UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Plaintiffs,

v.

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

Defendants.

Civil No. 13-2687 (JNE/JJK)
ORDER

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

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

Named plaintiffs James Thole and Sherry Smith ("Plaintiffs"), in a putative class action, sued defendants U.S. Bank, N.A. (the "Bank"), U.S. Bancorp (the Bank's parent company), and multiple individual U.S. Bancorp directors (collectively, "Directors") (all together, "Defendants"), challenging the Defendants' management of a defined benefit pension plan (the "Plan") from September 30, 2007 to December 31, 2010.[1] The case involves the intricacies of the Employee Retirement Income Security Act of 1974 ("ERISA"). Plaintiffs allege that Defendants violated ERISA Sections 404, 405, and 406, 29 U.S.C. §§ 1104-106, by breaching their fiduciary obligations and causing the Plan to engage in prohibited transactions with a Bank subsidiary, FAF Advisors. These ERISA violations allegedly caused significant losses to the Plan's assets in 2008, resulting in the Plan's underfunded status in 2008 through 2012. *See, e.g.*,

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

Consol. Am. Compl. ("CAC") ¶¶ 167, 170-71, Dkt. No. 92. Plaintiffs seek to recover Plan losses, disgorgement of profits, injunctive relief, and/or other remedial relief pursuant to ERISA Sections 502(a)(2) and 409 (29 U.S.C. § 1109), and also seek equitable relief pursuant to ERISA Sections 502(a)(3). CAC ¶¶ 328-30. "[T]he relief requested in this action is for the benefit of the Plan . . . ." *Id.* ¶ 53.

Defendants filed a motion to dismiss the action for lack of standing ("Motion"), Dkt. No. 210, renewing one of the arguments they had advanced on an earlier motion to dismiss ("2014 Motion"), Dkt. No. 102. The Court granted in part and denied in part Defendants' 2014 Motion. Order, Dkt. No. 146. Of particular relevance, the Court rejected Defendants' standing arguments based on the record before it, finding that Plaintiffs adequately allege injury, causation, and redressability to support the determination that they had standing when they filed their complaint in September 2013. *Id.* at 11-23. Defendants' "factual attack" was insufficient to undermine that conclusion. *See id.* at 14-15. A year later, Defendants argue that new facts and recent persuasive case law now compel dismissal. The Court finds that Defendants have incorrectly framed the question as a standing inquiry, but for the reasons below, the Court grants Defendants' motion to dismiss for lack of Article III jurisdiction, on the grounds that the action is moot.

Background

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

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

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

> Congress enacted ERISA in 1974 for the "primary purpose" of "protect[ing] individual pension rights." *Harley v. Minnesota Min. and Mfg. Co.* [(*Harley I*)], 284 F.3d 901, 907 (8th Cir. 2002) (quoting H.R. Rep. No. 93-533 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4639)). To that end, ERISA "regulat[es] the structure and operation of retirement plans." *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994).
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> Among the retirement plans that ERISA regulates are "defined benefit plans" like the Plan. *See* 29 U.S.C. §§ 1002(35), 1002(2)(A), 1003. A defined benefit plan "consists of a general pool of assets"—which "may be funded by employer or employee contributions, or a combination of both"—out of which "a fixed periodic payment" is made to a participant upon her retirement. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999) (internal quotation and citation omitted). Owing to the structure of this type of retirement plan, "[n]o [participant] has a claim to any particular asset that composes a part of the plan's general asset pool." *Id.* at 440. Participants in such plans do, however, have "a right to a certain defined level of benefits, known as 'accrued benefits.'" *Id.*
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> ERISA requires that the plan be funded in a manner that provides sufficient assets to meet its liabilities, 29 U.S.C. Ch. 18, Subch. I, Subt. B, Pt. 3, and that the plan maintain insurance against underfunding at termination through the Pension Benefit Guaranty Corporation [("PBGC")], 29 U.S.C. Ch. 18, Subch. III.

