No. _____

In the Supreme Court of the United States

STATE STREET BANK AND TRUST COMPANY,
Petitioner,

v.

RAYMOND M. PFEIL AND MICHAEL KAMMER,
individually and on behalf of all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

ERISA Section 409(a) provides a cause of action against ERISA fiduciaries for breaches of fiduciary duty for "losses to the plan *resulting from* each such breach." 29 U.S.C. § 1109(a) (emphasis added). ERISA Section 404(c) provides a safe harbor to liability under Section 409(a) for fiduciaries of qualified plans for "any loss, or by reason of any breach, *which results from* such participant's or beneficiary's exercise of control [over assets in the account]." 29 U.S.C. § 1104(c)(1)(A)(ii) (emphasis added). The questions presented are:

1. Whether ERISA Section 404(c) provides a fiduciary of an otherwise qualified plan a defense to liability against an imprudent investment claim when the participant's control over the investment is the proximate cause of the loss.

2. Whether liability under ERISA Section 409(a) for a breach of fiduciary duty claim requires that the breach constitute the proximate cause of the loss.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner State Street Bank and Trust Company states that it is a wholly-owned subsidiary of State Street Corporation.

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PETITION FOR A WRIT OF CERTIORARI

State Street Bank and Trust Company respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's decision below, *Pfeil v. State Street Bank and Trust Co.*, 671 F.3d 585 (6th Cir. 2012) is reprinted at Pet. App. 1a–33a. The Sixth Circuit's order denying rehearing is reprinted at Pet. App. 50a-51a.

The district court's opinion and order granting petitioner's motion to dismiss (unpublished but available in Lexis at 2010 U.S. Dist. LEXIS 105194 (E.D. Mich. Sept. 30, 2010)) is reprinted at Pet. App. 34a–47a. The district court's Judgment is reprinted at Pet. App. 48a.

JURISDICTIONAL STATEMENT

The Sixth Circuit issued its opinion in this case on February 22, 2012. Pet. App. 1a. The Sixth Circuit denied petitioner's petition for rehearing en banc on March 28, 2012. Pet. App. 50a. Justice Kagan extended the time to file a petition for a writ of certiorari until August 25, 2012. Application No. 11A1200. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

ERISA Section 404(c), 29 U.S.C. § 1104(c), provides in pertinent part:

> (c) Control over assets by participant or beneficiary
>
> (1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)--
>
> (i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and
>
> (ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

ERISA Section 409(a), 29 U.S.C. § 1109(a), provides:

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

STATEMENT OF THE CASE

1. The Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq*., imposes upon retirement plan fiduciaries the duty to act with "care, skill, prudence, and diligence" in connection with their fiduciary functions. 29 U.S.C. § 1104(a)(1)(B). ERISA Section 409(a) provides a cause of action for breaches of these fiduciary duties for "losses to the plan *resulting from* each such breach." 29 U.S.C. § 1109(a) (emphasis added). ERISA Section 404(c) in turn provides a safe harbor to fiduciaries from liability under Section 409(a) for "any loss, or by reason of any breach, *which results*

from such participant's or beneficiary's exercise of control [over assets in the account]." 29 U.S.C. § 1104(c)(1)(A)(ii) (emphasis added). By its terms, the safe harbor of Section 404(c) only applies if the plan qualifies under regulations promulgated by the Department of Labor ("DOL"). *Id.* at § 1104(c)(1)(A).[1]

2. General Motors Corporation ("GM") provided two "defined contribution" retirement plans (commonly known as "401(k)" plans) under ERISA to its employees.[2] These retirement plans (the "GM Plans") offered GM employees a wide array of mutual fund and non-mutual fund investment options, including the General Motors Common Stock Fund ("GM Fund"), an employee stock ownership plan ("ESOP"), which invested exclusively in GM common stock. Participants must have affirmatively elected to invest in the GM Fund—there were no default employee contributions to it—and could immediately divest themselves of any such investment on any business day.

In 2006, GM hired petitioner State Street Bank and Trust Company to manage the GM Fund as an

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[1] DOL's requirements for qualifying for Section 404(c) are set forth at 29 C.F.R. § 2550.404c-1.

[2] A "defined contribution" retirement plan "is typically one where the employer contributes a percentage of payroll or profits to individual employee accounts. Upon retirement, the employee is entitled to the funds in his account." *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 154 (1993). A "defined benefit" plan, by contrast, is one "where the employee, upon retirement, is entitled to a fixed periodic payment," *i.e.*, a pension. *Id.* This case concerns the former type of plan.

independent fiduciary. Although the plan documents required the GM Fund to invest exclusively in GM common stock, the plan documents allowed the fund fiduciary to sell GM stock and reinvest the proceeds in alternative investment vehicles if petitioner in its discretion, determined:

> (A) there is a serious question concerning [GM's] short-term viability as a going concern without resort to bankruptcy proceedings; or (B) there is no possibility in the short-term of recouping any substantial proceeds from the sale of stock in the bankruptcy proceedings.

Pet. App. 4a.

Pursuant to this authority, on March 31, 2009, petitioner began to liquidate the GM Fund's position in GM common stock, which was completed on April 24, 2009.

On June 1, 2009, GM filed for bankruptcy.

3. Respondents Raymond Pfeil and Michael Kammer brought this putative class action against petitioner in the Eastern District of Michigan on behalf of participants in and beneficiaries of the GM Plans. Invoking federal question jurisdiction under 28 U.S.C. § 1331, respondents alleged that petitioner had a fiduciary duty under ERISA to determine whether GM stock remained a prudent investment for the GM Plans, and to divest the GM Plans of GM

stock at the point when that stock became an imprudent investment.

Respondents alleged that in light of GM's publicly known business troubles, a reasonably prudent fiduciary would not have waited until March 31, 2009 to begin divesting the GM Fund of its investments in GM common stock, but instead would have done so by July 15, 2008 at the latest. Respondents alleged that in delaying the liquidation of the GM stock, petitioner breached its fiduciary duty of prudence under ERISA and caused the respondents and other class members to suffer hundreds of millions of dollars in losses. Respondents sought damages under Section 409(a) of ERISA.

Petitioner moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss respondents' complaint for failure to state a claim on the ground that petitioner could not have caused respondents' alleged losses as required by ERISA Section 409(a), which limits a fiduciary's liability to "any losses to the plan *resulting from each such breach*." 29 U.S.C. § 1109(a) (emphasis added). Petitioner argued that on the face of the complaint's allegations, respondents were the proximate cause of the loss, because the plan documents referenced in the complaint provided that respondents controlled their investments in the GM Fund.

The district court began its analysis of causation by observing that in order to prevail on a breach of fiduciary claim under ERISA Section 409(a), a plaintiff must prove not only such a breach, but that

the breach caused harm. Pet. App. 45a. The district court further noted that Section 404(c) of ERISA reinforces this requirement by providing that "a trustee is not liable for any loss caused by any breach which results from the participant's exercise of control over those assets." *Id.* (citing 29 U.S.C. § 1104(c)(2)(B)).

The district court then pointed to decisions by the Second and Seventh Circuit rejecting similar ERISA breach of fiduciary duty claims. Pet. App. 46a. In particular, the district court noted that the Seventh Circuit had affirmed the dismissal of a breach of fiduciary duty claim when the "plan, as in this case, offered a sufficient range of investment options 'so that the participants have control over the risk of loss.'" *Id.* (citing *Hecker v. Deere & Co.*, 556 F.3d 575, 589 (7th Cir. 2009)).

The district court concluded that the complaint failed to state a claim because respondents "cannot show causation." Pet. App. 46a. Recognizing that causation under ERISA Section 409(a) is related to the safe harbor of ERISA Section 404(c), the district court reasoned that respondents knew "that GM was in financial trouble yet they continued to invest in the [GM Fund]." *Id.* Invoking the language of Section 404(c), the district court held that petitioner

"cannot be held liable for actions which [respondents] *controlled*." *Id.* (emphasis added).[3]

4. Respondents appealed to the Sixth Circuit, which reversed.

a. As to causation under ERISA Section 409(a), the court of appeals categorically rejected the "district court's approach because it would insulate the fiduciary from liability for selecting and monitoring the menu of plan offerings so long as some of the investment options were prudent." Pet. App. 24a. The court reasoned that ERISA charges fiduciaries such as petitioner with the "duty to prudently select investment options and the duty to act in the best interest of the plans," *id.*, and that plan participants should not "be held to the same standard of care as an ERISA fiduciary." *Id.* at 24a-25a. Otherwise, "a fiduciary administering any 401(k) [sic] where participants direct their own investments *could always argue that the participant's decision to hold the imprudent investment was an intervening cause and avoid any liability*." *Id.* at 25a (emphasis added). Under the Sixth Circuit's categorical rule, petitioner is thus foreclosed from attempting to move for summary judgment or prove at trial that respondents'

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[3] Petitioner also moved to dismiss on the grounds that respondents' complaint failed to overcome the "presumption of prudence" applicable to an ERISA fiduciary's investment in company stock funds. *See Moench v. Robertson*, 62 F.3d 553, 568-73 (3d Cir. 1995). The district court rejected that argument, *see* Pet. App. 40a-44a, and as noted below, petitioners do not raise this issue here.

"decision[s] to hold the imprudent investment" were the proximate cause of their loss. *Id.*

b. The Sixth Circuit also rejected the district court's reliance on the safe harbor of Section 404(c), which petitioner defended in the court of appeals. First, the court of appeals determined that Section 404(c) "is not applicable at this stage of the case." Pet. App. 25a. The court explained that "Section 404(c) is an affirmative defense that is not appropriate for consideration on a motion to dismiss when, as here, the plaintiffs did not raise it in the complaint." *Id.* Moreover, petitioner "did not assert or prove that it had complied with the requirements of the [DOL] regulation to qualify for the safe harbor." *Id.* at 27a-28a.

Rather than remanding to allow the district court to consider the affirmative defense, however, the court of appeals went on to hold that "even if the plans satisfied the regulations to qualify as section 404(c) plans," Pet. App. 28a, the safe harbor defense categorically does not apply "because it does not relieve fiduciaries of the responsibility to screen investments." *Id.* In so holding, the Sixth Circuit followed the Seventh Circuit in *Howell v. Motorola, Inc.*, 633 F.3d 552 (7th Cir. 2011), explaining that "[i]f the purpose of the safe harbor is to relieve a fiduciary of responsibility for 'decisions over which it had no control,' *Howell*, 633 F.3d at 567, then it follows that the safe harbor should not shield the fiduciary for a decision which it *did* control, such as the selection of investment plan options." Pet. App. 29a (emphasis by the court).

