No. ______

In the Supreme Court of the United States

FIFTH THIRD BANCORP, et al.,
Petitioners,
v.

JOHN DUDENHOEFFER, et al.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred by holding that Respondents were not required to plausibly allege in their complaint that the fiduciaries of an employee stock ownership plan ("ESOP") abused their discretion by remaining invested in employer stock, in order to overcome the presumption that their decision to invest in employer stock was reasonable, as required by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1101, *et seq*. ("ERISA"), and every other circuit to address the issue.

2. Whether the Sixth Circuit erred by refusing to follow precedent of this Court (and the holdings of every other circuit to address the issue) by holding that filings with the Securities and Exchange Commission ("SEC") become actionable ERISA fiduciary communications merely by virtue of their incorporation by reference into plan documents.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Sixth Circuit.

The Petitioners (Defendants/Appellees below) are:

Fifth Third Bancorp

Kevin T. Kabat

Members of the Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee, who include:

Paul L. Reynolds

Nancy Phillips

Greg D. Carmichael

Robert Sullivan

Mary Tuuk

The Respondents (Plaintiffs/Appellants below) are:

John Dudenhoeffer

Alireza Partovipanah

RULE 29.6 STATEMENT

Fifth Third Bancorp is a publicly traded company and has no parent company. No publicly traded corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Fifth Third Bancorp, Kevin T. Kabat, and the members of the Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee, who include Paul L. Reynolds, Nancy Phillips, Greg D. Carmichael, Robert Sullivan, and Mary Tuuk, respectfully petition this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 692 F.3d 410, and reproduced at App. 1-27. The opinion of the district court is reported at 757 F. Supp. 2d 753, and reproduced at App. 28-54. The order denying a petition for rehearing and rehearing en banc is not reported, but reproduced at App. 55-56.

JURISDICTION

The Sixth Circuit entered its judgment and opinion on September 5, 2012, and denied rehearing and rehearing en banc on October 12, 2012. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

29 U.S.C. § 1104, reproduced at App. 57-65.

29 U.S.C. § 1106, reproduced at App. 66-67.

29 U.S.C. § 1107, reproduced at App. 68-80.

29 U.S.C. § 1108, reproduced at App. 81-114.

INTRODUCTION

The Sixth Circuit's decision in this case is contrary to three consistent decisions of the Second Circuit which dismissed ERISA breach of fiduciary duty claims challenging the decision of a fiduciary of an ESOP or eligible individual account plan ("EIAP") to remain invested in employer stock. On October 15, 2012, and November 13, 2012, respectively, this Court denied petitions for writs of certiorari in *Gray v. Citigroup, Inc.*, U.S., 11-1531, *Gearren v. McGraw-Hill Companies, Inc.*, U.S., No. 11-1550, and *Fisher v. JP Morgan Chase & Co.*, U.S., No. 12-298, allowing each of these decisions to stand. The Second Circuit held that ESOP and EIAP fiduciaries are entitled to a presumption of reasonableness with respect to the decision to invest in employer stock, which can only be overcome with plausible allegations that they abused their discretion by remaining invested in employer stock. In each case, the Second Circuit held that this presumption of reasonableness should be applied at the pleading stage. The Court found no abuse of discretion by the plan fiduciary because the plaintiffs failed to plausibly allege that their employer was in a "dire situation" that would have prompted a fiduciary to

remove employer stock as an investment option under the plans at issue.

The decision below is in direct conflict with the Second Circuit, as well as the Third and Eleventh Circuits, on this exact issue. The Sixth Circuit held that ESOP fiduciaries are not entitled to a presumption of reasonableness at the pleading stage and the court refused to apply the abuse of discretion standard in reviewing the decision of ESOP fiduciaries to remain invested in employer stock. App. 10-12. The court also refused to require plausible allegations that the employer was in a dire situation, or that its viability was threatened, to state a claim against ESOP fiduciaries. *Id.* at 12. The Sixth Circuit's holding not only conflicts with its sister circuits, it ignores fundamental principles of ERISA that specifically exempt ESOP fiduciaries from the duty to diversify plan investments. 29 U.S.C. § 1104(a)(2).

The decision below also created a conflict with the Second, Fifth and Eleventh Circuits on the issue of whether the mere incorporation by reference of SEC filings into plan documents constitutes a fiduciary act sufficient to form the basis for a breach of fiduciary duty claim under ERISA. In holding that mere incorporation by reference is enough, the Sixth Circuit ignored this Court's precedent, disregarded fundamental ERISA law, and imposed strict liability on fiduciaries for merely incorporating by reference securities filings which are legally required to be sent to plan participants.

The Court should grant certiorari and summarily reverse the decision below, or alternatively, grant

plenary review, to correct the Sixth Circuit's deviation from precedent of this Court and restore uniformity among the circuits with respect to these important and recurring questions of federal law.

STATEMENT OF THE CASE

1. Background

Fifth Third Bancorp ("Fifth Third") is a diversified financial services company headquartered in Cincinnati, Ohio, and among the largest money managers in the Midwest. App. 43. During the relevant period, Fifth Third had $119 billion in assets and operated 16 affiliates with 1,311 full-service Banking Centers. *Id.* At that time, Fifth Third was among the top 20 largest bank holding companies in the country.

Fifth Third sponsored the Fifth Third Bancorp Master Profit Sharing Plan ("Plan"), a defined contribution plan with a 401k feature. App. 30. Eligible Fifth Third employees were permitted to make voluntary contributions to the Plan and Fifth Third matched contributions up to 4% of each employee's pre-tax contribution. *Id*. Plan participants could direct the Plan to invest in any of 20 separate investment options. *Id*. The Plan document required that one investment option be the Fifth Third Stock Fund, which the Plan defined as an ESOP required to invest primarily in qualifying employer securities. *Id*. at 30, 35-36.

The Fifth Third Stock Fund qualified as an ESOP under ERISA. App. 33-37. While Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), generally requires

fiduciaries to diversify plan investments in order to minimize the risk of loss, Congress has specifically exempted ESOP fiduciaries from this diversification requirement in order to encourage ESOPs as a tool for corporate employees to own their employer's stock. 29 U.S.C. § 1104(a)(2). Congress expressly has warned against judicial rulings that impede this goal and treat ESOPs as "conventional retirement plans." 26 U.S.C. § 4975 (notes); *Donovan v. Cunningham*, 716 F.2d 1455, 1466 (5th Cir. 1983). Congress recognized that ESOPs were not intended to guarantee retirement benefits and decided that the policy of employee ownership was more important than short term investment gains. *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 254 (5th Cir. 2008).

2. Proceedings in the District Court

Respondents filed two separate class actions (later consolidated) against Fifth Third Bancorp, Kevin T. Kabat and members of the Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee (collectively, "Defendants"). The consolidated complaint alleged that Defendants violated their fiduciary duties under ERISA by: (i) continuing to offer Fifth Third stock as a Plan investment option when it was imprudent to do so during the worldwide financial crisis of 2008; and (ii) making misrepresentations by incorporating by reference allegedly false and misleading SEC filings into plan documents.[1]

[1] In addition to their "prudence" and "misrepresentation" claims, Respondents brought several additional derivative claims, none of which are before the Court.

Respondents sought recovery for losses allegedly sustained by the Plan resulting from its investment in the Fifth Third Stock Fund during the putative class period, *i.e.* from July 19, 2007 through the present.

Respondents' complaint was based on conclusory allegations that Defendants knew or should have known that the greatest financial catastrophe since the Great Depression was coming, should have predicted its ultimate impact and should have completely sold off all Fifth Third stock in the Plan. Even in the face of Fifth Third's declining stock price during the worldwide financial crisis of 2008, however, Fifth Third's financial health remained strong and its stock "rebounded substantially" during the relevant period. App. 43.

The district court granted Defendants' motion to dismiss for failure to state a claim. The district court held that the Fifth Third Stock Fund is an ESOP, the fiduciaries of which were entitled to a presumption of reasonableness with respect to their decision to invest in employer stock, citing *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995). App. 37. The district court further held that plaintiffs must plead facts sufficient to overcome this presumption at the pleading stage by plausibly alleging that ESOP fiduciaries abused their discretion by remaining invested in employer stock. *Id.* at 37-38. Relying on the well-established pleading requirements of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the court reasoned:

> if the plan at issue is an ESOP, as in this case, there really is no choice but to apply the *Kuper*

> presumption at the pleading stage . . . *Twombly* and *Iqbal* require the complaint to state a claim that is plausible on its face. If an ESOP plan fiduciary starts with a presumption that the decision to remain invested in plan securities was reasonable, then a claim for breach of fiduciary duty only becomes plausible if there are sufficient facts alleged to conclude that 'a prudent fiduciary acting under similar circumstances would have made a different investment decision.' *Id.* at 38.

The district court – relying on decisions from the Third, Fifth, Sixth and Ninth Circuits – held that the complaint failed to "establish any facts which would have caused a reasonable fiduciary to cease offering Fifth Third stock as an investment option and/or divest Fifth Third stock from the Plan entirely." App. 45-46. The district court reasoned: (i) the complaint failed to plausibly allege that Fifth Third's ongoing viability was in jeopardy under *Kuper* (*id*. at 45); and (ii) the allegations in the complaint merely challenged Fifth Third's business judgment, which is not actionable under ERISA (*id*. at 47).

With respect to Respondents' misrepresentation claim, the district court held that mere incorporation by reference of SEC filings into plan documents does not sufficiently state a claim for breach of fiduciary duty based on allegedly misleading statements or omissions in the underlying filings. App. 49-50. Relying on this Court's holding in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), the district court concluded "to act as a fiduciary, the defendant must intentionally connect his statements about the financial status of the

company to the ERISA benefit plan." App. 49-50. The district court held that Respondents failed to state a claim because there were no factual allegations indicating that "the speaker was intentionally connecting his statements about Fifth Third's financial condition to the Fifth Third Stock Fund," and therefore the challenged statements were not made in a fiduciary capacity. *Id*.

3. The Sixth Circuit's Decision

The Sixth Circuit reversed each holding of the district court. The Sixth Circuit became the only circuit to refuse to apply the presumption of reasonableness/abuse of discretion standard at the pleading stage. The Sixth Circuit similarly stands in stark conflict with its sister circuits by holding plan fiduciaries strictly liable for the mere incorporation by reference of SEC filings into plan documents.

While acknowledging that *Kuper* adopted a presumption of reasonableness with respect to an ESOP fiduciary's decision to invest in employer stock, which is only reviewed for an abuse of discretion, the Sixth Circuit refused to apply this presumption at the pleading stage, in conflict with the Second, Third and Eleventh Circuits. App. 11-13. The Sixth Circuit initially announced its divergence from the holdings of its sister circuits in *Pfeil v. State Street Bank and Trust Co.*, 671 F.3d 585 (6th Cir. 2012), even after acknowledging that the issue was not before it in that case. The Sixth Circuit concluded *Pfeil* was controlling in this case. App. 11-13. The court's refusal to apply the *Kuper* presumption at the pleading stage has created a clear circuit split that the Sixth Circuit acknowledged:

"some circuits have reached a different conclusion." *Id.* at 12.

To reach its novel holding, the Sixth Circuit recast the presumption of reasonableness as an evidentiary presumption, requiring a fully developed evidentiary record which does not exist at the pleading stage. App. 11-12. The Sixth Circuit further stated that it never has adopted a specific test for overcoming the presumption that requires allegations that the company "faced a 'dire situation,'" or faced "'the brink of bankruptcy' or an 'impending collapse.'" *Id.* at 12. Because "*Kuper* only requires a plaintiff to prove that 'a prudent fiduciary acting under similar circumstances would have made a different investment decision,'" the Sixth Circuit held that plausible allegations that an ESOP fiduciary abused its discretion by continuing to invest in employer stock are not necessary to state a breach of fiduciary duty claim under ERISA. *Id.* at 12-13.

The Sixth Circuit went further and summarily eliminated the well-established distinction between ESOPs and conventional retirement plans, holding that "*all* fiduciaries, including ESOP fiduciaries" are now subject to "identical standards of prudence and loyalty." App. 12-13 (emphasis in original). The Sixth Circuit is the only circuit to apply this prudent man standard to review an ESOP fiduciary's decision to remain invested in employer stock, despite the statutory exemptions created by Congress to protect ESOP fiduciaries from failure to diversify claims. *Id.*

The decision below created another circuit split on the issue of whether the incorporation by reference of

SEC filings into plan documents constitutes a fiduciary act under ERISA. App. 15-23. Holding in the affirmative, the Sixth Circuit's decision conflicts with precedent of this Court and the holdings of the Second, Fifth and Eleventh Circuits.

In determining that mere incorporation by reference of SEC filings is sufficient for liability, the Sixth Circuit ignored the "intentional connection" test enunciated by this Court in *Varity* that requires allegedly misleading statements about the company's financial health to be tied to statements concerning the future of plan benefits. 516 U.S. at 505. The decision below focused on the fact that a summary plan description ("SPD"), which incorporated SEC filings by reference, is an ERISA-required document and therefore "unquestionably a fiduciary communication." App. 18. The Sixth Circuit disregarded this Court's precedent and fundamental ERISA principles that require courts to look at whether the defendant was acting as a fiduciary when it made the challenged statements and blurred the distinction between corporate and ERISA communications. By so doing, the Sixth Circuit imposed strict liability on ERISA fiduciaries for the statements made by corporate officers and directors pursuant to securities laws which have no connection to the future of plan benefits.

Petitioners filed a petition for rehearing and rehearing en banc, which the Sixth Circuit denied. App. 53-54.

REASONS FOR GRANTING THE PETITION

The Petition should be granted for the following compelling reasons:

1. In conflict with every other circuit to address the issue, the Sixth Circuit eliminated the statutory exemptions which Congress afforded to ESOP fiduciaries when it refused to apply a presumption of reasonableness at the pleading stage with respect to an ESOP fiduciary's decision to invest in employer stock and require plaintiffs to plausibly allege that the ESOP fiduciary abused its discretion in order to state an ERISA breach of fiduciary duty claim.

2. The Sixth Circuit ignored the precedent of this Court and every other circuit to address the issue when it held that statements made in SEC filings become actionable ERISA fiduciary communications when they are merely incorporated by reference into plan documents.

The Sixth Circuit's decision constitutes plain error on these important and recurring questions of federal law and should be summarily reversed or plenary review should be granted.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS HOLDING THAT AN ESOP FIDUCIARY'S DECISION TO INVEST IN EMPLOYER STOCK IS PRESUMED REASONABLE AT THE PLEADING STAGE AND ONLY REVIEWED FOR AN ABUSE OF DISCRETION.

The Sixth Circuit refused to require Respondents to overcome the presumption of reasonableness at the pleading stage with plausible allegations that ESOP fiduciaries abused their discretion by remaining invested in employer stock because the company was in a dire situation or its ongoing viability was in question. Contrary to the five circuits that have applied this abuse of discretion standard – including the three circuits applying it at the pleading stage – the Sixth Circuit eliminated the statutory exemptions afforded to ESOP fiduciaries. The court also blurred the statutory distinction between ESOPs and conventional pension plans by applying an ordinary prudent man standard to review the decision of ESOP fiduciaries to remain invested in employer stock. This decision guarantees that ESOP fiduciaries and employers will be met with expensive litigation and extensive discovery every time the employer's stock price fluctuates.

A. Following *Twombly* and *Iqbal*, the Presumption of Reasonableness and Abuse of Discretion Standard Apply at the Pleading Stage.

Nearly twenty years ago, the Third Circuit first adopted a presumption of reasonableness with respect to an ESOP fiduciary's decision to invest in employer

stock, holding that a plaintiff may only overcome that presumption by establishing that the fiduciary abused its discretion by remaining invested in employer stock. *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995). Several months after *Moench*, the Sixth Circuit adopted the Third Circuit's presumption and abuse of discretion holding. *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995). The Second, Fifth, Ninth and Eleventh Circuits have all followed suit. *In re Citigroup ERISA Litig.,* 662 F.3d 128, 138 (2d Cir. 2011); *Kirschbaum v. Reliant Energy Inc*., 526 F.3d 243, 253-56 (5th Cir. 2008); *Quan v. Computer Scis. Corp.,* 623 F.3d 870, 881 (9th Cir. 2010); *Lanfear v. Home Depot, Inc.,* 679 F.3d 1267, 1279 (11th Cir. 2012).

Following the heightened "plausibility" pleading standard adopted by this Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009), the Second, Third and Eleventh Circuits – the only circuits to have addressed the issue – have held that the abuse of discretion standard applies at the pleading stage:

- **Second Circuit** – "Where plaintiffs do not allege facts sufficient to establish that a plan fiduciary has abused his discretion, there is no reason not to grant a motion to dismiss." *In re Citigroup*, 662 F.3d at 139.

- **Third Circuit** – "We . . . see no reason to allow this case to proceed to discovery when, even if the allegations are proven true, Edgar cannot establish that defendants abused their discretion." *Edgar v. Avaya*, 503 F.3d 340, 348-49 (3d Cir. 2007).

- **Eleventh Circuit** – "Unless a plaintiff pleads facts sufficient to raise a plausible inference that the fiduciary abused its discretion by following the plan's directions, the complaint fails to state a valid claim and a motion to dismiss should be granted." *Lanfear*, 679 F.3d at 1281.

Because these circuits apply an abuse of discretion standard at the pleading stage, it "is an element of a claim that the fiduciary's decision was imprudent." *Lanfear*, 679 F.3d at 1281. Each of these circuits based its holding on the conclusion that abuse of discretion is a standard of review, not an evidentiary presumption. *See In re Citigroup*, 662 F.3d at 139; *Edgar*, 503 F.3d at 349; *Lanfear*, 679 F.3d at 1281.