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

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

> All of these requirements are means to the end of "guarantee[ing] that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984) (quotation and citation omitted). *See also* 29 U.S.C. § 1001(b)-(c) (declaration that policy of ERISA is to "protect . . . the interests of participants in employee benefit plans and their beneficiaries" by "establishing standards of conduct, responsibility, and obligation for fiduciaries," "by requiring [plans] to meet minimum standards of funding," and "by requiring plan termination insurance"); *Lockheed Corp. v. Spink*, 517 U.S. 882, 887-88 (1996) (discussing "key measures" of ERISA that are designed "[t]o increase the chances that employers will be able to honor their benefits commitments—that is, to guard against the possibility of bankrupt pension funds").

Order 8-9.

Whether an ERISA-regulated defined benefit plan is underfunded or overfunded is measured annually pursuant to the statutory scheme. A plan's "funding target attainment percentage" or "FTAP" is "'the ratio (expressed as a percentage)' of 'the value of plan assets for the plan year (as reduced [by certain prefunding and carryover balances])' to 'the present value of all benefits accrued or earned under the plan as of the beginning of the plan year.'" *Id.* at 19 (citing 29 U.S.C. § 1083(d)(1)-(2)). Under ERISA's pension funding provisions, with respect to any defined benefit plan "in which the value of plan assets" is less than "the present value of all benefits accrued or earned under the plan as of the beginning of the year," ERISA obligates the employer to make the "minimum required contributions" necessary to amortize that shortfall over the ensuing seven years. *Id.* at 20 (citing 29 U.S.C. §§ 1082-83). In other words, an employer must make minimum funding contributions if the plan's FTAP is less than 100%, meaning that the plan is underfunded. *Id.* at 21 n.6.

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

The Court also found that Plaintiffs adequately allege that the increased risk of default was caused by the Defendants' ERISA violations, and that Defendants' asserted facts failed to rebut the allegations. *Id.* at 22-23. Finally, the Court found that the relief Plaintiffs seek—"in particular, the restoration to the Plan of the assets that were allegedly lost as a result of the Defendants' misconduct"—would "remedy the underfunding that is at the root of their injury."

Id. at 23. The Court concluded that Plaintiffs had made a sufficient showing of constitutional standing. *Id.*

Applicable Standards

Defendants again move the Court to dismiss this action for lack of standing, relying on the factual development that the Plan is now overfunded. Plaintiffs counter that standing is the wrong doctrine to apply in this procedural posture, and that the proper question is whether the case has become moot. Plaintiffs are correct. Standing is assessed as of the time a lawsuit is commenced. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.5 (1992); *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 869 (8th Cir. 2013); *Harley v. Zoesch* (*Harley II*), 413 F.3d 866, 872 (8th Cir. 2005). In contrast, mootness is the doctrine that applies when, after a plaintiff with standing files a case presenting a ripe question or controversy, circumstances change such that there is no longer an Article III case or controversy for the court to decide. *E.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000) (contrasting "initial standing to bring suit" with "postcommencement mootness"); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 72 (1997) (holding that "changed circumstances" post-filing "mooted the case stated in her complaint"); *Park v. Forest Serv. of United States*, 205 F.3d 1034, 1037-38 (8th Cir. 2000).[3] Many decisions describe mootness as "the doctrine of standing set in a time frame," so confusing the two "is understandable." *Laidlaw*, 528 U.S. at 189. Nonetheless, the mootness inquiry, not standing, applies to Defendants' argument that the case should be dismissed because the Plan became overfunded in 2014.

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

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

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

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

Mootness Analysis

The Court begins its analysis of whether an Article III case or controversy continues to exist by applying the general principles of mootness, then considers whether Defendants bear the

"formidable burden" imposed by the voluntary cessation doctrine. Under both analyses, the Court concludes that it no longer has Article III jurisdiction over Plaintiffs' claims.

A. Concrete Interest

Whether Plaintiffs continue to have a "concrete interest, however small, in the outcome of the litigation," *Knox*, 132 S. Ct. at 2287, turns on whether they still have an interest in the relief they seek in order to remedy the injury caused by Defendants' alleged misconduct. As discussed above, Plaintiffs' injury in fact is the increased risk of Plan default, or, put another way, the increased risk that Plan beneficiaries will not receive the level of benefits they have been promised.[4] Plaintiffs have no legal interest in any particular asset in the Plan, nor do they have a legal interest in any Plan surplus. *Hughes Aircraft*, 525 U.S. at 440; *see also LaRue*, 552 U.S. at 255.