The court of appeals noted that its holding was consistent with the position taken by the Secretary of Labor in an *amicus curiae* brief urging reversal, as well as the preamble to the DOL regulations implementing the safe harbor.[4] Pet. App. 29a. In addition, the court observed, its holding was consistent with DOL's proposed amendment to its regulation implementing the safe harbor.[5] *Id.* at 29a-30a. Although the proposed amendment "is not binding or even owed any deference in this case, it does provide additional, relevant support for the result we reach." *Id*. at 30a.

The Sixth Circuit acknowledged that its interpretation of Section 404(c) conflicts with the Fifth Circuit's decision in *Langbecker v. Electronic Systems Corp*., 476 F.3d 299 (5th Cir. 2007). Pet. App. 30a-31a. *Langbecker* held that Section 404(c) "'allows a fiduciary, who is shown to have committed a breach of duty in making an investment decision, to argue that despite the breach, it may not be held

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[4] The preamble stated that "the act of designating investment alternatives . . . in an ERISA section 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable." Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans), 57 Fed. Reg. 46,906, 46,922 (Oct. 13, 1992). *See also id*. at 46,924 n.27.

[5] The amendment provides that the safe harbor of Section 404(c) "'does not serve to relieve a fiduciary from its duty to prudently select and monitor any service provider or designated investment alternative offered under the plan.'" Pet. App. 30a (citing Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 75 Fed. Reg. 64,910, 64,946 (Oct. 20, 2010) (to be codified at 29 C.F.R. § 2550.404c–1(d)(2)(iv))).

liable because the alleged loss resulted from a participant's exercise of control.'" 476 F.3d at 311 (citing *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 445 (3d Cir. 1996)). Finally, the Sixth Circuit rejected two other arguments of petitioner not at issue here,[6] and remanded for further proceedings.

REASONS FOR GRANTING THE PETITION

In the decision below, the Sixth Circuit announced two related categorical rules. First, for purposes of the safe harbor of ERISA Section 404(c), the Sixth Circuit held as a matter of law that a loss can *never* "result[] from such participant's . . . exercise of control" when the alleged breach involves the fiduciary's selection of an imprudent investment. *See* Pet. App. 28a. Similarly, for purposes of ERISA Section 409(a)'s requirement that a loss "result[] from" a breach of fiduciary duty, the Sixth Circuit held as a matter of law that a loss can *never* "result from" a plan participant's investment decision when the alleged breach involves the fiduciary's selection of imprudent investment. *See* Pet. App. 24a-25a. As discussed below, the former rule widens an existing circuit split over Section 404(c), while the latter rule further splinters the courts of appeals over the standard for causation under Section 409(a).

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[6] The Sixth Circuit affirmed the district court's conclusion that respondents' complaint pled sufficient allegations to overcome the "presumption of prudence" applicable to an ERISA fiduciary's investment in company stock funds, at least for purposes of a motion to dismiss. *See* Pet. App. 11a-12a; note 3, *supra*. The Sixth Circuit also rejected petitioner's argument that respondents' suit is barred by issue preclusion. *See* Pet. App. 31a-33a.

I. The Sixth Circuit's Interpretation of Section 404(c) Widens an Entrenched Circuit Split

The Sixth Circuit's decision below widens an existing circuit split over the interpretation of Section 404(c). Three circuits now hold that Section 404(c) does not provide a defense to claims of breach of fiduciary duty for imprudent investments when the participant controls the investment, while two circuits take the contrary position.

a. On one side of the divide are the Sixth Circuit's decision below, the Seventh Circuit's decision in *Howell,* and the Fourth Circuit's decision in *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410 (4th Cir. 2007). In *DiFelice*, the Fourth Circuit held "this safe harbor provision [Section 404(c)] does not apply to a fiduciary's decisions to select and maintain certain investment options within a participant-driven 401(k) plan." *Id.* at 418 n.3.

On the other side of the divide are the Third Circuit's decision in *Unisys* and the Fifth Circuit's decision in *Langbecker*. In *Unisys*, the Third Circuit recognized that the "plain language" of ERISA § 404(c) excuses even a breaching fiduciary from liability where, as here, the claimed loss stemmed from the participants' investment allocations: "There is nothing in section 1104(c) which suggests that a breach on the part of a fiduciary bars it from asserting section 1104(c)'s application." 74 F.3d at 445.

Judge Jones, writing for the Fifth Circuit in *Langbecker,* followed *Unisys* and explained:

> A plan fiduciary may have violated the duties of selection and monitoring of a plan investment, but *§ 404(c) recognizes that participants are not helpless victims of every error*. Participants have access to information about the Plan's investments, pursuant to DOL regulations, and they are furnished with risk-diversified investment options. . . . *[T]he plan sponsor cannot be a guarantor of outcomes for participants.*

476 F.3d at 312 (emphasis added).

The Fifth Circuit in *Langbecker* also rejected the arguments advanced by DOL as *amicus curiae* in that case, including reliance on the preamble of Section 404(c)'s implementing regulations that the Sixth Circuit cited in support of its interpretation of Section 404(c). *See* Pet. App. 29a. The Fifth Circuit explained that the preamble "does not reasonably interpret Section 404(c) itself, because it contradicts the governing statutory language in cases where an individual account plan fully complies with the regulations' disclosure, diversification and participant control provisions, and loss is caused, notwithstanding some other fiduciary duty breach, by the participants' investment decisions." 476 F.3d at 311. The preamble "would render the Section 404(c) defense applicable only where plan managers breached no fiduciary duty, and thus only where it is unnecessary." *Id.*

As the Sixth Circuit expressly acknowledged below, its interpretation of Section 404(c) clashes with the Fifth Circuit's. *See* Pet. App. 30a-31a. If the Sixth Circuit had followed the Fifth and Third Circuits here, it would have remanded the case with instructions to allow petitioner to prove the applicability of Section 404(c) on summary judgment or at trial. Instead, the Sixth Circuit sided with the Fourth and Seventh Circuits, and adopted an interpretation of Section 404(c) that categorically forecloses petitioner from invoking that safe harbor.

II. The Sixth Circuit's Decision Further Splinters the Circuits over the Applicable Legal Standard for Causation Under Section 409(a)

Section 409(a) provides that ERISA plan fiduciaries that breach their fiduciary duties "shall be personally liable to make good to such plan any losses to the plan *resulting from each such breach*." 29 U.S.C. § 1109(a) (emphasis added). The Sixth Circuit's holding that a loss can never "result from" the participant's investment decision when the fiduciary's alleged breach involves an imprudent investment further splinters an existing circuit split over the standard for causation applicable to Section 409(a), a split that a leading ERISA practice treatise recognizes. *See* 2010 A.B.A. Sec. Lab. & Emp. L., *Employee Benefits Law* 702 (S. Sacher et al. eds., 2d ed. supp. 2010) ("[T]he circuits are split regarding the burden of proof or persuasion as to causation [under Section 409(a)].").

The Eleventh Circuit expressly holds that Section 409(a) requires a showing that the alleged fiduciary breach was the proximate cause of the participant's loss. *Willett v. Blue Cross and Blue Shield of Ala.*, 953 F.2d 1335, 1343 (11th Cir. 1992) ("Section 409 of ERISA establishes that an action exists to recover losses that 'resulted' from the breach of fiduciary duty; thus, the statute does require that the breach of the fiduciary duty *be the proximate cause* of the losses claimed by plaintiffs-appellees.") (emphasis added).

Three other circuits, the Fourth, Eighth, and Ninth, appear to apply the proximate cause standard in substance, if not in name. *See, e.g.*, *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 217 (4th Cir. 2011) ("Thus, while certain conduct may be a breach of an ERISA fiduciary's duties . . . that fiduciary can only be held liable upon a finding that the breach *actually caused* a loss to the plan.") (emphasis added); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594–95 (8th Cir. 2009) ("In order to state a claim . . . , a plaintiff must make a prima facie showing that the defendant acted as a fiduciary, breached its fiduciary duties, and *thereby caused* a loss to the Plan.") (emphasis added); *Friend v. Sanwa Bank Cal.*, 35 F.3d 466, 469 (9th Cir. 1994) ("ERISA holds a trustee liable for a breach of fiduciary duty *only to the extent that losses to the plan result from the breach*.") (emphasis added).

Two circuits, the Seventh and the Tenth, appear to apply a more relaxed "but for" standard of

causation.[7] *See Brandt v. Grounds*, 687 F.2d 895, 898 (7th Cir. 1982) ("The emphasized language [of Section 409(a)] clearly indicates that *a causal connection* is required between the breach of fiduciary duty and the losses incurred by the plan.") (emphasis added); *Allison v. Bank One-Denver*, 289 F.3d 1223, 1239 (10th Cir. 2002) ("The phrase 'resulting from' indicates that there must be a showing of *some causal link* between the alleged breach and the loss plaintiff seeks to recover.") (emphasis added and internal quotations omitted).

Two circuits, the Fifth and the Eighth, hold that Section 409(a) presumes causation upon a showing of breach and loss, which shifts the burden of persuasion to the fiduciary to show that it did not cause the loss. *See McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995) ("To establish a claimed breach of fiduciary duty, an ERISA plaintiff must prove a breach of a fiduciary duty and a prima facie case of loss to the plan. Once the plaintiff has satisfied these burdens, the burden

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[7] As this Court has recognized, "but for" causation sweeps far broader than the common law concept of proximate cause. *See Holmes v. SIPC*, 503 U.S. 258, 268 (1992); *see also Pac. Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680, 691-692 (2012) (Scalia, J., concurring) ("The term 'proximate cause' is 'shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability.' Life is too short to pursue every event to its most remote, 'but for,' consequences, and the doctrine of proximate cause provides a rough guide for courts in cutting off otherwise endless chains of cause-and-effect. Thus, as the Court notes in rejecting the Third Circuit's 'but for' test for § 1333(b) coverage, we have interpreted statutes with language similar to § 1333(b) as prescribing a proximate-cause standard.") (citations omitted).

of persuasion shifts to the fiduciary to prove that the loss was not caused by . . . the breach of duty.") (citation omitted); *Martin v. Feilen,* 965 F.2d 660, 671 (8th Cir. 1992) (same).[8] Had the Sixth Circuit applied this standard, it would have affirmed the district court's dismissal or at least allowed petitioner to demonstrate on summary judgment or prove at trial that respondents' own investment decisions were the proximate cause of their loss.

Here, the Sixth Circuit followed none of the existing (and varying) standards for causation under Section 409(a), but instead eliminated the requirement—*even at summary judgment and trial*—that the plaintiff demonstrate causation. Under the Sixth Circuit's unique standard, even if the fiduciary establishes at summary judgment or trial that the plan participant's own investment decision is the proximate cause of the loss, the fiduciary's imprudent investment selection creates *per se* liability for any loss. *See* Pet App. 23a ("Much as one bad apple spoils the bunch, the fiduciary's designation of a single imprudent investment offered as part of an otherwise prudent menu of investment choices amounts to a breach of fiduciary duty.").

