

297. The Class is defined as follows:

> All persons who were Participants of the Wells Fargo & Company 401(k) Plan at any time between January 1, 2014 through September 15, 2016 (the "Class Period") and whose Plan accounts suffered losses, as defined by ERISA, through investments in Wells Fargo common stock (the "Class").

298. Excluded from the Class are Defendants, governmental entities, and the Judge and Magistrate Judge to whom this case is assigned and their immediate families. Plaintiffs reserve the right to revise the Class definition based on information learned through discovery.

299. Certification of Plaintiffs' claims for class-wide treatment is appropriate because Plaintiffs can prove the elements of their claims on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claim.

300. **Numerosity – Federal Rule of Civil Procedure 23(a)(1).** The members of the Class are so

numerous that individual joinder of all the members is impracticable. On information and belief, there were not less than 350,000 Plan Participants during the time period relevant to this action. The precise number of Class members and their addresses is presently unknown to Plaintiffs, but may be ascertained from Wells Fargo's books and records. Class members may be notified of the pendency of this action by recognized, Court-approved, notice dissemination methods.

301. **Commonality and Predominance – Federal Rules of Civil Procedure 23(a)(2) and 23(b)(3).** Numerous common questions of law and fact exist as to Plaintiffs and the other Class members. Such questions Class include, but are not limited to:

a. Whether Defendants caused the Plan to invest its assets in funds and other investment products offered or managed by Wells Fargo subsidiaries and affiliates;

b. Whether Defendants caused the Plan to imprudently invest its assets in funds invested in Wells Fargo stock;

c. Whether Defendants breached their fiduciary duties by engaging in the conduct described herein;

d. Whether Defendants breached their duty of loyalty by failing to avoid conflicts of interest;

e. Whether Defendants breached their duty of loyalty by failing to disclose material information to Plan Participants;

f. Whether Wells Fargo breached its duty to monitor the Plan's fiduciaries to ensure the Plan was being managed in compliance with ERISA;

g. Whether Defendants are additionally or alternatively liable, as co-fiduciaries, for the unlawful conduct described herein pursuant to 29 U.S.C. § 1105;

h. Whether the Plan and its Participants suffered losses as a result of Defendants' fiduciary breaches;

i. Whether Defendants are liable under 29 U.S.C. § 1132(a)(3) to disgorge the revenues they earned as a result of the fiduciary breaches that occurred;

j. The proper form of equitable and injunctive relief; and

k. The proper measure of monetary relief.

Defendants have engaged in a common course of conduct toward Plaintiffs and the other Class members. The common issues arising from this conduct that affect Plaintiffs and the other Class members predominate over any individual issues. Adjudication of these common issues in a single action has important and desirable advantages of judicial economy.

302. **Typicality – Federal Rule of Civil Procedure 23(a)(3)**. Plaintiffs' claims are typical of the other Class members' claims because, among other things, all Class members were comparably injured through the above-described uniform misconduct.

303. **Adequacy of Representation – Federal Rule of Civil Procedure 23(a)(4).** Plaintiffs are adequate Class representatives because their interests do not conflict with the interests of the other Class members they seek to represent; Plaintiffs have retained counsel competent and experienced in complex commercial and class action litigation, including ERISA litigation; and Plaintiffs intend to vigorously prosecute this action. Class members' interests will be fairly and adequately protected by Plaintiffs and their counsel.

304. **Superiority – Federal Rule of Civil Procedure 23(b)(3).** A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The damages or other financial detriment suffered by Plaintiffs and each of the other Class members are small compared to the burden and expense that would be required to individually litigate their claims against Defendants, thus rendering it impracticable for Class members to individually seek redress for Defendants' wrongful conduct. Even if Class members could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court. This is particularly true here, where Defendants, as Plan fiduciaries, were obligated to treat all Class members similarly as Plan Participants under written Plan documents and ERISA, which impose uniform standards of conduct on fiduciaries.

305. **Declaratory and Injunctive Relief – Federal Rule of Civil Procedure 23(b)(2)**. Defendants have acted or refused to act on grounds generally applicable to Plaintiffs and the other Class members, thereby making appropriate final injunctive and declaratory relief, as described below.