Despite this clear weight of authority, the Sixth Circuit refused to apply the abuse of discretion standard at the pleading stage. App. 11-13; *see also Pfeil v. State Street Bank & Trust Co.*, 671 F.3d 585, 593 (6th Cir. 2012). In doing so, it erroneously recast the *Kuper* presumption as an evidentiary presumption, rather than a standard of review. App. 12. The Sixth Circuit below, therefore, held that abuse of discretion is not a pleading requirement. App. 12-13.[2]

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[2] Following the Sixth Circuit's decision in *Pfeil*, State Street Bank & Trust Company filed a petition for a writ of certiorari concerning the applicability of the safe harbor provided by ERISA § 404(c), 29 U.S.C. § 1104(c), and issues of loss causation, but explicitly stated that its petition did not raise the issue of whether the presumption of reasonableness and abuse of discretion standard apply at the pleading stage. *See State Street Bank and Trust Co. v. Pfeil*, U.S. 12-256, Petition for a Writ of Certiorari, at 8 n.3.

The Sixth Circuit's decision in *Pfeil* – which it found controlling in this case – was immediately criticized. *See Lanfear*, 679 F.3d at 1281 n. 16; *In re BP p.l.c. Secs. & ERISA Litig*., 2012 U.S. Dist. LEXIS 44801 (S.D. Tex. Mar. 30, 2012). The Eleventh Circuit criticized the Sixth Circuit, noting that the abuse of discretion "standard of review of fiduciary action is just that, a standard of review; it is not an evidentiary presumption. It applies at the motion to dismiss stage as well as thereafter." *Lanfear*, 679 F.3d at 1281 n. 16. *See also In re Citigroup*, 662 F.3d at 139 (abuse of discretion standard "is not an evidentiary presumption; it is a standard of review applied to a decision made by an ERISA fiduciary"); *Edgar*, 503 F.3d at 349.

The Eleventh Circuit also criticized the Sixth Circuit's holding because it affords ESOP fiduciaries less deference than that of the Second and Third Circuits. *Id*. This "less forgiving standard of judicial review could subject fiduciaries to liability if they adhered to the plan's terms and the stock price fell or if they deviated from the plan and the stock price rose. Closer judicial scrutiny would force ESOP fiduciaries to choose between the devil and the deep blue sea." *Lanfear*, 679 F.3d at 1279.

The Sixth Circuit's unjustified departure from the rule adopted by its sister circuits also was discussed in *In re BP p.l.c. Secs. & ERISA Litig*., 2012 U.S. Dist. LEXIS 44801, *47-48. There, the court ultimately found the reasoning of the Second and Third Circuits more persuasive, holding that the abuse of discretion standard is "a standard of review" – not an evidentiary presumption – through which the court must analyze the decision of ESOP fiduciaries to remain invested in

employer stock at the pleading stage. *Id*. at *51. "If a plaintiff does not plead such persuasive and analytically rigorous facts, i.e., the essential elements of his or her claim, there is no reason for the district court to allow the claim to proceed to discovery where, even if the allegations pleaded were proven true, plaintiffs would be unable to establish that Defendants abused their discretion." *Id*. (citing *Gearren v. McGraw-Hill Cos*., 660 F.3d 605, 610 (2d Cir. 2011)).

No other circuit has followed *Pfeil* or the decision below, and for good reason. As the Eleventh Circuit warned – ESOP fiduciaries must now "choose between the devil and the deep blue sea." *Lanfear*, 679 F.3d at 1279. The choice for ERISA plaintiffs, however, is very clear: file the breach of fiduciary duty lawsuit in the district courts of the Sixth Circuit when an employer's stock price drops, even when there is no plausible allegation of abuse of discretion, and be guaranteed to proceed with time-consuming discovery. The Court should grant review to restore uniformity among the circuits on this important and recurring question of federal law.

B. The Decision Below Conflicts With the Decisions of Every Circuit Requiring Plaintiffs to Plausibly Allege That the Company Was in a Dire Situation or its Ongoing Viability Was in Question to State a Claim That ESOP Fiduciaries Breached Their Duties to Plan Participants by Failing to Divest the Plan of Employer Stock.

The Sixth Circuit allowed Respondents' claims to proceed based on conclusory allegations concerning market warnings, company mismanagement, and a subsequent decline in the employer's stock price. App. 12. This decision is irreconcilable with the principles articulated by all other circuits to have addressed the issue.

Following this Court's decisions in *Twombly* and *Iqbal*, five circuits consistently articulated the high barrier plaintiffs must overcome to state a plausible claim against an ESOP fiduciary for its failure to divest the plan of employer stock:

- The **Second Circuit** concluded, "we believe that only circumstances placing the employer in a **'dire situation'** that was objectively unforeseeable by the settlor could require fiduciaries to override plan terms." *In re Citigroup*, 662 F.3d at 140 (emphasis added) (citations omitted).

- The **Third Circuit** found that corporate developments likely to have a negative effect on company earnings and its stock price do

not create a "**dire situation** which would require defendants to disobey the terms of the plans by not offering" company stock or divesting the plan of company stock. *Edgar*, 503 F.3d at 348 (emphasis added).

- The **Fifth Circuit** concluded the plaintiff could not establish its claim where there was "no indication that **[the company's] viability as a going concern was ever threatened**, nor that [the company's] stock was in danger of becoming essentially worthless." *Kirschbaum*, 526 F.3d at 255 (emphasis added).

- The **Ninth Circuit** held that to establish a non-speculative claim, "plaintiffs must therefore make allegations that 'clearly implicate [ ] the **company's viability as a going concern**'." *Quan*, 623 F.3d at 882 (citation omitted) (emphasis added).

- The **Eleventh Circuit** concluded that plaintiffs must allege the "type of **dire situation** which would require defendants to disobey the terms of the Plan by not offering" company stock or divesting the plan of company stock. *Lanfear*, 679 F.3d at 1282 (emphasis added).

These pleading requirements serve as a "'substantial shield' that protects fiduciaries from liability where 'there is room for reasonable fiduciaries to disagree as to whether they are bound to divest from company stock.'" *In re Citigroup*, 662 F.3d at 140

(quoting *Kirschbaum*, 526 F.3d at 256; *Quan*, 623 F.3d at 882). This allows ESOP fiduciaries to "fulfill their duties in the safe harbor that Congress seems to have intended for them" in managing ESOPs. *Quan*, 623 F.3d at 882.

ESOP fiduciaries are not required to ignore plan directives and entirely divest the plan of employer stock "just because they were aware that the stock price would likely fall." *Lanfear*, 679 F.3d at 1282; *Kirschbaum*, 526 F.3d at 256 ("[o]ne cannot say that whenever fiduciaries are aware of circumstances that may impair the value of company stock, they have a fiduciary duty to depart from the ESOP or EIAP plan provisions."). This is because "a fiduciary's decision not to divest, when faced with 'mere stock fluctuations, even those that trend downward significantly,' does not give rise to the inference that the fiduciary did not properly investigate the merits of continued investment in employer stock." *Quan*, 623 F.3d at 883 (citation omitted).

The Sixth Circuit rejected the sound reasoning of these decisions, opting for an ill-defined standard of "equality" and flexibility to be applied to *all* fiduciaries, including ESOP fiduciaries, even in the absence of plausible allegations that a company faced a dire situation or its ongoing viability was threatened. App. 12-13. The Sixth Circuit's endorsement of this fuzzy standard highlights the conflict with the other circuits and the deficiency of its logic.

The Sixth Circuit concluded that bare allegations of warnings by industry watchdogs, articles about the subprime lending market, and a "lack of leadership,"

coupled with a decline in stock price, are sufficient to state a claim that ESOP fiduciaries should have completely divested the plan of employer stock. App. 13-15.

The district court properly dismissed these claims as merely challenging the "wisdom of Fifth Third's business judgment," which is not an actionable theory of recovery under ERISA. App. 47.[3] It held that the complaint failed to plausibly allege that Fifth Third was in a "dire financial predicament," and "the fact that the company remained viable despite a substantial drop in the stock price is a strong indicator that no breach of fiduciary duty occurred by remaining invested in employer securities." *Id.* at 44-45.

The district court's decision is in line with the decisions of every other circuit to address the issue. The Sixth Circuit, however, went out of its way to create another unnecessary conflict among the circuits. Summary reversal or plenary review is warranted to eliminate this conflict the Sixth Circuit created.

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[3] Other courts have reached the same conclusion. *See Pugh v. Tribune Co.*, 521 F.3d 686, 701 (7th Cir. 2007) (dismissing breach of fiduciary duty claims because allegations of corporate mismanagement are insufficient to trigger a duty to investigate prudence of investing in employer stock); *In re Huntington Bancshares Inc. ERISA Litig.*, 620 F. Supp. 2d 842, 849-50 (S.D. Ohio 2009) (dismissing breach of fiduciary duty claims challenging company's business judgment based on warnings concerning subprime lending as being insufficient to trigger a duty to investigate because ERISA does not impose a duty to "continuously audit operational affairs").

C. The Sixth Circuit's Application of an Ordinary Prudent Man Standard to Review an ESOP Fiduciary's Decision to Remain Invested in Employer Stock Eliminates the Statutory Exemptions Afforded to ESOP Fiduciaries.

The Sixth Circuit clearly erred when it applied an ordinary prudent man standard of review to an ESOP fiduciary's decision to remain invested in employer stock. The court of appeals went far beyond its previous decisions, and further than Congress or any circuit has ever gone, when it declared that "*all* fiduciaries, including ESOP fiduciaries," are now subject to "identical standards of prudence and loyalty," despite the statutory exemptions that Congress carved out for ESOP fiduciaries when it enacted ERISA. App. 12-13 (emphasis in original).

ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), sets forth general fiduciary duties owed to plan participants, including the duty to act in the best interest of plan participants, the duty to act as a prudent person, the duty to act for the exclusive purpose of providing benefits to plan participants, the duty to act in accordance with plan documents consistent with ERISA, and the duty to diversify investment of plan assets. *Kuper*, 66 F.3d at 1458. ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1), generally prohibits fiduciaries from self-dealing.

In enacting ERISA, Congress created ESOPs to encourage employee ownership of employer stock. *Kuper*, 66 F.3d at 1458; H.R. Rep 93-1280, at 313 (1973), *reprinted* in 1974 U.S.C.C.A.N. 5038, 5093

(ESOPs are designed to "build equity ownership of shares of the employer corporation for its employees"). Congress explicitly exempted ESOP fiduciaries from the duty of diversification, the duty of prudence to the extent it requires diversification, and the prohibition against self-dealing. *See* ERISA §404(a)(2), 29 U.S.C. § 1104(a)(2); ERISA § 408(e)(3), 29 U.S.C. § 1108(e)(3); *Kuper*, 66 F.3d at 1458; *Moench*, 62 F.3d at 568. "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; *see also Moench*, 62 F.3d at 568 ("ESOP fiduciaries cannot be taken to task for failing to diversify investments, regardless of how prudent diversification would be under the terms of an ordinary non-ESOP pension plan.").

The exemptions for ESOP fiduciaries are necessary because – unlike ordinary pension plans – ESOPs are "designed to invest primarily in qualifying employer securities." *Kuper*, 66 F.3d at 1457 (quoting ERISA § 407(d)(6)(A), 29 U.S.C. § 1107(d)(6)(A)). ESOPs are not designed to guarantee retirement benefits because concentrated investment in employer stock necessarily carries more risk than investment in a diversified portfolio of an ordinary non-ESOP pension plan. *Id*. at 1457. Congress repeatedly has warned against judicial action that would thwart investment in employer stock or "treat employee stock ownership plans as conventional retirement plans." S. Rep. No. 93-127, at 32 (1973), *reprinted* in 1974 U.S.C.C.A.N. 4838, 4869; 26 U.S.C. § 4975 (notes); *see also Kuper*, 66 F.3d at 1458; *Moench*, 62 F.3d at 569 (citing Tax Reform Act of 1975, Pub. L. No. 94-455 § 803(h), 90 Stat. 1582, 1590)

("Congress is deeply concerned that the objectives sought by [the series of laws encouraging ESOPs] will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans . . . and which otherwise block the establishment and success of these plans.").

Mindful of this Congressional intent, the federal courts adopted the abuse of discretion standard for ESOP fiduciaries because applying an ordinary prudent man standard to failure to diversify claims "would render meaningless the ERISA provision excepting ESOPs from the duty to diversify." *Kuper*, 66 F.3d at 1458-59. Any less deferential standard "would risk transforming ESOPs into ordinary pension plans, thus frustrating Congress's desire to encourage employee ownership and contravening the intent of the parties." *Id*. at 1459.

While the Sixth Circuit correctly noted that the *general* standards of prudence and loyalty apply to ESOP fiduciaries, it impermissibly disregarded the *ESOP-specific* exemptions included in ERISA when it applied an ordinary prudent man standard:

> And this unembellished standard makes sense – not just because it closely tracks the statutory language of § 404(a)(1)(B) – but also because that language imposes identical standards of prudence and loyalty on *all* fiduciaries, including ESOP fiduciaries.

App. 9-10, 12-13 (emphasis in original). This standard cannot be reconciled with the exemptions Congress expressly enacted to protect ESOP fiduciaries and the

decisions of its sister circuits that apply the abuse of discretion standard to identical conduct. *Moench*, 62 F.3d at 571; *In re Citigroup,* 662 F.3d at 138; *Kirschbaum*, 526 F.3d at 253-56; *Quan,* 623 F.3d at 881; *Lanfear*, 679 F.3d at 1279.

Other circuits uniformly recognize that, by definition, the statutory exemptions afforded to *ESOP* fiduciaries demonstrate that Congress did not impose *identical* standards on *all* fiduciaries. *See Eaves v. Penn*, 587 F.3d 453, 460 (10th Cir. 1978) ("[T]he legislative history combined with a natural and clear reading of § 404, lead to the inexorable conclusion that ESOP fiduciaries are subject to the same fiduciary standards as any other fiduciary except to the extent that the standards require diversification of investments."); *Moench*, 62 F.3d at 568-69 ("except for a few select provisions . . . ESOP fiduciaries must act in accordance with the duties of loyalty and care."). The Court should summarily reverse the decision below, or grant plenary review, to eliminate the conflict among the circuits and restore the exemptions Congress enacted to protect ESOP fiduciaries.

* * *

Under the new Sixth Circuit standard, ESOP fiduciaries now face liability for failing to divest plans of all employer stock every time the stock price fluctuates temporarily. Plan participants will expect ESOP fiduciaries to become "virtual guarantors of the financial success of the ESOP plan," *Moench*, 62 F.3d at 570, and adopt risky strategies to maximize returns on plan investments. ESOP fiduciaries must now strive to meet this unattainable standard of predicting

the future of company stock performance and financial markets worldwide "so as to not breach their fiduciary duties under ERISA." *In re Huntington Bancshares*, 620 F. Supp. 2d at 853; *Kirschbaum*, 526 F.3d at 256. This is not what Congress intended.[4]

II. THE DECISION BELOW CONFLICTS WITH PRECEDENT OF THIS COURT AND DECISIONS OF OTHER CIRCUITS HOLDING THAT STATEMENTS MADE IN SEC FILINGS DO NOT BECOME ACTIONABLE ERISA FIDUCIARY COMMUNICATIONS MERELY THROUGH INCORPORATION BY REFERENCE INTO PLAN DOCUMENTS.

The Sixth Circuit held that because a SPD is an ERISA-mandated fiduciary communication, the mere incorporation of SEC filings by reference into a SPD is a fiduciary activity. The Sixth Circuit clearly erred by: (i) eliminating the first element of a breach of fiduciary duty claim based on misrepresentations, i.e., the requirement that the defendant actually make the challenged misrepresentation, while acting in an

[4] *See Lanfear*, 679 F.3d at 1282 (prudent investing does not involve "market timing" and "there is nothing in this Plan to indicate that those who created it intended for fiduciaries to disregard their instructions based on short term investments and fluctuations in the market."); *Quan*, 623 F.3d at 885 (the "'long-term horizon of retirement investing' requires protecting fiduciaries from pressure to divest when the company's stock drops"); *Kirschbaum*, 526 F.3d at 254 (prudence focuses on "'how the fiduciary acted' not 'whether his investments succeeded or failed," and relevant to this inquiry are the "'long-term horizon of retirement investing,' as well as the favored status Congress has granted to employee stock investments in their own companies.").

ERISA fiduciary capacity; (ii) ignoring this Court's requirement of an intentional connection between statements made about a company's financial condition and the future of plan benefits; and (iii) creating a conflict with the decisions of the Second, Fifth and Eleventh Circuits. This decision imposes strict liability on ERISA fiduciaries for the statements of corporate officers and directors made pursuant to securities laws.

A. The Sixth Circuit's Ruling Conflicts With Long-Standing Precedent of This Court and Basic Tenets of ERISA Law.

One of the most fundamental principles of ERISA is that a fiduciary may wear two hats – employer and ERISA fiduciary – but that a fiduciary is not liable under ERISA for actions taken in a non-ERISA capacity. *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000). The threshold question in every case alleging a breach of an ERISA fiduciary duty is "whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Id.* at 226. Where a claim for breach of fiduciary duty is based on alleged misrepresentations, a plaintiff must plausibly allege: "(1) that the defendant was acting in a fiduciary capacity when it made the challenged representations; (2) that these constituted material misrepresentations; and (3) that the plaintiff relied on those misrepresentations to their detriment." *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 449 (6th Cir. 2002).