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[8] The Eighth Circuit appears to have an unresolved intra-circuit conflict, as *Martin's* presumption of causation conflicts with *Braden's* requirement that causation be demonstrated.

III. The Questions Presented Involve Important and Recurring Questions Under ERISA That This Court Should Resolve

The questions presented involving the safe harbor of Section 404(c) and the related issue of Section 409(a) causation are both important and recurring. They are important because they concern Congress' legislative allocation of liability for alleged breaches of fiduciary duty under ERISA. They are recurring in that federal courts throughout the country adjudicate ERISA breach of fiduciary duty claims on a regular basis. A Westlaw search reveals that in 2011 alone, more than 400 federal court published and unpublished decisions addressed ERISA breach of fiduciary duty claims.

IV. The Sixth Circuit's Decision Is Erroneous

A. The Sixth Circuit's Interpretation of Section 404(c) Eliminated a Statutory Safe Harbor for Fiduciaries

Pursuant to ERISA Section 404(c), fiduciaries like petitioner are statutorily protected from liability for losses which result from a participant's exercise of control over the participant's choice of investments. Specifically, where an ERISA plan provides for individual accounts, permits a participant to exercise control over the assets in his account, and otherwise qualifies under the implementing regulations, no fiduciary "shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or

beneficiary's exercise of control." 29 U.S.C. § 1104(c)(1)(B).

The legislative history behind ERISA Section 404(c) explains the common sense intent of Congress in enacting this "safe harbor" provision—to insulate a fiduciary from liability (even when the fiduciary committed a breach of duty) where an investment does not meet ERISA's prudence standards but the participant has full knowledge and full control over making that investment. *See* H.R. Conf. Rep. No. 93-1280, *reprinted in* 1974 U.S.C.C.A.N. 5038, 5086 (1974) (where the participant has control over how to invest his or her plan assets, the fiduciary "is not to be liable for any loss because of a failure to diversify or *because the investment does not meet the prudent man standards*") (emphasis added).

The Sixth Circuit reasoned that Section 404(c) should only shield a fiduciary from a breach of fiduciary duty "for decisions over which it had no control" and deemed petitioner's retention of the GM Fund to be control of investment selection. Pet. App. 29a. This reasoning is deficient for two reasons: (1) a fiduciary can only commit a fiduciary breach about something that it has control over;[9] and (2) Section 404(c) *presumes* that the fiduciary committed a breach of duty, but then insulates that fiduciary decision where any actual loss results from the participant's own exercise of control. As the

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[9] ERISA imposes fiduciary liability only "to the extent" a person has control with respect to the matter in dispute. *See* 29 U.S.C. §1002(21)(A); 29 C.F.R. §2509.75-8, FR-16 (liability limited "to the extent" of the fiduciary functions performed).

Fifth Circuit recognized in *Langbecker*, if Section 404(c) applied only to situations where the fiduciary had no control, then there would be no need for the safe harbor, because there could be no breach of duty. *See Langbecker*, 476 F.3d at 311.

The Sixth Circuit's interpretation of Section 404(c) frustrates Congress's purpose in ERISA of promoting company stock funds for employee investing. *See, e.g.*, *Kuper v. Iovenko*, 66 F.3d 1447, 1458 (6th Cir. 1995) ("In drafting the ESOP provisions of ERISA, Congress intended to encourage employees' ownership of their employer company."); 29 U.S.C. § 1104(a)(2) (excepting individual account plans from ERISA diversification requirements to the extent the plan is invested in company stock); *see also* C.A. Brief for American Benefits Council as *Amicus Curiae* Supporting Appellee at 5–7 (noting favorable treatment Congress intended for company stock funds in order to encourage such funds). In ruling that Section 404(c) does not protect fiduciaries when employees make informed decisions to invest in company stock, the court of appeals has undermined one of the most significant policy considerations shaping ERISA's balanced provisions. *See Kuper*, 66 F.3d at 1458–59 (noting ERISA congressional intent and balancing of various interests).

B. The Sixth Circuit Eliminated Section 409(a)'s Causation Requirement for Imprudent Investment Claims

Section 409(a) provides that an ERISA fiduciary "who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan *resulting from each such breach*." 29 U.S.C. § 1109(a) (emphasis added). As the Eleventh Circuit has recognized, Section 409(a) thus requires that "the breach of the fiduciary duty *be the proximate cause* of the losses claimed." *Willett*, 953 F.2d at 1343 (emphasis added).

Petitioner argued in the court of appeals that respondents' complaint failed to state a claim because at all relevant times respondents controlled their investments and could have divested themselves of their interest in the GM Fund; that is to say, the proximate cause of the loss was respondents' own investment decisions rather than petitioner's failure to liquidate the GM Fund's position in GM stock.

The Sixth Circuit rejected this causation argument as a matter of law, thereby foreclosing petitioner from challenging causation on remand through a summary judgment motion or at trial. *See* Pet. App. 24a ("[W]e reject the district court's approach because it would insulate the fiduciary from liability for selecting and monitoring the menu of plan offerings so long as some of the investment

options were prudent."). In so doing, the Sixth Circuit erroneously imposed *per se* liability for imprudent investment selection. *See id*. at 23a ("Much as one bad apple spoils the bunch, the fiduciary's designation of a single imprudent investment offered as part of an otherwise prudent menu of investment choices amounts to a breach of fiduciary duty."). As every other circuit to consider the question has recognized, Section 409(a) requires the plaintiff to prove causation (although as demonstrated above, the circuits are divided as to the proper test for causation), or at least allows the fiduciary to prove on summary judgment or at trial that it was not the proximate cause of the loss.

CONCLUSION

For the reasons provided above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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August 24, 2012

APPENDIX

APPENDIX

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APPENDIX A

United States Court of Appeals,
Sixth Circuit.

Raymond M. PFEIL and Michael Kammer,
Individually and on behalf of all others
similarly situated,
Plaintiffs–Appellants,

v.

STATE STREET BANK AND TRUST COMPANY,
Defendant–Appellee.

No. 10–2302.
Argued: Oct. 7, 2011.
Decided and Filed: Feb. 22, 2012.
Rehearing and Rehearing En Banc Denied March 28, 2012.

ARGUED: Geoffrey M. Johnson, Scott & Scott, LLP, Cleveland Heights, Ohio, for Appellants. Wilber H. Boies, McDermott Will & Emery LLP, Chicago, Illinois, for Appellee. **ON BRIEF:** Geoffrey M. Johnson, Scott & Scott, LLP, Cleveland Heights, Ohio, for Appellants. Wilber H. Boies, Nancy G. Ross, McDermott Will & Emery LLP, Chicago, Illinois, Chris C. Scheithauer, McDermott Will & Emery LLP, Irvine, California, James D. VandeWyngearde, Pepper Hamilton LLP, Southfield, Michigan, for Appellee. Elizabeth S. Goldberg, United States Department of

Labor, Washington, D.C., Kent A. Mason, Davis & Harman LLP, Washington, D.C., for Amici Curiae.

Before: MARTIN and GRIFFIN, Circuit Judges; ANDERSON, District Judge.*

OPINION

S. THOMAS ANDERSON, District Judge.

Raymond M. Pfeil and Michael Kammer, individually and on behalf of others similarly situated, allege that State Street Bank and Trust breached its fiduciary duty under the Employee Retirement Income Security Act ("ERISA"). State Street was the fiduciary for the two primary retirement plans offered by General Motors, and the plaintiffs were plan participants. The plaintiffs allege that State Street breached its fiduciary duty by continuing to allow participants to invest in GM common stock, even though reliable public information indicated that GM was headed for bankruptcy. The district court dismissed the complaint, holding that State Street's alleged breach of duty could not have plausibly caused losses to the plan. For the reasons set forth below, we **REVERSE** the judgment of the district court and **REMAND** the case for further proceedings.

I. BACKGROUND

A. Factual Background

General Motors offered separate defined contribution 401(k) profit-sharing plans to its salaried and

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* The Honorable S. Thomas Anderson, United States District Judge for the Western District of Tennessee, sitting by designation.

hourly employees. The plans maintained individual accounts for each participant. A participant's benefits were based on the amount of contributions and the investment performance of the contributions. According to the complaint, the plans offered participants several investment options, including mutual funds, non-mutual fund investments, and the subject of this litigation: the General Motors Common Stock Fund. Participants had control over how their funds were invested. The plans imposed no restrictions on the participant's allocation of assets among the investment options and gave participants the discretion to change their allocation in any investment on any business day. The plans invested each participant's funds by default in the Pyramis Strategic Balanced Fund, and not the General Motors Common Stock Fund.

The plan documents explain that the purpose of the General Motors Common Stock Fund was "to enable Participants to acquire an ownership interest in General Motors and is intended to be a basic design feature" of the plans. The complaint alleges that the plans invested between $1.45 billion and $1.9 billion in plan assets in General Motors stock during the class period. The plan documents provide that this fund "shall be invested exclusively in [General Motors] $1–2/3 par value common stock without regard to" diversification of assets, the risk profile of the investment, the amount of income provided by the stock, or fluctuations in the market value of the stock. However, the plans state that these restrictions do not apply if State Street, acting as the independent fiduciary:

> in its discretion, using an abuse of discretion standard, determines from reliable public information that (A) there is a serious question concerning [General Motors'] short-term viability as a going concern without resort to bankruptcy proceedings; or (B) there is no possibility in the short-term of recouping any substantial proceeds from the sale of stock in bankruptcy proceedings.

In the event either of these conditions were met, the plan documents directed State Street to divest the plans' holdings in the General Motors Common Stock Fund.

State Street became fiduciary for the plans on June 30, 2006, at a time, as the plaintiffs allege, when General Motors was already in serious financial trouble. The complaint alleges that General Motors' troubles were well-documented and that commentators increasingly opined that bankruptcy protection was "virtually a certainty" for the company. On July 15, 2008, GM Chief Executive Officer Rick Wagner announced that the company needed to implement a restructuring plan to combat second quarter 2008 losses, which he described as "significant." As part of the plan, General Motors eliminated its dividend, reduced its salaried workforce by twenty percent, and curtailed truck and large vehicle production, all signs of what plaintiff contend was a "potential disaster for shareholders." The complaint alleges that on August 1, 2008, General Motors announced a third quarter net loss of $15.5 billion. These bleak reports forced the company to

acknowledge in its November 7, 2008 third-quarter financials that it would exhaust cash reserves by mid–2009. Three days later, General Motors filed its Form 10–Q for third quarter 2008, disclosing that its auditors had "substantial doubt" regarding the company's "ability to continue as a going concern." The plaintiffs allege that under these circumstances, State Street should have recognized as early as July 15, 2008, that General Motors was bound for bankruptcy and that GM stock was no longer a prudent investment for the plans.