306. **Risk of Inconsistent/Dispositive Adjudications – Federal Rule of Civil Procedure 23(b)(1)**. Class certification under Rule 23(b)(1) is merited here because prosecution of separate actions by individual

Class members would create the risk of (a) inconsistent or varying adjudications with respect to individual Class members that would establish incompatible standards of conduct Defendants; or (b) adjudications with respect to individual Class members that would, as a practical matter, be dispositive of the interests of the other Class members not parties to the adjudication or substantially impair or impede their ability to protect their interests.

VII. CLAIMS FOR RELIEF UNDER ERISA

307. At all relevant times, Defendants were and acted as fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

308. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides, in pertinent part, that a civil action may be brought by a participant for relief under ERISA§ 409, 29 U.S.C. § 1109.

309. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), provides, in pertinent part, that a participant may seek appropriate equitable relief for a violation of Title I of ERISA.

310. Plaintiffs, therefore, bring this action under the authority of ERISA § 502(a) for Plan-wide relief under ERISA § 409(a) to recover losses sustained by the Plan arising out of the Defendants' breaches of their fiduciary duties for violations under ERISA § 404(a)(l) and ERISA § 405(a), and ERISA § 502(a)(3) for appropriate equitable relief to remedy violations of Title I of ERISA.

COUNT I

Breach of Fiduciary Duty of Loyalty in Managing and Administering Plan (Against All Individual Defendants)

311. Plaintiffs incorporate all factual allegations in the preceding paragraphs as if fully set forth herein.

312. As alleged above, Hope Hardison, Justin Thornton, John Shrewsberry, Kevin Oden, Patricia Callahan, Stanhope Kelly, Dawn Martin Harp, Suzanne Ramos, James Steiner, George Wick, Martin Davis, Thomas Wolfe, Lloyd Dean, John Chen, Susan Engel, Donald James, and Stephen Sanger (the "Individual Defendants") were fiduciaries during the Class Period within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that they exercised discretionary authority or control over the administration and/or management of the Plan or disposition of the Plan's assets.

313. The Individual Defendants had a duty of loyalty pursuant to ERISA § 404, 29 U.S.C. § 1104(a)(1).

314. As part of their duty of loyalty, the Individual Defendants had a duty to avoid conflicts of interest.

315. The Individual Defendants failed to avoid conflicts of interest, and thus breached their duty of loyalty.

316. No later than January 1, 2014, the Individual Defendants had information concerning sales practices within Wells Fargo that was inconsistent with Wells Fargo's public statements concerning its standards for honesty, trust, and integrity, and the success of its cross-selling strategy.

317. The Individual Defendants, however, as Wells Fargo officers, employees, and Board members, were incentivized to avoid doing or saying anything that would harm the image or reputation of Wells Fargo, and thus potentially reduce its share price or jeopardize the jobs of their superiors and colleagues, because doing so would be reasonably likely to damage their relationships within Wells Fargo and on the Board, and thus harm their own careers or their places on the Board.

318. In addition, the Individual Defendants had relationships with their colleagues within Wells Fargo and on the Board that would dissuade them from doing or saying anything that would harm the image or reputation of Wells Fargo, and thus jeopardize the careers and positions of their colleagues within Wells Fargo and on the Board.

319. The Individual Defendants, therefore, had a conflict of interest between taking actions to protect Plan Participants that would, or potentially could, reveal negative information about Wells Fargo, and protecting their own careers and positions, as wells as those of their colleagues.

320. Individual Defendants were further conflicted because they were selling their own stock during the Class Period. Individual Defendants had a conflict of interest because taking any action to protect Plan Participants that might have reduced the artificial inflation in Wells Fargo's share price, such as revealing the facts giving rise to the artificial inflation to Plan Participants or temporarily halting investment in Wells Fargo's share price, was at odds with their own profiting from artificially-inflated Wells Fargo stock.

321. Further, as part of their duty of loyalty, Individual Defendants had a duty to deal fairly and honestly with all Plan Participants, which includes a duty to disclose material information that could adversely affect a Plan Participant's interests.