The Sixth Circuit became the first circuit to hold that plan fiduciaries may be held liable under ERISA

for allegedly misleading statements made by corporate officers in SEC filings, completely eliminating the fiduciary capacity element of a misrepresentation claim. App. 21-22. This Court, in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), held that to be actionable under ERISA, allegedly misleading statements made about the company's financial health must be "**intentionally connected**" to statements about the future of plan benefits so that "its intended communication about the security of benefits was rendered materially misleading." *Id.* at 505 (emphasis added).

The decision below is irreconcilable with the *Varity* rule and the fundamental ERISA principles on which it is premised. The Sixth Circuit held that simply because a SPD is an ERISA-required document, it is "unquestionably a fiduciary communication," so merely incorporating SEC filings by reference subjects plan fiduciaries to liability under ERISA. App. 18, 22-23. The Sixth Circuit reached this conclusion despite the fact that none of the alleged misstatements in the SEC filings were made by an ERISA fiduciary or connected to fiduciary statements about the future of plan benefits. The Sixth Circuit's holding blurs the distinction between corporate and ERISA communications, completely ignores the context in which the challenged statements are made, and imposes strict liability on ERISA fiduciaries for the statements of corporate officers and directors made pursuant to securities laws.

Pegram dictates that whether a person is acting as a fiduciary requires courts to analyze the "action subject to complaint" – here, the alleged misleading statements in SEC filings. 530 U.S. 226. These

purported misleading statements were made by corporate officers and directors acting in a corporate capacity by preparing, signing and disseminating SEC filings required by law. No ERISA fiduciary made these alleged misleading statements or took action that is "subject to complaint." Corporate officers or directors may be liable under federal securities laws for any misstatements contained in SEC filings. They are not additionally liable under ERISA for the same alleged conduct.

The mere incorporation by reference of allegedly misleading SEC filings into an ERISA-mandated document does not change this result. As *Varity* made clear, where corporate statements are communicated to plan participants there must be an "intentional connection" between the corporate statements and statements about the future security of plan benefits. 516 U.S. at 505. The Sixth Circuit tried to distinguish *Varity* on the flawed ground that the employer statements in that case were made "outside the course of plan administration," and therefore this Court's holding is not applicable. App. 20. The communications at issue in *Varity*, however, occurred during a special meeting that the employer held specifically for plan participants. 516 U.S. at 493-494. Seeking to persuade the participants to accept changes to their benefit plans, the employer made representations about the company's future business outlook and financial viability, stating that the participants' benefits would remain secure going forward. *Id.* These communications were aimed only at plan participants and directly pertained to their plan benefits. *Id.* The Sixth Circuit's attempt to distinguish

Varity on the basis that it did not involve plan administration is, therefore, irrelevant.

If the Sixth Circuit's holding is permitted to stand, the mere incorporation by reference of allegedly misleading SEC filings into plan documents will impose strict liability under ERISA, while explicit misrepresentations made directly to plan participants at a special meeting concerning the future of plan benefits are subject to the less stringent "intentional connection" test. Clearly, this is not and cannot be the law.

The district court in this case properly relied on *Varity* in concluding that all of the alleged misleading statements identified in the operative complaint were made by corporate officers in SEC filings and were not connected to fiduciary statements about the future of plan benefits. App. 49-50. Accordingly, the district court held that Respondents could not state a plausible claim that Defendants breached their ERISA fiduciary duties because the communications were not made in an ERISA fiduciary capacity. *Id*.

B. The Decision Below Conflicts with Decisions of Other Circuits.

If the Court does not summarily reverse, it should grant plenary review to resolve the circuit conflict created by the decision below. Other circuits have correctly held that the incorporation of SEC filings by reference into plan documents does not constitute ERISA fiduciary activity.

The first decision on this issue was *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 257 (5th Cir. 2008), where the Fifth Circuit relied on this Court's decision in *Varity*, 516 U.S. at 505, to hold that when the defendant incorporated SEC filings into its plan prospectus and distributed that prospectus to plan participants, it was merely "discharging its corporate duties under the securities laws, and was not acting as an ERISA fiduciary." *Kirschbaum*, 526 F.3d at 257. The *Kirschbaum* court reasoned that the defendant was obligated through securities laws to incorporate the SEC filings into its plan prospectus, and to distribute the prospectus to plan participants, thereby placing the defendants in their corporate, rather than fiduciary, capacities. *Id.* (*citing* 17 C.F.R. § 230.428(a)(1), (b)(1)). This reasoning is sound because those "who prepare and sign SEC filings do not become ERISA fiduciaries through those acts, and consequently do not violate ERISA if the filings contain misrepresentations." *Id*. at 257.

The Second Circuit, in *Gearren v. McGraw-Hill Cos.*, 660 F.3d 605 (2d Cir. 2011), specifically addressed and rejected the argument that the incorporation of SEC filings into an ERISA-mandated SPD constitutes a fiduciary act sufficient to state a claim for ERISA liability. *Id.* at 610-611. Relying on *Pegram* and *Kirschbaum*, the court held that:

> The only specific false or misleading statements identified by defendants are those contained in SEC filings that were later incorporated into the Plans' Summary Plan Descriptions ("SPDs"). ERISA, however, only holds fiduciaries liable to the extent that they were 'acting as a fiduciary

> . . . when taking the action subject to the complaint.' Here, defendants who signed or prepared the SEC filings were acting in a corporate, rather than a fiduciary, capacity when they did so. Therefore . . . these defendants may not be held liable under ERISA for misstatements contained in the SEC filings. (citations omitted). *Id.*

The Second Circuit further concluded that plaintiffs' conclusory allegation that defendants "knew or should have known" that the SEC statements issued by the corporation were false or misleading at the time they were incorporated into the plans' SPDs was not sufficient to state an ERISA breach of fiduciary duty claim. *Id.* at 611.

The Eleventh Circuit recently joined the Second and Fifth Circuits, holding that when the defendants created and distributed a plan prospectus containing alleged misrepresentations from SEC filings incorporated by reference, "they were acting in their corporate capacity and not in their capacity as ERISA fiduciaries." *See Lanfear v. Home Depot, Inc.,* 679 F.3d 1267, 1283-84 (11th Cir. 2012). "Because they were not acting as fiduciaries when they took those actions, any misrepresentations in those documents did not violate ERISA." *Id*. at 1284.

The decision below directly conflicts with these decisions on multiple grounds. First, the Sixth Circuit completely ignored the holding of the Second Circuit in *Gearren* and went so far as to mistakenly contend that "[n]o circuit court has answered the question of whether the express incorporation of SEC filings into

an ERISA-mandated SPD is a fiduciary communication." App. 20. Because the *Gearren* decision clearly held that incorporation of SEC filings into an ERISA-mandated SPD was not a fiduciary act, this premise of the Sixth Circuit's holding is wrong and creates a clear circuit split on this issue.

Second, as to *Kirschbaum* and *Lanfear*, the Sixth Circuit summarily dismissed these cases as inapplicable. App. 20-21. The decision below first distinguished *Kirschbaum* on the ground that the plan prospectus that incorporated SEC filings by reference in that case was not disseminated to plan participants. *Id.* at 20. This is flatly wrong. The Fifth Circuit, on multiple occasions, made clear that the plan prospectus at issue in *Kirschbaum* was distributed to plan participants and that defendants had an obligation to do so. 526 F.3d at 257. This second basis for the Sixth Circuit's holding is therefore also in error.

Third, the decision below reasons that both *Kirschbaum* and *Lanfear* involved plan prospectuses, not ERISA-mandated SPDs, and thus only incorporation of SEC filings into the latter is a fiduciary act. App. 20-21. This does nothing more than elevate form over substance. Where the same SEC filings are incorporated by reference into documents that both are disseminated to plan participants, it makes no difference whether securities or ERISA law mandated the distribution. Neither document "intentionally connects" the SEC statements to statements regarding the security of plan benefits and therefore neither constitutes a fiduciary act subject to ERISA liability.

Finally, the Sixth Circuit concluded that this case is consistent with what *Kirschbaum* specifically chose not to address – a circumstance where the plan prospectus also was used as the SPD. App. 21. Once again, this is plain error. As the exhibits to the operative complaint in this case make clear, Petitioners' plan prospectus and SPD were two separate and distinct documents – a full copy of the SPD was simply incorporated into the prospectus for dissemination purposes. The two documents, however, were not the same. The Sixth Circuit's holding is thus seriously flawed on multiple grounds.

* * *

The effect of the Sixth Circuit's opinion is that forwarding SEC filings to plan participants creates no fiduciary liability, but incorporating SEC filings by reference into a SPD – without changing, amending, or modifying their substance – is a fiduciary act. This makes no sense. The Sixth Circuit's opinion will require plan fiduciaries to investigate the truth of every single statement made in SEC filings that is incorporated by reference into plan documents, despite the fact that these statements are already independently verified and certified by the company, its officers and professional advisors. Plan fiduciaries do not have the time, resources, or access to information to make such an independent and redundant verification.

The legislative history of ERISA and this Court's precedent seek to protect plan fiduciaries, and differentiate between communications relating solely to the future of plan benefits and communications

relating to a company's financial condition that are authored and verified by others not acting in an ERISA capacity. The Sixth Circuit's opinion destroys this distinction and conflicts with the opinions of its sister circuits on this issue. The Court should summarily reverse the Sixth Circuit or grant plenary review.

CONCLUSION

The Court should grant the petition for certiorari and summarily reverse the decision below or, alternatively, accept the case for plenary review.

Respectfully submitted,

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APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11-3012

[Filed September 5, 2012]

JOHN DUDENHOEFER, on behalf of himself and all others similarly situated; ALIREZA PARTOVIPANAH,
Plaintiffs-Appellants,

v.

FIFTH THIRD BANCORP; KEVIN T. KABAT; PAUL L. REYNOLDS; THE PENSION AND PROFIT SHARING COMMITTEE; NANCY PHILLIPS; GREG CARMICHAEL; ROBERT SULLIVAN; MARY TUUK; JOHN DOES 1–20,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 1:08-cv-538—Sandra S. Beckwith, District Judge.

Argued: June 7, 2012

Decided and Filed: September 5, 2012

Before: COOK and STRANCH, Circuit Judges;
LAWSON, District Judge.*

COUNSEL

ARGUED: Peter H. LeVan, Jr., KESSLER TOPAZ MELTZER & CHECK, LLP, Radnor, Pennsylvania, for Appellants. Joseph M. Callow, Jr., KEATING, MUETHING & KLEKAMP PLL, Cincinnati, Ohio, for Appellees. Melissa Moore, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Amicus Curiae. **ON BRIEF:** Edward W. Ciolko, Mark K. Gyandoh, KESSLER TOPAZ MELTZER & CHECK, LLP, Radnor, Pennsylvania, Thomas J. McKenna, GAINEY & McKENNA, New York, New York, for Appellants. Joseph M. Callow, Jr., James E. Burke, Danielle M. D'Addesa, David T. Bules, KEATING, MUETHING & KLEKAMP PLL, Cincinnati, Ohio, for Appellees. Melissa Moore, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., Jay E.

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* The Honorable David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation.

Sushelsky, AARP FOUNDATION, Washington, D.C., for Amici Curiae.

OPINION

JANE B. STRANCH, Circuit Judge. Plaintiffs John Dudenhoefer and Alireza Partovipanah, participants in and contributors to their employer's retirement plan, filed suit against Fifth Third and several individual Defendants on behalf of themselves and a class of similarly situated individuals alleging violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq. Plaintiffs alleged that plan fiduciaries continued to invest in and hold Fifth Third Stock despite its precipitous decline in value in breach of their fiduciary duties including their duty to prudently and loyally manage the plan's investment in company securities. The district court found Plaintiffs failed to state claims upon which relief could be granted and granted Defendants' Motion to Dismiss the Amended Complaint. This appeal followed. For the following reasons, we **REVERSE** the judgment of the district court and **REMAND** for further proceedings.

I. BACKGROUND

A. Factual History

Because this appeal arises from a decision at the motion to dismiss stage, we draw the facts from the allegations of the Amended Complaint. Plaintiffs John Dudenhoefer and Alireza Partovipanah, former employees of Fifth Third Bank, are plan participants in

the Fifth Third Bancorp Master Profit Sharing Plan ("the Plan") and invested in Fifth Third common stock through the Plan during the class period. The Plan is a defined contribution retirement plan for employees sponsored by Fifth Third, which serves as trustee. Participants make voluntary contributions to the Plan from their salaries and direct the Plan to purchase investments for their individual account from options preselected by the Defendants. During the class period, these options included Fifth Third Stock, two collective funds, or seventeen mutual funds.

Once employees are eligible to participate in the Plan, Fifth Third matches 100% of the first 4% of a participant's compensation contributed as part of the employee's compensation package. Those matching contributions are initially invested in the Fifth Third Stock Fund but may be moved subsequently to the other investment options. The Plan is not invested solely in Fifth Third Stock, nor is it required to be: the Plan Document does not mandate that the Fifth Third Stock Fund invest solely in Fifth Third Stock and does not limit the ability of the Plan fiduciaries to remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock Fund, as prudence dictates. The Plan fiduciaries chose to incorporate by reference Fifth Third's SEC filings into the Summary Plan Description (SPD), an ERISA required communication to Plan participants.

During the class period, a significant amount of the Plan's assets were invested in Fifth Third Stock. Plaintiffs allege that, during this period, Fifth Third switched from being a conservative lender to a subprime lender, its loan portfolio became increasingly

at risk due to defaults, and it either failed to disclose the resulting damage to the company and its Stock or provided misleading disclosures. The price of Fifth Third Stock declined 74% from the beginning of the class period, July 19, 2007 through September 18, 2009, causing the Plan to lose tens of millions of dollars. The Amended Complaint further alleges that: Defendants were aware of the risks presented by its investment in the subprime lending market, citing specific public sources; and business and accounting mismanagement related to these risks, coupled with incomplete and inaccurate statements by Fifth Third executives, caused the price of Fifth Third Stock to be artificially inflated before plummeting. It is alleged that "[a] prudent fiduciary facing similar circumstances would not have stood idly by as the Plan's assets were decimated."

B. Procedural History

On September 21, 2008, Plaintiffs filed an Amended Complaint alleging ERISA violations against Fifth Third; Kevin T. Kabat, Fifth Third's President and Chief Executive Officer during the class period; and members of Fifth Third's Pension, Profit Sharing, and Medical Plan Committee (the "Committee"). Plaintiffs allege each Defendant acted as a fiduciary with respect to the Plan during the class period. The Amended Complaint contains four counts. Count I alleges that: (1) all Defendants breached their fiduciary duties under ERISA by maintaining significant investment in Fifth Third Stock and continuing to offer it as an authorized investment option at a time that they knew or should have known it was imprudent to do so; and (2) the Defendants breached their fiduciary duties by

failing to provide Plan participants with accurate and complete information about Fifth Third and the risks of investment in Fifth Third Stock. Count II alleges that Fifth Third and President/CEO Kabat breached their fiduciary duties under ERISA by failing to properly monitor the performance of their fiduciary appointees. Count III alleges that all Defendants failed to avoid or ameliorate inherent conflicts of interest relating to their management of the Plan. Finally, Count IV alleges that all Defendants are liable for breaches of their co-fiduciaries.

On October 5, 2008, Defendants filed a Motion to Dismiss the Amended Complaint. On November 24, the district court granted the motion, finding that the Amended Complaint failed to state a plausible claim for relief. Specifically, the district court found that the Plan was an employee stock ownership fund ("ESOP") under ERISA and, thus, Defendants benefitted from a presumption that their decision to remain invested in employer securities was reasonable. Applying this presumption at the motion to dismiss stage, the district court found that Count I of the Amended Complaint failed to allege facts to overcome this presumption of reasonableness. The district court also found that Count I of the Amended Complaint failed to the extent it relied on SEC filings incorporated into Plan documents because the court concluded the Defendants did not speak in a fiduciary capacity when those alleged misstatements and omissions were made. Finally, the district court dismissed the remaining Counts based entirely on their dependency on Count I. The district court dismissed the Amended Complaint in its entirety and denied the Plaintiffs' request for leave to amend. Plaintiffs timely appealed.

II. ANALYSIS

A. Standard of Review

This court reviews the district court's order granting a Rule 12(b)(6) motion to dismiss de novo. *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 572 (6th Cir. 2008). In assessing a complaint for failure to state a claim, we must construe the complaint in the light most favorable to the plaintiff, accept all well pled factual allegations as true, and determine whether the complaint "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation and citation omitted).

B. Count I: Violations of ERISA Fiduciary Duties

1. Fiduciary Duties under ERISA for ESOPs

"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 (1983). ERISA safeguards the "financial soundness" of employee benefit plans "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(a), (b). Section 404(a)(1) establishes the fiduciary duties of trustees administering plans governed by ERISA:

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(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;

(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

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. § 1104(a)(1). These fiduciary duties have been broken down into three components. *See 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.* (same). Third, ERISA fiduciaries must act for the exclusive purpose of providing benefits to plan beneficiaries. *Id.* "The duties charged to an ERISA fiduciary are the highest known to the law." *Pfeil v. State Street Bank & Trust Co.*, 671 F.3d 585, 591 (6th Cir. 2012) (citation and alteration omitted). Section 409(a) of 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. 29 U.S.C. § 1109(a).