1. The Plan Is Overfunded

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

Defendants, however, have presented evidence sufficient to show that the Plan is now overfunded. The Plan had an FTAP of 105.18% for Plan Year 2014 and an even higher FTAP of

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

115.30% for Plan Year 2015. Ellison Ltr. Exs. A, B, Dkt. No. 228. FTAP and ERISA's minimum funding requirements are "relevant measures" for assessing whether a plan has a surplus for purposes of Article III jurisdictional analysis. Order 20-21; *see also Perelman*, 793 F.3d at 375 ("[T]he controlling yardstick here is provided by the finely tuned framework established by Congress."); *Harley I*, 284 F.3d at 908 (assessing the plan's surplus by the statutory measures for required contributions). Further, and as the Court previously found, Plaintiffs have not alleged or offered any evidence to suggest that "U.S. Bancorp is incapable of meeting the minimum funding obligations or paying the PBGC [insurance] premiums that ERISA imposes for the purpose of bolstering the financial soundness of underfunded defined benefit plans." Order 15. The financial strength of a plan sponsor is relevant to determining if there is any increased risk of plan default once a plan is overfunded. *Harley I*, 284 F.3d at 907; *see also* Order 17 (noting that "the financial health of the plan sponsor" is not "irrelevant").

Plaintiffs contest the conclusion that the Plan is now overfunded. First, they argue in several footnotes that FTAP is not the only relevant measure for whether the Plan has surplus and that the Plan is underfunded by the following measures: "the FTAP funding ratio without adjusted interest rates, which is 80% for plan year 2014," and "the financial reporting funding ratio, which is 60% as of December 31, 2014" (citing figures in U.S. Bancorp's 2014 Annual Report). *E.g.*, Pls.' Opp. 10 n.10. Plaintiffs do not explain why the Court should find these measures to be relevant under the ERISA scheme. The current statutory scheme mandates the use of adjusted interest rates for assessing minimum funding requirements. Highway & Transp. Funding Act of 2014 (HAFTA), Pub. L. No. 113-159, § 2003(b)(1), 128 Stat. 1849 (2014) (modifying the MAP-21 rates in ERISA Section 303(h)(2), 29 U.S.C. § 1083(h)(2)); Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. No. 112-141, § 40211(b)(1), 126

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

2. Consequences of the Plan's Overfunded Status

Because the Plan is overfunded, Plaintiffs no longer have a concrete interest in any monetary relief that might be awarded to the Plan if they prevailed on the merits. *Knox*, 132 S. Ct. at 2287; *Hughes Aircraft*, 525 U.S. at 440. Plaintiffs seek the restoration of losses to the Plan caused by Defendants' alleged violations of ERISA Section 405; the disgorgement of any profits, ill-gotten gains, or fees Defendants obtained through the use of Plan assets in violation of ERISA Sections 404 and 406; and legal fees and costs. Pls.' Opp. 15-16; CAC § X ¶¶ B, C, F, H. But any money that could be awarded would simply add to the Plan's now-existing surplus, in which Plaintiffs have no legal interest. *Hughes Aircraft*, 525 U.S. at 440; *Harley I*, 284 F.3d at 906;

Order 13; *see also Perelman*, 793 F.3d at 375; *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013). Because they would have no interest in it, such monetary relief would not provide these individual plaintiffs any effectual relief. Moreover, to the extent that the Plan becomes underfunded again in the future, raising anew concerns about the security of Plan participants' future stream of benefits, the causal connection between the new increased risk of default and the Defendants' alleged violations in 2007 through 2010 would be tenuous at best.