322. Individual Defendants failed to deal fairly and honestly with Plan Participants, and thus breached their duty of loyalty, by failing to disclose to Plan Participants that there was a pervasive issue of sales practice misconduct within the Community Bank, resulting in hundreds of terminations and resignations a year, that

was inconsistent with Wells Fargo's public statements concerning its culture of honesty and integrity, and its successes in cross-selling. After all, "lying is inconsistent with the duty of loyalty owed by all fiduciaries[.]" *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996) (quoting *Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983)) (other citations omitted).

323. As a direct and proximate result of Individual Defendants' fiduciary duty breaches alleged herein, the Plan and Plan Participants suffered damage to and/or lost a significant portion of their retirement investments in an amount to be determined at trial.

324. Had Individual Defendants complied with their fiduciary obligations, Plan Participants would have avoided foreseeable losses from transactions in Wells Fargo stock and thereby eliminated, or at least reduced, losses to the Plan.

COUNT II

Breach of Fiduciary Duty of Prudence in Managing and Administering Plan[5]
(Against All Defendants)

325. Plaintiffs incorporate all factual allegations in the preceding paragraphs as if fully set forth herein.

326. As alleged above, all Defendants were fiduciaries during the Class Period within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that they exercised discretionary authority or control over the administration and/or management of the Plan or disposition of the Plan's assets.

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[5] Recognizing that the Court has dismissed Plaintiffs' Duty of Prudence claim with prejudice, Plaintiffs include this claim here strictly to preserve it for purposes of appeal.

327. Under ERISA, fiduciaries who exercise discretionary authority or control over management of a Plan or disposition of a Plan's assets are responsible for ensuring that investment options made available to Participants under a Plan, as well as employer matching investments, are prudent and not artificially inflated in value.

328. Furthermore, such fiduciaries are responsible for ensuring that all investments in the Company's stock in the Plan were prudent and not artificially inflated in value, and that such investments are consistent with the purpose of the Plan.

329. Defendants are liable for losses incurred as a result of Wells Fargo's stock being artificially inflated in price during the Class Period, and thus imprudent and inconsistent with the Plan's purposes.

330. A fiduciary's duty of prudence requires it to disregard Plan documents or directives that it knows or reasonably should have known would lead to an imprudent result or would otherwise harm Plan Participants or beneficiaries. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

331. Thus a fiduciary may not blindly follow Plan documents or directives that would lead to an imprudent result or that would harm Plan Participants or beneficiaries, nor may it allow others, including those whom they direct or who are directed by the Plan, including Plan trustees, to do so.

332. Defendants breached their duty of prudence to the Plan and Plan Participants. During the Class Period, Defendants engaged in an illegal scheme to hide or conceal material adverse facts about the broad and systemic fraud scheme. Defendants knew that Wells Fargo stock had become artificially inflated in value and that Plan

Participants lacked sufficient and material information to evaluate its prudence and appropriateness as an investment option for Plan Participants' retirement savings. Accordingly, Defendants should have taken appropriate alternative actions, as detailed above, but failed to do so.

333. Defendants knew or should have known that Plan Participants did not have full and complete information about the Company, and thus were unable to make fully informed decisions about whether to purchase Company stock, hold Company stock, or invest in alternatives under the Plan.

334. As a direct and proximate result of Defendants' fiduciary duty breaches alleged herein, the Plan and Plan Participants suffered damage to and/or lost a significant portion of their retirement investments in an amount to be determined at trial. Had Defendants complied with their fiduciary obligations, Plan Participants would have avoided foreseeable losses from transactions in Wells Fargo stock and thereby eliminated, or at least reduced, losses to the Plan.

COUNT III
Co-Fiduciary Liability

335. Plaintiffs incorporate all factual allegations in the preceding paragraphs as if fully set forth herein.

336. This count alleges co-fiduciary liability against all Defendants (the "Co- Fiduciary Defendants").

337. As alleged above, during the Class Period, the Co-Fiduciary Defendants were fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or *de facto* fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Defendants were thus

bound by the duties of loyalty, exclusive purpose, and prudence.