Congress made certain exceptions to these fiduciary duties for investments by employee stock ownership plans ("ESOPs"), defined under 29 U.S.C. § 1107(d)(6). *See Kuper*, 66 F.3d at 1458. Specifically, Congress eliminated the duty to diversify and the duty of prudence *to the extent that it requires diversification* with respect to investment in employer stock. 29 U.S.C. § 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, these specific statutory exemptions do not relieve ESOP fiduciaries from their remaining fiduciary duties. As we explained in *Kuper*, the 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. (citations omitted) (alterations and omissions in original); *Eaves v. Penn*, 587 F.2d 453, 460 (10th Cir. 1978) ("[T]he legislative history combined with a natural and clear reading of § 404, lead to the inexorable conclusion that ESOP fiduciaries are subject to the same fiduciary standards as any other fiduciary except to the extent that the standards require diversification of investments.").

These competing concerns—administering ESOP investments consistent with the provisions of both a specific employee benefit plan and the comprehensive fiduciary scheme of ERISA—are "particularly evident when an employee claims that a fiduciary breached his ERISA duties by failing to diversify an ESOP." *Kuper*, 66 F.3d at 1458. In recognition of this conflict, 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." *Pfeil*, 671 F.3d at 591 (citing *Kuper*, 66 F.3d at 1459). "A plaintiff may then 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. Our precedent thus establishes the standard that we find strikes the proper balance between the limited exemptions for ESOPs and fulfillment of the remedial purposes of ERISA.

2. Continued Offering of and Failure to Divest the Plan of Fifth Third Stock

The Amended Complaint alleges in Count I that all Defendants breached their ERISA fiduciary duties by continuing to offer and failing to divest the Plan of Fifth Third Stock and by failing to provide complete and accurate information about Fifth Third Stock. These allegations underlie all Counts of the Amended Complaint and we turn now to application of the legal standards to the allegations.

a. Application of the *Kuper* presumption

The district court determined that *Kuper*'s presumption of reasonableness applies at the motion to dismiss stage and was not overcome here. In so holding, it recognized that at the time of its decision, we had not resolved the issue and our district courts were split. This is no longer the case.

In February 2012, we issued our decision in *Pfeil* holding that the *Kuper* presumption "is not an additional pleading requirement and thus does not

apply at the motion to dismiss stage." 671 F.3d at 592. We based our conclusion on "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.'" *Id.* at 592-93 (emphasis added in *Pfeil*) (quoting *Kuper*, 66 F.3d at 1459). We noted that *Kuper* applied the presumption at summary judgment to a fully developed evidentiary record and reasoned that it would be inconsistent to apply the *Kuper* presumption—which concerns questions of fact—at the pleading stage where the court must accept the well pled factual allegations of a complaint as true. *Id.* at 593.

Pfeil recognized that some circuits have reached a different conclusion and apply the presumption of reasonableness at the pleading stage. We specifically distinguished several cases relied on by the district court in this case noting that, "[w]e 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*." *Id.* at 594-95. Unlike these other circuits, we emphasized that the Sixth Circuit has "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.'" *Id.* at 595. When properly applied to a fully developed evidentiary record, *Kuper* only 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. And this unembellished standard makes sense—not just because

it closely tracks the statutory language of § 404(a)(1)(B)—but also because that language imposes identical standards of prudence and loyalty on *all* fiduciaries, including ESOP fiduciaries. Due to this equality of standard, if a "prudent man acting in a like capacity and familiar with such matters" would not have undertaken that conduct at issue, then an ESOP or any other fiduciary may not do so regardless of whether a dire situation, pending bankruptcy, or impending collapse exists. We are not free to limit the standard set by the statute by imposing conditions not present in the statutory language.

Following the teaching of *Pfeil*, we do not apply the *Kuper* presumption of reasonableness to test the sufficiency of Plaintiffs' Amended Complaint. We apply the normal rules of notice pleading under Federal Rule of Civil Procedure 8. Thus, the proper question at the Rule 12(b)(6) stage in this case is whether the Amended Complaint pleads "facts to plausibly allege that a fiduciary has breached its duty to the plan" and a causal connection between that breach and the harm suffered by the plan—"that an adequate investigation would have revealed to a reasonable fiduciary that the investment [in Fifth Third Stock] was improvident." *Pfeil*, 671 F.3d at 596.

b. Sufficiency of Plaintiffs' Allegations

In the Amended Complaint, Plaintiffs allege that by the class period starting date of July 19, 2007, Defendants had knowledge of the 2007 warnings by industry watchdogs of subprime lending practices, the rise of foreclosures and delinquency rates in real estate loans, several published articles warning of the risks of

loosening standards in order to invest in the subprime lending market, and the closure of several mortgage companies due to their investment in the subprime mortgage industry. The Amended Complaint specifically enumerates and describes these warnings and public information of which the Defendants were aware. Plaintiffs allege this knowledge should have led Defendants to investigate whether Fifth Third Stock was still a prudent investment given its own exposure to the subprime lending. In addition to overexposure to subprime lending, the Amended Complaint also alleges Fifth Third Stock was an imprudent investment option because of company mismanagement and lack of sound leadership. Plaintiffs allege that Defendants knew or should have known of the existence of these problems because of their high-ranking positions within the company. The Amended Complaint alleges Fifth Third's participation in the U.S. Government's Troubled Asset Relief Program ("TARP") is further evidence that the company was in a weakened financial condition and an imprudent investment.[1]

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[1] In *Pfeil*, we gave examples of a court's temptation "to consider facts and evidence that have not been tested in formal discovery" when applying the *Kuper* presumption to a motion to dismiss. *Pfeil*, 671 F.3d at 593-94. For example, evidence presented by State Street, the defendant in *Pfeil*, in its motion to dismiss allegedly showed the government was expected to intervene on behalf of the company, which State Street argued showed that it was not unreasonable for the plans to continue to hold company stock during the class period. *Id.* We noted that "[t]he 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." *Id.* Therefore, the district court erred to the extent it weighed Plaintiffs' alleged evidence of

As *Pfeil* explained, Plaintiffs need only allege a fiduciary breach and a causal connection to losses suffered by the Plan. They do so here. Plaintiffs allege that Fifth Third engaged in lending practices that were equivalent to participation in the subprime lending market, that Defendants were aware of the risks of such investments by the start of the class period, and that such risks made Fifth Third Stock an imprudent investment. Plaintiffs allege the price of Fifth Third Stock dropped 74% during the class period. The Amended Complaint also expressly alleges that "[a]n adequate (or even cursory) investigation would have revealed to a reasonable fiduciary that investment by the Plan in Fifth Third Stock was clearly imprudent. A prudent fiduciary acting under similar circumstances would have acted to protect participants against unnecessary losses, and would have made different investment decisions."

Based on the foregoing, the Amended Complaint plausibly alleges a claim of breach of fiduciary duty and the requisite causal connection under Count I regarding Defendant's failure to divest the Plan of Fifth Third Stock and remove that stock as an investment option. *See Pfeil*, 671 F.3d at 596.

3. Failure to Provide Complete and Accurate Information About Fifth Third Stock

"[A] claim based on the purported material misrepresentations of fiduciaries is a classic

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Fifth Third's participation in the TARP program and its effect on the reasonableness of holding Fifth Third Stock.

breach-of-fiduciary-duty claim under ERISA." *Pfahler v. Nat'l Latex Prods. Co.*, 517 F.3d 816, 826 (6th Cir. 2007). "As one would expect, lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in § 404(a)(1)." *Gregg*, 343 F.3d at 843 (citation, alteration, and internal quotation marks omitted). A fiduciary also may not materially mislead beneficiaries. *Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996). We have explained that "a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision in pursuing . . . benefits to which she may be entitled." *Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 547 (6th Cir. 1999) (citation omitted). ERISA fiduciary duty provisions incorporate the common law of trusts, and the "duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." *Id.* at 548 (quoting *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993)). Significantly, "a fiduciary breaches its duties by materially misleading plan participants, regardless of whether the fiduciary's statements or omissions were made negligently or intentionally." *Id.* at 547.

The threshold question in all cases charging breach of ERISA fiduciary duty is whether the defendant was "acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). A defendant's fiduciary status is also an element of a claim of misrepresentation. To establish a claim for breach of fiduciary duty based on alleged

misrepresentations, a plaintiff must show that: (1) defendant was acting in a fiduciary capacity when it made the challenged statements; (2) the statements constituted material misrepresentations; and (3) plaintiff relied on them to his/her detriment. *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 449 (6th Cir. 2002). "Whether the communications constituted misrepresentations and whether they were material . . . are questions of fact that are properly left for trial." *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 443 (3d Cir. 1996); *see James*, 305 F.3d at 455 ("[W]ith respect to the situation presented when an employer on its own initiative disseminates false and misleading information about a benefit plan, the position of the Sixth Circuit is aligned with that of the Third Circuit in *Unisys*.").

The district court held that Plaintiffs' disclosure claim in Count I failed because Defendants' alleged misstatements and omissions were not made in a fiduciary capacity when Defendants expressly incorporated Fifth Third's SEC filings into Plan documents. The court's conclusion is broader than its reasoning, which focused on the filing of SEC documents *with the SEC*, not on the decision of Defendants to *incorporate those filings into the Plan documents*. Plaintiffs concede that the preparation, signing, and filing of SEC documents are not fiduciary acts under ERISA. *See In re World Com, Inc.*, 263 F. Supp. 2d 745, 766 (S.D.N.Y. 2003). The issue here is Plaintiffs' allegation that Defendants violated their fiduciary duties when they chose to incorporate SEC filings into ERISA Plan documents.

The Defendants expressly incorporated by reference specifically named SEC filings into the Plan's summary plan description ("SPD"). An SPD, a document ERISA requires to be sent to plan participants to provide specified information about the plan, is unquestionably a fiduciary communication. *See* 29 U.S.C. § 1022. Defendants chose to provide Plan participants with selected information—alleged to include misrepresentations about Fifth Third and its Stock—by incorporating only specifically enumerated SEC filings and specific future filings into the SPD:

> The SEC allows us to "incorporate by reference" into this booklet the information we file with it, which means that we can disclose important information to you by referring you to those documents. The information incorporated by reference is an important part of this booklet, and information that we subsequently file with the SEC will automatically update and supersede information in this booklet and in our other filings with the SEC. In other words, in case of a conflict or inconsistency between information contained in this booklet and information incorporated by reference into this booklet, you should rely on the information that was filed later.

Am. Compl., Ex. A, SPD of Fifth Third Bancorp at 44.

The Defendants correctly make no broad challenge to their status as fiduciaries with respect to the preparation of Plan documents. The Amended Complaint alleges Fifth Third was the trustee of the Plan and exercised responsibility through the

Committee for communicating with Plan participants and, in this fiduciary capacity, disseminated the Plan documents, including the Plan SPD to participants. The Amended Complaint also plausibly alleges that Kabat, President and CEO of Fifth Third, is a de facto fiduciary in light of his authority to augment the Plan Committee's powers and responsibilities, authority to appoint Committee members, and authority to resolve issues left unresolved by the Committee. *See Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 438 (6th Cir. 2006) (holding that plan fiduciaries include those "who exercise[] discretionary control or authority over a plan's management, administration, or assets"); 29 U.S.C. § 1002(21)(A). Finally, as named Plan administrator during the class period, the Plan Committee was correctly alleged to be a fiduciary. 29 U.S.C. § 1102(a)(1).

Although properly alleged to be fiduciaries with respect to the Plan, Defendants argue that they were not acting in a fiduciary capacity when they incorporated the SEC filings into the Plan documents. The district court identified *Varity Corp. v. Howe*, 516 U.S. 489 (1996), as an important precedent on the question of whether an employer was acting in a fiduciary capacity when making statements about a company's financial health. In *Varity*, the Court found that a defendant employer engaged in plan administration—therefore acting in a fiduciary capacity—when he intentionally connected his statements about the financial health of a division of the company to statements about the future of plan benefits. *Id.* at 504. In applying *Varity*, the district court only looked to the initial filing of the SEC disclosures and found "no factual allegations, however,

which indicate that the speaker was intentionally connecting his statements about Fifth Third's financial condition to the Fifth Third Stock Fund." Though *Varity* contains some applicable law, it primarily addresses the determination of when employer statements made outside the course of plan administration rise to the level of fiduciary communications. Such is not the case here. The Defendants were engaged in Plan administration: they were undertaking an ERISA-mandated fiduciary duty—the provision of information to Plan participants through the required SPD. See 29 U.S.C. § 1022. In this context, our job is to inquire whether the Amended Complaint plausibly alleged that Defendants committed a breach of fiduciary duty when, under the facts alleged, they chose to incorporate by reference Fifth Third's SEC filings into the Plan's SPD.

No circuit court has answered the question of whether the express incorporation of SEC filings into an ERISA-mandated SPD is a fiduciary communication. Defendants rely extensively on *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243 (5th Cir. 2008), but the case provides no authority on this issue. The Fifth Circuit there addressed the question of whether the incorporation of SEC filings into a plan's prospectus is a fiduciary communication. It reasoned that the misrepresentations were not actionable under ERISA because they were only contained in the plan's prospectus and Form S-8 registration, and the defendant was obligated to file those documents under the securities laws and did not disseminate them to the plan participants. *Id.* at 257; *accord Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1283-84 (11th Cir. 2012) (incorporation of SEC filings into Form S-8 and stock

prospectus are not fiduciary acts). That is not the case before us. And our case is the very situation the Fifth Circuit in *Kirschbaum* recognized was not before it. 526 F.3d at 257 (distinguishing a district court case where an employer "had used the 10a Prospectus as the Summary Plan Description ('SPD') for ERISA purposes," noting that "Kirschbaum makes no such claim, and the record reveals that the REI defendants issued a separate document to serve as the SPD") (citing *In re Dynegy, Inc. Erisa Litig.*, 309 F. Supp. 2d 861 (S.D. Tex. 2004)). Thus, *Kirschbaum* is, on its face, inapplicable.

We next review cases within our Circuit. A majority of district courts in this Circuit have found that incorporation of SEC filings into plan documents is a fiduciary act. *Compare Griffin v. Flagstar Bancorp, Inc.*, No. 2:10-cv-10610, 2011 WL 1261196, at *17 (E.D. Mich. Mar. 31, 2011) (dismissing the case under Rule 12(b)(6) but recognizing the principle that if certain financial information is distributed by a defendant or incorporated into plan documents, that information must be complete and accurate), *overruled by Griffin v. Flagstar Bancorp, Inc.*, 2012 WL 2989231 (6th Cir. July 23, 2012) (reversing the district court's dismissal under Rule 12(b)(6) because the complaint set forth a "plausible claim for breach of fiduciary duty"), *and In re Regions Morgan Keegan ERISA Litig.*, 692 F. Supp. 2d 944, 955 (W.D. Tenn. 2010) ("[S]ince it is universally accepted that ERISA fiduciaries are liable for making misrepresentations in plan documents, they should also be prohibited from incorporating into plan documents other documents that make material misrepresentations about the company and then disseminating those misrepresentations to plan

participants." (quoting *Taylor v. KeyCorp*, 678 F. Supp. 2d 633, 642 (N.D. Ohio 2009))), *and In re General Motors ERISA Litig.*, No. 05-71085, 2007 WL 2463233, at *6 (E.D. Mich. Aug. 28, 2007) (holding that defendants were engaged in acts of plan administration when they produced plan documents referencing various SEC filings that were allegedly misleading), *with Benitez v. Humana, Inc.*, No. 3:08CV-211-H, 2009 WL 3166651, at *10 n.6 (W.D. Ky. Sept. 30, 2009) ("[T]he preparation of SEC filings is not a fiduciary act for purposes of ERISA, even if the SEC filings are incorporated by reference into ERISA documents."). The majority line of cases correctly resolves this issue.

The Amended Complaint plausibly alleges Defendants breached their fiduciary duties by intentionally incorporating Fifth Third's SEC filings into the Plan's SPD and thereby conveying misleading information to Plan participants. ERISA requires the issuance of an SPD, but does not require the incorporation of a company's SEC filings into the SPD. *See* 29 U.S.C. § 1022. Defendants exercised discretion in choosing to incorporate the filings into the Plan's SPD as a direct source of information for Plan participants about the financial health of Fifth Third and the value of its stock, an investment option in the Plan. *See Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 666 (6th Cir. 1998) (distinguishing between business and fiduciary decisions, and stating that "[a]n employer is said to act in a fiduciary capacity when it communicates with employees about their benefits because, in essence, the employer puts on its plan administrator hat and undertakes action designed to carry out an important purpose of the plan"). The SPD is a fiduciary communication to plan participants and

selecting the information to convey through the SPD is a fiduciary activity. Moreover, whether the fiduciary states information in the SPD itself or incorporates by reference another document containing that information is of no moment. To hold otherwise would authorize fiduciaries to convey misleading or patently untrue information through documents incorporated by reference, all while safely insulated from ERISA's governing reach. Such a result is inconsistent with the intent and stated purposes of ERISA—to impose fiduciary duties "which are the highest known to the law," *Pfeil*, 671 F.3d at 591—and would create a loophole in ERISA large enough to devour all its protections.

We hold that Count I of the Amended Complaint—including the allegations that Defendants breached their fiduciary duties (1) by continuing to offer Fifth Third Stock as a Plan investment option and failing to divest the Plan of the Stock and (2) by providing false and misleading information and failing to provide complete and accurate information about the Stock to Plan participants—states a claim upon which relief may be granted.[2] The allegations of Count I easily

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[2] Defendants argue that to the extent Plaintiffs allege the Defendants failed to timely disclose adverse corporate information, the Plaintiffs could not show loss causation. The district court agreed, concluding that under the efficient market theory any disclosed negative information would have been immediately assimilated by the market and reflected in the price of Fifth Third Stock. This argument is ill-timed and without merit. Whether losses would have been more or less significant following timely disclosure is speculative and, even if the question raised issues of causation and damages, such would be inappropriate for resolution

satisfy the requirements that there be a plausible allegation that a fiduciary breached its duty to the plan and a causal connection between that breach and the harm suffered by the plan.