Plaintiffs also seek equitable and injunctive relief and a declaration that Defendants breached their fiduciary duties. Pls.' Opp. 15-16; CAC § X ¶¶ A, D, E, G. For example, they seek an injunction preventing Plan fiduciaries from pursuing in the future the 100% Equities Strategy—which Plaintiffs allege was abandoned in late 2010 or 2011, CAC ¶¶ 145-46—and "preventing disloyal decision-making," and an order appointing a new Plan manager or requiring Defendants to diversify Plan assets. Plaintiffs seek this equitable and injunctive relief pursuant to ERISA Sections 409, 502(a)(2) and 502(a)(3). CAC ¶¶ 19, 329-33. This relief, like the requested monetary relief, aims to remedy Defendants' alleged violations of ERISA Sections 404, 405, and 406. But their requests for injunctive and other equitable relief under Sections 502(a)(2) and 409 to remedy the same alleged violations do not suffice to create an Article III injury where the Plaintiffs lack an interest in monetary relief. *McCullough*, 585 F.3d at 1085, 1087. The remaining question is whether Plaintiffs maintain a concrete interest in the case through their requests for equitable relief pursuant to Section 502(a)(3), including for disgorgement and the imposition of a constructive trust. The Eighth Circuit has not directly addressed this question. *See id.* at 1087. It has, however, addressed the question of when Section 502(a)(3) relief is available to an ERISA plan participant plaintiff. The Eighth Circuit has held that where a plaintiff would be "provided adequate relief by her right to bring a claim"

under one of the other 502(a) subsections, "equitable relief would not be appropriate" and therefore would not be available under Section 502(a)(3). *Wald v. Sw. Bell Corp. Customcare Med. Plan*, 83 F.3d 1002, 1006 (8th Cir. 1996) (discussing *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996)). In this case, Plaintiffs seek equitable or remedial relief under Section 502(a)(2), including equitable or remedial relief under Section 409 to remedy breaches of fiduciary duty. CAC ¶ 329. They seek the same type of relief under Section 502(a)(3), also to remedy breaches of fiduciary duty under Sections 404, 405, and 406. CAC ¶¶ 328, 330. Because the relief available under Section 502(a)(2) would be adequate, the same type of relief under Section 502(a)(3) would not be "appropriate." *Wald*, 83 F.3d at 1006. Therefore, Plaintiffs' request for relief under Section 502(a)(3) cannot preserve a concrete interest in this case.

Finally, Plaintiffs' requests for fees and costs cannot, by themselves, "save the case from mootness." *Hechenberger v. W. Elec. Co., Inc.*, 742 F.2d 453, 455 n.5 (8th Cir. 1984); *see also Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990) ("This interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim . . . .").

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

fundamentally different than Plaintiffs' interests with regard to the Plan, a defined benefit plan. *See LaRue*, 552 U.S. at 255; *Hughes Aircraft*, 525 U.S. at 439-40.

The Court is mindful that a mootness analysis should not become an evaluation of the merits, and that a claim "cannot be dismissed as so implausible that it is insufficient to preserve jurisdiction." *Chafin v. Chafin*, 133 S. Ct. 1017, 1024 (2013). That is not the case here. Rather, as a matter of law in the intricate scheme governing defined benefit plans under ERISA, now that the Plan is overfunded, Plaintiffs do not have a concrete interest in the monetary damages they seek, and their other requests for relief do not work independently to keep the controversy live. This conclusion is consistent with ERISA's purposes. Allowing participants in an overfunded plan to pursue their claims "would not advance ERISA's primary purpose of protecting individual pension rights, because the pension rights of such plaintiffs are fully protected, and would if anything be adversely affected by subjecting"—or continuing to subject—"the Plan and its fiduciaries to costly litigation." *McCullough*, 585 F.3d at 1087 (internal quotation marks omitted) (quoting *Harley I*, 284 F.3d at 907).