338. As alleged above, ERISA § 405(a), 29 U.S.C. § 1105(a), imposes liability on a fiduciary, in addition to any liability which he may have under any other provision, for a breach of fiduciary responsibility of another fiduciary with respect to the same Plan if he knows of a breach and fails to remedy it, knowingly participates in a breach, or enables a breach. The Co-fiduciary Defendants breached all three of these provisions.

339. *Knowledge of a Breach and Failure to Remedy*: ERISA § 405(a)(3), 29 U.S.C. § 1105(a)(3), imposes co-fiduciary liability on a fiduciary for a fiduciary breach by another fiduciary if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach. Upon information and belief, each Defendant knew, or was reckless in not knowing, of the breaches by the other fiduciaries and made no efforts, much less reasonable efforts, to remedy those breaches.

340. *Knowing Participation in a Breach*: ERISA§ 405(a)(1), 29 U.S.C. § 1105(a)(1), imposes liability on a fiduciary for a breach of fiduciary responsibility of another fiduciary with respect to the same Plan if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach.

341. Various fiduciary Defendants knowingly or recklessly participated in the breaches of other fiduciary Defendants because, as alleged above, they had actual knowledge of, or were reckless in not knowing, the facts that rendered the Company stock an imprudent retirement investment and, yet, ignoring their oversight responsibilities, permitted certain Defendants to breach

their duties. Moreover, as alleged above, each of the Defendants participated in the management and/or administration of the Plan's improper investment in the artificially inflated Company stock and, upon information and belief, knowingly or recklessly participated in the improper management of that investment by the other Defendants.

342. *Enabling a Breach*: ERISA § 405(a)(2), 29 U.S.C. §1105(a)(2), imposes liability on a fiduciary if, by failing to comply with ERISA §404(a)(1), 29 U.S.C. §1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled another fiduciary to commit a breach.

343. As a direct and proximate result of Defendants' fiduciary duty breaches alleged herein, the Plan, and Plaintiffs, and the other Plan Participants, were damaged and sustained losses in an amount to be determined at trial.

344. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109, 1132(a)(2) and (a)(3), the Co-Fiduciary Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

COUNT IV

Failure to Monitor Fiduciaries

(Against Defendants Wells Fargo & Company, Patricia Callahan, and Hope Hardison)

345. Plaintiffs incorporate all factual allegations in the preceding paragraphs as if fully set forth herein.

346. Under ERISA, a person with authority to appoint, maintain, and remove plan fiduciaries is a fiduciary with respect to that exercise of authority.

347. Defendant Callahan, as Chief Administrative Officer, and Defendant Hardison, as Director of Human Resources, had the authority to appoint and remove EBRC members from January 1, 2014 through July 31, 2015.

348. Wells Fargo had the authority to appoint and remove the Plan Administrators, Defendants Hardison and Thornton, because it had the authority to appoint and remove the Chief Administrative Officer and the authority to appoint and remove the Director of Human Resources. Thus, Wells Fargo also effectively had the authority to appoint and remove EBRC members.

349. Persons empowered to appoint and remove fiduciaries have a duty to monitor those appoints, which includes a duty to act upon discovery that appointed fiduciaries are not performing properly.

350. A monitoring fiduciary must ensure that the monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment and monitoring of Plan assets, and must take prompt and effective action to protect the Plan and its Participants when the monitored fiduciaries fail to perform their fiduciary obligations in accordance with ERISA.

351. Defendants Callahan and Hardison knew that Wells Fargo stock had become artificially inflated during the Class Period. Defendants Callahan and Hardison further knew that members of the EBRC knew that Wells Fargo stock had become artificially inflated during the Class Period. Defendants Callahan and Hardison further knew that members of the EBRC were improperly allowing Plan Participants, who did not know of the artificial inflation or the facts giving rise to the artificial inflation, to invest in artificially inflated Wells Fargo stock.