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at the motion to dismiss stage. *See Taylor v. KeyCorp*, 678 F. Supp. 2d 633, 643 (N.D. Ohio 2009) (quoting *In re Ferro Corp. ERISA Litig.*, 422 F. Supp. 2d 850, 863 (N.D. Ohio 2006)). Further, as courts have recognized:

> Assuming that Defendants in fact concealed and misrepresented material information on [the company stock], it is not evident that full public disclosure of the true facts would not have prevented as [sic] least some of the losses allegedly incurred by the Plan. Disclosure might not have prevented the Plan from taking a loss on [company] stock it already held; but it would have prevented the Plan from acquiring (through Plaintiffs' uninformed investment decisions and through continued investment of matching contributions) additional shares of overpriced [company] stock: the longer the fraud continued, the more of the Plan's good money went into a bad investment; and full disclosure would have cut short the period in which the Plan bought at inflated prices.

In re Honeywell Int'l ERISA Litig., No. 03-1214, 2004 WL 3245931, at *12 (D.N.J. Sept. 14, 2004); *id.* at *12 n.17 ("In addition, as Plaintiffs suggest, although the Plan could not have sold Honeywell stock without full disclosure, it could have refrained from purchasing more without such disclosure."); *see also Pietrangelo v. NUI Corp.*, No. 04-3223, 2005 WL 1703200, at *4 (D.N.J. July 20, 2005) (holding that the efficient market theory is inapplicable at the motion to dismiss stage and noting that defendants "could have minimized Plan losses without disclosing adverse information by simply removing NUI stock as an investment option"). For these reasons, an efficient market theory does not foreclose Plaintiffs' ability to establish damages or loss causation.

C. Counts II, III, and IV of the Amended Complaint

Because the district court erred in dismissing Plaintiffs' prudence and disclosure claims under Count I, we reverse and remand the case. In its ruling below, the district court did not substantively analyze the plausibility of Counts II through IV because it found them derivative of Count I, which the court found deficient. These remaining Counts do present claims dependent upon the fiduciary breach allegations of Count I that we have found plausibly state a claim for relief. Based on our holding, we return Counts II through IV to the district court to address in accordance with the principles stated herein.

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the district court judgment dismissing the Amended Complaint and **REMAND** for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11-3012

[Filed September 5, 2012]

JOHN DUDENHOEFER, on behalf of himself and all others similarly situated; ALIREZA PARTOVIPANAH,
Plaintiffs - Appellees,

v.

FIFTH THIRD BANCORP; KEVIN T. KABAT; PAUL L. REYNOLDS; THE PENSION AND PROFIT SHARING COMMITTEE; NANCY PHILLIPS; GREG CARMICHAEL; ROBERT SULLIVAN; MARY TUUK; JOHN DOES 1–20,
Defendants - Appellees.

Before: COOK and STRANCH, Circuit Judges; LAWSON, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court dismissing the Amended Complaint is REVERSED, and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 1:08-CV-538

[Filed November 24, 2010]

John Dudenhoeffer,)
)
Plaintiff,)
)
vs.)
)
Fifth Third Bancorp, et al.,)
)
Defendants.)
)

O R D E R

This matter is before the Court on Defendant Fifth Third Bancorp, et al.'s motion to dismiss the amended consolidated class action complaint (Doc. No. 56). For the reasons that follow, Defendants' motion to dismiss is well-taken and is **GRANTED.**

I. Background

Plaintiffs John Dudenhoeffer and Alireza Partovipanah, both former employees of Fifth Third Bancorp, filed suit against Defendant Fifth Third Bancorp and several individual Defendants[1] on behalf on themselves and a class of similarly-situated individuals for alleged violations of the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq. Plaintiffs are participants in the Fifth Third Bancorp Master Profit Sharing Plan ("the Plan") and invested in Fifth Third common stock through the Plan during the class period.

The complaint has four counts. Count I generally alleges that Defendants breached their fiduciary duty to Plaintiffs and the class, in violation of 29 U.S.C. § 1109, by maintaining Fifth Third stock as an investment option after it become imprudent to do so. Count I also alleges that Defendants breached their fiduciary duty by failing to provide complete and accurate information to the plan participants about Fifth Third's financial condition and the prudence of investing in Fifth Third stock. Finally, Count I alleges that Defendants breached their fiduciary duty to plan participants by maintaining its pre-existing investment in Fifth Third stock, i.e., not divesting the Plan of Fifth Third stock, after it became an imprudent investment for the Plan.

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[1] The individual Defendants are Kevin T. Kabat, Fifth Third's Chief Executive Officer and President, the members of Fifth Third's Pension, Profit Sharing and Medical Plan Committee, Paul L. Reynolds, Nancy Phillips, Greg Carmichael, Robert Sullivan, Mary Tuuk, and other John Doe Defendants.

Count II alleges that some of the individual Defendants breached their fiduciary duties to the plan participants by failing to monitor the performance of persons charged with managing the Plan's assets despite their knowledge that investing in Fifth Third stock was an imprudent option.

Count III alleges that some of the individual Defendants violated ERISA by failing to avoid or ameliorate conflicts of interest, which in turn allegedly compromised their ability to act in the best interests of the plan participants.

Count IV alleges that Defendants breached their fiduciary duties to the plan participants by failing to correct known breaches of fiduciary duties, by participating in breaches of fiduciary duty, or enabling breaches of fiduciary duty, in violation of 29 U.S.C. § 1105.

The complaint sets out in detail the nature and operation of the Plan. Consolidated Class Action Complaint (Doc. No. 54) ¶¶ 37-51. Generally, however, the Plan is a defined contribution profit sharing plan with a 401(k) feature. Plan participants can make contributions to the Plan and can direct the Plan to make investments in any one of 20 separate investment funds, including one fund that invests entirely in Fifth Third common stock, except for short-term liquid assets to accommodate the liquidity needs of the fund. Fifth Third also matches up to 4% of each employee's pre-tax contributions. The matching contributions are invested initially in the Fifth Third Stock Fund, but participants have the right to move these contributions to other funds. Although the

parties dispute this point, as the Court explains infra, at 6-10, the Fifth Third Stock Fund of the Plan is an employee stock ownership fund ("ESOP") under ERISA.

The complaint contains 281 paragraphs and is 78 pages long. The alleged breaches of fiduciary duty generally arise, however, out of the same fact pattern set forth in Eshe Fund v. Fifth Third Bancorp, Case No. 1:08-CV-421 (S.D. Ohio) (Beckwith, S.J.), a securities fraud class action that has been consolidated with this one for purposes of discovery. For present purposes, it is sufficient to note that the complaint alleges that during the class period, Fifth Third switched from being a conservative lender to a subprime lender. As a result, Fifth Third's loan portfolio became increasingly at risk due to defaults. The complaint alleges that this change in lending philosophy and/or mismanagement of the company made investing in Fifth Third common stock too risky for a retirement plan, that Defendants knew or should have known that Fifth Third stock was too risky, that they should have stopped further investment of Plan assets in Fifth Third stock, and that they should have divested the Plan of Fifth Third stock. The complaint alleges that the price of Fifth Third stock declined 74% from the beginning of the class period, July 19, 2007, through September 18, 2009. Complaint ¶ 50.

Defendants now move to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. This motion has been fully briefed and is now ready for disposition.

II. Rule 12(b)(6) Standard of Review

A motion to dismiss for failure to state a claim operates to test the sufficiency of the complaint. The trial court must construe the complaint in the light most favorable to the plaintiff, and accept as true all well-pleaded factual allegations. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), and Roth Steel Products v. Sharon Steel Corp., 705 F.2d 134, 155 (6th Cir. 1983). The court need not accept as true legal conclusions or unwarranted factual inferences. Lewis v. ACB Business Servs., Inc., 135 F.3d 389, 405 (6th Cir. 1998).

The complaint, however, must contain more than labels, conclusions, and formulaic recitations of the elements of the claim. Sensations, Inc. v. City of Grand Rapids, 526 F.3d 291, 295 (6th Cir. 2008) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The factual allegations of the complaint must be sufficient to raise the right to relief above the speculative level. Id. Nevertheless, the complaint is still only required to contain a short, plain statement of the claim indicating that the pleader is entitled to relief. Id. (citing Erickson v. Pardus, 551 U.S. 89, 93 (2007)). Specific facts are not necessary and the pleader is only required to give fair notice of the claim and the grounds upon which it rests. Id. To withstand a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks omitted). Mere conclusions, however, are not entitled to the assumption of truth. Id. at 1950. A claim is facially plausible if it contains content which allows the court

to draw the reasonable inference that the defendant is liable for the misconduct alleged. Id. at 1949. Plausibility is not the same as probability, but the complaint must plead more than a possibility that the defendant has acted unlawfully. Id. If the complaint pleads conduct which is only consistent with the defendant's liability, it fails to state a plausible claim for relief. Id.

III. Analysis

Defendants' motion to dismiss starts with the premise that the Fifth Third Stock Fund is an ESOP. Because this fund is an ESOP, Defendants argue, they are entitled to a presumption that their decision to maintain the investment in, and decision not to divest the fund of, Fifth Third common stock is entitled to deference. Moreover, Defendants argue, the complaint fails to allege facts which overcome the presumption that investment in Fifth Third stock was reasonable. Thus, Defendants continue, the breach of fiduciary duty claims alleged in Count I fail as a matter of law. Additionally, Defendants argue, because the remaining breach of fiduciary duty claims are derivative of or dependent on Count I, they fail as well. The Court agrees.

B. Breach of Fiduciary Duty Concerning Retaining Fifth Third Stock as an Investment Option for the Plan

1. The Fifth Third Stock Fund is an ESOP

The first issue that needs to be resolved is whether the Fifth Third Stock Fund is an ESOP. Fifth Third

initially argues that Plaintiffs are not entitled to litigate this issue because then-Magistrate Judge Black determined in an earlier case, Shirk v. Fifth Third Bancorp, No. 05-CV-049, 2009 WL 692124, at *11 (S.D. Ohio Jan. 29, 2009), that the Fifth Third Stock Fund is an ESOP. Plaintiffs argue that Judge Black's decision is not res judicata on this issue because they were not parties in Shirk. The Court need not, however, resolve the collateral estoppel issue because the Fifth Third Stock Fund plainly is an ESOP.

An ESOP is "a stock bonus plan which is qualified, or a stock bonus plan and money purchase plan both of which are qualified, under section 401 of Title 26, and which is designed to invest primarily in qualifying employer securities[.]" 29 U.S.C. § 1107(d)(6)(A). The Sixth Circuit apparently has not addressed whether the ESOP determination is a question of law that can be decided at the pleading stage by reviewing the plan documents or whether it is a question of fact to be decided sometime after fact discovery is completed. District courts in the Sixth Circuit have reached opposition conclusions. See In re Ford Motor Co. ERISA Litigation, 590 F. Supp.2d 883, 903 (E.D.Mich. 2008) (question of law for trial court); In re General Motors ERISA Lit., No. 05-71085, 2006 WL 897444 at *7 (E.D.Mich. Apr. 6, 2006) (same); In re Diebold Erisa Lit., No. 5:06-CV-0170, 2008 WL 2225712, at *8 (N.D. Ohio May 28, 2008) (fact questions preclude determination of plan's ESOP status at pleading stage); Shirk v. Fifth Third Bancorp, No. 05-cv-49, 2007 WL 1100429, at *9 (S.D. Ohio Apr. 10, 2007) (Black, M.J.)

(same).[2] Generally, however, interpretation of an ERISA plan is made by simply reviewing the language of the plan. Kolkowski v. Goodrich Corp., 448 F.3d 843, 850 (6th Cir. 2006). Resort to extrinsic evidence to aid in interpretation is permissible only when the terms of the plan are ambiguous. Id. Thus, in this case, unless review of the pertinent plan provisions reveals some ambiguity, this Court sides with those decisions that have concluded that whether the plan is an ESOP can be determined at the motion to dismiss stage by reviewing the plan documents.

As indicated, in order to qualify as an ESOP, the plan must "invest primarily in qualifying employer securities" and meet such other requirements as are prescribed by 26 U.S.C. § 401. See, supra. Here, Section 7.4 of the Plan designates the "Fifth Third Stock Fund" as an investment option and states that the "fund shall be primarily invested in shares of common stock of Fifth Third Bank." Fifth Third Bancorp Master Profit Sharing Plan § 7.4(a) (Doc. No. 54-5, at 39). And, indeed, the ESOP Annual Information Schedule filed with Fifth Third's IRS Form 5500 indicates that the fund invests only in Fifth Third common stock. Doc. No. 56-6, at 11-13. The other principal requirement is that the plan document must formally designate the plan as an ESOP. 29 C.F.R. § 2550.407d-6(a)(2). The Plan also meets this requirement because Section 1.2

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[2] Interestingly, however, although then-Magistrate Judge Black determined in this order that whether the plan is an ESOP cannot not be determined at the motion to dismiss stage, at the summary judgment stage he determined that the plan was an ESOP almost solely by reference to the plan documents. See Shirk, 2009 WL 692124, at *11.

states that the Fifth Third Stock Fund "shall constitute a stock bonus plan and an employee stock ownership plan as defined in section 4975(e)(7) of the Code, designed to invest primarily in qualifying employer securities." Doc. No. 56-2, at 3. Thus, the Fifth Third stock fund unambiguously is an ESOP.

Plaintiffs argue, however, that this fund is not an ESOP because overall Section 3.3(a) of the Plan allows the plan administrator to discontinue or change investment options when it becomes prudent to do so. Additionally, Plaintiffs point out that § 7.4 of the Plan actually allows investment in short-term liquid assets. Neither of these arguments alter the conclusion that the Fifth Third Stock Fund is an ESOP. Regarding the latter argument, the authority to invest in short-term liquid assets clearly is simply a provision to allow the plan administrator to have cash or cash-equivalents in hand to pay out anticipated distributions. There is no indication that the Plan intended short-term liquid assets to be an alternative investment option for this fund. The former provision cited by Plaintiffs does nothing more than recognize that the plan administrators have an ongoing duty to monitor the performance of the investment funds selected for the Plan. This section, however, does not affect the characterization of the stock fund as an ESOP because the principal inquiry is not whether the plan administrators have authority to discontinue the fund, but rather whether it "invest[s] primarily in qualifying employer securities." As just stated, the record indicates that the Fifth Third Stock Fund is intended to and does invest primarily in Fifth Third common stock.

Accordingly, the Court concludes that the Fifth Third stock fund is an ESOP.

2. ESOPs and Breach of Fiduciary Duty Claims

The determination that the Fifth Third Stock Fund is an ESOP is an important one because it affects the consideration of whether the plan administrators fulfilled their fiduciary duties to the plan participants.

The case ultimately controlling the disposition of Defendants' motion to dismiss on this issue is Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995). Kuper discussed in some detail an appropriate way to reconcile the statutory exemption of ESOPS from ERISA's diversification requirements from ERISA's overall requirement that fiduciaries must act in the best interests of plan participants at all times and properly manage employee benefit plans. Id. at 1457-59. The Court need not recapitulate all of that analysis here. It is sufficient for present purposes to state that the Kuper Court held that if the plan is an ESOP, the plan fiduciaries start with a presumption that their "decision to remain invested in employer securities was reasonable." Id. at 1459. In other words, the plan administrator's decision to remain invested in employer securities presumptively is not a breach of fiduciary duty. The plaintiff may overcome "this presumption of reasonableness by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision." Id. Thus, in this case, Defendants start with a presumption that their decision to remain invested in Fifth Third stock was reasonable. Consequently, in order to state a claim for breach of fiduciary duty, Plaintiffs must plead facts

sufficient to overcome the presumption of reasonableness.

Plaintiffs argue that it is inappropriate to apply the Kuper presumption at the motion to dismiss stage and cite various district court cases to that effect. This question also presents another split of authority among district courts. Cf. In re The Goodyear Tire & Rubber Co. ERISA Lit., 438 F.Supp.2d 783, 793 (N.D. Ohio 2006) (identifying split). In light of Twombly and Iqbal, however, if the plan at issue is an ESOP, as in this case, there really is no choice but to apply the Kuper presumption at the pleading stage. As stated above, Twombly and Iqbal require the complaint to state a claim that is plausible on its face. If an ESOP plan fiduciary starts with a presumption that the decision to remain invested in plan securities was reasonable, then a claim for breach of fiduciary duty only becomes plausible if there are sufficient facts alleged to conclude that "a prudent fiduciary acting under similar circumstances would have made a different investment decision." A number of courts have reached the same conclusion for more or less the same reason. See In re Citigroup Erisa Lit., No. 07 Civ. 9790, 2009 WL 2762708, at *16 (S.D.N.Y. Aug. 31, 2009) (collecting cases); see also Morrison v. MoneyGram Int'l, Inc., 607 F. Supp.2d 1033, 1052 (D.Minn. 2009) ("To say that the presumption of prudence 'applies' at the pleading stage is just another way of saying that plaintiffs must allege sufficient facts to demonstrate that they have a non-speculative claim that the fiduciary abused its discretion (or otherwise acted in a manner that would overcome the [Kuper] presumption)."). Accordingly, the Court concludes that the Kuper presumption of prudence may be applied at the pleading stage.

