

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Robin E. Figas, and all  
others similarly situated,

Civil No. 08-4546 (PAM/FLN)

Plaintiff,

v.

**MEMORANDUM AND ORDER**

Wells Fargo & Company, Wells  
Fargo Bank N.A., Employee  
Benefit Review Committee, and  
John Does 1-20, et al.,

Defendants.

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This matter is before the Court on Plaintiff's Motion for Amended Class Certification.

For the reasons that follow, the Motion is granted.

**BACKGROUND**

Plaintiff Robin Figas is employed by Defendant Wells Fargo & Company ("Wells Fargo"). She participates in the Wells Fargo employees' 401(k) retirement plan. In this lawsuit, she alleges that Defendants violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., by mismanaging the plan.

In April, the Court certified the following class:

Participants in the Wells Fargo & Company 401(k) Plan (the "Plan") whose Plan accounts had a balance in any one of the following funds from November 2, 2001, to September 22, 2009: Wells Fargo Diversified Small Cap Fund; Wells Fargo Diversified Equity Fund; Wells Fargo Large Company Stock Fund; Wells Fargo Growth Balanced Fund; Wells Fargo Moderate Balanced Fund; Wells Fargo Aggressive Allocation Fund (formerly Wells Fargo Strategic Growth Allocation Fund); and Wells Fargo Conservative Allocation

Fund (formerly Wells Fargo Strategic Income Fund).

(Apr. 6, 2010, Order (Docket No. 150) at 18.)

Plaintiffs now seek to amend the class to include participants in another one of the funds available to employees, the Asset Allocation Fund.<sup>1</sup> Plaintiffs amended their Complaint in June 2010 to add claims related to this fund.

According to Defendants, Plaintiffs' claims regarding this fund are fundamentally different from the claims involving the other funds. In their initial claims, Plaintiffs contend that Wells Fargo improperly invested in Well Fargo-managed investment funds when it knew or should have known that there were "better-performing, lower cost, comparable investment funds [] available from unaffiliated entities." (3d Am. Compl. ¶ 43.) Defendants argue that Plaintiff cannot make these sorts of claims against the Asset Allocation Fund. First, because this Fund charged no management fees, Plaintiffs cannot claim that there were lower-cost funds available for investment. Second, during the class period the Asset Allocation Fund allegedly outperformed all of the comparator funds and thus Plaintiffs cannot claim that there were better-performing comparable funds in which Wells Fargo should have invested. For their part, Plaintiffs contend that the Asset Allocation Fund in fact lost more money than any of Wells Fargo's funds, and lost money in comparison to at least some of the comparator funds. Whether Plaintiffs or Defendants are correct is not relevant at this stage, however. As the initial certification Order made clear, the question of the magnitude of losses, or lack

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<sup>1</sup> Plaintiffs also ask for an extension of the class period to September 30, 2009, for administrative purposes.

thereof, is not relevant on class certification. (Apr. 6, 2010, Order (Docket No. 150) at 15.)

Defendants are correct that Plaintiffs' claims regarding the Asset Allocation Fund are different from their claims regarding the other funds. The Asset Allocation Fund was engaged in securities lending, in which the Fund's assets would purchase securities to lend to other entities, presumably reaping the rewards of the interest charged the borrower. Some of these securities, however, were the much-maligned mortgage-backed securities. When the recession hit and borrowers were unable to fulfill their obligations on these securities, the Fund lost a significant amount of money. According to Plaintiffs, this was by design: Wells Fargo wanted to lend the mortgage-backed securities with no risk, so it caused its 401(k) plan's Asset Allocation Fund to do the lending. When the bubble burst, only the Fund incurred losses, not Wells Fargo. Plaintiffs' fundamental allegation is that the use of "this excessively risky and imprudent securities lending process" made the Asset Allocation Fund "an imprudent investment option" and was therefore a breach of the Benefit Committee's fiduciary duties in violation of ERISA, 29 U.S.C. § 1104. (3d Am. Compl. ¶¶ 65-66.)

As discussed above, Plaintiffs' claims regarding the other funds are much simpler. The claims are merely that the funds did not perform well (and charged excessive fees for the poor performance) and that therefore the Benefit Committee should not have invested in those funds. The difference between Plaintiffs' two types of claims is not a barrier to class certification, however. The relevant question is not whether all claims are common with each other, but rather whether the claims are common as to the class as a whole. (Apr. 6, 2010, Order (Docket No. 150) at 7-8.) There is little doubt that Plaintiffs' claims regarding

the Asset Allocation Fund, if true, are common to the class as a whole. Thus, Plaintiffs are entitled to amend the class certification to include the Asset Allocation Fund.

## CONCLUSION

Accordingly, **IT IS HEREBY ORDERED that:**

1. Plaintiffs' Motion to Amend Class Certification (Docket No. 206) is

**GRANTED;**

2. The class previously certified under Fed. R. Civ. P. 23(b)(3), is amended as follows:

Participants in the Wells Fargo & Company 401(k) Plan (the "Plan") whose Plan accounts had a balance in any one of the following funds from November 2, 2001, to September 30, 2009: Wells Fargo Diversified Small Cap Fund; Wells Fargo Diversified Equity Fund; Wells Fargo Large Company Stock Fund; Wells Fargo Growth Balanced Fund; Wells Fargo Moderate Balanced Fund; Wells Fargo Aggressive Allocation Fund (formerly Wells Fargo Strategic Growth Allocation Fund); Wells Fargo Conservative Allocation Fund (formerly Wells Fargo Strategic Income Fund); and Wells Asset Allocation Collective Trust.

3. All other provision of the previous Order (Docket No. 150) shall remain in effect.

Dated: Wednesday, September 1, 2010

*s/ Paul A. Magnuson* \_\_\_\_\_

Paul A. Magnuson  
United States District Court Judge