352. Defendants Callahan and Hardison did not take any action; including the removal of EBRC members, demanding that EBRC members disclose to Plan Participants the facts giving rise to Wells Fargo stock's artificial inflation, demanding that EBRC members remove Wells Fargo stock as an investment option, or disclosing (themselves) the facts giving rise to Wells Fargo stock's artificial inflation; to protect Plan Participants from the improper performance of EBRC members. Defendants Callahan and Hardison thus breached their duty to monitor.

353. Wells Fargo knew that Wells Fargo stock had become artificially inflated during the Class Period. Wells Fargo further knew that Defendants Callahan, Hardison, Thornton, and members of the EBRC knew that Wells Fargo stock had become artificially inflated during the Class Period. Wells Fargo further knew that Defendants Callahan, Hardison, Thornton, and members of the EBRC, in their capacity as fiduciaries, were improperly allowing Plan Participants, who did not know of the artificial inflation or the facts giving rise to the artificial inflation, to invest in artificially inflated Wells Fargo stock.

354. Wells Fargo did not take any action; including the removal of Plan Administrators or EBRC members, demanding that Plan Administrators or EBRC members disclose to Plan Participants the facts giving rise to Wells Fargo stock's artificial inflation, demanding that Plan Administrators or EBRC members remove Wells Fargo stock as an investment option, or disclosing (itself) the facts giving rise to Wells Fargo stock's artificial inflation; to protect Plan Participants from the improper performance of the Plan Administrators and EBRC members. Wells Fargo thus breached its duty to monitor.

355. As a consequence of the foregoing breaches of the duty to monitor, the Plan, Plaintiffs, and the other Plan Participants, were damaged and sustained losses in an amount to be determined at trial. Had Defendants Callahan, Hardison, and Wells Fargo not abrogated their duties to monitor, Plan Participants would have avoided foreseeable damages and losses.

356. Pursuant to 29 U.S.C. §§ 1109(a), 1132(a)(2), and 1132(a)(3), Wells Fargo is liable to restore to the Plan all losses suffered as a result of the fiduciary breaches that resulted from their failure to properly monitor the Plan's fiduciaries, and subsequent failure to take prompt and effective action to rectify any observed fiduciary breaches.

VIII. CAUSATION

357. As discussed in detail above, the Plan suffered not less than hundreds of millions of dollars in damages and losses because Defendants breached their fiduciary duties by, among other things, allowing substantial Plan assets to be invested in Wells Fargo stock during the Class Period and not disclosing material information to Plan Participants.

358. Had Defendants properly discharged their fiduciary and co-fiduciary duties by taking any of the above-described alternative actions, the Plan and Plan Participants would have avoided the damages and losses that they sustained.

IX. REQUEST FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the other Class members, respectfully request that the Court grant the following relief:

(a) Determining that this action may proceed as a class action under Rule 23(b)(1), Rule 23(b)(2), and Rule 23(b)(3) of the Federal Rules of Civil Procedure.

(b) Designating Plaintiffs as Class Representatives and Plaintiffs' counsel as Class Counsel;

(c) Declaring that Defendants breached their fiduciary duty of loyalty under ERISA;

(d) Declaring that Defendants breached their fiduciary duty of prudence under ERISA;[6]

(e) Compelling Defendants to personally restore to the Plan all losses that the Plan incurred as a result of the above-described fiduciary duty breaches, and to restore the Plan to the position it would have been in but-for this unlawful conduct;

(f) Requiring Defendants to disgorge all revenues received from the Plan, and/or equitable relief pursuant to 29 U.S.C. 1132(a)(3) in the form of an accounting for profits, imposition of constructive trust, or a surcharge against Defendants as necessary to effectuate said relief, and to prevent Defendants' unjust enrichment;

(g) Enjoining Defendants from any further violations of their ERISA fiduciary responsibilities, obligations, and duties;

(h) Granting other equitable relief to redress Defendants' illegal practices and to enforce the provisions of ERISA as may be appropriate;

(i) Awarding pre-judgment interest;

(j) Awarding attorneys' fees and costs pursuant to 29 U.S.C. § 1132(g) and/or the common fund doctrine; and

(k) Awarding such other relief as the Court deems equitable and just.

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[6] *See* note 5, *supra.*

Dated: October 27, 2017

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