3. The Complaint Fails to Allege Facts Which Overcome the Presumption of Reasonableness

The next question that arises is what kind of facts must the plaintiff allege to overcome the presumption of reasonableness. In Kuper, the Court held that the following facts were insufficient to overcome the presumption of reasonableness: 1) defendants admitted that they did not consider diversifying or liquidating the ESOP despite their knowledge of the company's financial difficulties; 2) the company's CEO had sold all of his shares of company stock; and 3) the company should have considered diversifying or liquidating the ESOP when transfer of their ESOP shares to the purchaser of their particular division was delayed (plaintiffs claimed at the point of sale of their division, they no longer had the same interest in the company that they had while employees of the company). 66 F.3d at 1459. With respect to the plaintiffs' first contention, the Court held that in order for a fiduciary to be liable for failure to investigate other investment options, the plaintiff must also show that a reasonable investigation would have shown that the investment at issue was imprudent. Id. at 1459-60. In that particular case, which was decided on summary judgment, the Court held that plaintiffs had failed to show that holding onto the company stock was imprudent because defendants had shown that the price of the stock fluctuated during the class period and several investment advisors recommended holding it. Id.

Kuper appears to be the only Sixth Circuit decision which discusses whether the plaintiffs have adduced sufficient facts to overcome the presumption of reasonableness. The other Circuit Courts have not laid

down a general rule of applicability either. They do, however, tend to use the facts in Moench v. Robertson, 62 F.3d 553 (3rd Cir. 1995), the case which first articulated the reasonableness presumption adopted in Kuper, as a baseline for comparison. In Moench, where the Court remanded the case for further development of the record in light of its new presumption of reasonableness standard, the plaintiffs had adduced facts showing that the company stock had declined from $18.25 to less than $.25 per share in a two-year period, federal regulators had warned the company directors that the company was on the verge of collapse, there were various regulatory violations, the FDIC eventually took over the company, and the company ultimately filed for bankruptcy under Chapter 11. See id. at 557.

Thus, in Edgar v. Avaya, Inc., 503 F.3d 340 (3rd Cir. 2007), while the Court pointed out that it had never held that the company had to be on the brink of bankruptcy before divesting a plan of employer securities was required, it concluded that plaintiff had failed to allege facts showing that the company was in a "dire situation" requiring it to discontinue offering company stock and divesting the plan of company securities. Id. at 348, 349 n.13. The facts that plaintiff relied on were that the costs of integrating an acquisition into the company were higher than publicly represented, the acquisition had a negative effect on the company's earnings, changes to the method of delivering products were causing severe disruptions in service, and there was a drastic reduction in demand for the company's products. Id. at 348. The Court concluded that these were "bare allegations of fraud and other wrongdoing" which were insufficient to

overcome the presumption of reasonableness, particularly where the price of the stock rebounded within about 2 months of the company's disappointing earnings release. Id. at 348 n.13.

In Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243 (5th Cir. 2008), the price of company stock dropped about 40% when it was revealed that some employees were engaged in fraudulent energy transactions which had the effect of inflating the company's earnings by about 10% over a three-year period. Id. at 247. The Court concluded, however, that the plaintiffs had failed to overcome the presumption of reasonableness because "[t]here [was] no indication that REI's viability as a going concern was ever threatened or that REI's stock was in danger of essentially becoming worthless." Id. "This is a far cry," the Court stated, "from the downward spiral in Moench, and much less grave than facts other courts routinely conclude are insufficient to rebut the Moench presumption." Id.

In Wright v. Oregon Metallurgical Corp., 360 F.3d 1090 (9th Cir. 2004), the Court concluded that plaintiff had failed to allege facts sufficient to overcome the Moench presumption.[3] There, the company's merger with another company, followed by a reverse stock split, caused the price of the company stock to drop from $28.94 per share to $7.94, per share. Id. at 1095-96. The Court concluded that these facts were

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[3] It should be noted that in Wright, the Court only assumed that the Moench standard applied but it did not specifically adopt the standard in that opinion. See Wright, 360 F.3d at 1097, 1097 n.3. The Ninth Circuit did, however, adopt Moench in a recent decision. See Quan v. Computer Serv. Corp., 623 F.3d 870 (9th Cir. 2010).

insufficient to overcome the presumption of reasonableness because the case "did not present a situation where a company's financial situation is seriously deteriorating and there is a genuine risk of self-dealing." Id. at 1098. The Court noted further that the company's published earnings and financial statements "demonstrate that Oremet was a far cry from the sort of deteriorating financial circumstances involved in Moench and was, in fact, profitable and paying substantial dividends throughout that period." Id. at 1099. The Court stated that "mere stock fluctuations, even those that trend downward significantly, are insufficient to establish the requisite imprudence to rebut the Moench presumption." Id.

In this case, although the complaint's allegations perhaps demonstrate that Fifth Third's foray into subprime lending was ill-conceived and ill-considered, in light of the comparators just discussed, the Court concludes that Plaintiffs have failed to allege facts which overcome the presumption that Defendants' decision to remain invested in Fifth Third stock was reasonable. The complaint demonstrates that Fifth Third took substantial write-downs of non-performing assets during the class period and that it was required to take measures to bolster its Tier 1 capital, including selling shares of preferred stock to the government under the Capital Purchase Program.[4] The complaint

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[4] The complaint states that Fifth Third's sale of preferred securities to the government occurred under the Troubled Asset Relief Program ("TARP") and is evidence of Fifth Third's weakened financial condition. Complaint ¶ 178. The complaint then goes on to provide the definition of "troubled assets." While a component of the TARP program, the sale of preferred securities to the

also demonstrates that the price of Fifth Third stock declined during the class period from $25.61 in December 2007, Complaint ¶ 50, to a low of $2.85 per share on January 22, 2009. Complaint ¶ 177. The complaint also shows, however, that the price of Fifth Third rebounded substantially from that low and was trading at $10.24 per share as of September 18, 2009. Complaint ¶ 50. Nevertheless, the 75% decline in the price of Fifth Third stock during the class period alleged by the complaint is commensurate with declines in the stock prices in the cases discussed above which were insufficient as a matter of law to overcome the presumption of prudence. E.g. Wright, 360 F.3d at 1095-96 (72% decline in price insufficient to overcome presumption of reasonableness).

On the other hand, the complaint states that Fifth Third is "a diversified financial services company" with "16 affiliates and 1,311 full-service Banking Centers." Complaint ¶ 28. In other words, the complaint suggests that Fifth Third is and was a viable, on-going concern despite the problems created by its alleged subprime loan portfolio. Plaintiffs dispute the relevance of Fifth Third's viability in assessing the prudence of maintaining employer securities in the Plan, Doc. No. 59, at 43, and thus, as Defendants point out, apparently do not dispute that Fifth Third was not in danger of collapsing during the class period. Plaintiffs

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government occurred under the Capital Purchase Program and did not involve a direct purchase of toxic assets or bad loans by the government. Thus, the complaint incorrectly implies that the government acquired Fifth Third's bad loans. As explained further, infra, only viable and financially healthy financial institutions were permitted to participate in the Capital Purchase Program.

could not be more wrong, however, about the relevance of Fifth Third's ongoing viability to the issue whether they can overcome the presumption of prudence. As the cases discussed supra indicate, the fact that the company remained viable despite a substantial drop in the stock price is a strong indicator that no breach of fiduciary duty occurred by remaining invested in employer securities.

While the complaint relies on allegations that some analysts downgraded Fifth Third stock from "hold" to "sell" or otherwise recommended against purchasing Fifth Third stock to establish imprudence, complaint ¶¶ 182-83, Fifth Third has submitted SEC filings indicating that several large state pension funds continued to hold, and in some cases actually increased their positions in Fifth Third stock during the class period. Doc. No. 56-9; see City of Monroe Employees Ret. Sys. v. Bridgestone Corp., 399 F.3d 651, 655 n.1 (6th Cir. 2005) (court may take judicial notice of public records on a Rule 12(b)(6) motion). In fact, the New York State Teachers Retirement System quadrupled its position in Fifth Third stock between March 31, 2007 and December 31, 2008. Plaintiffs again dispute the relevance of this information, but in the Court's view, the fact that other pension funds held and increased their positions in Fifth Third stock is analogous to the situation Kuper where the Court held that the plan fiduciaries acted prudently because several analysts recommended holding the company's stock. See supra at 13.

Moreover, while the complaint views Fifth Third's participation in the Capital Purchase Program ("CPP") as a stigma and a sign of financial stress, the Treasury

Department states that the purpose of the CPP was "to stabilize the financial system by providing capital to viable financial institutions of all sizes throughout the nation." See Capital Purchase Program (available at http://www.financialstability.gov/roadtostability/capitalpurchaseprogram.html) (visited November 18, 2010) (emphasis added). Indeed, the Treasury Department goes on to state that "[p]articipation [in the CPP] was reserved for healthy, viable financial institutions that were recommended by their applicable federal banking regulator." See Factsheet on Capital Purchase Program (available at http://www.financialstability.gov/roadtostability/CPPfactsheet.htm) (visited November 18, 2010) (emphasis added). Thus, Fifth Third's participation in the CPP is actually a sign of its viability and another indication that the Defendants' decision to remain invested in Fifth Third stock was not imprudent.

The foregoing discussion should sufficiently illustrate that the complaint fails to plead facts necessary to overcome the presumption of reasonableness. While the Court must accept that Fifth Third embarked on an improvident and even perhaps disastrous foray into subprime lending, which in turn caused a substantial decline in the price of its common stock, the complaint fails to establish that Fifth Third was in the type of dire financial predicament sufficient to establish a breach of fiduciary duty under Kuper and Moench. Fifth Third remained a viable company throughout the class period and, while not back to its pre-class period level, Fifth Third stock has rebounded substantially from its nadir. The complaint fails to establish any facts which would have caused a reasonable fiduciary to cease offering Fifth Third stock

as an investment option and/or divest Fifth Third stock from the Plan entirely. Indeed, as indicated, several large pension funds actually increased their holdings in Fifth Third stock during the class period. Finally, the Court finds that it makes little or no difference to the analysis that Plaintiffs allege that the price of Fifth Third stock was artificially inflated during the class period due to its lending practices. As the Court stated in Kirschbaum:

> Kirschbaum contends that the court's presumption in favor of continued company stock investment should not apply at all where allegations, like his, relate to the fiduciaries' knowing purchases of stock at an artificially inflated price. Moench, Kirschbaum argues, concerned a "mere" failure to diversify. We reject this limitation. The distinction between these allegations is not only often elusive, but hardly justified by Moench itself. The opinion dwelt at length on the Benefits Committee's internal discussions based on their insider knowledge and fears about the company's dire financial prospects. More to the point, there is no principled difference between how a fiduciary should respond to "artificial inflation" of the stock price as opposed to other sorts of negative insider information. Consequently, the standard of judicial review applicable to such decisions should not generally turn on pleading artifices. The Moench presumption logically applies to any allegations of fiduciary duty breach for failure to divest an EIAP or ESOP of company stock.

526 F.3d at 254 (emphasis added).

The complaint fails to allege facts demonstrating the Defendants' decision to continue to allow plan participants to invest in Fifth Third stock was imprudent. The Court agrees with Defendants that Plaintiffs are generally attempting to challenge the wisdom of Fifth Third's business judgment and/or attempting to recover damages based on alleged mismanagement of the company, neither of which are actionable theories of recovery under ERISA. See Kuper, 66 F.3d at 1456 ("Under ERISA, purely business decisions by an ERISA employer are not governed by section 1104's fiduciary standards.") (quoting Berlin v. Michigan Bell Tele. Co., 858 F.2d 1154, 1163 (6th Cir. 1988)); Husvar v. Rapoport, 430 F.3d 777, 782 (6th Cir. 2005) ("A claim that company directors did not operate the business itself in conformity with sound business practices does not, however, implicate the protections afforded by ERISA.").

Accordingly, Defendants' motion to dismiss Plaintiffs' breach of fiduciary duty claim to the extent it relies on the continued offering of and failure to divest of Fifth Third common stock is well-taken and is **GRANTED**.

B. Failure to Provide Complete and Accurate Information About Fifth Third Stock

Count I also alleges that Defendants breached their fiduciary duty by failing to provide plan participants with complete and accurate information about Fifth Third stock. The alleged misstatements and omissions to which the complaint refers (paragraphs 113-163) for the most part were made in corporate SEC filings such

as Forms 10-Q and 10-K. Additionally, the complaint alleges that Fifth Third made misleading statements in press releases and other public fora, such as presentations to industry analysts. Generally speaking, the complaint alleges that the statements and omissions were misleading because Fifth Third failed to disclose such information as changing from its traditional conservative lending philosophy, its deteriorating Tier 1 capital quality, the qualifications of its Alt-A borrowers, its failure to set aside adequate reserves for non-performing loans, and its failure make timely reserves for non-performing loans. Fifth Third argues that these alleged misstatements and omissions are not actionable under ERISA because SEC filings are not statements made to participants in a fiduciary capacity. Plaintiffs, on the other hand, contend that these statements were made in a fiduciary capacity because the Plan and the Plan's summary plan description incorporate by reference Fifth Third's SEC filings.

The principal requirement under ERISA for a breach of fiduciary duty claim based on a misstatement or omission is that the statement must have been made in the defendant's fiduciary capacity. Moore v. LaFayette Life Ins. Co., 458 F.3d 416, 433 (6th Cir. 2006). The Court first notes that to the extent the complaint relies on public statements, such as press releases and statements made during conference calls and group presentations, concerning the financial outlook or financial performance of Fifth Third, the complaint fails to state a claim for breach of fiduciary duty. These statements were not made in a fiduciary capacity and are not actionable as a matter of law. In re Ferro Corp. ERISA Lit., 422 F. Supp.2d 850, 865

(N.D. Ohio 2006); Complaint ¶¶ 114, 116, 119, 120, 121, 122, 135, 136, 137, 140, 153, 158, 159, 160, 161.

Whether the defendant speaks in a fiduciary capacity when SEC filings are incorporated by reference into plan documents is yet another area of ERISA which has engendered a split of authority and has not been resolved by the Sixth Circuit Court of Appeals. Compare In re AEP ERISA Lit., 327 F. Supp.2d 812, 825 (S.D. Ohio 2004) (SEC filings incorporated by reference into plan documents are fiduciary statements), with, Shirk v. Fifth Third Bancorp, No. 05-cv-049, 2009 WL 692124, at *17 (S.D. Ohio Jan. 29, 2009) (defendants act in a corporate capacity when making statements in SEC filings), and, Benitez v. Humana, Inc., No. 3:08CV-211-H, 2009 WL 3166651, at *10 n.6 (W.D.Ky. Sept. 30, 2009) ("[T]he preparation of SEC filings is not a fiduciary act for purposes of ERISA, even if the SEC filings are incorporated by reference into ERISA documents."); see also In re Lehman Brothers Sec. & Erisa Lit., 683 F. Supp.2d 294, 300 (S.D.N.Y. 2010) (stating that "emerging caselaw makes clear that those who prepare SEC filings do not become ERISA fiduciaries through those acts" even where such filings are incorporated into the summary plan description).

To the extent that the weight of opinion on this issue is evenly distributed, the Court agrees with Defendants that Varity Corp. v. Howe, 516 U.S. 489 (1996), breaks the tie. In Varity, the Court held that a defendant does not act as a fiduciary when he makes statements about the company's financial condition. Id. at 504. Rather, to act as a fiduciary, the defendant must intentionally connect his statements about the

financial status of the company to the ERISA benefit plan. Id. In this case, the alleged misstatements and omissions identified in the complaint all were made in the context of filing routine financial disclosures required under the federal securities laws and regulations. There are no factual allegations, however, which indicate that the speaker was intentionally connecting his statements about Fifth Third's financial condition to the Fifth Third Stock Fund. Accordingly, the Court concludes that the complaint fails to allege facts from which it can reasonably be inferred that the alleged misstatements and omissions were made in a fiduciary capacity.

Accordingly, Defendants' motion to dismiss this aspect of Count I is well-taken and is **GRANTED.**

Plaintiffs also allege in Count I that Defendants breached their fiduciary duties to the plan participants by not disclosing negative information about Fifth Third of which they were aware. ERISA does not impose a duty on fiduciaries to disclose information to plan participants beyond what the statute itself requires. Sprague v. General Motors Corp., 133 F.3d 388, 405-06 (6th Cir. 1998) ("It would be strange indeed if ERISA's fiduciary standards could be used to imply a duty to disclose information that ERISA's detailed disclosure provisions do not require to be disclosed."); In re Ferro Corp. Erisa Lit., 422 F. Supp.2d 850, 864 (N.D. Ohio 2006) (ERISA fiduciaries have no duty to disclose non-public information about the company's financial condition). Additionally, as Defendants accurately point out, under the efficient market theory, any negative information disclosed about Fifth Third would have been immediately assimilated by the

market and reflected in the price of Fifth Third stock. Thus, earlier disclosure of the alleged omissions by the Defendants would not have prevented the plan participants from experiencing the decline the market value of their Fifth Third shares. See Edgar, 503 F.3d at 350;

Therefore, Count I fails to state a claim for relief for breach of fiduciary duty based on Defendants' alleged omissions and misstatements. Accordingly, Defendants' motion to dismiss Count I is well-taken and is **GRANTED.**

C. Counts II, III, and IV

Count II of the complaint alleges that the Defendants breached their fiduciary duty to the Plan participants by failing to monitor the performance of others who permitted the Plan to invest in Fifth Third common stock which, as already stated, they contend was an imprudent investment. Count III of the complaint alleges that the plan fiduciaries administered the Plan under a conflict of interest because they were compensated in part with Fifth Third stock and granted stock options. Count IV of the complaint alleges that the Defendants failed to remedy or correct the alleged breaches of fiduciary duty outlined in Count I of the complaint concerning allowing the Plan to invest in Fifth Third stock. Each of these claims is derivative of and dependent on proof of a primary breach of fiduciary duty. As already discussed, the complaint fails to allege facts to overcome the presumption that the plan fiduciaries' decision to allow the plan to remain invested in Fifth Third stock was reasonable. Since Count I - the

primary claim for breach of fiduciary duty in this case - fails to state a claim for relief, each of these derivative claims fails as a matter of law. Edgar, 503 F.3d at 349 n.13; In re Harley-Davidson, Inc. Sec. Lit., 660 F. Supp.2d 953, 969-70 (E.D.Wis. 2009); In re RadioShack Corp. ERISA Lit., 547 F. Supp.2d 606, 616 (N.D.Tex. 2008).