On November 21, 2008, State Street informed participants that it was suspending further purchases of General Motors Common Stock Fund citing "GM's recent earnings announcement and related information about GM's business." The plaintiffs allege, however, that State Street took no further action to divest the over fifty million shares of General Motors stock held by plan participants at that time. On March 31, 2009, State Street finally decided to sell off the plans' holdings in company stock and completed the sell-off on April 24, 2009. General Motors filed its bankruptcy petition on June 1, 2009.

B. Procedural History

The plaintiffs filed their putative class action on June 9, 2009, alleging State Street's breach of fiduciary duty in violation of ERISA § 409(a), 29 U.S.C. § 1109(a). Specifically, the complaint alleged that State Street had failed to prudently manage the plan's assets thereby breaching its fiduciary duty defined in ERISA § 404. The named plaintiffs brought this action on behalf of themselves and a class of in-

dividuals defined as: "All persons who were participants in or beneficiaries of the [General Motors 401(k) Plans] at any time between July 15, 2008 and April 24, 2009 (the 'Class Period') and whose accounts included investments in General Motors Stock."

State Street filed a motion to dismiss the complaint for failure to state a claim, which the district court granted on September 30, 2010. The district court held that the plaintiffs had sufficiently pleaded a breach of State Street's fiduciary duty by alleging that State Street continued to operate the General Motors Common Stock Fund after public information raised serious questions about General Motors' short-term viability as a going concern without resort to bankruptcy. However, the district court concluded that the plaintiffs had not plausibly alleged that State Street's breach proximately caused losses to the plans. The district court emphasized that plan participants had a menu of investment options from which to choose and that participants retained control over the allocation of assets in their accounts at all times. Because the participants could have elected to move their funds from the General Motors Common Stock Fund to one of the other investments offered in the plan, the court reasoned, State Street could not be liable for losses to the plan. Therefore, the district court granted State Street's motion to dismiss. The plaintiffs' timely appeal followed.

II. ANALYSIS

A. Standard of Review

We review de novo a dismissal for failure to state a claim under Rule 12(b)(6). *Ohio ex rel. Boggs v. City of Cleveland,* 655 F.3d 516, 519 (6th Cir.2011). A complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" in order to survive a motion to dismiss. *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal quotations and citations omitted); *Ctr. for Bio–Ethical Reform, Inc. v. Napolitano,* 648 F.3d 365, 369 (6th Cir.2011). A claim is facially plausible if the "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S.Ct. at 1949 (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

B. Duty of a Fiduciary under ERISA

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 90, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). ERISA § 404(a), 29 U.S.C. § 1104(a)(1), establishes the fiduciary duties of trustees administering plans governed by ERISA:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
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> (A) for the exclusive purpose of:

> (i) providing benefits to participants and their beneficiaries; and
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> (ii) defraying reasonable expenses of administering the plan;
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> (B) 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;
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> (C) 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
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> (D) in accordance with the documents and instruments governing the plan.

"We have explained that the fiduciary duties enumerated in [the statute] have three components." *Gregg v. Transp. Workers of Am. Int'l,* 343 F.3d 833, 840 (6th Cir.2003). First, a fiduciary owes a duty of loyalty "pursuant to which all decisions regarding an ERISA plan must be made with an eye single to the interests of the participants and beneficiaries." *Id.* (quoting *Kuper v. Iovenko,* 66 F.3d 1447, 1458 (6th Cir.1995) (internal quotations marks omitted)). Second, ERISA imposes "an unwavering duty to act both as a prudent person would act in a similar situation and with single-minded devotion to [the] plan participants and beneficiaries." *Id.* (internal quota-

tion marks and citation omitted). Third, ERISA fiduciaries must act for the exclusive purpose of providing benefits to plan participants and beneficiaries. *Id.* "[T]he duties charged to an ERISA fiduciary are the highest known to the law." *Chao v. Hall Holding Co., Inc.,* 285 F.3d 415, 426 (6th Cir.2002) (citation and internal quotation marks omitted). ERISA holds a fiduciary who breaches any of these duties personally liable for any losses to the plan that result from its breach of duty. *Kuper,* 66 F.3d at 1458 (citing 29 U.S.C. § 1109(a)).

It is undisputed in this case that the plans at issue are a specific kind of ERISA plan known as Employee Stock Ownership Plans ("ESOPs"). ERISA authorizes certain kinds of eligible individual account plans ("EIAP") including ESOPs. 29 U.S.C. § 1107(d). An ESOP is an ERISA plan investing primarily in "qualifying employer securities," which is most commonly the stock of the employer creating the plan. 29 U.S.C. § 1107(d)(6)(A). An ESOP promotes a policy of employee ownership of a company by modifying the fiduciary duty to diversify plan investments, 29 U.S.C. § 1104(a)(1)(C), and the prudence requirement to the extent that it requires diversification, 29 U.S.C. §§ 1104(a)(1)(B); 1104(a)(2). "[A]s a general rule, ESOP fiduciaries cannot be held liable for failing to diversify investments, regardless of whether diversification would be prudent under the terms of an ordinary non-ESOP pension plan." *Kuper,* 66 F.3d at 1458.

However, an ESOP fiduciary may be liable for failing to diversify plan assets even where the plan

required that an ESOP invest primarily in company stock. *Id.* at 1459. We have explained that ERISA's statutory exemptions for ESOPs

> do[ ] not relieve a fiduciary ... from the general fiduciary responsibility provisions of [§ 1104] which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interests of plan participants and beneficiaries and in a prudent fashion ... nor does it affect the requirement ... that a plan must be operated for the exclusive benefit of employees and their beneficiaries.

Id. at 1458 (citations omitted).

ESOP fiduciaries "wear two hats" as they "are expected to administer ESOP investments consistent with the provisions of both a specific employee benefits plan and ERISA." *Id.* (quoting *Moench v. Robertson,* 62 F.3d 553, 569 (3d Cir.1995) (internal quotation marks omitted)). Put another way, an ESOP fiduciary must follow the plan documents but only insofar as such documents and instruments are consistent with the provisions of ERISA. *Id.* at 1457. In recognition of an ESOP fiduciary's "two hats," we have adopted an abuse-of-discretion standard of review for an ESOP fiduciary's decision to invest in employer securities. *Id.* at 1459. A fiduciary's decision to remain invested in employer securities is presumed to be reasonable, the so-called *Kuper* or *Moench* presumption. *Id.* A plaintiff may rebut the presumption "by showing that a prudent fiduciary acting under similar circumstances would have

made a different investment decision." *Id.; accord Quan v. Computer Sciences Corp.,* 623 F.3d 870, 881–82 (9th Cir.2010); *Kirschbaum v. Reliant Energy, Inc.,* 526 F.3d 243, 254–56 (5th Cir.2008).

C. Whether the Kuper/Moench Presumption Applies at the Pleadings Stage

While State Street is entitled to the *Kuper/Moench* presumption, we have not addressed whether the presumption applies at the motion to dismiss stage. The Third Circuit in *Moench* announced the presumption of reasonableness when considering an evidentiary record on a motion for summary judgment. In *Kuper,* this Court adopted the *Moench* presumption in reviewing the judgment of the district court, which was based on the parties' trial briefs, proposed findings of fact and conclusions of law, and the stipulated record of the case. In this case the district court assumed the presumption would apply at the pleadings stage and held that the plaintiffs pleaded sufficient facts to rebut the presumption, particularly the allegations detailing General Motors' precarious financial situation during the class period and State Street's decision to continue holding GM stock as a plan asset.

We find no error in the district court's holding that, accepting the allegations of the complaint as true, the plaintiffs have pleaded facts to overcome the presumption. The plaintiffs have alleged that State Street failed to follow the terms of the plans themselves, which required State Street to divest the plans' holdings in company stock if "there is a serious question concerning [General Motors'] short-

term viability as a going concern without resort to bankruptcy proceedings." According to the complaint, on July 15, 2008, General Motors announced a restructuring plan designed to improve cash flow and save the company. By November 10, 2008, GM disclosed that its auditors had "substantial doubt" regarding the company's "ability to continue as a going concern." Nevertheless, State Street did not begin to divest the plan of its GM common stock holdings until March 31, 2009. Based on these allegations, the plaintiffs have sufficiently pleaded that "a prudent fiduciary acting under similar circumstances would have made a different investment decision" and thereby overcome the presumption of reasonableness.

Because the plaintiffs have pleaded facts to overcome the presumption, we need not decide whether the *Kuper* presumption creates a heightened pleading standard in order to resolve this appeal. However, both parties have addressed this issue in their briefs and at oral argument. We also recognize that many district courts in this Circuit have confronted the issue and reached conflicting decisions. *E.g. In re Regions Morgan Keegan ERISA Litig.,* 741 F.Supp.2d 844, 849 (W.D.Tenn.2010) (noting that "[a]t least fourteen district courts in this Circuit have addressed this issue ..." and have "overwhelmingly declined to apply the presumption of prudence" when considering a motion to dismiss); *Dudenhoeffer v. Fifth Third Bancorp,* 757 F.Supp.2d 753, 758–59 (S.D.Ohio 2010) (holding that the presumption applied at the pleadings stage in light of *Twombly* and *Iqbal*). Therefore, we take this opportunity to ad-

dress whether a plaintiff must plead enough facts to overcome the *Kuper* presumption in order to survive a motion to dismiss.

Today, we hold that the presumption of reasonableness adopted in *Kuper* is not an additional pleading requirement and thus does not apply at the motion to dismiss stage. Our holding derives from the plain language of *Kuper* itself where we explained that an ESOP plaintiff could "rebut this presumption of reasonableness by *showing* that a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Kuper,* 66 F.3d at 1459 (emphasis added). The presumption of reasonableness in *Kuper* was cast as an evidentiary presumption, and not a pleading requirement. *Cf. In re Citigroup ERISA Litig.,* 662 F.3d 128, 129 (2d Cir.2011) ("The 'presumption' is not an evidentiary presumption; it is a standard of review applied to a decision made by an ERISA fiduciary."). We also highlight that in *Kuper* we applied the presumption to a fully developed evidentiary record, and not merely the pleadings. As such, a plaintiff need not plead enough facts to overcome the presumption in order to survive a motion to dismiss.[1] *Cf. Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 510, 122

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[1] We also note that many district courts in this Circuit have reached a similar conclusion. See e.g. *Sims v. First Horizon Nat'l Corp.,* No. 08–2293, 2009 WL 3241689, at *24 (W.D.Tenn. Sept. 30, 2009); *In re Diebold ERISA Litig.,* No. 06–cv–170, 2008 WL 2225712, at *9 (N.D.Ohio May 28, 2008); *In re Goodyear Tire & Rubber Co. ERISA Litig.,* 438 F.Supp.2d 783, 793 (N.D.Ohio 2006); *In re Ferro Corp. ERISA Litig.,* 422 F.Supp.2d 850, 860 (N.D.Ohio 2006); *In re CMS Energy ERISA Litig.,* 312 F.Supp.2d 898, 914 (E.D.Mich.2004); *Rankin v. Rots,* 278

S.Ct. 992, 152 L.Ed.2d 1 (2002) (holding that a plaintiff was not required to plead all of the prima facie elements of the *McDonnell Douglas* evidentiary framework in order to survive a motion to dismiss).