3. Plaintiffs' Alternative Arguments

In another attempt to overcome the significance of the Plan's overfunded status, Plaintiffs argue that regardless of Plan funding levels, they continue to have an Article III concrete interest because Defendants' alleged breaches of their fiduciary duties to the Plan constitute an invasion of a legally protected interest under ERISA. They rely primarily on *Hammer v. Sam's East, Inc.*, 754 F.3d 492, 498 (8th Cir. 2014), in which the Eighth Circuit stated that "the actual-injury requirement [for Article III standing] may be satisfied *solely* by the invasion of a legal right that Congress *created*." That statement does not extend as far as Plaintiffs wish. Statutory standing and constitutional standing are not necessarily coterminous; even if a plaintiff satisfies every

statutory element, if she did not suffer an injury in fact, she does not have Article III standing. *E.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) ("Statutory broadening of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.") (internal brackets omitted). *Hammer* does not alter this bedrock principle. *Hammer* involved the question of whether plaintiffs had alleged injury in fact sufficient to establish Article III standing for their claims under the Fair and Accurate Credit Transactions Act, which provides for statutory damages if a company prints a person's credit card number on his or her receipt. 754 F.3d at 496, 498-99. In holding that the plaintiffs had standing, the Eighth Circuit stressed that they had alleged "actual, individualized" harm because "it was their own receipts" that contained numbers printed illegally. *Id.* at 499. Plaintiffs in this case have not alleged such an "actual, individualized" harm, because no one asserts that the Plan has failed to pay any of his or her benefits. Rather, they assert a more general increased risk of Plan default. The other cases on which Plaintiffs rely are likewise distinguishable. *Charvat v. Mutual First Federal Credit Union*, 725 F.3d 819, 824 (8th Cir. 2013) (plaintiff personally did not receive required notice and was charged a fee); *Oti Kaga, Inc. v. S. Dakota Housing Devel. Authority*, 342 F.3d 871, 878 (8th Cir. 2003) (plaintiff suffered increased costs and lost opportunities).[5]

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

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

B. Voluntary Cessation Doctrine

Plaintiffs further argue that even if the case is moot, Defendants cannot meet their "formidable burden" under the voluntary cessation exception to mootness. *Already*, 133 S. Ct. at

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

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

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

Nonetheless, assuming that the voluntary cessation doctrine does apply because Defendants' payments (whatever their motivation) have caused the Plan to become overfunded, Defendants have met their burden. Taking into consideration the CAC's allegations and the facts offered by both parties on Defendants' Motion, the Court "is satisfied that it is 'absolutely clear' that the allegedly unlawful activity cannot be reasonably expected to recur." *Already*, 133 S. Ct. at 729. Plaintiffs allege that Defendants unlawfully pursued the risky 100% Equities Strategy, which caused the Plan to suffer huge losses in 2008 and which the Defendants abandoned in 2011 when the Plan "meaningfully beg[a]n to diversify into asset classes other than equities." CAC ¶¶ 145-46; Order 22-23. They do not allege, nor have they offered any evidence to suggest, that Defendants have re-adopted a 100% Equities Strategy for the Plan since 2011. Plaintiffs also allege that Defendants improperly appointed the Bank subsidiary FAF Advisors as the Plan manager in 2007 and that FAF Advisors improperly invested Plan funds in the subsidiary's own equities-backed mutual funds from 2007 to 2011. Order 5, 31-32; *e.g.*, CAC ¶¶ 143, 146. They allege that after the Bank sold FAF Advisors in 2010, Defendants "ceased to use parties in interest to manage a significant portion of the Plan's assets." CAC ¶ 198. In addition, Plaintiffs allege ERISA violations based on the Plan's participation in FAF Advisors' Securities Lending Portfolio from 2005 to 2010, again causing Plan losses in 2008. Order 5-6; CAC ¶ 174.

Thus, Plaintiffs allege that Defendants' misconduct ended by 2011 at the latest and do not allege any continuing misconduct. Nor have Plaintiffs offered anything but speculation that the alleged misconduct will resume.[6] Their concerns about Defendants' potential future misconduct are "too conjectural or hypothetical to present an actual controversy" and cannot save the case from mootness now that the Plan is overfunded. *Ayyoubi*, 712 F.3d at 391. "A speculative possibility is not a basis for retaining jurisdiction over a moot case." *McCarthy*, 359 F.3d at 1036.

Conclusion

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

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

2. The action is DISMISSED AS MOOT.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 29, 2015

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

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