Accordingly, Defendants' motion to dismiss Counts II, III, and IV is well-taken and is **GRANTED.**

IV. Leave to Amend the Complaint

In their memorandum in opposition to the motion to dismiss, Plaintiffs ask the Court for leave to amend the complaint in the event Defendants' motion is granted. A request to amend the complaint in this fashion is not proper. Plaintiffs have not filed a separate and properly supported motion for leave to amend and they are not entitled to an advisory opinion on the weaknesses of their claims. PR Diamonds, Inc. v. Chandler, 364 F.3d 671, 699-700 (6th Cir. 2004); Begala v. PNC Bank, Ohio, Nat. Ass'n, 214 F.3d 776, 783-84 (6th Cir. 2000).

Accordingly, leave to amend the complaint is not well-taken and is **DENIED.**

IT IS SO ORDERED

Date November 24, 2010

s/Sandra S. Beckwith
Sandra S. Beckwith
Senior United States District Judge

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

Case No. 1:08-CV-538

[Filed November 24, 2010]

John Dudenhoeffer,
Plaintiff,

-vs-

Fifth Third Bancorp, et al.,
Defendants.

JUDGMENT

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdicts.

X **Decision by Court:** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motion to dismiss the amended consolidated class action complaint is **GRANTED**. Plaintiff's motion for leave to amend the complaint is **DENIED.**

Date: November 24, 2010

James Bonini, Clerk

By: s/Mary C. Brown
Mary C. Brown, Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-3012

[Filed October 12, 2012]

JOHN DUDENHOEFER, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; ET AL.,

Plaintiffs-Appellants,

v.

FIFTH THIRD BANCORP, ET AL.,

Defendants-Appellees.

O R D E R

BEFORE: COOK and STRANCH, Circuit Judges; and LAWSON,* District Judge.

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* Hon. David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation.

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.

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 ORDER OF THE COURT

/s/Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX D

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(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;

(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

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United 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.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of--

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon--

(A) the earlier of--

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which--

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if--

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) Default investment arrangements

(A) In general

For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising

control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) Notice requirements

(i) In general

The requirements of this subparagraph are met if each participant or beneficiary--

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) Form of notice

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of Title 26 shall apply with respect to the notices described in this subparagraph.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement--

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement--

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection--

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

29 U.S.C. § 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect--

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not--

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

29 U.S.C. § 1107. Limitation with respect to acquisition and holding of employer securities and employer real property by certain plans

(a) Percentage limitation

Except as otherwise provided in this section and section 1114 of this title:

(1) A plan may not acquire or hold--

(A) any employer security which is not a qualifying employer security, or

(B) any employer real property which is not qualifying employer real property.

(2) A plan may not acquire any qualifying employer security or qualifying employer real property, if immediately after such acquisition the aggregate fair market value of employer securities and employer real property held by the plan exceeds 10 percent of the fair market value of the assets of the plan.

(3)(A) After December 31, 1984, a plan may not hold any qualifying employer securities or qualifying employer real property (or both) to the extent that the aggregate fair market value of such securities and property determined on December 31, 1984, exceeds 10 percent of the greater of--

(i) the fair market value of the assets of the plan, determined on December 31, 1984, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(B) Subparagraph (A) of this paragraph shall not apply to any plan which on any date after December 31, 1974; and before January 1, 1985, did not hold employer securities or employer real property (or both) the aggregate fair market value of which determined on such date exceeded 10 percent of the greater of

(i) the fair market value of the assets of the plan, determined on such date, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(4)(A) After December 31, 1979, a plan may not hold any employer securities or employer real property in excess of the amount specified in regulations under subparagraph (B). This subparagraph shall not apply to a plan after the earliest date after December 31, 1974, on which it complies with such regulations.

(B) Not later than December 31, 1976, the Secretary shall prescribe regulations which shall have the effect of requiring that a plan divest itself of 50 percent of the holdings of employer securities and employer real property which the plan would be required to divest before January 1, 1985, under paragraph (2) or subsection (c) of this section (whichever is applicable).

(b) Exception

(1) Subsection (a) of this section shall not apply to any acquisition or holding of qualifying employer securities or qualifying employer real property by an eligible individual account plan.

(2)(A) If this paragraph applies to an eligible individual account plan, the portion of such plan which consists of applicable elective deferrals (and earnings allocable thereto) shall be treated as a separate plan--

(i) which is not an eligible individual account plan, and

(ii) to which the requirements of this section apply.

(B)(i) This paragraph shall apply to any eligible individual account plan if any portion of the plan's applicable elective deferrals (or earnings allocable thereto) are required to be invested in qualifying employer securities or qualifying employer real property or both--

(I) pursuant to the terms of the plan, or

(II) at the direction of a person other than the participant on whose behalf such elective deferrals are made to the plan (or a beneficiary).

(ii) This paragraph shall not apply to an individual account plan for a plan year if, on

the last day of the preceding plan year, the fair market value of the assets of all individual account plans maintained by the employer equals not more than 10 percent of the fair market value of the assets of all pension plans (other than multiemployer plans) maintained by the employer.

(iii) This paragraph shall not apply to an individual account plan that is an employee stock ownership plan as defined in section 4975(e)(7) of Title 26.

(iv) This paragraph shall not apply to an individual account plan if, pursuant to the terms of the plan, the portion of any employee's applicable elective deferrals which is required to be invested in qualifying employer securities and qualifying employer real property for any year may not exceed 1 percent of the employee's compensation which is taken into account under the plan in determining the maximum amount of the employee's applicable elective deferrals for such year.

(C) For purposes of this paragraph, the term "applicable elective deferral" means any elective deferral (as defined in section 402(g)(3)(A) of Title 26) which is made pursuant to a qualified cash or deferred arrangement as defined in section 401(k) of Title 26.

(3) Cross references

(A) For exemption from diversification requirements for holding of qualifying employer securities and qualifying employer real property by eligible individual account plans, see section 1104(a)(2) of this title.

(B) For exemption from prohibited transactions for certain acquisitions of qualifying employer securities and qualifying employer real property which are not in violation of 10 percent limitation, see section 1108(e) of this title.

(C) For transitional rules respecting securities or real property subject to binding contracts in effect on June 30, 1974, see section 1114(c) of this title.

(D) For diversification requirements for qualifying employer securities held in certain individual account plans, see section 1054(j) of this title.

(c) Election

(1) A plan which makes the election, under paragraph (3) shall be treated as satisfying the requirement of subsection (a)(3) of this section if and only if employer securities held on any date after December 31, 1974 and before January 1, 1985 have a fair market value, determined as of December 31, 1974, not in excess of 10 percent of the lesser of--

(A) the fair market value of the assets of the plan determined on such date (disregarding any portion of the fair market value of employer securities which is attributable to appreciation of such securities after December 31, 1974) but not less than the fair market value of plan assets on January 1, 1975, or

(B) an amount equal to the sum of (i) the total amount of the contributions to the plan received after December 31, 1974, and prior to such date, plus (ii) the fair market value of the assets of the plan, determined on January 1, 1975.

(2) For purposes of this subsection, in the case of an employer security held by a plan after January 1, 1975, the ownership of which is derived from ownership of employer securities held by the plan on January 1, 1975, or from the exercise of rights derived from such ownership, the value of such security held after January 1, 1975, shall be based on the value as of January 1, 1975, of the security from which ownership was derived. The Secretary shall prescribe regulations to carry out this paragraph.

(3) An election under this paragraph may not be made after December 31, 1975. Such an election shall be made in accordance with regulations prescribed by the Secretary, and shall be irrevocable. A plan may make an election under this paragraph only if on January 1, 1975, the plan holds no employer real property. After such election and before January 1, 1985 the plan may not acquire any employer real property.

(d) Definitions

For purposes of this section--

(1) The term "employer security" means a security issued by an employer of employees covered by the plan, or by an affiliate of such employer. A contract to which section 1108(b)(5) of this title applies shall not be treated as a security for purposes of this section.

(2) The term "employer real property" means real property (and related personal property) which is leased to an employer of employees covered by the plan, or to an affiliate of such employer. For purposes of determining the time at which a plan acquires employer real property for purposes of this section, such property shall be deemed to be acquired by the plan on the date on which the plan acquires the property or on the date on which the lease to the employer (or affiliate) is entered into, whichever is later.

(3)(A) The term "eligible individual account plan" means an individual account plan which is (i) a profit-sharing, stock bonus, thrift, or savings plan; (ii) an employee stock ownership plan; or (iii) a money purchase plan which was in existence on September 2, 1974, and which on such date invested primarily in qualifying employer securities. Such term excludes an individual retirement account or annuity described in section 408 of Title 26.

(B) Notwithstanding subparagraph (A), a plan shall be treated as an eligible individual account

plan with respect to the acquisition or holding of qualifying employer real property or qualifying employer securities only if such plan explicitly provides for acquisition and holding of qualifying employer securities or qualifying employer real property (as the case may be). In the case of a plan in existence on September 2, 1974, this subparagraph shall not take effect until January 1, 1976.

(C) The term "eligible individual account plan" does not include any individual account plan the benefits of which are taken into account in determining the benefits payable to a participant under any defined benefit plan.

(4) The term "qualifying employer real property" means parcels of employer real property--

(A) if a substantial number of the parcels are dispersed geographically;

(B) if each parcel of real property and the improvements thereon are suitable (or adaptable without excessive cost) for more than one use;

(C) even if all of such real property is leased to one lessee (which may be an employer, or an affiliate of an employer); and

(D) if the acquisition and retention of such property comply with the provisions of this part (other than section 1104(a)(1)(B) of this title to the extent it requires diversification, and

sections 1104(a)(1)(C), 1106 of this title, and subsection (a) of this section).

(5) The term "qualifying employer security" means an employer security which is--

(A) stock,

(B) a marketable obligation (as defined in subsection (e) of this section), or

(C) an interest in a publicly traded partnership (as defined in section 7704(b) of Title 26), but only if such partnership is an existing partnership as defined in section 10211(c)(2)(A) of the Revenue Act of 1987 (Public Law 100-203).

After December 17, 1987, in the case of a plan other than an eligible individual account plan, an employer security described in subparagraph (A) or (C) shall be considered a qualifying employer security only if such employer security satisfies the requirements of subsection (f)(1) of this section.

(6) The term "employee stock ownership plan" means an individual account plan--

(A) which is a stock bonus plan which is qualified, or a stock bonus plan and money purchase plan both of which are qualified, under section 401 of Title 26, and which is designed to invest primarily in qualifying employer securities, and

(B) which meets such other requirements as the Secretary of the Treasury may prescribe by regulation.

(7) A corporation is an affiliate of an employer if it is a member of any controlled group of corporations (as defined in section 1563(a) of Title 26, except that "applicable percentage" shall be substituted for "80 percent" wherever the latter percentage appears in such section) of which the employer who maintains the plan is a member. For purposes of the preceding sentence, the term "applicable percentage" means 50 percent, or such lower percentage as the Secretary may prescribe by regulation. A person other than a corporation shall be treated as an affiliate of an employer to the extent provided in regulations of the Secretary. An employer which is a person other than a corporation shall be treated as affiliated with another person to the extent provided by regulations of the Secretary. Regulations under this paragraph shall be prescribed only after consultation and coordination with the Secretary of the Treasury.

(8) The Secretary may prescribe regulations specifying the extent to which conversions, splits, the exercise of rights, and similar transactions are not treated as acquisitions.

(9) For purposes of this section, an arrangement which consists of a defined benefit plan and an individual account plan shall be treated as 1 plan if the benefits of such individual account plan are taken into account in determining the benefits payable under such defined benefit plan.

(e) Marketable obligations

For purposes of subsection (d)(5) of this section, the term "marketable obligation" means a bond, debenture, note, or certificate, or other evidence of indebtedness (hereinafter in this subsection referred to as "obligation") if--

(1) such obligation is acquired--

(A) on the market, either (i) at the price of the obligation prevailing on a national securities exchange which is registered with the Securities and Exchange Commission, or (ii) if the obligation is not traded on such a national securities exchange, at a price not less favorable to the plan than the offering price for the obligation as established by current bid and asked prices quoted by persons independent of the issuer;

(B) from an underwriter, at a price (i) not in excess of the public offering price for the obligation as set forth in a prospectus or offering circular filed with the Securities and Exchange Commission, and (ii) at which a substantial portion of the same issue is acquired by persons independent of the issuer; or

(C) directly from the issuer, at a price not less favorable to the plan than the price paid currently for a substantial portion of the same issue by persons independent of the issuer;

(2) immediately following acquisition of such obligation--

(A) not more than 25 percent of the aggregate amount of obligations issued in such issue and outstanding at the time of acquisition is held by the plan, and

(B) at least 50 percent of the aggregate amount referred to in subparagraph (A) is held by persons independent of the issuer; and

(3) immediately following acquisition of the obligation, not more than 25 percent of the assets of the plan is invested in obligations of the employer or an affiliate of the employer.

(f) Maximum percentage of stock held by plan; time of holding or acquisition; necessity of legally binding contract

(1) Stock satisfies the requirements of this paragraph if, immediately following the acquisition of such stock--

(A) no more than 25 percent of the aggregate amount of stock of the same class issued and outstanding at the time of acquisition is held by the plan, and

(B) at least 50 percent of the aggregate amount referred to in subparagraph (A) is held by persons independent of the issuer.

(2) Until January 1, 1993, a plan shall not be treated as violating subsection (a) of this section solely by holding stock which fails to satisfy the requirements of paragraph (1) if such stock--

(A) has been so held since December 17, 1987, or

(B) was acquired after December 17, 1987, pursuant to a legally binding contract in effect on December 17, 1987, and has been so held at all times after the acquisition.

29 U.S. C. § 1108. Exemptions from prohibited transactions

(a) Grant of exemptions

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 1106 and 1107(a) of this title. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this chapter. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is--

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 1106(a) or 1107(a) of this title, the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 1106(b) of this title

unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

(b) Enumeration of transactions exempted from section 1106 prohibitions

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees (within the meaning of section 414(q) of Title 26) in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured. A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of Title 26.

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 1107(d)(6) of this title), if–

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 1107(d)(5) of this title).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if--

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is--

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if--

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would

reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if--

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the

bank, trust company, or insurance company or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 1344 of this title (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of subchapter III of this chapter.

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 1411 of this title.

(12) The sale by a plan to a party in interest on or after December 18, 1987, of any stock, if--

(A) the requirements of paragraphs (1) and (2) of subsection (e) of this section are met with respect to such stock,

(B) on the later of the date on which the stock was acquired by the plan, or January 1, 1975, such stock constituted a qualifying employer security (as defined in section 1107(d)(5) of this title as then in effect), and

(C) such stock does not constitute a qualifying employer security (as defined in section

1107(d)(5) of this title as in effect at the time of the sale).

(13) Any transfer made before January 1, 2014, of excess pension assets from a defined benefit plan to a retiree health account in a qualified transfer permitted under section 420 of Title 26 (as in effect on August 17, 2006).

(14) Any transaction in connection with the provision of investment advice described in section 1002(21)(A)(ii) of this title to a participant or beneficiary of an individual account plan that permits such participant or beneficiary to direct the investment of assets in their individual account, if--

(A) the transaction is--

(i) the provision of the investment advice to the participant or beneficiary of the plan with respect to a security or other property available as an investment under the plan,

(ii) the acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice, or

(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with an acquisition, holding, or sale of a security or other property

available as an investment under the plan pursuant to the investment advice; and

(B) the requirements of subsection (g) of this section are met.

(15)(A) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a party in interest (other than a fiduciary described in section 1002(21)(A) of this title) with respect to a plan if--

(i) the transaction involves a block trade,

(ii) at the time of the transaction, the interest of the plan (together with the interests of any other plans maintained by the same plan sponsor), does not exceed 10 percent of the aggregate size of the block trade,

(iii) the terms of the transaction, including the price, are at least as favorable to the plan as an arm's length transaction, and

(iv) the compensation associated with the purchase and sale is not greater than the compensation associated with an arm's length transaction with an unrelated party.

(B) For purposes of this paragraph, the term "block trade" means any trade of at least 10,000 shares or with a market value of at least $200,000 which will be allocated across two or more unrelated client accounts of a fiduciary.

