**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

| | | |
|---|---|---|
| VALESKA SCHULTZ, *et al.*, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Case No. 4:16-cv-1346-JAR |
| | ) | |
| EDWARD D. JONES & CO., L.P., *et al.*, | ) | **ORAL ARGUMENT REQUESTED** |
| | ) | |
| Defendants. | ) | |

**DEFENDANTS' MOTION TO DISMISS**
**THE FIRST AMENDED CONSOLIDATED COMPLAINT**

COME NOW Defendants Edward D. Jones & Co., L.P. ("Edward Jones"), the Edward Jones Investment and Education Committee and its members (collectively, the "Investment Committee"), and the Edward Jones Profit Sharing and 401(k) Administrative Committee[1] by and through their undersigned counsel, and pursuant to Fed. R. Civ. P. 12(b)(6) jointly move the Court to dismiss the First Amended Consolidated Complaint ("Complaint") with prejudice. In support of their Motion, Defendants state as follows:

1. Plaintiffs allege that Edward Jones selected Preferred Partner Funds ("PFF funds") to be included as investment options in the Edward D. Jones & Co. Profit Sharing and 401(k) Plan (the "Plan") because of a pre-existing business relationship with Partners and Preferred Partners of Edward Jones. On that basis, the Plaintiffs assert that Defendants failed to discharge their duties to the Plan with the care, skill, diligence and prudence required under the Employee Retirement Income Security Act of 1974 ("ERISA"). Plaintiffs do not point to any facts showing deceit or disloyalty on the part of Defendants, but instead allege a bare conflict of

[1] Plaintiffs also purport to bring their claims against unidentified individual members of the Administrative Committee ("Jane and John Does 1-30"). This motion is not made by Jane and John Does 1-30, who are unidentified and have not been served with process, but is made by all other Defendants.

interest that cannot alone state a claim. The mere inclusion of PFF funds and other funds offering revenue sharing does not amount to a breach of the duty of prudence; and Plaintiffs' hindsight critique of the performance of a handful of such funds is too bare to state a plausible claim for a breach of the duty of prudence under ERISA.

2. Plaintiffs allege that the Plan should have included a Stable Value Fund instead of the American Funds Money Market Fund (a PFF fund) merely because there is a Vanguard Stable Value Fund that outperformed the American Funds Money Market Fund over the past six years. Defendants did not breach their fiduciary duty of prudence by including a Money Market Fund instead of a Stable Value Fund. Plaintiffs' allegations to the contrary ignore the structural differences between Stable Value Funds and Money Market Funds, improperly use hindsight to analyze the performance of Money Market Funds, and do not state a claim for relief.

3. Plaintiffs also fail to state a claim that Defendants breached their fiduciary duties by offering R-5 retirement share classes rather than R-6 share classes of the same funds. Plaintiffs' allegations that ignore the fact that because revenue sharing received from R-5 shares is used to offset recordkeeping expenses of the Plan, they have a net cost to the Plan that is equivalent to that of R-6 shares that do not pay revenue sharing. Plaintiffs' claims rest upon the faulty premise that plan fiduciaries must always select the cheapest available share class of a fund. Such claims are insufficient to state a claim that fiduciaries did not act with the prudence required of them by ERISA.

4. Plaintiffs similarly assert that the Investment Committee acted imprudently by placing actively managed Large-Cap Funds on the platform in preference to Large-Cap Index Funds. However courts have rejected the argument that fiduciaries must include index-based

over actively-managed funds to the point of holding that as a matter of law, such general allegations do not state a claim of imprudence under ERISA.

5. Count II alleges in conclusory fashion that Defendants breached their duties of loyalty and prudence to the Plan by failing to prudently monitor and control the compensation paid for recordkeeping and administrative services in light of the services provided to the Plan. Plaintiffs do not allege any facts suggesting that (a) the fees were excessive relative to the services performed or (b) that there were other qualified vendors equally capable of providing recordkeeping services for the Plan at a materially lower cost. Plaintiffs' claim therefore rests upon nothing more than a conclusory allegation that the recordkeeping fees were unreasonable and the (incorrect) speculation that the Administrative Committee did not engage in a competitive bid process to select the recordkeeper for the Plan. That is not sufficient to state a claim, and Count II should be dismissed.

6. Moreover, Plaintiffs ignore that various duties relative to the Plan are separate and distinct, and impermissibly assert all claims against all Defendants, without regard to whether each Defendant had fiduciary responsibilities over the misconduct alleged. Plaintiffs cannot simply assert that all Defendants violated all fiduciary duties. Allegations made as to all "Defendants" are impermissible group pleading that cannot support a fiduciary duty claim against either the Administrative Committee or the Investment Committee for duties each did not owe and actions each did not take.

7. Further, Count I fails to state a claim as to the Administrative Committee because Plaintiffs fail to allege that the Administrative Committee held or exercised any discretionary authority relating to the selection of Plan investment option. Similarly, Count II fails to state a claim as to the Investment Committee because Plaintiffs fail to allege that the Investment

Committee held or exercised any discretionary authority with regard to the selection or monitoring of Mercer as the Plan's recordkeeper.

8. In short, the Plaintiffs' claims discussed above are inadequately pleaded. Plaintiffs fail to plead facts giving rise to a plausible inference that Defendants (i) were motivated by a desire to serve their own interests instead of the interests of the beneficiaries or (ii) did not discharge their duties prudently. The meager and conclusory allegations of the Complaint fall far short of raising any inference of a violation of ERISA by any Defendant. Under Fed. R. Civ. P. 12(b)(6), the Complaint should therefore be dismissed for failure to state a plausible claim for breach of fiduciary duty or any other violation of the law.

9. Further support for this Motion is set forth in the contemporaneously filed Memorandum in Support of Defendants' Motion to Dismiss the First Amended Consolidated Complaint and supporting exhibits, which Defendants incorporate into this Motion.

10. Pursuant to E.D.Mo. L.R. 78 – 4.02, Defendants respectfully request that the Court hold oral argument on their Motion. The Complaint accuses the Defendants of violating fiduciary duties related to investment options included in and fees associated with an ERISA Plan that contains more than $4.6 billion in assets and seeks to adjudicate the rights of 40,000 Plan beneficiaries. These considerations warrant oral argument of Defendants' dispositive motion.

WHEREFORE, Defendants respectfully request that this Court enter its Order dismissing the Complaint with prejudice.

Dated: May 26, 2017

Respectfully Submitted,

**CAHILL GORDON & REINDEL LLP**

By: /s/ Thomas J. Kavaler (with permission)
Thomas J. Kavaler (*pro hac vice*)
tkavaler@cahill.com
Jonathan D. Thier (*pro hac vice*)
jthier@cahill.com
80 Pine Street
New York, New York 10005
(212) 701-3000 (telephone)
(212) 269-5420 (facsimile)

*Attorneys for Defendants*

**DOWD BENNETT LLP**

By: /s/ James F. Bennett
James F. Bennett, #46826MO
jbennett@dowdbennett.com
James E. Crowe, III, #50031MO
jcrowe@dowdbennett.com
7733 Forsyth Blvd., Suite 1900
St. Louis, Missouri 63105
(314) 889-7300 (telephone)
(314) 863-2111 (facsimile)

*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 26th day of May, 2017, a true and correct copy of the foregoing was filed with the Court using the CM/ECF system and service upon all participants in the case who are CM/ECF users will be accomplished by operation of that system.

/s/ James F. Bennett