Our holding is consistent with the standard of review for motions to dismiss generally. Courts are required to accept the well-pleaded factual allegations of a complaint as true and determine whether those allegations state a plausible claim for relief. *Napolitano,* 648 F.3d at 369. It follows that courts should not make factual determinations of their own or weigh evidence when considering a motion to dismiss. Precisely because the presumption of reasonableness is an evidentiary standard and concerns questions of fact, applying the presumption at the pleadings stage, and determining whether it was sufficiently rebutted, would be inconsistent with the Rule 12(b)(6) standard. Otherwise, courts would be forced to weigh the facts pleaded against their notion of the presumption and then determine whether the pleadings plausibly overcame the presumption of fiduciary reasonableness.

For example, State Street contends that the district court erred in concluding that the facts alleged in the complaint were sufficient to rebut the presumption. Specifically, State Street argues that there was a widely publicized expectation of government intervention on GM's behalf, and therefore,

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F.Supp.2d 853, 866 (E.D.Mich.2003); *see also Tullis v. UMB Bank, N.A.,* 515 F.3d 673, 681 (6th Cir.2008) (rejecting heightened pleading requirements in ERISA cases that "would elevate form over substance").

it was not unreasonable for the plans to continue to hold GM stock during the class period. State Street also asserts that holding GM stock continued to be reasonable until the White House "with all of its resources and expertise" determined on March 31, 2009, that GM's "viability as a going concern was in serious doubt." Appellee's Br. 42. State Street maintains that no amount of discovery will change these asserted facts. The possibility of federal intervention and its effect on the reasonableness of holding company stock, however, present questions of fact inappropriate for resolution on a motion to dismiss. State Street's argument about a possible bailout does nothing to establish that the numerous, detailed factual averments in the complaint fail to plausibly allege that General Motors was on the road to bankruptcy and thus had ceased to be a prudent investment for the plans. Short of converting the motion to dismiss into a motion for summary judgment, such an approach also invites courts to consider facts and evidence that have not been tested in formal discovery.[2] Therefore, it would be improper for a court to weigh these factual assertions against the facts pleaded in

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[2] Of course, even on a motion to dismiss, courts retain the discretion to take judicial notice of certain adjudicative facts under Federal Rule of Evidence 201. See Fed.R.Evid. 201(c) & (f) ("Judicial notice may be taken at any stage of the proceeding."). Likewise, courts may consider written instruments incorporated into the pleadings by reference pursuant to Rule 10(c). Nothing in our holding limits the courts' discretion to employ these Rules to consider uncontested facts or exhibits at the pleadings stage. We simply conclude that applying the presumption of reasonableness to the pleadings is likely to force courts to weigh factual assertions and run afoul of the standard of review for motions to dismiss.

the plaintiffs' complaint in order to determine whether the plaintiffs had overcome the presumption of reasonableness.

Finally, we recognize that sister circuits have reached the opposite conclusion and held that the *Kuper* presumption should be considered at the pleadings stage. State Street cites this authority in support of its assertion that the plaintiffs must plead facts to overcome the presumption in order to state a plausible claim. We find these decisions distinguishable because these circuits have adopted more narrowly-defined tests for rebutting the presumption than the test this Court announced in *Kuper*. For instance, the Third Circuit in *Edgar v. Avaya* affirmed the dismissal of a complaint, holding that the pleadings failed to allege facts demonstrating that the fiduciary abused its discretion by not divesting the plans of their holdings in company stock. 503 F.3d 340, 348–49 (3d Cir.2007). Concerning the kinds of facts required to overcome the presumption of reasonableness, the Third Circuit explained that a plaintiff need not necessarily prove that a company is "on the brink of bankruptcy" but must demonstrate more than possible fraud or corporate wrongdoing in order to rebut the presumption. *Id.* at 349 n. 13. The Third Circuit declined to find that corporate developments likely to have a negative effect on earnings, "or the corresponding drop in stock price [from $10.69 to $8.01], created the type of dire situation which would require defendants to disobey the terms of the Plans by not offering the Avaya Stock Fund as an investment option, or by divesting the Plans of Avaya securities." *Id.* at 348. The Third Cir-

cuit expressly rejected the plaintiff's contention that application of the presumption at the motion to dismiss stage was inconsistent with liberal notice-pleading standards. *Id.* at 349. The Third Circuit held that the allegations themselves affirmatively showed that the company was far from the sort of deteriorating financial circumstances that would permit the presumption to be rebutted, commenting that " '[m]ere stock fluctuations, even those that trend downward significantly, [were] insufficient to establish the requisite imprudence to rebut the *Moench* presumption.' " *Id.* (quoting *Wright v. Oregon Metallurgical Corp.,* 360 F.3d 1090, 1099 (9th Cir.2004)) (alterations in original).

The Second Circuit recently reached a similar conclusion that courts should apply the presumption of reasonableness when analyzing the plausibility of the pleadings on a motion to dismiss. *In re Citigroup ERISA Litig.,* 662 F.3d at 140–41. The plaintiffs in *Citigroup* alleged that the bank had made "ill-advised investments in the subprime-mortgage market while hiding the extent of those investments from Plan participants and the public." *Id.* at 140. As a result of the investments, the company suffered $30 billion in losses, and Citigroup stock lost significant value. *Id.* The Second Circuit explained that in order to rebut the presumption of reasonableness, plaintiffs might not necessarily have to plead the company's "impending collapse" but must allege a "dire situation." *Id.* at 140–41. The Second Circuit affirmed the district court's dismissal of the prudence claim under Rule 12(b)(6), holding that "plaintiffs fail to allege facts sufficient to show that de-

fendants either knew or should have known that Citigroup was in the sort of dire situation that required them to override Plan terms in order to limit participants' investments in Citigroup stock." *Id.* at 141. The Second Circuit stressed that even had the fiduciary investigated Citigroup's exposure to the sub-prime mortgage market, the company's losses and "the dire situation" in which it found itself during the class period were not foreseeable. *Id.*

We note that in addition to the Second and Third Circuits, the Fifth and Ninth Circuits have also adopted a rebuttal standard in cases involving the presumption of reasonableness, in which plaintiffs are required to come forward with some proof of "dire circumstances" or the "impending collapse" of the company. *Quan,* 623 F.3d at 882 (holding that a plaintiff must prove facts that "clearly implicate the company's viability as an ongoing concern or show a precipitous decline in the employer's stock combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement") (internal quotations marks, citations, and ellipsis omitted); *Kirschbaum,* 526 F.3d at 255 (affirming summary judgment in fiduciary's favor in absence of evidence that company's "viability as a going concern was ever threatened" or that the company's stock "was in danger of becoming essentially worthless"). The Fifth and Ninth Circuits have also commented that the strength of the presumption depends on other factors such as the amount of discretion given to the fiduciary under the terms of the plan and any conflicts of interest the fiduciary may have. *Quan,* 623 F.3d at 883 ("A guiding principle, however, is

that the burden to rebut the presumption varies directly with the strength of a plan's requirement that fiduciaries invest in employer stock.") (citing *Kirschbaum,* 526 F.3d at 255 & n. 9). Unlike the Second and Third Circuits, however, the Fifth and Ninth Circuits have not addressed whether a plaintiff must plead enough facts to rebut the presumption of reasonableness to survive a motion to dismiss.

In contrast to our sister circuits, we have not adopted a specific rebuttal standard that requires proof that the company faced a "dire situation," something short of "the brink of bankruptcy" or an "impending collapse." The rebuttal standard adopted in this Circuit, and the one which we are bound to follow, requires a plaintiff to prove that "a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Kuper,* 66 F.3d at 1459. This formulation establishes an abuse of discretion standard, much like the one set out in the plan documents at issue here, and forces plaintiffs in cases of this type to carry a demanding burden. At the same time, this standard retains enough flexibility to address the unique circumstances that might give rise to a breach-of-duty claim against an ESOP fiduciary, whether the company is one with small capitalization or a corporation "too big to fail." We recognize that ESOP plaintiffs, having had an opportunity to conduct formal discovery, may come forward with rebuttal proofs of many kinds, depending on the facts of each case. Because *Kuper's* standard for rebutting the presumption is not as narrowly defined to require proof of a "dire situation" or an "impending collapse," we find it

inappropriate to apply it to the pleadings on a motion to dismiss, making the contrary decisions of other circuits distinguishable.

Even if we applied the *Kuper* standard to the pleadings in this case, we conclude that the plaintiffs have plausibly alleged that a prudent fiduciary acting under similar circumstances would have made a different investment decision with respect to GM stock. In fact, we agree with the district court that the plaintiffs in this case have plausibly alleged that General Motors was on the brink of bankruptcy, under circumstances that would more than satisfy the "dire situation" standard of the Second, Third, Fifth and Ninth Circuits and arguably rise to the level of the "impending collapse" of the company.

In sum, we conclude that the better course is to permit the lower courts to consider the presumption in the context of a fuller evidentiary record rather than just the pleadings and their exhibits. Therefore, we hold that while a complaint must plead facts to plausibly allege that a fiduciary has breached its duty to the plan, the pleadings need not overcome the presumption of reasonableness in order to survive a motion to dismiss.

D. Whether the Plaintiffs Adequately Pleaded that State Street Proximately Caused Their Losses

The district court granted State Street's motion to dismiss based on its conclusion that the plaintiffs had failed to plausibly plead a causal connection between State Street's alleged breach of duty and loss-

es to the plan. The district court concluded that because plan participants could direct their investments by choosing from a menu of investment options and had the discretion to avoid GM stock altogether, State Street should not be held liable for the plaintiffs' decisions to stay invested in the General Motors Common Stock Fund. In other words, "State Street cannot be held liable for actions which Plaintiffs controlled." We disagree.

While it is true that the plaintiffs must eventually prove causation to prevail on their claims, *see Kuper,* 66 F.3d at 1459, the plaintiffs have plausibly pleaded causation to survive State Street's motion to dismiss. In order to establish a causal connection between State Street's alleged breach of duty and losses to the plan, the plaintiffs need only show "a causal link between the [breach of duty] and the harm suffered by the plan," meaning "that an adequate investigation would have revealed to a reasonable fiduciary that the investment [in GM stock] was improvident." *Id.* at 1459–60 (internal quotations and citations omitted). The plaintiffs allege that State Street allowed the plans to continue to hold GM stock well after it became imprudent to do so and thereby breached its duty to the plan. *See* Compl. ¶¶ 7–10, 71–72. According to the pleadings, GM stock ceased to be a prudent investment on July 15, 2008, the date on which GM announced its restructuring plan in response to its "significant" second quarter losses. State Street did not make the decision to divest the plans of their GM stock holdings until March 31, 2009. The plaintiffs allege that the plan suffered hundreds of millions of dollars in losses as a result of

State Street's delay.[3] Based on these allegations, the complaint has sufficiently pleaded a causal link between State Street's breach and losses to the plans.