(16) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a party in interest if--

(A) the transaction is executed through an electronic communication network, alternative trading system, or similar execution system or trading venue subject to regulation and oversight by--

(i) the applicable Federal regulating entity, or

(ii) such foreign regulatory entity as the Secretary may determine by regulation,

(B) either--

(i) the transaction is effected pursuant to rules designed to match purchases and sales at the best price available through the execution system in accordance with applicable rules of the Securities and Exchange Commission or other relevant governmental authority, or

(ii) neither the execution system nor the parties to the transaction take into account the identity of the parties in the execution of trades,

(C) the price and compensation associated with the purchase and sale are not greater than the

price and compensation associated with an arm's length transaction with an unrelated party,

(D) if the party in interest has an ownership interest in the system or venue described in subparagraph (A), the system or venue has been authorized by the plan sponsor or other independent fiduciary for transactions described in this paragraph, and

(E) not less than 30 days prior to the initial transaction described in this paragraph executed through any system or venue described in subparagraph (A), a plan fiduciary is provided written or electronic notice of the execution of such transaction through such system or venue.

(17)(A) Transactions described in subparagraphs (A), (B), and (D) of section 1106(a)(1) of this title between a plan and a person that is a party in interest other than a fiduciary (or an affiliate) who has or exercises any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of section 1002(21)(A)(ii) of this title) with respect to those assets, solely by reason of providing services to the plan or solely by reason of a relationship to such a service provider described in subparagraph (F), (G), (H), or (I) of section 1002(14) of this title, or both, but only if in connection with such transaction the plan receives no less, nor pays no more, than adequate consideration.

(B) For purposes of this paragraph, the term "adequate consideration" means--

(i) in the case of a security for which there is a generally recognized market--

(I) the price of the security prevailing on a national securities exchange which is registered under section 78f of Title 15, taking into account factors such as the size of the transaction and marketability of the security, or

(II) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of the party in interest, taking into account factors such as the size of the transaction and marketability of the security, and

(ii) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by a fiduciary or fiduciaries in accordance with regulations prescribed by the Secretary.

(18) Foreign exchange transactions

Any foreign exchange transactions, between a bank or broker-dealer (or any affiliate of either), and a plan (as

defined in section 1002(3) of this title) with respect to which such bank or broker-dealer (or affiliate) is a trustee, custodian, fiduciary, or other party in interest, if--

(A) the transaction is in connection with the purchase, holding, or sale of securities or other investment assets (other than a foreign exchange transaction unrelated to any other investment in securities or other investment assets),

(B) at the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arm's length foreign exchange transactions between unrelated parties, or the terms afforded by the bank or broker-dealer (or any affiliate of either) in comparable arm's-length foreign exchange transactions involving unrelated parties,

(C) the exchange rate used by such bank or broker-dealer (or affiliate) for a particular foreign exchange transaction does not deviate by more than 3 percent from the interbank bid and asked rates for transactions of comparable size and maturity at the time of the transaction as displayed on an independent service that reports rates of exchange in the foreign currency market for such currency, and

(D) the bank or broker-dealer (or any affiliate of either) does not have investment discretion, or

provide investment advice, with respect to the transaction.

(19) Cross trading

Any transaction described in sections 1106(a)(1)(A) and 1106(b)(2) of this title involving the purchase and sale of a security between a plan and any other account managed by the same investment manager, if--

(A) the transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available,

(B) the transaction is effected at the independent current market price of the security (within the meaning of section 270.17a-7(b) of title 17, Code of Federal Regulations),

(C) no brokerage commission, fee (except for customary transfer fees, the fact of which is disclosed pursuant to subparagraph (D)), or other remuneration is paid in connection with the transaction,

(D) a fiduciary (other than the investment manager engaging in the cross-trades or any affiliate) for each plan participating in the transaction authorizes in advance of any cross-trades (in a document that is separate from any other written agreement of the parties) the investment manager to engage in cross trades at the investment manager's discretion, after such fiduciary has received disclosure

regarding the conditions under which cross trades may take place (but only if such disclosure is separate from any other agreement or disclosure involving the asset management relationship), including the written policies and procedures of the investment manager described in subparagraph (H),

(E) each plan participating in the transaction has assets of at least $100,000,000, except that if the assets of a plan are invested in a master trust containing the assets of plans maintained by employers in the same controlled group (as defined in section 1107(d)(7) of this title), the master trust has assets of at least $100,000,000,

(F) the investment manager provides to the plan fiduciary who authorized cross trading under subparagraph (D) a quarterly report detailing all cross trades executed by the investment manager in which the plan participated during such quarter, including the following information, as applicable: (i) the identity of each security bought or sold; (ii) the number of shares or units traded; (iii) the parties involved in the cross- trade; and (iv) trade price and the method used to establish the trade price,

(G) the investment manager does not base its fee schedule on the plan's consent to cross trading, and no other service (other than the investment opportunities and cost savings available through a cross trade) is conditioned on the plan's consent to cross trading,

(H) the investment manager has adopted, and cross-trades are effected in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program, and that include a description of the manager's pricing policies and procedures, and the manager's policies and procedures for allocating cross trades in an objective manner among accounts participating in the cross-trading program, and

(I) the investment manager has designated an individual responsible for periodically reviewing such purchases and sales to ensure compliance with the written policies and procedures described in subparagraph (H), and following such review, the individual shall issue an annual written report no later than 90 days following the period to which it relates signed under penalty of perjury to the plan fiduciary who authorized cross trading under subparagraph (D) describing the steps performed during the course of the review, the level of compliance, and any specific instances of non-compliance.

The written report under subparagraph (I) shall also notify the plan fiduciary of the plan's right to terminate participation in the investment manager's cross-trading program at any time.

(20)(A) Except as provided in subparagraphs (B) and (C), a transaction described in section 1106(a) of this title in connection with the acquisition,

holding, or disposition of any security or commodity, if the transaction is corrected before the end of the correction period.

(B) Subparagraph (A) does not apply to any transaction between a plan and a plan sponsor or its affiliates that involves the acquisition or sale of an employer security (as defined in section 1107(d)(1) of this title) or the acquisition, sale, or lease of employer real property (as defined in section 1107(d)(2) of this title).

(C) In the case of any fiduciary or other party in interest (or any other person knowingly participating in such transaction), subparagraph (A) does not apply to any transaction if, at the time the transaction occurs, such fiduciary or party in interest (or other person) knew (or reasonably should have known) that the transaction would (without regard to this paragraph) constitute a violation of section 1106(a) of this title.

(D) For purposes of this paragraph, the term "correction period" means, in connection with a fiduciary or party in interest (or other person knowingly participating in the transaction), the 14-day period beginning on the date on which such fiduciary or party in interest (or other person) discovers, or reasonably should have discovered, that the transaction would (without regard to this paragraph) constitute a violation of section 1106(a) of this title.

(E) For purposes of this paragraph--

(i) The term “security” has the meaning given such term by section 475(c)(2) of Title 26 (without regard to subparagraph (F)(iii) and the last sentence thereof).

(ii) The term “commodity” has the meaning given such term by section 475(e)(2) of Title 26 (without regard to subparagraph (D)(iii) thereof).

(iii) The term “correct” means, with respect to a transaction--

(I) to undo the transaction to the extent possible and in any case to make good to the plan or affected account any losses resulting from the transaction, and

(II) to restore to the plan or affected account any profits made through the use of assets of the plan.

(c) Fiduciary benefits and compensation not prohibited by section 1106

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from--

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

(d) Owner-employees; family members; shareholder employees

(1) Section 1107(b) of this title and subsections (b), (c), and (e) of this section shall not apply to a transaction in which a plan directly or indirectly--

(A) lends any part of the corpus or income of the plan to,

(B) pays any compensation for personal services rendered to the plan to, or

(C) acquires for the plan any property from, or sells any property to,

any person who is with respect to the plan an owner-employee (as defined in section 401(c)(3) of

Title 26), a member of the family (as defined in section 267(c)(4) of such title) of any such owner-employee, or any corporation in which any such owner-employee owns, directly or indirectly, 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

(2)(A) For purposes of paragraph (1), the following shall be treated as owner-employees:

(i) A shareholder-employee.

(ii) A participant or beneficiary of an individual retirement plan (as defined in section 7701(a)(37) of Title 26).

(iii) An employer or association of employees which establishes such an individual retirement plan under section 408(c) of such title.

(B) Paragraph (1)(C) shall not apply to a transaction which consists of a sale of employer securities to an employee stock ownership plan (as defined in section 1107(d)(6) of this title) by a shareholder-employee, a member of the family (as defined in section 267(c)(4) of such title) of any such owner-employee, or a corporation in which such a shareholder-employee owns stock representing a 50 percent or greater interest described in paragraph (1).

(C) For purposes of paragraph (1)(A), the term "owner-employee" shall only include a person described in clause (ii) or (iii) of subparagraph (A).

(3) For purposes of paragraph (2), the term "shareholder-employee" means an employee or officer of an S corporation (as defined in section 1361(a)(1) of Title 26) who owns (or is considered as owning within the meaning of section 318(a)(1) of Title 26) more than 5 percent of the outstanding stock of the corporation on any day during the taxable year of such corporation.

(e) Acquisition or sale by plan of qualifying employer securities; acquisition, sale, or lease by plan of qualifying employer real property

Sections 1106 and 1107 of this title shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 1107(d)(5) of this title) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 1107(d)(4) of this title)--

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 1107(e)(1) of this title),

(2) if no commission is charged with respect thereto, and

(3) if--

(A) the plan is an eligible individual account plan (as defined in section 1107(d)(3) of this title), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 1107(a) of this title.

(f) Applicability of statutory prohibitions to mergers or transfers

Section 1106(b)(2) of this title shall not apply to any merger or transfer described in subsection (b)(11) of this section.

(g) Provision of investment advice to participant and beneficiaries

(1) In general

The prohibitions provided in section 1106 of this title shall not apply to transactions described in subsection (b)(14) if the investment advice provided by a fiduciary adviser is provided under an eligible investment advice arrangement.

(2) Eligible investment advice arrangement

For purposes of this subsection, the term "eligible investment advice arrangement" means an arrangement--

(A) which either--

(i) provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment option selected, or

(ii) uses a computer model under an investment advice program meeting the requirements of paragraph (3) in connection with the provision of investment advice by a fiduciary adviser to a participant or beneficiary, and

(B) with respect to which the requirements of paragraph (4), (5), (6), (7), (8), and (9) are met.

(3) Investment advice program using computer model

(A) In general

An investment advice program meets the requirements of this paragraph if the requirements of subparagraphs (B), (C), and (D) are met.

(B) Computer model

The requirements of this subparagraph are met if the investment advice provided under the

investment advice program is provided pursuant to a computer model that--

(i) applies generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time,

(ii) utilizes relevant information about the participant, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments,

(iii) utilizes prescribed objective criteria to provide asset allocation portfolios comprised of investment options available under the plan,

(iv) operates in a manner that is not biased in favor of investments offered by the fiduciary adviser or a person with a material affiliation or contractual relationship with the fiduciary adviser, and

(v) takes into account all investment options under the plan in specifying how a participant's account balance should be invested and is not inappropriately weighted with respect to any investment option.

(C) Certification

(i) In general

The requirements of this subparagraph are met with respect to any investment advice program if an eligible investment expert certifies, prior to the utilization of the computer model and in accordance with rules prescribed by the Secretary, that the computer model meets the requirements of subparagraph (B).

(ii) Renewal of certifications

If, as determined under regulations prescribed by the Secretary, there are material modifications to a computer model, the requirements of this subparagraph are met only if a certification described in clause (i) is obtained with respect to the computer model as so modified.

(iii) Eligible investment expert

The term "eligible investment expert" means any person--

(I) which meets such requirements as the Secretary may provide, and

(II) does not bear any material affiliation or contractual relationship with any investment adviser or a related person thereof (or any employee, agent, or registered representative of the investment adviser or related person).

(D) Exclusivity of recommendation

The requirements of this subparagraph are met with respect to any investment advice program if--

(i) the only investment advice provided under the program is the advice generated by the computer model described in subparagraph (B), and

(ii) any transaction described in subsection (b)(14)(A)(ii) of this section occurs solely at the direction of the participant or beneficiary.

Nothing in the preceding sentence shall preclude the participant or beneficiary from requesting investment advice other than that described in subparagraph (A), but only if such request has not been solicited by any person connected with carrying out the arrangement.

(4) Express authorization by separate fiduciary

The requirements of this paragraph are met with respect to an arrangement if the arrangement is expressly authorized by a plan fiduciary other than the person offering the investment advice program, any person providing investment options under the plan, or any affiliate of either.

(5) Annual audit

The requirements of this paragraph are met if an independent auditor, who has appropriate technical

training or experience and proficiency and so represents in writing--

(A) conducts an annual audit of the arrangement for compliance with the requirements of this subsection, and

(B) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the arrangement which presents its specific findings regarding compliance of the arrangement with the requirements of this subsection.

For purposes of this paragraph, an auditor is considered independent if it is not related to the person offering the arrangement to the plan and is not related to any person providing investment options under the plan.

(6) Disclosure

The requirements of this paragraph are met if--

(A) the fiduciary adviser provides to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication)--

(i) of the role of any party that has a material affiliation or contractual relationship with the fiduciary adviser in the

development of the investment advice program and in the selection of investment options available under the plan,

(ii) of the past performance and historical rates of return of the investment options available under the plan,

(iii) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

(iv) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

(v) the manner, and under what circumstances, any participant or beneficiary information provided under the arrangement will be used or disclosed,

(vi) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser,

(vii) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and

(viii) that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property, and

(B) at all times during the provision of advisory services to the participant or beneficiary, the fiduciary adviser--

(i) maintains the information described in subparagraph (A) in accurate form and in the manner described in paragraph (8),

(ii) provides, without charge, accurate information to the recipient of the advice no less frequently than annually,

(iii) provides, without charge, accurate information to the recipient of the advice upon request of the recipient, and

(iv) provides, without charge, accurate information to the recipient of the advice concerning any material change to the information required to be provided to the recipient of the advice at a time reasonably contemporaneous to the change in information.

(7) Other conditions

The requirements of this paragraph are met if--

(A) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

(B) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

(C) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

(D) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length transaction would be.

(8) Standards for presentation of information

(A) In general

The requirements of this paragraph are met if the notification required to be provided to participants and beneficiaries under paragraph (6)(A) is written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and is sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

(B) Model form for disclosure of fees and other compensation

The Secretary shall issue a model form for the disclosure of fees and other compensation required in paragraph (6)(A)(iii) which meets the requirements of subparagraph (A).

(9) Maintenance for 6 years of evidence of compliance

The requirements of this paragraph are met if a fiduciary adviser who has provided advice referred to in paragraph (1) maintains, for a period of not less than 6 years after the provision of the advice, any records necessary for determining whether the requirements of the preceding provisions of this subsection and of subsection (b)(14) of this section have been met. A transaction prohibited under section 1106 of this title shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

(10) Exemption for plan sponsor and certain other fiduciaries

(A) In general

Subject to subparagraph (B), a plan sponsor or other person who is a fiduciary (other than a fiduciary adviser) shall not be treated as failing to meet the requirements of this part solely by reason of the provision of investment advice

referred to in section 1002(21)(A)(ii) of this title (or solely by reason of contracting for or otherwise arranging for the provision of the advice), if--

(i) the advice is provided by a fiduciary adviser pursuant to an eligible investment advice arrangement between the plan sponsor or other fiduciary and the fiduciary adviser for the provision by the fiduciary adviser of investment advice referred to in such section,

(ii) the terms of the eligible investment advice arrangement require compliance by the fiduciary adviser with the requirements of this subsection, and

(iii) the terms of the eligible investment advice arrangement include a written acknowledgment by the fiduciary adviser that the fiduciary adviser is a fiduciary of the plan with respect to the provision of the advice.

(B) Continued duty of prudent selection of adviser and periodic review

Nothing in subparagraph (A) shall be construed to exempt a plan sponsor or other person who is a fiduciary from any requirement of this part for the prudent selection and periodic review of a fiduciary adviser with whom the plan sponsor or other person enters into an eligible investment advice arrangement for the provision of

investment advice referred to in section 1002(21)(A)(ii) of this title. The plan sponsor or other person who is a fiduciary has no duty under this part to monitor the specific investment advice given by the fiduciary adviser to any particular recipient of the advice.

(C) Availability of plan assets for payment for advice

Nothing in this part shall be construed to preclude the use of plan assets to pay for reasonable expenses in providing investment advice referred to in section 1002(21)(A)(ii) of this title.

(11) Definitions

For purposes of this subsection and subsection (b)(14) of this section--

(A) Fiduciary adviser

The term "fiduciary adviser" means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in section 1002(21)(A)(ii) of this title by the person to a participant or beneficiary of the plan and who is--

(i) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

(ii) a bank or similar financial institution referred to in subsection (b)(4) or a savings association (as defined in section 1813(b)(1) of Title 12), but only if the advice is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities,

(iii) an insurance company qualified to do business under the laws of a State,

(iv) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

(v) an affiliate of a person described in any of clauses (i) through (iv), or

(vi) an employee, agent, or registered representative of a person described in clauses (i) through (v) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

For purposes of this part, a person who develops the computer model described in paragraph (3)(B) or markets the investment advice program or computer model shall be treated as a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in section 1002(21)(A)(ii) of this title to a

participant or beneficiary and shall be treated as a fiduciary adviser for purposes of this subsection and subsection (b)(14) of this section, except that the Secretary may prescribe rules under which only 1 fiduciary adviser may elect to be treated as a fiduciary with respect to the plan.

(B) Affiliate

The term "affiliate" of another entity means an affiliated person of the entity (as defined in section 80a-2(a)(3) of Title 15).

(C) Registered representative

The term "registered representative" of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(17)) (substituting the entity for the investment adviser referred to in such section).