The district court erroneously relied on the fact that the plaintiffs had the ability to divest their 401(k) accounts of the GM stock on any given business day and held that State Street's alleged breach did not cause the losses to the plan. We hold that as a fiduciary, State Street was obligated to exercise prudence when designating and monitoring the menu of different investment options that would be offered to plan participants. *See Howell v. Motorola, Inc.,* 633 F.3d 552, 567 (7th Cir.), *cert. denied sub nom. Lingis v. Dorazil,* —— U.S. ——, 132 S.Ct. 96, 181 L.Ed.2d 25 (2011); *DiFelice v. U.S. Airways, Inc.,* 497 F.3d 410, 418 n. 3 (4th Cir.2007); *Langbecker v. Elec. Data. Sys. Corp.,* 476 F.3d 299, 312 (5th Cir.2007). As the Seventh Circuit explained, "[t]he choice of which investments will be presented in the menu that the plan sponsor adopts is not within the participant's power. It is instead a core decision relating to the administration of the plan and the benefits that will be offered to participants." *Howell,* 633 F.3d at 567. Therefore, "[i]t is ... the fiduciary's re-

[3] The plaintiffs need not ultimately prove that July 15, 2008 was the actual date on which it was no longer reasonable to continue holding GM stock, only that the "imprudent date" for GM stock occurred prior to March 31, 2009. The plaintiffs have alleged, for example, that in November 2008 GM's own auditors reported "substantial doubt" about the company's "ability to continue as a going concern." Regardless of whether the actual "imprudent date" was in July 2008 or November 2008, the date is more relevant to the amount of losses to the plan, and not the issue of causation.

sponsibility ... to screen investment alternatives and to ensure that imprudent options are not offered to plan participants." *Id.; see also Hecker v. Deere & Co.,* 569 F.3d 708, 711 (7th Cir.2009) (rejecting the notion that a fiduciary "can insulate itself from liability by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among them"); *accord Braden v. Wal–Mart Stores, Inc.,* 588 F.3d 585, 596 (8th Cir.2009) (holding that allegations that better investment options existed were sufficient to state a claim for breach of fiduciary duty).

Here State Street had a fiduciary duty to select and maintain only prudent investment options in the plans. Indeed, State Street's engagement letter with GM vested State Street with the "exclusive authority under each Plan and Trust to determine whether the Company Stock Fund continue[d] to be a prudent investment option under [ERISA]." Despite State Street's fiduciary duty to protect plan assets, the district court focused on the fact that plan participants had the power to reallocate their funds among a variety of options, only one of which was the General Motors Common Stock Fund. A fiduciary cannot avoid liability for offering imprudent investments merely by including them alongside a larger menu of prudent investment options. Much as one bad apple spoils the bunch, the fiduciary's designation of a single imprudent investment offered as part of an otherwise prudent menu of investment choices amounts to a breach of fiduciary duty, both the duty to act as a prudent person would in a similar situation with

single-minded devotion to the plan participants and beneficiaries, as well as the duty to act for the exclusive purpose of providing benefits to plan participants and beneficiaries. *Gregg,* 343 F.3d at 840. Therefore, we reject the district court's approach because it would insulate the fiduciary from liability for selecting and monitoring the menu of plan offerings so long as some of the investment options were prudent.

State Street also cannot escape its duty simply by asserting at the pleadings stage that the plaintiffs themselves caused the losses to the plans by choosing to invest in the General Motors Common Stock Fund. Such a rule would improperly shift the duty of prudence to monitor the menu of plan investments to plan participants. The Seventh Circuit opined that such a standard "would place an unreasonable burden on unsophisticated plan participants who do not have the resources to pre-screen investment alternatives." *Hecker,* 569 F.3d at 711. While some plan participants undoubtedly possess greater sophistication than others in these matters, the fact remains ERISA charges fiduciaries like State Street with "the highest duty known to the law," *Kuper,* 66 F.3d at 1458, which includes the duty to prudently select investment options and the duty to act in the best interests of the plans. For this reason, we reject State Street's argument that plan participants, who enjoyed access to all of the same publicly-available information about GM's woes during the class period as State Street, caused the plan losses. Aside from being an untested assertion of fact, we disagree that plaintiff-participants should be held to the same

standard of care as an ERISA fiduciary, particularly in a matter that pertains to plan administration. If the rule were otherwise, a fiduciary administering any 401(k) where participants direct their own investments could always argue that the participant's decision to hold the imprudent investment was an intervening cause and avoid any liability. Therefore, we conclude that the plaintiffs have pleaded enough facts to make plausible their claim of a causal link between State Street's conduct and the losses to the plan.

E. Whether Section 404(c) of ERISA Shields State Street from Liability

In ruling that the plaintiffs failed to adequately plead causation, the district court relied in part on the safe harbor provision found in ERISA § 404(c). Specifically, it stated that "Section 404(c) provides that a trustee of a plan is not liable for any loss caused by any breach which results from the participant's exercise of control over those assets." We hold that section 404(c) is not applicable at this stage of the case. Section 404(c) is an affirmative defense that is not appropriate for consideration on a motion to dismiss when, as here, the plaintiffs did not raise it in the complaint.

Section 404(c) contains an exception to the fiduciary duties otherwise imposed on plan administrators when the plans delegate control over assets directly to plan participants or beneficiaries. The relevant portion of the statute, 29 U.S.C. § 1104(c), states

> (c) Control over assets by participant or beneficiary
>
> (1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (*as determined under regulations of the Secretary*)—
>
> (i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and
>
> (ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

29 U.S.C. § 1104(c) (emphasis added).

The following example illustrates the policy rationale for the section 404(c) safe harbor defense. "If an individual account is self-directed, then it would make no sense to blame the fiduciary for the participant's decision to invest 40% of her assets in Fund A and 60% in Fund B, rather than splitting assets

somehow among four different funds, emphasizing A rather than B, or taking any other decision." *Howell,* 633 F.3d at 567. The safe harbor then "ensures that the fiduciary will not be held responsible for decisions over which it had no control." *Id.* (citing *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 262, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993)).

Nevertheless, the fact that a plan participant or beneficiary exercises control over plan assets does not automatically trigger the section 404(c) safe harbor. The statute specifies that participant control is determined under the Department of Labor ("DOL") regulations. 29 U.S.C. § 1104(c)(1)(A). The DOL has promulgated detailed regulations about the section 404(c) defense, defining the circumstances under which a plan qualifies as a section 404(c) plan. The regulations include over twenty-five requirements that must be met before a fiduciary may invoke the section 404(c) defense. *See* 29 C.F.R. § 2550.404c–1. One such requirement is that participants be provided with "an explanation that the plan is intended to constitute a plan described in section 404(c) and [the regulations]." *Id.* The regulation is consistent with the legislative history of ERISA, which suggests that Congress was reluctant to extend the section 404(c) safe harbor to include stock funds. H.R. Conf. Rep. No. 93–1280, at 305, *reprinted* in 1974 U.S.C.C.A.N. 5038, 5086. The regulations, accordingly, include particularly stringent protections with respect to stock funds.

While we have not previously addressed the issue, we join other circuits in recognizing that section

404(c) is an affirmative defense to a claim for breach of fiduciary duty under ERISA, on which the party asserting the defense bears the burden of proof. *Hecker,* 556 F.3d at 588; *Allison v. Bank One–Denver,* 289 F.3d 1223, 1238 (10th Cir.2002); *In re Unisys Sav. Plan Litig.,* 74 F.3d 420, 446 (3d Cir.1996); *see Langbecker,* 476 F.3d at 309 (referring to § 404(c) as a "defense"). Courts generally cannot grant motions to dismiss on the basis of an affirmative defense unless the plaintiff has anticipated the defense and explicitly addressed it in the pleadings.[4] *Hecker,* 556 F.3d at 588. Here, the complaint says nothing of the detailed requirements that a party must establish in order to rely on the defense. For its part, State Street did not assert or prove that it had complied with the requirements of the regulation to qualify for the safe harbor. The district court had no basis for assuming that the plans at issue here met the regulatory requirements for the section 404(c) defense. Therefore, we hold that the district court erred in relying on the section 404(c) safe harbor defense at this stage of the proceedings.

Moreover, even if the plans satisfied the regulations to qualify as section 404(c) plans, we hold that the safe harbor defense does not apply under the circumstances because it does not relieve fiduciaries of the responsibility to screen investments. The Seventh Circuit recently held that "the selection of plan investment options and the decision to continue offering a particular investment vehicle are acts to which fiduciary duties attach, and that the [section

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[4] This fact is no less true even if the result is only "to delay the inevitable." Appellee's Br. 36 n.6.

404(c)] safe harbor is not available for such acts." *Howell,* 633 F.3d at 567; *DiFelice,* 497 F.3d at 418 n. 3 (holding that "although section 404(c) does limit a fiduciary's liability for losses that occur when participants make poor choices from a satisfactory menu of options, it does not insulate a fiduciary from liability for assembling an imprudent menu in the first instance").

We find the Seventh Circuit's reasoning persuasive. If the purpose of the safe harbor is to relieve a fiduciary of responsibility "for decisions over which it had no control," *Howell,* 633 F.3d at 567, then it follows that the safe harbor should not shield the fiduciary for a decision which it *did* control, such as the selection of plan investment options. *See also* 29 C.F.R. § 2550.404c–1(d)(2)(i) ("[I]f a plan participant or beneficiary of an ERISA section 404(c) plan exercises independent control over assets in his individual account in the manner described in [the regulation]," then the fiduciaries may not be held liable for any loss or fiduciary breach "that is the *direct and necessary result* of that participant's or beneficiary's exercise of control." (emphasis added)).

This holding is also consistent both with the position taken by the Secretary of Labor in her amicus curiae brief in this appeal and with the preamble to the regulations implementing the safe harbor. *See* Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404( ) Plans), 57 Fed.Reg. 46,906, 46,924 n.27 (Oct. 13, 1992) (explaining that "the act of designating investment alternatives ... in an ERISA section 404(c) plan is a fi-

duciary function to which the limitation on liability provided by section 404(c) is not applicable"). We add that the Department of Labor began a notice and comment rule-making proceeding in 2010 to revise its regulations and "reiterate [the Department's] long held position that relief afforded by section 404(c) and the regulation thereunder does not extend to a fiduciary's duty to prudently select and monitor ... designated investment alternatives under the plan." Fiduciary Requirements for Disclosure in Participant–Directed Individual Account Plans, 73 Fed.Reg. 43,014, 43,018 (proposed July 23, 2008). The amended text of the 404(c) regulation also provides that the safe harbor provision "does not serve to relieve a fiduciary from its duty to prudently select and monitor any service provider or designated investment alternative offered under the plan." Fiduciary Requirements for Disclosure in Participant–Directed Individual Account Plans, 75 Fed.Reg. 64,910, 64,946 (Oct. 20, 2010) (to be codified at 29 C.F.R. § 2550.404c–1(d)(2)(iv)). Although the proposed amendment to the regulation is not binding or even owed any deference in this case, it does provide additional, relevant support for the result we reach.

We recognize that the Fifth Circuit took a contrary view in a split opinion considering a class certification motion and held that a fiduciary may be able to rely on the safe harbor defense when presented with claims that it improperly selected and monitored plan investment choices. *Langbecker,* 476 F.3d at 309. The court explained that

> a plan fiduciary may have violated the duties of selection and monitoring of a plan investment, but § 404(c) recognizes that participants are not helpless victims of every error. Participants have access to information about the Plan's investments, pursuant to DOL regulations, and they are furnished with risk-diversified investment options. In some situations, as happened here, many of the Participants will react to the company's bad news by buying more of its stock. Other Participants will ... trade their way to profit no matter the calamity that befell the stock. Section 404(c) contemplates an individual, transactional defense in these situations, which is another way of saying that in participant-directed plans, the plan sponsor cannot be a guarantor of outcomes for participants.

Id. For the reasons state above, we disagree with this approach. But even were we were to adopt it, State Street would only be able to raise the section 404(c) defense on an individual basis at some later stage of the case, such as at the class certification stage, but not on a motion to dismiss. However, we hold that section 404(c) does not provide a defense to the selection of the menu of investment options that the plan will offer.

F. Whether the Plaintiffs are Collaterally Estopped

State Street argues that the plaintiffs are collaterally estopped from bringing this action because the issues raised are "virtually identical" to issues decid-

ed by the Second Circuit in *Young v. General Motors Investment Management Corp.,* 325 Fed.Appx. 31 (2d Cir.2009). In order to establish preclusion, State Street must show

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Kosinski v. Comm'r, 541 F.3d 671, 675 (6th Cir.2008) (citation omitted)

State Street has failed to establish the first element, that the precise issue raised in this case was raised and actually litigated in a prior proceeding. The district court in *Young* issued its decision on March 24, 2008. The plaintiffs in the case at bar allege that State Street breached its duty at the earliest on July 15, 2008, several months after the district court in *Young* granted summary judgment in favor of State Street and another fiduciary on claims arising well before the ones at issue here. Therefore, putting aside all the other requirements that must be established to invoke collateral estoppel, *Young* could not have resolved the fiduciary breaches alleged to have occurred during the class period in this

case. Therefore, we hold that the plaintiffs are not collaterally estopped from bringing this action.

For the reasons set forth above, we **REVERSE** the judgment of the district court and **REMAND** the case for further proceedings.

APPENDIX B

United States District Court,
E.D. Michigan,
Southern Division.

Raymond M. PFEIL and Michael Kammer,
Plaintiffs,

v.

STATE STREET BANK AND TRUST COMPANY,
Defendant.

No. 09– CV– 12229.
Sept. 30, 2010.

David R. Scott, Scott & Scott, Colchester, CT, Elwood S. Simon, John P. Zuccarini, Elwood S. Simon & Associates, P.C., Bloomfield Hills, MI, Geoffrey M. Johnson, Scott & Scott, Cleveland Heights, OH, for Plaintiffs.

James D. Vandewyngearde, Pepper Hamilton, Detroit, MI, Wilber H. Boies, McDermott, Will, Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER REGARDING DEFENDANT'S MOTION TO DISMISS

DENISE PAGE HOOD, District Judge.

I. BACKGROUND/FACTS

This matter is before the Court on Defendant State Street Bank and Trust Company's ("State Street") Motion to Dismiss under Rule 12(b)(6) of the Rules of Civil Procedures. A response and reply have been filed and a hearing held on the matter. For the reasons set forth below, the Court grants State Street's Motion to Dismiss.

Plaintiffs Raymond M. Pfeil and Michael Kammer ("Plaintiffs") filed the instant suit, individually and on behalf of others similarly situated, against State Street pursuant to Section 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132, on behalf of plan participants in and beneficiaries of General Motor Corporation's ("GM") two main 401(k) plans, the General Motors Savings–Stock Purchase Program for Salaried Employees ("Salaried Plan") and the General Motors Personal Savings Plan for Hourly Employees ("Hourly Plan") (collectively, "Plans"). (Complaint, ¶ 1) The one-count Complaint alleges a breach of fiduciary duty by State Street, as an independent fiduciary, for failure to prudently manage the Plans' assets, in violation of Section 404 of ERISA.

The Plans are defined contribution profit sharing plans, referred to as 401(k) plans. The benefits each participant receives are based on the amount of contributions in the participant's account and the investment performance of those contributions. (Complaint, ¶¶ 1, 3–4) The Plans offered several investment options, including mutual funds, non-mutual fund investments and the GM Common Stock Fund.

(Salaried Plan, Art. I, § 5; Hourly Plan Art. VII, § 7.01(a)) Contributions to the Plan are invested "in accordance with the Employee's election." *Id.* If an employee does not elect an option, the investments are placed in the Pyramis Strategic Balanced Fund, not the GM Stock Fund. (Salaried Plan, Art. 1, §§ 5(C), (D) and 6; Hourly Plan, Art. VII, § 7.01(a)) Plan participants may change the allocation of the assets in their Plan accounts between several options "on any Business Day of the month" up to "100%." (Salaried Plan, Art. I, § 8(B); Hourly Plan, Art. VII, § 7.01(d)(ii)).

The GM Common Stock Fund "is intended to be a separate stock bonus plan and employee stock ownership plan ("ESOP") satisfying the requirements of Section 401(a), certain subsections of 409, and Section 4975(e) of the Code." (Salaried Plan, Art. III, p. 70; Hourly Plan, Art. X, § 10.01, p. 80) The purpose of the ESOP is "to enable Participants to acquire an ownership interest in General Motors and is intended to be a basic design feature" of the Plans. *Id.* The ESOP funds "shall be invested exclusively in GM $1–2/3 par value common stock ... without regard to (i) the diversification of assets, (ii) the risk profile of investments in GM [common sock]." *Id.*

On June 30, 2006, State Street and GM entered into an engagement letter which allowed State Street to be the Fiduciary and Investment Manager for the Company Stock Fund. (Complaint, ¶ 2) Under the Agreement, State Street was responsible to exercise its judgment and discretion to determine whether to continue offering the Company Stock

Fund investment option. The Agreement limited State Street's discretion: "State Street will exercise independent discretionary judgment in the performance of its obligations hereunder in accordance with the fiduciary requirements set forth in ... ERISA, subject to the statement of Company Intent in Section 4 hereof." (Agreement, pp. 2–3) Section 4 provides:

> The Company confirms to State Street that it is the Company's intent in its settler capacity, that the Company Stock Fund continue to be invested exclusively in Company Stock ... without regard to (A) the diversification of assets of each Plan and Trust, (B) the risk profile of Company Stock, (C) the amount of income provided by Company Stock, or (D) the fluctuation in the fair market value of Company stock, unless State Street, using an abuse of discretion standard, determines from reliable public information that (i) there is a serious question concerning the Company's short-term viability as a going concern without resort to bankruptcy proceedings; or (ii) there is no possibility in the short-term of recouping any substantial proceeds form the sale of stock in bankruptcy proceedings.

(Agreement, p. 3)

Plaintiffs claim that on June 30, 2006 when State Street became the Fiduciary, GM was already in serious financial trouble. (Complaint, ¶ 23) By the time State Street assumed fiduciary responsibility for the

GM stock in the Plans, numerous securities analysis and experts were already discussing a possible GM bankruptcy filing. *Id.* GM's financial condition continued to deteriorate throughout 2007 and the first Quarter of 2008 with a $39 billion Third Quarter 2007 loss. *Id.,* ¶¶ 28, 30. On July 15, 2008, GM Chief Executive Officer Rick Wagner announced that GM needed to implement a restructuring plan to combat Second Quarter 2008 losses that he described as "significant" and to stem an impending liquidity crisis. *Id.,* ¶ 34. GM's financial condition continued to spiral out of control and on August 1, 2008, GM announced a Third Quarter 2008 net loss of $15.5 billion. *Id.,* ¶ 38. Analysts projected that GM was on track to run out of cash by the First Quarter of 2009. *Id.,* ¶ 39. In its November 10, 2008 Form 10–Q for the Third Quarter of 2008, GM acknowledged that its auditors had "substantial doubt" regarding GM's "ability to continue as a going concern." *Id.,* ¶ 46. In a November 2, 2008 notice to participants and beneficiaries, State Street temporarily suspended the purchases of the GM Common Stock Fund until further notice noting that "it is not appropriate at this time to allow additional investments by participants." *Id.,* ¶ 49. It was not until March 31, 2009 that State Street decided to divest the GM stock held in the fund, with the process completed by April 24, 2009. *Id.,* ¶ 51.

Plaintiffs claim that State Street breached its fiduciary duty by failing to act in the face of an onslaught of red flags clearly indicating that GM stock was an imprudent investment causing the people who rely on the assets in the Plans to fund their re-

tirement, to suffer hundreds of millions of dollars in losses. *Id.,* ¶ 52. Plaintiffs thereafter filed the instant Complaint.

State Street now moves to dismiss the Complaint asserting: 1) Plaintiffs have not pleaded facts demonstrating a plausible claim to overcome the presumption of prudence for holding GM stock in the Plans; 2) State Street was required to keep GM stock in the Plans until public information called into serious question the short-term viability of GM as a going concern or there was no possibility of recouping any substantial proceeds from the sale of stock in bankruptcy proceedings; and, 3) Plaintiffs have not pleaded facts showing that State Street proximately caused any loss to Plaintiffs.

II. ANALYSIS

A. Standard of Review under Rule 12(b)(6)

In *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), under Rule 12(b)(6) of the Rules of Civil Procedures, the Supreme Court explained that "a plaintiff's obligation to provide the 'grounds' of his 'entitle [ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do [.] Factual allegations must be enough to raise a right to relief above the speculative level...." *Id.* at 555 (internal citations omitted). Although not outright overruling the "notice pleading" requirement under Rule 8(a)(2) entirely, *Twombly* concluded that the "no set of facts" standard "is best forgotten as an incomplete negative gloss on an accepted pleading standard." *Id.* at 563. The Supreme

Court clarified in *Ashcroft v. Iqbal,* ——U.S. ——, 129 S.Ct. 1937, 1948–50, 173 L.Ed.2d 868 (2009) that "bare assertions ... amount[ing] to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim," for the purposes of ruling on a motion to dismiss, are not entitled to "an assumption of truth." *Iqbal,* 129 S.Ct. at 1951. Such allegations are not to be discounted because they are "unrealistic or nonsensical," but rather because they do nothing more than state a legal conclusion—even if that conclusion is cast in the form of a factual allegation." *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949. After *Iqbal* and *Twombly,* to survive a Rule 12(b)(6) motion to dismiss, the non-conclusory "factual content" in the complaint and the reasonable inferences from that content, must be "plausibly suggestive" of a claim entitling a plaintiff to relief. *Id.* Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not "show [n]"—"that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2).

B. Presumption of Prudence and Requirement to Keep GM Stock

State Street argues that Plaintiffs have not pleaded facts demonstrating a plausible claim to overcome the presumption of prudence for holding GM stock in the Plans. Plaintiffs agree that State Street is afforded a presumption of prudence as to the ESOP plans at issue. However, Plaintiffs argue

that this does not mean that State Street is no longer subject to ERISA's general fiduciary responsibility or no longer owes the Plans and their participants a duty of prudence. Plaintiffs claim that it simply means that ESOP fiduciaries like State Street are afforded a "presumption of prudence" when determining whether they have breached their fiduciary duty. Plaintiffs assert that they have rebutted the presumption of prudence, that they are not required to show "impending" or "imminent" collapse (even though Plaintiffs claim they have), and that State Street cannot override ERISA's duty of prudence by including self-serving language in its Agreement with GM that purport to lower the operative ERISA standards.

The Sixth Circuit has noted:

> In drafting the ESOP provisions of ERISA, Congress intended to encourage employees' ownership of their employer company. In order to promote this goal, Congress carved out specific exceptions to certain fiduciary duties in the case of an ESOP.

Kuper v. Iovenko, 66 F.3d 1447, 1458 (6th Cir.1995). "[A]s a general rule, ESOP fiduciaries cannot be held liable for failing to diversify investments, regardless of whether diversification would be prudent under the terms of an ordinary non--ESOP pension plan." *Id.* The Sixth Circuit went on to note that,

> [A] proper balance between the purpose of ERISA and the nature of ESOPs requires ... a

> review [of] an ESOP fiduciary's decision to invest in employer securities for an abuse of discretion. In this regard, we will presume that a fiduciary's decision to remain invested in employer securities was reasonable.

Id. at 1459. A plaintiff may rebut the "presumption of reasonableness" by showing "that a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Id.* It will not be enough to prove that the stock was an unwise investment or that defendants ignored a decline in stock price. *In re General Motors ERISA Lit.,* 2006 WL 897444 * 11 (E.D.Mich. Apr.6, 2006). "[A] fiduciary's duty is limited to those aspects of the plan over which he exercises authority or control." *In re Delphi Corp. Sec., Deriv. and ERISA Litig.,* 602 F.Supp.2d 810, 820 (E.D.Mich.2009).

The Agreement between GM and State Street noted that "State Street will exercise independent discretionary judgment in the performance of its obligations hereunder in accordance with the fiduciary requirements set forth in ... ERISA, subject to the statement of Company Intent in Section 4 hereof." (Agreement, pp. 2–3) The Agreement expressly limited State Street's discretionary judgment in Section 4 which provides:

> The Company confirms to State Street that it is the Company's intent in its settler capacity, that the Company Stock Fund continue to be invested exclusively in Company Stock ... without regard to (A) the diversification of assets of

> each Plan and Trust, (B) the risk profile of Company Stock, (C) the amount of income provided by Company Stock, or (D) the fluctuation in the fair market value of Company stock, unless State Street, using an abuse of discretion standard, determines from reliable public information that (i) there is a serious question concerning the Company's short-term viability as a going concern without resort to bankruptcy proceedings; or (ii) there is no possibility in the short-term of recouping any substantial proceeds form the sale of stock in bankruptcy proceedings.

(Agreement, p. 3)

Plaintiffs would have the Court ignore the Agreement between GM and State Street limiting State Street's discretion over the ESOP plan. It is clear from the Agreement that State Street must "exclusively" invest in GM's stock, no matter the risk, the amount of income and fluctuation in the fair market value of the stock. The Agreement provides that State Street may diversify only in two situations: there is a serious question concerning GM's short-term viability as a going concern without resorting to bankruptcy proceedings, or, there is no possibility in the short-term of recouping any substantial proceeds from the sale of stock in the bankruptcy proceedings. Plaintiff has sufficiently established that GM was in serious financial trouble on June 30, 2006 when State Street became the ESOP plan Fiduciary and Investment Manager and on the verge of bankruptcy shortly thereafter. Based on the

Agreement, State Street was only allowed to invest in the ESOP GM stocks, no matter how the stock was performing.

However, the Agreement provides State Street with the discretion, albeit subject to an abuse of discretion standard, not to invest in GM stock in the two situations noted above. The Complaint alleges facts to allow the reasonable inference to rebut the presumption of prudence given to State Street. The Complaint also alleges sufficient facts to allow the reasonable inference that there existed a serious question concerning the Company's short-term viability as a going concern without resorting to bankruptcy proceedings or there was no possibility in the short-term of recouping any substantial proceeds form the sale of stock in bankruptcy proceedings sufficient for State Street to exercise its fiduciary discretion.

The Court notes State Street's argument that many ERISA "stock drop" class actions filed recently have been dismissed on motions to dismiss. *See, e.g., In re Huntington Bancshares, Inc. ERISA Litig.,* 620 F.Supp.2d 842, 852 (S.D.Ohio 2009). In that case, the district court noted that a duty to investigate only arises when there is some reason to suspect that investing in company stock may be imprudent—that is, "there is must be something akin to a 'red flag' of misconduct." *Id.* at 852. The Complaint alleges sufficient "red flags" that should have placed State Street on notice of a need to cease offering GM stock to Plan participants or to liquidate the ESOP funds prior to March 2009.

C. Causation

State Street argues that Plaintiffs have not pleaded facts showing that State Street proximately caused any loss to Plaintiffs. In response, Plaintiffs assert that because State Street did not exercise its fiduciary duty to divest the GM stock until March 31, 2009, this caused the Plans hundreds of millions of dollars in losses. (Comp., ¶ 71) Plaintiffs claim the fact that the individual GM Plan participant could have sold their GM stock does not absolve State Street of its fiduciary duty to divest the Plans of GM stock. State Street argues that Plaintiffs are suing on behalf of the Plans.

The Sixth Circuit has held that to prevail on a breach of fiduciary duty claim under ERISA, a plaintiff must generally prove that the defendant not only breached its fiduciary duty but also caused harm by that breach. *Kuper,* 66 F.3d at 1457; *Romberio v. Unumprovident Corp.,* 2009 WL 87510 (6th Cir. Jan.12, 2009) ("A causal connection between the alleged breach and the alleged harm" is an element of an ERISA breach of fiduciary duty claim.). Section 404(c) provides that a trustee of a plan is not liable for any loss caused by any breach which results from the participant's exercise of control over those assets. 29 U.S.C. § 1104(c)(2)(B). The Second Circuit Court of Appeals, in reviewing the same Plans at issue in this case, held that ERISA contemplates a failure to diversify claim when a plan is undiversified as a whole. *Young v. General Motors Investment Management Corporation,* 325 Fed. Appx. 31, 29 WL 1230350 (2d Cir. May 6, 2009); 29 U.S.C. § 1104(a)(1)(C). State Street argues that it was a de-

fendant in the Second Circuit case which involved the same plans at issue in this case, therefore, Plaintiffs in this case are in privity with the GM plan participants and are bound by the Second Circuit's opinion in *Young. See Hickman v. C.I.R.,* 183 F.3d 535, 537 (6th Cir.1999). As in this case, the Second Circuit noted that plaintiffs only allege that individual funds within the plan were undiversified. The Second Circuit held that "[t]he complaint's narrow focus on a few individual funds, rather than the plan as a whole, is insufficient to state a claim for lack of diversification." *Id.* The Seventh Circuit has also affirmed a dismissal of a breach of fiduciary duty claim because the plan, as in this case, offered a sufficient range of investment options "so that the participants have control over the risk of loss." *Hecker v. Deere & Company,* 556 F.3d 575 (7th Cir.2009).

Plaintiffs agree that only the ESOP funds under the Plans are at issue. They do not dispute that the Plans offer several diverse investment options for participants to choose for themselves. The Plans at issue allow the participants to change the allocation of the assets from one account to another on any business day. Plaintiffs had total control over how to allocate their assets. As alleged in their Complaint, Plaintiffs had knowledge at the time State Street became the fiduciary, that GM was in financial trouble yet they continued to invest in the ESOP. State Street cannot be held liable for actions which Plaintiffs controlled. The facts alleged by Plaintiffs are not plausible to draw the reasonable inference that State Street is liable under a breach of fiduciary duty claim since Plaintiffs cannot show causation. The

Complaint must be dismissed for failure to state a claim upon which relief may be granted.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that State Street's Motion to Dismiss **(Doc. No. 19, filed September 4, 2009)** is GRANTED.

IT IS FURTHER ORDERED that this action is DISMISSED with prejudice.

S/Denise Page Hood
Denise Page Hood
United States District Judge

Dated: September 30, 2010

[*Certificate of Service omitted in printing of this appendix*]

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RAYMOND M. PFEIL AND MICHAEL KAMMER,
Plaintiffs,

v.

STATE STREET BANK AND TRUST COMPANY,
Defendant.

CASE NO. 09-CV-12229
HONORABLE DENISE PAGE HOOD

JUDGMENT

This action having come before the Court and pursuant to the Order entered this date, accordingly,

Judgment is entered in favor of Defendant State Street Bank and Trust Company and against Plaintiffs Raymond M. Pfeil and Michael Kammer.

DAVID J. WEAVER
CLERK OF COURTS

By: s/ Wm. F. LEWIS
Deputy Clerk

Approved:

s/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge
Detroit, Michigan

Dated: September 30, 2010

[*Certificate of Service omitted in printing of this appendix*]

APPENDIX D

United States Court of Appeals,
Sixth Circuit.

Raymond M. PFEIL and Michael Kammer,
Individually and on behalf of all others
similarly situated,
Plaintiffs–Appellants,

v.

STATE STREET BANK AND TRUST COMPANY,
Defendant–Appellee.

No. 10–2302.

Filed
Mar 28, 2012
LEONARD GREEN, Clerk

BEFORE: MARTIN and GRIFFIN, Circuit Judges; and ANDERSON*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

* Hon. S. Thomas Anderson, United States District Judge for the Western District of Tennessee, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY THE ORDER OF THE COURT

Leonard Green, Clerk